The University of the State of New York

The State Education Department
State Review Officer
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No. 20-181

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Deborah A. Ezbitski, attorneys for petitioner, by Deborah A. Ezbitski, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Aaron School (Aaron) for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's determination that Aaron was an appropriate unilateral placement for the student during the 2019-20 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

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 Committee on Special Education (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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The parent notified the district of her intent to unilaterally place the student at Aaron for the 2019-20 school year in a letter dated August 19, 2019 (see Parent Ex. B). In a due process complaint notice, dated November 13, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). The CSE convened on December 4, 2019, to formulate the student's IEP for the 2019-20 school year (see generally Dist. Ex. 8).

An impartial hearing convened on May 19, 2020 and concluded on July 28, 2020 after four days of proceedings (Tr. pp. 1-82). In a decision dated October 19, 2020, the IHO determined that the district offered the student a FAPE for the 2019-20 school year, that Aaron was an appropriate

unilateral placement, and that equitable considerations did not weigh in favor of the parent's request for an award of tuition funding (IHO Decision at pp. 5-12). As to relief, the IHO denied the parent's request for tuition reimbursement and/or direct funding at Aaron for the 2019-20 school year (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review[1] and the district's answer and cross-appeal thereto is also presumed and will not be recited in detail herein. The gravamen of the parties' dispute on appeal is whether the IHO correctly determined that the district had not violated its obligations under child find; however, preliminary matters also need to be addressed.

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

[1] The parent's filing included a "Notice with Petition" and a "Verified Petition." As the regulations governing practice before the Office of State Review refer to the name of the pleading to initiate review as a "request for review" (8 NYCRR 279.4[a]), the parent's pleading will be referenced as such herein.

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]).[2]

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

[2] 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).

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 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. Preliminary Matter — Compliance with Practice Regulations

The district argues that the request for review should be dismissed because the parent has not indicated the reasons for challenging the IHO's decision; rather, the request for review only states which IHO findings were incorrect, and the district contends that mere disagreement is an insufficient basis upon which to overturn the IHO's findings. I disagree and find that the parent does sufficiently indicate the reasons for challenging the IHO's decision in the request for review.

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8 [c][4]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was

untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

I find that the parent's request for review complies with the practice requirements set forth above. Specific to the district's argument, I note that the request for review identifies three IHO findings with which the parent disagrees: (1) the IHO's finding that the district sustained its burden to prove that it met its obligations under the IDEA to identify, locate and evaluate students suspected of having a disability; (2) the IHO's finding that the district offered the student a FAPE; and (3) the IHO's finding that the parent acted in bad faith in failing to seek out a special education evaluation from the CSE (Req. for Rev. ¶¶ 9; 42; 45; 48-49; 52). Further, facts are set forth in the request for review which, in the parent's view, establish a basis for overturning the IHO's findings with which the parent disagrees (see, e.g. Req. for Rev. ¶¶ 7; 10-36; 38-41; 50-51). Lastly, the request for review identifies the specific relief sought in the underlying action as well as on appeal (Req. for Rev. ¶¶ 4-6; 53-55). It does not appear that any alleged defect in the pleading materially prejudiced the district in its ability to answer the allegations in the request for review. To the contrary, the district formulated a responsive answer to the allegations that directly addresses the issues identified by the parent in the request for review. Therefore, I decline to dismiss the request for review on this basis.

B. Burden of Proof

The parent asserts that the IHO shifted the burden of proof to the parent in contravention of State law, which places the burden on the district to demonstrate it offered the student a FAPE. The parent bases her assertion on the IHO's statement in her decision that the parent had failed to meet the first of the three "Burlington/Carter" criteria for tuition reimbursement, and the claim that the district had failed to offer any evidence to show that it offered the student a FAPE and satisfied its child find obligations (IHO Decision at p. 8; see Req. for Rev. ¶¶ 48-51).

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 parent's contention. In her 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 p. 4). 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 Aaron was appropriate (see Tr. pp. 43-49; Parent Exs. A-Y; Dist. Exs. 1-11). It does not appear upon review of the IHO decision as a whole, that the statement that the parent had "failed to meet the first of the three Burlington/Carter criteria for tuition reimbursement" leads to a conclusion that the IHO misallocated the burden of proof. Moreover, I disagree with the parent's

contention that the burden of proof was misallocated because the district had failed to enter any evidence to show that it had offered a FAPE and satisfied its child find obligation because there was ample evidence entered by both parties on the issues in the impartial hearing, and the IHO cited to significant amounts of evidence entered in the record by the parent in reaching her determinations with respect to FAPE and child find (see IHO Decision at pp. 5-8; Parent Exs. A-Y; Dist. Exs. 1-11). Although the parent disagrees 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 her 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]).

C. Child Find and Parent Referral

The parent asserts that the IHO erred in finding that the district had satisfied its child find obligations under the IDEA and argues that the CSE denied the student a FAPE by failing to identify the student as requiring special education and developing an IEP prior to the start of the 2019-20 school year.[3]

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

[3] This specific "child find" argument was raised by the parent in the due process complaint notice initiating the impartial hearing, and the same facts are alleged in the parent's request for review concerning when the district had reason to suspect a disability and reason to suspect that special education services may be needed (Parent Ex. A at p. 2; Req. for Rev. at pp. 3-5). The IHO based her analysis of the district's "child find" obligation on the issue of when the district had reason to suspect a disability as well (IHO Decision at pp. 5-8). Oddly, in the parent's memorandum of law this argument is abandoned and instead the parent argues that the district failed to prove that it had "procedures in place" to locate and identify students suspected of having disabilities (see Parent Mem. of Law at p. 11). However, a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6 [a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision.

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]).

Upon review of the impartial hearing record and the IHO decision, I find that the IHO carefully considered the evidence and the basis for the parent's assertion that the district failed to comply with its obligations under the child find provisions of the IDEA, and correctly determined that the district had met its burden to show that it had not denied the student a FAPE during the 2019-20 school year.

In her decision, the IHO noted that the first communication that the parent describes as a "referral" to the CSE was contained in a report of a private psychological evaluation conducted

May 9, 2019 (IHO Decision at p. 5; see Parent Ex. D). However, the IHO correctly characterized the recommendations contained in the report as including a recommendation that the parent refer the student for an evaluation to the CSE (IHO Decision at p. 5; see parent Ex D at pp. 1, 4-5). It does not appear that the parent referred the student to the CSE at that time, nor does the record show that she forwarded a copy of the psychological evaluation report to the district or the CSE. The May 2019 psychological evaluation report also included a recommendation that the parent pursue a private autism evaluation for the student, and the parent did so shortly thereafter (Parent Ex. D at p. 4; see Parent Ex. E).

The parent wrote to the CSE by letter dated August 19, 2019, describing that the student had undergone a psychological evaluation in May 2019 and an autism evaluation in July 2019 and noted that "[t]he evaluator referred me to the District CSE to discuss educational settings for [the student] in July 2019" (Parent Ex. B). The parent's letter to the CSE went on to indicate that as of the date of the letter she had not been contacted by the CSE nor had the CSE convened, the student had no IEP and therefore the parent had "no other choice" but to place the student at Aaron and seek tuition funding (id.). The letter also noted that the parent was represented (by an advocate or attorney) and also sought transportation from the district (id.). The IHO determined that the two private evaluations were not "CSE referral[s]" because the May 2019 evaluation report had not been sent to the CSE and did not independently constitute a CSE referral, and the report of the July 22, 2019 autism evaluation was not produced until October 2019 and when reduced to writing did not recommend referral to the CSE as the parent had suggested (IHO Decision at p. 5; see Parent Exs. B; D; E at pp. 5-8).

The IHO also found that the parent's August 19, 2019 letter to the CSE was a "10-day notice" letter, but did not constitute a CSE referral because it did not request that the CSE evaluate the student for eligibility for special education, rather it only requested transportation to the private school (IHO Decision at pp. 5-6; see Parent Ex. B).[4] Moreover, the IHO noted that even if the August 19, 2019 letter from the parent to the CSE had the effect of referring the student to the CSE for evaluation, such referral would have been too close to the start of the 2019-20 school year for the CSE to have evaluated the student, convened the CSE and developed an IEP for the student before the start of that school year (IHO Decision at p. 6).[5]

Next, the IHO considered the parent's argument that staff at the student's universal pre-kindergarten program knew or had reason to suspect that the student had a disability (IHO Decision at pp. 6-8; Parent Ex. A at p. 2). The IHO reviewed the parent's affidavit testimony to the effect

[4] The hearing record contains a September 3, 2019 e-mail communication between district personnel that suggests that CSE staff decided that the parent's August 19, 2019 letter to the CSE should be considered as a CSE referral of the student, and began to put the CSE evaluation process in motion (see Dist. Ex. 1 at p. 2).

[5] Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

that during a parent teacher conference during the 2018-19 school year, staff at the pre-K program had suggested to the parent that the student should be evaluated for speech language needs (Parent Ex. Y at p. 1). In her testimony, the parent also related that she had removed the student from the pre-K program in February 2019 after an illness and that because the student resisted returning to school so much the parent thought it better not to return for the remainder of the school year (IHO Decision at p. 6-7; Parent Ex. Y at pp. 1-2). The IHO also considered and gave weight to the parent's testimony during the impartial hearing wherein the parent confirmed that staff at the pre-K program had told her that the student "needed help with her speech, and her writing" but that she did not recall anyone at the school mentioning that the student should be evaluated for special education (IHO Decision at p. 7; Tr. pp. 71-75).

The IHO ultimately identified a clear referral of the student by the parent to the CSE for evaluation in the hearing record, albeit after the start of the 2019-20 school year and after the student began to attend Aaron (IHO Decision at p. 6). Curiously, although the parent had not shared the psychological evaluation report of the May 2019 evaluation with the CSE, nor explicitly asked the CSE to evaluate the student in her August 19, 2019 letter to the CSE, by letter dated September 12, 2019 the parent requested that the CSE evaluate the student for a determination of her eligibility for special education in clear terms that demonstrated the parent's understanding and familiarity with the CSE process (Parent Ex. C). The IHO noted that two of the student's older siblings also attended the Aaron School (IHO decision at p. 11).

Taking the above into account, the IHO noted that the information available to the CSE prior to the parent's September 12, 2019 written referral to the CSE, was limited by the student's brief attendance at the pre-K program due to the parent's removal of the student from that program, and the parent's decision to withhold evaluative information from the CSE (IHO decision at pp. 5, 7-8). Thus, the IHO found that the district did not have sufficient reason to suspect a disability or reason to suspect that special education services may be needed to address that disability until after the parent's September 12, 2019 written referral to the CSE, and I agree (IHO Decision at pp. 7-8).

After the September 12, 2019 parent referral to the CSE, there is ample evidence in the hearing record showing that the CSE obtained consent from the parent and began appropriate evaluations of the student, held a CSE meeting, determined that the student was eligible for special education, and developed an IEP for the student without undue delay (see Parent Exs. F-J; Dist. Exs. 1-10).

For the reasons set forth above, I decline to disturb the IHO's determination that the district did not fail to comply with its child find obligations under the IDEA and did not deny the student a FAPE for the 2019-20 school year.

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 prior to the parent's written referral of the student dated September 12, 2019, 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. Specifically, with respect to the district's cross appeal of the IHO's determination that Aaron was an appropriate unilateral placement for the student

during the 2019-20 school year, I find that it is unnecessary to address the cross-appeal because I am not reversing or modifying the IHO's finding that the district did not violate its child find and, therefore, did not deprive the student of a FAPE for the 2019-20 school year. For the same reason, I need not address the parent's contention that the IHO erred in finding that the parent acted in bad faith such that equitable considerations weighed against tuition reimbursement.[6]

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
February 5, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER

[6] Although I have found that the IHO correctly determined that the district complied with its obligations under the child find provisions, I note that in many instances, the appropriate remedy for a child find violation is something other than tuition funding, such as referral to the CSE and/or compensatory education (see Application of a Student with a Disability, Appeal No. 20-053 [holding "Typically, relief awarded for a child find violation would be an order directing the district to evaluate the student and make a determination whether the student is eligible for special education" and finding therein "the IHO's award of a prospective placement of the parents' choice to remedy the district's child find violation where, as here, there have been intervening appropriate recommendations would not be appropriately related to redress the initial child find violation . . . the more appropriate relief to remedy a child find violation in this case would be compensatory education"]; see also Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]).