The University of the State of New York

The State Education Department
State Review Officer
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No. 13-136

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

Appearances:
Littman Krooks LLP, attorneys for petitioner, Giulia Frasca, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for compensatory education and other relief and determined that the educational program/services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2010-11, 2011-12, and 2012-13 school years were appropriate.[1] The appeal must be dismissed.

II. Overview—Administrative Procedures

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 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

[1] The IHO also dismissed in part claims from the 2010-11 school year on statute of limitations grounds.

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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The student was eligible for special education and related services as a student with an other health impairment and received special education services from the district during all times relevant to this appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In a due process complaint notice dated March 18, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11, 2011-12, and 2012-13-school years (see Dist. Ex. 1 at pp. 1-8). Specifically, the parent objected to the recommendations of CSEs that convened on September 27, 2010, June 1, 2011, and May 24, 2012 (id.; see Dist. Exs. 2A; 2B; 2C).

An impartial hearing convened on April 23, 2013, and concluded on May 16, 2013 after four days of proceedings (Tr. pp. 1-903). In a decision dated June 24, 2013, the IHO found that the parent's claims related to the September 2010 IEP were barred by the IDEA's statute of limitations (IHO Decision at pp. 15-16). The IHO also determined that the district offered the student a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years (IHO Decision at pp. 14-21). This appeal ensued.

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues set forth in the parent's petition for review and the district's answer thereto is also presumed and will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO conducted the impartial hearing in a manner consistent with due process;

2. Whether the IHO erred in dismissing the parent's allegations related to the 2010-11 school year;

3. Whether the parent's participation in the development of the student's IEPs was significantly impeded due to the lack of an interpreter at the June 2011 or May 2012 CSE meetings;

4. Whether the IHO erred in determining that the May 2012 CSE was appropriately composed;

5. Whether the IHO erred in determining (implicitly) that the June 2011 and May 2012 IEPs accurately stated the student's present levels of performance with regard to the student's health needs;

6. Whether the June 2011 or May 2012 CSEs should have conducted a functional behavioral assessment (FBA) or developed a behavioral intervention plan (BIP) for the student;

7. Whether the district failed to implement the May 2012 IEP with regard to an incident that occurred in October 2012; and

8. Whether the IHO erred in determining that the May 2012 CSE prescribed an appropriate amount of speech-language services to address the student's needs.

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, 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 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).

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

VI. Discussion

A. Preliminary Matters

1. Statute of Limitations

First, I turn to the district's argument that the parent's claims are barred by the IDEA's statute of limitations. 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[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 WL 4375694, at * 2, *4 [S.D.N.Y. Sept. 16, 2011]).

Here, the parent's due process complaint, which is dated March 18, 2013, relates to the recommendations made by successive CSEs that convened on September 27, 2010, June 1, 2011, and May 24, 2012 (Dist. Ex. 1 at pp. 1-7; see Dist. Exs. 2A; 2B; 2C; Tr. pp. 561, 565-66). The hearing record reflects that the parent attended each of these CSE meetings (Parent Ex. QQ at pp. 4-6; Tr. pp. 771-72). There is no allegation that the contents of the September 2010 IEP that resulted from the CSE meeting were in any way withheld from the parent. The September 2010 IEP was generated as a result of the September 2010 CSE meeting and the parent should have known of any perceived deficiencies with the September 2010 IEP at the time it was generated by the district in September 2010. Moreover, even if the claim had not accrued in September 2010 when the parent should have known of the alleged violation, the parent testified that by January 2011 she had become aware of and, therefore, had actual knowledge of the alleged deficiency with the present levels of performance in the September 2010 IEP (Tr. pp. 813-14). Thus, even if considered in a light most favorable to the parent, the evidence submitted by the parties on this issue nevertheless demonstrates that the parent's claim accrued no later than January 2011 and she had until, at latest, January 2013 to file a due process complaint notice with respect to the September 2010 IEP (see G.W., 2013 WL 1286154, at *17; 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]). In accordance with the foregoing, the claims accrued and the clock appears to have started to run in September 2010 but certainly no later than January 2011 and, therefore, the parent's claims in the March 2013 due process complaint regarding the September 2010 IEP are barred by the statute of limitations and will not be considered on appeal.[2]

[2] While the IDEA's statute of limitations may not apply as strictly in situations where a parent alleges that a district fails to implement an IEP, the implementation of the September 2010 IEP was, as described below, not at issue in this proceeding.

2. Scope of Review

On appeal, the parent raises additional bases for a denial of FAPE that were not included in her due process complaint notice. Specifically, the parent alleges that the student's classification was inappropriate; that the district did not conduct sufficient evaluations of the student; and that the district failed to appropriately implement each of the challenged IEPs.[3] The parent also avers that the CSE erred by failing to prescribe special education services on a twelve-month basis as well as parent counseling and training services. A complaining party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended 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]; see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]). Therefore, because these claims were not identified as issues to be resolved at the impartial hearing, they cannot be considered on appeal.[4]

3. Conduct of Impartial Hearing

Next, the parent contends that the IHO conducted the impartial hearing in a manner inconsistent with due process. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall

[3] With respect to the implementation of the student's IEPs, the district did not consent to an expansion of the scope of the impartial hearing to include this issue (see Tr. pp. 66, 390, 443, 470-71; 720-21). While the district introduced evidence that arguably pertained to implementation of the IEPs, the hearing record reflects that the district introduced this evidence only to refute the parent's allegation that the student's service levels were inadequate (see Dist. Ex. 1 at 6). And although the district asked the parent questions about the implementation of the student's related services on cross-examination, this issue was originally raised by the parent in her direct testimony (Parent Ex. QQ at p. 5). In any event, the parent testified that the student had, in fact, received all of her related services during the 2011-12 school year (see Tr. p. 781-86).

[4] Additionally, the district did not open the door to these claims by soliciting testimony from a witness "in support of an affirmative, substantive argument" as to these issues (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59, 2014 WL 2748756, at *2 [2d Cir. Jun. 18, 2014]; see M.H., 685 F.3d at 250-51; 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, 282-84 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *9).

not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]).

The district denies the parent's allegations and asserts that both parties were treated in a similar manner. The parent's allegations are not substantiated by the evidence in the hearing record. First, with respect to the April 23, 2013 hearing date, the hearing record reflects that it commenced at 11:35 A.M. and concluded at 5:35 P.M. (see Tr. pp. 1, 376). This is a significant discrepancy from the timeframe of "approximately 9:30am until 6:00pm" alleged by the parent in her petition (Pet. at p. 10).[5] Moreover, although the parent's attorney contends that she was not permitted to take a break on the April 23, 2013 hearing date, the district essentially denies that the request occurred and the hearing record does not reveal that the parent or her attorney requested such a break. While the allegation against the IHO suggests insensitivity toward the needs of the parent's counsel that is not insignificant, more than a bare allegation of callousness is required—some inkling that there has been problematic activity should appear in the hearing record that is contemporaneous with the event. In this case, one letter purportedly sent to the IHO from a supervising attorney from parent's counsel's firm was dated April 29, 2013—five days after the alleged event—which identified the parent counsel's need for breaks, but I also find that letter troubling in that the IHO makes no reference to it, there is no indication that opposing counsel was informed of this communication with the IHO (which went so far as to suggest that the IHO should consider recusing herself)[6] and, other than a request in the letter that it be added to the hearing record, the parent's counsel made no further attempt in the three subsequent hearing dates to offer it into evidence during the hearing. It is also unclear to me why the parent's counsel alleges that she requested a break during the hearing on April 23, 2013, but none of the alleged requests by the parent's counsel appear in the transcript from that day, and the counsel for the parent makes no attempt to explain why.[7] Therefore, even if the IHO was demanding of counsel for the parties and the hearing room was hot, on this record there is insufficient evidence to conclude that the IHO acted with bias or conducted the impartial hearing in a manner inconsistent with due process.[8]

[5] This timeframe is further inconsistent with the parent's allegation in her memorandum of law that the hearing lasted from "11a.m-6:00p.m." (Pet. Memo of Law at p. 18).

[6] If counsel for a party seeks recusal of an IHO, the hearing record should indicate with abundant clarity that the opposing counsel has been made aware of such a request.

[7] On a later hearing date, the IHO allowed the parent, upon request, to take a break (Tr. p. 491) and permitted the parent's attorney to open a door to increase the comfort level in the room (Tr. p. 655).

[8] The parent's assertions of bias and misapplication of the applicable burden of proof are without merit. With regard to the burden of proof, even assuming for purposes of argument that the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer v. Weast, 546 U.S. 49, 58

B. FAPE

1. Parental Participation

Turning to the parent's substantive claims, the parent contends that the IHO erred by finding that the parent did not require an interpreter at the June 2011 and May 2012 CSE meetings. A review of the hearing record supports the IHO's conclusion. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of the Dep't of Educ., Appeal No. 12-215; Application of a Child with a Disability, Appeal No. 05-119).

The evidence in the hearing record reveals that the parent attended the June 2011 and May 2012 CSE meetings and that she understood the recommendations discussed at these meetings (Dist. Ex. 33 at p. 3; Parent Ex. QQ at pp. 4-6). Most importantly for purposes of this appeal, the evidence in the hearing record does not show that the parent requested that an interpreter attend the June 2011 or May 2012 CSE meetings. Moreover, the parent communicated with district employees and the student's providers in English such that none of these individuals suspected that the parent did not understand English (Dist. Exs. 31 at p. 1; 33 at p. 3; 34 at p. 2; 36 at p. 2; Tr. pp. 69-70, 752-53). Therefore, the evidence demonstrates that neither the June 2011 nor May 2012 CSEs were put on notice as to the parent's alleged need for an interpreter.[9]

However, I note that an interpreter assisted the parent during the impartial hearing (see, e.g., Tr. pp. 755-863). Further, the parent testified that her "first language" is a language other than English (Parent Ex. QQ at p. 2). Therefore, I will order that when the next CSE reconvenes, the district shall consider whether the parent requires an interpreter and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE provided or elected not to provide such services (20 U.S.C. § 1415[c][1]; 34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

[2005]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]). Moreover, regardless of which party bore the burden of proof, an independent review of the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2011-12 and 2012-13 school years.

[9] The parent's general statement that the district was "aware of th[e] fact" that she required an interpreter is insufficient to impart knowledge of a need for interpretation services to the June 2011 and May 2012 CSEs (Parent Ex. QQ at p. 2).

2. CSE Composition

Turning next to the parent's argument regarding the composition of the May 2012 CSE, the May 2012 IEP indicates that the following individuals attended the CSE meeting: a special education teacher, the parent, a district representative, the student's speech-language pathologist, the student's occupational therapist, and the student's physical therapist (Dist. Ex. 2C at p. 16). On appeal, the parent contends that the failure to include, as required, a regular education teacher and/or a school psychologist resulted in a denial of FAPE to the student.

First, as neither party argues that the student should have been educated in a general education environment, a regular education teacher was not a required member of the CSE (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). Moreover, the hearing record reflects that the student's then-current special education teacher was also certified as a regular education teacher (Dist. Ex. 33 at p. 1).

Second, the parent is correct that the May 2012 CSE should have included a school psychologist and that its failure to do so constituted a procedural violation of the IDEA. However, there is no evidence in the hearing record suggesting that this violation significantly impeded the parent's ability to participate in the development of the student's educational program or deprived the student of educational benefits (Dist. Ex. 33 at p. 3; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Absent some evidence as to how this error impacted the student or the parent's ability to participate in the May 2012 CSE meeting, the hearing record does not support a finding of a denial of a FAPE on this basis (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]).

3. Present Levels of Performance

The parent alleges on appeal that the present levels of performance in the June 2011 and May 2012 IEPs were insufficient because they did not incorporate information regarding the student's health and medical needs. It does not appear, however, that this information was before the June 2011 or May 2012 CSEs (see Tr. p. 787). The student's special education teacher for the 2010-11 and 2011-12 school years testified that she "was not aware that the student was taking medication" nor was she "aware that the student has asthma, several food allergies, attention deficit disorder[,] or epilepsy" (Dist. Ex. 33 at p. 3). This teacher further testified that the parent did not communicate this information to her "at any time before or during" the June 2011 CSE meeting (id.).

Similarly, regarding the May 2012 CSE meeting, the special education teacher indicated that she was not aware of any of the student's purported health conditions and that the parent did not make this information available to her "before or during" the meeting (Dist. Ex. 33 at p. 5). The parent did not refute this evidence at the impartial hearing. Therefore, because the June 2011 and May 2012 CSEs were unaware of and had no reason to suspect that the student had unaddressed medical needs, the resultant IEPs cannot be deemed insufficient on this basis (A.B. v. Franklin Twp. Cmty. Sch. Corp., 898 F. Supp. 2d 1067, 1080 [S.D. Ind. 2012] [no denial of FAPE where the district "included as much information regarding [the student's] medical issues as it was aware of at the time the IEP was proposed"]).

The evidence in the hearing record reveals that a registered nurse employed by the district served as the de facto liaison between the parent and the district regarding the student's health needs (see Tr. pp. 113, 126, 134-38). It appears that the nurse ensured that the student's medication and health needs were monitored and implemented and, further, that information related to the student's seizure disorder was shared with district employees including the student's providers after the June 2011 and May 2012 CSEs (Tr. pp. 138, 141-42, 433-34, 466, 503-04, 518, 713; Parent Ex. MM-1). Therefore, while I agree with the parent in principle that the student's health needs should be discussed and incorporated into her IEP so that all teachers and service providers who work with the student may familiarize themselves with her needs (see 34 CFR 300.323[d]), I can discern no evidence suggesting that the CSE failed to respond to such needs. In light of the information that became available during the events post-dating the CSE meetings in question, I will order that if the CSE has not already done so that, at the student's next annual review, the CSE shall discuss the student's health and medical needs and, as appropriate, secure the attendance of a school physician at this meeting (see Educ. Law § 4402[1][b][1][a], [b]; 8 NYCRR 200.3[a][1][vii]).[10]

4. FBA/BIP

A review of the hearing record supports the IHO's conclusion that neither the June 2011 nor May 2012 CSE participants had any information indicating that the student exhibited interfering behaviors requiring an FBA or BIP. The June 2011 and May 2012 IEPs' present levels of performance do not indicate that the student evinced behavioral needs requiring the generation of an FBA or BIP (Dist. Exs. 2B at pp. 1-2; 2C at pp. 1-2). Additionally, the student's teachers and related service providers uniformly testified that the student did not exhibit any interfering behaviors at the time of the June 2011 and May 2012 CSE meetings that could not be redirected by a teacher or provider (Dist Exs. 31 at p. 2; 33 at pp. 3, 4; 34 at p. 2; 36 at pp. 3, 4; Tr. pp. 412, 526)

While the student's classroom teacher for the 2012-13 school year described in testimony some "non-complian[t]" behaviors that lasted "a couple of weeks," this evidence post-dates the May 2012 CSE meeting and, accordingly, may not be considered in assessing the validity of the May 2012 IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] ["a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]).[11]

[10] Moreover, the parent testified that she did not receive a procedural safeguards notice from the district (Tr. pp. 876-77). I will also order the district to, to the extent it has not done so, provide the parent with a copy of this document on the form prescribed by the Commissioner and in accordance with the IDEA and State regulations (20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]).

[11] Assuming for purposes of argument that the parent argues that the CSE should have reconvened after observing such behaviors, the evidence in the hearing record shows that the student's changed behavior was a side-effect of medication (Dist. Ex. 36 at pp. 3, 4; Parent Ex. QQ at pp. 9-10; Tr. pp. 526, 537-38). Indeed, the parent testified that these behaviors "occurred as a direct result of the medication [the student] t[ook] for epilepsy" (Parent Ex. QQ at pp. 9-10; see also Tr. pp. 806, 821-22). However, the student's classroom teacher for the 2012-13 school year testified that the student was still able to be managed through "time-outs and other strategies" during this time period (Dist. Ex. 36 at p. 3; Tr. pp. 543-44). The teacher further testified that the student "returned to her

5. Implementation of May 2012 IEP

Next, the parent contends that the district failed to properly implement the May 2012 IEP insofar as the student fell and sustained an injury at school in October 2012.[12] The student had a history of left side facial paresis and precautions recommended due to a history of reflux, choking and respiratory difficulties (Parent Ex. E at p. 2; see Tr. p. 708). The evidence shows that the 1:1 "[h]ealth" paraprofessional required by the May 2012 IEP was present with the student in the classroom on the day of the injury, and that she was present with the student at all times (Tr. pp. 739-40, 742, 754; see Dist. Ex. 2C at p. 8). The evidence indicates that the student fell once, appeared alright to the staff and the nurse, and then fell once more later in the same day at which point the parent was asked to pick up the student (Dist. Exs. 36 at p. 2; 39 at p. 2; Tr. pp. 116-22, 454-55, 738-41, 754) Following the student's initial injury, the student was examined by the school nurse who, shortly thereafter, contacted the parent to inform her of the incident (Tr. pp. 116-19, 741, 790). The student's pediatrician testified that the student had no reported seizure activity prior to when the student fell in October 2012; that she could not determine whether the seizure disorder was caused by the falls or if the falls resulted from the seizure disorder; and that the student was prescribed medication thereafter to address the seizure disorder, which medication could affect the student's demeanor in the manner observed by the pediatrician (Parent Ex. SS; Tr. pp. 171-72). While the parent was understandably upset by this incident, the parent's allegations in the due process complaint appear to suggest that (1) the paraprofessional had been recommended by the CSE to prevent falling; (2) district staff was negligent and failed to prevent the student from falling; and (3) that the seizure disorder was the result of the falls in October 2012 (Dist. Ex. 1 at p. 4), but a claim of causation, duty, negligence and injury sound more as state law liability and damages claims rather than an appropriate topic for relief through the IDEA's due process procedures (see Pet. at ¶ 25 [criticizing district's "failure to provide appropriate services and supervision" and its "negligence"]; cf. Begley v. City of New York, 111 A.D.3d 5, 37, 972 N.Y.S.2d 48 [2013], leave to appeal denied, 23 N.Y.3d 903, 988 N.Y.S.2d 130 [2014]). Moreover, to the extent that there is overlap between these claims (i.e., common law liability and the district's statutory obligation to implement an appropriately designed IEP), the evidence in this case reveals no failure on the part of the district to implement the student's services in conformity with the May 2012 IEP. Further, the hearing record shows that district personnel responded without delay to the student's injury on the day of the October 2012 incident (Tr. pp. 116-22, 455, 522-23, 534-35).

Another appropriate inquiry for purposes of a due process proceeding is whether a district addressed a student's educational needs, including, if necessary, responding to any changed circumstances brought about by an injury (see J.N. v. Pittsburgh City Sch. Dist., 536 F. Supp. 2d 564, 578 [W.D. Pa. 2008]; see also Application of a Student with a Disability, Appeal No. 13-172); however, the parent did not present a claim that the district failed to revise the student's IEP as a result of the development of the student's seizure disorder (see Dist. Ex. 1 at pp. 4-5).

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normal behavior within the classroom" within "a couple of weeks" (Dist. Ex. 36 at p. 4). While the parent testified that she continues to observe aggressive behaviors at home, it does not appear that the district was on notice of any such behaviors (Tr. p. 835).

[12] The due process complaint identifies the date of the student's fall as occurring in October 2013 (Dist. Ex. 1at p. 4), an obvious typographical error since such an event would have post-dated the complaint (see Dist. Ex. 36 at pp. 2-3).

Accordingly, the parent's claim that the district failed to implement the May 2012 IEP with respect to the October 2012 incident is without merit.

6. Sufficiency of Speech-Language Therapy Services

Finally, the parent contends that the IHO erred by finding that the district was not required to increase the amount of speech-language therapy on the May 2012 IEP. The basis for this request is that, according to the parent, the student "did not meet any of her [s]peech and [l]anguage goals during the 2011-2012 school year" (Pet. at p. 17). This contention, however, is belied by the evidence in the hearing record. The student's speech-language provider for the 2011-12 school year testified at the impartial hearing that, with one exception, the student met all of her speech-language goals during the 2011-12 school year (see Tr. pp. 86-89). This provider also testified that the level of speech language services in the May 2012 IEP—three 30-minute individual sessions per week—was appropriate to meet the student's needs (Dist. Ex. 31 at p. 2). The evidence in the hearing record supports the speech-language pathologist's determination; accordingly, the parent's argument is without merit.

VII. Conclusion

A review of the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. Moreover, the IDEA's statute of limitations prohibits consideration of the parent's claims related to the 2010-11 school year.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

IT IS ORDERED that, at the student's next annual review, the district shall consider whether the parent requires an interpreter and, thereafter, shall provide the parent with prior written notice explaining the basis for its action or refusal to take action in accordance with the IDEA as well as State and federal regulations; and

IT IS FURTHER ORDERED that, to the extent it has not already done so, the district shall provide the parent with a hardcopy of the procedural safeguards notice that conforms with State regulations within 10 days from the date of this decision; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree or have already done so, the district shall, as appropriate, secure the attendance of a school physician at the student's next annual review meeting of the CSE and the CSE shall discuss the extent to which the student's health and medical needs relating to her seizure disorder should be addressed in her IEP.

Dated: **Albany, New York**
March 23, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER