The University of the State of New York

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

No. 12-231

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Rhinebeck Central School District

Appearances:
Family Advocates, Inc., attorneys for petitioners, RosaLee Charpentier, Esq., of counsel

Shaw, Perelson, May & Lambert, attorneys for respondent, Michael K. Lambert, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter was appropriate. The district cross-appeals from the IHO's determination to the extent that the IHO failed to rule on its motion to dismiss and reached the merits of the parties dispute. The appeal must be dismissed. The cross-appeal must be sustained in part.

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]-[B], [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 279.4[b], 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

On May 21, 2010, a CSE convened to conduct the student's annual review and to develop the student's IEP for the 2010-11 school year (Dist. Ex. 14 at p. 1). Finding that the student remained eligible for special education and related services as a student with a learning disability, the May 2010 CSE recommended that the student be placed in a non-district public placement, an 8:1+1 special class in a Board of Cooperative Educational Services (BOCES) setting (see id.). The May 2010 CSE also recommended that the student receive the following related services: one 30-minute session per week of individual counseling and one 30-minute session per week of

counseling in a group of five (id.). The projected implementation date of the resultant IEP was identified as September 8, 2010 (id.).

In a letter dated August 31, 2010, the district's director of special programs wrote to the BOCES facility and informed it that she "heard directly from [the parents] . . . that [the student and parent] ha[d] moved to South Carolina" (Dist. Ex. 2). The director of special programs indicated that the student was "enrolled in a private school" located in South Carolina, and that the student "w[ould] not be attending the [BOCES] program . . . in the fall" (id.).

In a letter from to the district dated September 11, 2011, the student's mother expressed dissatisfaction with the special education services provided to her daughter over a period of several years and requested tuition reimbursement for Trident Academy (Trident) for the 2010-11 school year (Dist. Ex. 4 at pp. 1-3). According to the letter, the parent had moved to South Carolina with the student, indicating that she was "in search of a school that would help [the student]" (id. at p. 2).[1] The student's mother contended that the student made "tremendous progress" at Trident and further requested that the district "promptly" respond to her request for tuition reimbursement (id.).

On January 30, 2012, the director of special education wrote to the parent and denied her request for tuition reimbursement (Dist. Ex. 6). The director of special education contended that the district's duty to provide the student with a free appropriate public education (FAPE) ceased when the student moved out of the district in August 2010 (id.). Therefore, the district was "not obligated to reimburse [the parents] for private school tuition" incurred after August 2010 including "the 2010-2011 and 2011-2012 school years" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 6, 2012, the parents requested tuition reimbursement for the costs of the student's education at Trident for the "2010" school year (Dist. Ex. 1 at pp. 1-3).[2] With respect to the challenged school year (2010-11), the parents alleged that a class profile revealed that the student would be the only student eligible for special education due to having a disability category of learning disability; all other students had "behavioral/emotional" diagnoses (id. at p. 3).[3] Additionally, the parents alleged that the "[f]inal IEP" failed to include reading goals despite this being her "#1" area of deficit (id.). The parents further alleged that during the "[s]pring/summer of 2010", the parents and district were unable to "agree on [a] placement for the fall" despite "[m]ultiple communications" (id.). The parents claimed that she informed the district that the student was accepted to two nonpublic schools and

[1] Although both parents bring this appeal, it is necessary at times to distinguish between the student's parents as the hearing record reflects that one parent remained in the district while the other moved to South Carolina with the student (see, e.g., Tr. pp. 25-28, 34, 39, 42; Dist Exs. 2, 4). Unless otherwise noted, references to the "parent" refer to the student's mother.

[2] While the cover sheet of the due process complaint notice is dated May 3, 2012, the cover sheet incorporates by reference an attached recitation of facts dated June 6, 2012 (compare Dist Ex. 1 at p. 1, with id. at p. 2).

[3] Although the due process complaint notice references events that occurred between 2007 – 2009 (see Dist. Ex. 1 at pp. 2, 3), the parents have clarified on appeal that they do not seek any relief related to these school years (Pet. at p. 4, ¶ 6).

that the district "refuse[d] to pay" for them (id.). Therefore, according to the parent, her "only option was to move" to South Carolina and enroll the student at Trident (id.).

According to the parent, she arrived in South Carolina "hours before" the student's first day of school at Trident (Dist. Ex. 1 at p. 3). The parent further alleged that she and the student moved to South Carolina solely so the student "could get the education she deserves" (id.). The parent indicated that she was "willing to return to my family and my home" if the district agreed to "pay" for the student to attend an in-state nonpublic school (id.).[4] For relief, the parents sought tuition reimbursement for the student's attendance at Trident for the 2010-11 school year (id.).

B. Impartial Hearing

The matter proceeded to an impartial hearing on September 20, 2012 (Tr. pp. 1-51).[5] The parties indicated at the hearing that the testimony and evidence presented on that day would relate solely to the district's motion to dismiss the parents' complaint (see, e.g., Tr. pp. 13-17, 29-30-31). The district raised three arguments in support of its motion to dismiss: (1) the parents were not owed a FAPE because they were not residents of the district during the 2010-11 school year; (2) the due process complaint notice was insufficient; and (3) the due process complaint notice was filed more than two years after the parent knew about the recommendations made by the May 2010 CSE (Tr. pp. 13-17). The parties agreed that, should the IHO deny this motion, the parties would introduce additional evidence and testimony at a subsequent hearing date (Tr. pp. 6-8, 30-31, 47-48).

C. Impartial Hearing Officer Decision

In a decision dated November 9, 2012 the IHO issued a final decision in which she described the documentary exhibits that had been offered into evidence (IHO Decision at pp. 3-8), and then made several findings of fact (IHO Decision at p. 9). Although the reasons why are not entirely clear, the IHO appeared to determine that with respect to the merits of the parents' claims, the student had made progress and the "IEPs" were appropriate (IHO Decision at p. 9). The IHO did not address the parties' residency dispute in her decision (id.). The IHO made one reference indicating that "the timeline ha[d] passed" for the parent to seek "remuneration for costs" but did not otherwise address the statute of limitations defense raised in the district's motion to dismiss (id.). Again although not clear, it appears that the IHO granted the district's motion to dismiss basis of its statute of limitations defense (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO rendered "[a]n illogical and incomprehensible decision" that improperly found that the district offered the student a FAPE. The parents also contend that the IHO's decision "d[id] not mention or address the issues raised by the parties." Further, argue the parents, the IHO improperly rendered a decision "on the merits of more than

[4] Specifically, the parent identified Kildonan, a nonpublic school that has not been approved as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[5] According to the hearing record, the parties engaged in a resolution meeting prior to the impartial hearing that did not resolve the parties' dispute (Tr. p. 5).

one unidentified IEPs." The parents contend that these deficiencies demonstrate "bias and/or incompetence" and request that the IHO's decision be annulled and the matter remanded to a new IHO for a determination on the merits. The parents additionally request the issuance of the following declarations: that the parents are residents of the district; that the parents' due process complaint notice raises tuition reimbursement claims for the 2010-11 and 2011-12 school years; and that the due process complaint was filed "at least two years from the date the parents became aware of . . . the possibility of a claim for tuition reimbursement."

In an answer, the district concurs with the parents that the IHO improperly issued findings on the substance of the parents' claims and that the IHO's decision should be annulled. However, the district argues that the proper remedy at this juncture is not full hearing on the merits but, rather, a ruling on the district's motion to dismiss by the either an SRO or, in the alternative, a new IHO. Additionally, the district denies the parents' material assertions and reiterates the arguments as presented in its motion to dismiss.[6] The district also objects to additional evidence attached to the parents' petition.[7]

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. v. Rowley, 458 U.S. 176, 180-83, 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; 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. Florida 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]). 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

[6] The district interposed a cross-appeal regarding the IHO's failure to dismiss the parents' complaint in its entirety as well as the IHO's decision on matters outside the scope of the due process complaint notice Additionally, the parents served a response to the district's answer and cross appeal.

[7] The parents submitted additional evidence with their petition that, according to the parents, "was intended to be included" with the due process complaint notice (Pet. Ex. A). The parents have not provided an explanation of whether it was available at the time of the impartial hearing and it does not appear to be necessary in order to render a decision in this matter. Accordingly, this evidence has not been considered.

245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

A review of the entire hearing record supports the parties' contentions that, given the procedural posture of this case, it was inappropriate for the IHO to render substantive findings in this matter, especially when the IHO did not dispose of a number of the issues in the motion to dismiss. At the start of the first day of the impartial hearing, the district indicated that "the purpose of today's hearing . . . is . . . to introduce . . . exhibits . . . and thereafter make several applications involving whether or not this [hearing] proceeds" (Tr. p. 6). The district proceeded to introduce exhibits for purposes of this application (see Tr. pp. 6-8, 10-12) and then "move[d] to dismiss" the parents' due process complaint notice based on the parents' residency, the sufficiency of the due process complaint notice, and the statute of limitations (Tr. p. 13; see Tr. pp. 13-17). The parents agreed to this procedure, agreeing to abstain from introducing exhibits "because we need a decision on the preliminary issues raised by [the district]" (Tr. p. 48; see Tr. pp. 47-48). Parties may not, even by agreement, take control a hearing process—that authority rests with an IHO alone—and in this case the parents' attorney stated on the record that "I want to make sure we are clear that [the IHO] won't make a final decision . . . until she hears all the evidence", to which the IHO responded "[o]f course" (Tr. p. 23), thus appearing to endorse the parties preferred approach.

Moreover, at the conclusion of the hearing, the district thereafter unequivocally indicated to the IHO that: "if you dismiss, we won't present more evidence [but] [i]f you don't dismiss, both parties will present more evidence on those three Burlington-Carter prongs" (Tr. p. 48). The parents' attorney reiterated that they were "asking for a written decision" on the issues raised in the district's motion to dismiss to which the IHO responded "Okay" (Tr. p. 48).

In view of the forgoing, the hearing record reveals that it was the understanding of all involved that the IHO would first rule on the issues raised in the district's motion to dismiss, after which the parties would be in a better position to present evidence after knowing which particular issues, if any, would survive the districts motion to dismiss the parents' complaint. Therefore, under these particular circumstances, it was error for the IHO to on the one hand affirm to the parties that she would allow them to defer presentation of their evidence on the merits and, on the other hand, omit rulings on most of the motion practice and render a final determination with a substantive finding of fact upon the appropriateness of the student's IEPs without affording the parties a further opportunity to be heard.[8] Accordingly, these findings must be annulled.[9]

2. Scope of Review

Before further delving into the substance of this appeal, a determination must be made regarding which claims have been properly presented on appeal. The parent argues that the district denied the student a FAPE for the 2011-12 school year; however, there is no claim for relief regarding the 2011-12 school contained in the parents' due process complaint notice (compare Pet. at pp. 6, 7; with Dist. Ex. 1 at pp. 2-3).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other

[8] Although the use of summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA, such procedures should be used by the impartial hearing officer with caution and are appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; Application of a Student with a Disability, Appeal No. 11-090; Application of the Bd. of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018).

[9] Even assuming for the sake of argument that it was appropriate for the IHO to make findings as to the parties' substantive claims, the IHO's analysis in this regard consists of two sentences and, as the parties have observed, was inadequate. The IHO would have been required to conduct a prospective analysis of the May 2010 IEP (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 187 [2d Cir. 2012] ["[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision"; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). Instead, the IHO determined that the student made progress, a determination that could not have been made unless the IHO impermissibly considered evidence that was not "reasonably known to the parties at the time of the placement decision" in May 2010 (IHO Decision at p. 9; see R.E., 694 F.3d at p. 187; K.L., 530 Fed. App'x at 87). Further, the IHO appears to have inappropriately considered multiple IEPs in determining that the 2010-11 IEP provided the student with a FAPE (IHO Decision at p. 9).

party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a], [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y. 2013] [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]).

In this case, the parents' due process complaint notice cannot be reasonably read to include any allegations related to the 2011-12 school year (see Dist. Ex. 1 at pp. 1-3). Where, as here, the due process complaint notice is silent as to this issue and the district explicitly indicated that it did not agree to expand the scope of the impartial hearing, the parents cannot pursue this claim on appeal (see Tr. p 21).[10]

B. Statute of Limitations

The use of the summary disposition procedures agreed to by the parties and initially endorsed by the IHO was an effective mechanism for resolving this proceeding and, therefore, I will consider this issue of the district's motion to dismiss next rather than remand the matter to an IHO for a determination. Turning to the district's argument that the parents' allegations in their due process complaint notice fall outside the scope of the IDEA's statute of limitations, the uncontested evidence in the hearing record supports the district's argument. The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217,

[10] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; N.K v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 283-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), the district limited its presentation to the issues identified in its motion to dismiss and did not raise any allegations regarding the 2011-12 school year.

221-22 [2d Cir. 2003]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[11]

In this case, the parents' due process complaint notice challenges aspects of the May 21, 2010 IEP (Dist. Exs. 1 at p. 3; 14 at p. 1). The parents testified at the impartial hearing that they attended the May 21, 2010 CSE meeting and, at the end of the meeting, understood the CSE's recommendations for the student (Tr. p. 43). There is no information suggesting that any event other than the May 21, 2010 CSE meeting provided the parents with knowledge of any perceived deficiencies with the May 2010 IEP. Therefore, evidence submitted by the parties on this issue demonstrates that the parents had until May 21, 2012 to file a due process complaint notice with respect to the May 2010 IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; Keitt v. New York City, 882 F.Supp.2d 412, 437 [S.D.N.Y. 2011]; G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1131 [D. Or. 2011].[12]

At the impartial hearing, the district asserted that it received the parents' due process complaint notice on June 25, 2012, after the statute of limitations had run (Tr. p. 16; see Ex. 1 at p. 1).[13] The parents do not contest or rebut the district's contention in this regard, and an independent review of the hearing record supports the district's position (see Dist. Ex. 1 at p. 1). The parents instead argue that they only had reason to know of the May 2010 IEP's deficiencies when the parents decided to enroll the student at Trident in August or September of 2010 (Tr. pp. 20-22; Pet. Memo of Law at p. 10). This interpretation is not supported by the evidence in the hearing record. The parents' primary objection to the May 2010 IEP is that it denied the student a FAPE by improperly omitting reading goals, an area of need for the student (Dist. Ex. 1 at p. 3). Based upon the parents' testimony that they attended the May 2010 CSE meeting and understood the CSE's recommendations at that time, the hearing record demonstrates that the parents knew (or should have known) of this deficiency as of May 21, 2010 (Tr. p. 43).

As to the parents' grouping challenge, it is irrelevant when the parent knew or had reason to know of this claim because the Second Circuit has made it clear that in cases like this, where an IEP is rejected before a district has an opportunity to implement it,[14] the sufficiency of the district's offered program must be determined only on the basis of the IEP, and not on speculative concerns as to whether it may have been properly implemented. In R.E., for example, the Second Circuit was confronted with a situation where the parents did not "seriously challenge the substance of the IEP," and instead argued that "the written IEP would not have been effectively implemented at

[11] New York State has not explicitly established a different limitations period since Congress adopted the two-year limitations period.

[12] Contrasting this, a different result may reached under a different type of claim of injury such as if the student attended the public school and the parents claimed that the district failed to implement the student's services listed in the IEP (see K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995] [date of CSE meeting not determinative for statute of limitations purposes where plaintiff "challenge[d] the IEPs and the implementation of his IEPs . . ."] [emphasis added]; accord G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1130-35 [D. Or. 2011]).

[13] Alternatively, even if I were to consider the date of the parents' due process complaint notice, June 6, 2012, this would still fall outside of the IDEA's statute of limitations (Dist. Ex. 1 at p. 2).

[14] The hearing record indicates that the parent enrolled the student in Trident in August or September of 2010, prior to the date the IEP's projected date of implementation, (see Tr. pp. 20-21, 36; Dist. Ex. 2).

[the assigned public school site]" (R.E., 694 F.3d at 195). The court rejected these claims, noting in relevant part that a court's "evaluation must focus on the written plan offered to the parents" (id.). Likewise, in K.L., the Second Circuit, citing to R.E., held that the "appropriate inquiry [wa]s into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187 [internal quotations omitted]). Claims relating to a district's "school placement" have been rejected by the Second Circuit as a basis for a finding of a denial of FAPE where an IEP has been rejected prior to when it was required to be implemented (see K.L., 530 Fed. App'x at 87 [rejecting claims that a school placement was "inadequate and unsafe" since the appropriate inquiry is into the nature of the written plan]; see also F.L. v. New York City Dep't of Educ., -- Fed. App'x --, 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]).

Because the student did not attend a district placement for the 2010-11 school year, any analysis of this issue would require the use of retrospective evidence by the district, explaining how the district would have executed the student's May 2010 IEP, which the Second Circuit has determined is not appropriate (see K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186, 195). Accordingly, the parents' "grouping" claim, no matter when the parents knew or had reason to know about it, would not be sufficient to support the parents' unilateral placement of the student in this matter (see, e.g., R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; N.K., 961 F.Supp.2d at 588-89; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]).

Therefore, the hearing record supports the district's uncontested assertion that the parents' due process complaint was received by the district on June 25, 2012.[15] Thus, it was filed more than two years from the date the parents knew of the alleged action that formed the basis of the complaint and must be dismissed.

C. Residency

Next, in light of the determination that the parent's claims are barred by the IDEA's two-year statute of limitations, it is not necessary to resolve the parties dispute over the student's residency. Although the precise date is unclear, the hearing record reveals that the district determined that the student was no longer a resident of the district (see Dist. Exs. 2, 6). The district unequivocally communicated this determination in a letter to the parents dated January 30, 2012 (Dist. Ex. 6). In this letter, the district's director of special programs informed the parents that the student "ceased to be [a] resident [ ] of the [district]" as of "August, 2010" (Dist. Ex. 6). Typically residency disputes are resolved by the Commissioner of Education (see Educ. Law § 310; see also Appeal of a Student with a Disability, Decision No. 16,552 [Sept. 16, 2013], available at http://www.counsel.nysed.gov/Decisions/volume53/documents/d16552.pdf; Appeal of a Student with a Disability, Decision No. 16,533 [Aug. 28, 2013], available at http://www.counsel.nysed.gov/Decisions/volume53/documents/d16533.pdf), and the IDEA does not clearly the procedures that must be employed by a State to resolve residency disputes involving

[15] Similarly, the district argued that no statutory exception to the IDEA's statute of limitations applied under these circumstances and the parents did not introduce any evidence or testimony rebutting this assertion (see Memo of Law in Support of Motion to Dismiss at p. 7, n. 2).

students with disabilities.[16] Because the matter can be resolved on the statute of limitations defense, a matter over which jurisdiction is clear, it is not necessary in this case to determine whether this is the proper forum to resolve the residency dispute.

VII. Conclusion

In accordance with the forgoing, the hearing record reveals that the IHO erred reaching the merits of the parties dispute without affording them the opportunity to present their evidence and in conflict summary disposition procedures endorsed by the IHO in this proceeding. Accordingly, these findings are hereby annulled. A further review of the hearing record reveals that the parents' due process complaint notice was filed over two years after the parent knew or should have known of deficiencies with the student's May 2010 IEP. Therefore, the parents' claims in the due process complaint must be dismissed and there is no need in this particular case to take further evidence regarding the merits of the parents' claims.

THE APPEAL IS DIMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 9, 2012 is modified by reversing those portions which determined that the district offered the student a FAPE and that the IEPs were appropriate; and

IT IS FURTHER ORDERED that that branch of the district's motion to dismiss the parents' claims as time-barred is granted.

Dated: **Albany, New York**
May 27, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[16] One concern with assuming jurisdiction is that in some circumstances such as these in which the claims accrued at different points in time, could encourage duplication of proceedings which may result in potentially conflicting decisions, particularly if the parties do not present identical evidence in both proceedings. At the very least, it would be incumbent upon both parties to clarify before an IHO or SRO regarding whether a district had rendered a residency determination and whether such determination was appealed to the Commissioner of Education before asking the IHO or SRO to address the same issue.