The University of the State of New York

The State Education Department
State Review Officer
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No. 22-124

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York Department of Education.

Appearances:
The Law Office of Natan Shmueli, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 son's tuition costs at the Big N Little: Ziv Hatorah Program (Ziv Hatorah) for the 2020-21 school year. The 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

By report, the student's "developmental milestones were mixed," and caregiver reports indicated "that they had major concerns initially with [the student's] development when he began school" (Parent Ex. F at p. 8). Reportedly, the student struggled to communicate his wants and needs, struggled to display body awareness or social skills with peers using words, had difficulty speaking clearly, and lacked focus and age-appropriate language/communication skills (id.).

On August 27, 2020, the parent executed an enrollment contract with Ziv Hatorah for the student to attend Ziv Hatorah for the 2020-21 school year which, chronologically speaking, was the student's kindergarten school year (Parent Ex. B at pp. 1-3).

In a letter dated August 31, 2020, with a facsimile cover sheet bearing a September 16, 2020 date, the parent requested that the district evaluate the student and "place him in a full-time special education classroom" (Parent Ex. G at pp. 1-2). The parent indicated that the student's academic, social, and behavioral needs could "no longer be met in a general education classroom," and shared her intent to unilaterally place the student at Ziv Hatorah for the 2020-21 school year (id. at p. 2).

The student attended Ziv Hatorah for "upper kindergarten" during the 2020-21 school year (Tr. p. 81; Parent Exs. B at pp. 4-9; C-F). According to testimony of the program supervisor at Ziv Hatorah, at the beginning of the school year, the student exhibited "behavioral challenges," in that he lacked the ability to follow directions and cues, had a very short attention span, lacked boundaries with peers, was impulsive, sensory seeking, and not easily redirected, and lacked flexibility (Tr. pp. 78, 84-87). Further, at that time, the student demonstrated a lack of academic readiness skills, language, and communication skills, and had difficulty with visual-motor tasks (Tr. pp. 87-90). At Ziv Hatorah, the student was in a "special education classroom" with a "small class size" and he received speech-language therapy, occupational therapy (OT), and counseling (Tr. p. 84; Parent Ex. F at p. 8).

A November 2020 treatment plan produced by Ziv Hatorah recommended that the student "continue receiving special education classroom to enable him to function in the academic setting" (Parent Ex. F at pp. 8, 10).

In December 2020 Ziv Hatorah conducted a functional behavioral assessment (FBA) of the student and identified target behaviors including that the student was highly distractible and struggled to maintain focus during a lesson, left his seat frequently during structured tasks and was "fidgety," resisted/argued/refused to comply with teacher direction, defied time limits, was unable to control impulses and would tantrum, and resisted transitions to his next activity (Parent Ex. F at pp. 2-6). A behavior intervention plan (BIP) was developed addressing the target behaviors identified in the FBA (id. at pp. 11-17).

In a letter dated March 2, 2021, with a facsimile cover sheet showing the same date, the parent followed up on her September 16, 2020 letter, which she indicated had requested that the district evaluate the student and place him in a "full-time special education classroom for the 2020-21 school year" (Parent Ex. H at pp. 1-2). In the letter the parent noted that "no one ha[d] reached out" to her and that she had not yet received an evaluation or an appropriate placement for the student (id. at p. 2). Because of this, the parent indicated that she "unilaterally placed" the student at Ziv Hatorah and she notified the district that she intended to "commence proceedings to seek tuition funding or/and reimbursement from the [d]istrict" (id.).

On March 4, 2021, the district sent the parent a prior written notice of recommendation acknowledging receipt of the parent's written referral for an initial evaluation of the student (Dist. Ex. 2 at p. 1). According to the notice, the district proposed to conduct an initial evaluation of the student to determine the student's eligibility for special education services, to include a social history, a psychological evaluation, a physical examination, and an observation (id.). Additionally, the notice indicated the proposed evaluation could not be conducted without written consent (id. at p. 2). The notice informed the parent that she would be invited to a meeting with a representative of the district at which time the representative would explain the evaluations

to be conducted and the parent's rights under the law, and the representative would then request the parent's written consent (id.). In addition, the March 4, 2021 prior written notice included a three-page request for physical examination form (id. at pp. 4-6).

The district's SESIS events log noted that on March 19, 2021, the social history was "contracted out" (Dist. Ex. 4 at p. 1). The events log indicated that between March 24 and May 5, 2021, a number of unsuccessful attempts were made via phone and email by the agency social worker to contact the parent regarding scheduling the social history (id.).

In a letter to the district, dated May 11, 2021—with a facsimile cover sheet showing the same date, the parent again requested that the district evaluate the student "and provide him with a full-time special education public classroom" (Parent Ex. I at pp. 1-2).

On May 14, 2021, the district school psychologist and the parent had a conversation about the parent's request for an evaluation and the student's performance (Dist. Exs. 3; 4 at p. 1). As discussed further below, the parent cancelled her request to have the student evaluated the same day (Dist. Ex. 3).

A. Due Process Complaint Notice

By due process complaint notice dated June 23, 2022, the parent alleged that the district failed to provide the student with a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. A). Specifically, the parent contended that the district failed to hold an annual CSE meeting, develop a timely and appropriate IEP, and provide an appropriate placement for the student (id. at p. 2). According to the parent, she had requested that the district evaluate the student "for an . . . IEP" which did not occur, that forced her to place the student at Ziv Hatorah for the 2020-21 school year (id.). Among other relief, the parent sought "prospective tuition payment" to Ziv Hatorah for the 2020-21 school year (id.).

B. Impartial Hearing Officer Decision

On January 5, 2022, the parties proceeded to an impartial hearing, which concluded on May 12, 2022, after eight days of proceedings (see Tr. pp. 1- 151).

During the hearing, the IHO asked the parent to produce evaluations of the student that the parent's attorney represented had been conducted (Tr. pp. 143-49). Although the hearing adjourned at that point with the intention that the hearing would reconvene (Tr. pp. 149-50), the parent thereafter requested that she be allowed to rest her case without providing the requested evaluations (IHO Ex. 1A at p. 1). The IHO indicated that she was waiting for the parent to produce the evaluations and counsel for the parent responded by requesting that the case proceed without the evaluations because the parent was having "difficulty getting a copy of the evaluations" (id.).

In a decision dated August 23, 2022, the IHO found that the district "met its burden" and denied the parent's request in its entirety (IHO Decision at p. 5).

Specifically, the IHO found the district's case "very persuasive" in that the district responded to the parent's request to have the student evaluated when it sent a prior written notice to the parent on March 4, 2021 and "contracted out" the social history "to an outside agency"; the

district made several attempts to contact the parent as documented in the district's SESIS events log; the parent cancelled the evaluation in writing; and the hearing record was "void of any testimony by a qualified evaluator to show that [the student] [wa]s a student with an educational disability" (IHO Decision at p. 4). Additionally, the IHO relayed that she had requested documentary evidence from the parent to establish that the student had an educational disability, but the parent failed to produce copies of any evaluations (id. at p. 5).

The IHO found that the parent's "choice of an education program" was "moot" as the parent failed to demonstrate that the student had an educational disability (IHO Decision at p. 5). The IHO further found that equitable considerations did not favor "the parent since she refused to consent to the evaluation and subsequently withdrew the request for an evaluation" (id.). Thus, the IHO denied the parent's request for funding of the student's tuition for the 2020-21 school year.

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district met its burden when it failed to evaluate the student for the 2020-21 school year and failed to create an IEP. The parent further contends that the IHO improperly shifted the burden to the parent to show that the student had a qualifying disability. The parent further implies that the IHO erred in this finding because the parent presented evidence summarizing the student's challenges and showing that the student needed a special education program and a behavioral plan.

The parent contends that the district failed to meet its burden of evaluating the student within 60 days of the initial request submitted by the parent. The parent claims that she sent the district three separate written notices requesting an evaluation for the student during the 2020-21 school year. The parent asserts the notices were sent on September 26, 2020, March 2, 2021, and May 11, 2021. The parent further contends that the district contracted an agency to conduct the social history evaluation in violation of its obligations. According to the parent, the IHO should have rejected the agency's assertion that it attempted to contact the parent on several occasions to gain the parent's consent to conduct the evaluation, as documented in the SESIS events log entries, because the first time the district contacted the parent, in May 2021, she promptly answered the call. Therefore, the parent argues that the district failed to have the student evaluated within the 60 days following the parent's request, as the first time the district contacted her was in May 2021.

The parent also argues that the IHO improperly shifted the burden to the parent to prove that the student had a qualifying disability, as the district has the burden of proving that it provided a FAPE to the student. The parent further contends that nonetheless she provided documentary evidence as well as testimony from the private school supervisor regarding the student's challenges and his need for a small special education program. Further, the parent argues that the IHO erred in finding that she failed to meet her burden to show the student had a disability, because she failed to produce copies of reports from privately conducted evaluations. The parent asserts that she did not have the burden of proving the student's needs and that she was not required to produce privately conducted evaluation reports.

As relief, the parent requests an order reversing the IHO's decision and finding that the district did not provide a FAPE to the student, that the unilateral placement was appropriate for the student, and that equitable considerations favored the parent and ordering the district to directly

fund the cost of the student's tuition for the parent's unilateral placement of the student at Ziv Hatorah for the 2020-21 school year.

The district responds in an answer, generally denying the allegations contained in the parent's request for review. As for an answer, the district asserts that the IHO correctly determined that the district was unable to properly evaluate the student because parent did not cooperate with the district's evaluation process. According to the district, the first referral of the student for an initial evaluation that it received was the parent's letter dated March 2, 2021. The district contends that it responded by providing the parent with a March 4, 2021 notice identifying the evaluations that would be conducted. The district further contends that the agency it contracted with made five attempts to contact the parent, but the parent failed to respond. In addition, the district asserts that, in May 2021, when the district school psychologist got in touch with the parent, the parent closed the evaluation because the student was performing well academically. According to the district, the district was not under any obligation to offer the student a FAPE because the parent did not consent to an evaluation of the student. Additionally, the district contends that the parent did not appeal from the IHO's decision not to address the appropriateness of the unilateral placement, and that if the parent did appeal from that determination the parent did not meet her burden of proving that the unilateral placement was appropriate. Finally, the district contends that equitable considerations weigh against granting the parent relief as the hearing record supports the IHO's determination that the parent acted unreasonably in refusing to provide consent for the district to evaluate the student.

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]).[1]

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).

VI. Discussion

A. Conduct of Hearing

The parent contends that the IHO improperly shifted the burden of proof to the parent to show that the student was a child with a disability. According to the parent, the IHO failed to hold the district to its burden because the district failed to show that it evaluated the student within 60 days of the parent's referral of the student for an evaluation. The parent asserts that the IHO shifted the burden further by requiring that the parent prove that the student was a student with a disability. In addition, the parent asserts that the IHO erred in basing her finding, in part, on the parent's failure to provide copies of the private evaluation reports.

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).

[1] 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).

Review of the IHO's decision shows that the IHO used some language which in isolation could appear to support the parent's contention that the IHO shifted the burden of proof from the district to the parent. For example, the IHO found that "the parent failed to demonstrate that [the student] is a student with a disability" (IHO Decision at p. 5). However, this finding arises out of the IHO's determination that she had requested documentation from the parent—specifically, evaluations that parent's counsel represented were available—that were never produced (id.). The State's burden shifting statute certainly requires the district to show how it complied with its obligation to offer a student a FAPE if the student is eligible for special education, but the statute does not clearly indicate an expectation that a district has the burden at an impartial hearing to produce private evaluative information that has not been shared with it and is in the possession of a parent. Under these factual circumstances, it is not convincing that the IHO's finding should be read as burden shifting, as asserted by the parent, instead of as the outcome of a directive directed at counsel for the parent for the purpose of ensuring the completeness of the hearing record. Such a directive is within the IHO's express authority "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3][vii]). Accordingly, I do not find that the IHO impermissibly shifted the burden of production or, more accurately, overstepped her authority in asking questions for the purpose of developing a complete hearing record.

Additionally, the IHO expressly found that the district met its burden (IHO Decision at p. 5). More specifically, the IHO found the district's case "very persuasive" in that the district established that it responded to the parent's request for an evaluation, the district sent prior written notice and contracted the evaluation out to an agency, the hearing record shows several attempts were made to contact the parent, and the parent thereafter cancelled the evaluation request in writing (id. at p. 4).

The decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses of the evidence presented by both the district and the parent rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, such an error would not require reversal in this case 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., 685 F.3d at 225 n.3).

Nevertheless, I have conducted an impartial and independent review of the entire hearing record and applied the correct burden of proof, which is on the district to establish that it complied with its obligations under the IDEA (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see Educ. Law § 4404[1][c]). As discussed below, the hearing record supports finding that the district did not deny the student a FAPE.

B. Referral for Initial Evaluation

The parent asserts that the IHO erred in finding that the district met its burden to show that it offered the student a FAPE for the 2020-21 school year. Specifically, the parent argues that the district failed to evaluate the student and develop an appropriate IEP for the student for the 2020-21 school year. The parent asserts that she sent three separate letters to the district, dated September 16, 2020, March 2, 2021, and May 11, 2021, but that the parent did not receive a

response from the district until May 2021, at which time the district representative asked the parent to withdraw her request for evaluation. The parent avers that she complied with the request to withdraw her request for an evaluation because she did not believe an evaluation for the 2020-21 school year was necessary as that year was almost completed, and she was not aware that "the case would be completely closed if [the parent] sent an email cancelling the evaluation."

In an answer, the district asserts that it was unable to properly evaluate the student because the parent did not cooperate with the district's evaluation process and ultimately, withdrew her request for evaluation of the student. The district argues that in March 2021, it contracted out the social history evaluation and based on the SESIS records that provider contacted the parent on five separate occasions in an attempt to gain her consent for the evaluation.

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1][i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a][2][i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

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]).

Where a district fails to adhere to the requisite timelines for evaluating a student and creating an educational program post-referral, relief for such a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688

[E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501; [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]).

Initially, the parent contends that she referred the student for an initial evaluation on September 16, 2020 and she produced a letter dated August 31, 2020, with a facsimile cover sheet bearing a September 16, 2020 date, in which she requested that the district evaluate the student and "place him in a full-time special education classroom" (Parent Ex. G). The parent testified that she sent three letters requesting an evaluation, September 16, 2020, March 2, 2021, and May 11, 2021 (Tr. p. 121).

According to the SESIS events log, it appears that the district acknowledged the "initial" referral of the student as of March 4, 2021 (Dist. Ex. 4 at p. 2). After the district contracted with an agency to complete the social history, on March 24, 2021, an agency social worker left a message for the parent regarding scheduling the social history (id. at p. 1). On April 5, 2021 an attempt was made to reach the parent to discuss the social history; however, the voicemail was full and a follow-up email was sent (id.). On April 12, 2021, and April 21, 2021, an agency social worker left a voicemail for the parent regarding the social history (id.). On May 3, 2021, an agency social worker left a voicemail for the parent and texted a phone number asking for a call back regarding the student's referral (id.). The SESIS events log indicated that on May 5, 2021, the CSE case manager agreed to reach out the parent regarding testing, as the agency social worker had been "leaving messages but [the] parent ha[d] not responded yet" (id.).

According to the parent, she did not receive any response from the district until she received a phone call from the school psychologist in mid-May (Tr. p. 122). The parent testified that they discussed that there was no point in evaluating the student at that time because it was already the end of the school year (id.). The parent further testified that the school understood the student's needs and he was doing well with the program put in place for him at the school (id.). The parent testified that the school psychologist asked her to withdraw the request for an evaluation and that she did (id.). However, the parent also noted that she had sent three letters and it had taken eight months for the district to reach out to her and she then emphasized that she did not want to close the evaluation and she wanted to keep it open (Tr. pp. 123-24).

The district presented a different view of events. A district school psychologist testified that the only request for an evaluation of the student that the district received was a letter in March 2021 (Tr. pp. 54-55; see Parent Ex. H). She further testified that she started the process for an initial evaluation of the student at that time (Tr. p. 55). According to the school psychologist, the district "contracted out the social history intake and consent to an agency" (Tr. p. 57; see Dist. Ex. 4 at p. 1). The contracted agency then tried to reach the parent on five separate occasions; in addition, the school psychologist called the parent multiple times before finally reaching her on May 14, 2021 (Tr. pp. 60-61; see Dist. Ex. 4 at p. 1). According to the school psychologist, she informed the parent the district had been trying to contact her for the initial evaluation, the school psychologist asked if the parent would like to move forward with the evaluation and the parent's response was that she felt the student was doing well (Tr. p. 62). According to the school psychologist, the parent spoke with the student's teachers and they did not have any concerns, the parent indicated that she did not want to move forward with the evaluation, and the parent only

asked for the evaluation because the school had advised her to (id.). The school psychologist testified that the parent "asked to close the request for the evaluation" (id.).

With regard to documentation, in an email dated May 14, 2021, the school psychologist asked the parent to confirm that, as per their conversation, the student was "performing well academically, and [the parent] d[id] not have any concerns," and that the parent "would like to close the request for evaluations at this time" (Dist. Ex. 3). The parent responded the same day stating that she "would like to cancel the evaluation" (id.). At the time of the impartial hearing, the parent testified that she "did not write that [she] want[ed] to cancel it all the way" (Tr. p. 127). According to the parent, the student was already getting all of the services from Ziv Hatorah and it was late for the district to evaluate the student (id.).

The IHO was responsible to resolve these conflicting viewpoints. The IHO in this matter weighed the evidence regarding the parent's requests for evaluations and the district's attempts to contact the parent to discuss the social history and concluded that the district "established that it responded to the parent's request for an evaluation" (see IHO Decision). Review of the evidence discussed above supports the IHO's findings that the district was responsive to the parent's request to evaluate the student, attempts were made to contact the parent, and that the parent canceled her request for evaluation in writing (id. at p. 4; see Dist. Exs. 3; 4).

Additionally, even if the district were late in requesting the parent's consent for the initial evaluation, the parent never consented to an evaluation of the student. Instead, when the school psychologist got in touch with the parent, the parent cancelled the evaluations. As determined by the IHO, the hearing record shows that the parent cancelled the evaluation process in writing in her May 14, 2021 email responding to the district school psychologist (Dist. Ex. 3; see IHO Decision at p. 4). On appeal, the parent does not challenge this factual finding by the IHO and only asserts that she "did not know that the case would be completely closed" when she sent the email cancelling the evaluation (Req. for Rev. at ¶17; see Tr. pp. 123, 127-29). However, the IHO reviewed the parent's testimony on this point (IHO Decision at pp. 3-4). The IHO then made a reasonable determination, in citing the email, that the weight of the evidence showed that the parent cancelled the evaluation process (id. at p. 4).

Considering the above, the hearing record supports the IHO's determination that the parent withdrew her request for an initial evaluation of the student. Specifically, as noted in a May 14, 2021 SESIS events log entry, the district school psychologist spoke with the parent, who reported that she had spoken with the teachers and they had "no concerns" about the student (Dist. Ex. 4 at p. 1; see Dist. Ex. 3 at p. 1). The SESIS events log entry reflected reports that the parent felt the student was "doing well academically" and did "not need any services or evaluations" (Dist. Ex. 4 at p. 1). According to the SESIS events log, when the parent was asked about the "latest letter," the parent replied that "she was aware of the lawyer sending the letter and they suggested [the student] get evaluated 'in case he needs anything'" (id.). However, as noted in the SESIS events log entry, at that point the parent reported she was "comfortable with leaving the case closed and [wa]s happy with [the student's] performance in school" (id.).

As the hearing record supports finding that the parent withdrew her request for an initial evaluation in May 2021, even if there was sufficient information to find that the district delayed the evaluation process, such an error would not rise to the level of a denial of FAPE in this instance.

As explained above, any failure to comply with the timelines for the completion of an initial evaluation is a procedural violation and such a procedural violation only results in a denial of FAPE if the delayed completion of the student's initial evaluation and eligibility determination deprived the student of a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). In this instance, even if the process were delayed, the parent did not sign consent to allow for that process to be completed; accordingly, there is no deprivation of educational benefits to the student (see V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013] ["[a] parent seeking special education services for their child under the IDEA must allow the school to evaluate the student]).

Accordingly, the hearing record does not provide sufficient reason to depart from the IHO's findings, and therefore the district was under no obligation to offer the student a FAPE as the parent confirmed that the student was performing well academically, she did not have any concerns, and she effectively withdrew her request for evaluations. However, should the parent have concerns about the student's performance in the future, she may make a referral "in writing to the chairperson of the district's committee on special education or to the building administrator of the school which the student attends or is eligible to attend" for an initial evaluation (8 NYCRR 200.4[a][1][i]). In such event, it is suggested that the parent include updated contact information so that the district may get in touch with her to begin and complete the evaluation process within the applicable timelines.

VII. Conclusion

Having found that the hearing record supports the IHO's conclusion that the district did not fail to offer the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 18, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER