The University of the State of New York

The State Education Department
State Review Officer
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No. 19-069

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

Appearances:
Law Offices of Martin Marks, attorneys for petitioner, by Martin Marks, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 her daughter's tuition costs at a nonpublic school (NPS) for the 2016-17 school year. Respondent (the district) cross-appeals from the IHO's denial of its motion to dismiss the parent's claims based on the IDEA's statute of limitations. The appeal must be dismissed. The cross-appeal must be sustained in part and, for reasons explained more fully below, the matter must be remanded to the IHO for further administrative proceedings.

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 CSE convened on March 23, 2016 to develop an IEP for the student for the 2016-17 school year (kindergarten) and found the student eligible for special education and related services as a student with autism (Parent Ex. R at pp. 1, 15, 17).[1] The CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with related services

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

of occupational therapy (OT), physical therapy (PT), speech-language therapy, and parent counseling and training (id. at pp. 12-13, 15).

The parent executed a contract to enroll the student at the NPS for the 2016-17 school year on June 14, 2016, and the contract was countersigned by the school on July 5, 2016 (Parent Ex. C).

On August 23, 2016, the parent sent the district a notice indicating that the parent disagreed with the recommendations of the March 2016 CSE and that she intended to enroll the student at the NPS for the 2016-17 school year and seek tuition reimbursement from the district (Parent Ex. B at p. 3).[2] The student attended the NPS for the 2016-17 school year (see Parent Ex. J).

A. Due Process Complaint Notice

By due process compliant notice dated September 2, 2018, the parent asserted that the district "failed to provide" the student with a free appropriate public education (FAPE) for the 2016-17 school year and requested "prospective payment/tuition reimbursement" for both tuition and related services at the NPS (Parent Ex. A at pp. 1, 3).[3]

The parent asserted that the March 2016 IEP was "procedurally and substantively flawed" (Parent Ex. A at p. 2). Specifically, the parent asserted that the CSE was not properly composed because it did not include a parent member (id.). The parent also indicated that "she was not provided with her due process rights" (id.). The parent further contended that the CSE denied her meaningful participation in the creation of the student's IEP because the CSE did not consider the parent's input, such as her request that the CSE consider placing the student in a State-approved nonpublic school (id. at p. 3). The parent also argued that the district did not conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student (id. at p. 2). With respect to the March 2013 IEP, the parent alleged that the annual goals on the IEP were insufficient in that they did not address the student's sensory, behavioral, or safety needs and insufficiently addressed her academic needs; she also alleged the annual goals and short-term objectives were vague and lacked benchmarks and methods of measurements (id.). Further, the parent contended that the IEP did not contain applied behavior analysis (ABA) goals or methodology, although this was the methodology that had been successful for the student (id.). The parent argued that the IEP did not include a sensory diet, which was necessary for the student (id.). The parent further disputed the CSE's failure to recommend "1:1 ABA support" or a 1:1 paraprofessional to address the student's behavioral, safety, and activities of daily living needs (id.at p. 3).

Finally, the parent contended that she visited the particular public school to which the district assigned the student to attend and found that it would not have been appropriate to meet

[2] The parent's August 23, 2016 letter set forth several procedural and substantive concerns about the March 2016 CSE and resultant IEP that the parent later asserted, almost verbatim, in the September 2, 2018 due process complaint notice, which is summarized below (compare Parent Ex. B at pp. 1-3, with Parent Ex. A at pp. 1-3).

[3] The hearing record indicates that the parent filed a prior due process complaint notice raising the same allegations; however, that due process compliant notice was withdrawn without prejudice by the parent prior to the commencement of this proceeding (Tr. pp. 13-14).

the student's needs (Parent Ex. A at p. 3). The parent asserted that the assigned public school site was on the fifth floor, with no elevator and no air conditioning in the stairwells, which would have been a problem for the student (id.). The parent also alleged that the school did not use ABA, there was no Board Certified Behavior Analyst (BCBA) on staff, the curriculum used in the particular classroom that the student would have attended was not appropriate for the student, the students at the school ate lunch in a crowded room without 1:1 support, and the school was a distance from the student's home (id.).

B. Impartial Hearing

The parties proceeded to an impartial hearing, which occurred over five nonconsecutive days from October 25, 2018 to May 22, 2019 (see Tr. pp. 1-74).[4] During the course of the proceedings, the district representative indicated that the district intended to defend the case (Tr. pp. 3-4, 13, 29). Meanwhile, the parent's advocate indicated that the case was in settlement and that the parent was awaiting a settlement offer (Tr. pp. 12-14, 20-23).[5] On March 15, 2019, the IHO and parties set May 15, 2019 as the date for the hearing to take place (Tr. pp. 29, 32-33).

A hearing date did not occur on May 15, 2019, but the matter was rescheduled to May 22, 2019 (Tr. pp. 36-37). At the start of the hearing date on May 22, 2019, the parent's advocate relayed a conversation she had with the district representative to the IHO (Tr. pp. 37-38). The parent's advocate indicated that the district representative said she had not been notified of a hearing date scheduled for that day (Tr. p. 38). The IHO indicated that he had "a copy of the hearing rescheduled," which was generated on May 17, 2018 and indicated "rescheduled/continued Wednesday, May 22nd, 2019 at 12:30," and that the district representative "gets a copy of this, and it is on the calendar" (Tr. pp. 38-39). The IHO then stated that, "since we do not have a District Representative, then I do not have any evidence from the District, or any witnesses. They default on Prong I" (Tr. p. 39). The parent then presented documentary evidence and the testimony of the education director of the NPS and the parent (see Tr. pp. 39-73; Parent Exs. A-D; F-R).

The district representative sent the IHO and parent's advocate a motion to dismiss on May 23, 2019 (see generally Dist. Mot. to Dismiss).[6] In the motion to dismiss, the district raised the defense of statute of limitations and argued that the claims raised by the parent in the September 2, 2018 due process complaint notice were barred by the IDEA's two-year statute of limitations (id. at pp. 1-5). Moreover, the district representative asserted that she spoke to the parent advocate and informed the advocate that she intended to raise the statute of limitations as a defense at the May 22, 2019 hearing (id. at p. 2). The district representative asserted that the advocate informed the district representative that she wanted the opportunity to respond and that she intended to ask the IHO to allow both parties to brief their positions (id.). In addition, the district representative

[4] A pre-hearing conference was held on October 11, 2018 (Tr. p. 2; Nov. 12, 2018 IHO Pre-Hr'g Conf. Summ.).

[5] The parent's advocate indicated that the settlement was under the prior case number related to the previously withdrawn due process complaint notice (Tr. pp. 13-14).

[6] The motion to dismiss is incorrectly paginated, with the second page of the document labeled as page "1." For purposes of clarity, the motion to dismiss, along with the email to which the motion was attached, will be cited by reference to the first page of the document as page "1" and each page consecutively numbered thereafter, with the ninth and final page of the motion being the email (see Dist. Mot. to Dismiss at pp. 1-9).

asserted that neither party exchanged evidence or witness lists prior to the May 22, 2019 hearing date and that the district had two representatives, who "were present and ready," at the hearing site on May 22, 2019 (id.).

C. Impartial Hearing Officer Decision

In a decision dated June 22, 2019, the IHO found that the parent failed to establish at the impartial hearing that the NPS was an appropriate unilateral placement for the student for the 2016-17 school year and, therefore, denied the parent's request for the costs of the student's tuition (IHO Decision at pp. 5-9).

Initially, the IHO noted that the district had been provided notice of the May 22, 2019 hearing date but that a district representative did not appear (IHO Decision at p. 1). The IHO then indicated that the district submitted a motion to dismiss via email "after the date of the substantive hearing" raising the defense of statute of limitations (id.). The IHO determined that he could not "accept the email after the close of testimony" and noted that there was no request to keep the record open (id.).[7]

The IHO then turned to the evidence presented by the parent (IHO Decision at pp. 1-5). The IHO found that all the information "presented by the witness and documents [was] hearsay" and that, although hearsay could be admitted in an administrative hearing, it was "not as reliable" (id. at p. 3). The IHO noted that, because the parent waited more than two years to file her due process complaint notice—the reason for which was never explained—no one was available from the NPS to testify regarding the first eight months of the 2016-17 school year (id.). Thus, the IHO found that the testimony from the education director of the NPS about the student's progress was hearsay as the witness did not begin working at the NPS until the last two months of the 2016-17 school year (id. at p. 4).[8] The IHO further held that the education director was "evasive, had a subjective memory and at times contradicted . . . her own testimony" and was, therefore, not credible (id.at pp. 7-8). Specifically, the IHO noted that the education director contradicted herself regarding the age range of the students in the class and did not sufficiently describe the training of the paraprofessional assigned to the student (id. at pp. 7-8). The IHO held that the education director was "an interested witness and the parties who signed the documents are all interested witnesses who are paid by the entity seeking" payment (id. at pp. 8-9). The IHO also noted discrepancies regarding the student's age within the documentary evidence submitted by the parent (id. at pp. 7-8). The IHO noted that there was testimony that the school assessed the student and that the student received instruction using ABA methodology but that there was no documentary evidence to support the testimony (id. at pp. 3, 7, 8). Substantively, the IHO noted testimony that a paraprofessional worked with the student for a majority of the time and found that this was not appropriate for the student and that the hearing record did not include information as to the instruction that took place when the student was with a paraprofessional (id. at pp. 7, 8). The IHO

[7] The IHO set the record close date as June 10, 2019 (IHO Decision at p. 1).

[8] In describing the testimony of the education director of the NPS, the IHO included two sections labeled "Note[s]": the first indicated that the witness did not inform the IHO until later in her testimony that she did not begin working at the NPS until April 2017; the second indicated that the witness incorrectly testified that the student was working with a teacher during "[I]ntensive [T]eaching [T]ime" rather than with a "high school graduate" (IHO Decision at pp. 1, 4; see Tr. pp. 56-57).

also found that there was no evidence that the student was grouped appropriately with other students (id. at p. 8). Based on these findings the IHO determined the parent failed to establish that the NPS was an appropriate unilateral placement and denied the parent's request for tuition at the NPS for the 2016-17 school year (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by denying her request for tuition reimbursement. The parent asserts that the IHO based his decision on a mischaracterization of the testimony from the education director of the NPS and assumed facts that were not in evidence. Initially, the parent objects to the IHO's findings regarding the credibility of the education director of the NPS. The parent asserts that two notations within the IHO's decision were "detrimental to the student" and were "indications of the IHO's thought process in determining credibility." The parent contends that one of the notations was "blatantly false" and that the other was an example of the IHO misinterpreting the witness's testimony and then making an improper inference based thereon later in the decision. The parent asserts that the IHO incorrectly determined that there was insufficient evidence that the student made progress at the NPS during the 2016-17 school year. Further, the parent contends that the qualifications of the student's paraprofessional should not have been an issue in this matter, noting that private schools do not have the same requirements for licensing and certifications as public schools. Moreover, the parent asserts that the IHO failed to make a finding regarding equitable considerations and argues that the balance thereof weighs in favor of an award of the costs of the student's tuition at the NPS for the 2016-17 school year. Finally, the parent contends that the conduct of the IHO at the hearing and in the written IHO decision demonstrates that the IHO was biased in favor of the district. For relief, the parent seeks an order directing the district to fund the costs of the student's tuition and related services at the NPS for the 2016-17 school year or, in the alternative, that the matter be remanded for a new impartial hearing.

In its answer with cross-appeal, the district argues that the IHO's decision, denying the parent's request for the costs of the student's tuition at the NPS for the 2016-17 school year, should be upheld. In its cross-appeal, the district asserts that the parent's claims are barred by the IDEA's two-year statute of limitations and must be dismissed. The district argues that the parent's claims began to accrue as of the date of the March 23, 2016 CSE or no later than the date of the parent's August 23, 2016 letter to the district, in which she detailed her objections to the IEP. Therefore, the district asserts that the parent's September 2, 2018 due process complaint notice was untimely. The district also contends that the parent has not asserted a basis for tolling the statute of limitations. Further, the district argues that it never waived the defense of statute of limitations because it submitted its motion to dismiss to the IHO prior to the record close date of June 10, 2019. The district requests that the parent's claims be dismissed or, in the alternative, that the matter be remanded in order for the IHO to accept additional evidence on the issue of whether the parent's claims are time-barred. The district also requests that, in the event that the IHO's determination regarding the appropriateness of the unilateral placement is reversed, that the matter be remanded to the IHO for a determination regarding equitable considerations.

In an answer to the cross-appeal, the parent argues that the district did not raise the statute of limitations defense during the initial administrative hearing and, therefore, waived the defense. The parent contends that the district did not raise the defense until after the final hearing date on

May 22, 2019 and that, therefore, the IHO correctly denied the district's motion. The parent argues that, although the district submitted of the motion before the record close date of June 10, 2019, it was still not properly submitted because this time is generally reserved for the IHO to receive transcripts and draft the decision. Moreover, the parent argues that the timing of the district raising this defense effectively prevented the parent from properly defending the claim. The parent asserts that, if the SRO entertains the defense of statute of limitations, the district's motion to dismiss should be denied or remanded to the IHO.

V. Applicable Standards—Statute of Limitations

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[9] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Remand

In its answer, the district cross-appeals from the IHO's decision and asserts that the parent's claims are barred by the statute of limitations. The parent argues that the IHO correctly found that the district did not timely raise this defense.

[9] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

Case law indicates that a statute of limitations defense is timely interposed so long as it is raised at some point during the impartial hearing (M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 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"]).

The district raised the issue of statute of limitations in its May 23, 2019 motion to dismiss (see Dist. Mot. to Dismiss). Although it does not appear that the parent objected to the timing of the district's motion or otherwise responded to the district's motion, the IHO declined to review the district's motion, finding that he could not accept it because it was submitted after the close of testimony on May 22, 2019 and there was no request to keep the record open (IHO Decision at p. 1).[10]

Initially, the district did not raise the statute of limitations defense during any of the five hearing dates held (see Tr. pp. 1-74).[11] At the March 19, 2019 hearing date, the parties agreed to proceed with the impartial hearing on May 15, 2019 and acknowledged that they would communicate with each other regarding the expectations for the presentation of witnesses and evidence on that date (Tr. pp. 32-33). The March 15, 2019 hearing date was apparently rescheduled due to the IHO's illness (see Tr. p. 37). On the last hearing date, May 22, 2019, the district did not appear (Tr. pp. 37-39). The matter "came on for hearing at 2:18 p.m." (Tr. p. 36).

[10] The district asserts that, because the IHO set the record close date as June 10, 2019, its defense was timely interposed in the May 23, 2019 motion to dismiss. An IHO determines when the record is closed; further, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf; see 8 NYCRR 200.5[j][5][iii]). Generally, the record close date would not be determinative of the parties' dispute insofar as it is within the IHO's discretion to determine the manner in which the impartial hearing is conducted, including whether and when to receive motions or other written submissions from the parties. However, there is nothing in law, regulation, or State guidance which would preclude an IHO from accepting a written motion from a party after the last date of hearing but before the record close date.

[11] Nor is there evidence that the district raised the issue at the pre-hearing conference held on October 11, 2018 (Tr. p. 2). The district's failure to raise the defense during the prehearing conference or the subsequent hearing dates may have been, in part, due to the possibility that the parties would engage in settlement negotiations to resolve the dispute; while that was clearly the parent's preferred course, the district did indicate several times on the record that it would likely be defending the matter (see Tr. pp. 4, 20-23, 29). In any event, the district would be well advised, regardless of the likelihood of settlement, to state any defenses it may want to raise early in the impartial hearing process (ideally, during the prehearing conference), so that the IHO has an opportunity to articulate his expectations for written submissions, if any, and the timing thereof.

The parent's advocate indicated that she spoke with the district representative and the district representative did not know that there was a hearing scheduled for that day (Tr. p. 38). The IHO found that, on May 17, 2019, a notice of the hearing was sent to the district representative, which rescheduled the hearing date for May 22, 2019 at 12:30 p.m., and that, because the district did not appear, the district defaulted "on Prong I," i.e., the district's obligation to prove that it offered the student a FAPE (Tr. p. 39).[12] The parent then proceeded to present her case regarding the appropriateness of the NPS (Tr. pp. 39-72).

With regard to the district's nonappearance on May 22, 2019, there are inconsistencies between the information provided by the parent's advocate during the May 22, 2019 hearing date and the representations made in the district's motion to dismiss. In its motion to dismiss, the district representative asserted that she informed the parent's advocate that the district would be raising the defense of statute of limitations at the May 22, 2019 hearing (Dist. Mot. to Dismiss at p. 2). Yet, when the IHO questioned the advocate at the May 22, 2019 hearing as to the substance of her communications with the district representative, the parent's advocate did not mention that the district was planning on defending the matter; she only stated that the district representative did not know about the hearing (Tr. pp. 37-39). The district, in the motion to dismiss, disputed the statements made by the advocate at the May 22, 2019 hearing and asserted that it had representatives at the hearing location on the day of the hearing (Dist. Mot. to Dismiss at p. 2). The district representative also noted that the parent's advocate had indicated to her that she intended to ask the IHO for the opportunity to allow both parties to submit written briefs regarding their positions on the issue of the statute of limitations to the IHO (id.). It is noted that the IHO relied on the parent's advocate's statements regarding her conversation with the district representative (Tr. pp. 37-39). The IHO did not attempt to contact the district representative on the record as he had at prior impartial hearing dates (Tr. pp. 2-3, 11-12, 27-28).[13] Further, once the district submitted its motion to the IHO on May 23, 2019, and sent a copy thereof to the parent's advocate, there is no indication in the hearing record that the parent responded to the motion (arguing, for example, that the defense should be deemed waived) (see Dist. Mot. to Dismiss at p. 9; see also NB & CB v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016] [referring to the "classic waiver of waiver"] [internal quotation marks omitted], aff'd, 711 Fed. App'x 29 [2d Cir. 2017]).[14] Based on the conflicting assertions by the parties, the IHO's sua sponte determination that the district waived the defense as a consequence of its failure to appear at the May 22, 2019 hearing date or interpose its statute of limitations defense before that date is without sufficient support in the hearing record.

To be sure, unless specifically prohibited by regulation, IHOs are generally provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see

[12] The notice of the rescheduling of the hearing was not included in the hearing record.

[13] On February 12, 2019, the district representative informed the IHO that she would not be able to attend the hearing as she was in another hearing (Tr. p. 20).

[14] Although the parent argues that the timing of the district's motion, "effectively prevented the [parent] from properly defending this claim" (Answer to Cross-Appeal ¶ 15), it is unclear how or why the parent was prevented from submitting a response to the district's motion.

Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). Here, however, it is unclear whether the IHO was presented with a full and accurate picture of the district's intentions for the case. The responsibility for that lack of clarity certainly should fall on the district, particularly to the extent that the district failed to appear at a hearing date for which it received notice. Again, however, given that the hearing date agreed to by the parties on the record was rescheduled, the notice of the rescheduling was not included in the hearing record, there are representations in the district's motion that a district representative was available at the hearing location on that date and time, and no further attempts to contact the district were made on the record, I am hesitant to affirm the IHO's hard line on precluding the district from presenting its statute of limitations defense in this matter.[15] This is particularly so, since there is nothing in the hearing record to indicate that the parent objected to the timing of the district's submission of the motion to dismiss or otherwise responded to the motion.

Accordingly, the matter is remanded to the IHO to determine the issue of statute of limitations consistent with this decision and based upon sufficient evidence and a complete hearing record (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10-*11 [S.D.N.Y. Jan. 9. 2019] [remanding matter to IHO to supplement hearing record and to issue a pendency determination]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013]).[16] Upon remand, the IHO may allow the parties to present

[15] The IHO should have the discretion to manage the hearing process in an efficient manner and to respond to a party's failure to appear in a way that maintains that efficiency so long as each party has been provided a meaningful opportunity to present evidence; however, an alternative to outright precluding the district's presentation of any evidence or defenses in this matter may have included allowing the parent to either present her case out of order in the district's absence and hearing the district's case on a subsequent date or, if the parent did not prefer this course, allowing the parent to request an adjournment of the matter. At the very least, absent a request from the parent that the IHO find the district in default, the IHO should not have precluded the district's ability to present any evidence or defenses altogether.

[16] Given the nature of the parent's allegations in her due process complaint notice and the almost verbatim content of the August 23, 2016 letter (tending to reveal that the parent knew or should have known about the alleged action that forms the basis of the complaint), it appears that the district's defense may have merit, at least in terms of the date(s) on which the parent's claims accrued (compare Parent Ex. A, with Parent Ex. B; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]). However, review of the statute of limitations defense may also require evidence about the earlier due process complaint notice that the parent apparently initiated and withdrew without prejudice (Tr. pp. 13-14). For example, it could be the case that the district agreed to waive a statute of limitations defense in exchange for an agreement that the parent withdraw her due process complaint notice. The hearing record in its current state is insufficient to consider the question without further evidence.

evidence on the issue of the statute of limitations, including whether the district waived or agreed to waive the defense and whether any exceptions to the defense may apply.[17]

Furthermore, given the "fact-specific inquiry" necessary for a determination regarding statute of limitations (K.H., 2014 WL 3866430, at *16), in the event further evidence is presented by the parties which may influence the IHO's determination regarding the appropriateness of the NPS, the IHO may revisit the earlier findings as set forth in the June 22, 2019 decision; otherwise, the IHO may adopt the findings from the June 22, 2019 decision on this point. It is up to the IHO's sound discretion to set the parameters of the parties' respective evidentiary presentations on remand.

B. IHO Bias

Given that the matter is being remanded, it is necessary to consider the parent's argument that the IHO demonstrated bias during the hearing.[18] Specifically, the parent contends that the IHO made several comments that were inappropriate and were an indication the IHO was predisposed to rule 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 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 (see, 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]).

The parent contends that the IHO inappropriately took on the role of a district representative during the hearing, referencing the IHO's directive to the witnesses to only answer the question asked (see Tr. pp. 42-43, 67). There is nothing inappropriate about this directive and it is within the scope of the authority of an IHO. It is the IHO's responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious, and an IHO may limit the examination of a witness by either party if the IHO determines the testimony is "irrelevant,

[17] To be clear, however, as the district has not asserted in its cross-appeal that, assuming its statute of limitations defense failed, the IHO erred in finding that the district failed to offer the student a FAPE, that matter is final and binding on the parties and will not be reviewed on appeal and should not be the subject of the proceedings on remand (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[18] The parent also objects to some of the language used within the IHO decision; however, a review of the IHO decision does not support the parent's claims that the decision itself evidences any bias on the part of the IHO.

immaterial, or unduly repetitious" (see 8 NYCRR 200.5[j][3][xii][c], [d]). In this instance, the IHO's directive that the witnesses only answer the questions asked was within the IHO's authority to ensure the development of a clear and complete record.[19]

The IHO also objected and sustained his own objection in response to one question asked by the parent advocate (Tr. p. 62). The IHO indicated he did not want to hear the witness's "impression" of the student's progress based on her conversations with the student's related service providers (who did not testify); it appears that this objection was an attempt to limit the witness's testimony to matters the IHO found to be relevant. Although the practice of an IHO of formally raising and sustaining his or her own objections has not been especially common, it has some basis in adjudication (see State v. Santos, 413 A.2d 58, 69 [R.I. 1980]). From time to time, it may leave open the possibility that the IHO will later be accused of bias or partiality, but neither the practice itself nor an adverse ruling inexorably leads to the conclusion that the IHO has acted with bias or renders the impartial hearing fundamentally unfair (see Menchaca v. Uribe, Jr., 2010 WL 3294249, *7 [C.D. Cal. Jun. 30, 2010]; U.S. v. Battles, 2003 WL 22227190, at *10-*11 [N.D. Ill. Sept. 26, 2003]). Further, the IHO explained his objection on the record and requested that the parent's advocate rephrase the question, which the parent's advocate was able to do by asking the witness what the student's related services providers told her about the student's progress (Tr. p. 62).

Within the section of the request for review alleging bias on the part of the IHO, the parent also objects to the IHO's finding that the education director of the NPS and the people who signed the documents produced by the NPS were "interested witnesses paid by the entity that is seeking $125,000 in payment" (Req. for Rev. ¶¶ 40-42, quoting IHO Decision at pp. 8-9). However, this argument is related more to the substance of the parent's claims and the weight that the IHO accorded to the testimony of the education director of the NPS and the documentary evidence. The parent's disagreement with the conclusions reached by the IHO 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).

Overall, an independent review of the hearing record demonstrates that the parent had a full and fair opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process, and that the IHO did not exhibit bias against the parent. Further, the IHO's preclusion of the district's ability to present evidence or submit a defense in this matter would tend to overcome any view that the IHO had bias in favor of the district.

[19] In the request for review, the parent asserts that the IHO did not issue this directive due to relevance because the IHO did not allow the education director of the NPS to testify as to the student's progress, which the parent asserts was relevant (Req. for Rev. ¶ 37). However, the parent does not cite to any instances where the IHO prevented information from coming into the hearing record based on the directive that the witnesses only answer the question asked.

VII. Conclusion

In summary, the matter must be remanded to the IHO for further administrative proceedings consistent with the body of this decision. In particular, the IHO should receive evidence and make a determination regarding whether the district waived or agreed to waive the defense of statute of limitations and, if not, whether the parent's claims are barred by the IDEA's statute of limitations, including whether any exceptions to the statute of limitations may apply. Moreover, if necessary, the IHO should either adopt his pervious findings or render a determination on whether the NPS was an appropriate unilateral placement for the student for the 2016-17 school year. Finally, if the IHO finds the unilateral placement was appropriate, the IHO should consider whether equitable considerations support an award of the costs of the student's tuition at the NPS.

In light of the foregoing, the merits of the parent's appeal of the IHO's determination that the NPS was not an appropriate unilateral placement for the student for the 2016-17 school year will not be addressed (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated June 22, 2019, is vacated; and

IT IS FURTHER ORDERED that this matter is remanded to the same IHO who issued the June 22, 2019 decision for further development of the hearing record in accordance with this decision; and

IT IS FURTHER ORDERED that, in the event the IHO who issued the June 22, 2019 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
September 27, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER