The University of the State of New York

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

No. 19-055

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Barger & Gaines, attorneys for petitioners, by Giulia Frasca, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Chrystal O'Connor, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the parents' claims were barred by the IDEA's statute of limitations and dismissed their due process complaint notice. 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 student has been found eligible for special education and related services as a student with an emotional disturbance, and there is some evidence that he began receiving special education services in the second grade and was offered IEPs and attended public schools in the district before he began attending Waypoint Academy during the 2013-14 school year (ninth grade) through summer 2014 (early tenth grade), which is a therapeutic residential school in Utah (see Tr. pp. 81, 91-92; Dist. Ex. 3 at p. 2; Parent Ex. I at p. 1, V at pp. 6-7, 11; GG). In September 2014, the parents placed the student at the Dublin School (Dublin), a nonpublic residential school in New Hampshire, where he attended school for the 2014-15 and 2015-16 school years (Parent Exs. GG; V at p.10; M). The student has been the subject of a prior administrative hearing that

concerned the 2014-15 and 2015-16 school years (Parent Ex. V at p. 5). According to the IHO's decision in that proceeding, the parents had alleged in a due process complaint notice dated September 29, 2015 that the district denied the student a free appropriate public education (FAPE) for the 2014-15 and 2015-16 school years (id. at p. 16; Parent Ex. FF at p.15). The prior administrative hearing began on November 12, 2015 and concluded on December 14, 2016 after ten non-consecutive hearing days (Parent Ex. V at p. 1). During the prior hearing, the district conceded that it failed to offer the student a FAPE for the 2014-15 and 2015-16 school years, and further argued that the parent's unilateral placements of the student at Waypoint and Dublin were not appropriate (id. at p. 5). In a decision dated January 20, 2017, the IHO in the prior matter awarded the parent tuition reimbursement for the student's attendance at Waypoint from July 2014 through August 18, 2014 and for the student's enrollment at Dublin, for the 2014-15 and 2015-16 school years (id. at p. 14). Neither party appealed the decision of the IHO in the previous administrative hearing.

While the prior administrative hearing was pending, a meeting notice from the district dated April 18, 2016 invited the parents to attend an April 25, 2016 CSE meeting to "[r]eview the results of the initial evaluation, determine your child's eligibility for special education services and develop" an IEP (Parent Ex. KK-1 at p. 1).[1] For reasons unclear, the April 25, 2016 CSE meeting was not held and, thereafter, correspondence in May 2016 indicated that the CSE social worker requested progress reports from Dublin, which the parent thereafter provided (Parent Exs. KK-4-KK-6). The CSE convened on May 31, 2016 and developed an IEP with an implementation date of July 1, 2016 (Parent Ex. I at pp. 1, 8, 11). The student and his mother attended the May 31, 2016 CSE meeting (Parent Exs. I at 12; KK-2 at p. 1; see Tr. p. 32).

The May 2016 CSE continued to find the student eligible for special education and related services (Parent Ex. I at p. 1).[2] The May 2016 CSE recommended the student attend a 15:1 special class for all subjects for 35 periods per week, individual counseling two times per week for 45-minute sessions in a separate location, and group (4:1) counseling two times per week for 45-minute sessions in a separate location (id. at p. 8). Although the May 2016 IEP reflected an implementation date of July 1, 2016, the IEP also indicated that the student was not eligible for 12-month services (Parent Ex. I at pp. 1, 8, 11). The May 2016 CSE further recommended a coordinated set of transition activities, testing accommodations, postsecondary goals, annual goals in the areas of reading comprehension, organization, study program, [time] management, and placement in a State-approved nonpublic residential school (Parent Ex. I at pp. 4-7, 8, 9, 10). On June 24, 2016, the student's mother executed a contract for the student's attendance at Dublin for the 2016-17 school year (Parent Ex. J). By letter dated July 21, 2016, the district notified the student's mother that the student's "case" had been "sent" to the Central Based Support Team (CBST) to place the student in an appropriate school (Parent Ex. KK-7). The hearing record also includes one of 18 pages from the district's computerized Special Education Student Information

[1] Parent Ex. KK consists of the parents' brief in response to the district's motion to dismiss (Parent Ex. KK at pp. 1-20), an exhibit list (unnumbered), and includes ten additional exhibits (Parent Exs. KK-1-KK-10).

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

System (SESIS) (Parent Ex. KK-8).[3] According to the parent, the student stayed home and attended a teen travel tour "hiking in the west somewhere" for which he received college credit during summer 2016, and the student returned to Dublin for the 2016-17 school year beginning in September 2016 (see Tr. pp. 52-53; Parent Exs. G, L, O).

A. Due Process Complaint Notice

By due process complaint notice dated August 24, 2018, the parents alleged that the district: (1) failed to provide notice of an IEP meeting for the 2016-17 school year; (2) failed to offer a "viable placement option for the period July 1, 2016 through June 30, 2017, and gave [the parents] no indication that it planned to convene a CSE meeting or to propose a program"; and (3) failed to propose any placement for the student for the 2016-17 school year (Parent Ex. FF at pp. 15-16). The parents assert that as a result they continued the student's enrollment at Dublin (id. at p. 16). The parents argued that Dublin was appropriate and that the student made progress there (id. at 16-18). With regard to equitable considerations, the parents asserted that the district was "on notice" of the student's placement at Dublin (id. at p. 16). For relief, the parents sought reimbursement from the district for all costs associated with the unilateral placement of the student at Dublin for the 2016-17, school year "beginning and for so long as that program remained appropriate" including the 12-month portion during summer 2016 (id. at pp. 18-19).

B. Impartial Hearing Officer Decision

An IHO was appointed to hear the matter on August 24, 2018, and after settlement negotiations were unsuccessful, the hearing was scheduled to begin on January 31, 2019 (IHO Decision at p. 1; see IHO Ex. I). By email dated January 28, 2019, the district raised the issue of the IDEA's two-year statute of limitations for the first time (IHO Decision at p. 2; see IHO Ex. II). The hearing convened on January 31, 2019, and the district presented a motion to dismiss the parents' due process complaint notice for failing to file within the two-year statute of limitations period (IHO Decision at pp. 2-3; see Tr. pp. 8-13). The parents objected to the district's motion to dismiss as untimely (IHO Decision at pp. 2-3; see Tr. p. 13). The hearing proceeded with the parties presenting evidence and testimony from the student and his father (IHO Decision at p. 2; see Tr. pp. 17-20, 25, 28, 31-43, 44-54). The January 31, 2019 hearing date concluded with the IHO granting the parents time to respond to the district's motion to dismiss and to obtain an affidavit from the student's mother (IHO Decision at p. 2; see Tr. pp. 54-55).

On March 20, 2019, the parents submitted their response to the district's motion to dismiss and an affidavit from the student's mother (IHO Decision at p. 2; see Parent Exs. KK, KK-2). The hearing was reconvened on May 8, 2019, to permit the district to cross-examine the student's mother regarding her affidavit (IHO Decision at p. 2; see Tr. pp. 63-92).

By decision dated May 15, 2019, the IHO granted the district's motion to dismiss finding that the parents' claims related to the 2016-17 school year were barred by the two-year statute of

[3] The page from the SESIS log includes entries from May 27, 2016, indicating the status of "documents related to" the student's IEP were changed from "draft" to "final," through October 9, 2017, when the student was "discharged" from special education due to his graduation from high school in June 2017 (Parent Ex. KK-8).

limitations (IHO Decision at pp. 9-10). The IHO noted that the district's motion to dismiss was not timely made,[4] but ultimately found that no timeline applied to a motion to dismiss on statute of limitations grounds (id. at p. 9). The IHO additionally found that the district's delay in filing its motion had no impact on the student, who was currently attending college, and had no impact on the parents' claims being time-barred (id.). The IHO determined that the parents' claims accrued on July 1, 2016—the implementation date of the May 31, 2016 IEP—holding that the parents knew or should have known on July 1, 2016 that the district failed to offer a placement for the July 1, 2016-June 30, 2017 school year (id. at pp. 8-9).

The IHO further determined that neither of the two exceptions to the statute of limitations applied to the parents' claims (IHO Decision at pp. 7-8). With regard to the first exception, the IHO found that there was no evidence that the district ever informed the parents that it actually found an appropriate placement for the student or provided a final notice of recommendation, and further that the student's mother testified that no one from the district ever informed her that it agreed to pay the student's tuition at Dublin; therefore the district did not specifically misrepresent that it had resolved the problem forming the basis of the parents' complaint (id. at p. 7). As to the second exception, the IHO found that the district sent the May 31, 2016 IEP to the student's mother before the July 1, 2016 implementation date, and further found that the mother received a copy from her attorney during the summer of 2017, a full year before the filing of the parents' due process complaint notice (id. at p. 8). The IHO also determined that the delay in filing was not caused by the district's withholding of information, but rather as the student's mother testified, the delay was related to personal family reasons (id. at p. 8).

IV. Appeal for State-Level Review

The parents appeal the IHO's determination that their claims related to the 2016-17 school year were barred by the IDEA's two-year statute of limitations. The parents allege that the IHO incorrectly permitted the district to bring an untimely motion to dismiss on the first day of the impartial hearing. Specifically, the parents argue that the district waived its right to raise any affirmative defenses, including the statute of limitations defense, because the district's motion to dismiss was untimely and the district failed to provide a response to the parents' due process complaint notice and "dispute" the parents' due process complaint notice. Additionally, the parents contend that the district did not demonstrate at the hearing that the parents had received prior written notice or a procedural safeguards notice. The parents further allege that they never received prior written notice or a procedural safeguards notice from the district.

With regard to the district's motion to dismiss, the parents argue that as a result of the district's failure to timely raise any affirmative defenses, there were no issues related to the statute of limitations pending before the IHO on the first day of the impartial hearing and therefore the IHO erred by allowing the district to bring its motion to dismiss. The parents also contend that the IHO did not consider that the student's rights were continuously violated by the district's failure to

[4] It unclear why the IHO stated the motion was untimely, while also concluding that there is no timeline for asserting a statute of limitations, but I find it is permissible for an IHO, in the context of managing a particular hearing, to affirmatively direct a particular timeline for filing a dispositive motion based on a statute of limitations defense as it may obviate the need to proceed further into the evidentiary hearing, at least on claims that are stale. It would be up to the discretion of the IHO to address a parties' noncompliance with such a timeline directive.

implement the 2016-17 IEP, and as a result, the parents' implementation claim was timely. The parents next argue that the IHO failed to consider case law holding that a student whose IDEA rights have been violated for more than two years is entitled to a remedy for the entire "period of deprivation," no matter how many years the student's rights were violated provided that the claim for relief was timely brought.

With regard to accrual, the parents contend that the IHO erred by determining that the May 2016 IEP mandated 12-month services, disregarded the parties' agreement that the student was recommended to receive 10-month services, and improperly relied on the student's IEP for the 2014-15 school year in finding the student was recommended to receive 12-month services. The parents allege that their claims did not accrue until the district failed to offer a placement by September 1, 2016, as the student was recommended to receive 10-month services. The parents also argue that the IHO failed to consider that conflicting information contained in the May 2016 IEP raised questions of fact, that the IHO ignored significant questions of fact regarding when the parents knew or should have known of the district's IDEA violation, and further that the IHO should have held a hearing to determine the date when the parents knew or should have known of the district's IDEA violation. The parents next argue that the district failed to provide prior written notice or a procedural safeguards notice to the parents for the 2016-17 school year, and that such a failure automatically tolled the statute of limitations.

The parents next contend that the IHO exhibited bias toward them and failed to properly conduct the impartial hearing in a manner that comports with due process. The parents specifically allege that the IHO demonstrated bias by failing to consider their evidence, accepting the district's "self-serving" and "irrelevant" evidence, holding the student's mother to a higher standard because she is an attorney, excluding the 2012-13 IEP offered by the parents as irrelevant but admitting the 2013-14 IEP offered by the district which was also irrelevant for the same reasons, and by declining to consider the parents' motion for a default judgment based on the district's failure to submit a response to the parents' due process complaint notice. The parents further argue that the IHO's decision was arbitrary and capricious, not in accordance with the law, not fair and impartial based on the hearing record, and that dismissal of the due process complaint notice was inequitable and contrary to the IDEA.

For relief, the parents request that the IHO's decision be reversed and that the matter be remanded to a different IHO for a decision on the merits. In the alternative, the parents request that an SRO find that the parents' due process complaint notice was timely filed, consider the parents' motion for default judgment since the district failed to submit a response to the due process complaint notice, determine that the student was denied a FAPE for the 2016-17 school year, find the parents' unilateral placement at Dublin was appropriate, and award tuition reimbursement for the cost of the student's attendance at Dublin for the 2016-17 school year.

In an answer, the district responds to the parents' allegations with admissions and denials and argues that the IHO's decision should be upheld. The district further argues that the IHO correctly dismissed the parents' motion for default judgment, and properly allowed the district to proceed with its motion to dismiss the parents' due process complaint notice. The district contends that it was not required to raise the statute of limitations as an affirmative defense in a 15-day challenge to the sufficiency of the parents' due process complaint notice, and that the IHO stated

that the district could make statute of limitations arguments at the impartial hearing. The district further argues that its failure to adequately respond to the parents' due process complaint notice did not affect the student's substantive rights and that the parents were notified of the district's intention to raise the statute of limitations as a defense prior to the date of the impartial hearing and were given adequate time to respond.

Next the district argues that to the extent the parents have alleged claims not raised in the due process complaint notice, such claims are not proper and should not be considered. Specifically, the district contends that the parents' due process complaint notice primarily alleges that they did not receive notice of the CSE meeting held to develop the student's 2016-17 IEP and that the district failed to offer a placement for the 12-month 2016-17 school year. The district states that it is unclear whether, on appeal, the parents now make additional FAPE claims in the request for review and memorandum of law or if their arguments relating to "[prior written notice, procedural safeguards notice,] and IEP (sometimes referred to as 'multiple procedural violations') are exclusively within the context of the SOL argument." The district contends that to the extent that they constitute additional claims that the district failed to offer the student a FAPE, they are outside the scope of the due process compliant notice and should not be considered by the undersigned.

In response to the parents' arguments relative to claim accrual, the district alleges that: (1) the parents' claims regarding notice of the CSE meeting and any participation claims accrued no later than May 31, 2016; and (2) the parents' claim that the district failed to offer a placement for the 12-month 2016-17 school year accrued no later than July 1, 2016.

The district further argues that neither the specific misrepresentation or withholding information exceptions to the two-year statute of limitations apply in this matter. As to the first, the district asserts that the parents did not allege any specific misrepresentations made by the district, and regarding the second exception, the district contends that even if it failed to provide a procedural safeguards notice to the parents, they were not prevented from requesting an impartial hearing. According to the district, the parents did not allege that they were unaware of their rights, rather the parents participated in the May 2016 CSE meeting, exercised their due process right against the district for "at least the three previous school years," and notified the district of the student's unilateral placement at Dublin as evidence of their familiarity with their due process rights. In addition, the district contends that the parents alleged in their due process complaint notice that the student required 12-month services but changed their argument to allege the student was recommended to receive 10-month services after the district filed its motion to dismiss on the basis of statute of limitations. The district asserts that the parents' arguments are further undermined by the testimony of the student's mother wherein she averred that: (1) the reason for the delay in filing the due process complaint notice was "somewhat personal" in nature; and (2) she believed that the statute of limitations had not run and there was time to let these "other matters resolve" prior to requesting an impartial hearing.

Lastly, the district contends that the IHO exercised sound discretion and properly conducted the impartial hearing, and that the IHO's decision should be affirmed.

In a reply, the parents reallege the claims raised in their request for review, assert new arguments related to those claims, allege for the first time that the IHO failed to address pendency, challenge the district's statement of background and material facts set forth in its answer, and respond to the defenses asserted by the district in its answer (Reply at pp. 1-10).

V. Applicable Standards

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (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 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[5] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred 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]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

As an initial matter, I note that the parents appear to misapprehend the limited purposes of a reply in a State-level proceeding content of the reply fails to comply with State regulations. State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). In this case, I note that the district's answer does not interpose a cross-appeal or set forth any procedural defenses to the State-level review proceeding (e.g. a defense that the State-level appeal should be rejected as untimely or that it was not properly served upon the district)., rather the district counters the claims and arguments asserted by the parents in their request for review and further argues that the IHO's decision should be affirmed. To the extent that the reply rehashes the issues that were the subject of the request

[5] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

for review or raise new issues such as the student's pendency placement for the first time on appeal, it exceeds the scope of a permissible reply and will not be considered.

2. IHO Bias and Conduct of Hearing

The parents allege that the IHO demonstrated bias by not considering their evidence, accepting the district's "self-serving" evidence, holding the parents to a higher standard because the student's mother was an attorney, excluding the 2012-13 IEP offered by the parents and admitting the 2013-14 IEP offered by the district, and by declining to consider the parents' motion for a default judgment based on the district's failure to submit a response to the parents' due process complaint notice. The parents further argue that the IHO's decision on a statute of limitations basis was arbitrary and capricious, not in accordance with the law, not fair and impartial based on the hearing record, and that dismissal of the due process complaint notice was inequitable and contrary to the IDEA.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

On review, the hearing record does not support a finding that the IHO demonstrated bias. The hearing record suggests that the IHO generally exhibited patience in conducting the hearing and interacting with the parties, allowed the parents adequate time to respond to the district's motion to dismiss and to present witnesses on the issue of the statute of limitations (see Tr. pp. 1-94). The parents' disagreement with the conclusions reached by the IHO does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on

extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Further, the IHO's rulings fell within her broad discretion (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *7-*8 [S.D.N.Y. Mar. 30, 2017]). As discussed further below, I reach a different conclusion in this matter, based on a single oversight on the part of the IHO. However, my decision to disagree with the IHO's ruling, while significant to the outcome of the statute of limitations analysis, is a narrow one. Nevertheless, this error hardly rises to the level of establishing bias by the IHO, and the parents' arguments to the contrary are without merit.

Additionally, the IHO was not remiss in failing to enter a "default judgment" due to the lack of a response to the due process complaint notice. When a district receives a due process complaint notice from a parent, it

> shall, within 10 days of receiving the complaint, send to the parent a response that shall include:
>
> > (a) an explanation of why the school district proposed or refused to take the action raised in the complaint;
> >
> > (b) a description of other options that the committee on special education considered and the reasons why those options were rejected;
> >
> > (c) a description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action; and
> >
> > (d) a description of the factors that are relevant to the school district's proposal or refusal

(8 NYCRR 200.5[a]; see 34 CFR 300.508[e]). A response to a due process complaint notice is "qualitatively different than a federal or state court pleading" and does not require affirmative defenses or specific denials of the allegations contained in the due process complaint (see R.B. v. Dep't of Educ., 2011 WL 4375694, at *5-*6 [S.D.N.Y. Sept. 16, 2011]). Furthermore, a response by the district is only required "[i]f the school district has not sent a prior written notice" which has essentially the same information as a school district's due process response (8 NYCRR 200.5[a]; see 34 CFR 300.508[e]).[6]

[6] I note that the parents did not specifically assert the lack of a prior written notice among their claims in their due process complaint notice, and only allege a lack of notice of the CSE meeting, a meeting in which the student's mother ultimately participated (see Parent Exs. I at p.12; FF at p. 15). Notwithstanding that point, the parents are, for purposes of the merits of their claims, entitled to the information in a prior written notice and/or a response to a due process complaint notice. At this juncture, I do not see how the information required in such a document would be particularly relevant to a claim that the school district simply failed to implement a student's IEP and thereby denied the student a FAPE, but that does not mean that the district should not produce it to the parent.

The IHO also did not err in failing to grant default judgement against the district or act with bias in that regard. Subject to certain limited exceptions, not applicable to the arguments proffered by the parent in this case, a decision made by an impartial hearing officer "shall be made on substantive grounds based on a determination of whether the student received a free appropriate public education" (8 NYCRR 200.5[j][4][i] see 20 U.S.C. § 1415[f][3][E][i]; 34 CFR 300.513[a][1]).

One court has explained how a case might differ if there was an evidentiary basis upon which substantive findings could be made. In rejecting an argument that a hearing officer should have granted a default judgment in an IDEA due process proceeding due to the lack of a due process response by the district, a court explained that a directed verdict would be more appropriate because at that point there would be an "evidentiary foundation" for the ruling (Jones v. D.C., 2018 WL 7286022, at *22 [D.D.C. Sept. 5, 2018], report and recommendation adopted, 2019 WL 532671 [D.D.C. Feb. 11, 2019]; citing Suggs v. Dist. of Columbia, 679 F. Supp. 2d 43, 54 [D.D.C. 2010] [discussing plaintiff's challenge to hearing officer's refusal to enter default judgment where District failed to file an answer to administrative complaint]; Jalloh ex rel. R.H. v. Dist. of Columbia, 535 F. Supp. 2d 13, 19–20 [D.D.C. 2008] [affirming hearing officer's denial of motion for default judgment where District failed to respond to two arguments raised in due process complaint and included insufficient detail in response to other arguments]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 266–67 [D.D.C. 2007]). One of the purposes of an IDEA due process proceeding is to craft appropriate relief that is tailored to a student's special education needs and, for that, a meaningful evidentiary hearing is necessary. A default judgment in this case due to a failure to provide a response to the parents' due process complaint would not be appropriate. Once again, none of the IHO's actions suggest that she was bias against the parents.

B. Motion to Dismiss

Turning to the parents' argument that the IHO erred in allowing the district to proceed with a motion to dismiss on the ground of statute of limitations because the motion was untimely, I find there is no reason to disturb the IHO's determination to accept the motion to dismiss. To the extent that the parents argue that such a motion should have been brought within 15 days of the filing of the due process complaint notice, the IHO was correct in holding that the district's motion was not a sufficiency challenge and, the essence of her holding, which was that a motion to dismiss on statute of limitations grounds is not waived because the IDEA itself does not specify a timeframe within an impartial hearing within which a statute of limitations defense must be raised.[7]

[7] The Court in R.B also dispensed with any notion that a sufficiency challenge within the first 15 days of a proceeding and a statute of limitations defense were one and the same, holding that the statute of limitations defense was not waived and describing the sufficiency challenge provision as "inapposite" to the issue (R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 n.6). A sufficiency challenge addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA. The IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not

C. Statute of Limitations

The parents allege that the IHO erred by finding that their claims for the 2016-17 school year were barred by the IDEA's two-year statute of limitations and for determining that no exceptions to the limitations period applied (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]).

Turning first to the issue of accrual, in determining the accrual dates that applied to the parents' claims, the IHO relied on two documents in evidence to establish that the student was a 12-month student. The student's IEP for the 2013-14 school year recommended 12-month services and the IHO in the prior administrative hearing awarded tuition reimbursement for the summer program at Waypoint in 2014 further establishing the student as a 12-month student in summer 2014 (IHO Decision at p. 9; see Parent Ex. V; Dist. Ex. 3). The IHO then noted that there was no documentation that the CSE had changed the student's status from a "twelve month student to a ten month student" (IHO Decision at p. 9). On that basis, the IHO determined that when the May 31, 2016 IEP was not implemented on July 1, 2016, the parents knew or should have known that the district had failed to offer a placement for the 2016-17 school year (id.).

The hearing record reflects that the student and his mother attended the May 31, 2016 CSE meeting. The hearing record also included a notice of a CSE meeting scheduled for April 25, 2016 (Parent Ex. KK-1), which appears to have been rescheduled for May 31, 2016 (Tr. pp. 38-39, 65, 67-68, Parent Ex. I at pp. 11, 12). The hearing record also indicates that the parent unilaterally enrolled the student at Dublin on June 24, 2016 (Parent Ex. J).[8]

As described above, the May 2016 IEP sets forth an implementation date of July 1, 2016, but does not recommend 12-month services, and with an implementation date of July 1, 2016 the evidence as it relates to accrual weighs in favor of the district as the document is internally inconsistent and the student received 12-month services previously. As for evidence weighing in favor of the parent's version of accrual, the student's mother was not informed until July 21, 2016 that the student's case had been accepted by the CBST and the search would begin to locate a State-approved nonpublic residential school for the student to attend for the 2016-17 school year (Parent Exs. KK-2 at p. 2; KK-7). The student's mother provided direct testimony by affidavit that she received telephone calls during the fall from two prospective schools that ultimately rejected the student (Parent Ex. KK-2 at p. 3). As a result, she asserts that she had no reason to believe that

proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c-d]; 8 NYCRR 200.5[i][2-3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

[8] The hearing record, at least at this juncture, does not include a 10-day notice letter informing the district of the parents' intention to seek tuition reimbursement for the 2016-17 school year.

the CBST would not continue to try to find a placement for the student (id.). On the other hand, when asked if the student required 12-month services, the student's father indicated that he did not know (Tr. 52-53), which testimony is less than convincing in terms of the parents' accrual theory.

The most significant problem with the parents' arguments in terms of accrual has been pointed out by the district. The district asserts that the parents have changed their position in their request for review—now alleging that the student was a ten-month student—thereby changing the date that the parents knew or should have known of the injury that forms the basis of their complaint to fit within the two-year limitations period to wit: September 1, 2016. Whether it was their intention or not, that is precisely the effect of their argument on appeal.[9] The problem with their argument is that it is undermined by their own due process complaint notice which explicitly states that "[t]he DOE failed to offer [the student] with a viable placement option for the period July 1, 2016 through June 30, 2017" (Parent Ex. FF at p.16 [emphasis added]). The IHO did not err in determining the accrual of their claims.

In this case, the parents' due process complaint notice is dated August 24, 2018 (Parent Ex. FF) more than two years after their claims accrued.[10] Consequently, they will not be able to pursue them further unless one of the exceptions to the statute of limitations applies, and I will turn to that issue next.

1. Exceptions to the Statute of Limitations

As described previously, the IHO determined that neither of the two exceptions to the statute of limitations applied to the parents' claims finding first that there was no testimony or documentary evidence establishing that the district could not have specifically misrepresented that it had resolved the problem forming the basis of the parents' complaint as it had not made any representations at all (IHO Decision at p. 7). Regarding the withholding of information exception, the IHO found that the district mailed the May 31, 2016 IEP to the student's mother before the July 1, 2016 implementation date, and further found that the mother received another copy from her attorney during the summer of 2017, a full year before the filing of the parents' due process complaint notice (id. at pp. 7-8). The IHO also determined that the parents' delay in filing was not caused by the district withholding information, rather the student's mother testified that the delay was related to personal family reasons (id. at p. 8).

The parents do not allege any facts in their request for review that they were prevented from requesting a hearing as a result of the district misrepresenting that it had resolved the problem forming the basis of their complaint, therefore, the "specific misrepresentations" exception to the timeline to request an impartial hearing does not apply (see 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]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. 2018][noting that the district's refusal to accede

[9] They actually raise the 10-month theory in their March 2019 brief in response to the district's motion to dismiss (Parent Ex. KK at p. 17).

[10] I reject the parents' assertion that that the continuous violation doctrine should be applied in this case, as use of the doctrine is disfavored in IDEA cases in this Circuit (L.K. v. Sewanhaka Cent. High Sch. Dist., 2015 WL 12964663, at *12 [E.D.N.Y. July 16, 2015], aff'd, 641 F. App'x 56 [2d Cir. 2016]).

to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 977, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments 'were sufficient to warrant application of the statutory exception, the exception would swallow the rule'"]; see also Application of a Student with a Disability, Appeal No. 13-215).[11]

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (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]. Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. Sch. Dist. 2018 WL 3650185, at *3; R.B. 2011 WL 4375694, at *4, *6; see D.K. 696 F. 3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

In this case, the parents allege the district failed to provide prior written notice and a procedural safeguards in their opposition to the district's motion to dismiss. Although the parents brief these points to the IHO, the IHO did not address the parents' arguments regarding missing notices when finding that the withholding of information exception did not apply. The specific

[11] The parents assert a strained argument in their memorandum of law that CBST's continued search for a school for the student was a misrepresentation. Initially, a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131), thus the allegations in the memorandum of law have not been properly raised. Even if the factual allegations had been set forth in the parent's request for review, the district communication that it was seeking a school for the student does not constitute a misrepresentation that it has solved the problem and thereby prevented the parent from seeking due process. If anything, it suggests that the district had not solved the problem of locating a school.

point raised by the parent about the lack of a procedural safeguards notice is important because that notice places parents on notice of the IDEA's two year statute of limitations (see 20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]) .[12] The hearing record does not contain a procedural safeguards notice or any indication that one was sent to the parents, although the hearing record establishes that the student began receiving special education services in the second grade (Parent Ex. V at p. 6; see also Tr. p. 81; Parent Ex. KK-8). While the IHO relied on the mother's testimony that the delay in filing the due process complaint notice was due to personal reasons in finding that the withholding of information exception did not apply, that only explains why the parent waited, not that the district had provided the parents with an annual procedural safeguards notice that shows they were aware of the two year statute of limitations.[13] In asserting its affirmative defense of the statute of limitations, the district made no effort to demonstrate when, if ever, it had complied with this obligation to provide a procedural safeguards notice to the parents, and the IHO did not address it at all prior to dismissing the parents' claims. There is no evidence that tends to show that the parents had actual knowledge of the two-year statute of limitations prior to filing their due process complaint notice.[14] Instead the student's mother's testified as to her her lack of awareness of her due process rights, stating that she had no reason to believe that the district would not continue to look for a placement for the student during the 2016-17 school year, and that she believed the statute of limitations had not run (Tr. pp. 84-85; Parent Ex. KK-2 at p. 3). Thus, while the evidence does not support the specific misrepresentation exception, the parents prevail as to the withholding information exception and I find that the district has not succeeded in its arguments that the two-year statute of limitation should bar the parents' claims.

VII. Conclusion

Based on the foregoing, the IHO's decision dismissing the parents' claims on the ground of the IDEA's statute of limitations must be reversed. The matter must be remanded for further proceedings address the parents' claims in the due process complaint for the 2016-17 school year. I have considered the parents' remaining claims and find that it is not necessary to address them given the disposition of this matter.

THE APPEAL IS SUSTAINED.

[12] The other aspects of the parents' argument (i.e. the lack of a procedural safeguards notice) are not convincing because they do not explain why the parent was prevented from filing a timely due process complaint notice alleging that the district did not locate a program for the student.

[13] Although the student has been the subject of a prior administrative proceeding that concerned two school years, that case was filed well within the two-year statute of limitations, thus there was no timeliness defense for the district to bring which would have alerted the parents to the two-year statute of limitations. This is also unlike a case in which the parents' awareness of their substantive rights could be inferred through multiple prior proceedings during which they failed to raise the lack of procedural safeguards argument before the IHO and thereby waived their ability to argue the exception to the statute of limitations (R.B., 2011 WL 4375694 at *7).

[14] The Second Circuit has described how a later provision of a procedural safeguards notice may delay but will not completely nullify the applicability of IDEA's statute of limitations (Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 744 F. App'x 7, 11 [2d Cir. 2018]). But there is no evidence of timely or delayed receipt in this case.

IT IS ORDERED that the portion of IHO's decision dated May 15, 2019 that dismissed the parents' August 24, 2018 due process complaint notice is on the ground of the IDEA's statute of limitations reversed; and

IT IS FURTHER ORDERED that the matter is remanded to the same IHO who issued the May 15, 2019 decision, to address the merits of parents' claims as discussed above; and

IT IS FURTHER ORDERED that if the IHO who issued the May 15, 2019 decision is not available, the district shall appoint a new IHO in accordance with its rotational selection procedures and State regulations.

Dated: **Albany, New York**
July 26, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER