The University of the State of New York

The State Education Department
State Review Officer
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No. 18-067

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 New York City Department of Education

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the cost of her son's tutoring expenses for the 2014-15, 2015-16, and 2016-17 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for those years. The appeal must be dismissed. The cross-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

This appeal arises from an IHO's decision issued after remand (Application of a Student with a Disability, Appeal No. 17-057). Additionally, the student has been the subject of two prior State-level administrative appeals (Application of a Student with a Disability, Appeal No. 16-007; Application of a Student with a Disability, Appeal No. 15-022). Accordingly, the parties' familiarity with the facts and procedural history of the case, including the IHO's decision before remand, is presumed and will not be repeated here in detail.

Briefly, however, as noted in prior decisions, a CSE convened on November 27, 2013, and, finding the student eligible for special education as a student with autism, recommended a twelve-month school year program consisting of a 6:1+1 special class placement in a specialized school with a full-time 1:1 crisis management paraprofessional and the related services of one 45-minute

session of individual counseling per week, one 45-minute session of group counseling per week, two 45-minute sessions of group speech-language therapy per week, and one session of parent counseling and training per month (Parent Ex. E at pp. 1, 11-13, 16).[1]

As discussed in Application of a Student with a Disability, Appeal No. 17-057, the parent's concerns regarding the student's education appear to stem from an incident that occurred in school on September 8, 2014, during which the parent alleged that a paraprofessional "grabbed and threw [the student] heavily on the floor of the hallway." The student did not attend the district school after the September 8, 2014 incident.

A. Due Process Complaint Notice

As noted in Application of a Student with a Disability, Appeal 17-057, by due process complaint notice dated March 10, 2017, the parent alleged that the student "could not acquire[] appropriate education [and] treatment" in a district public school (IHO Ex. I at p. 2). She further alleged that the student "[had] been accepting private tutoring which [wa]s appropriate," as opposed to "going to public school" (id.). As a remedy, the parent requested an award of reimbursement for the cost of the student's tutoring expenses (id.).

B. Impartial Hearing Officer and State Review Officer Decisions

After a prehearing conference on April 26, 2017, the parties proceeded with the impartial hearing on May 16, 2017, and June 2, 2017 (Tr. I pp. 1-61).[2] By decision dated June 15, 2017 ("IHO Decision I"), an IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision I at p. 4). In a decision dated September 11, 2017, an SRO remanded the matter for substantive determinations on the merits of the parent's claims raised in the March 10, 2017, due process complaint notice (or as clarified by the parties upon remand) (Application of a Student with a Disability, Appeal No. 17-057).

Specifically, in Application of a Student with a Disability, Appeal No. 17-057, the case was remanded, directing the IHO:

> to first address whether the district offered the student a FAPE after the September 2014 incident and, then—if necessary—address whether the parent established the appropriateness of the private tutoring and whether equitable considerations weighed against awarding the parent the relief requested, namely, an award of reimbursement for the private tutoring.

[1] The parties in this proceeding offered exhibits into evidence both before remand (Parent Exs. A-F; Dist. Exs. 1-2) and after remand (Parent Exs. A-F; Dist. Exs. 1-3) using duplicative exhibit designations. Unless otherwise specified, the exhibits cited in this decision are those that were entered into evidence after remand.

[2] For purposes of this decision, the transcript of proceedings prior to remand shall be cited as "Tr. I," and the transcript of proceedings after remand shall be cited as "Tr. II."

Upon remand, the parties continued with the impartial hearing on April 25, 2018 (see Tr. II pp. 1-314). The parent clarified at the impartial hearing after remand that her claim that the district denied the student a FAPE was "[f]rom all the years after September 8, 2017. . . . [t]o the last day he was entitled to the public school" (Tr. II p. 101).[3] In a decision dated May 7, 2018, the IHO found that the district did not meet its burden to prove that the November 2013 IEP was appropriate (IHO Decision II at p. 10).[4] Further, the IHO found that no evidence or testimony supported the recommendations set forth in the student's IEPs dated January 2, 2012, and April 22, 2013 (id. at pp. 10-11).

Next, the IHO turned to the appropriateness of the parent's unilateral placement of the student (IHO Decision II at p. 12). The IHO found the tutoring services inappropriate because the tutor had no special education training or experience, the tutor "never stated that there was a program or objectives for the student," and no reports or assessments were introduced at the impartial hearing regarding the services delivered to the student (id.).

With respect to equitable considerations, the IHO identified additional reasons to deny the parent's claim for reimbursement, including that "[o]ne month after the [September 8, 2014,] incident the district offered a different school, evaluations or home schooling" but the "parent never responded" and her "complaint was dismissed" (IHO Decision II at p. 12). Further, the IHO noted that, at the impartial hearing, the parent testified that she did not want home schooling or to enroll the student in school (id. at p. 13). In addition, the IHO found that, while home instruction was ordered in a prior administrative proceeding and the district sent attendance teachers to the student's home, the parent did not cooperate and did not want anyone to come to her home (id.). With respect to the cost of the services requested by the parent, the IHO found that the parent submitted nothing to substantiate her claim for $25,000 in reimbursement and noted that the tutor previously testified he was paid through Medicaid and that his rate of pay was $12.50 per hour (id.). Finally, the IHO found that the parent continued to litigate the September 8, 2014, incident and that the impartial hearing was "an inappropriate forum for such litigation" (id.). Accordingly, the IHO denied the parent's request for reimbursement of the costs of tutoring services (id.).

The IHO also addressed the issue of the student's "post high school education," based on the parent's clarification at the impartial hearing that her claims pertained to "all the years" through "[t]o the last day [the student] was entitled to the public school" (IHO Decision II at p. 13). The IHO set forth the standards for awarding compensatory education to a student after he is no longer eligible for special education under the IDEA and found that the district "had an obligation after September 8, 2014 when the parent withdrew the student, to provide the student with a FAPE until

[3] It appears that the parent intended the clarified date to be September 8, 2014, rather than September 8, 2017, because the last day the student would have been eligible to receive special education under the IDEA would have been the end of the school year in which he turned 21 (the 2016-17 school year) (Educ. Law §§ 3202[1]; 4401[1]; 4402[5][b]; 8 NYCRR 100.9[e]; 200.1[zz]; see 34 CFR 300.102[a][1]; [a][3][ii]), which preceded September 8, 2017, and, further, because September 8, 2014 was the date of the incident, which precipitated the end of the student's attendance at school. Thus, as discussed further below, the parent's claim that the district denied the student a FAPE is considered to be for that period of time after September 8, 2014 through the end of the 2016-17 school year.

[4] The IHO's decision includes two dates: May 7, 2018 and May 10, 2018 (IHO Decision II at p. 14). There is no explanation appearing in the IHO's decision or elsewhere in the hearing record for the two dates.

he graduated or was twenty one" (id.). The IHO found that the district offered the parent several options for the student and school personnel came to the parent's home on several occasions, but that the parent refused to cooperate (id.). Thus, the IHO found that "the parent . . . failed to make the student available for the school district to create an IEP program for future years for the student" (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in dismissing her claim for reimbursement for private tutoring services. First, the parent contends that the IHO acted with bias in favor of the school district, alleging that the IHO accepted "and even encouraged" the district's "wrongful conduct[]." The parent also argues that the IHO erred in finding that the impartial hearing was an inappropriate forum for litigating the alleged assault, asserting that the proceeding related to the district's failure to provide a FAPE to the student and the parent's request for a "tuition fee."

The parent also argues that the IHO erred in finding the private tutor's services inappropriate. The parent asserts that the IHO erred in finding insufficient evidence regarding the unilateral placement, alleging that the IHO "failed to request" or offer the parent "permission" to submit evidence relating to the tutoring services. Further the parent contends that the IHO misrepresented that the tutor was paid for tutoring by Medicaid, rather than by the parent, alleging that the tutor received pay from Medicaid "for his other job."

With respect to equitable considerations, the parent asserts that, as a result of the history of the district's conduct—including "lost . . . trustworthiness," "longtime neglect[]" of the student's special educational needs, "failing to provide FAPE," "seriously physically assaulting [the] Student," "committing . . . falsifications, misrepresentations, slander[], [and] wrongful manipulation" of laws and regulations, and depriving the student of his right to educational benefits—the district (including all of its employees) established its inability to provide a FAPE to the student. As a result, the parent argues that the district failed to provide a safe environment for the student and that she had the right to "turn down all the[] wrongful unilateral treatment" (by way of the district's offers to arrange for a different school, evaluations, or home schooling for the student) and choose an appropriate and safe educational placement for the student.

With respect to the IHO's determinations related to the student's "post high school education," the parent asserts that she was offered "[n]o explanation [or] details" regarding this issue.[5] The parent seeks an order for tuition reimbursement because she "obtained the special/appropriate" tutoring services after the district failed to provide the student with a FAPE.

In an answer and cross-appeal, the district denies the parent's material allegations and asserts that the IHO correctly determined that the unilaterally obtained tutoring services were not appropriate for the student and that equitable considerations do not support the parent's claim for

[5] In raising the issue of compensatory education, the IHO weighed whether it would be appropriate to direct the district to provide special education services to the student to make up for a past deprivation of services. However, it is evident from the request for review that the parent did not seek compensatory education as a remedy, and although the IHO sua sponte considered the issue of compensatory education, she ultimately did not award it; thus it will not be reviewed here on appeal.

reimbursement based on the parent's refusal to cooperate with the district in establishing an educational program for the student and on the reasonableness of the requested relief.[6]

In addition, the district repeats its request for an SRO to review previously submitted additional evidence, which the district argues is necessary to create a complete and accurate record and render a decision. Additionally, the district asserts that the parent's due process complaint notice failed to specify the school years at issue or the basis for the alleged denial of FAPE and argues that the parent really sought relief for the alleged incident on September 8, 2014. The district also argues that, assuming that the parent's due process complaint notice "set forth a valid cause of action," the claim is time-barred under the two-year statute of limitations and that the SRO should dismiss the parent's claim sua sponte with prejudice, as the parent has been given notice and an opportunity to be heard. The district argues that the untimeliness of the parent's claim is "compounded" by the fact that the parent previously sought the same relief in a prior proceeding, which was dismissed without prejudice.

