The University of the State of New York

The State Education Department
State Review Officer
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No. 23-109

Application of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW ROCHELLE for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Jennifer Arditi, Esq., attorney for respondents

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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it violated its child find obligation and failed to offer an appropriate educational program to respondents' (the parents') child for the 2021-22 school year and ordered it to reimburse the parents for the student's tuition costs at Westfield Day School (Westfield). The appeal must be sustained.

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 parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. During sixth grade, the parents referred the student to the CSE in a letter dated February 14, 2022 for purposes of conducting an initial evaluation for special education (Parent Ex. P).[1, 2] In a March 10, 2022 email

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only one version of a document (either parent or district exhibit but not both) is cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] Several pages of the hearing record filed with the Office of State Review contain handwritten notes, which were

the parents notified the district that the student had started a trial/evaluation period at Westfield and requested information about whether the district could "help subsidize tuition there" (Parent Ex. G). The CSE convened on May 6, 2022, and, finding the student eligible for special education as a student with an emotional disability, developed an IEP with a projected implementation date of May 23, 2022 (see generally Dist. Ex. 23).[3] In an amended due process complaint notice, dated August 12, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A).[4]

An impartial hearing convened on December 2, 2022 and concluded on April 4, 2023 after four days of proceedings (Tr. pp. 1-477). In a decision dated May 8, 2023, the IHO determined that the district violated its child find obligation and failed to offer the student a FAPE for the 2021-22 school year, that Westfield was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 9-29). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Westfield for the 2021-22 school year (id. at p. 29).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The essence of the parties' dispute on appeal is whether the district met its obligations under the "child find" provisions of the IDEA and whether, given the timing of events, the May 2022 IEP was appropriate for the student for the end of the 2021-22 school year.

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]).

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presumably made by either the attorney for the district or the IHO (see, e.g., Tr. pp. 360-381). The district and/or the IHO is reminded that it is necessary to avoid annotating the documents maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or to the party offering the exhibit. In this instance, the handwritten notes have been disregarded.

[3] The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

[4] The August 12, 2022 due process complaint notice is an amended document (Dist. Ex. 1). The original due process complaint notice, which the IHO referenced as dated April 22, 2022, is not present in the hearing record (see IHO Decision at pp. 3, 6).

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. 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. Child Find

The district contends that the IHO erred in determining that the district failed to satisfy its child find obligations during the 2021-22 school year, arguing that the student's anxiety and other symptoms of a potential disability emerged suddenly during the 2021-22 school year, that the district appropriately attempted to address the student's needs with building level supports, and that after an appropriate time period the parents and the district worked together to evaluate the student and found the student eligible for special education as a student with an emotional disability.

[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 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 ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students 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], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; 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 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 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]).

Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an

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

The district argues that, considering the brief period between the sudden onset of symptoms in November 2021 and the February 2022 referral, the IHO erred by determining that the student's symptoms persisted for "a long period of time" and that the district waited "too long" to see if the building level interventions were effective.

As noted above, a district's child find obligation arises 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, 158 F. Supp. 2d at 1194). "A school district must begin the evaluation process within a reasonable time after the district is on notice of a likely disability" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 144 [2d Cir. 2019]). In this case, the parties put forth arguments and the IHO only addressed only one category of disability pursuant to which the student should have been deemed eligible for special education, the emotional disability category. The May 2022 CSE ultimately found the student eligible as a student with an emotional disability (Parent Ex. C at p. 1), and there is no allegation that the district had reason to suspect any other category of disability. The statutory and regulatory framework for classification of a student as a student with an emotional disability is, therefore, relevant to considering the degree to which the district had reason to suspect a disability and when.

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]). State regulations were recently amended to use the term "emotional disability" rather than "emotional disturbance" to label the disability due to a negative connotation associated with the latter term and a decision that it should no longer be used in New York State; however the underlying definition itself was not changed and otherwise employs similar classification characteristics contained its federal counterpart (compare 8 NYCRR 200.1[zz][4], with 34 CFR 300.8[c][4]; see "Proposed Amendment of Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance" available at

https://www.regents.nysed.gov/sites/regents/files/722brca16.pdf). Accordingly, I will use the term emotional disability herein even when referencing federal law.

Under the IDEA, in order to be found eligible for special education as a student with an emotional disability, the student must meet one or more of the following five characteristics:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> (D) A general pervasive mood of unhappiness or depression.
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). While emotional disability includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

Taking into account the definition of emotional disability, I turn to a consideration of what the hearing record shows concerning the student leading up to the parents' referral of the student to the CSE in February 2022. In reviewing whether the district satisfied its child find obligations, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at *8, quoting J.S., 826 F. Supp. 2d at 652; see, e.g., Application of the Dep't of Educ., Appeal No. 21-113 [rejecting the parent's argument that a child find violation occurred between September and November and upholding the IHO's finding that a district had reason to suspect a disability in March of the same school year when the district had taken some interventive steps, but the difficulties persisted]). With respect to the specific wording of the emotional disability criteria, federal guidance provides that the generally accepted definition for a "long period of time" is from two to nine months and typically it is required that preliminary interventions are deemed to be ineffective during that period (Letter to Anonymous, 213 IDELR 247 [OSEP 1989]).

The evidence shows that the student attended the district's elementary school in a general education classroom beginning in kindergarten (Dist. Exs. 19 at pp. 1-2; 22 at p. 3). At that time the student reportedly adjusted well to school and classroom routines (Dist. Ex. 19 at p. 1). In second grade the student's teacher alerted the parents to the student's "headaches and occasional unhappy moods" (id.). The parents took the student to a doctor who found no medical issues, and no further concerns were noted (id.). During third grade, the parents reported to the student's teacher that the student was having difficulty getting up and going to school (id.). At the time, the

teacher reported that the student seemed happy and engaged and had many friends (id.). The student made "universal" academic progress and was "consistently" above grade level in reading (Tr. pp. 48, 358-59; Dist. Ex. 19 at p. 1). Overall, the student reportedly did "very well" in elementary school, with no academic concerns noted (Tr. p. 46).

The student participated in a gifted program in the district's elementary school in fourth and fifth grades (Tr. pp. 46, 91-92, 443-44; Dist. Exs. 3 at p. 1; 19 at p. 1). In fourth grade the student was described as "responsible [and] considerate," with a "great sense of humor" (Dist. Ex. 19 at p. 1). The student's reading skills were consistently above grade level throughout the year, and the student was noted to be an avid reader with insightful ideas, though the student could often be somewhat shy in sharing them (id.). The student's math abilities were at grade level (id.). In March 2020 (fourth grade), school was disrupted and significantly impacted by the COVID-19 pandemic (id.). By parent report, in spring of fifth grade (2020-21 school year) the student was withdrawing from friends and experienced a bullying incident (Tr. p. 259).

In September 2021, the student began sixth grade at the district's middle school, the school year from which the parties' dispute stems (see Tr. pp. 359-60; Dist. Ex. 7). According to the parent's testimony during the impartial hearing, in early November 2021, the student reported hearing voices telling the student to engage in self-harm (Tr. pp. 360-61). The student's mother testified that she contacted the student's pediatrician and got references for a therapist and a nurse practitioner, who initially saw the student for medication management (Tr. p. 361). The student's mother indicated that she then contacted the student's guidance counselor (id.). In a November 5, 2021 email the parent notified the school guidance counselor that the student was having some issues with mental health, as well as issues with friends and bullying (Dist. Ex. 4 at p. 1). In a response moments later, the guidance counselor emailed the parent saying she would call the parent (id.). In their phone call the parent informed the guidance counselor of the concerns regarding the student's self-harm ideation (Tr. p. 361). The guidance counselor met with the student during lunch once a week, and school staff subsequently engaged in regular email communication with the parent (see Parent Exs. A at p. 2; N; Q-S; Dist. Exs. 4-11; 13-14; 16-17).[6, 7]

In a series of emails dated November 8, 2021, the student's mother thanked the guidance counselor for meeting with the student (Dist. Ex. 4 at p. 2). The guidance counselor responded to the parent, copying the school social worker on the email, explaining that she was previously unaware of the "intensity" of the bullying incidents and offered to refer the situation to a grade level supervisor for an investigation in order to "address it immediately" (id.). The parent answered that she thought the student had responded well to support from school staff, and that

[6] The school social worker reported that the student was referred to her in late fall for the purpose of joining a group called the "lunch bunch," which was comprised of other sixth grade students who received mandated student counseling in accordance with their IEPs (Tr. pp. 196-99, 231; see Dist. Ex. 6). The group met once per week and engaged in activities that were designed to teach social skills, mindfulness, and to help the students adjust to the middle school environment (Tr. p. 197). The student attended the group with the guidance counselor (Tr. pp. 197, 228; Dist. Ex. 9 at p. 1).

[7] The parent indicated that, "at times, [the guidance counselor] had to assist [the student] with entering the school building" and that "[the student] started to see [the guidance counselor] during the school day when he would report that he was not feeling well" (Parent Ex. A at pp. 2-3).

the student did not want to report the incident for an investigation unless it occurred again (id. at pp. 2-3). The parent asked the guidance counselor to help the student by offering advice as to how to handle similar situations in the future (id. at p. 3).

On the morning of November 9, 2021, the parent sent an email to the guidance counselor and the social worker informing them that the student was in the school parking lot refusing to enter the building and requesting staff intervention (Parent Ex. S at pp. 3-4). In a subsequent email about two hours later the parent thanked the staff for intervening and helping the student earlier that day (id. at p. 3). The guidance counselor responded to the parent saying that she notified staff of the student's difficulties and would check on the student again during the day (id. at pp. 2-3). In a separate email on November 9, 2021, the guidance counselor notified school staff that the student was "struggling to regulate his emotions" and had difficulty that morning coming into school (Dist. Ex. 5). She informed the staff that if the student needed to leave the classroom during the day, the student should be allowed to come to her office (id.). Later in the day on November 9, 2021 the guidance counselor notified the parent in an email that the student had come to see her and reported not feeling well (Parent Ex. S at p. 2). She talked with the student and allowed the student to remain in her office with a friend to play cards (id.). The guidance counselor told the parent to "keep us in the loop" and to "let us know if you need anything from us" (id.). The social worker also followed up with an email on November 10, 2021, asking the parent to let her know if the parent needed help "finding some mental health support" for the student (id. at p. 1).

Reportedly, around this time the student received diagnoses from the nurse practitioner of major depressive disorder and anxiety disorder and began taking medication (Dist. Ex. 22 at p. 3). According to the parents, the student began attending weekly therapy sessions outside of school (Parent Ex. A at p. 3).

In a November 16, 2021 email the parent notified the school social worker that the student's therapist did not think the student was in any immediate danger, but rather the student was "expressing his unhappiness" (Parent Ex. S at p. 1). The parent also notified the social worker that the private therapist would be sending her a release form so the district could communicate directly with the student's therapist (id.).

On November 17, 2021, the parents requested that the student be removed from Spanish class and excused from the cafeteria and recess, as these settings triggered the student's anxiety (Tr. p. 363; Dist. Ex. 7; see Dist. Ex. 22 at p. 3). In response, the student was excused from Spanish class (Dist. Ex. 7).[8]

The parent reported that during November 2021 she would receive phone calls from the school telling her that the student was hearing voices and asking her to pick up the student from school (Tr. pp. 363-64).

[8] The social worker testified that the student was discussed during a child study meeting which included school administrators, social workers, guidance counselors, psychologists, and the school nurse; however, the timeframe of these discussions is not clear from the hearing record (Tr. pp. 200-01, 234-35).

In a November 30, 2021 email, the guidance counselor informed the vice principal of three incidents in which the student reported being slapped by another student when at the student's locker (Dist. Ex. 8).

By email dated December 5, 2021, the student's mother connected the student's private therapist with the student's school guidance counselor (Dist. Ex. 9 at p. 1). The two arranged to meet, along with the school social worker, on December 9, 2021 (id.).

In a December 9, 2021 email to the guidance counselor, the parent requested input about "next steps" for the student, noting that the student's new medication "will hopefully be working in another month," and that the student continued to work with a private therapist on ways to manage "overwhelming sad feelings when they emerge" (Parent Ex. R). In addition, the parent informed the guidance counselor that she was discussing remote and private school options, but that the student currently wanted to return to the public-school class because the student had begun making new friends and was "feeling hopeful about that" (id.).

Later that day, the district contacted the parent and suggested the student be seen by a psychiatrist because the student reported hearing voices that told the student to engage in self-harm (Tr. pp. 203-04, 365). The student was picked up from school and taken to the emergency room by the parent (Tr. pp. 362, 365). However, the student was not admitted and was released the same day after it was determined that the student was not in any immediate risk of danger or suicide (Tr. pp. 365-66).[9, 10]

On December 10, 2021, the student and the parents met with the vice principal, social worker, and guidance counselor to discuss the student's return to school (Tr. pp. 203-07; Parent Ex. A at p. 3; Dist. Ex. 10). The social worker testified that, at the time of the meeting, she was concerned about the student's attendance and mental health, but that the student remained appropriate for a general education setting given the grades achieved (Tr. pp. 242, 245). As a result of the meeting, the student's seat was moved in some classes, and staff was identified that the student could speak to if needed during the day (Dist. Ex. 10).

The student passed all classes during the first marking period of sixth grade (Dist. Exs. 12; 19 at p. 2). The student "worked closely" with the school counselor and social worker due to struggles attending school every day, for a full day (Tr. pp. 47-48; Dist. Ex. 19 at p. 2). The social worker acknowledged that, by January 2022, mental health issues were negatively affecting the student's ability to attend school (Tr. p. 240).

The student began seeing a private psychiatrist in January 2022, who determined the student met the criteria for diagnoses of generalized anxiety disorder and panic disorder without agoraphobia (Dist. Ex. 19 at p. 2). In late-January 2022, the parents were contacted to pick up the

[9] The parent testified that the school social worker brought inpatient services to her attention in December 2021 (Tr. p. 385).

[10] At the time of the incident the district was offering the student the opportunity to participate in lunch bunch, assisting the student with getting into school as needed, and allowing the student to go see the guidance counselor or social worker as needed (Tr. pp. 367-68). In addition, the district modified the amount of work that the student was required to complete and the student was not required to attend school for the full day (Tr. pp. 209-10, 238, 245-48).

student due to the student experiencing dysregulation (Dist. Ex. 11 at p. 1). The student's frequent absences were discussed at an attendance meeting in mid- to late-January (Tr. pp. 235-36). The school social worker, guidance counselor, and the student's private therapist discussed during approximately three conversations how to best support the student, to share what the student was disclosing at school, and get feedback from the therapist as to how to best support the student (Tr. pp. 236-37). The private psychiatrist and psychologist working with the student emphasized the importance of the student attending school with support in order to overcome school refusal (Tr. pp. 51, 214, 421; Parent Exs. E at p. 2; N at p. 1; Dist. Exs. 14 at pp. 2, 5; 19 at p. 2).

The school psychologist testified that the student was referred to a psychiatrist in or around February 4, 2022 because the student was hearing voices telling the student to engaged in self-harm (Tr. pp. 212-13). The student's psychiatrist offered diagnoses of anxiety disorder and school refusal and prescribed a new medication for the student (Dist. Ex. 22 at p. 3). The parent testified that in February she learned from the private therapist of a program at the student's public school for special education students who required support for emotional issues (Tr. pp. 376-77). The parent's impression was that district staff believed the program might not be a "good fit" told that the student would have to go through the special education evaluation process for it (Tr. pp. 377-79; Parent Ex. Q at pp. 2-3). In a series of emails dated between February 8, 2022 and February 15, 2022 the parent and student's guidance counselor discussed the possibility of pursuing a 504 plan or special education services (Tr. pp. 218-19; Parent Exs. N at pp. 1-2; Q at pp. 2-3; Dist. Ex. 14 at pp. 3-4).

On February 14, 2022, the parents referred for the student to the CSE for an evaluation due to the student's diagnoses of "major depressive disorder and anxiety disorder" and because the student suffered from panic attacks at school which impeded "his ability to attend his classes" (Parent Ex. P). The parent added that the student's panic attacks were "accompanied by persistent thoughts of self-harm" resulting in 20 absences and that the student had "missed most of the last month of school" (id.). The parent stated that the student had been working with a child psychiatrist and therapist, both of whom recommended that the student needed accommodations that would enable the student "to get through the school day" and "resume classes and social interaction with peers" (id.; see Tr. pp. 393-94).

In an email dated February 15, 2022, the student's private psychiatrist informed the parent and school staff that the student was "psychiatrically cleared" to return to school the next day (Tr. pp. 220-21; Parent Ex. O; see Tr. pp. 270-71). The parent testified that the student had to be cleared to return to school due to an incident in which the student held a knife to their wrist the previous morning (Tr. pp. 382-83; see Tr. pp. 220-21).[11, 12] The social worker testified that the student told her about the incident with the knife but had been told not to disclose the incident at school (Tr. pp. 221-22, 243-44, 269-70, 286). In a separate email dated February 15, 2022 the

[11] In February 2022, the student began identifying as non-binary and using the pronouns "they/them" (Dist. Ex. 22 at p. 3).

[12] The parent explained that both the student's psychiatrist and therapist felt that an inpatient program was inappropriate because the student would be exposed to children with more serious problems and the student felt safe at home (Tr. p. 384; see Tr. p. 401-02). In addition, the student's psychiatrist and therapist had determined that the student was not a risk to self, but rather the student's behavior was a result of school refusal and social anxiety (Tr. p. 385).

parent informed the school staff that the student had been evaluated by three clinicians who, in addition to the student's therapist, had opined that the student was not suicidal or psychotic but rather that the student's depression and anxiety was triggered by the school setting, and had recommended exposure to school to overcome this (Tr. pp. 398-99, 421; Parent Ex. N at p. 1).

Due to the student's thoughts of self-harm and reports of hearing voices, the school conducted approximately three risk assessments between December and February to determine if the student "needed a higher level of care," and requested the student receive an evaluation by the private therapist (Tr. pp. 233, 239).

According to the student's mother, the student did not attend school most days during January and February 2022 and when the student did attend it was not for a full day (Tr. p. 375).

In an email dated February 18, 2022, the parents requested a 504-plan meeting with the district (Dist. Ex. 14 at p. 6). In a February 26, 2022 letter, the student's private psychiatrist informed the district that the student had recently received diagnoses of generalized anxiety disorder and panic disorder without agoraphobia and would benefit from 504 plan accommodations including flexible setting and schedule, breaks as needed, in-school counseling, the ability to sit in the counselors' office during specials, and a transition plan to help the student adjust to school after a weekend or school break (Dist. Ex. 17).

Reviewing the foregoing course of events, leading up to the parents' referral of the student in February 2022, the district did not "overlook clear signs of disability" but rather, as described in detail above, took proactive steps to intervene on the student's behalf. The student in this case had, up until sixth grade, demonstrated no indication of disability or any need for special education services. In addition, the student's social/emotional issues came on abruptly. Although the district did after evaluation determine that the student was eligible for special education as a student with an emotional disability in need of special education services after the parents' referral in February 2022, the district was not remiss in first implementing building level accommodations to address the student's needs. Overall, the foregoing evidence demonstrates that, while the student was clearly experiencing difficulties in the social/emotional realm during the 2021-22 school year, and the district first became aware of the student's emotional struggles, the district staff implemented numerous interventions over a between November 2021 and February 2022, which in their professional opinions were designed to address the student's difficulties and help the student access education. Additionally, there were periods during the 2021-22 school year prior to the student's referral wherein the district had reason to hold off on convening a CSE and evaluating the student, for example to determine if a change in the student's medication would be effective or observe whether the requirements for classification with an emotional disability were met; to wit, whether the student exhibited one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4] [emphasis added]). The IHO mentioned the "long period of time" aspect of the criteria but merely stated in conclusory fashion that the criteria was met without further discussion. As noted above the student did not have a history of emotional concerns and performed well academically. The student's social/emotional difficulties had been occurring for approximately three months when the parent referred the student in February 2022; it is unlikely that, had the student been referred sooner, a CSE could have concluded that the characteristics of an emotional disability had been occurring "over a long period of time" and this is not the kind of test that can be expressed as a bright line rule. In light of the above, the evidence in the hearing

record does not reflect that the district "overlooked clear signs of disability" and had been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P., 885 F.3d at 750). The Second Circuit indicated that the school district must begin the evaluation process "within a reasonable time after the district is on notice of a likely disability" (id. 742-43, 750-52; [finding that the that a four month period between the onset of the student's behaviors and the initiation of the evaluation process to monitor the situation was not unreasonable or a violation of child find procedures and discussing facts including a student's "D" grades in all classes, suicidal ideation, brief psychiatric hospitalizations, the confiscation of a pocket knife, anxiety, school refusal behavior, and the introduction of a medication regimen and the district's pre-referral strategies]). The time period in this case is on the shorter end of the two-to-nine-month range discussed by OSEP and slightly shorter than the time frame within the Mr. P. case that had similar (albeit not identical) facts, and I decline to find that the district was unreasonable and violated child find while it actively engaged in pre-referral strategies and continued to discuss matters with the parent in the evolving circumstances after November 2021 until the parent referred the student in February 2022.

As a final matter, the district asserts that the IHO erred in finding that the district inappropriately shifted the burden to the parent to make the referral. In particular, the IHO focused on a conversation between the district social worker, the district guidance counselor, and the parent in February 2022, just preceding the parents' request for an evaluation on February 14, 2022, wherein the district staff advised the parent to write a letter requesting services (see IHO Decision at pp. 13, 14; see also Tr. pp. 218-19; Parent Ex. P). The district's position that school staff cannot refer a student but, instead, can only recommend and request such a referral to a designee of the school district is technically correct (see 8 NYCRR 200.4[a]), however, this alone would not absolve the district from a potential finding that a school district failed to initiate a referral in a timely manner because the designee and the other staff involved with the student are both agents of the district that holds the responsibility to initiate a referral within a reasonable time.[13] I do not share the IHO's concern with the fact that district staff encouraged the parent to write the referral to the CSE because the parent is among those explicitly listed the State's procedures as an individual who can make the referral (8 NYCRR 200.4[a][1]) because what is important is that the referral occur within a reasonable time, not pointing fingers over who should make the request. Sometimes it is faster as a practical matter if a willing parent makes the referral because of additional delays and procedures that come to bear if a professional staff member requests referral (8 NYCRR 200.4[a][2][iv][b]) and thus, contrary to the IHO's determination, I find the suggestion was good advice to the parent on the part of the school district staff and likely saved time. Accordingly even assuming for the sake of argument that the suggestion was a procedural violation the parent ultimately made the referral at that time and therefore it had no effect upon the initiation of an evaluation of the student to determine the student's eligibility for special education.

[13] Moreover, contrary to the district's contention that the parents did not raise this issue in their amended due process complaint notice, the complaint includes the claim that "the district knew that [the student] may be a student with a disability under the IDEA and failed to make the necessary referral to the [CSE]" (Parent Ex. A at ¶ 30). Accordingly, I now turn to the question of whether the district should have referred the student to the CSE for evaluation prior to the parents' referral in February 2022 and by failing to do so thereby denied the student a FAPE for the 2021-22 school year.

Accordingly, the IHO erred in finding that the district denied the student a FAPE during the 2021-22 school year by failing to satisfy its obligations under child find.

B. May 2022 IEP

The district also appeals the IHO's determination that that the May 2022 IEP was inappropriate because it contemplated the student's return to the district middle school near the end of the school year. The IHO opined that it was "unreasonable" to expect the student, who was suffering from severe anxiety, to transition to the district program from the private school "at such a late date in the school year" (IHO Decision at p. 21).

After the parents' referral of the student on February 14, 2022, on March 1, 2022, a meeting was held comprised of the parents, a school district physician, the director of pupil personnel services, a guidance counselor, the student's private psychiatrist, the school social worker, and a school psychologist (Parent Exs. E at p. 2; K). The team reportedly recommended "exploration of an [i]ntensive [d]ay [t]reatment setting" and decided that until placement could be arranged the student should be placed on home instruction as it was "deemed the safest option" until the CSE meeting was held (Parent Ex. E at p. 2; see Tr. p. 432). The parent testified that the meeting was more about the district's liability than the student and that the school district physician informed the parents that the student was being assigned to remote instruction because the student was a "legal liability" (Tr. pp. 432-33). The student was placed on home instruction due to safety concerns until the CSE meeting could be held (Tr. pp. 274-75, 432-433; Parent Ex. E at p. 2; Dist. Ex. 22 at p. 4). The parents left the meeting without knowing how long the student would be on home instruction and with no plan in place other than waiting for a spot to open at an intensive day treatment program (Tr. pp. 434-435).

In a March 3, 2022 email the parent inquired when remote learning would begin, stating that every day the student was out of school made it more difficult for the student to return, and noting that she had been working with school staff regarding the student's issues since the fall (Parent Ex. I). The parent also inquired as to when she could give consent for a CSE evaluation (id.). On March 4, 2023, the parent sent an email inquiring as to the status of the referral for special education (Tr. pp. 428-431; Parent Ex. H).

In a March 10, 2022 email the parent notified the district that the student had started a trial/evaluation period at Westfield (Parent Ex. G). The parents indicated that they would "like to explore if the district might help subsidize the tuition [at Westfield]," given that a placement in a Board of Cooperative Educational Services (BOCES) program had not been offered, and sought direction as to with whom they should follow up (Tr. pp. 434-35; Parent Ex. G). The parent signed a consent to evaluate the student on March 14, 2022 (Dist. Ex. 18). In addition, on March 14, 2022, a notice was sent to the parent for a March 21, 2022 504 initial determination meeting (Parent Ex. T).

In late April 2022, the district completed psychological and educational evaluations of the student and conducted a classroom observation and a social history (see Dist. Ex. 19-22).

The May 2022 CSE determined that the student was eligible to receive special education services as a student with an emotional disability, and recommended placement of the student in a 12:1 special class in the "Positive Alternative Techniques (PAT)" program within the district

middle school, along with two 30-minute per week of counseling, one session in a group and one individual session (Dist. Ex. 23 at pp. 1-2, 7-8, 10).[14] The IEP noted that the student required "a flexible academic environment" and a "flexible approach to learning" to improve the student's attendance and provide support if the student felt anxious and wanted to avoid class (id. at p. 6). Annual goals focused on the student's ability to identify coping skills to decrease anxiety and to maintain acceptable school behavior, to identify behavioral triggers, and to interact with peers (id. at p. 7). In addition to the special class and counseling services, the IEP recommended that the student be provided constructive breaks, preferential seating, checks ins with the psychologist on an as-needed basis, identification of an alternative space for the student to go for a break, and chunking of information to support the student's working memory challenges (id. at p. 8). In addition, the IEP provided that the student, teacher, and family would develop a transition plan to support the student's return to school, which would be modified on an as needed basis based on the student's progress (id.). The projected start date for the IEP was May 23, 2022 (id. at pp. 1, 7-8).

Specific to the transition back to the middle school, CSE chairperson testified that, due to concerns about the student's return to the school, the CSE recommended development of a transition plan (Tr. p. 135-36).[15] As to the timing of the projected IEP implementation at the end of the school year, the CSE chairperson testified that it would be appropriate and that they "would work to find a smoot transition and plan for [the student]" (Tr. p. 148). Similarly, the district school psychologist testified that the CSE recommended the transition plan because "it's always challenging to reintegrate a student back into school when they've been out for an extended period of time" (Tr. pp. 71-72). The psychologist acknowledged that it was not "ideal" for the student to transition back to the school so late in the school year, but she felt that, with a transition plan in place, the recommendations of the CSE would be appropriate (Tr. pp. 88-89).

State regulations require that "[w]ithin 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]).[16] Simply put, the IHO's

[14] The district school psychologist described that the PAT program consisted of students who, cognitively, were "typically close to average" and, academically, were "on or close to grade level" but who struggled "with some level of disregulation" and needed "additional emotional support during the school day" (Tr. pp. 65-67). She explained that the class followed a dialectical behavior therapy (DBT) model and curriculum and had a devoted school psychologist assigned to it (Tr. pp. 67-68). She described DBT as consisting of four components, "mindfulness, distress tolerance, emotional regulation and interpersonal effectiveness," which provided individuals with skills to tolerate and change their emotions to something more positive and engage in more effective interactions (Tr. p. 68).

[15] Generally, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

[16] The parents have not cross-appealed the IHO's finding that the district processed the parents' February 2022 referral and convened the May 2022 CSE meeting in a timely manner (IHO Decision at pp. 19-21). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y.

failed to recognize that the district was required to put a program in place for the student at the time the CSE developed an IEP for the student, regardless of when during the school year the timeline for developing an initial IEP and putting it into effect for the student matured. The CSE was also required to balance providing appropriate services while doing so in the student's LRE. The 12:1 special class in the PAT program within the district middle school that the student had previously attended would have provided the student with regular access to non-disabled peers in the school that the student would have otherwise attended had the student not been found eligible for special education, whereas options such as home instruction or non-district placements would likely have run afoul of these requirements (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, 489 F.3d at 108; Walczak, 142 F.3d at 132). Moreover, as the district notes, the CSE could not have recommended that the student attend Westfield for the remainder of the 2021-22 school year, as Westfield 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; see also Tr. pp. 102-03). Accordingly, while the IHO may have had legitimate concerns about the student's re-introduction into the district middle school environment, he did not take into account the supports included in the IEP to address the transition or the CSE's options in light of LRE requirements. It is not uncommon for either parents or school districts to be concerned about changes in programming close to the conclusion a school year, but if the parties do not have a mutually agreeable, legally permissible solution, then the best alternative for the district is to offer the programming developed through the collaborative process called for by the CSE (see Mr. P., 885 F.3d at 744, 751 n.9 [discussing the obligation to have an IEP in effect under Connecticut timelines and noting the continuation of a student's home tutoring near the close of a school year]). In this case the student had already been unilaterally placed by the parent at Westfield before the CSE convened and the IEP process was completed, so the effective date of the IEP in May 2022 was ultimately of marginal relevance (Parent Ex. C at p. 1).

In view of the foregoing, the IHO's concern regarding the district staff's suggestion that the parents refer the student, amounted to, at most, a procedural violations that did not rise to the level of a denial of FAPE. Furthermore, the district did not violate the procedures with regard to developing an IEP with an effective date that fell shortly before the conclusion of the school year. Accordingly, the IHO's finding that the district failed to offer the student a FAPE during the 2021-22 school year must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determinations that the district failed to offer the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Westfield was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

Mar. 21, 2013]).

IT IS ORDERED that the IHO's decision dated May 8, 2023 is modified by reversing that portion which found that the district did not offer the student a FAPE for the 2021-22 school year and ordered the district to fund the student's tuition costs at Westfield.

Dated: **Albany, New York**
August 7, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER