The University of the State of New York

The State Education Department
State Review Officer
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No. 14-109

Application of the BOARD OF EDUCATION OF THE CAZENOVIA CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for petitioner, Susan T. Johns, Esq., of counsel

The Law Office of William J. Porta, attorneys for respondent, William J. Porta, 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 district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2010-11 and 2012-13 school years were not appropriate. The district further challenges certain relief ordered by the IHO. The parent cross-appeals from those portions of the IHO's decision which found that certain claims were barred by the IDEA's statute of limitations, that the district was not responsible for the provision of a FAPE for the 2011-12 school year, and that the district offered the student a FAPE for the 2013-14 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part and the matter must be remanded for further development of the hearing record.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Although this proceeding includes claims pertaining to five school years beginning with the 2009-10 school year, there is scant evidence in the hearing record regarding the 2009-10 and most of the 2010-11 school years; however, the record shows that the student received special

education services within the district during the 2009-10 and 2010-11 school years (Dist. Exs. 11, 15, 16, 21, 28).

At some point prior to the beginning of the 2011-12 school year, the parent sold her home and moved with the student to a neighboring school district (Tr. pp. 1163-64). The neighboring district developed an IEP for the student for the 2011-12 school year (see Dist. Ex. 29).[1] The parent rejected this IEP and, instead, elected to provide home instruction to the student during the 2011-12 school year (Tr. p. 1171). In August 2012, the parent and the student returned to the district (Tr. pp. 452-53, 712).

On August 28, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 33 at pp. 1, 9). Finding the student eligible for special education as a student with autism, the CSE recommended placement in a 12:1+4 special class for one and one-half hours per day (id. at p. 1). The CSE further prescribed adapted physical education in a 8:1+1 ratio three times per six day cycle in thirty-minute increments as well as the related services of individual speech-language therapy three times per six day cycle, occupational therapy (OT) in a "small group" twice per six day cycle, and physical therapy (PT) in a "small group" two times per week (id.).

On May 2, 2013, the CSE met to develop the student's IEP for the 2013-14 school year. Finding that the student remained eligible for special education, the CSE recommended placement in a 12:1+4 special class for two hours and 30-minutes per day as well as the related services of speech-language therapy and OT for July and August of 2013 (Dist. Ex. 37 at pp. 1, 8). Beginning in September 2013, the CSE recommended full-time placement in a 12:1+4 special class (id.; see Dist. Ex. 39 at pp. 1-2). The CSE further recommended the services of a 1:1 "[t]eaching [a]ssistant" to assist the student "[t]hroughout the school day" due to "safety concerns" as well as the student's "need for consistent programs to develop [his] adaptive skills" (Dist. Ex. 37 at p. 8). The CSE also recommended adapted physical education in an 8:1+1 ratio four times per six day cycle in thirty-minute increments as well as the related services of speech language therapy, OT, and PT (id.). The May 2013 IEP further indicated that the IEP would be provided by way of a Board of Cooperative Educational Services (BOCES) program referenced as "SKATE" (id. at p. 11).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated May 21, 2013, the parent alleged that the district failed to offer a FAPE to the student for the 2009-10 through 2013-14 school years. The parent asserted that the statute of limitations should be tolled so as to include all of the above school years because the district withheld information from the parent that prevented her from requesting an impartial hearing.

[1] This IEP is dated May 16, 2012, which appears to be a typographical error as the evidence in the hearing record shows that it was developed for the 2011-12 school year (Dist. Ex. 29 at p. 1; see Tr. pp. 373, 452, 455, 712, 1066).

[2] The hearing record reflects that "SKATE" is an acronym for Scaffolding Kids' Abilities Through Education (Tr. p. 595).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 5, 2013, and concluded on January 14, 2014 after seven days of proceedings (Tr. pp. 1-1401). In an interim decision, dated October 16, 2013, the IHO found that the parent's claims related to the 2009-10 and 2010-11 school years (specifically, those before May 24, 2011) were barred by the IDEA's statute of limitations (Parent Ex. H at pp. 1-3). In a final decision on the merits dated June 15, 2014, the IHO determined: that the district was not responsible for the provision of FAPE to the student for the 2011-12 school year as she was not a resident; that the district failed to offer the student a FAPE for May and June 2011, as well as for the 2012-13 school year; and that the district offered the student a FAPE for the 2013-14 school year. As a remedy for the district's failure to provide a FAPE for May and June 2011 and the 2012-13 school year, the IHO ordered the district to provide compensatory additional services to the student. This appeal ensued.

IV. Appeal for State-Level Review

The district appeals, challenging the IHO's conclusion that it failed to offer the student a FAPE for May and June 2011 and the 2012-13 school year. The district further objects to several aspects of the IHO's order of relief. In an answer, the parent denies the district's material allegations and argues that the IHO correctly concluded that the district failed to offer the student a FAPE for May and June 2011 and the 2012-13 school year. The parent also interposes a cross-appeal asserting that the IHO erred by: (1) unnecessarily prolonging the impartial hearing; (2) dismissing certain claims as outside his jurisdiction; (3) failing to specify what evaluations the student was entitled to in his decision; (4) failing to toll the statute of limitations for the 2009-10 and 2010-11 school years; (5) finding that the district did not violate the McKinney–Vento Homeless Assistance Act of 1987 (McKinney-Vento Act) during the 2011-12 school year; and (6) finding that the district offered the student a FAPE for the 2013-14 school year.

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 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

A. Preliminary Matters

1. Conduct and Scope of the Impartial Hearing

First, I turn to the parent's claims relating to the impartial hearing. The parent's claim of inordinate delay during the impartial hearing is without merit. Numerous courts have rejected the notion that untimeliness in the administrative hearing process in and of itself should constitute a reason to reject an administrative decision particularly where, as here, the parent received a final decision on the merits of her claim (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015]; J.W. v. New York City Dep't of Educ., 2015 WL 1399842, at *6 n.3 [S.D.N.Y. Mar. 27, 2015]; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *6 [S.D.N.Y. Aug. 21, 2014]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *7 n.3 [S.D.N.Y. July 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014]). Moreover, the parent's claim that the first IHO appointed to hear this matter was biased was wholly without merit. The parent's grievance was related to the timeliness of the IHO's appointment, and the parent failed to articulate any reason why this IHO was unable to fairly and impartially adjudicate the parent's claims (Tr. pp. 131-32, 134, 137). Thus, ironically, counsel for the parent's protracted objection to this IHO's appointment served only to further delay the impartial hearing. Therefore, there is no legal or regulatory basis to set aside the IHO's decision on the basis of delay. But even if there was grounds for granting additional relief as a result of impermissible delay in the hearing process, counsel for the parent's own conduct would, as an equitable matter, preclude any further relief in this instance.

Additionally, I can find no error in the IHO's refusal to resolve the parent's claims under various federal statutes that are outside the scope of the IDEA or the Education Law. In her due process complaint notice, the parent alleged violation of, among other laws, Section 504 of the Rehabilitation Act (section 504), the Americans with Disabilities Act (ADA), and the Family Educational Rights and Privacy Act (FERPA) (see Dist. Ex. 1 at p. 17). State law does not make

provision for review of section 504, ADA or FERPA claims through the SRO appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]). Nor is there any evidence in the record indicating that the IHO was appointed for purposes of a hearing process other than the IDEA.[3] Thus, I have no basis for finding a violation of the IDEA or its State law counterpart when the IHO declined to consider these claims (IHO Decision at pp. 2-3).

Third, a review of the IHO's decision reveals that he relied at least in part upon retrospective testimony to support his conclusion that the IEPs in place during May and June 2011 as well as the August 2012 IEP failed to offer the student a FAPE (IHO Decision at pp. 7, 15-16, 22-23). The information about the student's subsequent progress under those IEPs, which was unavailable to the CSEs, cannot be used to assess the CSEs' recommendations at the time they were made (see 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"]; see R.E., 694 F.3d at 193). Accordingly, these findings of the IHO that relied on a retrospective analysis of the IEPs discussed above must be reversed.

2. Scope of Ordered Evaluations

The parent cross-appeals a portion of the IHO's decision related to an agreement between the parties to conduct an evaluation of the student. During the impartial hearing, the parties appear to have reached a private settlement as to this claim (Tr. pp. 1008, 1222).[4] It further appears that an evaluation was, in fact, conducted during the impartial hearing (Tr. pp. 1222-23). The IHO, in his decision, referenced this issue by noting that "the [d]istrict conceded a demand for independent evaluations and offered the [p]arent such evaluations" (IHO Decision at p. 3). The IHO further noted that "[t]his then will become part of this order without further discussion" (id.). On appeal, the parent argues that the IHO's decision, which uses the plural "evaluations," contemplates additional evaluations which the district failed to conduct. I agree with the parent insofar as the IHO's reference to "evaluations" without any further explanation is ambiguous. However, the parties did not develop sufficient information as to the nature of their agreement in the hearing record, and it does not appear that the evaluation in question constituted an independent

[3] Compliance with the IDEA's impartial hearing procedures is one, but not the only, means by which a district may satisfy the hearing requirements for section 504 claims (34 CFR 104.36).

[4] The hearing record also contains references to, and a copy of, a second due process complaint filed by the parent in this proceeding (see Tr. pp. 132-34, 274-85). It appears that this due process complaint notice requested an independent evaluation (IEE) at public expense. It does not appear that an IHO consolidated this request with the due process complaint notice discussed in this proceeding (Tr. pp. 275-82). But, in any event, the relevant due process complaint notice in this proceeding requested an IEE.

educational evaluation (IEE) as defined by the IDEA.[5] Given the ambiguity of the order and the necessity of remanding this matter as further described below, the IHO will have the opportunity to clarify precisely which evaluations were included in the scope of this portion of his order.

B. Statute of Limitations

Turning next to the parties' dispute over the applicability of the IDEA's statute of limitations, the parent argues that the IHO erred by finding that an exception to the statute of limitations did not apply. A review of the evidence in the hearing record supports the parent's argument. Accordingly, this portion of the IHO's decision must be reversed and this appeal must be remanded for a consideration of the parent's claims regarding the 2009-10 and 2010-11 school years.

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, 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]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[6]

An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 WL 4375694, at * 6; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634,

[5] Although the parties referred to this evaluation as an IEE during the impartial hearing, I note that the parent has not expressed disagreement with any aspect of any evaluation obtained by the school district as required by federal and State regulations (34 CFR 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005]; Application of a Student with a Disability, Appeal No. 10-101; Application of a Student with a Disability, Appeal No. 10-033; Application of a Student with a Disability, Appeal No. 09-144). While the parent argues that a January 29, 2009 letter disagreed with a district evaluation, the concerns expressed in this letter do not rise to the level of disagreement (see L.S. v. Abington Sch. Dist., 2007 WL 2851268 [E.D. Pa. Sept. 28, 2007]).

[6] New York State has not explicitly established a different limitations period.

at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the prior written notice and the procedural safeguards notice, the latter of which contains, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulation, a district must provide parents with a copy of a procedural safeguards notice annually, as well as upon initial referral or parental request for evaluation; the first occurrence of the filing of a due process complaint; and upon parental request (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, regardless of whether a district has provided the parent with a procedural safeguards notice, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Here, the evidence in the hearing record reveals that the district did not provide the parent with a procedural safeguards notice in the manner required by the IDEA. The district's director of special education testified that "it is [district] practice that[,] when a child is referred [for an initial evaluation], a copy of the procedural safeguards notice is sent" (Tr. p. 300). The hearing record further reflects that, on March 12, 2007 and January 11, 2008, the district sent letters to the parent indicating that "a description of [the parent's] legal rights" was attached (Parent Ex. A at pp. 42, 44). The parent denied receiving a procedural safeguards notice from the district at any time prior to the date that she requested the instant impartial hearing (Tr. pp. 338, 1168).[7] The director further testified that, although several prior written notices were sent to the parent that stated "[p]reviously you received a procedural safeguards notice," no procedural safeguards notices were, in fact, included in correspondence to the parent (Tr. pp. 210, 215-41, 249). Thus, it appears that the parent was not provided with a copy of the procedural safeguards notice at any time after January 11, 2008. Although the prior written notices issued by the district referenced a prior provision of a procedural safeguards notice, under these particular circumstances, this was inadequate to overcome the withholding information exception to the statute of limitations, and the district did not demonstrate that the parent otherwise had actual knowledge of the limitations period.

The evidence in the hearing record is sufficient to support a finding that the parent was prevented from requesting an impartial hearing based upon the district's failure to provide the parent with a procedural safeguards notice in the manner dictated by the IDEA. Specifically, the evidence shows that the parent attended and participated in each CSE meeting for the student, and the parent testified that, had she been aware of her legal rights in 2009, she would have requested an impartial hearing at that time (Tr. pp. 308-10, 344, 347, 348-49). A review of the entire hearing record reveals no information suggesting that the parent was aware of her right to request a due process hearing. The testimony of the district's director of special education that the parent made statements such as "I know my rights" or "[y]ou can't make a decision without me agreeing" during unspecified CSE meetings, which the parent denied making, does not demonstrate awareness of the statute of limitations (Tr. pp. 320, 351-52).

[7] While the district contended that it enclosed a copy of the procedural safeguards notice together with a May 28, 2013 letter, this is unlikely given the parent's contradictory testimony as well as the modest postage cost associated with the mailing of this letter to the parent (Parent Ex. A at 24-26; see Tr. pp. 245-48 [district's procedural safeguards notice over 40 pages which would not have been successfully mailed for 46 cents]).

Similarly unsupportive of the district's argument is the director of special education's testimony that the parent attended certain CSE meetings accompanied by a caseworker, relative, or advocate (Tr. pp. 308-09). The hearing record reflects: that a relative attended the October 5, 2009 CSE meeting; that a "service coordinator" attended the October 2009, April 13, 2010, and August 2012 CSE meetings; and that a special education advocate attended the August 2012 CSE meeting (see Dist. Exs. 16 at p. 8; 17; 21 at pp. 6, 10; 22; 25 at p. 1; 33 at p. 12; see also Tr. pp. 350-51). While obtaining the assistance of an individual holding him or herself out as a special education advocate creates a more compelling argument that knowledge of the limitations period and other due process rights should be imputed to a parent, in this case the argument is unavailing as such an advocate did not attend a CSE meeting relative to the disputed 2009-10 and 2010-11 school years and there is no other information in the hearing record suggesting that such an individual otherwise informed the parent of her due process rights at that time (see R.B., 2011 WL 4375694, at *7 [noting that the parent attended a CSE meeting with an "attorney who specialize[d] in education law" as evidence of the parent's awareness of his rights]; Richard R., 567 F. Supp. 2d at 945 ["[I]n the absence of some other source of IDEA information, a [school district's] withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights."]).

Therefore, considering the record as a whole, the district's failure to provide a procedural safeguards notice, from at least January 11, 2008 through the filing of the due process complaint notice on May 23, 2013, is sufficient to conclude that the withholding information exception to the IDEA's statute of limitations applies in this instance (20 U.S.C. § 1415[f][3][D]).[8] As noted previously, the hearing record was not developed with regard to the parents claims for the 2009-10 and 2010-11 school years due to the limitations period ruling and, accordingly, the portion of the IHO's dismissing the parents claims on statute of limitations grounds will be reversed and the matter will be remanded for development of the record and a determination as to the issues raised in the parent's due process complaint notice regarding the provision of FAPE was for the 2009-2010 and 2010-2011 school years.[9]

C. 2010-11 School Year

The district appeals the IHO's finding that it failed to offer the student a FAPE for May and June portion of the 2010-11 school year. Upon review of the hearing record and given the overall disposition of this appeal, the IHO's findings shall be vacated and remanded for reconsideration of the parent's claims for that entire school year without using retrospective evidence of the student's progress to evaluate the adequacy of the IEP.

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[8] The underdevelopment of the hearing record on the early school years at issue is understandable in the context of the IHO's conclusion regarding the statute of limitations. Had I reached the same conclusion as the IHO on the statute of limitations issue, I would have likely precluded evidence from the 2009-10 and 2010-11 school years that was not relevant to the parent's claims arising from the 2011-12 school year and onward.

[9] On remand, the IHO shall address the discrete issues raised in the parent's due process complaint notice with respect to the IEPs developed during these school years (Dist. Ex. 1 at pp. 14-17). Moreover, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying and narrowing those issues (8 NYCRR 200.5[j][3][xi]).

As an initial matter, the IHO failed to apply a prospective analysis of the IEPs in effect during this time period; namely, an April 13, 2010 IEP and a June 9, 2011 IEP (IHO Decision at p. 13; see Dist. Exs. 21 at p. 1; 28 at p. 1). While the IHO found that the failure of these CSEs to develop a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) for the student resulted in a denial of FAPE, he did not analyze the April 2010 and June 2011 IEPs to determine whether they addressed the student's interfering behaviors (see R.E., 694 F.3d at 190 [observing that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE" and that, if an FBA is not conducted, an administrative officer or court "must take particular care to ensure that the IEP adequately addresse[d] the child's problem behaviors").[10]

Additionally, in finding that the district failed to offer the student a FAPE during May and June 2011, the IHO indicated that he "extrapolated retrospectively" from his conclusions regarding the 2012-13 school year, which was an improper mode of analysis, because the controlling law in this circuit requires a prospective analysis of claims that an IEP is inadequate (IHO Decision at p. 23; R.E., 694 F.3d at 186 [an "IEP must be evaluated prospectively as of the time of its drafting"]). Therefore, upon remand, the IHO shall adjudicate the parent's claims with respect to the 2010-11 school year by conducting a prospective analysis of the April 2010 and June 2011 IEPs, assessing their adequacy based on the information available to the CSE at the time each was written.

D. 2011-12 School Year

The parent cross-appeals the IHO's dismissal of her claim that the district, although not the student's district of residence or location, should have provided services to the student during the 2011-12 school year pursuant to the McKinney-Vento Act. As stated above, a party may request an impartial hearing "with respect to any matter relating to the identification, evaluation or educational placement of [a] student or the provision of a [FAPE] to [a] student or a manifestation determination or other matter relating to placement upon discipline of a student with a disability" (Educ. Law § 4404[1]; see also Educ. Law § 4404[2]; A.M., 840 F. Supp. 2d at 672 n.17). A claimed violation of the McKinney-Vento Act, therefore, is not, in and of itself, within the jurisdiction of an IHO or SRO (see Lampkin v. D.C., 27 F.3d 605, 611 [D.C. Cir. 1994] [finding that "the McKinney Act contains no statutory mechanisms for the administrative enforcement of the beneficiaries' rights"]; Holmes-Ramsey v. D.C., 747 F. Supp. 2d 32, 41 [D.D.C. 2010] [determining that the IHO did not err by finding McKinney-Vento Act claim outside of his jurisdiction]; Kirby v. Cabell Cnty. Bd. of Educ., 2006 WL 2691435, at *6 [S.D. W. Va. Sept. 19, 2006] [finding that the McKinney-Vento, among other laws, does not "place[] additional

[10] Further, while the IHO found that these CSEs' failure to prescribe behavioral goals, offer parent counseling and training, and issue a procedural safeguards notice during this time period contributed to a denial of FAPE, it is unclear if the IHO would find a denial of FAPE based solely upon these violations (IHO Decision at pp. 7, 22-23; see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *10 [S.D.N.Y. Dec. 3, 2014] ["the failure to include parent counseling and training is insufficient, on its own, to amount to a FAPE denial"]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting courts' reluctance "to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"], aff'd, 526 Fed. App'x 135, 2013 WL 2158587 [2d Cir. May 21, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]).

obligations on the development or assessment of a child's IEP . . . ."]). Therefore, the IHO's determination is hereby affirmed.[11]

E. 2012-13 School Year—FAPE

On appeal, the district asserts that the IHO erred by finding that the district failed to offer the student a FAPE for the 2012-13 school year. Specifically, the district appeals the IHO's findings that it failed to address special factors related to the student's needs and failed to recommend parent counseling and training. A review of the evidence in the hearing record reveals no error in the IHO's conclusion.[12]

Turning first to the August 2012 CSE's consideration of special factors, the evidence in the hearing record supports the IHO's finding that the CSE failed to address special factors related to the student's behavioral needs. The August 2012 IEP stated that the student "indicate[d] displeasure by screaming, crying[,] or stomping his foot" (Dist. Ex. 33 at p. 4). The IEP further noted that the student "need[ed] strategies, including positive behavioral interventions, supports[,] and other strategies to address behaviors that impede[d] the student's learning or that of others" (id. at p. 6). Despite this information, the IEP contains no such strategies or supports and, inexplicably, states that the student did not require a BIP (id.). Thus, although it identified interfering behaviors and recognized the student's need for support, the CSE failed to prescribe supports or services in the IEP to address them. Accordingly, the IHO properly concluded that the CSE failed to address the student's interfering behaviors.[13]

On appeal, the district contends that the special class recommended in the August 2012 IEP offered skills that would "address[] the underlying cause of the [student's] behavior" (Pet. ¶ 74). However, the August 2012 CSE recommended placement in a special class for only one and one-half hours per day (see Dist. Ex. 33 at p. 1) and did not explain at the impartial hearing

[11] I note that the August 2012 IEP indicated that the student was "brought to school for therapies only by his mother" at the time of the CSE meeting (Dist. Ex. 33 at p. 3). It appears that the district copied this statement from a May 16, 2012 IEP developed by the student's then-district of residence and location (compare Dist. Ex. 29 at p. 3, with Dist. Ex. 33 at p. 3). While the district's director of special education testified at the impartial hearing that the student received related services from this other district (i.e. not the district in this proceeding), the parties are free to clarify this issue on remand (see Tr. p. 715). If the district indeed provided services to the student notwithstanding its position that the student was not a resident of the district, this would affect my disposition of this claim.

[12] As noted above, I have not relied upon those portions of the IHO's decision that utilized retrospective evidence (see IHO Decision at pp. 7, 15-16).

[13] Additionally, while it appears from the hearing record that the student was provided with a 1:1 teaching assistant through the 2012-13 school year, this service was not identified in the August 2012 IEP and cannot be used to support the district's recommendations (R.E., 694 F.3d at 188 [finding "that, with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible."]). Further, I disclaim any reliance on the IHO's finding that district teaching assistants were "minimally trained"; review of State policy regarding certification requirements for teaching assistants is not an appropriate issue for resolution through the IDEA's due process procedures and, in any event, the IHO's reasoning is not supported by the evidence in the hearing record as there is no proof regarding the qualifications of these teaching assistants (IHO Decision at p. 23; see 8 NYCRR 80-5.6[c]).

how the student's interfering behaviors could be managed in a general education classroom.[14] Indeed, the evidence in the hearing record suggests that the primary reason for pushing the student in to the general education classroom was the parent's desire for this arrangement (see Tr. pp. 457, 718).[15] Additionally, although the district contends that it developed a BIP for the student, no such written plans were entered into the hearing record (Tr. pp. 1107-09). Therefore, I find that the district's failure to address the student's interfering behaviors in the August 2012 IEP resulted in a denial of FAPE to the student.[16]

The above violation was compounded by the August 2012 CSE's failure to prescribe the related service of parent counseling and training. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]; see also 20 U.S.C. § 1401; 34 CFR 300.34[a]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, the presence or absence of parent counseling and training on an IEP does not necessarily have a direct effect on the substantive adequacy of the plan (see R.E., 694 F.3d at 191). Moreover, districts are required to provide parent counseling and training pursuant to State regulations and, therefore, "remain accountable for their failure to do so no matter the contents of the IEP" (id.; see 8 NYCRR 200.13[d]; see also R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 431-32 [S.D.N.Y. 2014], aff'd sub nom., 2015 WL 1244298 [2d Cir. Mar. 19, 2015]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11-*12 [S.D.N.Y. Mar. 19, 2013]). Thus, while a district's failure to provide parent counseling and training in the IEP would not standing alone constitute a denial of FAPE, the district's failure to do so for the 2012-13 school year may be found to have contributed to a denial of FAPE in this instance (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *10 [S.D.N.Y. Dec. 3, 2014]). Therefore, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year.

F. 2013-14 School Year—FAPE

The parent cross-appeals the IHO's conclusion that the district offered the student a FAPE for the 2013-14 school year. A review of the hearing record supports the IHO's resolution of this claim. The parent raises three challenges to the May 2013 IEP on appeal: that it did not adequately

[14] The student's special education teacher for the 2012-13 school year testified that the remainder of the student's day was spent in related services sessions or in the general education classroom (Tr. pp. 457-59).

[15] To the extent the district argued that it was unfamiliar with the student's present levels of performance, it could have ascertained this information by conducting an evaluation of the student (see Tr. p. 718).

[16] The extent of the student's interfering behaviors during the 2012-13 school year may not be considered in assessing the prospective recommendations of the August 2012 CSE (see Tr. pp. 478-80).

address the student's need for special factors; that its annual goals were inappropriate; and that it failed to prescribe parent counseling and training.[17]

First, with regard to special factors, the May 2013 IEP indicated that the student engaged in "negative sensory behaviors" including putting his fingers in his mouth, kicking, and screaming (Dist. Ex. 37 at p. 5). Therefore, the IEP recommended a BIP "to extinguish behaviors that are interfering with his learning, ie [sic] screaming" (id. at p. 6). Although there is no indication that the district, in fact, developed a BIP, the parent rejected the May 2, 2013 IEP shortly after the CSE meeting by due process complaint notice dated May 23, 2013 (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 37 at p. 1). Moreover, the May 2013 IEP indicated that the IEP would be implemented within the BOCES SKATE program (Dist. Ex. 37 at p. 1). Therefore, there would have been limited utility to conducting a BIP until the student was enrolled in the BOCES SKATE program (id.). Under these circumstances, I find that it was appropriate for the district to wait to finish developing a BIP until the student arrived in the BOCES site during the 2013-14 school year so that the providers could get an indication of how the student's behavioral needs presented within the BOCES classroom (Tr. pp. 576-77; cf. Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522, 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

Also, the May 2012 CSE recommended recommended the services of a 1:1 "[t]eaching [a]ssistant" to assist the student "[t]hroughout the school day" due to "safety concerns" as well as the student's "need for consistent programs to develop [his] adaptive skills" (Dist. Ex. 37 at p. 8). The Second Circuit has recognized that 1:1 assistance can constitute a behavioral management service (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014]; F.L v. New York City Dep't of Educ., 553 Fed. App'x 2, 6 [2d Cir. 2014]).[18] Additionally, a review of the information in the hearing record reveals that the BOCES SKATE program would provide

[17] The parent also raises an allegation pertaining to the May 2013 IEP's placement recommendation. The parent claims that the IEP recommended a 6:1+1 special class, while the district, in fact, offered placement in a 12:1+4 classroom. This claim, however, was not contained in the parent's due process complaint notice and is beyond the scope of review. Moreover, the district did not open the door to these claims by soliciting testimony from a witness "in support of an affirmative, substantive argument"—indeed, the issue was originally raised by counsel for the parent on cross-examination (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. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; see also Tr. pp. 547, 560). In any event, the evidence in the hearing record supports the IHO's determination that this was a ministerial error which the district attempted to remediate within a reasonable time after the CSE meeting (see Tr. p. 738; Dist. Ex. 39 at pp. 1-2).

[18] The parent also asserts, as the IHO found, that the student did not make progress during the 2012-13 school year. While a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, such concerns are not relevant here because the CSE offered a different and more supportive placement recommendation; namely, the BOCES SKATE program (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]

supports for the student's interfering behaviors (Dist. Ex. 37 at p. 11; see Tr. pp. 589-90, 631).[19] A BOCES psychologist explained that a behavior plan is created for each student in the SKATE program (Tr. p. 576).[20] The psychologist further explained that, with specific respect to self-stimulatory behaviors, BOCES personnel "meet with the famil[ies]" and attempt to ascertain "what is that purpose of th[e] self-stimulatory behavior" (Tr. p. 590). The psychologist offered further details as to how personnel within the SKATE program ascertain and respond to interfering behaviors in the classroom (Tr. pp. 590-91).

The parent is correct, however, that the May 2013 CSE failed to develop an FBA. The Second Circuit has indicated that a CSE's failure to conduct an FBA, if required, is a "serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors" (R.E., 694 F.3d at 190). When a CSE fails to conduct an FBA, an administrative official or court "must take particular care to ensure that the IEP adequately addresses the [student]'s problem behaviors" (id. at 194). Here, given the CSE's avowed intent to provide a BIP, the provision of a 1:1 teaching assistant in the IEP, and the supports within the prescribed BOCES SKATE program set forth in the IEP,[21] I find that the CSE offered sufficient supports to address the student's interfering behaviors (see Dist. Ex. 37 at p. 5).[22]

Turning next to the May 2013 IEP's annual goals, the parent contends that they were inappropriate. Specifically, the parent contends on appeal that they did not address the student's "inability to read, write, speak or do math." The parent further argues that the May 2013 CSE should have developed a toileting goal and "new supports" to help the student meet his speech-language goals. Here, the May 2013 IEP included four annual goals to address the student's needs in the areas of motor skills, direction following, picture communication, and play (Dist. Ex. 37 at p. 7). Consistent with the CSE's determination that the student would be graded according to an alternate assessment, these goals also contained short-term objectives (id.). The goals also contained measurability criteria (e.g., "70% success with moderate assistance over 10 weeks" and "7 out of 10 trials on 5 consecutive occasions") and indicated the methods of observation (i.e., "[r]ecorded observations") as well as the evaluative schedule (i.e., "[q]uarterly") (id.). While the parent contends that these annual goals did not address the student's "inability to read, write, speak, or do math," the evidence in the hearing record shows that the student was nonverbal and working

[19] Although the parent makes much of the fact that the SKATE program was not discussed at the May 2013 CSE meeting, counsel for the parent affirmatively represented during the impartial hearing that the SKATE program was discussed at an April 2013 CSE meeting attended by the parent and characterized as a "pre-CSE meeting" in the hearing record (Tr. pp. 735-36). This is consistent with an April 28, 2013 letter written by the parent to the district indicating that she "disagree[d] with the [CSE's decision] to send [the student] to the BOCES program" as well as the testimony offered at the impartial hearing by district employees (Tr. pp. 486-87, 489, 536, 560, 732-33, 916-17; Parent Ex. A).

[20] This testimony is relevant as it "explains or justifies the services listed in the IEP" (R.E., 694 F.3d at 186).

[21] Although the record is unclear whether an FBA would also be conducted within the BOCES environment to support the development of the BIP, given the supports in the IEP, the absence of an FBA would not, in this case, rise to the level of a denial of a FAPE where the hearing record shows that the student's behaviors stemmed from his inability to communicate (see Tr. p. 493, 563-64).

[22] This case is distinguishable from cases where the district has not identified the particular program where it intends to implement the IEP on the face of the IEP (C.F., 746 F.3d at 80; R.E., 694 F.3d at 194).

toward developing pre-academic skills (id. at pp. 3-6). Therefore, the student needed to develop communication skills before annual goals in areas such as reading, writing, and math would be appropriate. In this regard, two of the May 2013 IEP's annual goals specifically addressed the student's ability to communicate (id. at p. 7). The first stated that the student would "follow one verbal and/or visual one step direction[] . . ." (id.). The second indicated that the student "will hand an adult the PEC symbol card that corresponds to the item or activity that he wants to do from a choice of three cards . . ." (id.).[23] Thus, the May 2013 IEP's communication goals were appropriate and targeted to meet the student's needs.[24]

The parent is correct that the May 2013 IEP did not include a toileting goal (see Dist. Ex. 37 at p. 7). However, given the overall supports in the IEP as well as those offered within the BOCES SKATE program, I do not find that this omission rose to the level of a denial of FAPE. Specifically, the evidence in the hearing record indicates that the IEP would have adequately addressed the student's needs related to activities of daily living, including toileting. The IEP indicated that the student's "daily living skills . . . [we]re significantly delayed" and that he "need[ed] adult assistance to perform activities of daily living . . ." (id. at p. 6). Therefore, the CSE prescribed the services of a 1:1 teaching assistant on a full-time basis (id. at p. 8). Moreover, a psychologist employed by BOCES explained, in detail, how the SKATE program addressed students' toileting needs (Tr. pp. 584-85; see Tr. p. 572). Thus, although a toileting goal may have been beneficial, the IEP indicated that the student required adult assistance for all of his daily living skills and the recommended program possessed supports to meet these needs, including toileting. Thus, the evidence in the hearing record does not support a denial of FAPE on this basis (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting courts' reluctance "to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"], aff'd, 526 Fed. App'x 135, 2013 WL 2158587 [2d Cir. May 21, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; see also Watson v. Kingston City Sch. Dist., 142 Fed. App'x 9, 11 [2d Cir. 2005]).

Finally, it appears from the hearing record that the May 2013 CSE failed to recommend the related service of parent counseling and training. While this was improper, this omission, by itself or considered together with the CSE's failure to develop a toileting goal, did not result in a denial of FAPE to the student (see M.W., 725 F.3d at 142; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; B.P., 2014 WL 6808130, at *10 ["the failure to include parent counseling and training is insufficient, on its own, to amount to a FAPE denial"]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 585 [S.D.N.Y. 2013] ["a failure to provide parent counseling and training . . . alone is insufficient to rise to the level of denial [of FAPE]").[25]

[23] The hearing record reflects that "PEC" is an abbreviation for "Picture Exchange Communication" (Tr. p. 463).

[24] Similarly, the parent's argument that the student's speech-language pathologist should have recommended "new supports" to address the student's communication needs is without merit. The May 2013 CSE's placement recommendation—namely, the SKATE program—represented a significant support for the student's needs.

[25] Moreover, the psychologist at BOCES testified that the SKATE program "offer[ed] a family support group" that met "five to six times a year" and could help if "a family is struggling with things at home" (Tr. p. 577).

G. Relief—Compensatory Additional Services

Finally, I turn to the district's challenge to the relief awarded by the IHO. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[26] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the

[26] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

First, it is necessary to define the time period for which relief may be properly awarded. As the question of whether the district provided FAPE for the entirety of the 2010-11 school year must be determined on remand, the IHO's award of compensatory additional services for May and June of 2011 is vacated for reconsideration. As for the 2012-13 school year, the evidence in the hearing record supports an award based upon 10 rather than 11 months of this school year. In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]). With regard to the 2012-13 school year, the district's director of special education testified that she spoke with the parent by telephone "towards the end of the summer" and that the parent informed her that she "w[as] planning to move back to the district" and wished to enroll the student in the district (Tr. p. 712). The CSE met to develop the student's educational program "just a few days before the school year started" on August 28, 2012 and there is nothing in the hearing record indicating that the district unreasonably delayed convening the CSE (Dist. Ex. 33 at p. 1; see Tr. pp. 452-53). As such, there is no reason to award compensatory additional services for that portion of the 2012-13 school year prior to August 28, 2012. Therefore, the IHO's award of compensatory education must be reduced by this time period, which results in a period of 44 weeks.

Turning to the services awarded by the IHO, the IHO's award of parent counseling and training services is upheld, subject to the above limitation. Thus, based upon the rate of two hours per month, the parent shall be entitled to 20 hours of parent counseling and training services. The IHO's order that the individual who provides these services also serve as a consultant to the SKATE program and provide an additional 10 hours of services shall only be implemented to the extent that the CSE recommends the BOCES SKATE program for the 2015-16 school year and the student, in fact, attends this program.

Next, with respect to the SEIT services ordered by the IHO, modification of this award is necessary to tailor this relief to the violations described above. As an initial matter, the student was not eligible for SEIT services, which are defined by State law as services available only to preschool students with disabilities (Educ. Law § 4410[1][k]). Therefore, the IHO's order shall be modified to prescribe direct consultant teacher services, the service which most closely approximates the relief described by the IHO (see 8 NYCRR 200.1[m][1]; 200.6[d]).

As for the amount of compensatory relief awarded to the student, the IHO did not explain how an award of eight hours per week of educational services addressed the district's violation of the IDEA (see Reid v. Dist. of Columbia., 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the

educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]). The evidence in the hearing record reflects that the district's failure to address the student's behavioral needs had a deleterious effect on his ability to receive instruction in the general education classroom (Tr. pp. 508-09, 531, 1361-64). It is unclear, however, how much time the student spent in the general education classroom. The student's special education teacher for the 2012-13 school year testified that the amount of time "varied throughout the year and . . . was inconsistent day to day" (Tr. p. 480). The teacher testified that the student spent one and one-half to two hours in the general education classroom "on a good day" but did not offer additional estimates or clarification (Tr. p. 500).[27]

Meeting minutes taken contemporaneously with the August 2012 CSE meeting by the director of special education suggest a more objective measure of the time the student spent in the general education classroom (Dist. Ex. 33 at p. 13). These notes indicate that the student attended "[a]cademy [t]ime" for an hour each day, and the hearing record suggests that this involved academic instruction in the general education classroom (id.; see Tr. pp. 724-26).[28] Additionally, the student's then-current special education teacher testified that the student would be removed from the general education classroom if he became overly distracting to the other students in the class (Tr. pp. 481-82). Accounting for such removals, the evidence in the hearing record supports a finding that the student spent an average of 45 minutes in the general education classroom per day. This amounts to 3 hours and 45 minutes per week for a total of 165 hours for the period in which the student was denied a FAPE.[29] Therefore, the district is hereby ordered to provide 165 hours of compensatory, direct consultant teacher services to the student. Additionally, these services shall be provided at a school location, as it does not appear from the hearing record that home-based services were necessary for the student or consistent with the IDEA's LRE mandate (8 NYCRR 200.6[i]; see, e.g., A.K. v. Gwinnett County Sch. Dist., 556 Fed. App'x 790, 792-93 [11th Cir. 2014] [noting the preference set forth in the IDEA for educating children in a school setting]; Walczak, 142 F.3d at 132 [noting that "[t]he norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families"]). Further, I will order the district to provide these additional services to the student by February 1, 2016, so that they shall be delivered prior to the time that the CSE begins to develop the student's educational programming for the 2016-17 school year.[30]

Those portions of the IHO's award directing that compensatory additional services be delivered using the Applied Behavioral Analysis (ABA) methodology—including the order that the district engage a Board Certified Behavior Analyst (BCBA)—are not supported by the

[27] Additionally, it is unclear whether the teacher's estimate included nonacademic subjects such as lunch (see Tr. pp. 515-16).

[28] I note that the meeting minutes are difficult to decipher and partially cut-off in the version of this document entered into the hearing record (Dist. Ex. 33 at p. 13).

[29] The ten months described above constitutes 43 weeks and 5 days, which has been rounded up to 44 weeks.

[30] While the district is responsible for delivering these services, the district may elect to provide them within the context of the student's school day at, for example, the BOCES SKATE program. Also, the district may select an appropriate individual to implement these services regardless of whether he or she is employed by or associated with the SKATE program.

evidence in the hearing record. Although the hearing record reflects that the student received instruction during the 2012-13 school year using ABA, the student also received instruction in a different methodology and there is no evidence that the student could only receive educational benefit from ABA (see Tr. pp. 516-17, 862, 967-68). Thus, it would be inappropriate to limit the student's teachers to use of a specific methodology where one or more methodologies may be equally or more effective for the student (R.E., 694 F.3d at 192; see also R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *11 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. 2014]). Therefore, those portions of the IHO's order requiring the district to implement the compensatory services by providers who exclusively utilize the ABA methodology as well as his order that the district provide a "ceiling" of 65 hours of BCBA services will be reversed.[31]

Finally, the IHO's order that the student be excused from the beginning of the school day based on his sensitivity to early mornings falls outside of the scope of the "appropriate relief" that may be ordered pursuant to the IDEA and the Education Law (IHO Decision at p. 25). Accordingly, this portion of the IHO's order must be reversed.[32]

VII. Conclusion

A review of the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and offered a FAPE for the 2013-14 school year. The IHO erred, however, by failing apply the exception to the statute of limitations and by ordering compensatory additional services unrelated to the violations of the IDEA committed by the district. Accordingly, this matter will be remanded to the IHO for a consideration of the parent's claims arising out of the 2009-10 and 2010-11 school years. Additionally, the IHO's order of compensatory additional services is modified in accordance with the above discussion.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision dated October 16, 2013 which barred the parent's claims on statute of limitations grounds is reversed and the matter is remanded to the IHO for further development of the hearing record regarding the parent's claims related to the 2009-10 and 2010-11 school years; and

[31] Another reason to vacate this portion of the IHO's ordered relief is that the BOCES SKATE program does not utilize ABA instruction (Tr. pp. 575-76). Therefore, enforcement of the IHO's order that the district utilize an individual from the BOCES SKATE program to oversee the delivery of ABA services to the student would present very practical challenges in coordinating the delivery of services in a manner that was not unduly disruptive to the student (IHO Decision at p. 26).

[32] Should the IHO find a denial of FAPE for the 2009-10 and 2010-11 school years, the parties should assist the IHO in developing a record as to what services would be necessary to place the student in the position he would have occupied but for the denial of FAPE.

IT IS FURTHER ORDERED that the portion of the IHO's decision dated June 15, 2014 which relied upon retrospective evidence to assess the adequacy of the district's IEPs for the 2010-11 and 2012-13 school years is reversed; and

IT IS FURTHER ORDERED that the relief directed by the IHO is modified in accordance with the body of this decision, and that, unless the parties otherwise agree, the district shall provide the student with 165 hours of direct consultant teacher services as additional services. These services shall be delivered to the student in the school environment and shall be completed by February 1, 2016; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide 20 hours of parent counseling and training services to be delivered to the parent at her home or at a location agreed upon by the parties. These services shall be completed by February 1, 2016; and

IT IS FURTHER ORDERED that if the CSE continues the student's placement in the BOCES SKATE program for the 2015-16 school year and the student, in fact, attends such program, the district shall provide an additional 10 hours of parent counseling and training services to the parent at her home or a location agreed upon by the parties. If the above conditions are satisfied, these services shall be completed by June 30, 2016; and

IT IS FURTHER ORDERED that the IHO identify the specific evaluations that the district was directed to provide to the parent in the June 15, 2014 decision.

Dated: **Albany, New York**
April 22, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER