The University of the State of New York

The State Education Department
State Review Officer
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No. 23-055

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 Mordechai Buls, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Big N Little: Ziv Hatorah Program (Ziv Hatorah) for the 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). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student attended a private school from kindergarten to second grade (Parent Ex. J at p. 1). He transferred to Ziv Hatorah in third grade (2020-21 school year) (id.).

According to the district's Special Education Student Information System (SESIS) events log, the student was initially referred to the district for an evaluation in fall 2020 (Dist. Ex. 2 at p. 4). In November 2020 the district attempted to schedule a social history with the parent but was unsuccessful (id.). In December 2020 the parent advised the district that she did not feel the student required services and requested that the case be closed (Dist. Exs. 2 at pp. 3-4; 5 at pp. 1-2). The SESIS log indicates that in March 2021 the district received a letter from an attorney that indicated "they did not have evaluations for the student"(Dist. Ex. 2 at p. 3). The school psychologist "called

[the] parent to confirm [the] letter since [the] case was closed in December as [the] parent felt [the student] did not need services" (id.). The SESIS log states that the parent "pick[ed] up" but as soon as the school psychologist explained the reason for the call the parties were "'disconnected'" and there was no response to the district's subsequent attempts to call the parent back (id.). The school psychologist left messages and sent an email to the parent (Dist. Exs. 2 at p. 3; 5 at pp. 1-2). A March 5, 2021 email from the school psychologist to the parent indicates that the district "received a new letter stating that [the parent] would . . . like to move forward with the case for special education services" and requested that the parent either confirm or close her request for evaluation of the student (Dist. Ex. 5 at pp. 1-2). In a SESIS entry dated March 15, 2021, the school psychologist indicated that she spoke with parent who felt the student was doing well (Dist. Ex. 2 at p. 2). The parent reported that she had spoken with the student's teachers, who did not have any concerns, and the parent further stated that she did not feel that the student needed any services or evaluations (id.). According to the SESIS log, when questioned about the "latest letter" the parent indicated that she was aware that the attorney had sent it and that "they" had suggested that the student get evaluated "'in case he need[ed] anything'" (id.). The SESIS entry reflects that the "parent [wa]s comfortable with leaving the case closed and [wa]s happy with [the student's] performance in school" (id.).

In a letter to the district dated May 11, 2021, the parent requested that the district evaluate the student and provide him with "a full-time special education public classroom" (Parent Ex. B at p. 2).[1] The letter was attached to a facsimile cover sheet dated May 11, 2021 and titled "Request for Eval" (id. at p. 1).

In an email to the parent dated May 14, 2021, the school psychologist stated that "As per our conversation, you confirmed that [the student] is performing well academically, and you do not have any concerns. Please confirm that you would like to close the request for evaluations at this time" (Dist. Ex. 5 at p. 1). A SESIS log entry recorded that the school psychologist called the parent and summarized the content of their conversation (Dist. Ex. 2 at p. 2). That same day parent responded to the school psychologist's email and indicated that she "would like to cancel the evaluation" (Dist. Ex. 5 at p. 1).

By letter to the district dated July 1, 2021, titled "Ten Day Notice," the parent indicated that she had sent letters to the district in September 2020 and March 2021 in which she requested that it evaluate the student and place him in a full-time special education classroom but to date the district had done neither (Parent Ex. K at p. 2). The parent requested placement of the student in "a full time special education classroom for the upcoming extended 12 month 2021-2022 school year" (id.). The parent indicated that, unless the issue could be resolved, she intended to unilaterally placed the student at Ziv Hatorah for the 2021-22 school year and commence proceedings to seek funding/reimbursement from the district (id.). In a subsequent letter dated August 16, 2021, the parent reiterated her concerns as well as her intent to unilaterally place the student at Ziv Hatorah and seek funding from the district (Parent Ex. L).

[1] The parent's last name is spelled differently on various documents in the hearing record (compare Parent Exs. B at p. 2; K at p. 2, and Dist. Ex. 5 at p. 1, with Parent Exs. A at p. 1; C at p. 2; D at p. 2; E at p. 3; L at p. 2, and Req. for Rev. at p. 1).

The parent signed a student contract with Ziv Hatorah for the 2022-23 school year on June 16, 2022 (see Parent Ex. E). The following day, in a letter to the district dated June 17, 2022, tilted "Ten Day Notice," the parent alleged that the student had "not received a proper or adequate educational and school placement for the upcoming extended twelve-month 2022-2023 school year" (Parent Ex. C at p. 2). The parent indicated that she intended to unilaterally place the student at Ziv Hatorah for the extended 2022-23 school year and would commence proceedings to seek tuition funding/reimbursement from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 1, 2022, the parent asserted that in 2020 she had requested the district evaluate the student and that she sent additional requests on March 2, 2021, May 11, 2021, July 1, 2021, and August 16, 2021 (Parent Ex. A at p. 1). The parent contended that, despite requesting an evaluation, the district had not evaluated the student or provided an appropriate public education (id.). The parent indicated that she enrolled the student at Ziv Hatorah for the 2021-22 school year and that she continued his enrollment there for the 2022-23 school year (id. at p. 1). The parent argued that the student required and continued to require a special education program and behavioral plan (id. at p. 2).

Regarding the 2022-23 school year, the parent asserted that she notified the district on June 17, 2022 that the district had not provided a free appropriate public education (FAPE) for that school year and was continuing the student's placement at Ziv Hatorah for the 12-month 2022-23 school year (Parent Ex. A at p. 2). The parent argued that the student was not offered a FAPE because the district failed to hold an annual meeting, develop a timely IEP, or provide an appropriate placement for the student (id.).

The parent requested a finding that Ziv Hatorah was an appropriate placement for the student and an award of direct funding for the student's tuition at Ziv Hatorah for the 2022-23 school year (Parent Ex. A at p. 2).

B. Events Subsequent to the Due Process Complaint Notice

In a letter to the district dated November 1, 2022, the parent indicated that she had previously sent letters to the district during the 2020-21 and 2021-22 school years requesting that the district evaluate her son and provide him with an IEP and "placement in a full-time special education classroom," but to date the district had failed to do so (Parent Ex. D at p. 2). The parent renewed her request that the district evaluate the student, provide him with an IEP, and place him in a full time special education classroom for the 2022-23 school year (id.). The parent indicated that, unless the identified issues were resolved, she would continue to unilaterally place the student at Ziv Hatorah and seek funding/reimbursement from the district for the placement (id.).

In a prior written notice dated November 4, 2022, the district indicated that it had "received a written referral from [the parent] requesting an evaluation to determine if [the student] has an educational disability and may require special education services" (Dist. Ex. 1 at p. 1). The prior written notice stated that the district was proposing to conduct an initial evaluation of the student to determine his initial eligibility for special education services (id.).

C. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing on December 8, 2022, which concluded on February 21, 2022 after six days of proceedings (see Tr. pp. 1-196). In an interim decision, dated November 14, 2022, the IHO denied the parent's request to consolidate the November 2022 due process complaint notice in the present matter with a due process complaint notice, dated May 6, 2022, that pertained to the 2021-22 school year (Interim Decision at p. 2). The IHO found that consolidation would delay resolution of both cases (id. at p. 2).

In a final decision dated March 1, 2023, the IHO denied the parent's request for district funding of the student's tuition at Ziv Hatorah because the parent did not allow the district evaluations to proceed (IHO Decision at p.7). The IHO found that the parent's assertion that the district failed to evaluate the student after multiple requests from September 2020 to August 2021, ignored "the fact that after each such request, the Parent contradicted that request when the [district] attempted to begin the evaluation process" (id. at p. 4). The IHO held that the parent had informed the district on each occasion prior to the 2022-23 school year that she did not want the student evaluated or any special education services (id.). The IHO determined that the evidence supported the district's assertion that the parent did not consent to evaluations and requested that the case be closed (id.). The IHO credited the testimony of the school psychologist on this issue and noted that the school psychologist was not cross-examined by the parent (id. at p. 5).

The IHO determined that that the parent "refused to cooperate with the [district] in participating in a social history and stated that she did not want an evaluation or services and wanted the case closed" and that this occurred in March and May of 2021 (IHO Decision at p. 5). The IHO then held that the parent did not make another request for evaluation until after the start of the 2022-23 school year in November 2022 (id.). By the time the parent made that request in November 2022, the student had already been privately evaluated and there was no evidence in the hearing record that the parent had provided the district with the private evaluation or informed the district that the private evaluation had been conducted (id.). The IHO noted that the July 1, 2021 10-day notice was for the 2021-22 school year and did not indicate that a private evaluation was conducted and the June 17, 2022 10-day notice also did not indicate that a private evaluation was conducted (id.). The IHO held that there "was no evidence to support a finding that the Parents cooperated with the [district] in agreeing to an evaluation or following through on any request for an evaluation or the development of an IEP" and that there was "no evidence that the Parents had any interest in a [district] program" (id. at p. 6).

The IHO further determined that the parent's assertion she did not consent to email communication was not relevant as the evidence relating to the IHO's findings for the 2022-23 school year were based on testimony and evidence about telephone conversations (IHO Decision at p. 6). The IHO also noted that, even if it were true that the parent did not consent to email communication, the parent sent emails on at least two occasions (id.). In any event, the IHO noted that there was no evidence to contradict the district's testimony that the school psychologist spoke with the parent, at which time the parent requested the case be closed (id.).

Lastly, the IHO noted that the parent signed the enrollment agreement with the unilateral placement on June 16, 2022 and that the contract stated the parent's obligation was unconditional

(IHO Decision at p. 6). The IHO noted that the parent had full knowledge of her obligations to the unilateral placement well before requesting evaluations in November 2022 (id. at pp. 6-7).

Because the parent "did not allow the evaluation process to proceed," the IHO denied the parent's request for district funding of the student's tuition at Ziv Hatorah (IHO Decision at p. 7).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her request for tuition reimbursement for the student's attendance at Ziv Hatorah for the 2022-23 school year. The parent argues that, despite several requests, the district failed to evaluate the student, develop an appropriate special education program, and provide an appropriate public school placement for the student for the 2022-23 school year. The parent asserts that the district did not show that it provided the student with a FAPE or dispute the appropriateness of Ziv Hatorah, the unilateral placement.

The parent asserts that the IHO erred in denying her requested relief on equitable grounds. The parent contends that the IHO erred in finding that the parent did not allow the evaluation process to proceed. The parent asserts that the IHO's findings that she contradicted each of her requests for an IEP and that there was no contact between the district and the parent between May 2021 and November 2022 were contrary to the evidence in the hearing record. The parent contends that she submitted requests to the district in that timeframe, dated July 1, 2021, August 16, 2021, June 17, 2022, and November 1, 2022.

Additionally, the parent asserts that she never consented to communication/correspondence via email. The parent argues that the IHO mistakenly rejected her argument on this issue due to her use of email in the past and imposed implied consent upon the parent; however, the parent argues that, for the 2022-23 school year, the parent did not correspond via email. The parent also argues that any telephone conservations referenced by the IHO did not occur during the 2022-23 school year and are irrelevant to this school year.

In addition, the parent argues that the IHO erred in denying relief based on the timing of her ten-day notice after she had entered into a contract with Ziv Hatorah. The parent argues that the district did not provide her with a procedural safeguards notice and that, therefore, an award of tuition reimbursement could not be reduced or denied for failure to provide a 10-day notice.[2] Moreover, the parent contends that the IHO's finding that the parent was not interested in a district program is not relevant to this matter because the "pursuit of a private placement is not a basis for denying tuition reimbursement even assuming the parent does not intend to send the child to public-school."

The parent requests a finding that the district did not offer the student a FAPE for the 2022-23 school, that the unilateral placement was appropriate, and that no equitable considerations would warrant a reduction or denial of relief. The parent requests the district be required to directly fund the student's tuition at Ziv Hatorah for the 2022-23 school year.

[2] The parent also argues that a prior written notice was not provided.

In an answer, the district responds to the parent's allegations and argues that the IHO correctly denied the parent's request for tuition funding on equitable grounds.

The district also argues that, in contravention of State regulation, the parent's assertions about the district's obligation to offer a FAPE are not framed as allegations of IHO error.[3] Further, the district asserts that the parent's claims concerning an alleged deprivation of FAPE for the 2022-23 school year are unfounded and not supported by the record. Next, the district asserts that the claims regarding the procedural safeguards and prior written notice were not raised in the due process complaint notice and should be disregarded.

Finally, the district argues that, since the parent did not consent to the district conducting evaluations, it cannot be considered in violation of the requirement to make a FAPE available. The district asserts that "record is replete with the [district's] documented attempts to secure the Parent's consent" and the parent failed to respond to repeated requests for consent or withdrew them."[4]

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]).

[3] While the parent could have more specifically alleged that the IHO erred in failing to address her allegations of a denial of a FAPE, as the IHO did not directly address the district's obligation to offer the student a FAPE, I decline to exercise my discretion to reject the parent's appeal on the ground that it failed to allege a specific IHO error on this point (see 8 NCYRR 279.4[a]).

[4] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parent's reply reiterates arguments made in the request for review and does not address any of the procedural defenses raised by the district. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

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. 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

Both the IDEA and State regulation direct that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (see 20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4][i]). Here, the IHO's decision, while setting forth factual findings relevant to the question of whether the district was required to evaluate the student to determine his eligibility for special education for the 2022-23 school year, appears to rest on equitable considerations as the rationale for denying the parent's requested relief (see IHO Decision at pp. 4-7). When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

In present matter, the IHO should have made a determination regarding whether the district failed to evaluate the student and offer a FAPE for the 2022-23 school year, as asserted in the due process complaint notice (see Parent Ex. A). While I considered remanding the matter to the IHO, in this instance, the hearing record is sufficiently developed to render a decision on the merits of

[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).

the parent's claims and, as noted, the IHO made factual determinations relevant to the questions posed.

Turning to the merits of the parent's claims in the due process complaint notice, the issue to be resolved is whether the district failed to respond to a referral of the student for an initial evaluation.

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]-[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 referral may be withdrawn in a written agreement to that effect (8 NYCRR 200.4[a][7], [9]).[6] 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]).

Here, the hearing record shows that the parent referred the student for an evaluation during the 2020-21 school year in fall 2020 and May 2021, but the parent withdrew the referrals (Dist. Exs. 2 at pp. 2-4; 5 at pp. 1-2; Parent Ex. B). However, the parent asserts that subsequently she requested the student be evaluated on July 1, 2021 and August 16, 2021 for the 2021-22 school year and on June 17, 2022 and November 1, 2022 for the 2022-23 school year (see Tr. p. 82; see also Req. for Rev. ¶¶ 5-9, 33-34).

The letters referenced by the parent constituted "10-day notice letters" communicating the parent's intent to the district to unilaterally place the student for the 2021-22 and 2022-23 school years respectively (Parent Exs. C; D; K; L). The July 2021 letter referenced the parent's earlier referrals of the student and argued that, despite those referrals, the district had failed to evaluate the student (Parent Ex. K at p. 2). The August 2021 letter referred to the parent's "previous[] request[s]" to provide the student with an IEP (Parent Ex. L at p. 2). The parent's June 2022 letter to the district stated that the student "ha[d] not received a proper or adequate educational and school placement for the upcoming extended twelve-month 2022-2023 school year" (Parent Ex. C at p. 2).

The evidence in the hearing record does not support the parent's position that the ten-day notice letters constituted written referrals of the student for initial evaluation. I decline to adopt so broad an interpretation such that the bald allegations that the district failed to act in the past would be deemed a request for future action and automatically trigger the district's obligation to

[6] 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]). The 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]).

conduct an initial evaluation of the student and convene the CSE to consider the student's eligibility for special education under the provision in State regulation for written referral of a student (see 8 NYCRR 200.4[a]; see also D.K. v. Alington Sch. Dist., 696 F.3d 233, 248 n.5 [3d Cir. 2012] [finding that "general expressions of concern" do not amount to "a 'parental request for evaluation' under the plain terms of the statute"], quoting 20 USC 1415[d][1][A][i]). In the case of the July and August 2021 letters, the parent attempted to resurrect her earlier referrals by ignoring her subsequent withdrawals of the same and stating that the district had, in the past, failed to evaluate the student (see Parent Exs. K at p. 2; L at p. 2).[7] With respect to the June 2022 letter, the parent did not even reference an evaluation and instead stated her position as if the student had already been found eligible for special education and that the district failed to recommend or provide an appropriate program (Parent Ex. C at p. 2).[8]

Instead, the purpose of the ten-day notice letters sent by the parent was quite clear—that the parent wished to communicate her dissatisfaction with the district's alleged failure to provide the student with an educational placement and to inform the district of her decision to unilaterally place the student and her intent to pursue funding for Ziv Hatorah (Parent Ex. C at p. 2).[9] Accordingly, I do not find support for the conclusion that these letters constituted a written parental referral of the student for special education.

Since the parent did not refer the student for an evaluation subsequent to withdrawing her referrals from the 2020-21 school year but prior to the filing of the November 2022 due process complaint notice, the district was not obligated to evaluate the student or offer him a FAPE and the parent's allegations to the contrary are without merit.

VII. Conclusion

While the IHO focused on equitable considerations in denying the parent's requested relief, the evidence in the hearing record shows that the district did not have an obligation to conduct an evaluation of the student based on a parent referral during the relevant timeframe. Therefore, while

[7] According to the parent, in a separate proceeding, the IHO rendered a decision awarding funding for the unilateral placement for the 2021-22 school year (Req. for Rev. ¶ 12 n.1). An IHO decision relating to the 2021-22 school year was not included in the hearing record. In any event, I make no determination about that school year. Instead, I review the parent's July and August 2021 letters only to determine whether the district failed to respond to a referral of the student leading up to the 2022-23 school year.

[8] In contrast, the November 2022 letter, bearing the same date as the due process complaint notice, stated that the parent was "requesting the [district] evaluate" the student and provide an IEP and a full-time special education classroom for the 2022-23 school year (Parent Ex. D at p. 2; see Parent Ex. A at p. 3). The district treated this letter as a referral of the student and took steps to evaluate the student thereafter (Dist. Exs. 1 at p. 1; 2 at p. 1; 6 at p. 1). The district's actions in response to this letter, which post-date the parent's unilateral placement of the student for the 2022-23 school year and the due process complaint notice, were not the subject of the impartial hearing and will not be reviewed on appeal.

[9] 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]).

I rest on different grounds, there is no basis to modify the IHO's denial of the parent's requested relief.

Based the above determinations, it is not necessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 30, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER