The University of the State of New York

The State Education Department
State Review Officer
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No. 23-206

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

Appearances:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice against respondent (the district) regarding the 2022-23 school year with prejudice. 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

Given the limited issues raised on appeal, a full recitation of the student's educational history is not necessary and the parties' familiarity with this matter is presumed, however, due to the nature of the parent's appeal, a detailed recital of the procedural history of the case and the IHO's decision is required. As further described below, the CSE had found the student was no longer eligible for special education and, accordingly, did not convene to develop an IEP for the student for the 2022-23 school year.

The evidence in the hearing record indicates that the Committee on Preschool Special Education (CPSE) convened for an initial meeting to determine the student's eligibility for special education on April 10, 2018 (Dist. Ex. 1). Finding the student eligible for special education as a

preschool student with a disability, the April 2018 CPSE recommended the student receive special education itinerant teacher (SEIT) services for five hours per week and "Speech Therapy 2x30:1:1" in a preschool setting selected by the parent beginning April 24, 2018 (id. at pp. 1, 10, 16). The following year the CSE met on March 25, 2019 and reviewed a social history update and classroom observations and, as noted above, determined that the student "no longer me[t] the eligibility criteria for an educational disability" and "no longer require[d] special education services" and proposed a declassification date of June 30, 2019 (Dist. Exs. 3; 4).

On September 1, 2019, the parent initiated an impartial hearing to challenge the CSE's March 2019 declassification determination and requested independent psychological, speech-language and occupational therapy (OT) evaluations as well as provision of "5 hours of SETSS at school per week" (Dist. Ex. 5). In a partial resolution agreement, executed in September 2019, the parties agreed that the district would conduct psycho-educational, speech and OT evaluations, as well as a social history (Dist. Ex. 6). The parties further agreed that after the evaluations were completed a CSE would convene to "conduct an IEP meeting" (id.).

The parent consented to the student's evaluation and the district conducted a social history evaluation dated November 20, 2019, a psychoeducational evaluation with a report dated November 25, 2019, an OT evaluation with a report dated January 17, 2020, and a speech-language evaluation dated February 5, 2020 (Dist. Exs. 7; 8; 10; 12; 13).[1] The CSE met on March 3, 2020 and, after review of the evaluations and discussion with the members of the CSE, determined that the student was not eligible for special education (Dist. Ex. 11). According to the CSE conference minutes, the CSE was composed of the student's classroom teacher, the parent, a social worker, a school psychologist, and a special education teacher (id. at p. 1). The minutes listed the "school's comments" as follows:

> "It's a pleasure working with [the student]. He is very settled. Academically, 'he is amazing.' Sometimes he doubts himself and she encourages him not to do that. He grasps math concepts 'very quickly.' Penmanship needs some improvement, but that is typical. [The student] wants to be the first to finish assignments. He is very helpful and volunteers. 'Very eager to do everything in class.' Listens carefully and then will answer questions."

(id. at p. 2). The conference minutes listed "parent's comments" as follows: "Initial evaluation was due to social issues. [The student] began acting out due to family issues. This happened when [the student] was two. His issues 'were never academic.' He doesn't listen to his mother at home." (Dist. Ex. 11 at p. 3). The minutes listed "additional comments" as follows: "All evaluations reviewed with parent. OT is strongly recommended for sensory motor issues. However, parent is declining services. Parent does not want [the student] to be 'classified' if 'it's not necessary to classify him'. [The student] is declassified from special education services. Parent was informed that she can request another meeting at any time" (id. at p. 4).

[1] A document dated November 20, 2019 identified as a classroom observation does not include any findings but references the psychoeducational evaluation; however, it does not appear that the psychoeducational evaluation included an observation of the student in his classroom (Dist. Exs. 9; 10).

An undated document titled "present levels of performance and individual needs" identified, among other things, a summary of the evaluations conducted in November 2019 and January and February 2020, set forth above, as well as reports from the March 2020 CSE meeting and stated that "[a]t this time, due to the progress [the student] has made, his needs no longer warrant Special Education Services. Parent is in agreement" (Dist. Ex. 14 at p. 5).

By prior written notice dated March 12, 2020, the district noted that the student was not eligible for special education and explained that at the meeting held in March 2020, the assessments and materials identified were reviewed and discussed and it was determined that the student did not meet the eligibility criteria for an educational disability as defined in Part 200 of State regulations (Dist. Ex. 15).

The parent, through her attorney, filed a due process complaint notice dated September 21, 2022, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year, stating that the last program that the parent agreed with was the program set forth in the student's April 2018 IEP and disputing "any subsequent program [the district] developed that removed and/or reduced the services on the IEP" as well as "any act [the district] may have taken to deactivate or declassify the student from being eligible to receive services" (Parent Ex. A at p. 1). The parent requested pendency, asserted that the district had denied a FAPE to the student by failing to provide special education and related services, and requested an order for "5 sessions per week of special education teacher services at an enhanced rate for the entire 2022-23 school year" along with an award for any related services listed on the IEP (id. at p. 2).

An impartial hearing convened on December 28, 2022 and concluded on August 17, 2023 after 11 days of proceedings (Tr. pp. 1-144). In an interim decision, dated February 8, 2023, the IHO determined that the parties agreed that pendency stemmed from the April 2018 CPSE IEP which provided "Special Education Itinerant Teacher Services (SEITS), 1:1 direct service, 5 hours per week" and "Speech Language Therapy, Direct service, 2x per week for 30-minute sessions" and that the district shall provide those services retroactive to the filing of the September 21, 2022 due process complaint notice (IHO Ex. IV).

On the hearing date held July 10, 2023, the parent did not appear in person or by counsel and the IHO noted that the parent had not submitted a closing brief as anticipated (Tr. pp. 110-13). The IHO stated that the district had submitted a closing brief, and noted that she "would give the parent one more opportunity, a final opportunity to submit a closing brief" (Tr. p. 113; see IHO Ex. I).

On the following hearing date, conducted on July 25, 2023, counsel for the parent appeared and stated with respect to submitting a closing brief that:

> I didn't submit a brief. I wish to withdraw the case. Initially, I said without prejudice, [district counsel] objected to it. And based on the fact that the school year is concluded we can withdraw with prejudice. We have a pendency decision, so. And the school year is over. So we do not wish to proceed with this case any further.

(Tr. p. 119). Counsel for the district objected to the parent's motion to withdraw the due process complaint notice, arguing: "I would like Your Honor to render a findings of fact and decision in this matter. [The district] put on a case . . . We went through a full hearing, not just [the district's] case, but also parent's case . . . your honor should exercise discretion and reject the application" (Tr. pp. 119-20). District counsel further argued that parent's counsel admission that the parent did not want a decision because the parent had already been fully paid out under pendency was "in some ways an abuse of the pendency process" and that the district "has the right to show that it complied with its FAPE obligations" (Tr. pp. 120-21).

The parties and the IHO further discussed the parent's request to withdraw the matter, and the IHO concluded that she wished to see legal briefs from the parties addressing the question before she rendered a determination (Tr. pp. 121-31). Both parties submitted briefs, as the IHO requested, and the impartial hearing drew to a close (see Tr. pp. 132, 142: IHO Exs. II; III).

In a decision dated August 23, 2023, the IHO determined that the district had not failed to offer the student a FAPE for the 2022-23 school year, rather the IHO found the district had correctly determined that the student should not have been classified as a student with a disability during the March 2020 CSE meeting (IHO Decision at pp. 5-6). Additionally, the IHO denied the parent's motion to withdraw the matter, finding that the parties had had an opportunity to brief the issue, both parties had put on evidence and rested their case prior to the parent's request to withdraw the matter rendering the parent's request "late" (id.). The IHO found the parent's failure to appear in person at the impartial hearing significant and noted that there was no evidence in the hearing record to demonstrate a contract and legal obligation between the parent and the private agency that provided services to the student (id. at p. 6). Accordingly, the IHO determined that it was not possible to find a financial obligation for the services delivered in order to support an equitable award of reimbursement or funding (id.). The IHO denied the parent's request for "enhanced rate services" for the 2022-23 school year and dismissed the September 2022 due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals, contending that the IHO erred in failing to allow the parent to withdraw the due process complaint notice with prejudice and requests an order dismissing the due process complaint notice. In the event that the SRO does not rule that the due process complaint notice is withdrawn, the parent requests a finding on the merits that the district failed to offer the student a FAPE and that the student requires the services the parent obtained unilaterally. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in denying the parent's request to withdraw the September 2022 due process complaint notice with prejudice and rendering a final decision on the merits in this matter.

2. Whether the IHO erred in determining that the district correctly declassified the student in March 2020 or erred in failing to find a child find violation by the district.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[2]

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).

[2] 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).

VI. Discussion

A. Withdrawal

In the interests of judicial economy, I will briefly address the parent's claim that the IHO erred in failing to grant the parent's request to withdraw the due process complaint notice with prejudice. The parent generally contends that she had the sole right to withdraw the matter at any point in the hearing prior to the issuance of a decision by the IHO. The district counters that annulment of the IHO decision after a full hearing on the merits would deny the district its due process right to a full hearing on the merits. The district further contends that this matter is akin to cases decided using a mootness analysis—in particular, the capable of repetition yet evading review exception—as the parent has repeated the same claim in multiple due process complaint notices and has avoided having the claim heard by withdrawing it prior to completion of the hearing so that she may refile and continue having the student receive pendency services pursuant to a five-year old CPSE IEP.

Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]).[3] Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding" (8 NYCRR 200.5[j][6][iv]).

Here, the parties had both entered evidence in the hearing record regarding the burdens of proof each party held in relation to the parent's claim that the district failed to offer the student a FAPE, the appropriateness of the parent's unilaterally obtained services, and equitable considerations (Tr. pp. 1-144; Parent Exs. A-B; Dist. Exs. 1-15). As noted above, the parent first requested withdrawal of the proceeding at the July 25, 2023 hearing date, after the district had submitted its closing brief (Tr. p. 119). In briefing the issue of the parent's request for withdrawal, the parent asserted that the IHO had no discretion to deny her request to withdraw the due process complaint notice with prejudice, while the district contended that it had a right to a decision that could show that it had offered an appropriate education to the student and had not erred in finding the student ineligible for special education (IHO Exs. II; III). Although the district's position regarding withdrawal is somewhat understandable, the practical effect of a decision on the merits

[3] If a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to hear the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

in favor of the district or a dismissal of the parent's due process complaint notice with prejudice is the same. "'Dismissal with prejudice 'operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation' of them'" (N.S. v. Dist. of Columbia , 272 F. Supp. 3d 192, 200 [D.C. Cir. 2017], citing Belizan v. Hershon, 434 F.3d 579, 583 [D.C. Cir. 2006]).

Although the parent is correct in that the IHO should have accepted the parent's withdrawal of this matter with prejudice, in light of the above, the IHO's denial of the parent's request to withdraw the matter and issuance of a decision against the parent on the merits has resulted in the same conclusion as a practical matter that would have been reached if the parent's request for a withdrawal with prejudice had resulted in an order of termination with prejudice, thus the error is harmless. Accordingly, now that the parties already have the IHO's thoughts on the matter, I will leave the IHO's decision dated August 23, 2023 undisturbed as an alternative finding for the dismissal of the parent's claims for the 2022-23 school year and the parent's due process complaint notice is dismissed with prejudice.[4]

Although this matter is dismissed with prejudice due to the parent's withdrawal, the parties' positions and the repeating nature of the proceedings brought on behalf of the student over the past few years warrant further discussion. The parent asserts that impartial hearing requests were filed for the 2020-21 and 2021-22 school years requesting that the student receive the services set out in the April 2018 IEP and that each year the student received "5 hours a week of SEIT" services under pendency rulings made in those impartial hearings (Req. for Rev. ¶ 5). Pursuant to State regulation (8 NYCRR 279.10[b]), the undersigned requested additional information with respect to the filing and disposition of prior due process proceedings concerning the student as well as the 2020-21 and 2021-22 school years by letter to the district dated October 19, 2023. In response to the request from the undersigned, the district submitted eight documents consisting of copies of various due process complaint notices, pendency agreements and orders, and orders of termination or evidence of case withdrawals in matters relating to the student which are marked for identification and cited as "SRO Exs. A-H."[5] In particular, in the parent's September 2022 due

[4] It is worth noting that the IHO's findings as to equitable considerations serve as an additional alternative ground for dismissing the parent's due process complaint notice in this proceeding. Neither the parent nor the district specifically challenged the IHO's equitable consideration determination that there was no evidence in the hearing record to demonstrate a contract and legal obligation between the parent and the private agency that provided services to the student sufficient to find a financial obligation for the services delivered to support a reimbursement or funding order.

[5] The district's submission consisted of a cover letter identifying the documents submitted and included assertions as to what the "impartial hearing database" contained regarding disposition of the relevant matters (SRO Ex. A). With respect to IHO Case No. 185974, the hearing record contains a due process complaint notice dated September 1, 2019 (Dist. Ex. 5), and the district submitted an order on pendency dated October 25, 2019 (SRO Ex. H) and noted that the impartial hearing database reflects that the case was withdrawn without prejudice on July 6, 2020 (see Dist. Ex. 5; SRO Exs. A; H). With respect to IHO Case No. 205622, the district submitted a due process complaint notice dated January 9, 2021 (SRO Ex. B) and a pendency agreement dated January 9, 2021 (SRO Ex. F) and noted that the impartial hearing database reflects that the case was withdrawn without prejudice on November 22, 2021 (see SRO Exs. A; B; F). With respect to IHO Case No. 212051, the district submitted a due process complaint notice dated August 30, 2021 (SRO Ex. C), a pendency agreement dated August 30, 2021 (SRO Ex. G), and a termination order effecting a withdrawal without prejudice by the parent dated July 14, 2022 (SRO. Ex. E). With respect to IHO Case No. 253538 the district submitted a due process complaint notice dated August 31, 2023 (SRO Ex. D) and noted that the impartial hearing database reflects that

process complaint notice, the parent indicated that the April 2018 CPSE IEP was the last IEP that she agreed with and she objected to "any subsequent program the [district] developed that removed and/or reduced the services on the IEP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (Parent Ex. A at p. 1). Accordingly, the dismissal of the due process complaint notice with prejudice means that the parent can no longer object to any action taken by the district up to the date of the September 2022 due process complaint notice to declassify the student and as of that date the student was not eligible for special education (see N.S., 272 F. Supp. 3d at 200).

Additionally, looking back at the parent's prior due process complaint notices, filed in January 2021 and August 2021, the parent raised similar claims regarding the student's declassification; however, both were withdrawn by the parent prior to the September 2022 due process complaint notice that initiated the present appeal (SRO Exs. B; C; Parent Ex. A; see SRO Ex. A). Thus, although there were challenges to the March 2019 CSE's declassification and the March 2020 CSE's ineligibility finding in prior matters concerning the student, none of those challenges reached a settlement or decision overturning the ineligibility finding (Dist. Exs. 3-4; 14-15; Parent Ex. A; SRO Exs. A; B; C). Moreover, the parent's first challenge to the declassification of the student by CSE on March 25, 2019, effective June 30, 2019 was withdrawn by the parent on July 6, 2020 after a partial resolution agreement to evaluate the student according to the hearing records maintained by the district (Dist. Exs. 5; 6; SRO Ex. A). The March 2019 determination of ineligibility by the CSE was not further challenged in another subsequently filed due process proceeding and now stands as such (SRO Exs. B, C, D).

Accordingly, at the time of the filing of the September 2022 due process complaint notice initiating the present matter the student was not eligible for special education services as a student with a disability or a student suspected of having a disability and the parent had no due process hearing right to claim that the district failed to provide special education services during the 2022-23 school year because of his prior eligibility for services during the 2018-19 school year without a proper challenge to the declassification of the student. Moreover, the March 2019 ineligibility finding went undisturbed for years at the time of filing of the September 2022 due process complaint notice, which raises the suspicion that the claim is now outside of the applicable limitations period or is subject of a defense of laches (Parent Ex. A; Dist. Exs. 3-4).[6]

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the case was ongoing (see SRO Exs. A; D). All three of the pendency orders/agreements submitted by the district concerning the student as well as the pendency order issued in the present matter reflect that the parent obtained pendency for the student from the district consistent with the April 2018 IEP (see IHO Ex. IV; SRO Exs. F-H).

[6] The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA

Here the student was declassified in March 2019 (Dist. Exs. 3-4), found ineligible for special education a second time in March 2020 (Dist. Exs. 14-15), and has no determination from a due process proceeding that the student was erroneously found ineligible, which leads to the conclusion that as of the September 2022 due process complaint notice the student was not eligible for special education. Additionally, because as the student has not been eligible for special education and the parent can no longer challenge the student's declassification due to the dismissal of this proceeding with prejudice, the only way for the student to be found eligible for special education—including the protections of pendency as part of a due process proceeding—is for the student to be referred for an initial evaluation due to new circumstances.[7]

However, it appears that the parent, notwithstanding the student's ineligibility for special education, has been obtaining special education services for the student at district expense under pendency orders and agreements during the 2020-21, 2021-22, and 2022-23 school years and the district is raising the concern of permitting the parent to continue the pattern by withdrawing this matter with prejudice for the first time in this proceeding and therefore sought a determination on the merits in lieu of a termination order. For example, in the district's closing brief, the district asserted that during "future proceedings, the [p]arent will likely continue to benefit from the same pendency program as in this case, again substantially mitigating their exposure to risk, with the [district] has to present the same case, despite having put forth a good faith effort to do so in this case" (IHO Ex. III at pp. 4-5). The district further noted that this matter was the third proceeding in which the parents have received pendency services for a school year prior to withdrawing their due process complaint notice, thus, according to the district, the parent has been "abusing" due process (id.at p. 5). Upon review of the additional evidence submitted, it appears the parent is attempting to take advantage of the same procedural irregularity that has plagued these proceedings going forward, as the parent filed another due process complaint notice dated August 31, 2023 (SRO Ex. D). In the August 2023 due process complaint notice, the parent uses the same language challenging any subsequent programs or actions taken to declassify the student; however, the parent references a May 9, 2022 IESP, which although it predates the September 2022 due process complaint notice was not a part of the hearing record in this matter nor referenced in the September 2022 due process complaint in this proceeding (id. at p. 1; see Parent Ex. A at p. 1). The parent

(Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]). Exceptions to the timeline to request an impartial hearing apply if a parent was 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

[7] 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]). 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]).

again asserts in the September 2023 due process complaint that the student, who was declassified in March 2019, is eligible for pendency services (SRO Ex. D at p. 2). At this juncture, there is no indication as to a pendency agreement for the August 2023 due process complaint notice; however, if the student has not been found eligible for special education by the CSE subsequent to the initiation of this proceeding, the student should not be permitted to continue to receive pendency services if no one has determined the student is eligible for special education after the March 2019 CSE meeting.

B. Child Find

To the extent that the parent challenges the IHO's award on the merits, as discussed above, the parent withdrew any claims she had with prejudice. Nevertheless, even if the issues were properly before me, the parent does not present a viable challenge to the IHO's determination that the student was not eligible for special education. The parent contends that she has challenged the district's declassification of the student and the March 2020 ineligibility determination for every school year since the 2020-21 school year. However instead of bringing a specific challenge to the IHO's determination that the March 2020 ineligibility determination was proper, the parent asserts that the district "has done nothing in over 3 years to review the child and determine what services would be appropriate," further asserting that the parent's challenges to the ineligibility determination should have triggered the district's child-find obligations. According to the parent, the district should have evaluated the student given the parent's multiple due process claims arguing that the student required special education prior to the present matter.

As an initial matter, the district correctly points out that the parent did not raise this claim in the September 2022 due process complaint notice and only invoked a child find argument at the impartial hearing over the district's objection (see Parent Ex. A; Tr. pp. 33, 35). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; [i][7][i][a]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]).

Accordingly, any argument on appeal asserting a child find violation by the district has not been properly raised. Nevertheless, in an abundance of caution, I will briefly address the issue.

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]).

Here the district has complied with its obligations under the child find provisions of the IDEA and State law. This is not a student who was not "found" or identified as potentially eligible, rather the student was evaluated multiple times by the district which determined in due course that the student did not require special education (see Dist. Exs. 1; 2; 4; 7; 8-15). The parent's multiple due process complaint notices and subsequent withdrawals do not constitute grounds to find that school officials overlooked clear signs of disability or were negligent in failing to order testing. The student attended private school during the time period from the March 2020 CSE determination that the student was not eligible for special education to the present and there is no allegation from the parent that she initiated a written referral of the student to the district for an initial evaluation at any time.

VII. Conclusion

In accordance with the forgoing, the IHO should have terminated the proceeding with prejudice, but the parties were given the opportunity to present their respective cases and therefore the error was harmless and the IHO's findings on the merits may be viewed as an alternative basis for dismissing the proceeding. Having determined that a withdrawal with prejudice as well as the IHO's dismissal of the parent's claim with prejudice should have the same effect of leaving a challenged district determination that the student is ineligible for special education intact going forward and further finding that the evidence in the hearing record supports the IHO's determination that the district did not deny the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the parent's unilaterally obtained services were appropriate.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 3, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER