The University of the State of New York

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

No. 20-117

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Law Offices of Irina Roller, PLLC, attorneys for respondent, by Vida M. Alvy, 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 district) appeals from the decision of an impartial hearing officer (IHO) which denied its motion to dismiss the parent's claims based on the IDEA's statute of limitations. Respondent (the parent) cross-appeals from the IHO's denial of reimbursement for a privately obtained neuropsychological evaluation. The appeal must be sustained. The cross-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

Due to the disposition of this matter, the parties' familiarity with the student's educational history is presumed and will not be repeated in detail. Briefly, the student has been diagnosed as having an unspecified neurodevelopmental disorder, generalized anxiety disorder, an unspecified depressive disorder, a history of an unspecified mood disorder, and a history of obsessive-compulsive disorder, and of trichotillomania, both reportedly in remission (Parent Ex. J at p. 10). The student's classification as a student with an emotional disturbance, as well as her need for a residential placement are not in dispute (Tr. pp. 24, 45). The student was unilaterally enrolled in

out-of-state nonpublic residential placements for the 2017-18, 2018-19, and 2019-20 school years (Parent Exs. P at pp. 1-2, X at p. 1; AA at pp. 1-3, 5; FF at pp. 1-3, 5).

A. Due Process Complaint Notice

By due process complaint notice dated September 3, 2019, the parent alleged that the student had been denied a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (Parent Ex. A at p. 2). Specifically, and as relevant herein, the parent asserted that the CSE failed to convene for an annual review, develop an IEP, provide prior written notice, or provide a school location letter with an offer of placement for the student for the 2017-18 school year (id. at pp. 2-3). For the 2018-19 school year, the parent contended that the CSE recommended an inappropriate program and placement and failed to evaluate the student using meaningful assessments or more than one method of assessment (id. at pp. 4-11). For the 2019-20 school year, the parent alleged that the CSE failed to recommend a timely placement for the student (id. at p. 11). For relief, the parent requested reimbursement for the cost of the student's attendance at the Grier School from September 2017 through January 2018, reimbursement for the cost of the student's attendance at the Solebury School from January 2018 through June 2020, reimbursement for the cost of the student's attendance at the New Leaf Aftercare program for the 2017-18 and 2018-19 school years, reimbursement for travel expenses to and from the student's placements, and reimbursement for a privately obtained neuropsychological evaluation (id. at p. 12).

B. Motion to Dismiss

By motion to dismiss with exhibits dated September 19, 2019, the district alleged that the parent's claims related to the 2017-18 school year were barred by the IDEA's two-year statute of limitations (Dist. Mot. To Dismiss at pp. 6, 16). On October 30, 2019, the parent submitted a list of "Objections to the Evidentiary Submissions" (Parent Objections) and an answer in response to the district's motion to dismiss (Answer in Opp'n at p. 7; Parent Objections at pp. 1-3).[1] By email dated November 18, 2019, the IHO denied the district's motion to dismiss, indicating that he agreed with the parent, and further finding that the beginning of the 2017-18 school year was not more than two years prior to September 3, 2019, the date the parent filed the due process complaint notice (IHO Decision on Dist. Mot. to Dismiss at p. 1). Accordingly, the parent's claims related

[1]As further discussed below, in an answer with cross-appeal, the parent references her written submissions to the IHO in opposition to the district's motion to dismiss (Answer ¶32; fn. 6, 7). In its reply and answer to the parent's cross-appeal, the district indicates that an affidavit in support of the parent's opposition to the district's motion to dismiss was never submitted to the IHO and was not included with the certified hearing record submitted to the Office of State Review (Reply ¶2; fn. 1). By letter dated September 4, 2020, the parent provides a copy of the parent's October 26, 2019 affidavit in support of the Parent Objections and asserts that it had been provided to the IHO. The parent argues that she had notified the district that the affidavit was missing from the hearing record as submitted to the Office of State Review and that the district had failed to correct the hearing record. The parent further asserts that the district consented to her submission of the affidavit as part of the hearing record that should have been originally submitted by the district. An email thread attached to a clarification of the hearing record, indicates that the parent's opposition to the district's motion to dismiss included an affidavit in support and was sent to the IHO on October 31, 2019; however, the IHO's clarification appears to indicate it was not part of the hearing record.

to the district's denial of a FAPE for the 2017-18 school year were not barred by the two-year statute of limitations.

C. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on February 4, 2020 (Tr. pp. 1-58). The IHO noted on the record that the district conceded it did not offer the student a FAPE for the school years in question and would present documentary evidence without calling any witnesses (Tr. pp. 12-13). The parties stipulated on the record to the student's need for a residential placement (Tr. p. 45). The parties submitted documentary evidence (Parent Exs. A; G; I-K; L; N-Q; S-OO; QQ; Dist. Exs. 2; 8; 16; 19-21; 24; 33-34); the district did not present testimony from any witnesses; the parent presented testimony by affidavit with the witnesses available for cross-examination in-person (Tr. pp. 32-34, 40-44, 53-56; Parent Exs. RR-UU). The parties also submitted post-hearing briefs (Parent Ex. VV; Dist. Ex. 35).

By decision dated May 25, 2020, the IHO determined that the district's failure to present a case at the impartial hearing constituted a concession that the student was denied a FAPE for the 2017-18, 2018-19, and 2019-20 school years (IHO Decision at pp. 7-10).[2] The IHO further found that because the district conceded that it did not offer the student a FAPE for multiple school years, the district committed a gross violation of the IDEA (id. at p. 11). The IHO then determined that the parent had met her burden by demonstrating the appropriateness of the unilateral placements for each of the school years in question (id. at pp. 17, 21). In denying the parent's request for reimbursement of the student's New Leaf Aftercare Program, the IHO determined that the program did not qualify as a transition service (id. at p. 18). The IHO further found that the student was not eligible for special transportation services and as a result, he denied the parent's request for reimbursement of travel expenses (id. at pp. 18-20). Regarding the parent's request for reimbursement for a private neuropsychological evaluation, the IHO determined that the parent's evaluation did not meet the criteria for an independent educational evaluation (IEE) (id. at pp. 20-21). As relief, the IHO ordered that upon satisfactory proof of services having been rendered, the district shall reimburse and/or directly pay the cost of the student's tuition and related services at each of the nonpublic schools the student attended for the entirety of the 2017-18, 2018-19, and 2019-20 school years (id. at p. 21). The IHO further ordered the district to conduct a reevaluation of the student in all areas of suspected disability that had not been evaluated within the last two years and to reconvene to develop an IEP for the 2020-21 school year (id.).

IV. Appeal for State-Level Review

The district appeals and alleges that the IHO erred by failing to grant its motion to dismiss the parent's claims related to the 2017-18 school year as time-barred by the two-year statute of limitations for IDEA claims. The district argues that the parent's due process complaint notice was filed more than two years after the parent's claims accrued. In the alternative, the district argues that the IHO erred by finding that the parent's unilateral placement of the student at the Grier

[2] The IHO decision has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-24.

School from September 2017 through January 2018 was appropriate and requests reversal of the IHO's award of tuition reimbursement. The district has attached a July 10, 2019 response to a ten-day notice letter from the parent to its request for review for consideration as additional evidence (Req. for Rev. Ex. A).

In an answer and cross-appeal, the parent argues that the IHO correctly found the due process complaint notice was timely filed, that the student's unilateral placement at the Grier School was appropriate, and that tuition reimbursement was an appropriate award. The parent further alleges that the IHO erred by denying her request for reimbursement of a private neuropsychological evaluation as additional equitable relief for the district's failure to offer the student a FAPE. The parent has attached three exhibits to her answer and cross-appeal for consideration as additional evidence (Answer and Cross-Appeal Exs. A-C).

In a reply and answer to the parent's cross-appeal, the district agrees that two of the parent's supplemental exhibits are necessary to the disposition of the appeal; however, the district argues that Exhibit A and Exhibit B attached to the answer and cross-appeal, were also submitted with the district's motion to dismiss as part of the hearing record certified on July 6, 2020, and do not need to be resubmitted by the parent. Regarding the parent's statute of limitations argument, the district asserts that the parent, by her own admission was aware of the basis of her claims for the 2017-18 school year as of the date of the ten-day notice letter on August 23, 2017. Concerning the parent's request for reimbursement for a private neuropsychological evaluation, the district asserts that the district obtained consent from the parent to reevaluate the student and provided written notice of a scheduled psychoeducational evaluation. The district further asserts that the parent did not respond or present the student for the evaluation and instead obtained a private neuropsychological evaluation, for which the district argues, she now improperly seeks reimbursement. Annexed to its reply and answer to the parent's cross-appeal, the district has included a June 18, 2018 notice to the parent of a psychoeducational evaluation scheduled for July 18, 2018 and a November 2015 psychoeducational evaluation (Answer to Cross-Appeal Exs. 1-2). The district further contends that the May 24, 2018 consent to reevaluate attached to the answer and cross-appeal as Exhibit C should be considered as additional evidence.

In a reply to the district's answer to the parent's cross-appeal, the parent objects to the district's argument in opposition to the parent's request for equitable reimbursement of the private neuropsychological evaluation. The parent asserts that the district never argued that the parent acted inequitably by obtaining a private evaluation at any point during the impartial hearing and never questioned the parent about any aspect of the evaluation (Reply ¶14). The parent also objects to the district's submission of additional evidence. Lastly, the parent argues that in conceding FAPE, the district waived any arguments opposing her request for equitable relief.

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[3]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Initially, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review

[3] 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., 137 S. Ct. at 1000).

and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

Neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that the parent's unilateral placements from January 2018 through the end of the 2019-20 school year were appropriate, and that equitable considerations favored the parent (see IHO Decision at p. 21). Additionally, the parties do not appeal the IHO's order directing the district to reevaluate the student in all areas of suspected disability that have not been evaluated over the last two years. The parent does not cross-appeal the IHO's denials of reimbursement for the New Leaf Aftercare program, or for travel expenses. Therefore, the IHO's determinations on these issues have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The remaining claims before me are whether the IHO correctly denied the district's pre-hearing motion to dismiss arguing that the parent's claims related to the 2017-18 school year were barred by the applicable statute of limitations and whether the IHO correctly denied the parent's request for reimbursement of the private neuropsychological evaluation.

2. Additional Evidence

Both parties have submitted additional documentary evidence with their pleadings for consideration on appeal.[4] As noted above, the parent attached three proposed exhibits with her answer and cross-appeal (Answer and Cross-Appeal Exs. A-C). The district also submitted one proposed exhibit with the request for review and two proposed exhibits with its answer to the parent's cross-appeal (Req. for Rev. Ex. A; Answer to Cross-Appeal Exs. 1-2). In a letter dated September 4, 2020, accompanying her reply, the parent submitted an October 25, 2019 affidavit in support of her opposition to the district's motion to dismiss.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered

[4] The IHO's practice of requiring the parties to stipulate to or provide a foundational witness for every document offered into evidence has been discussed in at least one other appeal (Application of a Student with a Disability, Appeal No. 19-026). In that matter an SRO found that the IHO's evidentiary rules were impractical for special education due process proceedings and served to undermine an IHO's responsibility to develop a complete hearing record (see id.; see also, Tr. pp. 13-15). Contrary to the IHO's position on documentary evidence, the Commissioner's regulations tend to promote admissibility stating that an IHO may receive any oral, documentary, or tangible evidence except that the IHO "shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]), and State regulations provide that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, if a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]). Further, 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.

at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Initially, I note several of the documents offered by the parent were or should have been included as part of the hearing record and, therefore, do not represent additional evidence presented for the first time on appeal. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]).

The district's motion to dismiss with exhibits, the parent's answer and list of evidentiary objections to the district's motion, and the IHO's decision on the district's motion were properly submitted as part of the hearing record on July 6, 2020. The exhibits annexed to the district's motion to dismiss were (1) the parent's June 28, 2017 due process complaint notice, (2) an August 18, 2017 unappealed IHO decision which formed the basis of the student's pendency, (3) an October 5, 2017 amended due process complaint notice, (4) an August 22, 2018 due process complaint notice, (5) a September 3, 2019 due process complaint notice,[5] (6) an August 23, 2017 ten-day notice letter, and (7) a June 23, 2016 prior written notice (see Dist. Mot. to Dismiss Exs. 1-7). As indicated above, the parent's affidavit in support of her opposition to the district's motion to dismiss should have been submitted as part of the hearing record. The affidavit was submitted by the parent in a letter dated September 4, 2020 to the Office of State Review and does not constitute additional evidence.

Two of the parent's proposed exhibits, an August 23, 2017 ten-day notice letter (Answer and Cross-Appeal Ex. A) and the IHO's decision on the district's motion to dismiss (Answer and Cross-Appeal Ex. B) were already received with the hearing record, are therefore duplicative and will not be accepted for consideration in this appeal. With respect to Exhibit C attached to the answer and cross-appeal, a May 24, 2018 consent to evaluate form, the district concurs with the parent that it should be accepted as additional evidence (Reply ¶8n.4) and therefore it will be considered on appeal.[6]

Regarding the district's proposed additional evidence (Req. for Rev. Ex. A and Answer to Cross-Appeal Exs. 1-2), the district argues that its July 10, 2019 response to a ten-day notice letter, a June 18, 2018 notice for a psychoeducational evaluation scheduled for July 18, 2018, and a November 5, 2015 psychoeducational evaluation are "germane to issues in this appeal" (Answer to Cross-Appeal ¶8n.3,4). I find that the June 18, 2018 notice (Answer to Cross-Appeal Ex. 1)

[5] The due process complaint notice is misidentified on the district's motion to dismiss exhibit list as dated September 4, 2019 and appears to be the same document admitted during the hearing as parent's exhibit A.

[6] The district offered a copy of Exhibit C to the answer and cross-appeal at the impartial hearing but the parent did not agree to its admission into evidence at that time and it was excluded from the hearing record (Tr. 32, 34).

and the November 5, 2015 psychoeducational evaluation (Answer to Cross-Appeal Ex. 2) are necessary in order to render a decision on the parent's request for reimbursement of the private neuropsychological evaluation and, as such, I will exercise my discretion and accept them as additional evidence.[7] However, I do not find that the district's response to the parent's ten-day notice letter (Req. for Rev. Ex. A) is necessary to determine any of the issues on appeal and as such it will not be considered.

B. Statute of Limitations

The district alleges that the IHO erred by failing to find that the parent's claims related to the 2017-18 school year were barred by the IDEA's two-year statute of limitations.

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]).[8] 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]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception 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]). A second exception may apply if a parent was 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 (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).[9]

The parent's September 3, 2019 due process complaint notice asserted that the district failed to convene a CSE, develop an IEP, or to provide prior written notice and also failed to provide an

[7] The parent objects to the inclusion of the June 2018 notice of evaluation asserting that the district did not offer it at the hearing; however, a review of the hearing record indicates that the district offered a document marked as "consent for evaluation" dated June 18, 2018, which description fits the contents of the document attached as Exhibit 1 to the answer to cross-appeal, but the parent did not agree to the admission of this evidence (due only to relevance) and the IHO excluded it at that time (Tr. pp. 31-34). The parent does not now object to the inclusion of the October 2015 psychological evaluation report; it was also submitted during the hearing but excluded because the parent objected at that time (id.).

[8] 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]).

[9] The parent has not asserted any exceptions to the statute of limitations.

offer of placement for the 2017-18 school year (Parent Ex. A at pp. 2-3).[10] In its motion to dismiss, the district argued that the parent knew or should have known that the CSE failed to convene to develop an IEP for the 2017-18 school year no later than February 20, 2017 (Dist. Mot. to Dismiss at p. 13). The district further asserted that the student's annual review for the 2016-17 school year was held on February 22, 2016 and that the student's annual review for the 2017-18 school year should have been held no later than February 19, 2017 (id. at p. 12). The district also alleged that the parent was sent a prior written notice for the 2016-17 school year on June 23, 2016 and that the parent knew or should have known that the district failed to send a prior written notice related to the 2017-18 school year no later than June 23, 2017 (id. at p. 13). The district also contended that the parent was sent a school location letter and offer of placement for the 2016-17 school year on July 28, 2016 and that the parent knew or should have known that the district failed to provide an offer of placement for the 2017-18 school year no later than July 28, 2017 (id.). In her answer in opposition to the district's motion to dismiss, the parent argued that the earliest date that her claims accrued was September 5, 2017, when she withdrew the student from the district (Answer in Opp'n at p. 5). The parent further argued that the parent's claims could not accrue before September 5, 2017, because the district failed to provide prior written notice for the 2017-18 school year (id. at pp. 5-6).

In its appeal, the district argues that the latest possible date the parent's claims could have accrued was on August 23, 2017, when the parent provided a ten-day written notice to the district of her intent to unilaterally enroll the student at the Grier School for the 2017-18 school year and seek tuition reimbursement due to the district's failure to hold a CSE review or provide a school location letter (Req. For Rev. ¶ 12). Therefore, according to the district, the parent was required to file her due process complaint notice no later than August 23, 2019. In her answer and cross-appeal, the parent alleges that her claims accrued when the district's time to respond to the August 23, 2017, ten-day notice letter expired on September 7, 2017 (Answer and Cross-Appeal ¶¶ 32, 33).

In this matter, the alleged action that forms the basis of the parent's complaint was the district's failure to convene a CSE for the student's annual review, develop an IEP for the 2017-18 school year, issue a school location letter and offer of placement or provide prior written notice. Thus, the district correctly asserted in its motion to dismiss that the parent's claims associated with the CSE's failure to convene and develop an IEP for the 2017-18 school year accrued at the time the parent knew about the district's failure.

As the district argues on appeal, by her own assertion, the parent knew the basis for her claims related to the 2017-18 school year at the latest by the time she sent her ten-day notice to the district on August 23, 2017. In the August 23, 2017, ten-day notice letter, the parent advised the CSE that it had not convened to develop an IEP or make a program recommendation for the 2017-18 school year (Dist. Mot. to Dismiss Ex. 6 at p. 2). The parent also stated that she was "hoping to receive a School Location Letter with an appropriate placement by August 15, 2017" in order to schedule a site visit (id.). Based on those assertions, which are comparable to the parent's claims

[10] The district's motion to dismiss with exhibits included multiple due process complaint notices that were filed during the 2016-17, 2017-18, 2018-19 school years, which were withdrawn (see Dist. Mot. to Dismiss Exs. 1, 3, 4).

in the due process complaint notice, the parent informed the district that she intended to place the student at Grier and seek reimbursement from the district for the cost of the student's tuition (id.).

However, the parent did not file her due process complaint notice, in this matter, asserting claims for the 2017-18 school year until September 3, 2019. The parent does not cite any authority to support her contention that the statute of limitations period began to run on the date that the district's time to respond to her ten-day notice expired as opposed to when she knew or should have known of the actions that formed the basis for her IDEA claims related to the 2017-18 school year (20 U.S.C. § 1415[f][3][C]; 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]). Therefore, as the parent did not assert her IDEA claims for the 2017-18 school year within two years of their accrual as required and she has not raised any exceptions to the statute of limitations, these claims are time-barred and the IHO erred by denying the district's motion to dismiss the parent's claims for the 2017-18 school year.[11]

C. Reimbursement for Neuropsychological Evaluation

The parent cross-appeals from the IHO's denial of her request for reimbursement of a private neuropsychological evaluation and argues that the IHO erred in utilizing the standard for an IEE rather than assessing it as a form of equitable relief for the district's denial of FAPE. In her due process complaint notice, the parent alleged that because the May 2018 CSE "failed to use meaningful assessments and/or failed to communicate assessment results in a meaningful manner," the district shifted the burden to the parent to conduct a triennial evaluation (Parent Ex. A at pp. 5, 11). In her answer and cross-appeal, the parent asserts that the IHO erred by analyzing her request for additional equitable relief as a request for an IEE and further erred by failing to award reimbursement for a privately obtained August 2018 neuropsychological evaluation.[12]

In its answer to the parent's cross-appeal, the district argues that the parent is not entitled to equitable relief because she failed to appear for the July 18, 2018 district psychoeducational evaluation and instead sought and obtained the August 2018 private neuropsychological evaluation.

In her reply, the parent contends that the district has alleged for the first time that the parent was not entitled to equitable reimbursement of a neuropsychological evaluation on the ground that the parent failed to appear for a scheduled district psychoeducational evaluation. The parent

[11] The student attended the Solebury School for a portion of the 2017-18 school year—January 2018 through June 2018—and for the entirety of the 2018-19, and 2019-20 school years (Parent Exs. X; AA; FF). The IHO awarded tuition reimbursement for the costs of the student's attendance at Solebury for the whole time the student attended the school (IHO Decision at p. 21). However, the district acknowledged that the IHO Decision granted tuition reimbursement for the Solebury school but provided explicitly that it did not appeal from that portion of the decision (Req. for Rev. n.1). As the district has not appealed from the award of tuition reimbursement for Solebury, that part of the decision has become final and binding and this decision will only address the portion of the 2017-18 school year during which the student was attending Grier—September 2017 through January 2018.

[12] The student was evaluated on August 1, 2018 and the resultant report includes a "Date of Feedback" of September 26, 2018 (Parent Ex. J at p. 1). The private neuropsychological evaluation is referenced in this decision as an "August 2018 neuropsychological evaluation."

further argues that by conceding FAPE, the district waived any arguments against the parent's request for equitable relief.

Relevant to the parent's request for reimbursement for the private neuropsychological evaluation, the parent's due process complaint notice included allegations that the November 2018 CSE relied on outdated evaluations, failed to perform assessments with more than one method, and failed to conduct a vocational assessment (Parent Ex. A at pp. 8-11). Additionally, the parent connected her request for reimbursement of the private neuropsychological evaluation to her claim that the district shifted the burden for conducting an updated triennial evaluation to the parent (id. at p. 11).

The parent's August 23, 2017 ten-day notice letter did not indicate a disagreement with the district's last evaluation of the student or include a request for a neuropsychological evaluation or other type of evaluation (Dist. Mot. to Dismiss Ex. 6 at p. 2). The student began attending the Grier School on September 11, 2017 (Parent Ex. U). In two separate letters dated January 11, 2018, the student was notified of an offer of admission to the Solebury School for the remainder of the 2017-18 school year (Parent Ex. W at pp. 1, 2). According to the student's transcript, she began attending the Solebury School on January 16, 2018 (Parent Ex. NN). A "Special Education Plan" was created by staff of the Solebury School at a meeting held on April 5, 2018, with the parents in attendance (Parent Ex. OO at pp. 1-2).

A CSE convened on May 24, 2018 and developed an IEP with an implementation date of June 15, 2018 (Parent Ex. G at pp. 1, 16). The May 2018 CSE relied on a November 5, 2015 psychoeducational evaluation and recommended the related services of counseling and occupational therapy (id. at pp. 11, 16).

On August 1, 2018, the student was evaluated by two private clinicians and the resultant neuropsychological evaluation report dated September 26, 2018, was shared with the CSE (Parent Ex. A at p. 11; J at pp. 1, 11). According to the parent's due process complaint notice, a CSE convened on November 20, 2018 (Parent Ex. A at p. 8).[13] The district offered a November 2, 2018 CSE meeting notice, November 20, 2018 CSE meeting minutes, and a November 20, 2018 IEP into evidence; however, the parent did not stipulate to the admissibility of these documents and as a result they were not admitted into evidence (Tr. pp. 32, 34). Thus, there is no information in the hearing record regarding what evaluative information was considered by the November 2018 CSE.[14]

At the outset I note that the IHO did not err in his finding that the parent's request for reimbursement for the cost of the August 2018 neuropsychological evaluation did not meet the

[13] The parent's due process complaint notice references both a November 20, 2018 and a November 28, 2018 CSE meeting (compare Parent Ex. A at p. 11; with Parent Ex. A at p. 8). A November 20, 2018 IEP was offered as Parent Exhibit H and as District Exhibit 12; however, neither exhibit was admitted into evidence (Tr. pp. 32, 34, 40, 43). The parent's private neuropsychological evaluation also indicated that a November 20, 2018 CSE meeting had been scheduled (Parent Ex. J at p. 2).

[14] The hearing record does not indicate whether the parent requested an evaluation of the student or requested reimbursement for the August 2018 private neuropsychological evaluation contemporaneously with the November 2018 CSE meeting.

statutory framework under which a parent has a right to obtain an IEE at public expense (see IHO Decision at pp. 20-21). The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). As the hearing record does not indicate that the parent expressed disagreement with any evaluation conducted by the district, the parent was not entitled to an IEE at public expense. To the extent that the parent alleged the district did not conduct a current evaluation of the student and shifted the burden for conducting a triennial evaluation to the parent, such an allegation "does not necessarily imply the evaluation was not appropriate at the time it was conducted" (D.S. v. Trumbull Bd. of Educ., 2020 WL 5552035, at *13 [2d Cir. Sept. 17, 2020]).[15]

However, this does not end the inquiry as the parent's due process complaint notice and arguments in her cross-appeal clearly demonstrate that the parent did not request an IEE through the statutory framework but requested it as additional equitable relief due to the district's denial of a FAPE to the student. As cited by the parent, this type of relief has been granted in at least one other administrative proceeding at this level (see Application of a Student with a Disability, Appeal No. 20-049 [granting reimbursement for a neuropsychological evaluation based on equities where "the district ha[d] not taken its obligation to evaluate the student seriously for a long period of time"]).

Under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including

[15] Although the parent's due process complaint notice included claims regarding the district's evaluations, such as the district did not use a variety of assessments and did not conduct a vocational evaluation, those claims were not tied to the parent's request for reimbursement for the August 2018 neuropsychological evaluation (see Parent Ex. A at pp. 8-11). The only claim that is included as a part of the parent's request for reimbursement for the neuropsychological evaluation was that the district "failed to conduct any evaluations or consider the most recent and relevant evaluations available to them when developing their recommendations" and "[t]he burden for conducting an updated triennial evaluation was improperly shifted to parents" (id. at p. 11).

information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The hearing record reflects that the May 2018 CSE considered, among other things, a November 2015 psychoeducational evaluation and a January 2016 OT evaluation (see Parent Ex. G at pp. 1, 6; Answer to Cross-Appeal Ex. 2).[16] Accordingly, absent a request for an evaluation or an indication that the educational or related services needs of the student warranted a reevaluation, the district was not yet required to conduct a reevaluation of the student (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]). To this end, the parent signed a district consent form that indicated "additional assessments are required as part of a requested reevaluation or mandated three-year-evaluation" (Answer and Cross-Appeal Ex. C). In a notice dated June 18, 2018, the district notified the parent that a psychoeducational evaluation had been scheduled for July 18, 2018 (Answer to Cross-Appeal Ex. 1). As discussed above, the parent then had the student evaluated in August 2018 (Parent Ex. J at pp. 1, 11).

Accordingly, the hearing record demonstrates that unlike Application of a Student with a Disability, Appeal No. 20-049, the district did not fail to respond to repeated requests for an evaluation. Rather, the district attempted to evaluate the student in July 2018 and the parent did not produce the student for the evaluation, but instead chose to have the student evaluated privately in August 2018. This matter is further distinguishable from Application of a Student with a Disability, Appeal No. 20-049 in that the district in that case had failed to evaluate the student for ten years despite repeated parental requests. In this case, at the time the CSE convened in May 2018, it appears from the hearing record that the student was not yet due for a triennial evaluation and at that meeting, the district obtained written consent for additional assessments (see Answer and Cross-Appeal Ex. C).

Accordingly, the extraordinary circumstances present in Application of a Student with a Disability, Appeal No. 20-049 are not present in this case. Further, the parent was not without recourse as she had the opportunity to express disagreement with the November 2015 psychological evaluation and request an IEE at public expense. Having not made such a request and having then decided to have a private neuropsychological evaluation conducted in August 2018 while the district was in the process of completing a reevaluation of the student (see Parent

[16] It is not clear from this evaluation whether it was initiated by the district, obtained privately by the parent, or the result of some type of agreement between the district and the parent; however, the report does indicate that the evaluation was requested by the parents and school staff "as part of an effort to ensure that the academic and emotional growth program is well suited to [the student's] educational and psychological needs with a view toward assisting the staff in planning appropriate personalized program goals" (Answer to Cross-Appeal Ex. 2 at p. 1).

Ex. J; Answer and Cross-Appeal Ex. C; Answer to Cross-Appeal Ex. 1), I decline to award the parent the additional equitable remedy of reimbursement for the August 2018 neuropsychological evaluation. Permitting the parent to obtain an evaluation of the student, under these circumstances, would bypass the evaluation process, which is something that the Second Circuit has recently cautioned against (D.S., 2020 WL 5552035, at *11 [rather than seeking an IEE based on an objection to a particular assessment, a functional behavioral assessment, that was not part of the student's last reevaluation, the parents could have requested that the district conduct another reevaluation of the student]).

VII. Conclusion

Having determined that the IHO should have dismissed the parent's claims related to the 2017-18 school year as being outside of the statute of limitations and having determined that the IHO correctly denied the parent's request for reimbursement of the August 2018 private neuropsychological evaluation, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's interim decision dated November 18, 2019 on the district's motion to dismiss is reversed and the parent's claims regarding the 2017-18 school year are barred by the IDEA's two-year statute of limitations period; and

IT IS FURTHER ORDERED that the IHO's decision dated May 25, 2020 is modified by reversing those portions which granted the parent reimbursement for the cost of the student's tuition at Grier for the 2017-18 school year.

Dated: **Albany, New York**
October 5, 2020

STEVEN KROLAK
STATE REVIEW OFFICER