The University of the State of New York

**The State Education Department**
**State Review Officer**
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**No. 10-014**

**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:**
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Gloria M. Bruzzano, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondent, Stewart Karlin, Esq., of counsel

## DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that respondent's (the parent's) unilateral placement of his daughter was appropriate to meet her special education needs for the 2006-07 school year and ordered it to reimburse the parent for his daughter's tuition costs for the 2006-07 school year at the Vanguard School (Vanguard), an out-of-State private special education school for students with "learning differences" (Tr. pp. 24-25, 78, 88; Dist. Ex. 1; Parent Ex. D at p. 1). The appeal must be sustained in part.

The student attended in-State private schools from 1998 through 2006, and is described in the hearing record as possessing "low average to average cognitive potential" with "variable, and at times significant visual-motor, higher level expression, visual-perceptual and executive functioning difficulties secondary to a [traumatic brain injury]" (Tr. pp. 107-08, 121; Dist. Ex. 2 at p. 1; Parent Ex. K at p. 4). The student's eligibility for special education programs and services and her classification as a student with a traumatic brain injury are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

The hearing record is sparse relative to the student's educational history. On June 4, 2005, at the parent's request, the student was evaluated by a private pediatric psychologist (the

psychologist) (Parent Ex. K).[1] The psychologist revealed that the student sustained a traumatic brain injury in 1998 (id. at p. 1; see Tr. p. 106; Parent Ex. L at p. 1).[2] Administration of the Wechsler Intelligence Scale for Children – IV Integrated Battery (WISC–IV Integrated)[3] demonstrated that the student's ability to reason abstractly was "solid," while her knowledge of vocabulary words and fund of general information "were both average and significantly higher in this multiple choice format" as compared to her scores from the previous summer on the WISC–IV, which required the student to produce answers on her own (Parent Ex. K at pp. 2, 8). These results prompted the psychologist to comment "[i]t is clear that [the student] has a strong knowledge base that she is not always able to access given her higher level language difficulties" (id. at p. 2). While acknowledging that the student's "verbal skills are better developed than her visual-spatial and visual-motor skills," the psychologist noted that "there are still discrepancies in her range of abilities," observing that "[s]he is particularly vulnerable when processing lengthy verbally presented information" due to fatigue, inattention, and distractibility (id.). He opined that "she demonstrates inconsistent ability to access her fund of information, and multiple choice testing allows one to better assess her fund of knowledge" (id.). He also reported that the student's visual-spatial and visual-motor skills "demonstrate[d] better potential" when a particular test was not timed (id. at p. 3).

With respect to working memory, the psychologist related that the student "ha[d] difficulty holding an appropriate amount of information in 'active memory' for further processing, encoding, and/or mental manipulation," which, in turn, impaired her ability to focus for increased time periods (Parent Ex. K at p. 3). According to the psychologist, the student's working memory scores on the WISC–IV Integrated demonstrated that she did better with verbally, rather than visually, presented material, and that "she benefit[ed] from externally imposed structure and smaller chunks of presented information," citing the student's improvement in arithmetic skills as corroboration (id. at pp. 3, 8). The psychologist observed that the student's "attention fluctuates depending on the nature of the task demands and her level of fatigue," and that "[h]er neurological issues, coupled with her visual and motoric difficulties" presented challenges; therefore, he reasoned that the student would benefit from "frequent breaks, small class size, and external prompting" (id. at p. 3).

[1] The psychologist noted that the student previously underwent a neuropsychological evaluation during summer 2004, at which time "[s]he demonstrated difficulties in processing speed, working memory, visual-perceptual difficulties, and complex language skills," and that the purpose of the June 4, 2005 psychological consultation was "to clarify some of the findings of that evaluation and to aid in educational planning" (Parent Ex. K at p. 1). The hearing record does not contain a report from the summer 2004 evaluation.

[2] The hearing record indicates that the student received special education programs and services from 1998 through 2006 (see Tr. pp. 107-12).

[3] According to the psychologist, the student was administered the Wechsler Intelligence Scale for Children – IV (WISC-IV) during summer 2004 (Parent Ex. K at p. 2). The results of that test indicated that the student's verbal skills were "variable and ranged from the borderline to low average/average range, suggesting unevenness of abilities, and areas of strength and weakness," and that her working memory composite score was "extremely low" (id. at pp. 2-3).

The psychologist offered several recommendations in his June 4, 2005 report, including: (1) placement in a "small, structured special education classroom to help bolster [the student's] skills and to give her the opportunity to work up to her cognitive and academic potential;" (2) continuation of related services;[4] (3) a central auditory processing examination; (4) an intense multisensory phonics approach to reading; (4) provision of Lindamood-Bell services to the student; (5) a structured writing program emphasizing the individual components of writing (such as spelling, sentence construction, and organization) and access to assistive technology, such as a laptop computer; (6) previewing of new information prior to discussion in class, so as to accommodate the student's working memory difficulties; (7) participation in a social skills group to improve the student's self-esteem and confidence; and (8) a neurological reevaluation (Parent Ex. K at pp. 7-8).

During the 2005-06 school year, the student attended a non-approved in-State private school for adolescents with learning difficulties (Tr. p. 121). On June 26, 2006, the Committee on Special Education (CSE) convened for the student's annual review to develop an individualized education program (IEP) for the student for the 2006-07 school year (Dist. Ex. 2; Parent Ex. B).[5,6] The June 26, 2006 CSE meeting was attended by a school psychologist who also acted as a district representative, a school social worker, a special education teacher, an additional parent member, the parent, and the parent's attorney; a teacher from the student's then current private school participated telephonically (Dist. Ex. 2 at p. 2; see Tr. pp. 119-20).

The June 26, 2006 CSE recommended deferring the case to the district's "CBST"[7] for placement of the student in a 12-month class with a 12:1+1[8] student-to-teacher ratio in a State-approved nonpublic school (NPS) residential program; related services consisting of counseling twice per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 3:1 setting; speech-language therapy twice per week for 30 minutes per session in a 3:1 setting; occupational therapy (OT) once per week for 30 minutes per session in a 1:1 setting;

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[4] The hearing record does not identify the related services that the student received during the 2004-05 school year.

[5] In the exhibit list attached to the decision, the impartial hearing officer incorrectly ascribed a date of June 26, "2009" to this IEP (see IHO Decision at p. 12).

[6] The hearing record contains duplicative exhibits. For the purposes of this decision, only District exhibits were cited in instances where both a District exhibit and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of a Student with a Disability, Appeal No. 09-134; Application of the Bd. of Educ., Appeal No. 09-124; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

[7] Although not defined in the hearing record, "CBST" is presumed to mean the district's central based support team.

[8] This refers to a class consisting of no more than 12 students in which one supplementary school personnel assists the special education teacher (see 8 NYCRR 200.6[h][4][i]).

and physical therapy (PT) once per week for 30 minutes per session in a 1:1 setting (Dist. Ex. 2 at pp. 1, 20). The IEP also recommended assistive technology consisting of "an Alpha Smart, printer, and appropriate software;" testing accommodations consisting of double time on tests, a separate location, use of a calculator, answers recorded in any manner, and directions read and reread; and modified criteria for promotion, namely, achievement of 65 percent of the English and math curriculum standards of the seventh grade based upon teacher assessments, observations, and teacher-made material, with program effective dates from July 1, 2006 to June 2007 (Dist. Ex. 2 at pp. 2, 7, 16-18, 20).

On July 28, 2006, the student's father entered into a contract with Vanguard, enrolling the student at the school for the 2006-07 school year (Parent Ex. D; see Tr. pp. 68, 115, 117-18). The contract stipulated that "the obligation to pay the tuition and fees for the entire school year is unconditional and that no portion of such fees…will be refunded or canceled…" (Parent Ex. D at p. 1).

By due process complaint notice dated February 16, 2009, the parent requested an impartial hearing (Dist. Ex. 1).[9] He alleged that for the 2006-07 school year, the district "as required, failed to provide the recommended NPS residential placement" to his daughter as recommended in the June 26, 2006 IEP (id. at p. 2). He sought reimbursement for all tuition and charges for services received by the student for the 2006-07 school year at Vanguard (id.).

On April 21, 2009,[10] the district moved to dismiss the parent's due process complaint notice on the grounds that: (1) the due process complaint notice was untimely under the statute of limitations as set forth in 20 U.S.C. § 1415(b)(6)(B); or, in the alternative, (2) the parent's due process complaint notice was barred under the equitable doctrine of laches (Dist. Ex. 3; IHO Decision at p. 3).[11] The impartial hearing officer issued an interim order dated May 28, 2009 granting the district's motion to dismiss the parent's complaint on the basis of laches and granting leave to the parent to amend his request (IHO Interim Order; see IHO Decision at p. 3). However, on June 24, 2009[12] the impartial hearing officer issued a "corrected" interim order rescinding his May 28, 2009 interim order and denying the district's motion (IHO Corrected Interim Order; see IHO Decision at p. 3; IHO Ex. I at pp. 3-4). In the corrected interim order, the impartial hearing officer noted that "[s]ince the [district] has pleaded the [statute of limitations] defense and I

[9] In the petition, the district contends that the parent did not file the due process complaint notice until March 19, 2009 (see Pet. ¶4). The copy of the due process complaint notice contained in the hearing record does not contain a date stamp or any other indication of when the district received it.

[10] In the exhibit list attached to the decision, the impartial hearing officer incorrectly ascribed a date of "April 10, 2009" to this motion (compare Dist. Ex. 3 at p. 4, with IHO Decision at p. 12).

[11] The hearing record does not contain a response by the district to the parent's due process complaint notice (see 20 U.S.C. § 1415[c][2][B][i][I]; 34 C.F.R. § 300.508[e]; 8 NYCRR 200.5[i][4]).

[12] In the decision and the exhibit list attached thereto, the impartial hearing officer ascribed a date of "June 23, 2009" to the corrected interim order; however, the corrected interim order contained in the hearing record bears a date of "June 24, 2009" (compare IHO Decision at p. 3, with IHO Ex. I at p. 4). For consistency, I will refer to the latter date in this decision.

presume will include it in its formal answer to the complaint, the defense will be preserved during the hearing on the merits if that is done" (IHO Corrected Interim Order at pp. 3-4; see IHO Decision at p. 3; IHO Ex. I at pp. 3-4). On July 2, 2009, the district moved for the impartial hearing officer to voluntarily recuse himself from hearing the case, alleging bias and improper ex parte communications with the parent (IHO Decision at p. 4; IHO Ex. II at p. 3).[13] In a second interim order dated July 7, 2009, the impartial hearing officer denied the district's motion for recusal (IHO Second Interim Order; see IHO Decision at p. 4; IHO Ex. II at p. 3).[14]

On July 29, 2009, an impartial hearing convened and concluded after one day of testimony.[15] During the impartial hearing, the district conceded that it did not offer the student a free appropriate public education (FAPE) for the 2006-07 school year (Tr. pp. 18, 58).[16] On January 6, 2010, the impartial hearing officer issued a decision awarding the parent full tuition

[13] A copy of the district's motion for recusal is not included in the hearing record.

[14] In his findings of fact and decision, the impartial hearing officer referenced his denial of the district's motion for recusal by stating that "[t]he [district] was advised that the proper remedy for a disagreement with a ruling is an appeal to the proper judicial forum. In this instance, it would have been [a] State Review Officer. It was not done and I proceeded to the hearing on the merits" (IHO Decision at p. 4). Jurisdiction of a State Review Officer in appeals from interim decisions of impartial hearing officer decisions is limited to pendency determinations (8 NYCRR 279.10[d]; Application of the Bd. of Educ., Appeal No. 09-023; Application of a Child with a Disability, Appeal No. 07-057; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 04-064). The State regulations pertaining to practice on review of hearings for students with disabilities state:

> (d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

(8 NYCRR 279.10[d]).

In the instant case, the impartial hearing officer's ruling on the district's motion for recusal is neither a pendency determination that may be appealed prior to the impartial hearing officer's final determination (see Educ. Law 4404[4]; 8 NYCRR 279.10[d]; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52), nor a final decision that may be appealed (see Educ. Law 4404[1]; 34 C.F.R. § 300.514; 8 NYCRR 200.5[k]).

[15] The parent was represented by counsel at the impartial hearing (IHO Decision at p. 2).

[16] The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

reimbursement for the student's 2006-07 school year at Vanguard (IHO Decision at p. 10).[17] First, the impartial hearing officer concluded that the district waived its statute of limitations defense when it failed to respond to the parent's due process complaint notice per State regulation 8 NYCRR 200.5(i)(5), asserting that a "[m]otion to [d]ismiss is not a substitute for the required answer" (id. at pp. 3-4). Next, the impartial hearing officer noted that, as conceded by the district, it failed to offer the student a FAPE for the 2006-07 school year (id. at p. 5).

The impartial hearing officer then found that Vanguard was an appropriate placement for the student for the 2006-07 school year because the evidence contained in the hearing record established that: (1) Vanguard specialized "in working with students with learning disabilities and social differences, including Traumatic Brain Injuries;" (2) all students received "individualized education and learning accommodations;" (3) Vanguard "evaluates each student at time of enrollment and develops a student profile, summary, learning accommodations checklist and academic plan" for each student; (4) "various progress reports indicated [the student's] educational progress in many areas;" and (5) "the major areas of the [June 26, 2006] IEP were addressed by the school" and that "[t]he school was in disagreement with certain goals and objectives and when that occurred reasons for the difference were stated" (IHO Decision at pp. 8-9).

In addressing equitable considerations, the impartial hearing officer found that the equities supported the parent's claim because: (1) the hearing record established that the parent had cooperated with the district in attempting to find an appropriate placement for his daughter; and (2) the district never offered the student a placement (IHO Decision at pp. 9-10). The impartial hearing officer declined to deny or reduce the parent's claim for reimbursement notwithstanding the parent's failure to furnish the district with proper 10-day notice because the district "failed to establish … that it made any offer of placement for the student" and "the student had been in nonpublic school placements for years" (id. at p. 10).

The district appeals, and asserts four principal arguments: (1) the parent's claim is barred by the statute of limitations; (2) the impartial hearing officer improperly denied the district's motion to dismiss; (3) the parent failed to prove that Vanguard was an appropriate placement for the student for the 2006-07 school year; and (4) equitable considerations preclude an award of tuition reimbursement to the parent because the parent failed to provide the district with any notice of his intent to enroll his daughter at Vanguard and to seek reimbursement from the district, in

[17] A procedural irregularity in this case should be noted. Federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (see 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, the impartial hearing officer failed to document in the hearing record or include in his decision information about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing, and the date of the decision suggests that one or more extensions were granted. I note that the impartial hearing officer was previously cautioned on this issue in Application of the Dep't of Educ., Appeal No. 08-025, and I again remind the impartial hearing officer to comply with federal and State regulations.

contravention of 20 U.S.C. § 1412(a)(10)(C)(iii). The district seeks to vacate the impartial hearing officer's January 6, 2010 decision in its entirety.

The parent, through counsel, answers. The parent counters that the district waived its right to assert the statute of limitations defense due to its failure to comply with the impartial hearing officer's June 24, 2009 interim order directing it to file a response to the due process complaint notice. Additionally, the parent maintains that even if the district did not waive its statute of limitations defense, the statute was tolled during the 2006-07 school year, because the parent had no way of knowing that the district would not offer an appropriate placement until June 30, 2007, the last day of the school year. Therefore, because the parent filed his due process complaint notice before June 30, 2009, two years later, he contends that the due process complaint notice was timely. The parent also raises five affirmative defenses: (1) the petition fails to state a claim upon which relief may be granted; (2) the impartial hearing officer's decision should be upheld in its entirety because it set forth the factual basis and reasons for its determination which are supported by law; (3) at all times, the parent acted in good faith and completely cooperated with the CSE; (4) the district waived its right to raise the statute of limitations defense; and (5) the district did not offer the student a FAPE for the 2006-07 school year, the placement at Vanguard was appropriate for the 2006-07 school year, and equitable considerations support an award of tuition reimbursement.

Initially, I note that the parties do not dispute the impartial hearing officer's finding that the district failed to offer the student a FAPE for the 2006-07 school year (IHO Decision at p. 5). Accordingly, because the district did not appeal this determination, this aspect of the impartial hearing officer's January 6, 2010 decision is final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 10-017; Application of a Student with a Disability, Appeal No. 10-016; Application of a Student with a Disability, Appeal No. 10-011; Application of a Student with a Disability, Appeal No. 10-010; Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 09-134; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

I will now address the impartial hearing officer's refusal to consider the district's statute of limitations defense on account of the district's failure to respond to the parent's due process complaint notice (IHO Decision at pp. 3-4). In his decision, the impartial hearing officer found that "[n]o answer was ever filed by the [d]istrict. Therefore, the [s]tatute of [l]imitations [d]efense as specified in my [June 24, 2009] order … was not preserved.… There was not any answer filed and therefore the [district] failed to preserve the affirmative defense …. Therefore, the statute of limitations does not defeat the claims of the parent" (id. at p. 4). However, the impartial hearing

officer's position is not supported by the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) or the federal or State regulations. In discussing 34 C.F.R. § 300.508(e), regarding a district's obligation to respond to a parent's due process complaint notice, the United States Department of Education noted that the IDEA "does not establish consequences" for parents for the failure to respond to a due process complaint notice; however, either party's failure "to respond to or to file, the requisite notices could increase the likelihood that the resolution session meeting will not be successful in resolving the dispute and that a more costly and time consuming due process hearing will occur" (Filing a Due Process Complaint, 71 Fed. Reg. 46699 [August 14, 2006]; see Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007] [court determined that a default judgment was not the appropriate remedy for district's failure to conform to the requirements for a response to parent's due process complaint notice]; see also Application of a Student with a Disability, Appeal No. 09-080).

Moreover, while the district conceded in this case that it failed to offer the student an appropriate educational program for the 2006-07 school year, the evidence in the hearing record does not support a determination that the district's failure to respond to the due process complaint notice, by itself, rose to the level of denying the student a FAPE (Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 20 [D.D.C. 2008] [finding that a district's failure to appropriately respond to a due process complaint notice did not affect the student's substantive rights]; Sykes, 518 F. Supp. 2d at 261; Application of a Student with a Disability, Appeal No. 09-080; Application of a Student with a Disability, Appeal No. 08-151; Application of a Student with a Disability, Appeal No. 08-013; see Heather S. v. State of Wis., 125 F.3d 1045, 1059 [7th Cir.1997] [holding that the alleged procedural violation during an impartial hearing did not result in the loss of educational opportunity]; James D. v. Bd of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 2009 WL 2178431, at *7 n.11 [N.D. Ill. July 22, 2009]).

The parent argues that by failing to plead the statute of limitations as an affirmative defense in an answer to the due process complaint notice, the district waived that defense. The hearing record indicates that the district first raised the statute of limitations defense in its motion to dismiss, and when the impartial hearing officer denied that motion, the district raised it again during the impartial hearing (Tr. pp. 12-14; Dist. Ex. 3; IHO Ex. I at p. 3; IHO Decision at p. 3). Therefore, the evidence contained in the hearing record establishes that the parent was aware of the district's intention to assert this affirmative defense well in advance of the filing of the instant appeal.

Furthermore, in New York State, the formal rules of evidence and motion practice that are applicable in civil proceedings generally do not apply in impartial hearings (see Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006] [strict formal rules of evidence need not be observed at administrative hearings]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977] [Federal Rules of Civil Procedure do not apply to administrative proceedings]; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child with a Disability, Appeal No. 99-5; Application of a Child with a Disability, Appeal No. 96-45); however, nothing precludes an impartial hearing officer from considering a motion by either party under appropriate circumstances (Application of a Child with a Disability, Appeal No. 96-45; see Application of the

Bd. of Educ., Appeal No. 05-007 [motion for a directed verdict]; Application of a Child with a Disability, Appeal No. 04-061 [motion to identify the issues]; Application of a Child with a Disability, Appeal No. 04-046 [motion for recusal]; Application of a Child with a Disability, Appeal No. 04-018 [recognizing motion for summary judgment could be used in IDEA proceedings in certain circumstances if there is a lack of any genuine issue of material fact and both sides have had an opportunity to present evidence]).

Based upon the foregoing, and because I do not find that statutory or case law supports the impartial hearing officer's determination that the district's failure to file a response to the due process complaint constituted a waiver of its statute of limitations defense, I will annul that portion of the impartial hearing officer's January 6, 2010 decision and will consider the district's statute of limitations defense in this appeal. However, in the future, I remind the district of its obligation to file a response that contains the required descriptions and explanations related to the subject matter set forth in the due process complaint notice (see 20 U.S.C. § 1415[c][2][B][i][I]; 34 C.F.R. § 300.508[e]; 8 NYCRR 200.5[i][4]).

In addressing the district's statute of limitations defense, it is important to ascertain when the parent's claim accrued (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 [2d Cir. 2008]). A district must have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 [2d Cir. 2005]; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). The district asserts that the parent's claim accrued on July 1, 2006, the first day of the 2006-07 school year.[18] The parent counters that the claim did not arise until June 30, 2007, the last day of the 2006-07 school year.

The IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]).

IDEA 2004 contains two statutory exceptions to the limitations period:

> The timeline described in [20 U.S.C. § 1415[f][3][C]] shall not apply to a parent if the parent was prevented from requesting the hearing due to –

[18] As a matter of State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]).

> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent

20 U.S.C. § 1415[f][3][D]. The parent does not allege that the first exception applies to the facts of this case (see 20 U.S.C. § 1415[f][3][D][i]). However, in the answer on appeal, the parent's counsel contends that the district did not supply the parent with a procedural safeguards notice after the June 26, 2006 CSE meeting, and maintains that said failure excuses the parent's delay in filing the due process complaint notice (Answer ¶ 14).[19] The parent did not raise this argument in either the due process complaint notice or at any point during the impartial hearing (20 U.S.C. § 1415[f][3][B]; 34 § 300.511[d]). Consequently, I find that this argument has been waived and is outside the scope of the instant appeal and not properly before me (see Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-102; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student with a Disability, Appeal No. 08-008; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

The parent also argues that he did not know that the district would not offer an appropriate placement for the student until the last day of the 2006-07 school year. However, evidence contained in the hearing record establishes that the parent enrolled his daughter in Vanguard, an out-of-State placement, on July 28, 2006, three weeks after the start of 2006-07 school year; and that on July 5, 2006, August 29, 2007, and March 7, 2007, he remitted non-refundable payments to the school totaling almost $39,000.00 for the student's 2006-07 tuition (Parent Exs. D; E; F; see Tr. pp. 68, 115, 117-18).[20] According to the hearing record, the student began classes at Vanguard in September 2006, and the parent did not contact the district at any time thereafter to inform it of the unilateral placement (Tr. pp. 122-23; Parent Ex. E). Furthermore, the hearing record contains no evidence of any follow-up communication initiated by the parent or his counsel regarding the

[19] The hearing record indicates that the parent was accompanied at the June 26, 2006 CSE meeting by an attorney (Tr. pp. 119-20; Dist. Ex. 2 at p. 2); and that from 1998 through 2005, this attorney represented the parent in the course of filing "[m]ore than four, more than five" previous due process complaint notices in connection with his daughter's education in the district (Tr. pp. 121-22).

[20] According to the hearing record, the parent paid a deposit of $4,000 on July 5, 2006 (nine days after the June 26, 2006 CSE meeting), $15,337.50 on August 29, 2006, and $19,337.50 on March 7, 2007 (Parent Exs. E; F).

status of the district's placement offer after the June 26, 2006 CSE meeting, nor any evidence establishing that the district withheld any information from the parent relative thereto.

The evidence contained in the hearing record suggests that by September 2006, the parent had committed to his daughter spending her seventh grade year at Vanguard, and at that point, he knew or should have known that the district was in violation of its obligation to offer the student a FAPE under the IDEA and federal and State regulations because it had not offered the student an appropriate placement prior to the beginning of the school year (Southington, 334 F.3d at 221). Consequently, based upon the evidence contained in the hearing record and the circumstances of this case, I conclude that the parent's claim accrued no later than September 2006, when the student began her 2006-07 school year at Vanguard. Having determined that the parent's claim arose no later than September 2006, I must also conclude that the due process complaint notice dated February 16, 2009 was subject to the two-year statute of limitations and was therefore untimely (see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]; Southington, 334 F.3d at 221; Application of a Student with a Disability, Appeal No. 08-035; Application of a Child with a Disability, Appeal No. 07-116). Accordingly, I will annul that portion of the impartial hearing officer's decision awarding the parent reimbursement for tuition and fees he incurred relative to the student's 2006-07 school year at Vanguard.

It is unnecessary to consider the merits of the instant appeal in light of my determination above.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED,** that the impartial hearing officer's decision is annulled to the extent that, with regard to the 2006-07 school year, he determined that: (1) appeal to a State Review Officer was the proper judicial forum in which the district should have sought remedy for its disagreement with the impartial hearing officer's denial of its motion for recusal; (2) that the district's failure to file a response to the due process complaint notice precluded it from raising the affirmative defense of statute of limitations; and (3) that the parent was entitled to reimbursement for tuition and fees he incurred relative to the student's 2006-07 school year at Vanguard.

**Dated:** **Albany, New York**
**May 11, 2010**

**PAUL F. KELLY**
**STATE REVIEW OFFICER**