As for a cross-appeal, the district argues that it provided the student a FAPE and that the IHO erred in finding that the district failed to meet its burden of proving that the November 2013 IEP was appropriate. The district argues that it developed and implemented an IEP with services that met the student's needs. The district contends that, as the due process complaint notice did not contain a particular basis for a deprivation of FAPE, the IHO abused her discretion in expecting the district to put forth witnesses to address the universe of hypothetical scenarios the parent may or may not have had in mind. The district also contends that the parent's claim was not a claim against the implemented special education program as recommended in the November 2013 IEP but, rather, was a tort cause of action stemming from the September 8, 2014 incident.[7]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v.

[6] The district's answer and cross-appeal, and the cover letter accompanying the filing, referenced incorrect appeal numbers (17-057 and 17-055, respectively). In a letter dated June 26, 2018, the Office of State Review advised the parties that the case number assigned to this appeal is Appeal No. 18-067 and that the answer and cross-appeal would be treated as filed in reference to this appeal number. The parties were permitted to file any objection within two days. The parent objected by letter dated June 28, 2018 (and received via facsimile on June 29, 2018), stating that she "object[ed] [to] a new SRO Appeal No. assigned to this case due [to] the mistake of the District." The parent did not state a reason for her objection except to say that "[f]urther explanation" in support of her objection was "available [upon] inquiry." As the errors appeared to be clerical in nature, and the parent did not articulate a substantive reason for her objection, I find the objection to be without merit.

[7] As noted in Application of a Student with a Disability, Appeal No. 17-057, the parent had a full opportunity to litigate her claims related to the September 8, 2014 incident during the prior impartial hearing (see Application of a Student with a Disability, Appeal No. 16-007); accordingly, the doctrine of res judicata or collateral estoppel continues to operate to bar consideration of the claims raised in that proceeding.

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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 Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. IHO Bias

The parent alleges that the IHO exhibited bias in favor of the district. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

There is no evidence in the hearing record to support the parent's claim that the IHO exhibited bias toward the district. The parent's claim states that the IHO "allowed, accepted, covered, protected, and even encouraged [the district's] wrongful conduct[] and slander [of the] parent" (Req. for Rev. at p. 2). A review of the hearing record suggests that the IHO took a liberal view of allowing documentary and testimonial evidence into the hearing record, which appeared potentially relevant to the issues on remand. For example, the IHO permitted the parent to submit evidence related to the September 8, 2014 incident, as well as testimony regarding investigation of the incident (Tr. II pp. 302-03, 167-70, 172-73; Parent Exs. B-D). The IHO also permitted evidence submitted by the parent and the district in relation to the November 2013 IEP, as well as prior IEPs from 2012 and 2013 that provided background and information about the student (Tr. II pp. 82, 90-92; Parent Ex. E; Dist. Exs. 1-3). Additionally, the hearing record suggests that the IHO generally exhibited patience in assisting the parent in her questioning and objections throughout the impartial hearing proceedings, as well as in working with the translator (see Tr. II pp. 119-23, 175-76). Finally, to the extent that the parent disagrees with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083).

2. Additional Evidence

In its answer, the district states that it "repeats its request" for the SRO to review previously submitted additional evidence which the district argues is necessary "to create a complete and accurate record of the events and procedural history, and without which it would be impossible to render a decision."

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 18-057; Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

With respect to the additional evidence submitted by the district in Application of a Student with a Disability, Appeal No. 17-057, the SRO stated that the evidence provided was not necessary at that juncture but that the district would be permitted to offer the evidence at the impartial hearing upon remand. The district failed to do so, thus the district's request is denied. Moreover, the district's proffered exhibits were available at the time of the impartial hearing (both before and after remand) and are not necessary to render a decision.

3. Statute of Limitations

The district argues that the claim is time-barred under the two-year statute of limitations. The district further argues that the SRO should dismiss the parent's claim sua sponte with prejudice, as the parent has been given notice and an opportunity to be heard.[9]

To the extent the district raises the statute of limitations once again in its answer on appeal as a basis for dismissing the parent's claims, as noted previously in Application of a Student with a Disability, Appeal No. 17-057, there is again no indication that the district raised its statute of limitations defense on the record before the IHO even upon remand. The SRO's decision in Application of a Student with a Disability, Appeal No. 17-057 noted that there was some discussion between the IHO and the parent during the impartial hearing about the timeframe of the events underlying the parent's claims, during which the parent referenced "junior high," "senior high," and "2010," and the IHO explained to her that the statute of limitations would not permit claims that arose two years earlier than her due process complaint notice (Tr. I p. 14). However, even after the case was remanded to the IHO and the district had a second opportunity to argue this point, the district was again lax in failing to raise this defense at the impartial hearing level. I find the district has waived its right to assert this defense (M.G. v. New York City Bd. of Educ., 15 F. Supp. 3d 296, 306 [S.D.N.Y. 2014] [holding that "[b]ecause the [district] did not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [holding that a statute of limitations defense need not be raised in the district's response to the due process complaint notice but noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level"]; Vultaggio v. Bd. of Educ., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). Thus, I decline

[9] As authority, the district cites Rodriguez v. Mount Vernon Hospital, 2011 WL 3163506 (S.D.N.Y. July 27, 2011) for the proposition that a court may sua sponte dismiss a complaint as time barred if the plaintiff is given an opportunity to be heard. Even assuming that the parent had notice and an opportunity to be heard about the district's statute of limitations defense based on the inclusion of the defense in its answer in Application of a Student with a Disability, Appeal No. 17-057, which is a strained application of the authority cited by the district (particularly to the extent that the district attempts to cast blame on the parent for not raising statute of limitations at the impartial hearing on remand), the district has failed to show that the present matter meets the other requirement outlined by the court in Rodriguez; to wit, that it is "apparent 'from the face of the complaint that the action is barred, for example by expiration of the statute of limitations'" (2011 WL 3163506, at *5, quoting Baker v Cuomo, 58 F.3d 814, 819 [2d Cir. 1995], vacated on other grounds, Baker v Pataki, 85 F.3d 919 [2d Cir. 1996]). By the district's own argument, the timeframe of the parent's claim as set forth in the due process complaint notice was not entirely clear and, as discussed herein, was further clarified during the impartial hearing after remand. Accordingly, it was not clear on the face of the due process complaint notice that the parent's claim was barred by the statute of limitations. Moreover, unlike the more straightforward application of the relevant statute of limitations in Rodriguez, the statute of limitations inquiry under the IDEA "is necessarily a fact-specific inquiry" focused on determining when a parent knew or should have known of an alleged action (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]).

to dismiss the parent's claim on the statute of limitations basis (see, e.g., Application of a Student with a Disability, Appeal No. 17-095; Application of a Student with a Disability, Appeal No. 17-057; Application of a Student with a Disability, Appeal No. 16-056).

B. Provision of FAPE - After September 8, 2014 through June 2017

Turning to the parties' dispute as to whether the district offered the student a FAPE, as directed by the SRO in Application of a Student with a Disability, Appeal No. 17-057 and as noted above, the parent clarified during the impartial hearing that her claim that the district denied the student a FAPE was from that period of time after September 8, 2014 through June 2017, the end of the school year in which the student turned 21 years old (see Tr. II p. 101).

At the impartial hearing prior to remand, the principal testified regarding efforts taken to restore the student's attendance in school or some other placement after the September 2014 incident (see Tr. I pp. 35-41).[10] Initially, the principal testified that district staff "had several phone conferences looking for another school [the student] could go to [and] offered the parent Home Instruction" (Tr. I pp. 35-36). As for home instruction, the principal testified that it was not provided because the "parent did not want anyone to come to her house" (Tr. I pp. 36-37). The principal also indicated that "the attendance teacher went several times, and the parent was not collaborative" and that the district was "having a very difficult time" (Tr. I p. 36). The principal further testified that "the attendance teacher was not allowed to go in . . . the house," so meetings with the parent "happened in the hallway," and that the parent "did not like the options" presented to her by the attendance teacher (Tr. I p. 40). The principal further testified that "the parent did not want [the student] to" return to the school he attended prior to the September 2014 incident and that "she just did not feel that [that] school was a safe environment for [him]" (Tr. I p. 36). The principal also noted that the school the student attended prior to the September 2014 incident "was one of many that this student" had attended and that, although there were "other schools recommended" for the student, he had previously attended them and "the parent did not want those other schools" (Tr. I pp. 37-38). With respect to any other efforts that were employed by the district to get the student back in school, the principal testified that "there were phone conferences, and [her] principal spoke with the parent," she "sent letters," and district staff "tried to work with th[e] parent as much as [they] could and as much as [the parent] let [them]" (Tr. I pp. 38-39); however, the principal testified that she did not have documents showing how many times the district staff contacted the parent "in front of [her]" and could not recall (Tr. I pp. 40-41).

In Application of a Student with a Disability, Appeal No. 17-057, the SRO directed the IHO on remand to "first address whether the district offered the student a FAPE after the September 2014 incident" focusing first on procedural compliance with the IDEA. The SRO specifically stated that:

> although the hearing record includes anecdotal evidence of the district's less formal efforts to return the student to a district school or provide home instruction services, there is no information in the hearing record to support a finding that the district made efforts to comply with its obligation to offer the student a FAPE pursuant to

[10] The principal was the assistant principal at that time (Tr. I pp. 30-31).

> the IDEA (see Tr. [I] pp. 35-39). Such information might include invitations to CSE meetings, IEPs, or prior written notices.

(Application of a Student with a Disability, Appeal No. 17-057).

Upon remand, the principal initially testified before the IHO that the student received services under the November 2013 IEP in the 6:1+1 special class as "part of the [district's] obligation" and that he was "placed in the program up until the point that he was no longer attending [the] school" (Tr. II pp. 165-66). The principal reiterated her earlier testimony that the district sent the attendance teacher, contacted the parent by phone, and offered other schools the student had previously attended and that "there were no other options" (Tr. II pp. 170-171, 180-81). The principal further testified as to the parent's response to these efforts stating that "the parent never wanted to talk to us" (Tr. II p. 171). As for documentation of the district's efforts, the principal testified that she didn't "have any of that documentation in front of [her]" and that she didn't know if the documentation existed (Tr. II p. 174). She further indicated that she "would have to go through the documents" and that she thought the parent had "all those papers" (id.). The principal further testified that she didn't "remember if [the attendance teacher] saw the student" and could not recall dates or times of when the attendance teacher saw the parent (Tr. II p. 180).

Additionally, the CSE supervisor testified that the student had been "officially discharged" from the school on September 9, 2014 (Tr. II pp. 117-18). He also testified that, subsequently, on approximately June 12, 2016, he met with the parent and that his "recollection of the meeting was that she was seeking reimbursement of funds for . . . a teacher that was providing, . . . some kind of teaching instruction to [the student] at the home during the past couple of years" (Tr. II pp. 107-08). The CSE supervisor further testified that a social worker from the school, who had been assisting the parent in April 2016, "contacted the parent and sent her . . . an ACCES-VR package" to help the student with vocational training (Tr. II pp. 110-11). The witness testified that he called the parent on July 15, 2016 to verify she received the package, which had been sent twice, and "she confirmed she had received it. But she said she wasn't interested, that she felt it wasn't helpful to [the student]" and that "she did not want to discuss the case further. And she felt the DOE was not being helpful to her" (Tr. II pp. 111-12).

While the testimony of the principal and the CSE supervisor supports the district's contention that it made some efforts to get the student in an educational placement after the September 8, 2014 incident, I am struck by the similarities between the pre- and post-remand testimony. Much of the testimony is vague, suffering from a lack of specificity about dates and timeframes, and repetitive in covering previous testimony. The witnesses appeared to be struggling with the lack of documentation regarding the events following the September 8, 2014 incident. The main new testimony does show that the district made efforts to pass on information to the parent regarding vocational training for the student in 2016. However, other than this, there did not appear to be very much new information in terms of events not previously covered in testimony.

Likewise, the documentary evidence submitted on remand does not appear to present very much in the way of new evidence. The student's last IEP dated November 27, 2013 was received into evidence (Parent Ex. E; Dist. Ex. 1). The district also offered the student's two prior IEPs dated April 22, 2013, and January 3, 2012, into evidence which, while helpful for background, do not appear to be relevant in light of the SRO's remand instructions and the parent's due process

complaint notice and clarification thereof (Dist. Exs. 2, 3). Similarly, the parent's evidence related to the September 2014 incident itself is not relevant with respect to the SRO's remand instructions (Parent Exs. B-D). The parent also includes a letter dated June 13, 2014 with respect to the student's absences from school and her request for a "meeting as soon as possible" in order to solve the issues outlined in the letter (Parent Ex. F.).

Here, although I agree with the IHO's findings that the district did not meet its burden to prove that the student was offered a FAPE, I find that the student was denied a FAPE on other grounds. While the IHO found a denial of FAPE based upon her determination that no testimony or evidence was submitted to support the recommendations set forth in the November 2013, April 2013, and January 2012 IEPs, it is unclear why the IHO ruled upon these IEPs. I find the district denied the student a FAPE because it failed to prove even the most basic compliance with the procedural and substantive requirements of the IDEA during the time period after September 8, 2014, despite the guidance offered by the SRO in Application of a Student with a Disability, Appeal No. 17-057 (i.e., that evidence to show compliance by the district with its obligation to offer the student a FAPE pursuant to the IDEA "might include invitations to CSE meetings, IEPs, or prior written notices").

What is most notable about this case is what is not included in the hearing record. As noted above, in New York State, a student who is 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 (Educ. Law §§ 3202[1]; 4402[1][b][5]; 34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), 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]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Since the September 8, 2014 incident, there is no evidence that the parent revoked her consent for services in writing or that the district declassified the student[11] or, failing that, that the district satisfied its obligations to the student under the IDEA and took steps to convene a CSE meeting, obtain consent from the parent to conduct evaluations, issue any prior written notices, or develop IEPs for the years after the September 8, 2014 incident. In other words, after the November 2013 IEP, there is no evidence that the CSE attempted to develop or that student ever had an IEP for the time period covering all or part of the last three school years—2014-15, 2015-16 and 2016-17—during which time he was eligible for special education under the IDEA.

Despite the district's position that the student was "discharged" after the September 2014 incident (see Tr. II at pp. 117-18), the district cites no legal authority that such a "discharge" terminates the district's obligation to a student with a disability[12] and, in any event, a computer log kept by the district suggests that more IDEA-related activity took place after the alleged "discharge" date (Application of a Student with a Disability, Appeal No. 16-007, Dist. Ex. 2 at p.

[11] The IDEA requires a board of education to evaluate a child before determining that that child is no longer a child with a disability (20 U.S.C. § 1414[c][5]; 34 CFR 300.305[e][1]; 8 NYCRR 200.4[c][3]).

[12] The term "discharged" was not defined during the impartial hearing and seems to be a term that the district coined for some unknown purpose. To the extent that the district intended to "drop[] [the student] from enrollment," the State Education Law includes a specific procedure pertaining to such an action (Educ. Law § 3202[2]). The district did not establish at the impartial hearing that it followed this procedure set forth in law.

1).[13] The district is quick to point at the parent as the reason that no placement was settled upon during this timeframe; however, while the evidence in the hearing record indicates that the parent exhibited distrust of school officials and appeared to not want the student to attend a public school building or receive services from public school officials, it does not show that the parent wanted the student declassified or to go without any special education or services under the IDEA. The parent continued to feel that the student would be unsafe with public school officials but there is no indication in the hearing record that the district attempted to address this concern of the parent using the procedures of the IDEA. Despite the parent's reluctance, it remained the district's obligation to offer the student a FAPE, and it may not abdicate its responsibility to develop an appropriate IEP that is based on the individual needs of the student to the desires of the parents or the student (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d at 371). If the district's position is that it should be relieved from the obligation to provide a FAPE because the parent appeared to revoke consent for continued provision of special education programs and services to the student, State regulations require that such revocation be in writing and that the district provide prior written notice before ceasing provision of special education programs and services (8 NYCRR 200.5[b][5][i]; see 20 U.S.C. § 1415[b][3], [c][1]; 34 C.F.R. 300.503; 8 NYCRR 200.5[a]). Consequently, I find that the district's failure offer evidence that it developed any IEPs for the student for the period after September 8, 2014 through the school year ending June 2017 constitutes a gross denial of a FAPE.

VII. Unilateral Placement

A. The Student's Needs

Since it was not necessary to elaborate on the student's needs with respect to the above finding that the district failed to offer the student a FAPE for the period after September 8, 2014 through the school year ending June 2017—and although the student's needs are not directly in dispute—a brief discussion here provides context for the disputed issue to be resolved, namely, whether the unilaterally obtained tutoring services addressed the student's needs.

With respect to identifying the student's needs, although no current, up-to-date documents were included in the hearing record, the November 2013 IEP provides some evidence of the student's needs (Parent Ex. E at pp. 1-17) and the November 2013 functional behavioral assessment (FBA) and behavioral intervention plan (BIP), as well as the November 2014 psychiatric evaluation—included in a previous hearing record regarding the same student—offer further insight into the student.[14] Therefore, in order to present the student's needs that were identified

[13] An SRO may, as a matter within his or her discretion, take notice of records before the Office of State Review in other proceedings, especially those between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal. Given the district's multiple failures to develop a complete hearing record regarding this student, to the extent necessary, the hearing record in the prior State-level appeal involving this student will be referenced (e.g., Application of a Student with a Disability, Appeal No. 16-007, Dist. Exs. 2; 3; 8).

[14] In order to discuss the student's needs more thoroughly, the November 2013 FBA and BIP and the November 2014 psychiatric evaluation will be relied upon and cited (see Application of a Student with a Disability, Appeal No. 16-007, Dist. Exs. 3 at pp. 1-4; 8 at pp. 1-3). With respect to the FBA and BIP, while the present hearing record includes a May 2013 FBA and BIP summary (see IHO Exs. VIII; VIX), they were not tethered to the November 2013 IEP and the November 2013 FBA and BIP included in the prior hearing record include a more

when the tutoring services began (September 2014), the November 2013 IEP, FBA, and BIP and the November 2014 psychiatric evaluation will be discussed.

According to the November 2013 IEP, the student was assessed using: the Developmental Reading Assessment (DRA); an unidentified writing continuum; the Student Annual Needs Determination Inventory (SANDI) in mathematics; and a level one vocational assessment (Parent Ex. E at p. 1). With respect to the student's "level of intellectual functioning," the IEP noted that, when completing "independent work," the student could get "off task and need assistance" from his 1:1 paraprofessional "to complete work in a timely manner" (id.). In addition, the November 2013 IEP noted that the student demonstrated severe cognitive and developmental delays (id. at p. 3). With respect to reading, the student performed at Level 6 on the DRA and demonstrated difficulty comprehending what was read as well as recalling information from a story (id. at p. 1). The student required the support of adapted texts with some pictures during class readings in order to assist with comprehension and benefitted from class discussions, visual supports, and questions asked during reading (id.). With respect to spelling, the student was able to spell many high frequency and familiar words without assistance and attempted to sound out unfamiliar words or asked for help (id.). With respect to writing, the student demonstrated pre-emergent skills on the writing continuum and, although he was able to write many words independently, he required prompting to write in sentence form (id.). According to the results of an administration of the SANDI mathematics assessment, the student performed addition of two-digit numbers and skip counted (id.). The November 2013 IEP reported information provided by the parent for the level one vocational assessment that she wanted the student to focus on learning academic skills in order to strengthen his reading, writing, and mathematics skills (id.).

With respect to activities of daily living (ADLs), the student: was able to pack his backpack at the end of the day but required prompting and assistance to unpack his backpack and hand in his paperwork from home; followed directions but at times required them to be broken down into small steps or repeated; and was independent with respect to toileting but required prompting to wash his hands after using the bathroom (Parent Ex. E at p. 1). In addition, the November 2013 IEP indicated that the student needed to continue to work on his personal hygiene including cleaning himself, selecting clean clothes daily, and applying hygiene products such as deodorant (id. at p. 3). The IEP noted that the parent informed the CSE that the student was working on improving his "ADL skills with his respite worker" (id.). With respect to adaptive behavior, the November 2013 IEP indicated that the student presented with defiant behaviors, including refusing to complete work, walking away, or pushing to avoid an activity (id. at p. 2). Due to the student's tendency to wander, he benefitted from being near a staff member when traveling through the school and community (id.). In addition, when upset, the student remained quiet, but sometimes demonstrated an upset facial expression that included lip quivering (id.). With respect to social development, the student was able to express his wants and needs verbally and was aware of some peers (id.). However, the student required prompting to engage in conversation with peers, demonstrated difficulty expressing his emotions, and made fun of other students by mimicking their phrases or gestures and persisted unless prompted to stop by staff (id.). The student went off-

detailed and updated description of the student's needs. Accordingly, to maintain some measure of consistency in discussing the student's needs at the time of the student's last IEP and when tutoring would have commenced in September 2014, the November 2013 FBA and BIP will be discussed instead of the earlier May 2013 FBA and BIP summaries.

topic during class discussions by bringing up unrelated subjects of personal interest and demonstrated difficulty listening and answering questions about topics being discussed (id.). In addition, the student presented with low voice projection which made it difficult for him to be heard by others (id. at p. 3). The November 2013 IEP indicated that the student needed to continue working on "knowing what [was] and [was] not appropriate to say to adults/students in the classroom and community in order to refrain from using inappropriate statements" (id.). According to the November 2013 IEP, among other things, the student required a specialized adapted curriculum, high levels of structure, visual aids, and support services to meet his academic and social needs (id. at pp. 1-3). Additionally, with respect to behavior, the November 2013 IEP indicated that the student required strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded the student's learning or that of others, and that the student needed a BIP (id. at p. 4).

Consistent with the CSE recommendations in the November 2013 IEP, the hearing record for Application of a Student with a Disability, Appeal No. 16-007 included a November 2013 FBA, and in addition, a November 2013 BIP (Application of a Student with a Disability, Appeal No. 16-007, Dist. Ex. 8 at pp. 1-3). According to the FBA, the student displayed defiant behavior in response to staff instructions that he did not want to complete, such as pushing in his chair or picking up a mess he made (id. at p. 1). The defiant (targeted) behaviors included pushing staff, leaving the room, making verbal threats, or pretending to shoot the staff by displaying fake guns the student made with his hands (id.). An additional targeted behavior identified in the FBA, was the student's tendency to display inappropriate communication with females in the school and community (id.). The FBA specified that the targeted behaviors occurred one to three times per day, for a duration ranging from a few seconds to five to ten minutes, and with varying intensity (id.). Further, according to the FBA, the behaviors occurred in settings including less structured locations such as hallways, the bathroom and cafeteria, as well as all classroom and community settings (id.). Additionally, the FBA indicated that the triggers for the targeted behaviors included the student attempting to avoid an activity, seeking attention from staff and peers, staff asking the student to do something he did not want to complete, or seeing a female to whom the student was attracted (id.). According to the FBA, the following environmental conditions affected the targeted behaviors: the students and staff members around the student, the location in school, presence of females, and lack of one-to-one supervision (id.). According to the FBA, previously attempted interventions that met with varying results included verbal prompting to state appropriate phrases to others, placing a reminder on the student's desk to state only relevant or appropriate phrases when volunteering answers, and reminding the student of "CHAMPS" rules (which was ongoing) (id.). The FBA recommended eight interventions to address the student's inappropriate behaviors including the use of written scripts, a mood meter, and short breaks, among other things (id. at pp. 1-2). Consistent with the FBA, the BIP identified defiant behaviors and inappropriate communication with females, as the target behaviors (id. at p. 3). According to the BIP, the expected behavior changes included the student advocating for himself verbally instead of acting out, asking for a break, and using appropriate communication when speaking with females (id.).

According to the evaluation report, the stated reason for the November 2014 psychiatric evaluation was "placement" (Application of a Student with a Disability, Appeal No. 16-007, Dist. Ex. 3 at p. 3). The evaluation report noted that the student had been previously diagnosed with "mental retardation," autism, and "as having speech and language issues" (id. at p. 1). In addition, the student demonstrated oppositional behaviors and defied rules in school, even with one-to-one

intervention (id.). The evaluation report stated that the parent refused to return the student to the school where the incident took place and noted that she was seeking both a private school for the student and home instruction because she did not believe that the student was ready to return to school (id.). The evaluation report further indicated that the student refused to go to therapy on some occasions and, by parent report, it would be very difficult to get the student to leave the house if he did not want to go out (id.). At the time of the evaluation, the parent reported that the student had been soiling himself and she had removed him from medication as she believed it was the cause; however, she also reported that the student had been soiling himself, on and off, since third grade (id. at pp. 1-2). According to the psychiatric evaluation report, the student had a difficult time waking up in the morning and so the parent wanted a school that began later in the day (id. at p. 2). The parent also reported that the student was "scared to get back on a bus as he was bullied on one and the children and staff on the bus [we]re 'nasty'" (id.). The parent reported that the student urinated on the furniture if she "trie[d] to correct his behavior or get him to do anything else except play video games or watch TV" (id.). The parent reported that the student only left the apartment to use the free Wi-Fi in the lounge downstairs or to go for a walk or to the store with his mother or residential habilitation specialist (RHS) (id.). The evaluator noted that the student was always talking to himself, mostly in a mumbling voice while playing video games or drifting off into his own world, and that, when the evaluator tried to engage with him, the student did not speak with the evaluator and only made brief eye contact (id.).

According to the psychiatric evaluation report, with respect to academics, the student did little work, did work sent home for him, and was able to formulate some words when asking for what he wanted (Application of a Student with a Disability, Appeal No. 16-007, Dist. Ex. 3 at pp. 2-3). With respect to the mental status evaluation, the student related "in a distant manner" with his mother, the RHS, and the evaluator and did not cooperate with the evaluation (id. at p. 3). The evaluator noted that the student's psychomotor activity and attention span were decreased, his mood was neutral, affect constricted, and he was irritable (id.). The student presented with "mild self stim and repetitive actions," appeared to be having an "internal communication" that was not audible, and the evaluator opined that it "may be hallucinations" (id.). According to the evaluation, although the student's memory was not able to be tested, it appeared weak; his intelligence was in the "Mentally Retarded range" and his insight, judgment, and impulse control were poor (id.). The evaluator commented that the student had "been receiving many different special education services since little with only a little progress over the years" and that the student "still needs all of his services in a small classroom setting" (id. at p. 4).

The information above provides a background picture of the student's needs that is most contemporaneous with the start of the parent's private tutoring services (September 2014). Next, I will turn to the issue of whether the tutoring services were specially designed to meet the student's identified individual needs.

B. Specially Designed Instruction

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14).

Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

As the IHO found, there are no reports, documents, assessments, programs, or objectives included in the hearing record that reflect the tutoring services provided to the student. The individual who provided tutoring services for the student was in fact his RHS, and the RHS testified that he "help[ed] tutor [the student]" (Tr. II p. 195). The RHS testified that he had a high school diploma and "[s]ome college" (Tr. II pp. 197, 217-22). The RHS further testified that he has been employed by Lifespire, and that the company "belongs to" the Office for People with Developmental Disabilities (OPWDD) (Tr. II p. 197). According to the RHS, in his role as RHS, he helped "individuals that have developmental disabilities to become more independent, like,

teaching them home living skills, teaching them outdoor skills, teaching them money management, and teaching them safety skills" in their homes (Tr. II p. 226). The RHS reported that he worked with the student for five years (Tr. II pp. 197-98). The RHS testified that, following "the incident," the parent was scared for the student's safety and did not send the student back to school; while the parent was looking for other schools for the student, the RHS "helped [the student] with his . . . math and science [and] his English work" (Tr. II p. 210). Further, the RHS testified that the parent "wanted some type of education" for the student and that, because the RHS worked there during the day with the student, he "[could] stay a few hours extra to help him with his—his work" (Tr. II p. 212). The RHS testified that they utilized something like "a reward system" and that, after they completed tutoring for the day, the student would "get[] to go outside" (Tr. II p. 214). However, the RHS also testified that he had never read any of the student's IEPs (Tr. II pp. 270-71). With respect to the student's defiant behaviors, the RHS testified that he provided the student with choices but that, "if he sa[id] no," the tutor would not "pursue to make him do anything" (Tr. II p. 271). When asked what documentation he had to prove that he offered tutoring services to the student, the RHS testified that he had "workbooks that he used" with the student and "written notarized documents . . . between [him] and the parent" (Tr. II pp. 215-16). The RHS commented that he was doing "the best [he] c[ould]" and that the student "trie[d] to do the work" (Tr. II p. 216). The RHS testified that, while the student was attending school, he (the RHS) worked with the student through Lifespire from "2:30 to 6:30, five days a week, Monday to Friday" (Tr. II p. 231). The RHS confirmed that, when the student was not attending school, he generally worked the same hours with him (Tr. II pp. 234-37). It is unclear when during the day and for how long the RHS served as the student's tutor.

Even considering the testimony of the student's RHS, which is vague at best when discussing the role he played as the student's "tutor," there is no evidence in the hearing record to support that the tutoring services were specially designed to address the student's needs as unilaterally obtained services under the IDEA. There are no programs, goals, objectives, or assessments available in the evidence to determine the appropriateness of the tutoring services. While the tutor broadly mentioned working with the student in certain subject areas and that he utilized a reward system, the hearing record includes no further detail about the services such as what skills in the areas of math, science, and English he targeted with this student and for what purpose the reward system was utilized. Further, although the RHS testified about helping individuals with ADL skills, this was not specific to the student and was in the context of describing his duties as a RHS in his work for Lifespire. Further, there are no progress reports, summaries, or information that reflect the student's progress over the course of the two years for which the parent is seeking reimbursement.

The parent specifically argues that the IHO should have taken some initiative to request the documentation that she ultimately found lacking in the hearing record. While IHOs are to some extent responsible for ensuring that there is an adequate record upon which to render findings and permit meaningful review (see 8 NYCRR 200.5[j][3[vii]), it is ultimately a parent's burden of production and persuasion to establish the appropriateness of a unilateral placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85). Further, the SRO in Application of a Student with a Disability, Appeal No. 17-057 observed that the hearing record before remand was lacking in information about whether the tutoring services "were directed at the student's special education needs." The inadequacies of the hearing record were pointed out previously, and both parties in this proceeding received a second opportunity to meet their respective burdens. The IHO

attempted to provide some guidance upon remand and at this point she bears no responsibility for the deficiencies in the hearing record. It was not the IHO's responsibility to make a case on behalf of a party.

Based on all of the foregoing, the IHO's determination that parent failed to show that the tutoring services were appropriate for the student is upheld.

VIII. Conclusion

In summary, the evidence in the hearing record reflects that the district failed to meet its burden to establish that it offered the student a FAPE for the period after September 8, 2014 through the school year ending June 2017 and, further, that the parent failed to carry her burden of demonstrating the appropriateness of the unilateral placement. The necessary inquiry is at an end and there is no need to consider whether equitable factors weigh in favor of the parent's request for an award of reimbursement of the cost of her son's tutoring expenses.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
July 13, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER