The University of the State of New York

The State Education Department
State Review Officer
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No. 20-166

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Iroquois Central School District

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by H. Jeffrey Marcus, Esq.

Harris Beach, PLLC, attorneys for respondent, by Jeffrey J. Weiss, Esq., and Anne M. McGinnis, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Gow School (Gow) for the 2017-18 school year. Respondent (the district) cross-appeals from the IHO's determinations that it failed to refer the student to its Committee on Special Education (CSE) and found the parents' unilateral placement of the student at Gow was appropriate. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and

initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative appeal and a pending district court proceeding regarding the CSEs' determinations about the student's programming and eligibility for special education for the 2014-15, 2015-16, and 2016-17 school years and the parents' unilateral placement of the student at Gow (see Application of the Bd. of Educ., Appeal No. 18-009; see also 18-CV-859 [W.D.N.Y. filed Aug. 3, 2018]).

The parties' familiarity with the events leading up to the prior proceeding and the procedural history of that matter is presumed and, therefore, such facts and procedural history will not be recited here in detail, except as relevant. Briefly, the student was deemed eligible for special education in August 2012 and CSEs or subcommittees on special education (CSE subcommittees) developed IEPs for the student (which variably included recommendations for resource room, consultant teacher, or integrated co-teaching services and/or special classes, along with supplementary aids and services and program modifications/accommodations) for the 2012-13, 2013-14, and most of the 2014-15 school year (seventh through ninth grades) (see Dist. Exs. 9; 12; 15; 18; 21; 26; 31; 36). A CSE subcommittee convened on May 22, 2015 and with parent agreement determined that the student should be declassified from special education services (Dist. Exs. 45 at p. 1; 46 at pp. 1-2). The student was then referred for services under section 504 of the Rehabilitation Act of 193 ("section 504"), 29 U.S.C.§ 794(a) (Dist. Ex. 45). A "504 committee" determined that the student met the "criterion for qualification as a handicapped individual under Section 504 of the Rehabilitation Act of 1973" and developed a "504 Accommodation Plan" for the student to be implemented beginning on June 11, 2015 and through the 2015-16 school year (tenth grade) (Dist. Exs. 44 at pp. 1-2; 45 at p. 1). Accommodations on the May 2015 plan included preferential seating, wait time to allow the student to process information, directions clarified, copy of class notes, provision of due dates for chunks of large assignments, no penalties for misspelling, as well as testing accommodations (Dist. Ex. 45 at pp. 1-2). On November 19, 2015, a 504 committee convened for a program review and revised the student's plan to include additional accommodations including taking a break to meet with a trusted adult, having the school counselor meet with the student's teachers to review the student's 504 plan, and providing bimonthly check-ins with the counselor (Dist. Exs. 47 at pp. 1-2; 48). The parents advised the district that they were looking into Gow to see if it would be a good fit for the student (Dist. Ex. 48 at p. 1).[1] On December 17, 2015, the parents notified the district in writing that they were sending the student to Gow for the remainder of the 2015-16 school year and they would be seeking reimbursement from the district for all expenses associated with the placement (Parent Ex. V). On December 23, 2015, the district responded to the parents' letter and denied the parents' request for tuition reimbursement, noting that the district believed that general education with the accommodations provided in the 504 plan was appropriate for the student and the student was no longer eligible for classification as a student with a disability (Parent Ex. X). The student began attending Gow in January 2016 (see Tr. pp. 205-06, 349; Parent Ex. U).

On August 18, 2016, the parents notified the district in writing that they had decided to send the student to Gow for the 2016-17 school year (eleventh grade) and they would seek reimbursement from the district for all expenses associated with the placement (Parent Ex. W). By letter dated August 20, 2016, the district denied the parents' request for tuition reimbursement, reiterating that the district believed that general education with the accommodations provided in the 504 plan was appropriate for the student and the student was no longer eligible for classification as a student with a disability (Parent Ex. Y).

In a due process complaint notice dated November 18, 2016, the parents initiated the prior proceeding, challenging the May 2015 CSE's declassification of the student and the district's

[1] Gow has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCCR 200.1[d], 200.7).

failure to offer the student a FAPE for the 2014-15, 2015-16, and 2016-17 school years (see Parent Ex. A).

While the prior proceeding was ongoing, by letter dated August 16, 2017, the parents notified the district of their intent to unilaterally enroll the student at Gow for the 2017-18 school year and seek tuition reimbursement for the costs of the student's attendance (Dist. Ex. 75). In a letter dated August 17, 2017, the district denied the parents' request for tuition reimbursement citing the prior determination of the student's ineligibility for special education (Dist. Ex. 76). The district's letter stated that the student would be offered accommodations pursuant to a 504 plan, should the parents "return [the student] to our schools" (id.). In conclusion, the letter stated that the parents should contact the district if they "would ever like the [d]istrict to schedule a meeting to discuss [the student]'s educational programming" (id.).

An IHO issued a decision in the prior proceeding on December 18, 2017, which the district appealed (see Application of the Bd. of Educ., Appeal No. 18-009). In a decision dated April 11, 2018, an SRO reversed the IHO's decision and found that the district did not deny the student a FAPE during the 2014-15 school year, that the May 2015 CSE properly declassified the student, and that the student was not eligible for special education thereafter during the 2015-16 and 2016-17 school years (id.).[2]

In June 2018, the student graduated from Gow (Dist. Ex. 72 at p. 4).

A. Due Process Complaint Notice

In a due process complaint notice dated August 7, 2019, the parents alleged that the district violated its child find obligation by failing to refer the student to the CSE and failing to "evaluate, classify, and provide [the student] an IEP prior to the 2017-18 school year" and, therefore, denied the parents an opportunity to participate in the decision-making process regarding the provision of a FAPE and denied the student a FAPE for the 2017-18 school year under both the IDEA and section 504 (Dist. Ex. 72 at pp. 3-4, 5, 6). The parents asserted that, "prior to September of 2017, the District possessed a mountain of documentation and information concerning [the student's] serious reading needs and issues" and, therefore, the CSE should have convened to "reassess" the student's eligibility for special education for the 2017-18 school year (id. at pp. 4-5). The parents also asserted that, prior to the 2017-18 school year, no changes were made to the student's programming in response to information and documents provided to the district and the district failed to offer the student any specialized reading instruction and, therefore, "there was no reasonable basis for the Parents to believe that [the student] would be provided the support and specially designed instruction she required" if she returned to the district (id. at p. 5).

The parents also contended that Gow was an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition reimbursement (Dist. Ex. 72 at

[2] In a report, recommendation, and order dated November 24, 2020, a magistrate judge recommended that the district's motion for summary judgment be granted and the SRO's decision in the prior administrative proceeding be upheld (see 18-CV-859). As of the date of this decision, the matter remains pending before the district court.

pp. 5-6). As relief, the parents requested an award of reimbursement for all costs and expenses associated with the student's placement at Gow for the 2017-18 school year (id. at p. 6).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on January 22, 2020, which concluded on June 12, 2020, after three days of proceedings (see Tr. pp. 1-444). In a decision dated September 23, 2020, the IHO denied the parents' request for tuition reimbursement (see IHO Decision). Initially, the IHO noted that the 2015-16 and 2016-17 school years had been previously litigated and determined that the matter before him was limited to the 2017-18 school year (id. at pp. 6-7, 8).

Turning to the district's obligations under child find, the IHO stated that the parents' August 16, 2017, ten-day notice letter "illustrate[d] the [p]arent's [sic] intent to seek services for the [s]tudent beyond that of the 504 plan" for the 2017-18 school year (IHO Decision at pp. 9-10). The IHO then indicated that he found it "perplexing that [the ten-day notice letter] did not trigger a [d]istrict response to review the [s]tudent's needs and functioning" for the 2017-18 school year (id. at p. 10). Nevertheless, the IHO stated that "[t]he issue [wa]s whether or not the [s]tudent, while known to the district, was suspected of having a disability that could be served through special education services" (id.). The IHO found that "no new information was offered to the [d]istrict regarding the [s]tudent's needs during the 2017/2018 [school year] that would have . . . triggered a good faith reasonable belief that the [s]tudent required an evaluation" and, as a result, the IHO determined that the district had met its child find obligations (id.).

Next, the IHO considered whether the parents' August 16, 2017, ten-day notice letter constituted an initial referral of the student to the CSE (IHO Decision at pp. 11-12). The IHO found that it was "clear and unambiguous" that the parents sought special education services for the student for the 2017-18 school year in their August 16, 2017, ten-day notice letter, and that the district's response demonstrated its understanding of the parents' request (id. at p. 12). The IHO determined that the district should have evaluated the student and convened a CSE upon receipt of the parents' ten-day notice letter (id.).[3] While the IHO found that the district's failure to evaluate the student and convene a CSE in response to the parents' ten-day notice letter constituted a procedural violation, he determined that such violation did not rise to the level of a denial of a FAPE (id. at pp. 13-18, 22). Specifically, the IHO determined that the hearing record did not support a finding that the student required special education services, noting evidence that the student's needs had remained relatively consistent between eleventh and twelfth grades (id. at pp. 13-18).

While acknowledging that he was not required to do so, out of an abundance of caution, the IHO next determined that the student's unilateral placement at Gow was appropriate and that equitable considerations would not have warranted a denial or reduction of an award of tuition reimbursement (IHO Decision at pp. 18-22).

[3] In an apparent typographical error, the IHO's decision refers to the parents' ten-day notice letter as dated August 13, 2017, rather than August 16, 2017 (compare Dist. Ex. 75 at p. 1; with IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred by finding that the district met its child find obligations and by determining that the district's failure to convene a CSE to consider the student's eligibility for special education services did not result in a denial of a FAPE to the student. The parents assert that the district's failure to convene a CSE and evaluate the student impeded the parents' right to participate in the decision-making process and caused a deprivation of educational benefit to the student. The parents further argue that the IHO's determination that the district complied with its child find obligations was inconsistent with other findings that the district failed to respond to the parents' "referral letter" (Req. for Rev. ¶ 4). The parents also assert that the IHO improperly considered whether the student was eligible for special education services and erroneously determined that the student was not eligible. Next, the parents contend that the IHO improperly found that the parents were obligated to offer new information to the district regarding the student's needs during the 2017-18 school year that would have demonstrated the student's need for an evaluation. The parents further allege that by failing to find the district was obligated to evaluate the student, the IHO erroneously shifted the burden of proof to the parents. The parents also assert that the IHO made a number of factual errors and applied an incorrect legal standard in determining that the district did not deny the student a FAPE. As relief, the parents request a finding that the student was denied a FAPE, that tuition reimbursement be awarded for the cost of the student's attendance at Gow for the 2017-18 school year.

In an answer, the district responds to the parents' claims with admissions and denials. For a cross-appeal, the district alleges that the IHO erred by finding that the parents' ten-day notice letter constituted a referral to the CSE and that the CSE committed a procedural violation by failing to evaluate the student and convene the CSE. The district asserts that there is no authority to support a finding that a ten-day notice letter can be construed as a referral to the CSE and that the parents took no actions to refer the student. The district further argues that the parents' ten-day notice letter did not refer the student to the CSE, request an evaluation, or request a CSE meeting. The district contends that the parents were aware of their right to refer the student to the CSE because the parents had previously referred the student in 2012. The district asserts that it would have completed an evaluation if the parents had explicitly referred the student to the CSE. Further, the district argues that the parents' position at the impartial hearing was that the ten-day notice letter "should have triggered the [d]istrict to refer the [s]tudent to the CSE," not that the letter itself was a referral (Answer ¶ 31). Next, the district contends that it did not have an obligation to refer the student to the CSE in response to the parents' ten-day notice letter because it did not have any information that the student's needs had changed since the student was last evaluated by the district. Consequently, the district asserts that it had no obligation to convene a CSE to consider the student's eligibility for special education.

The district also contends that the IHO erred by finding that Gow was an appropriate unilateral placement for the student. The district argues that Gow was not appropriate and too restrictive for the student because she did not require special education. The district asserts that the student consistently made meaningful progress within a general education setting and did not require a "highly segregated" program without access to non-disabled peers (Answer ¶ 39). The district alleges that the IHO's finding that Gow was appropriate contradicted the finding that the student did not require an IEP. As relief, the district requests that the IHO's findings that the

district improperly failed to evaluate the student or convene the CSE, and that Gow was an appropriate unilateral placement be reversed.

In an answer to the district's cross-appeal, the parents respond to the district's arguments with general denials and argue that the IHO's determinations that the parents' ten-day notice constituted a referral and that Gow was an appropriate unilateral placement should be upheld.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Burden of Proof

The parents assert that the IHO shifted the burden of proof to the parents in contravention of State law, which places the burden on the district to demonstrate it offered the student a FAPE. The parents base their assertion on the IHO's statement that the district was not offered any new information regarding the student's needs during the 2017-18 school year that would have "triggered a good faith reasonable belief that the [s]tudent required an evaluation" (IHO Decision at p. 10; see Req. for Rev. at p. 3).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85;).

The hearing record does not support the parents' contention. In his decision, the IHO correctly stated that the burden of proof was on the district and cited the correct provision of State law (IHO Decision at pp. 4-5). Further, the parties conducted themselves during the hearing in a manner consistent with the State's burden of proof statute with the district presenting evidence in support of its arguments that it offered a FAPE and the parent presenting evidence to support the claim that Gow was appropriate. Although the parents disagree with the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to give effect to the State's burden of proof statute when conducting his analysis. Additionally, even assuming the IHO misallocated the burden of proof to the parents, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]). Furthermore, reversal is not warranted because I have conducted an impartial and independent review of the entire hearing record, and as further described below, reach the conclusion, based upon the State's allocation of the parties' respective burdens, that the district prevails (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. Child Find and Parent Referral

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student

with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have "overlooked clear signs of disability" and been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225,). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

Related to child find is the referral process. Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]).

Turning first to the district's cross-appeal, the hearing record does not support the IHO's determination that the parents' ten-day notice letter constituted a parental referral of the student to the CSE. Apart from the date and the reference to the 2017-18 school year, the parents' August 16, 2017 ten-day notice letter contains language that is identical to the ten-day notice letters dated December 17, 2015 and August 18, 2016 (compare Dist. Ex. 75; with Dist. Exs. 4; 6). The letters reference the same December 1, 2015 Gow admissions assessment, which an SRO considered in the prior proceeding and determined that it did not support a finding that the student needed special education (compare Dist. Ex. 75; with Dist. Exs. 4; 6; see Parent Ex. I; see also Application of the Bd. of Educ., Appeal No. 18-009). In addition, although the letter indicated that the student continued to demonstrate an "inability to read at a level that w[ould] allow her to be successful," it also touted the student's improvement, stating that the student "spent part of the 2015-2016 school year and the entire 2016-2017 school year at the Gow School," and demonstrated "growth and progress during that time" including academically and in her "reading skills" (Dist. Ex. 75). The August 16, 2017 ten-day notice letter does not include any new information for the district to consider (other than subjective statements about the student's progress) and does not include a request for a referral of the student to the CSE or a request for an evaluation (id.). Moreover, the district's August 17, 2017 response clearly indicated that the parents' letter was not considered a referral, demonstrated by the district's closing, "if you would ever like the [d]istrict to schedule a meeting to discuss [the student]'s educational programming, please contact [the director's] office so we can make the necessary arrangements" (Dist. Ex. 76).

Based on the foregoing, the evidence in the hearing record does not support the IHO's determination that the parents' ten-day notice letter constituted a written referral for initial evaluation. I decline to adopt so broad an interpretation of the parents' ten-day notice of unilateral placement such that, notwithstanding a lack of new information concerning the student's needs, a recitation of past disagreements and previously shared assessment information would automatically trigger the district's obligation to conduct an initial evaluation of the student and convene the CSE to consider the student's eligibility for special education under the provision in State regulation for written referral of a student (see 8 NYCRR 200.4[a]; see also D.K., 696 F.3d at 248 n.5 [finding that "general expressions of concern" do not amount to "a 'parental request for evaluation' under the plain terms of the statute"], quoting 20 USC 1415[d][1][A][i]). Instead, the purpose of the ten-day notice sent by the parents was quite clear—that the parents wished to communicate their dissatisfaction with the district's alleged "longstanding" failure to address the student's needs, the decision that they had reached to unilaterally place the student, and their intent to pursue a claim for reimbursement for all expenses associated with the student's attendance at Gow (Dist. Ex. 75).[5] Accordingly, I do not find support for the conclusion that this notice constituted a written parental referral of the student for special education (id.).

While the ten-day notice did not amount to a referral of the student, the issue remains as to whether the district fulfilled its child find obligations. As noted above, the district must have procedures in place to satisfy this obligation (see 34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1],

[5] Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).

[7]). Here, the district's child find policy broadly stated its obligations, including that "[i]f the District boundaries encompass a nonpublic school, the District, as the district of location, must develop and implement methods to identify, locate, and ensure the identification and evaluation of students with disabilities who have been, or are going to be, parentally placed in such nonpublic school" (Dist. Ex. 79).[6] Although the district had previously evaluated the student and, after delivering special education services for several year, the CSE had declassified the student, child find is a "continuing obligation" and, as part of that continuing duty, a district may be required to complete another initial evaluation of a student (P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 [3d Cir. 2009]; Kruvant v. District of Columbia, 2005 WL 3276300, at *8 [D.D.C. Aug. 10, 2005] [noting that there is no federal regulation that limits a district's obligation to conduct "an 'initial evaluation' to a single occurrence that forever fulfills its 'child find' obligations," and that such an interpretation would be at odds with other provisions that recognize a child's disability status is subject to change]; but see J.G. v. Oakland Unified Sch. Dist., 2014 WL 12576617, at *10 [N.D. Cal. Sept. 19, 2014] [relying on expert testimony that reassessment for the particular disorder at issue would be unnecessary absent a material change in circumstances]).

In reviewing whether the district satisfied its child find obligations leading up to the 2017-18 school year, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at *8, quoting J.S., 826 F. Supp. 2d at 652). While the parents place great weight on the evidence of the student's needs that was part of the hearing record in the prior matter, such information, without more, was not sufficient to trigger the district's child find obligation leading up to or during the 2017-18 school year. According to the parents, the district had reasonable notice of the student's disability and need for special education services based on the "great deal of information" supplied to the district during the 2016-17 school year "via their ongoing litigation with the [d]istrict" (Parent Mem. of Law at p. 9). The parent specifically cites a September 2015 psychoeducational evaluation and the December 2015 evaluation conducted by Gow (id. at pp. 9-10, see Parent Ex. I; Dist. Ex. 71). The SRO in the prior proceeding considered both of these documents and weighed them in his determination that the student did not demonstrate a need for special education (see Application of the Bd. of Educ., Appeal No. 18-009). In particular, the SRO reviewed the student's scores as reported in the September 2015 psychoeducational evaluation and noted the testimony of the district school psychologist that conducted the evaluation that nothing in her report identified a need for special education (id.). The SRO in the prior matter also reviewed the December 2015 Gow admissions assessment but concluded that, although the evaluation indicated the student needed interventions, "the evaluator did not offer any additional explanation and the assessment report did not include a summary of test results" (id.). While there may be components of these evaluations that, when accumulated with other information, could have contributed to trigger the district's need to evaluate the student,

[6] The district's director of instruction, student services and assessment (director) testified generally about the procedures if the parents notified the district that the student would be returning to the district, including that the student would be considered a transfer student and the district "would have a meeting and look at the 504 plan and see if we need to make any adjustments to the plan upon her return" (Tr. p. 71). The director further testified that assessments were "not mandated" for a transfer student, but the district "typically [performed them]" (id.). The director also testified to the procedure for "re-referral" to the CSE, stating that if testing indicated that accommodations would not be sufficient for the student, the student would be referred to the CSE, or the parent could make a referral in writing (Tr. p. 72). The director testified that the CSE would want to consider evaluations completed by the district school psychologist as well as "any evaluation Gow had done" (Tr. p. 73).

there is no other information in the hearing record that would support a finding that the district should have referred the student for evaluation leading up to the 2017-18 school year or thereafter (see Tr. pp. 37-38).

The student's Gow academic reports for the 2016-17 school year show that the student achieved As and Bs in all of her classes and earned high praise from her teachers (Parent Exs. R; T). The parents' evidence in the hearing record current to the 2017-18 school year consists of (1) a June 28, 2018 Gow progress report and May 29, 2018 testing record, (2) an April 24, 2018 Gow advisor report, and (3) a June 7, 2020 affidavit from the student's reconstructive language teacher at Gow (Parent Exs. FF-HH). All this evidence post-dates the timeframe during which the parents allege that the district should have referred the student (i.e., subsequent to the parents' unilateral placement of the student at Gow for the 2017-18 school year).[7]

The parents argue that the district had reasonable notice of the student's disability and need for special education based on the student's receipt of "individualized education at a small, specialized private school" (Parent Mem. of Law at p. 10). While I sympathize with the parents' position that the student was receiving individualized education at Gow (the implication being that such education was masking the student's needs), the student's exceptional academic performance at Gow was consistent with her performance when attending the district, and given the district's previous consideration of the student's eligibility and the lack of new information indicating that the student needed special education services to address her disability, the student's receipt of individualized instruction at Gow on its own is not sufficient to support a finding that the district failed in its child find obligations.

In summary, the hearing record lacks evidence that the district overlooked clear signs of a disability and was negligent by failing to order testing or had no rational justification for deciding not to evaluate the student. Thus, there is insufficient basis to disturb the IHO's determination that (independent of any parent referral) the district was not obligated to refer the student to the CSE or conduct an evaluation and did not violate its child find obligation.

VII. Conclusion

Having determined that the evidence in the hearing record supports the district's position that it was not obligated to refer the student to the CSE or conduct an evaluation of the student, the necessary inquiry is at an end. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

[7] The May 29, 2018 student testing record includes the student's results from testing administered on March 10, 2016, April 15, 2017, and April 12, 2018 (Parent Ex. FF at pp. 4-5). The prior administrations on March 10, 2016 and April 15, 2017 were part of the hearing record in the prior proceeding (compare Parent Ex. S; with Parent Ex. FF). The additional testing conducted on April 12, 2018 was conducted after the date of the parents' ten-day notice letter. Moreover, the director testified that student's standard scores as reflected in the testing conducted by Gow indicated that she was performing within the average range in each of the domains assessed (Tr. pp. 87, 88, 92, 96, 115-16). The district's school psychologist testified that she had never seen the additional testing information before the hearing, nevertheless, she opined that the student's results continued to place her within the average range of functioning consistent with the school psychologist's September 2015 evaluation and with Gow's prior testing (Tr. pp. 124-26, 128, 136, 137, 139, 142, 143, 160, 176, 177).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated September 23, 2020 is modified by reversing that portion which determined that, in response to the parents' ten-day notice letter, the district was obligated to conduct an evaluation of the student and convene a CSE to consider the student's eligibility for special education.

Dated: **Albany, New York**
January 4, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER