The University of the State of New York

The State Education Department
State Review Officer
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No. 15-053

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Cazenovia Central School District

Appearances:
The Law Office of William J. Porta, attorneys for petitioner, William J. Porta, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for respondent, Susan T. Johns, 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 determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2014-15 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior administrative appeal related to the 2009-10, 2010-11, 2011-12, 2012-13, and 2013-14 school years, and as a result, the parties' familiarity with the student's educational history and the prior due process proceeding is assumed and they will only be repeated herein to the extent relevant to this matter (see Application of the Bd. of Educ., Appeal No. 14-109). In the prior appeal, an SRO found that the IHO erred in finding the parent's claims relative to the 2009-10 and 2010-11 school years were time barred and remanded the matter for development of the hearing record on the issues raised in the parent's due process complaint notice relative to those school years (id.). The SRO further determined that the district failed to offer the student a FAPE for the 2012-13 school year and offered the student a FAPE for the 2013-14 school year (id.). With respect to the 2013-14 school year, the SRO agreed with the IHO that the recommendations made by a May 2013 CSE were appropriate to meet the student's needs. As

relief, the SRO awarded certain compensatory educational services; ordered the district to provide parent counseling and training services; and directed the IHO to identify the specific independent evaluations the district was required to provide pursuant to his decision (id.).

As relevant to the instant appeal, a CSE convened on May 8, 2014, to develop the student's IEP for the 2014-15 school year (District Ex. 8 at p. 1).[1] The May 2014 CSE recommended that the student attend a BOCES 12:1+4 special class identified in the IEP as the "SKATE program" and receive speech-language therapy, occupational therapy (OT), a sensory diet, physical therapy (PT), adapted physical education, and the services of a 1:1 teaching assistant (id. at pp. 9, 11).[2] The May 2014 CSE further recommended a 12-month school year program substantially similar to that recommended for the 10-month 2014-15 school year (id. at pp. 9-10). The hearing record reflects that the student attended the SKATE program during summer 2014 (Tr. pp. 237-38; see Dist. Ex. 17).

A. Due Process Complaint Notice

In a due process complaint notice dated September 2, 2014, the parent alleged that the district failed to offer the student a FAPE for the 2014-15 school year (Dist. Ex. 1). The parent alleged that the May 2014 CSE failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) and relied on insufficient evaluative information to develop the student's IEP (id. at pp. 5-8).[3] The parent also alleged that the IEP developed at the May 2014 CSE meeting lacked appropriate goals, supplemental aids and services, and parent counseling and training (id. at pp. 8-10). The parent also contended that the program recommended by the May 2014 CSE was inappropriate because it was too restrictive for the student (id. at p. 11). The parent further alleged that the placement recommended by the May 2014 CSE required the student to ride the bus for an unreasonable length of time and that this constituted a denial of a FAPE (id. at pp. 11-12).[4] For relief, the parent requested, among other things, district funding for specified independent evaluations and compensatory educational services (id. at pp. 22-24).[5]

B. Impartial Hearing Officer Decision

On October 14, 2014, a prehearing conference was held (IHO Decision at p. 1). Prior to the commencement of the impartial hearing, the parent submitted two motions, relating to the

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][1]).

[2] The hearing record reflects that SKATE stands for Scaffolding Kids' Abilities Through Education (Tr. p. 383).

[3] Citation to the district's exhibits is made according to the pagination of the exhibit rather than the pagination of the document itself.

[4] The parent also raised a number of claims outside the scope of an SRO's jurisdiction or which were adjudicated in the prior impartial hearing and appeal involving this student. For reasons set forth below, none of these claims need be addressed in this appeal.

[5] During the course of the impartial hearing, the parent filed a subsequent due process complaint notice, dated December 22, 2014 (Tr. pp. 624-626). The IHO initially indicated that he would consolidate the two complaints, as requested by both parties (Tr. pp. 653, 763-64, 767-70), but eventually did not consolidate the matters and issued a separate decision regarding the second complaint, an appeal from which is currently pending before the Office of State Review.

venue of the impartial hearing and the selection of the transcriptionist, both of which were opposed by the district (IHO Exs. 1-3). The IHO denied both motions by interim decision dated November 14, 2014 (IHO Ex. 4). By motion dated November 19, 2014, the district sought to dismiss those portions of the parent's due process complaint notice alleging claims which were or could have been raised and addressed in the prior impartial hearing involving this student (IHO Ex. 5). The parent opposed the district's motion and cross-moved for a finding that the district was in default for failing to respond to the claims raised in her due process complaint notice (IHO Ex. 6); the IHO reserved judgment on the motions (Tr. p. 978).

The impartial hearing convened on November 24, 2014, and concluded on January 14, 2015, after six hearing dates (Tr. pp. 1-1085). On the first day of the impartial hearing, the parent asserted that the student's pendency placement was in a 12:1+4 special class in a district elementary school pursuant to an IEP developed for the 2012-13 school year (Tr. pp. 6-9, 45, 49-50, 54-55, 225-26, 231-32). The district opposed the parent's position on pendency, contending that the student's pendency placement was the BOCES SKATE program that he attended during summer 2014; however, the district further asserted that the parties agreed that the student would attend a district elementary school during the pendency of the proceedings (Tr. pp. 52-55, 219-25; IHO Ex. 7). The IHO also received evidence and argument in support of, and in opposition to, the parent's pendency claims (Tr. pp. 237-94, 301-32, 925-34; IHO Ex. 8; see Dist. Ex. 18; Parent Ex. R). The IHO rendered an interim decision on pendency dated February 23, 2015 and found that the student's pendency placement was that which was agreed to by the parties at a meeting held on September 16, 2014 (IHO Ex. 9).[6]

In a decision dated April 13, 2015, the IHO determined that the district offered the student a FAPE for the 2014-15 school year and denied all of the parent's requested relief (IHO Decision). The IHO found that although the district did not assess the student in certain areas, its failure to conduct evaluations regarding the student's reading, toileting, sleeping, and assistive technology needs did not rise to the level of a denial of a FAPE; the parent's claim that the May 2014 CSE predetermined its recommendation was without merit; the May 2014 IEP "provided a reasonably comprehensive description of" the student's present levels of educational performance; the lack of an FBA and BIP did not result in a denial of a FAPE, as the IEP and SKATE program otherwise addressed the student's behavioral needs; while the goals contained in the May 2014 IEP did not address all of the student's areas of deficit, the hearing record did not support a finding that they were not appropriate to meet his needs; the district made meaningful efforts to include the student in the general educational environment and the recommended program was in the LRE for the student; that while parent counseling and training should have been included on the May 2014 IEP, this procedural violation did not rise to the level of a denial of a FAPE; and the CSE recommended appropriate services to address the student's needs (id. at pp. 10-21, 26, 28). The IHO also determined that the parent's claims relative to implementation of the student's pendency placement during the 2013-14 school year; access to educational records; requests for independent educational evaluations (IEEs); alleged interference with a private evaluator; and failure to provide notice of procedural safeguards were without merit (id. at pp. 22-27).[7] The IHO further found that

[6] Neither party appealed from the IHO's interim decision on pendency, and it has therefore become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). To the extent the parent now raises challenges to the implementation of the student's pendency placement, those claims were raised in the subsequent due process complaint notice and will be addressed as necessary in a forthcoming decision.

[7] The IHO also found that because the district had already provided all requested IEEs, the parent's claim was

the hearing record did not support a finding that the length of the student's bus ride to the SKATE program would have resulted in a denial of a FAPE to the student (id. at pp. 21-22). Lastly, the IHO determined that he had no authority to adjudicate the parent's discrimination and retaliation claims, and further stated that the parent's theories relative to such claims were not convincing (id. at pp. 28-30).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in determining that the district offered the student a FAPE for the 2014-15 school year. Specifically, the parent claims that the IHO erred by: finding that the district adequately evaluated the student's areas of need; concluding that the district's failure to conduct evaluations of the student's needs in reading, toileting, sleeping, and assistive technology did not deny the student a FAPE; concluding that there was no predetermination of the student's 2014-15 recommended program; finding that the May 2014 IEP described the student's present levels of educational performance; concluding that the district's failure to conduct an FBA and develop a BIP did not deny the student a FAPE; concluding that the annual goals in the IEP were appropriate; finding that the recommended placement was the student's LRE; finding that the absence of parent training and counseling on the May 2014 IEP was not a denial of a FAPE; finding that the May 2014 IEP recommended services to address the student's needs; finding that pendency was properly implemented for the 2012-13 school year; finding that the district's failure to provide timely access to educational records was not a denial of a FAPE; finding that the parent's claims regarding IEEs were moot and that the district's failure to timely respond to a request for several IEEs and failing to fund IEEs did not result in a denial of a FAPE; concluding that the parent did not have a right to have her expert observe the student in the classroom; concluding that the district's failure to provide the parent with a notice of procedural safeguards for nine years did not have any substantive impact on the student; finding the length of the student's bus ride was not a denial of a FAPE; failing to consider the cumulative impact of procedural errors; and finding that the district did not violate section 504 of the Rehabilitation Act (section 504) and denying the parent's discrimination and retaliation claims. Finally, the parent claims that the IHO disregarded the record, failed to set forth the factual basis for each and every determination he made, and that his decision contained insufficient findings of fact or references to the hearing record in support of his conclusions.

In an answer, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. The district asserts that the parent is attempting to relitigate matters that were adjudicated in a prior appeal to the SRO and are barred by the doctrines of res judicata and collateral estoppel. The district also asserts that the petition was not personally served on the district and that the appeal should be dismissed.

In a reply, the parent admits that she did not personally serve the district because in the prior appeal, she appeared as the respondent and service upon counsel for the district was permissible. Additionally, the parent contends that the district timely served an answer and was therefore not prejudiced by her error and that counsel for the district had accepted service in the past. The parent annexed an affidavit of service to her reply, indicating that she served the petition on the district on June 1, 2015. The district separately answers the petition and argues that the

moot (IHO Decision at p. 24).

petition failed to state good cause for the parent's failure to timely effectuate personal service and the appeal should be dismissed.[8]

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]).

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]). 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

[8] Neither the parent's second service of the petition on the district nor the district's service of a second answer to the petition is permitted by State regulations and counsel for the parties are cautioned to familiarize themselves with the procedures for practice before the Office of State Review (8 NYCRR Part 279).

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).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]).

VI. Discussion

A. Preliminary Matters

1. Initiation and Timeliness of Appeal

As an initial matter, the parent's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by an SRO; (2) the parties agree to waive personal service; or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Bd. of Educ., Appeal No. 12-207; Application of the Bd. of Educ., Appeal No. 11-129).[9]

A petition for review must be personally served within 35 days from the date of the IHO's decision to be reviewed, except that if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto are excluded in computing the period within which the petition may be timely served (8 NYCRR 279.2[b], [c]). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause set forth in the petition (id.).

In this case, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The findings of fact and decision of the IHO was dated April 13, 2015 (IHO Decision at p. 30). Even if the IHO's decision was transmitted to the parties by mail, the parent was required to personally serve the petition upon the district no later than May 22, 2015 (see 8 NYCRR 279.2[b]).[10] However, the petition was first served upon counsel for the district on May 18, 2015 (see May 18, 2015 Parent Aff. of Service). The petition was not served upon the district until June 1, 2015 (see June 1, 2015 Parent Aff. of Service). Accordingly, the service of the petition upon the district was untimely. Additionally, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review, the reasons for the failure must be set forth in the petition (see 8 NYCRR 279.13). Here, the parent failed to assert good cause—or any

[9] Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

[10] The only indication of the method of transmittal of the decision is that the IHO sent the decision to counsel for the parties via electronic mail on April 13, 2015, and again on April 14, 2015, noting a "slight correction on page 2" and the addition of an evidence list (Answer Exs. 2; 3).

reason whatsoever—in her petition for the failure to timely initiate the appeal, and instead indicated her reason for failing to timely initiate the appeal in a reply.[11] Accordingly, there is no basis on which to excuse the untimely personal service of the petition on the district.

With respect to the service of the petition on counsel for the district, State regulations contemplate alternate forms of service and parties may seek authorization for alternate forms of service from an SRO (see 8 NYCRR 275.8[a]; 279.1[a]). Nevertheless, counsel for the parent has provided no indication that he attempted to contact counsel for the district in order to obtain a waiver of personal service or to effectuate service through consent of the parties in this matter; instead asserting that counsel for the district had consented to accept service on behalf of the district in the past.[12] Therefore, because the parent did not timely serve the petition upon the district, set forth good cause for the failure to timely serve the petition, or obtain permission from opposing counsel or an SRO to effectuate service by alternate means, the parent's appeal must be dismissed.

Accordingly, the IHO's determination that the district offered the student a FAPE for the 2014-15 school year has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). However, out of an abundance of caution and notwithstanding the parent's failure to timely initiate this appeal, I have reviewed the entire hearing record and find that the IHO rendered a thorough and well-reasoned decision and properly determined that the district offered the student a FAPE for the 2014-15 school year.

2. Scope of Review

Before reaching the merits of this case, a determination must be made regarding which claims are properly before me on appeal. The district argues that the parent has impermissibly raised a number of issues on appeal that were not raised in the parent's due process complaint notice. In addition, the district argues that the parent's due process complaint notice filed in May 2013 encompassed claims relating to the 2009-10, 2010-11, 2011-12, 2012-13, and 2013-14 school years, which were or could have been adjudicated in a prior administrative appeal, and are barred by the doctrines of res judicata and collateral estoppel (see Application of the Bd. of Educ., Appeal No. 14-109).

A 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 prior to the impartial hearing per permission given by the IHO at

[11] Even if the reasons had been stated in the petition, the reason given for the failure to timely personally serve the petition—counsel's lack of familiarity with the regulations governing practice before the Office of State Review—does not constitute good cause (B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]).

[12] If anything, the fact that counsel for the district specifically requested that counsel for the parent waive personal service of a petition for review in a prior matter undermines counsel's assertion that he was unaware of the requirement (Reply Ex. C). And although counsel for the district agreed to accept service of the answer by mail on behalf of the district in that proceeding (id.), State regulations expressly permit service of an answer by mail to be made on counsel for the respondent (8 NYCRR 275.8[b]).

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]).

Parties are also limited by the doctrine of collateral estoppel, which "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006] [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]).

A thorough review of the hearing record reveals that counsel for the parent proffered documentary and testimonial evidence related to prior school years, despite the best efforts of the IHO to constrain the hearing to the 2014-15 school year. As a result, there is very little evidence in the hearing record that relates to the 2014-15 school year. With regard to counsel for the parent's attempts to reargue prior school years, these claims were litigated and decided in a prior impartial hearing, which was subsequently affirmed in part by an SRO (Application of the Bd. of Educ., Appeal No. 14-109). I therefore concur with the district that the doctrine of collateral estoppel bars any consideration of the claims raised in the prior proceeding and which the parent had a full and fair opportunity to litigate, as the resolution of the issues was necessary to support the final judgment on the merits. Although the impartial hearing in this matter commenced while the district's appeal of the IHO's decision in the prior proceeding was pending, the pendency of an appeal does not divest a decision on the merits of the requisite finality for collateral estoppel purposes (DiSorbo v. Hoy, 343 F.3d 172, 183 [2d Cir. 2003]).

In addition, the district correctly asserts that the parent did not raise in her due process complaint notice the claims that the district failed to provide the parent with a notice of procedural safeguards for nine years, that the student's pendency placement was not properly implemented during the 2013-14 school year, that the CSE predetermined the student's 2014-15 program, and that the cumulative impact of the district's procedural errors resulted in a denial of a FAPE to the student. Although the IHO found these claims to be without merit, it was not necessary for him to do so. The parents' due process complaint notice cannot reasonably be read to include these claims (see District Ex. 1), and a review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include these issues, nor did the parents attempt to amend the due process complaint notice to include these issues. Therefore, these allegations are outside the scope of my review and will not be considered.[13]

Also outside the scope of my review and addressed in the prior appeal are claims that do not involve the identification, evaluation, or educational placement of a student with a disability. As in the prior administrative hearing, the parent alleges a series of discriminatory and retaliatory

[13] Additionally, the district did not open the door to consideration of 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 [2d Cir. June 18, 2014]; see M.H., 685 F.3d at 250-51).

claims arising from violations of federal statutes upon which no relief can be granted pursuant to the IDEA or the Education Law (Application of the Bd. of Educ., Appeal No. 14-109). The IHO declined to consider these claims, noting that the parent provided no authority that an IHO appointed pursuant to the IDEA could adjudicate such matters. Nor is there any evidence in the record indicating that the IHO was appointed for purposes of a hearing process other than the IDEA.[14] Likewise, the parent's alleged violations of various federal civil rights statutes as well as section 504, the Americans with Disabilities Act (ADA), and the Family Educational Rights and Privacy Act (FERPA), exceed the jurisdiction of an SRO.[15] Thus, I am without jurisdiction to address the IHO's rulings on the parent's section 504 claims or his refusal to rule on the parent's other claims arising under the ADA or FERPA.

The district also correctly observed that the claims set forth in the due process complaint notice are remarkably similar to those claims raised in the prior school years. To the extent that the claims relate to the 2014-15 school year, they will be addressed herein. Of note, the May 2014 CSE continued to recommend the same program and placement for the student as did the May 2013 CSE, and that program was determined to be appropriate for the 2013-14 school year in a prior proceeding (see Application of the Bd. of Educ., Appeal No. 14-109). As discussed in greater detail below, the student's needs have not changed since the 2013-14 school year and I find that the district offered the student a FAPE for the 2014-15 school year.

B. May 2014 IEP

1. Sufficiency of Evaluative Information and Present Levels of Performance

According to the hearing record, the evaluative information considered by the May 2014 CSE included a January 2014 independent psychological evaluation (January 2014 psychological IEE) report,[16] an April 2014 team evaluation report, and progress notes (Tr. pp. 155, 307; Dist. Exs. 3; 7; 8 at p. 2).[17] The parties do not dispute the content of the evaluations available to the May 2014 CSE. With respect to the student's cognitive ability and speech-language development, the January 2014 psychological IEE report noted that standardized testing required a participant to maintain their gaze on presented stimuli and point with intent and that the student was nonverbal and had difficulty with these tasks (Dist. Ex. 7 at p. 10). Similarly, the April 2014 team evaluation

[14] 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).

[15] State law does not make provision for review of section 504, ADA, or FERPA claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2]; 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"]).

[16] The May 2014 IEP refers to the January 2014 psychological IEE report as a November 2013 evaluation (Dist. Ex. 8 at p. 2). Review of the January 2014 psychological IEE report reveals that the evaluation was conducted over five days in November 2013 but that the signature page of the report was dated January 3, 2014 (Dist. Ex. 3 at pp. 1, 25).

[17] There is at least one duplicate exhibit in the hearing record (see Dist. Ex. 3; Joint Ex. 26 at Parent Ex. G). While the parties conferred during the hearing proceedings in the instant case and submitted joint exhibits admitted during a prior proceeding to the extent practicable, the pagination of the joint exhibits is confusing and cumbersome (8 NYCRR 200.5[j][3][xii][b]). Unless otherwise specified and for simplicity, where exhibits are duplicative, I have cited to the corresponding district exhibit.

report deemed standardized testing as not appropriate for the student because of his difficulty with sustaining attention, following directions, and staying seated for any length of time (Dist. Exs. 3 at pp. 12-13). As a result, in both instances the evaluators used alternative means of assessment such as school-based observations, various rating tools, interviews/conversations with the parent and school-based personnel who knew the student, and review of previous reports (see Dist. Exs. 3; 7; 8 at pp. 2-4).

Using the evaluations available to it, the May 2014 CSE identified the student's strengths, interests and preferences, as well as his academic, developmental, and functional needs (Dist. Ex. 8 at pp. 4-5). Particularly relevant to the claims raised by the parent, the present levels of performance section of the May 2014 IEP reflects the use of a total communication approach incorporating speech, sign, and the Picture Exchange Communication System (PECS) throughout the student's day, including in his related service areas of speech-language therapy, OT, and PT (Dist. Ex. 8 at pp. 2-5).

With respect to the student's academic achievement, functional performance and learning characteristics, the May 2014 IEP reflected the student's need for close adult supervision at all times due to a lack of safety awareness; clear, consistent expectations and repetition of similar activities; an alternate communication system such as PECS; a visual schedule; a quiet environment to learn pre-academic and early communication skills; and compliance with verbal directives consistently in all environments (id. at p. 4). The May 2014 IEP also identified the student's social development needs including his need to communicate his wants and needs, develop understanding of his body in space in relation to peers, and develop understanding of appropriate voice levels when in a variety of settings throughout the school (id. at p. 5). Next, the May 2014 IEP identified the student's physical development needs including his need for sensory activities throughout his day with focus on increasing his tolerance of touching/handling objects for play and learning and decreasing his negative sensory behaviors (e.g., fingers in mouth, spitting, screaming), support from an adult on the playground to facilitate appropriate play on the equipment and play with other children, direct PT treatment to work on improving motor play skills for better participation in physical education class and playground activities, donning clothing, and learning to place objects more carefully into their proper place (id.). With regard to the student's management needs, the May 2014 IEP stated that the student required close adult supervision at all times for safety, communication, and interaction to learn new skills; 1:1 physical assistance to engage in all aspects of classroom activities and activities of daily living; a simple visual schedule; a quiet and non-distracting classroom and learning environment (free of strings, cords, and plastic as the student would seek these out and not engage); an alternative communication system such as PECS; praise, smiles, and other positive reinforcement; as well as to develop basic school routines and behaviors (id. at pp. 4-5). Based on the foregoing, the hearing record supports the IHO's determinations that the district had adequate evaluative information to identify the student's educational needs and develop the May 2014 IEP, that any evaluations the district failed to conduct did not rise to the level of a denial of a FAPE, and that the present levels of performance sufficiently reflected the student's needs (IHO Decision at pp. 19-21).

2. Annual Goals

On appeal, the parent asserts that the IHO erred in concluding that the annual goals recommended by the May 2014 CSE were appropriate and argue that the IEP lacked sufficient goals tailored to meet the student's needs in the critical areas of communication, social skills, reading, and sensory processing. While the May 2014 IEP did not include goals specifically

labeled as addressing communication, social skills, reading, and sensory processing, it included seven annual goals and seven objectives aligned to the student's present levels of educational performance and his identified developmental needs previously discussed (Dist. Ex. 8 at pp. 2-8). Here, the IEP included four annual goals, each with a corresponding short term objective, targeting the student's communication needs (id. at pp. 7-8). The first annual goal and short-term objective required the student to identify a desired item or activity by handing an adult a corresponding PECS symbol card, given a choice of four cards (id.). A similar annual goal and short-term objective targeted the student's ability to choose a preferred PECS card from a field of two (id. at p. 8). The next annual goal and short-term objective required the student to answer a question using "yes" and "no" symbol cards (id. at p 7). The final annual goal and short-term objective related to the student's communication needs targeted the student's ability to follow one-step verbal directions (id. at p. 8). Thus, I find the parent's claim regarding the lack of adequate communication goals to be unsubstantiated. Furthermore, the May 2014 IEP identified the student's ability to communicate his wants and needs as a social development need of the student, and thus the goals that targeted the student's ability to identify a desired activity and respond "yes" or "no" to a concrete question while using PECS targeted this social need as well (id. at pp. 5-6).

Next, although the May 2014 IEP did not include a "reading" goal, the IEP did include a prerequisite goal that required the student to identify the correct letter from a field of two (Dist. Ex. 8 at p. 8). The April 2014 team evaluation report suggested that this pre-academic skill was appropriate for the student (see Dist. Ex. 7 at pp. 12-13). In addition, the January 2014 psychological IEE report indicated that, "[p]reacademic skills are skills that are mastered before academic skills are taught. For example, before a child begins to read (academic skill), he or she must first master letter recognition (preacademic skill)"; further supporting the inclusion of this annual goal on the student's May 2014 IEP (Dist. Ex. 3 at p. 15).

The parent correctly asserts that May 2014 IEP lacked annual goals to address the student's sensory needs. However, as noted above, the May 2014 IEP indicated that the student needed sensory activities throughout the day to focus on increasing his tolerance for touching and handling objects, and decreasing his negative sensory behaviors (Dist. Ex. 8 at p. 5). To that end, the CSE recommended that the student be provided with a sensory diet as needed throughout the school day, as well as individual OT services (id. at p. 9). Thus, while the May 2014 lacked a specific sensory processing goal, it otherwise provided for the student's sensory processing deficits.

Based on the foregoing, the hearing record supports the IHO's determination that, although "it would have been better" if the May 2014 IEP contained goals addressing the student's daily living and adaptive behavior skills (IHO Decision at pp. 12-14), the annual goals and short-term objectives contained in the May 2014 IEP were appropriate for the student and addressed his needs at the time of the May 2014 CSE meeting (see, e.g., D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-60 [S.D.N.Y. 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

C. SKATE Program—Appropriateness and Least Restrictive Environment

Following a detailed analysis, the IHO determined that the district did not violate the IDEA requirement that a student's recommended program must be provided in the LRE (IHO Decision at pp. 14-19). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the

general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (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 112, 120-21). The IHO correctly applied the Second Circuit's two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20). A determination regarding whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120). The Court explained that the inquiry is individualized and fact-specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (id.). If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (id.).

The IHO determined that the district attempted to accommodate the student in a general education classroom until his behaviors became unmanageable and it was clear that the student made no educational progress (IHO Decision at p. 18). The IHO also determined that the BOCES SKATE program did not require the student to be in a self-contained classroom for the entire school day and provided the student the opportunity to participate with general education students (id. at p. 19). The IHO found, and the hearing record supports, that the parent has not identified what additional academic services or supplemental aids and services the district could have provided to the student that would have enabled him to participate in a general education classroom to a greater extent during the 2014-15 school year (id. at p. 21). Additionally, the IHO noted the undisputed fact that the district's attempts to educate the student in the regular education classroom did not result in meaningful progress (IHO Decision at pp. 17-18; see Tr. pp. 663-74).

The hearing record reflects that the student attended the BOCES SKATE program during the summer 2014 session and for the first day of the 2014-15 ten-month school year (Tr. pp. 237-39; see Dist. Ex. 17). The BOCES director of special education testified that the parent indicated her satisfaction with the SKATE program and with the student's classroom teacher and rejected the May 2014 IEP because the SKATE program was not located within the district (Tr. pp. 470, 481; see Tr. p. 390). Consistent with the BOCES director's testimony, the parent testified that she wanted the student to remain in the district elementary school despite the lack of an appropriate classroom (Tr. p. 986).[18]

[18] The parent testified that she did not want the student placed at the SKATE program because the travel time would leave the student tired and uncooperative (Tr. p. 934).

In a prior administrative appeal, an SRO found that a May 2013 CSE appropriately recommended the BOCES SKATE program for the student for the 2013-14 school year (see Application of the Bd. of Educ., Appeal No. 14-109). The hearing record reflects that the district attempted to maintain the student in a general education classroom for as long as he could tolerate being in that environment, in light of his significant disabilities and constant need for supervision (Tr. pp. 1039-044).[19] The student frequently engaged in behaviors such as screaming, dropping to the floor, and disrupting other students, which necessitated his removal from the classroom (Tr. pp. 301-02; Dist. Ex. 8 at pp. 3-4).

The CSE chairperson testified that the evaluative information considered by the May 2014 CSE did not indicate a need for a change in placement for the student and that the SKATE program remained the most appropriate recommendation for the student given his unique needs (id. p. 100). She also testified that there were no other students in the district elementary school with whom the student could be appropriately functionally grouped and this resulted in the student receiving 1:1 instruction in a 12:1+4 special class (id.).

According to the testimony of the student's SKATE special education classroom teacher, the student attended the SKATE summer program in a classroom of 11 students and that most students in the class received 1:1 support (Tr. pp. 385-86).[20] The teacher's description of a typical day in the SKATE program during summer 2014 reflected the opportunity for SKATE students to participate in mainstream classes, including some of the students pushing into general education classrooms for morning group (Tr. pp. 391-92). Each student had an individualized schedule based on ability, with a five-minute choice activity built in after each activity, and in consideration of each student's individual behavior plan (Tr. p. 392). The student's IEP reflected that he was unable to participate in a general education classroom for more than five minutes because of his screaming, spitting, and crying behaviors (Dist. Ex. 8 at pp. 3, 4).

The student's SKATE classroom teacher further testified that she established a visual schedule for him, created a behavior notebook that contained the concept of "first, then," listed some basic rules (e.g., sit in your chair, listen to your teacher), and included name cards ready to help the student transition (activities), so that he would know when to check his (visual) schedule (Tr. p. 393; Dist. Ex. 8 at pp. 4, 6). The teacher also indicated that staff used many visual supports and fewer verbal cues in the classroom (Tr. pp. 393-94; Dist. Ex. 8 at pp. 4, 6). The student seemed to understand the "first, then" concept quickly, and rapidly demonstrated the ability to go to the schedule with his name card and check what was coming up next, put the visual representation of the activity on his "first" card and then choose his desired thing to do on his "then" card (Tr. pp. 394-95). Academically, the student was in a small reading group of three students, during which the teacher learned the student was able to turn the pages of a book, follow along, and could identify sight words when presented with a model of the sight word (Tr. p. 395). The teacher noted that it was difficult for the student to sit and attend so staff adjusted the amount of time the student was required to sit (Tr. p. 395).

[19] The retired director of special education testified that the student started his day in the general education classroom, and ate lunch and had recess with the general education population (Tr. p. 301).

[20] The SKATE special education teacher testified that at the time of the impartial hearing, her class consisted of ten students and nine full-time certified 1:1 teaching assistants (Tr. pp. 385-86, 388). The class also included a full-time speech therapist, a part-time social worker, and a part-time occupational therapist (Tr. p. 386).

With regard to the student's management needs when he attended SKATE in summer 2014, he had a 1:1 teaching assistant to help keep him focused and on-task, and to assist him with toileting (Tr. p. 396). Socially, the student was non-verbal and used PECS with his visual schedule; staff also explored use of a computer based alternative mode of communication (id.). The teacher indicated the student had a group of students with whom he could be functionally grouped for instruction and that the student was a "good fit" for her classroom (Tr. pp. 395-97).

The SKATE special education classroom teacher testified that at the start of the summer the student was unable to sit and participate in group activities at all (Tr. pp. 397-98). The student demonstrated progress such as being able to sit in a group and take a turn, and improved focus and attention with the use of visual boundaries and visual reminders (Tr. pp. 397, 398, 445-46).[21] The teacher indicated the student had favorite teaching assistants that he liked to be with or work with in the program, and he seemed "pretty happy" (Tr. p. 398). The SKATE special education teacher noted that the student responded to the overall class management plan (Tr. p. 400). Aligned with the student's needs included in the May 2014 IEP, the teacher indicated the SKATE program was able to provide the student with consistent expectations and repetition, an alternative communication system such as PECS, a visual schedule, sensory activities, and a quiet environment to learn pre-academic skills and early communication skills (Tr. pp. 401-02; Dist. Ex. 8 at p. 4). The teacher further noted that all goals included in the May 2014 IEP could be implemented in the context of the SKATE program (Tr. p. 403).

For the reasons set forth above, I agree with the IHO that the program recommended by the May 2014 CSE was an appropriate placement and the LRE for the student for the 2014-15 school year. To the extent that the parent asserts that the district should have implemented additional services within the general education environment, the record establishes that the district attempted to provide the student with appropriate access to typically developing peers, while appropriately considering the benefits available to the student in a special class not available to him within a general education classroom.[22]

D. Remaining Claims

1. Independent Educational Evaluations

The hearing record is unclear as to which IEEs remain at issue. On remand in the prior administrative appeal, an SRO directed the IHO to specify what evaluations the district was ordered to conduct (Application of the Bd. of Educ., Appeal No. 14-109). The hearing record in

[21] The SKATE special education director testified that she considered the student's ability to make a choice, follow a verbal direction of point or show me, and attend to a direction, "all academic progress" (Tr. p. 446).

[22] The hearing record supports a finding that the student should spend a portion of the school day in a general education classroom (as recommended in the IEP), but the private evaluator admitted that the student would, out of necessity, spend at least some portion of the day in a special class (Tr. pp. 860-61, 888).

this matter reflects that an independent FBA[23] was conducted on November 15, 2014, pursuant to the parent's request (Parent Ex. E).[24] The private evaluator completed the assessment primarily through the use of observation, interviews with the student's team, and a review of previous reports (id. at p. 2). The private evaluator testified at the hearing and, when given an opportunity to review the summary of special education programs and services recommended on the May 2014 IEP, stated that the IEP was appropriate for the student (Tr. pp. 867-89). In addition, the hearing record contains an independent assistive technology evaluation, dated November 16, 2014 (Parent Ex. G). Furthermore, the district CSE chairperson testified that the district has approved all of the IEEs for which the parent requested public funding (Tr. pp. 620, 627, 630; see Dist. Ex. 21). Accordingly, there is no reason appearing in the hearing record to disturb the IHO's determination that this issue is now moot.[25]

2. Parent Counseling and Training

The IHO correctly found that parent counseling and training should have been included on the May 2014 IEP, but that such an omission was a procedural violation that did not rise to the level of a denial of a FAPE in this instance. Additionally, the SRO in the prior appeal involving this student ordered compensatory services including up to 30 hours of parent counseling and training (Application of the Bd. of Educ., Appeal No. 14-109).

3. Length of Transportation

The May 2014 CSE recommended 12-month programming at SKATE, as well as an individual transportation aide to ride the bus with the student to/from the recommended program, in order to address the parent's concerns about the student's safety and engagement on the bus (Tr. pp. 102-03).[26] The IHO determined that the hearing record was insufficient to find that the length of the student's transportation time resulted in a denial of a FAPE to the student. The student's BOCES SKATE special education classroom teacher testified that primarily the parent drove the student to school, and on the few times that the student rode the bus, the parent accompanied him

[23] In the prior administrative appeal, an SRO found that it was appropriate for the district to reserve development of a BIP until the student attended the BOCES SKATE program and could be evaluated in the classroom by his direct providers (see Application of the Bd. of Educ., Appeal No. 14-109). The student's BOCES SKATE special education classroom teacher testified that the student responded well to the classroom management visual and written schedule (Tr. pp. 389-90). She further testified that a school psychologist and social worker were available on-site to evaluate classroom behavior and develop plans if the classroom teacher and staff felt they "might be missing [something] or we need to look at other things" (id.).

[24] Citations to the FBA are made without reference to the cover letter, which was not consecutively paginated with the FBA (Parent Ex. E).

[25] To the extent the parent asserts that the district's failure to authorize the parent to obtain the requested IEEs at public expense when initially requested negatively impacted the student, the May 2014 IEP offered the student a FAPE for the reasons stated above.

[26] As noted above and in the IHO decision, the parent does not clarify what additional academic services, supplemental aids and services the district should have provided to the student, or what additional supports the district should have been provided to school personnel on behalf of the student during the 2014-15 school year (IHO Dec. at p. 21). Review of an audio recording and a transcription of the May 8, 2014 CSE meeting indicates that upon hearing the May 2014 CSE's program recommendation for the student at the BOCES SKATE program, the parent initially stated that she would "think about it," and then added that the district should "be prepared anyway for a program here" (Parent Exs. H at p. 27; P).

(Tr. pp. 400, 407-08). She further testified that the student "didn't seem to be bothered by the bus . . . he seemed happy on the bus" and that his behavior was not impacted by the length of the bus ride (Tr. p. 408).

The IDEA does not preclude busing students to out-of-district programs, and multi-district cooperation in the delivery of special education and related services is encouraged and specifically authorized by federal and New York State law (20 U.S.C. § 1413[a][4]; Educ. Law §§ 1950[1], [4]; 8 NYCRR 200.2[i]; 34 CFR 300.208[a][3]; see Letter to Waxler, 211 IDELR 60 [OSEP 1978]). In the absence of any indication in the hearing record of harm to the student based upon the duration of his transportation to the BOCES SKATE program, there is no basis to overturn the IHO's determination that the length of the student's bus ride rose to the level of a denial of a FAPE.

VII. Conclusion

Because the parent did not timely appeal from the IHO's determination that the district offered the student a FAPE, her appeal must be dismissed. Had the parent properly initiated this appeal, I would nonetheless affirm the IHO's decision and find that the district offered the student a FAPE for the 2014-15 school year for the reasons stated in the IHO's decision and above.

I have considered the parent's remaining contentions and find them to be without merit for substantially the reasons stated in the IHO's decision or that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 10, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER