The University of the State of New York

The State Education Department
State Review Officer
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No. 21-129

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, 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 Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Jesse Cole Cutler, Esq., and Linda A. Goldman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 Windward School (Windward) for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it met all procedural requirements in its review of the student's eligibility for special education as a student with a disability. The appeal must be sustained in part. 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 student attended a nonpublic general education preparatory school (nonpublic school) from kindergarten through fifth grade (Tr. pp. 91-94; Parent Ex. B at p. 1; C at p. 2). Her early learning history is significant for language-based deficits that impacted her reading skills (Parent Ex. C at p. 2). Notably, the student struggled with reading comprehension and in January 2015 (first grade) she underwent a speech-language evaluation, which revealed significant weaknesses

in language processing (Tr. pp. 91-92; Parent Ex. C at p. 2). The student began receiving speech-language therapy two times per week (Tr. pp. 91-92, Parent Ex. C at p. 2). In second grade, the parent obtained a private neuropsychological evaluation of the student, which resulted in the student receiving a diagnosis of a language disorder with weakness in expressive and receptive language skills (Tr. p. 92; Parent Ex. C at p. 2). In first and second grades the student received school-based reading support and worked with a private tutor outside of school twice weekly for 45 minutes (Parent Ex. C at p. 2). In third and fourth grades, the student received language-based support through a learning resource center at the nonpublic school (Tr. p. 92).[1] In addition, she received tutoring outside of school and continued with speech-language therapy (Tr. pp. 92-93; Parent Ex. C at p. 2).

A teacher report generated at the end of fourth grade (June 2018) reportedly indicated that in English language arts (ELA) the student exhibited challenges with organizing her ideas when writing essays or reading responses (see Parent Ex. C at p. 2).[2] Although the student often started with a strong central thesis, her subtopics and evidence did not always match her claim (id.). The teacher report noted that in math the student struggled with abstract concepts, that repetition helped her memorize important algorithms and carry them out with greater accuracy, and that when she had difficulty with problem solving questions she asked for clarification (id. at p. 3). The report stated that the student benefitted from "extra explanation" (id.). With regard to the learning resource center, the teacher report indicated that as academic demands increased the student appeared more anxious during the learning center sessions (id.). The student reportedly became more impulsive in her oral responses and needed frequent reminders to think before she responded (id.). According to the report, the student had recently begun to state that she often did not understand classroom lessons (id.). Although the student's teachers provided consistent one-to-one support for the student in the classroom, due to her language challenges and difficulty maintaining focus, she "was often unable to fully participate in the lessons or to keep up with the fourth-grade expectations" (id. at p. 3). At the end of fourth grade, the nonpublic school informed the parent that the school was "not enough for [the student] anymore" and suggested that the parent consider enrolling her in a different private school, such as The Windward School (Windward) or The Stephen Gaynor School (Stephen Gaynor) (Tr. p. 93).

The parent obtained a private neuropsychological evaluation of the student, which was conducted over several dates in June 2018, in order "to address concerns regarding [the student's] learning in the areas of reading and processing" (Parent Ex. C at p. 1). The resultant evaluation report indicated that, according to the parent, the student required much support to complete homework, could not execute tasks independently, and required reteaching of what she had been taught in school (id. at p. 3). In addition, the student's overall "speed and processing" was slow, and as a result her ability to execute tasks took an "exceedingly long time" (id.at p. 3).

According to the June 2018 neuropsychological evaluation report, results of formal intelligence testing suggested that the student possessed adequate abilities across all domains

[1] The student's mother reported that the language resource program at the nonpublic school provided the student with one hour of remediation per day (Tr. p. 92).

[2] The original teacher report is not part of the hearing record, rather a summary of some or all of the teacher report is included a June 2018 neuropsychological evaluation report (see Parent Ex. C at pp. 2-3).

(Parent Ex. C at p. 10). However, the student demonstrated "lags" in her "ability to access language with precision and to process, digest and comprehend layered language" (id.). In addition, the student exhibited significant auditory processing deficits (id.). The evaluation report noted that, academically, the student presented with adequate word reading and decoding skills and that her computational math skills and spelling were also intact (id. at p. 11). In contrast, the student struggled in areas that required more language processing and the student's reading comprehension was negatively impacted by her language processing deficits (id.). The psychologist offered diagnoses of a specific learning disorder, with impairment in reading, and a language disorder (id.).

In August 2018, the parent applied to Windward, but the school was unable to enroll the student at the time because there were no openings available (Tr. p. 94).

An initial educational screening conducted by Windward in September 2018 indicated that the student's reading comprehension was at the 2.8 grade level (timed) based on the Gates-MacGinitie Reading Test (Dist. Ex. 12 at p. 6).

The student continued at the nonpublic school for the 2018-19 school year (fifth grade) (Tr. p. 241). According to the parent, the student's grades that year were "mediocre with a lot of things omitted" (Tr. pp. 243-44). The school provided accommodations for the student "to get through the year" such as removing Spanish class, allowing for untimed tests, and reducing homework, thereby making "things much easier for her" (Tr. p. 241). The student continued to receive in-school and afterschool tutoring which also reportedly "helped her" (Tr. pp. 94-95, 243).

On February 25, 2019, the parents executed an enrollment contract for the student's attendance at Windward for the 2019-20 school year (sixth grade) (Parent Ex. I). The student began attending Windward in September 2019 (Tr. pp. 95, 178, 241).

The parent referred the student to the district CSE in a letter dated September 5, 2019, requesting an evaluation of the student and an initial review of the student's eligibility for special education (Parent Ex. B at p. 1). Reading assessments conducted by Windward in September 2019 yielded scores between the 4th and 19th percentiles (Parent Ex. D). The district purportedly conducted an evaluation of the student; however, the results were not entered into evidence at the impartial hearing (see Tr. pp. 23-26). According to the parents, a CSE convened on December 12, 2019 for the student's initial review (Parent Ex. A at p. 2). The district determined that the student was not eligible for special education services as a student with a disability (Tr. pp. 40, 101-02; Parent Ex. A at p. 2).[3] According to the district school psychologist, the student's diagnosis did not impact her ability to meet grade-level expectations in any academic areas (Tr. p. 40). The school psychologist asserted that the neuropsychological evaluation report submitted by the parents reflected scores that all fell within the average range (Tr. pp. 44-45).

A. Due Process Complaint Notice

In a due process complaint noticed dated February 11, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20

[3] The hearing record does not include copies of the district evaluations or any documentation arising from the December 2019 CSE meeting.

school year (Parent Ex. A at p. 1).[4] The parents argued that the district impeded their ability to participate in the CSE process and predetermined that it would not find the student eligible for special education (id. at pp. 2, 3). In addition, the parents alleged that the district failed to evaluate the student in all areas of suspected disability, "resulting in an inaccurate and incomplete understanding of her needs," and "mischaracterize[d]" the results of testing that had been conducted (id. at p. 2). The parents asserted that the December 2019 CSE incorrectly determined that the student was not eligible for special education as a student with a disability (id.). The parents also alleged that "[t]he program recommended" for the student was not appropriate and did not provide for a sufficiently structured or supportive setting to meet the student's needs (id. at p. 3).

The parents also alleged that Windward was an appropriate unilateral placement for the student for the 2019-20 school year and that there were no equitable considerations that would warrant a reduction or denial of district funding of the student's tuition (Parent Ex. A at p. 3). For relief, the parents requested that the district be required fund the costs of the student's tuition at Windward for the 2019-20 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 29, 2020, and concluded on November 24, 2020, after three days of proceedings (see Tr. pp. 1-257). During the second hearing date, the district offered documentary evidence; however, the district had not provided the documents to the parents' counsel five days prior to the date on which the district sought to have them introduced, and, upon the parent's objection, the IHO declined to admit the documents into evidence (see Tr. pp. 23-28).[5]

In a decision dated April 30, 2021, the IHO found that the district failed to meet its burden to prove that it "acted appropriately regarding [the student's] education" for the 2019-20 school year (IHO Decision at p. 19). Initially, the IHO acknowledged that, during the impartial hearing, the parents made an argument that the district violated its child find obligations to the student; however, the IHO found that the parents had not raised a child find claim in their due process complaint notice and the district had not opened the door to such a claim and that, therefore, the issue was outside the scope of the impartial hearing (id. at p. 4 n.2). Regarding the CSE's determination that the student was not eligible for special education, the IHO found that there was no evidence upon which to base a finding that the December 2019 CSE acted appropriately (id. at p. 20). The IHO concluded that the district failed to demonstrate that it complied with its procedural obligations relating to the IDEA and, therefore, "violated the student's procedural rights under the IDEA" (id.). However, the IHO declined to go so far as to make a finding that the student was eligible for special education based on the evidence presented (id.).

[4] In addition to allegations under the IDEA, the parents alleged that the district violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (Parent Ex. A at p. 3).

[5] During the third hearing date, the district offered one exhibit that was entered into evidence (Tr. pp. 222-25; Dist. Ex. 12).

As for the unilateral placement, the IHO determined that Windward was appropriate to meet the student's needs (IHO Decision at p. 21). The IHO noted that Windward offered the student language instruction three times per day and that the student "thrived in the Windward learning environment" (id.).

Turning to equitable considerations, the IHO found evidence that the parents were set on the student attending Windward "even though it meant returning [the student] to a school they felt was causing her great anxiety" until a spot opened at Windward (IHO Decision at p. 23). The IHO noted that the parents obtained the June 2018 private neuropsychological evaluation "as part of their application to Windward," Windward "required a diagnosis of a language-based learning disorder for admission," and the neuropsychological evaluation report "delivered" (id.). Under these circumstances, the IHO opined that it was "not impossible to imagine" that the private evaluation "highlighted the student's lower scores in reading comprehension" (id.). The IHO also noted the timing of the contract between the parents and Windward for the 2019-20 school year in February 2019, prior to the December 2019 CSE meeting (id. at pp. 23-24). The IHO found the testimony of the student's mother that she made a referral of the student to the CSE in order "to have 'options' . . . less than credible" (id. at p. 24). Rather, the IHO did not believe that the parents would consider a public school placement for the student, particularly in light of the fact that the student had never attended a public school (id.). Finally, the IHO noted that the parents did not provide the district with notice of their intent to unilaterally place the student (id.). Thus, based on equitable considerations, the IHO denied the parents' request for tuition reimbursement.

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying their request for tuition reimbursement for the student's attendance at Windward for the 2019-20 school year based on equitable considerations. First, the parents claim that the IHO should have addressed the district's child find obligations to the student, asserting that, although the parents did not raise it in their due process complaint notice, the district opened the door to the claim. Next, the parents allege that the IHO erred in determining that equitable considerations warranted a denial of the parents' request for tuition reimbursement.

In an answer, the district responds to the parents' allegations and argues that the IHO's determinations that child find was outside the scope of the impartial hearing and that equitable considerations warranted a denial of the parents' request for tuition reimbursement should be affirmed. The district also interposes a cross-appeal, alleging that the IHO erred in finding that the district failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 school year. Initially, the district argues that the IHO abused her discretion in refusing to admit the district's exhibits into evidence. Further, the district asserts that "there is no basis for reversing the [district's] proper determination that the Student was ineligible to receive special education and services."

The parents answer the district's cross-appeal, responding to the district's allegations and asserting that the IHO properly excluded the district's documentary evidence at the hearing.

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]).[6]

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 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).

[6] 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).

VI. Discussion

A. Preliminary Matters

1. Five-Day Disclosure

The district asserts that the IHO abused her discretion in declining to admit the district's exhibits into evidence based on the district's failure to disclose the documents to the parents' counsel five days prior to the hearing date. The district argues that the parents had prior access to the documents the district sought to enter into evidence and did not suffer any prejudice due to the district's delay in disclosing the exhibits. The district submits the exhibits with its answer and cross-appeal and requests that they be considered.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). If a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]).

Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. Apr. 9, 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Here, it is undisputed that the district did not disclose its exhibits to the parents' attorney until October 29, 2020, the day before the hearing date on which the district was scheduled to present its case (see Tr. p. 23). The district's attorney apologized for the untimely disclosure but stated her belief that the parents had "access" to the proposed exhibits as they were documents that were part of the student's educational record (Tr. p. 26). Therefore, the district's counsel asked that the untimely disclosure "be excused" (id.). The IHO stated her understanding that the five-day disclosure rule was "the one evidentiary rule that [wa]s a hard and fast rule" and that the parents were entitled to have access to the proposed exhibits so that they could prepare for the hearing (Tr. p. 27). The district went on to present the testimony of one witness, a district school psychologist (see Tr. pp. 29-61). After the testimony of the district school psychologist, the district "rest[ed]" (Tr. p. 76). The district did not request a continuance so that it could present its documentary

evidence at a future hearing date, nor did it attempt to offer its documents into evidence at the subsequent hearing date on November 24, 2020 (see Tr. pp. 80-257).

The IHO acted well within her discretion in prohibiting the introduction of the district's exhibits into evidence given the district's failure to comply with the five-day disclosure rule. On appeal, the district reiterates its argument that the parents were not prejudiced by its untimely disclosure since they previously had access to the documents it sought to introduce through other means (see Tr. pp. 26-27); however, contrary to the district's representation, the parents have not conceded that they previously received all of the evidence the district sought to introduce (compare Answer with Cross-Appeal ¶ 11, with Answer to Cross-Appeal at pp. 6; see generally Tr. pp. 26-27). The IHO's articulated rationale for declining to receive the exhibits into evidence (see Tr. p. 27) was consistent with the stated purpose of the five-day rule "to insure that neither party was denied knowledge of the evidence to be used by the other" (Letter to Bell, 211 IDELR 166 [1979]). Further, on appeal, the district has not offered any explanation for its failure to request that the exhibits be received into evidence on the November 24, 2020 hearing date.

Overall, there is an insufficient basis to disturb the IHO's decision to prohibit the district's introduction of the documentary evidence, which the district concedes it failed to disclose to the parents in a timely manner. As such, the district's request that the documents be considered on appeal is also denied.

2. Scope of the Impartial Hearing

The parents allege that the IHO erred in refusing to address the district's failure to meet its child find obligations to the student.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

The parents acknowledge that they did not raise a child find claim in their due process complaint notice (see Parent Ex. A). Also, there is no indication that the parents sought to amend the due process complaint notice during the impartial hearing or that the district agreed to expand the scope of the impartial hearing. However, the parents argue that the district opened the door to the claim. Specifically, the parents point to the opening statement of the district's attorney and questions posed by the district's attorney to the student's mother during cross-examination.

The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]).

Here, in its opening statement, the district, among other things, summarized its child find obligations and stated that it "expect[ed] the evidence to show today that the CSE fulfilled its Child Find obligations and did not deny the student a FAPE" (Tr. pp. 14-15). Thereafter, in his opening statement, the parents' attorney highlighted that the district should have evaluated the student prior to the parents' referral and should have suspected that the student needed special education "in accordance with its consultation requirements under federal and state law and regulation and the Child Find regulations that [the district's counsel] ha[d] discussed" (Tr. pp. 16-17). Despite the reference in its opening statement, the district did not pursue any questions related to child find during its direct examination of its only witness, a district school psychologist (see Tr. pp. 29-61). The only testimony elicited by the district that might have been relevant to examining whether the district met its child find obligations was during the district's cross-examination of the parent when the district inquired about the timing of the parent's referral of the student to the district for an evaluation and the student's prior educational history in nonpublic schools (see Tr. pp. 241-42). However, this line of questioning was not part of the district's direct case and appears to have been pursued in order to raise equitable considerations regarding the degree to which the parents would have considered a public school placement for the student.

While the district did raise the issue of child find in its opening statement, it did not pursue evidence through direct examination of its witness and, thus, this is not an instance where "most of the testimony presented by both parties to the IHO related to the [issue]" (M.H., 685 F.3d at 250; see P.G. v New York City Dep't of Educ., 959 F Supp 2d 499, 515 [S.D.N.Y. 2013] [finding that the district's inquiry on the issue during direct examination evinced that the attorney did not raise the issue in its opening statement "by accident"]). Based on the foregoing, the hearing record does not support the parents' contention that the district opened the door to the issue of child find (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9). Therefore, there is no reason to disturb the IHO's determination that the parents' argument regarding child find was outside the scope of the impartial hearing.

3. Scope of Review

Before turning to the merits of the parent's appeal, it is necessary to examine which claims are properly before me. State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "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 further specify 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][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party has appealed that portion of the IHO's decision in which she found that there was insufficient evidence in the hearing record to determine whether the student met the criteria to be found eligible for special education as a student with a disability (see IHO Decision at p. 20).[7] In addition, neither party has appealed the IHO's finding that Windward was an appropriate unilateral placement for the student for the 2019-20 school year (see IHO Decision at p. 21). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. FAPE

The district appeals the IHO's determination that the district failed to meet its burden to defend the December 2019 CSE's ineligibility determination. The district argues that the evidence in the hearing record does not support the IHO's finding that the district did not comply with procedural obligations while reviewing the student's eligibility. The district argues that, in the absence of a finding of eligibility for the student by either the CSE or the IHO, the student was not entitled to a FAPE and, therefore, the district may not be found to have denied the student a FAPE.

Initially, regarding the "procedures" surrounding the CSE's initial review, upon receipt of a written request of a referral, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1]-[3]; 8 NYCRR 200.4[a][1]-[2]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). In determining the student's eligibility, a "[CSE] and other qualified individuals must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]; see 34 CFR 300.306[c][i]). If a student has been deemed ineligible for special education, the recommendation must indicate the reasons for such a finding and the parent must be provided with a copy of the recommendation (8 NYCRR 200.4[d][1]). The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including an other health-impairment, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]).

Here, in their due process complaint notice, the parents raised claims relating to parent participation, predetermination, and sufficiency of evaluative information, and further asserted that

[7] While the parents argue that they were not aggrieved and, therefore, did not have to appeal the IHO's decision to refrain from deciding eligibility, the IHO's finding in this regard was adverse to the parents insofar as a finding of eligibility would have ensured the student was entitled to the protections of the IDEA until such time that the CSE may have convened and declassified the student (see C.M. v. Mt. Vernon City Sch. Dist., 2020 WL 3833426, at *17 [S.D.N.Y. July 8, 2020] [finding that the parents were aggrieved by IHO decision that parents did not raise challenges to IEP in the due process complaint notice and, therefore, parents failure to appeal from the IHO's finding meant the issue was not properly before the SRO]). As it is, the student's status going forward remains that of a regular education student and the district does not have an obligation to reconsider the student's eligibility until the student is again referred for special education (see 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]).

the December 2019 CSE inappropriately found the student ineligible for special education (see Parent Ex. A at pp. 2-3). At the impartial hearing, the district was the party that carried the burden of production and persuasion regarding whether it met the procedural requirements of the IDEA and whether the CSE appropriately found the student ineligible for special education (see Educ. Law § 4404[1][c]). Having found that the IHO did not abuse her discretion in declining to admit the district's documentary evidence, the only evidence presented by the district was that of a district school psychologist who had not attended the December 2019 CSE meeting and whose only familiarity with the student was based on a review of documents in preparation for the impartial hearing (see Tr. pp. 31-32, 35, 37-38, 42, 62-32).

The district school psychologist testified that the CSE became aware of the student when the parent referred her to the district for an evaluation to determine her eligibility for special education (Tr. p. 37). According to the psychologist, the district thereafter "collect[ed] documentation" from the parent and did its own evaluations of the student (Tr. pp. 37, 56-57). The psychologist did not herself evaluate the student (Tr. pp. 37-38, 75). The psychologist testified that a CSE was held and determined that the student was ineligible for services (Tr. p. 40). Based on her recollection, the psychologist testified as to who she believed attended the meeting (Tr. pp. 40-41); however, she did not herself attend the meeting (Tr. p. 62). According to the psychologist, "[i]t was decided that [the student's] diagnosis, which was submitted by her parent, did not significantly or at all impact her ability in the classroom setting" and that the student "was able to reach and meet grade-level expectations in all academic areas" (Tr. pp. 40, 44); however, it is unclear from what source the psychologist gleaned this information since she did not evaluate the student or attend the CSE meeting.

The foregoing testimony offers no insight into the parents' ability to participate in the CSE process, the degree to which the CSE predetermined its finding of eligibility, or the sufficiency of the evaluations. Nor did the district offer adequate evidence to defend the CSE's determination that the student was not eligible for special education. Accordingly, there is insufficient basis in the hearing record to modify the IHO's determination that the district failed to meet its burden to show it met the procedural requirements of the IDEA or that its eligibility determination was appropriate.

Having found insufficient basis to modify the IHO's decision in this regard, it is necessary to address the district's position regarding the student's entitlement to a FAPE. There is some authority that supports the position that relief may not be warranted in a dispute absent a finding that a student is eligible for a FAPE (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 249-50 [3d Cir. 2012]; D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. June 1, 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225-26 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding consideration of alleged procedural errors of IDEA unnecessary when student was not eligible for special education services]; D.H.H. v. Kirbyville Consol. Ind. Sch. Dist., 2019 WL 5390125, at *6 [E.D. Tex. Jul. 12, 2019] [finding a school district does not violate the IDEA if it declines to provide special education to a student who does not need special education and does not qualify as a child with a disability under the IDEA]; see also Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 [5th Cir. 2003]). However, putting aside the student's eligibility, an IHO may find that procedural inadequacies rise to the

level of a denial of a FAPE if they significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]) and there is no prerequisite in the statute or regulations that the student be eligible for special education in order for an IHO to reach such a conclusion. Moreover, the district has not pointed to any authority from a jurisdiction such as New York, which places the burden of proof on the district, that supports the premise that the district can avoid its burden of proof on the question of eligibility but ultimately prevail by relying on the challenged finding of the CSE that the district failed to defend (i.e., the student's ineligibility). To find otherwise would turn the burden of proof statute on its head and serve to encourage districts to disavow their statutory burden in future eligibility disputes.

C. Equitable Considerations

The parents assert that the IHO erred in finding that the issue of child find was outside the scope of the impartial hearing but then endorsing the district's position that the parents had a responsibility to reach out to the CSE and refer the student for special education before unilaterally placing the student at Windward. In addition, the parents argue that their pursuit of a private placement may not form a basis for a denial of reimbursement even if the parents never intended to place the student in public school. The parents further argue that the hearing record does not, in any event, support a finding that the parents were unwilling to consider a public school placement for the student. As for the lack of the ten day notice, the parents argue that the IHO should not have faulted them given the lack of evidence of the district's child find processes and the unlikelihood that the district would have acted any differently had it received notice.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Among the equitable considerations that the IHO weighed was the parents' purported preference for Windward over all other options including a public school option (see IHO Decision

at pp. 23-24). First, the IHO highlighted the parents' decision to continue the student at the nonpublic school for the 2018-19 school year (the year prior to the school year at issue) because Windward did not have an opening for the student at that time, notwithstanding that the nonpublic school caused the student anxiety and the staff at the school informed the parents that they could not address the student's needs (see IHO Decision at p. 23). However, there is insufficient evidence in the hearing record to support the IHO's finding that this decision was unreasonable given the testimony of the student's mother that the nonpublic school recommended the student attend a different private school, such as Windward or Stephen Gaynor, and that the parents believed that "those were [their] two options" (Tr. p. 93). Nor is the parents' decision regarding the student's education during the 2018-19 school year particularly germane to the reasonableness of their decision for the 2019-20 school year in question.

The parents executed an enrollment contract for the student's attendance at Windward for the 2019-20 school year in February 2019 and made a full payment for the student's tuition in April 2019, and the student began attending Windward in September 2019 (Tr. pp. 95, 178, 241; Parent Exs. I; J). During the impartial hearing, the student's mother testified that the parents believed they "had no other choice" but to send the student to Windward (Tr. p. 95). The parent testified that, after the student began attending Windward, she was made aware of the possibility of an IEP by other parents and initiated the referral process (Tr. p. 99; see Parent Ex. B at p. 1).

The IHO found the testimony of the student's mother that she referred the student to the district for an evaluation so that she would have options "less than credible," noting that the student had never attended a public school and that the parents had been working for two years to secure the student a spot at Windward (IHO Decision at p. 24). However, even if the parents had no intention of placing the student in any program the district may have recommended, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

Finally, the IHO noted that the parents did not comply with their obligation to provide the district with ten business days notice of their intention to unilaterally place the student and seek tuition reimbursement from the district. 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]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the parents acknowledged that they did not provide the district with a ten-day notice of their intention to place the student at Windward for the 2019-20 school year (Tr. p. 253). However, the student's mother testified that, during the December 2019 CSE meeting, she expressed that she was "flabbergasted" that the CSE had not "agree[d] that [the student] had a learning disability" and the CSE liaison from Windward testified that the student's mother cried at the end of the meeting (Tr. pp. 187, 246). Thus, it would seem that the parents sufficiently expressed their disagreement with the December 2019 CSE's determination of ineligibility. Moreover, while the district may not have been aware of the parents' intent, at that juncture, to seek public funding for the costs of the student's attendance at Windward for the 2019-20 school year, it is likely the district was aware that the student was attending the school, given that the representative from Windward attended the December 2019 CSE meeting (see Tr. p. 174). On the other hand, had the parents provided the district with notice of their intention to seek tuition reimbursement, the district may have responded by offering to reconvene the CSE and reconsider the student's eligibility. Therefore, a reduction (but not a denial) of tuition reimbursement is warranted due to the parents' failure to provide the district with the requisite 10-day notice.

In addition, the timing of the parents' placement of the student at Windward prior to the CSE's initial review of the student's eligibility—and in the absence of any child find claim relating to that portion of the school years prior to the December 2019 CSE meeting, as discussed above—forecloses the parents' ability to obtain tuition reimbursement for the costs of the student's attendance at Windward for the period of September through December 2019. Accordingly, between the parents' failure to provide a ten-day notice and the timing of the unilateral placement of the student at Windward vis-à-vis the December 2019 CSE meeting, the evidence in the hearing record supports a 50 percent reduction in the amount of tuition reimbursement that the district shall be required to fund for the student's attendance at Windward for the 2019-20 school year.

VII. Conclusion

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's determination that the district failed to meet its burden to prove that it met its procedural obligations under the IDEA. Further, the IHO's finding that Windward was an appropriate unilateral placement for the student has not been appealed and, therefore, is final and binding on the parties. However, the evidence in the hearing record does not support the IHO's determination that equitable considerations warrant a denial of tuition reimbursement and, instead, the district shall be required to fund 50 percent of the student's tuition at Windward for the 2019-20 school year.

IT IS ORDERED that the IHO's decision, dated April 30, 2021, is modified by reversing that portion which denied the parents' request for tuition reimbursement in full based on equitable considerations; and

IT IS FURTHER ORDERED that the district shall be required to reimburse the parents for 50 percent of the costs of the student's tuition at Windward for the 2019-20 school year.

Dated: **Albany, New York**
July 15, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER