The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-090

Application of a STUDENT WITH 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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, 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 reduced the amount of funding awarded for the cost of her son's tuition at the Ha'Or Beacon School (Ha'Or Beacon) for the 2022-23 school year based on equitable considerations. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

According to the special education student information system (SESIS) log included in the hearing record, the student was referred for an initial evaluation to determine his eligibility for special education on or around December 2, 2019; however, the parent withdrew the student from the initial evaluation process on January 10, 2020 (Dist. Ex. 3 at pp. 4-5). The hearing record also reflects that the student was again referred for an initial evaluation on or around July 14, 2022 (id. at p. 4). By prior written notice dated July 14, 2022, the district wrote to the parent to propose conducting an initial evaluation of the student to determine his initial eligibility for special education services, to provide a procedural safeguards notice, and to request a physical examination (Dist. Ex. 1 at pp. 1, 3, 6-7). The district conducted a July 25, 2022 Level I vocational

assessment, a July 28, 2022 psychoeducational evaluation, an August 3, 2022 occupational therapy (OT) evaluation and an August 29, 2022 speech-language evaluation (Dist. Exs. 7; 8; 9; 10).

By letter dated August 22, 2022, the parent provided the district with ten-day written notice asserting that the student had not been scheduled for a CSE meeting and had not received a timely IEP or proposed placement for the 2022-23 school year (Parent Ex. N). The parent further notified the district of her intention to unilaterally enroll the student at Ha'Or Beacon and to seek public funding for the cost of the student's attendance (id.).[1,2] On August 31, 2022, the parent signed a letter of agreement with Ha'Or Beacon enrolling the student for the 2022-23 school year and agreeing to pay tuition in the amount of $110,000 (Parent Ex. L).

On October 31, 2022, a CSE convened to determine the student's initial eligibility for special education and related services (Parent Ex. B at p. 20; Dist. Ex. 5 at pp. 1-3). The October 2022 CSE found the student eligible for special education and related services as a student with an other health-impairment (OHI) and developed an IEP with an implementation date of November 14, 2022 (Parent Ex. B at pp. 1, 14-15, 20).[3] The October 2022 CSE recommended that the student receive ten-month services consisting of a 12:1+1 special class in a non-specialized school with the related services of one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, one 30-minute session per week of OT in a group of three, and special transportation (id. at pp. 14-15, 19-21).

By prior written notice dated November 10, 2022, the district summarized the recommendations of the October 2022 CSE and by school location letter dated November 10, 2022, the district notified the parent of the public school site to which the student had been assigned (Dist. Exs. 6 at pp. 1-3; 11 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated June 20, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) (Parent Ex. A at p. 1). The parent asserted that the October 31, 2022 IEP was not appropriate and that the recommended program and placement for the student was too large (id.). The parent also alleged that the district "delayed in providing the student with a proposed program and placement" (id.). The parent next argued that Ha'Or Beacon was an appropriate unilateral placement and that the parent had provided timely notice to the district of her unilateral placement (id. at pp. 1-2). As relief, the parent requested findings that the district failed to offer the student a FAPE for the 2022-23 school year, and that Ha'Or Beacon was an appropriate unilateral placement (id. at p. 2). The parent further requested funding for tuition, including the costs of related services and aides (id.).

[1] There are duplicate exhibits in the hearing record (compare Parent Ex. B, with Dist. Ex. 4; compare Parent Ex. N, with Dist. Ex. 2). Where exhibits are duplicative, only the parent exhibits have been cited.

[2] Ha'Or Beacon has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 18, 2024 (Tr. pp. 49-146).[4] By decision dated February 6, 2024, the IHO found that the district complied with the procedural requirements of the IDEA but failed to substantively provide the student with a FAPE for the 2022-23 school year (IHO Decision at p. 9). The IHO further found that although the district appeared at the impartial hearing, provided documentary evidence and cross-examined the parent's witnesses, the district failed to "provide its own witnesses, and did not put on a prong I case" (id.). The IHO determined that the district's recommendation of a 12:1+1 special class in a non-specialized school was not appropriate for the student given his need for repetition, redirection and breaks (id. at pp. 9-10). The IHO then determined that the parent had met her burden of demonstrating the appropriateness of her unilateral placement of the student at Ha'Or Beacon (id. at p. 10).

Turning to equitable considerations, the IHO found that the district "met its burden of showing that the equities were not in the parent[']s favor" (IHO Decision at p. 10). The IHO recounted the student's SESIS record with regard to the first initial referral in 2019 and determined that the parent's attorney's assertion that the district violated "child find" was not correct (id. at pp. 10-11). The IHO found that the parent had withdrawn her consent for an initial evaluation in January 2020 and did not have any interaction with the district until July 2022 (id. at p. 11). The IHO also found that the parent first contacted Ha'Or Beacon in spring 2022 (id.). The IHO further noted that the parent provided the district with ten-day written notice of the unilateral placement on August 22, 2022 and enrolled the student at Ha'Or Beacon on August 31, 2022 (id.). The IHO found that the parent provided ten-day written notice to the district before the district's time to complete the initial evaluation process had elapsed (id.). The IHO determined that "[t]his evidence, when taken as a whole, show[ed] that [the] parent had no intention of sending the student to a [district] school, and show[ed] predetermination and bad faith on the part of the parent" (id.). The IHO then determined that the amount of tuition that the district should be required to pay would be reduced (id.).

The IHO found that the district's failure to offer the student a FAPE for the 2022-23 school year and the "parent's bad faith require[d] that the tuition be split equally between the parent and the [district]" (IHO Decision at p. 11). The IHO initially found that the district would be responsible for 50 percent of the tuition ($55,000), but then further determined that the district was not responsible for that portion of the student's school day which consisted of religious instruction (id. at pp. 11-12). The IHO credited the testimony of the parent's witness who indicated that 16.4 percent of the student's schedule consisted of religious instruction (id. at p. 12). The IHO calculated 16.4 percent of the full tuition amount ($18,040), and further found that the district was not obligated to fund the first two months of the school year until October 31, 2023, when the CSE convened to develop the IEP (id.). The IHO divided the total amount of tuition by ten months to calculate a monthly tuition rate of $11,000 and deducted $22,000 from the district's obligation (id.). The IHO then awarded the parent direct funding in the amount of $14,960 (representing $55,000-$18,040-$22,000) (id. at pp. 12-13).

[4] The hearing record reflects that a preliminary conference was held on July 25, 2023, and status conferences were held on September 5, 2023, October 12, 2023, and November 28, 2023 (Tr. pp. 1-48; see IHO Decision at p. 2).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in reducing the amount of tuition funding awarded to the parent. The parent asserts that there were no arguments or evidence provided in support of inequitable conduct by the parent. The parent concedes that the IHO correctly reduced the award by 16.4 percent for the amount of religious instruction, but erred in making any other deductions to the award. As relief, the parent requests direct funding of tuition in the amount of $73,920.

In an answer, the district asserts that the IHO correctly reduced the amount of tuition funding awarded to the parent; however, the district concedes that the IHO calculated the amount of the deduction for religious instruction incorrectly. The district argues that the award should be modified to provide direct funding in the amount of $23,980.

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]).[5]

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.

[5] 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).

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. Scope of Review

It is first necessary to identify what issues are properly before me on appeal. State regulations governing practice before the Office of State Review require 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]). Further, 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]).

The district has not cross-appealed any aspect of the IHO's decision. More specifically, the district has not appealed the IHO's determinations favoring the parent on the first two prongs of the Burlington/Carter test, namely that the student was not offered a FAPE for the 2022-23 school year and that the parent's unilateral placement at Ha'Or Beacon was appropriate. Neither party has appealed the IHO's determination that 16.4 percent of the student's program at Ha'Or Beacon consisted of religious instruction, for which the parent was not entitled to direct funding. Therefore, those determinations have become final and binding and they 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]). At issue in this appeal is whether or not the IHO correctly reduced the amount of direct funding for tuition at Ha'Or Beacon for the 2022-23 school year on equitable grounds (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any."].

B. Equitable Considerations

The parent argues that there was no basis in the hearing record for the IHO to reduce the amount of tuition funding based on the parent's conduct. The parent further asserts that the district had "developed and finalized an IEP on August 15, 2022, but withheld it . . . until November 10, 2022" (Req. for Rev. ¶ 3). The parent also argues that the district did not respond to the parent's

August 22, 2022 ten-day notice letter. The parent further asserts that the IHO erred in deducting funding for September and October 2022 and further erred by reducing the total award by 50 percent. The district responds that the IHO appropriately reduced the award of tuition based on equitable considerations. According to the district, the parent's conduct and timeframes of when she submitted her ten-day notice letter to the district and withdrew the student were unreasonable because such conduct occurred so far in advance of the district's timelines for evaluating and developing an IEP for the student and evidences that the parent had no intention of placing the student in public school.

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"]).

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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

1. Child Find and Timing of the Initial Evaluation and Provision of Special Education Services

In determining whether the equities warrant a reduction of an award of tuition reimbursement in the instant matter, it is first necessary to review the parties' arguments and the legal standards regarding the district's obligations under "child find" and the timelines for an initial evaluation. In her opening statement at the impartial hearing, the district's attorney argued that the student was referred for an initial evaluation in July 2022 and that the CSE convened to determine the student's eligibility and to develop an IEP on October 31, 2022 (Tr. p. 65). The district's attorney further argued that the parent was provided with prior written notice of the October 2022 CSE's recommendations and an offer of placement on November 10, 2022 (id.). The district asserted that the student was offered a FAPE for the 2022-23 school year (id.). The district's attorney also alleged that the parent's ten-day written notice was filed before the CSE convened and therefore equitable considerations favored the district (id.). During his opening statement, the parent's attorney argued that the district was required to offer the student a FAPE for the 2022-23 school year because the parent did not revoke consent in writing in January 2020 in accordance with 8 NYCRR 200.5(b)(5) (Tr. pp. 65-68). The parent's attorney alleged that the district had a continuing obligation under "child find" beginning in December 2019 and continuing in perpetuity until such time as the parent provided a written revocation of consent to the district.[6] Although the IHO did not set forth the applicable regulations in her decision, she correctly determined that the district did not violate "child find."

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the

[6] The parent's attorney later attempted to clarify his opening statement by acknowledging that the request "in 2020" was for an "initial evaluation that could not be completed" (Tr. p. 72). The parent's attorney conceded that the student had not been identified as a student with a disability in 2020 and that the "argument [he] meant to make was that the [s]chool [d]istrict was on notice that this could potentially be a student with a disability" (id.). There was no evidence in the hearing record to support the parent's attorney's argument that the district had reason to suspect the student had a disability before the July 2022 initial referral.

requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

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

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]). 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]). State regulations do not prescribe the form that a referral by a parent must take but do require that it be in writing (8 NYCRR 200.4[a]). It has been held "that general expressions of concern" cannot be deemed to "constitute a 'parental request for evaluation' under the plain terms of the statute" (D.K., 696 F.3d at 247 n. 5 [emphasis in the original], citing 20 U.S.C. § 1415[d][1][A][i]).

Review of the SESIS log demonstrates that the student was referred for an initial evaluation to determine his eligibility for special education on or around December 2, 2019; however, the parent withdrew the student from the initial evaluation process on January 10, 2020 (Dist. Ex. 3 at pp. 4-5). Section 200.5(b)(5), as relied on by the parent's attorney, applies to a student who has been identified as a student with a disability and for whom special education programs and services have been provided by the district (see 8 NYCRR 200.5[b][5]). The district sent the parent a notice of initial referral on December 2, 2019 (Dist. Ex. 3 at p. 5). Between December 12, 2019 and January 10, 2020, the district documented four attempts to schedule the student for a social history (id. at pp. 4-5). During the fourth phone call to the parent, "she agreed to close the case and she will re-open when her schedule opens up . . . [s]he reports she will re-write another letter to open case" (id. at p. 4). On January 10, 2020, the district provided the parent with a final notice of

withdrawal from the initial evaluation and closed the student's case on SESIS (id.). Based on the foregoing and contrary to the parent's attorney's assertions, 8 NYCRR 200.5(b)(5) does not apply to this student.

During the time period of December 12, 2019 through January 10, 2020, the student had not been identified as a student with a disability and had not received any special education programs or services (Dist. Ex. 3 at pp. 4-5). State regulation provides in relevant part that if the parents of a student with a disability refuse to give consent for an initial evaluation or fail to respond to a request to provide consent for an initial evaluation, the school district may, but is not required to, continue to pursue those evaluations by using the due process procedures; and the school district does not violate its obligation to locate, identify, and evaluate a student if it declines to pursue the evaluation (8 NYCRR 200.5[3]). Therefore, the district did not have an ongoing obligation to convene a CSE, develop an IEP or offer a placement for the 2022-23 school year based on the district's failure to obtain a written revocation of consent to evaluate in January 2020.

Turning to the district's obligations related to the referral for an initial evaluation made in July 2022, the parent did not allege that the student should have been referred to the CSE prior to July 2022, the parent instead asserted that the district "delayed in providing the student with a proposed program and placement" (Parent Ex. A at p. 1). Although the parent's due process complaint notice does not assert that the district's initial evaluation and provision of special education services were untimely, discussion of the requisite timeframes is warranted.

Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, 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]). In addition, 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][iv][a]; see also 34 CFR 300.300[a]).[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]).[8]

[7] 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, 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]).

[8] A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

The hearing record indicates that the district entered an initial referral in SESIS on July 14, 2022, and sent an appointment letter and spoke to the parent on July 19, 2022 (Dist. Ex. 3 at p. 4). The SESIS log reflects that the parent agreed "to come in for July 25, 2022" but does not indicate when consent to evaluate was obtained (id.). On July 25, 2022, the district conducted a psychoeducational evaluation and a Level I vocational assessment (Dist. Exs. 3 at p. 4; 7 at p. 1; 8 at pp. 1-9). The psychoeducational evaluation report was completed on July 28, 2022 (Dist. Ex. 7 at p. 5). Entries in SESIS reflect that on July 29, 2022, an OT evaluation was scheduled for August 2, 2022 and the status of the psychoeducational evaluation was changed from draft to review (Dist. Ex. 3 at p. 4). On August 1, 2022, the status of the psychoeducational evaluation was changed from review to final (id.). On August 1, 2022, documents related to assessment were changed from draft to final and on August 3, 2022, the status of the social history package was changed from draft to review (id.). The district conducted an OT evaluation on August 3, 2022 (Dist. Ex. 10 at p. 1). An August 3, 2022 entry in SESIS stated that the OT eval had been completed on August 3, 2022 and a report was in progress (Dist. Ex. 3 at p. 4). On August 4, 2022, the district sent the parent a copy of the July 28, 2022 psychoeducational evaluation report and on August 5, the status of the social history package was changed from review to final (id. at p. 3). On August 5, 2022, the district conducted a speech-language evaluation which was completed on August 29, 2022 (Dist. Ex. 9 at pp. 1, 3).

On August 14, 2022, the status of the OT evaluation was changed from draft to review and on August 15, 2022, it was changed to final (Dist. Ex. 3 at p. 3). Also on August 15, 2022, the status of documents related to the IEP were changed from draft to final (id.). On August 23, 2022, the status of documents related to placement were changed from draft to final (id.).

On September 1, 2022, the status of the speech-language evaluation was changed from draft to final (Dist. Ex. 3 at p. 3). On October 4, 2022, the district responded to an inquiry from the parent regarding scheduling the CSE meeting and advised that the meeting would be scheduled after the holidays (id.). On October 24, 2022, the district requested progress reports from Ha'Or Beacon (id.). The CSE convened on October 31, 2022 (Parent Ex. B at p. 20).

Neither party offered evidence of the parent's consent for an initial evaluation and for the provision of special education. The parent did not testify at the impartial hearing. The actual date of consent for an initial evaluation can only be inferred from the SESIS log (see Dist. Ex. 3). Parental consent to evaluate was obtained no earlier than July 14, 2022, and no later than July 25, 2022, when the student was evaluated by the district (Dist. Ex. 3 at p. 4). The district was required to complete the initial evaluation within 60 days from the date of parental consent to evaluate (8 NYCRR 200.4[b]). Based on the entries in SESIS, the district had until at least September 12, 2022 to complete the student's initial evaluation.[9] The district also had 60 school days from the receipt of parental consent to evaluate the student to arrange for the provision of special education programs (8 NYCRR 200.4[e][1]). The hearing record supports the district's position that the parent's ten-day written notice letter dated August 22, 2022, was sent before the district's time to

[9] Although it appears that the district's initial evaluation of the student was not timely, as noted above, neither party has appealed the IHO's determination that the district did not commit any procedural violations (IHO Decision at p. 9).

evaluate the student had elapsed. The equitable considerations related to the timing of the parent's ten-day notice will be addressed below.

2. Ten-Day Written Notice

The IHO determined that the parent had sent the August 22, 2022 ten-day written notice letter "just over 30 days after the initial referral" (IHO Decision at p. 11). The IHO noted that the district had 60 days to evaluate the student (id.). The IHO found that the parent first contacted Ha'Or Beacon in spring 2022, provided the district with a ten-day written notice of the unilateral placement on August 22, 2022, and enrolled the student at Ha'Or Beacon "nine days later" on August 31, 2022 (id.). The IHO determined that "[t]his evidence, when taken as a whole, show[ed] that [the] parent had no intention of sending the student to a [district] school, and show[ed] predetermination and bad faith on the part of the parent" (id.).

In reviewing the IHO's determinations, it must be noted that the Second Circuit has held that even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840). Accordingly, discounting the IHO's finding that the parent had no intention of sending the student to a district school, I nonetheless find that the IHO's reduction was warranted given her analysis of the timing of the parent's ten-day written notice.

The Second Circuit has emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist. v. C.S., 990 F.3d 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the 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"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

The parent's August 22, 2022 ten-day notice letter stated that the student "ha[d] not been scheduled for an IEP meeting, ha[d] not received a timely IEP and ha[d] not received a timely proposed placement for the 2022-2023 school year" and that "[f]or this and other reasons, [the] parent w[ould] enroll the student in" Ha'Or Beacon for the 2022-23 school year (Parent Ex. N). The parent further wrote that she "intend[ed] to keep the student [at Ha'Or Beacon] for the 2022-2023 school year until further notice but remain[ed] open to considering any steps the [district] may take to try and remedy the situation" (id.).

As noted above, the purpose of the ten-day written notice is to give the district an opportunity, before the child is removed, to evaluate the student, convene a CSE and to develop

an IEP. While I may not agree with the IHO's characterization of the parent's conduct as bad faith, the phrasing and timing of the ten-day notice was disingenuous at best, as the parent removed the student before the initial evaluation process had concluded, and at a time when the parent was actively participating in the initial evaluation process (Dist. Ex. 3 at pp. 4-5). Here, the timing of the parent's ten-day notice letter was unreasonable. As of August 22, 2022, the district was within the timeframe to complete the initial evaluation, determine the student's eligibility for special education programming, develop the IEP, and make an offer of placement. In preempting the district, the parent did not advise the district that she was rejecting the IEP and placement offer and thwarted the district's ability to address any potential objections to the CSE's recommendations before the student was removed.

In determining that the amount of tuition funding awarded should be reduced by 50 percent, the IHO found the actions of the parent to be unreasonable (20 U.S.C. § 1412[a][10][C][iii]). Under IDEA, the district court enjoys broad discretion in considering equitable factors relevant to fashioning relief (Gagliardo, 489 F.3d 105, 112), and the courts have generally accorded similarly broad discretion to IHOs when fashioning equitable relief (L.S. v. Fairfield Bd. of Educ., 2017 WL 2918916, at *13 (D. Conn. July 7, 2017). The IHO acted within that broad discretion in determining that a 50 percent reduction was appropriate, after she analyzed and weighed the equities based on her review of the hearing record (see also A.P., 2004 WL 763386 at *1 [finding it improper for a court to reduce an award of tuition reimbursement without making any findings that equities weighed against a parent]).

Turning to the parent's claim that the IHO erred in determining that the parent was not entitled to tuition funding for September 2022 and October 2022, I find the parent's arguments unavailing. The parent has not asserted in the due process complaint notice or in her request for review that the district failed to timely complete the initial evaluation within 60 days and/or failed to provide special education programs within 60 school days. In fact, the parent appears to concede that the district was "not in technical violation of the law in taking all 60 school days to finalize an IEP and placement" (Req. for Rev. ¶ 23). Rather the parent alleges that the district "developed and finalized" an IEP "on August 15, 2022, but withheld it and did not send [the p]arent an IEP until November 10, 2022" (Req. for Rev. ¶¶ 3, 24). The parent argues that the district's failure to provide the purported August 15, 2022 IEP was a denial of a FAPE, entitling the parent to tuition funding for the ten-month 2022-23 school year (Req. for Rev. ¶¶ 23, 24).

The parent's claim is wholly without merit. Review of the SESIS log demonstrates that on August 15, 2022, the status of documents related to the IEP were changed from draft to final and on August 23, 2022, the status of documents related to placement were changed from draft to final (Dist. Ex. 3 at p. 3). Additional review of the hearing record demonstrates that the speech-language evaluation was not completed until August 29, 2022, and was not entered into SESIS until September 1, 2022, the district did not request progress reports from Ha'Or Beacon until October 24, 2022, and the CSE did not convene to determine the student's initial eligibility until October 31, 2022 (Parent Ex. B at p. 20; Dist. Exs. 3 at p. 3; 9 at p. 3). The hearing record does not support the parent's position that an IEP was created in August 2022 and withheld from the parent until November 2022. I therefore find no basis to disturb the IHO's determination that the parent was not entitled to tuition funding for September 2022 and October 2022.

Lastly, the IHO deducted 16.4 percent of the total amount of funding for the portion of the student's school day which consisted of religious instruction. The parties do not challenge the 16.4 percent, instead they challenge the IHO's calculations. I agree with the parties that the IHO calculated an incorrect amount, which was not consistent with the language in her decision. The total cost of tuition for eight months is $88,000, subtracting 16.4 percent for the amount of religious instruction ($14,432) equals $73,568. Fifty percent of that amount is $36,784. Thus, the parent is entitled to direct funding in the amount of $36,784 and I will modify the order accordingly.

VII. Conclusion

The evidence in the hearing record supports the IHO's decision to reduce the amount of tuition funding on equitable grounds. Nevertheless, the IHO calculated an incorrect amount of funding. The IHO should have awarded direct funding in the amount of $36,784.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated February 6, 2024, is modified by directing the district to directly fund the tuition in the amount of $36,784 to Ha'Or Beacon, which represents 50 percent of the tuition from November 1, 2022 through June 30, 2023 after deducting 16.4 percent for the cost of religious instruction.

Dated: **Albany, New York**
April 18, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER