The University of the State of New York

The State Education Department
State Review Officer
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No. 23-257

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 City Department of Education

Appearances:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's tuition at the Big N Little: Tiferet Torah Program (Big N Little) for the 2022-23 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[a]). 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 in this case has reportedly never attended a district public school but instead, has continuously attended nonpublic religious schools for first through eighth grades (see Parent Ex. J at p. 1). In an email to the district, dated June 12, 2022, the parent indicated that the student was "struggling in school, mostly math" and that she believed he would "greatly benefit from P3 services" (Dist. Ex. 2). The parent also indicated that the student was, at that time, finishing ninth grade (id.).[1]

[1] In the June 2022 email, the parent identified the student's then-current school only by address (see Dist. Ex. 2).

Interpreting the parent's June 2022 email as a referral for an initial evaluation for special education eligibility and services pursuant to an individualized education services plan (IESP), district staff began the initial evaluation process on June 15, 2022 (see Dist. Exs. 4 at pp. 1-2; 6 at ¶ 6). The evidence reflects that on June 15, 2022, the district sent the parent a prior written notice and the procedural safeguards notice via email, as well as a "Notice of Referral: Initial" document (Dist. Ex. 4 at p. 1; see Dist. Ex. 6 ¶¶ 7-8).

On June 22, 2022, a district clinician attempted to contact the parent via telephone, but was "unable to leave a message" at that time (Dist. Ex. 4 at p. 1). The clinician then contacted the student's father via telephone, "who confirmed their request" for the initial evaluation and development of an IESP, and thereafter, the clinician "forwarded the [student's] father the email sent to the [parent] with the SHP/HLS documents for him to complete" (id.; see Dist. Ex. 6 ¶ 9).[2]

In a letter dated July 19, 2022, and identified in boldface type as a "TEN DAY NOTICE," the parent wrote to the district that the student was not receiving a "proper or adequate educational and school placement" for the 2022-23 school year and that, unless resolved, she intended to unilaterally place the student at Big N Little and seek "tuition funding and/or reimbursement" from the district (Parent Ex. B at p. 2). The parent allegedly provided this letter to the district via facsimile on July 20, 2022, with a cover page indicating that the "previous 10 day notice 22-23 for this child" should be disregarded (id. at p. 1).

In an email to the parent dated August 5, 2022, the district's "special education, evaluation, placement, and program officer" (SEEPPO) confirmed her understanding that, at that time and pursuant to their telephone conversation on the same day, the parent "d[id] not wish to continue with the special education process and that [the parent] would like the case to be closed" (Dist. Exs. 3 at p. 1; 6 ¶¶ 10-13).[3] The parent responded via email, indicating "yes that [wa]s correct" and thanked district staff for "following up" (Dist. Ex. 3 at p. 1).

On August 16, 2022, the parent executed an enrollment contract with Big N Little for the student's attendance during the 2022-23 school year from September 2022 through June 2023 for 10th grade (see Parent Exs. E at pp. 1, 3; F at p. 1).[4] Evidence in the hearing record indicates that the student began attending Big N Little on or about September 1, 2022 (see Parent Ex. H).

[2] The evidence in the hearing record does not describe what the abbreviations of "SHP/HLS" refer to (see generally Tr. pp. 1-176; Parent Exs. A-J; Dist. Exs. 1-6; IHO Ex. I).

[3] The district staff member who contacted the parent in August 2022 via telephone and then via email was not the same individual to whom the parent had sent her initial June 2022 email seeking "P3" services (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 2).

[4] The address identified for Big N Little within the contract was the same address identified in the parent's June 2022 email of the student's then-current school where he was finishing ninth grade (compare Parent Ex. E at p. 1, with Dist. Ex. 2).

On August 23, 2022, the student underwent a private psychoeducational evaluation (see Parent Ex. J at p. 1).[5]

In a letter dated February 20, 2023, the parent wrote to the district and indicated that the student's "academic, social, and behavioral needs" could not be "met in a general education classroom," and requested that the district provide the student with an "IEP and place him in a full-time special education classroom" for the 2022-23 school year (Parent Ex. C at p. 2). The cover page for this letter indicated that the parent was requesting an IEP for the student (id. at p. 1). The parent also notified the district of her intention to unilaterally place the student in a "private special education program" and to seek "tuition funding and/or reimbursement" from the district for the 2022-23 school year if the matter was "not timely addressed" (id. at p. 2). The parent allegedly provided this letter to the district on February 20, 2023, via the same facsimile number to which the parent allegedly sent her July 2022 letter (compare Parent Ex. C at p. 1, with Parent Ex. B at p. 1).

In a letter dated April 21, 2023, and identified in boldface type as a "FOLLOW UP TEN DAY NOTICE," the parent wrote to the district to follow-up on her previously sent letter, dated February 2023 (Parent Ex. D at p. 2). The parent indicated that, in her previous letter, she had requested that the district "reconvene an IEP meeting" and place the student in a "full-time special education classroom" (id.). According to the parent, the district had not yet provided the student with an IEP or offered any placement for the 2022-23 school year (id.). As a result, the parent indicated that, unless the issue could be resolved, she intended to unilaterally place the student in a private special education program at Big N Little and to seek "tuition funding and/or reimbursement" from the district (id.). The parent allegedly provided this letter to the district on April 21, 2023, via the same facsimile number to which the parent allegedly sent her July 2022 letter and her February 2023 letter (compare Parent Ex. D at p. 1, with Parent Ex. C at p. 1, and Parent Ex. B at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated June 1, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at pp. 1, 2). The parent asserted that, by letters dated July 2022, February 2023, and April 2023, she "requested an IEP and special education classroom" for the student for the 2022-23 school year and notified the district of her intentions to unilaterally place the student at Big N Little and to seek funding or reimbursement for the costs of the student's tuition from the district if the matter was not otherwise resolved (id. at p. 1). According to the parent, the district did not respond to these letters and the district "did not evaluate, create an IEP, or offer" the student a public school placement for the 2022-23 school year (id.). As relief, the parent requested an order directing the district to prospectively fund the costs of the student's tuition at Big N Little for the 2022-23 school year and to reimburse or directly fund the costs of the privately obtained evaluation of the student (August 2022 psychoeducational evaluation) (id. at p. 2).

[5] Testimony elicited at the impartial hearing indicated that the school psychologist who conducted the student's August 2022 psychoeducational evaluation was not an employee of Big N Little, but had been paid by the private program to conduct the student's evaluation (see Tr. pp. 113-16).

B. Impartial Hearing Officer Decision

On July 6, 2023, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH), and the IHO conducted a prehearing conference (see Tr. pp. 1-17). In a motion to dismiss dated July 14, 2023, the district argued that, due to the parent indicating that she no longer wanted to pursue special education services for the student and expressed her wish to close the student's case, no live case or controversy remained and the parent's due process complaint notice must be dismissed (see generally Dist. Ex. 5). The parent prepared a brief in opposition to the district's motion to dismiss, dated July 31, 2023, arguing that an impartial hearing was needed because issues of both law and fact remained in controversy (see generally IHO Ex. I). On August 7, 2023, the impartial hearing resumed, and concluded on September 26, 2023, after a total of four days of proceedings (see Tr. pp. 18-176).

In a decision dated October 13, 2023, the IHO determined that the district sustained its burden to establish that it was not obligated to evaluate the student or to offer the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 3-4, 10-13). In support of this conclusion of law, the IHO examined the facts and circumstances of this matter under the lens of the legal standards guiding the district's child-find obligation and the district's obligation to conduct an initial evaluation of the student upon proper referral (id. at pp. 10-13). In part, the IHO noted that, if a parent failed to provide consent for an initial evaluation as part of the initial evaluation process, then both State and federal regulations implementing the IDEA indicated that a district would not violate its "obligation to locate, identify, and evaluate a student if the school district decline[d] to pursue the evaluation and decide[d] not to file a due process complaint" notice (id. at p. 11).

With this as backdrop, the IHO found that, once the parent sent the district her June 2022 email, the district was "on notice and had 'reason to suspect a disability and reason to suspect that special education services may be needed to address that disability'" (IHO Decision at p. 11). The IHO also found that, consistent with its obligation, the district "opened an initial referral" of the student three days later on June 15, 2022, and began the initial evaluation process by sending the parent documents, including a "Procedural Safeguards Notice" (id.). Subsequently, when a district staff person attempted to contact the parent on June 22, 2022 via telephone and could not leave a message for her, the district staff person then contacted the student's father by telephone and "discussed with him the [p]arent's request for special education services," which he confirmed (id. at pp. 11-12). Thereafter, the IHO indicated that the district sent the student's father the same emails that had been sent to the parent (id. at p. 12).

According to the IHO, a member of the district staff made contact by telephone with the parent on August 5, 2022, and at that time, the parent indicated to her that she "'no longer wished to receive special education services for the [s]tudent and asked that the case be closed'" (IHO Decision at p. 12). The IHO further noted that, as a follow-up to that telephone conversation with the parent, district staff emailed the parent to confirm and to memorialize that conversation (id.). The IHO indicated that district staff member reiterated her understanding of the conversation with the parent by writing in the email that the parent "'d[id] not with to continue with the special education process and . . . would like the case to be closed'" (id.). Next, the IHO indicated that the parent responded to the district staff email, and wrote "'yes, that [wa]s correct'" (id.). Consistent with the parent's request, the district staff person closed the student's case on that day, August 5, 2022 (id.).

Based upon the foregoing evidence, the IHO concluded that the district "initiated the special education process within the required timeframe, and the [p]arent subsequently withdrew her request on August 5, 2022" (IHO Decision at p. 12).

Next, the IHO turned to the parent's testimony offered during the impartial hearing, wherein she explained that "she was only closing her request that she [had] initiated via email on her own because she [had] started working with the [p]rivate [s]chool and the [p]arent's [a]ttorney to seek a full-time special education placement" for the student (IHO Decision at p. 12). Finding no corroborating evidence in the hearing record to support the parent's testimony at the impartial hearing on this point, the IHO concluded that the parent's testimony was "unreliable" and that, once the parent "closed her request to initiate the special education process" on August 5, 2022, the district "no longer had an obligation to evaluate" the student or to determine the student's eligibility for special education or to provide the student with a FAPE (id.).

Notwithstanding the foregoing, the IHO also found that the parent's July 2022 letter "allegedly sent . . . via facsimile transmission on July 20, 2022" by her attorney on her behalf was not a "request for an initial evaluation, but was purely a [10]-day notice" (IHO Decision at p. 12). Here, the IHO determined that, based on the plain language of the letter, the parent was not seeking or requesting an evaluation of the student, an IEP, or a public school placement (id.). Moreover, the IHO noted that the evidence in the hearing record did not support a finding that the district ever received the July 2022 letter, "even though the fax cover sheet ha[d] a timestamp showing July 20, 2022 11:04 AM" and that it was sent through "'HumbleFax.com'" (id.). Regardless, the IHO noted that the parent "closed her request to initiate the special education process [16] days after this letter was purportedly sent" (id.).

Next, the IHO found that the evidence in the hearing record supported a conclusion that the parent's subsequent letters dated February 2023 and April 2023 purportedly sent to the district via the same facsimile number were never received by the district—pointing specifically to the district witness's testimony in conjunction with documentary evidence reflecting the district's Special Education Student Information System (SESIS) log (see IHO Decision at p. 13). The IHO indicated that, although the parent's attorney asserted that the timestamps on the cover sheets for the two separate letters "show[ed] they were received," the IHO determined that "nothing on the fax cover sheets demonstrate[d] a successful transmission of the letters as the fax cover sheets simply state[d] the date, time, and 'sent with HumbleFax.com'" (id.).

Overall, IHO concluded that the district sustained its burden of proof at the impartial hearing (see IHO Decision at p. 13). Specifically, the IHO noted that the district's witness was credible and her testimony was "corroborated by the documentary evidence including the email communications between the [p]arent and the CSE and the SESIS log" (id.). And in summary, the IHO determined that the parent withdrew her request to "initiate the special education process via email on August 5, 2022" and closed the student's case (id.). As a result, the IHO found that the district acted "immediately to initiate the evaluation process within the statutorily required timeframe" and offered a "'cogent and responsive explanation for their decisions'" to not evaluate the student and to not develop an IEP (id.).

Next, the IHO examined whether the parent sustained her burden of proof to establish the appropriateness of the student's unilateral placement at Big N Little for the 2022-23 school year

(see IHO Decision at pp. 13-14). Initially, the IHO noted that, having found that the district was not required to offer the student a FAPE, it was not necessary to determine whether the unilateral placement was appropriate (id. at p. 13). The IHO opined, however, that, even if the district had not sustained it burden of proof, the IHO could not determine at that time whether the unilateral placement was appropriate to meet the student's needs (id.). Here, the IHO explained that it was "unclear whether the [s]tudent ha[d] a disability that trigger[ed] jurisdiction under the IDEA," noting that the student had not been classified by the CSE, and moreover, "that the privately obtained psychoeducational evaluation paid for by the [p]rivate [s]chool [wa]s not reliable, d[id] not specify a diagnosis, and d[id] not adequately explain the [s]tudent's special education needs" (id. at p. 14). The IHO indicated that the hearing record lacked any evidence about the evaluator's "qualifications, educational background, or certifications," and the IHO did not "find the psychoeducational evaluation paid for by the [p]rivate [s]chool credible" (id.). Accordingly, the IHO found that it was "premature to make a finding" on the appropriateness of the unilateral placement's ability to meet the student's special education needs" (id.).

As a final point, the IHO addressed equitable considerations and determined that they did not weigh in favor of the parent's requested relief (see IHO Decision at pp. 14-16). Based on the evidence in the hearing record, the IHO found that the parent did not "work with the CSE to ensure that the [s]tudent received a FAPE" (id. at p. 15). In support of this conclusion, the IHO pointed to the parent's unreliable testimony about closing the student's case, as well as the timing of the three letters purportedly sent to the district via facsimile (id. at pp. 15-16).

Consequently, the IHO granted the district's motion to dismiss the parent's due process complaint notice and denied the parent's request for tuition funding for the student's unilateral placement at Big N Little for the 2022-23 school year (see IHO Decision at p. 16).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that the district sustained its burden of proof with respect to whether the district offered the student a FAPE. The parent also argues that the IHO erred by finding that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement for the 2022-23 school year. The parent asserts that the IHO similarly erred by finding that equitable considerations did not weigh in favor of the parent's requested relief. Finally, the parent argues that the IHO erred by granting the district's motion to dismiss. As relief, the parent seeks to reverse all of the IHO's findings and to order the district to directly fund the costs of the student's tuition at Big N Little for the 2022-23 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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).

VI. Discussion

Pursuant to the IDEA, State law, and State and federal regulations, a district must initiate an individual evaluation of a student upon written request by a student's parent (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]). 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]). A

[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., 580 U.S. at 402).

referral may be withdrawn in a written agreement to that effect (8 NYCRR 200.4[a][7], [9]).[7] 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]).

If, however, a parent does not provide consent for an initial evaluation, or fails to respond to a request to provide consent for an initial evaluation, the district, pursuant to State regulation, "may, but is not required to, continue to pursue those evaluations by using the due process procedures" (8 NYCRR 200.5[b][3]). A district "does not violate its obligation to locate, identify, and evaluate a student . . . if it declines to pursue the evaluation" (8 NYCRR 200.5[b][3]; see 34 CFR 300.300[a][3][ii]). Absent a parent's consent for an initial evaluation, a district "shall not provide the special education programs and services to the student and shall not use the due process procedures . . . to challenge the parent's refusal to consent" (8 NYCRR 200.5[b][4]). Additionally, State regulation precludes finding that a district will be in "violation of the requirements to make available a [FAPE] to the student because of the failure to provide such student with the special education program and services for which the parent refuses to or fails to provide consent" (8NYCRR 200.5[b][4][i]).

Consistent with the IHO's determination, the evidence in the hearing record reflects that, upon receipt of the parent's referral for an evaluation dated June 12, 2022, the district took immediate steps to begin the initial evaluation process by sending the parent a prior written notice, a procedural safeguards notice, and a letter concerning the referral, and thereafter, on June 22, 2022, district staff confirmed the parent's intent to pursue special education services for the student by speaking with the student's father and forwarding him the documents already sent to the parent via email (compare IHO Decision at pp. 11-12, with Dist. Ex. 2, and Dist. Ex. 4 at pp. 1-2, and Dist. Ex. 6 ¶¶ 6-9).

Upon further review, the evidence in the hearing record reflects that, consistent with the IHO's finding, the parent subsequently withdrew her referral for an initial evaluation of the student on August 5, 2022 (compare IHO Decision at p. 12, with Dist. Ex. 3 at p. 1, and Dist. 4 at p. 1, and Dist. 6 ¶¶ 10-14). Here, the IHO examined the parent's testimony at the impartial hearing, wherein she attempted to clarify the intention of that conversation with the district's SEEPPO; however, the IHO found the parent's testimony to be unreliable and lacking any corroboration in the hearing record (see IHO Decision at p. 12, citing Tr. p. 137).[8] In the same vein, the IHO examined the

[7] If parental consent to an initial evaluation is not obtained within 30 days of the date of receipt of referral despite documented attempts, a district may but is not required to pursue an impartial hearing to seek permission to conduct an evaluation of the student without the consent of the parent (8 NYCRR 200.4[a][8]; 200.5[b][3]; see also 20 U.S.C. 1414[a][1][D][ii][I]; 34 CFR 300.300[a][3]).

[8] At the time of the parent's conversation with the district SEEPPO on August 5, 2022 in which she indicated that she was no longer seeking special education for the student, the parent had allegedly already faxed her July 2022 letter informing the district of her intention to unilaterally place the student. It is unclear why the parent did not even mention the July 2022 letter regarding unilateral placement during the August 5, 2022 telephone conversation much less inquire about its receipt and, like the IHO, I do not find the parent's explanation of the conflicting messages is reliable. In addition, the hearing record fails to explain why neither the parent nor her

three letters allegedly sent by the parent or her attorney to the district via facsimile in July 2022, February 2023, and April 2023 (see IHO Decision at pp. 12-13). The IHO concluded that the district never received any of these letters, especially since the hearing record did not include any evidence that the facsimiles were successfully transmitted and that the timestamped dates on the cover sheets of the facsimiles did not constitute evidence of successfully transmitted documents (id.). The evidence in the hearing record supports the IHO's findings in this regard. In addition, the evidence in the hearing record reflects that, at the impartial hearing, the district SEEPPO testified that she did not recognize the facsimile number on the cover sheets of the parent's letters, and moreover, the parent did not present any evidence to rebut her testimony or to otherwise establish that the facsimile number that the parent placed on the cover sheets was the appropriate fax number to contact the CSE (see Tr. pp. 75, 79-80; see generally Parent Exs. B-D). The district SEEPPO also testified that, prior to the COVID-19 pandemic, the district had "relied on the fax machine in terms of getting referrals," but since the pandemic, the district no longer "utilize[d] the fax machine in terms of getting the faxes in" and instead, received referrals via email (Tr. p. 80).

On appeal, the parent offers no arguments regarding how the IHO erred by finding that the district was not obligated to evaluate the student or to develop an IEP or an IESP for the 2022-23 school year. For example, the parent does not assert that the IHO relied on an improper legal standard or misapplied the appropriate legal standard in reaching her conclusions of law (see Req. for Rev. ¶¶ 19-22). Instead, the crux of the parent's arguments is that the district SEEPPO did not personally receive all facsimiles sent to the district, she did not personally upload all information received by the district into the SESIS log, and information the district received was not automatically uploaded into the SESIS log (id.). In addition, the parent continues to assert that the facsimile number was "a known fax number for the [district]," but without pointing to any evidence in the hearing record or attempting to offer additional documentary evidence to support this assertion (id.). Significantly, the parent does not point to any evidence to support a conclusion that the IHO erred by finding her testimony at the impartial hearing concerning her request to close the special education process for the student was unreliable (id.).[9]

Even assuming for the sake of argument that the parent's assertions about that the SEEPPO did not personally receive and upload all faxes are true, the argument is unconvincing because the hearing record still lacks any evidence that after the parent confirmed her withdrawal of her request for special education in August 2022, the parent thereafter successfully transmitted the subsequent facsimiles to the district such that the district may have been placed on notice that the student was

attorney followed-up with the district after purportedly faxing the July 2022, February 2023, and April 2023 letters to the district by emailing either the SEEPPO, who had corresponded with the parent via email on August 5, 2022, or with the district staff person the parent initially emailed when referring the student for an initial evaluation (see generally Tr. pp. 1-176; Parent Exs. A-J; Dist. Exs. 1-6; IHO Ex. I).

[9] Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the hearing record lacks a compelling reason to disturb the IHO's credibility findings as the IHO was in the best position to assess the parent's testimony and neither the documentary evidence nor the hearing record in its entirety justifies a contrary conclusion.

suspected of having a disability and in need of special education and triggered its child-find obligations.[10] Therefore, since the parent did not refer the student for an evaluation subsequent to withdrawing her referral for the 2022-23 school year on August 5, 2022, in a manner that was received by the district and prior to the filing of the June 2023 due process complaint notice, the district was not obligated to evaluate the student or offer the student a FAPE for the 2022-23 school year and the parent's allegations to the contrary are without merit.

VII. Conclusion

Having found that, consistent with the IHO's decision, the district did not violate its child-find obligations or otherwise fail to evaluate the student and develop an IEP or an IESP for the 2022-23 school year, there is no reason to disturb the IHO's findings and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 20, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] Aside from failing to show that the correct number was used, the parent also provided no transmission confirmation reports that accompany facsimiles to demonstrate successful transmission with a date and time (see, e.g., New York v. Mountain Tobacco Co., 55 F. Supp. 3d 301, 306 [noting the sender's receipt of a "facsimile confirmation" [E.D.N.Y. 2014]; Mojdeh M. v. Jamshid A., 36 Misc. 3d 1209(A) [N.Y. Sup. Ct. 2012] [defendant testified that he had the confirmations for 200 facsimiles at home but failed to proffer them at trial]; Serio v. Dwight Halvorson Ins. Servs., Inc., 2007 WL 9701070, at *7 [S.D.N.Y. Oct. 4, 2007] [describing that evidence successfully supporting plaintiff's claims consisted of "three facsimiles, each with a confirmation sheet"]). Accordingly, I find insufficient basis to disturb the IHO's decision.