The University of the State of New York

The State Education Department
State Review Officer
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No. 19-098

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 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 dismissed her claims related to the 2009-10, 2010-11, and 2011-12 school years as barred by the IDEA's statute of limitations. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The hearing record in this matter contains little documentary or testimonial evidence (see generally Tr. pp. 1-48; Parent Exs. A-J). Due to the lack of development of the hearing record and the procedural posture of this matter, portions of the factual background are derived from allegations in the parent's due process complaint notice dated May 30, 2018 (see Parent Ex. A). The student was placed by the district at the Pathway School (Pathway), an approved out-of-state nonpublic residential school, from September 2005 through August 2009 (Parent Exs. A at p. 2; F at p. 1). The student was then placed by the district in the REACH program (REACH), an approved in-State nonpublic school which he attended from September 2009 through May 2011 (Parent Ex. A at p. 3). While the student was attending REACH, the parent expressed concern about the type of diploma the student would receive (id. at p. 4). According to the parent, the student's REACH guidance counselor stated in an email that since the student was "classified" as

a student with a disability, he was "required to try the [R]egents examination (in each offered subject) but must pass the RCTs in order to receive his local diploma. Any [R]egents passed will, of course, be reflected in his transcript" (id.). The parent also reported, however, that the REACH guidance counselor did not indicate that the student was required to take the Regents exams before taking the Regents Competency Tests (RCTs) (id.). The student was administered the Global Studies Regents exam in January 2010, which he did not pass (id.). The student was administered RCTs in science (January 2010), math (January 2011) and Global Studies (January 2011) while attending REACH, which he passed (id.).

A CSE convened on April 20, 2010, to conduct the student's annual review and develop an IEP for the student for the 2010-11 school year (Parent Ex. H at pp. 1-2). The April 2010 IEP indicated that the student was 18 years, nine months old and was in the twelfth grade (id.). The April 2010 IEP also indicated that the student had been diagnosed as having attention deficit hyperactivity disorder (ADHD), "Asperger's Disorder," anxiety disorder, and a history of seizures (id. at p. 1). The April 20, 2010 CSE continued to find the student eligible for special education and related services as a student with an emotional disturbance and recommended a State-approved nonpublic residential placement (id. at pp. 1-2). The April 2010 CSE further recommended a 6:1+2 special class placement with weekly related services of one 30-minute session of individual occupational therapy (OT), two 30-minute sessions of individual counseling, one 45-minute session of group counseling (8:1), and one 30-minute session of group speech-language therapy (4:1) (id. at pp. 1, 7, 9).[1] The April 2010 CSE also recommended testing accommodations of extended time, separate location, answers recorded in any manner, directions read and reread aloud and use of a calculator (id. at p. 9). The student's present levels of academic performance reflected the results of a "recent" neuropsychological evaluation showing that the student demonstrated consistent weakness in "reading and writing areas" (id. at p. 3). The student's decoding skills were described as "grade equivalent;" however the student's reading comprehension was noted to be "very weak" (id.).[2] The student's expressive writing was also reported to be an area of weakness, as was his math problem solving with scores falling within the low average to borderline range (id.). The student's academic management needs reflected that the student required detailed verbal descriptions and precise explanations; reduced number of visual displays when presented learning tasks; checks for understanding; and reteaching of materials (id.). The student's social/emotional

[1] According to the student's speech-language provider, the student's receptive and expressive language skills were at age level (Parent Ex. H at p. 13). The student's main deficits were noted to be social/pragmatic language, his ability to read social cues and his improper use of nonverbal cues, and his difficulty with understanding abstract language and figurative language (id.). Although the April 2010 CSE recommended group speech-language therapy, the student's speech-language provider indicated that it was decided—with the agreement of the parent—that the student should be discharged from speech-language services "for the upcoming school year" (compare Parent Ex. H at pp. 7, 9; with Parent Ex. H at p. 14).

[2] A draft IEP produced by REACH, includes reports from the student's teachers that could be considered inconsistent with the information in the IEP (compare Parent Ex. H at p. 3; with Parent Ex. H at p. 13). For example, the student's decoding skills were estimated by his classroom teacher to be at an eighth grade level and his comprehension was estimated to be at a tenth grade level (id.). The student's teacher also reported that the student could compose a report or essay on a computer with greater efficiency than with paper and pencil but that he did not consistently edit his work (Parent Ex. H at p. 13). It was noted that the student did not pass the math RCT in January 2010 and was scheduled to retake the RCT in June 2010 (id.). It appears that the draft IEP produced by Reach was included as an attachment to the IEP (see Parent Ex. H at pp. 6, 10, 11-17).

performance reflected that the student's behavior seriously interfered with instruction and required additional adult support (id. at p. 4). The April 2010 IEP included information from a January 30, 2010 adaptive functioning assessment noting that the student exhibited significant weakness in all domains (id.). The student was further described as having difficulties with communication skills and weaknesses with expressive thoughts, feelings and emotions (id.). The student was also noted to be unable to complete academic and vocational-based tasks independently and he also demonstrated weakness with self-care and activities of daily living (id.). The student's social/emotional management needs indicated that the student needed to be prepared ahead of time for any changes in the schedule or routine of the day, and that social learning strategies needed to be modeled through discussion and role playing (id.). The April 2010 IEP reflected that the student was supported by the classroom teacher and two paraprofessionals as well as the school counselors (id.). In the domain of health and physical development, it was noted that the student exhibited fine motor delays and decreased muscle strength and muscle tone throughout his upper extremities (id. at p. 5).

In May 2011, the student began attending the Westbrook Preparatory School (Westbrook) and according to the parent "continued taking and passing courses" through June 2012 (Parent Ex. A at p. 4). In June 2011, the student was administered and passed RCTs in reading and writing, and the Regents exam in U.S. history (id.). The parent stated that on June 22, 2012—the date the student was supposed to graduate—she learned for the first time that the student was required to complete a course in economics in order to receive a "high school diploma" (id.). When the student completed the economics course in August 2012, Westbrook issued the student a diploma dated June 22, 2012, stating that the student had "fulfilled the requirements for graduation as presented by New York State" (id.; Parent Ex. J).

According to the parent, the student met with college counselors in spring 2016 and was advised that he "was not eligible for admission based on his diploma" (Parent Ex. A at p. 5). In an email dated March 28, 2016, the parent contacted the deputy director (deputy director) of the district's Central Based Support Team (CBST) in an effort to obtain a diploma for the student so that he could attend college (Parent Ex. B at pp. 4, 5). In the letter, the parent informed the deputy director that the student had graduated from Westbrook without receiving "any diploma" from the district or the New York State Education Department (NYSED) (id. at 5). The parent stated that although the student had a diploma from Westbrook, she was advised by the current principal of Westbrook that "graduates need a diploma from the local school district" (id. at 5). The deputy director responded by email dated March 29, 2016, to advise the parent that she would contact Westbrook to obtain a copy of the student's transcript, which would be reviewed by "Central Office" to determine whether the student was eligible for a Regents or local diploma (id. at p. 4). The parent replied that same day that, based upon her copies of the student's transcripts, the student was not eligible for a Regents diploma, but should receive a local diploma, having passed one Regents exam and several RCTs (id.). In an email dated May 31, 2016, the deputy director advised the parent that she had obtained the transcripts from the three residential schools the student had attended and, upon review by the district, it was determined that the student was not eligible to receive a local diploma (id. at p. 2). The deputy director indicated that the student was missing one economics credit, one art credit, two credits in a language other than English or an exemption from the requirement, two elective credits, and two advanced level math credits, and that in order to use his passing RCT scores to graduate, the student would have to demonstrate that he

"attempted the corresponding Regents exam" (id.). The parent replied the same day with a list of credits that she had discerned from the transcripts she had in her possession, and asserted that the REACH program did not have the student take the Regents exams "as they thought he would get so flustered and then not take the RCTs" (id. at pp. 1-2). The parent further stated that the CSE had failed her and the student by not providing guidance "as to the NY State requirements for graduation" (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated May 30, 2018, the parent alleged that she believed that the student had met the requirements for graduation and did not learn until May 31, 2016, in an email from the deputy director, that the student "had not been provided the required credits or tests necessary to earn a regular high school diploma" (Parent Ex. A at p. 1).[3] Generally, the parent asserts that the district failed to ensure that the nonpublic schools the student attended provided him with the necessary credits and exams for graduation (id. at pp. 2, 6). In particular, the parent contends that the schools did not offer the student the opportunity to sit for Regents examinations, which was a requirement for graduation (id. at p. 3). The parent asserted that the student was denied a FAPE for the 2009-10, 2010-11, and 2011-12 school years because the residential programs wherein the student was placed by the district failed to ensure that the student was "programmed" to receive the credits necessary for graduation with a local diploma and was properly administered an exit exam (id. at p. 6).

The parent alleged that the district failed to provide prior written notice or any exit summary memorializing a credit accounting for the student (Parent Ex. A at p. 6). The parent asserted that the student's IEPs for the 2009-10 and 2010-11 school years included a transition goal for the student to earn a diploma and attend a post-secondary institution (id.). The parent also alleged that the student was denied a FAPE because the district did not develop an IEP after the April 20, 2010 IEP to incorporate updated transition goals, and that she was not aware that this was a "substantive or significant procedural error" until May 31, 2016, when she learned the student failed to satisfy the local diploma requirements (id.). The parent argued that she was consistently told that the student was "on track to graduate" and that he had, in fact, graduated after completing an economics course in August 2012 (id.).

Overall, the parent alleged that "[e]very IEP and placement developed for [the student] during the years in question" were substantively and procedurally flawed, did not comport with the standards of the IDEA or State law, and resulted in a significant deprivation of educational benefit and deprivation of FAPE (id.). Specifically, the parent asserted that the district made recommendations pursuant to illegal blanket policies and practices; failed to offer 1:1 tutoring, remediation and executive functioning support; failed to offer behavioral support and social skills training; failed to conduct a functional behavior assessment, develop a behavioral plan and/or implement positive behavioral supports; failed to provide appropriate transition services and

[3] The parent contends that if the student has met the criteria for a regular diploma, then "there is a continuing violation" and the district should issue the student a diploma and if the student has not met the criteria, then the student "needs additional credits and exit exams to facilitate graduation with a 'regular' high school diploma" (Parent Ex. A at p. 2).

transition planning; inappropriately predetermined the student's recommended program and placement; failed to conduct timely and thorough evaluation and reevaluation; failed to consider adequate evaluative information; failed to develop IEPs that accurately described the student's strengths, weaknesses and ability to make progress, and addressed all of the student's disabilities and diagnoses; failed to offer l:1 instruction, multi-sensory instruction, behavioral and social support, tutoring, accessible texts, books on tape, a scribe, OT, transition services, assistive technology and training, vocational education, life skills training, employment readiness and "several other services legally required for FAPE" (id. at pp. 6-7). The parent further alleged that the student's IEPs failed to address how the student's disabilities impacted his ability to make progress in the general curriculum; that the CSEs were not properly constituted and participants did not possess the required knowledge, training or independence to properly formulate a legal IEP, and that the IEP team members did not have the expertise to ensure the student was programmed for and satisfying the graduation requirements (id. at p. 7). Finally, the parent alleged that the IEPs failed to include peer-reviewed research-based methods (id.).[4]

As relief, the parent requested a finding of a denial of a FAPE for the 2009-10, 2010-11, and 2011-12 school years, extended IDEA eligibility beyond the age of 21, a credit accounting from the district to determine what credits the student has earned toward graduation, an order directing the district to allow the student to take the Regents exams, the issuance of a local diploma to the student, 1:1 instruction in credit-bearing classes necessary for the student to earn a diploma, a neuropsychological evaluation, the testing accommodations that the student received from 2010-2012, and compensatory education and services delivered by private providers to make up for the denial of a FAPE (id. at pp. 9-10).

B. Impartial Hearing Officer Decision

The parties convened on January 17, 2019 and June 27, 2019 (Tr. pp. 1-48). Following the first day of the proceedings, in an interim decision dated January 17, 2019, the IHO directed the district to conduct a complete, comprehensive, and thorough review of the student's transcript in order to determine the district's specific position on the student's diploma, the diploma type, and whether or not the student properly obtained a diploma (Interim IHO Decision at p. 4). The IHO further ordered that the district review the student's transcript and determine its position on the diploma received, if any, and what diploma the student was supposed to obtain according to the last IEP in effect (id.). On the second day of the proceedings, the IHO admitted documentary evidence from the parent and permitted the parent to state her position on the record, without formally taking her testimony (Tr. pp. 31-32, 33-38, 40-43, 46). In a decision dated August 30, 2019, the IHO dismissed the parent's due process complaint notice "based on the applicable two (2) year statute of limitations" (IHO Decision at p. 7).

[4] The parent further alleged that the district violated Section 504 of the Rehabilitation Act of 1973 (section 504) and the Americans with Disabilities Act (ADA) and failed to issue procedural safeguards notice (Parent Ex. A at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO misapplied the statute of limitations to her claims. Specifically, the parent alleges that she was led to believe that her son had been awarded a "regular high school diploma" after he completed an economics course during summer 2012.[5] The parent contends that she first learned during spring 2016 that the student had not been awarded a local diploma when she unsuccessfully attempted to enroll him in a local community college. On this basis, the parent argues that her due process complaint notice was timely filed. The parent further asserts that the district's motion to dismiss her complaint was untimely as the motion was not made in writing or within 15 days of the parent's due process complaint notice. The parent contends that the district failed to comply with the IHO's interim order to conduct a thorough review of the student's transcript to determine whether the student was eligible to receive a local diploma. The parent asserts that the student was denied a FAPE because the schools that the student attended "did not follow the IEPs which always had the goal as 'Local Diploma' and did not program him for the proper courses to receive a local diploma." The parent also alleges that the requirements for a local diploma were never explained to her, and that the student was denied a FAPE by every school he attended because those schools failed to follow the guidelines of the Commissioner of Education in administering Regents exams and RCTs "and guidelines for courses required for graduation." For relief, the parent requests that the IHO's dismissal of her due process complaint be reversed, as well as an order directing the district to conduct an accurate and complete accounting of the student's credits and to reevaluate the student's transcripts. The parent also requests compensatory education for any credits missing in order to obtain a local diploma, and issuance of a local diploma.

In an answer, the district responds with admissions and denials and argues that the parent's request for review be dismissed. In the alternative, the district argues that the matter should be remanded for further development of the record with respect to the district's statute of limitations defense. The district further argues that the IHO's decision dismissing the parent's due process complaint should be upheld. The district asserts that the parent conceded that neither exception to the statute of limitations applies herein as the district made no specific misrepresentations and withheld no information that it was required to provide, and therefore the parent has waived those exceptions in this appeal. The district contends that the parent knew or should have known that the student did not meet the requirements to receive a local diploma when the parent was informed during the 2010-11 school year that the student would not be eligible to graduate if he had not at least attempted to take each Regents exam. The district also asserts, in the alternative, that the matter could be remanded for development of the record as to when the parent's claims accrued or for determination of relief if a determination is made that the parent's claims are not barred by the statute of limitations. Finally, the district states that it agrees the IHO erred in finding that the district conducted a thorough review of the student's transcript; however, contends that if the

[5] New York State awards a Regents or local high school diploma and requirements for a diploma apply to students depending upon the year in which they first enter grade nine (8 NYCRR 100.5 [a]). A student who takes more than four years to earn a diploma is subject to the requirements that apply to the year that student first entered grade nine (id.).

claims are barred by the statute of limitations, there would be no need to conduct such a review as it would only be necessary to determine whether relief is warranted.[6]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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).

[6] As further discussed below, a review of the transcript reveals that the district representative at the impartial hearing stated that "the District fulfilled the interim order where you asked that the Department do an audit of the credits and the summation of that audit was emailed to both [the parent and the IHO] (Tr. p. 38). The parent's response was that "I don't believe that back when whoever evaluated it had the additional information about the art classes, the math classes …[and] completion of the economics requirement. I don't know if they ever viewed that." (Tr. p. 38).

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]).[7]

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. Scope of Review

[7] 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).

At the outset, a determination must be made regarding which claims are properly before me on appeal. In the due process complaint notice, the parent asserted claims for the 2009-10, 2010-11, and 2011-12 school years challenging the student's IEPs, which are no longer pursued in her request for review and are therefore deemed abandoned (8 NYCRR 279.8[c][4] ["any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).[8] The IHO did not address the specifics of any of the parent's FAPE claims, having dismissed them on statute of limitations grounds without determining when they accrued. In her request for review, the parent's sole FAPE claim, which is addressed further below, alleges that the schools the student attended during the school years at issue "did not follow the IEPs which always had the goal of 'Local Diploma'" and did not follow guidelines of the Commissioner of Education for courses required for graduation and for administering Regents exams and RCTs to ensure that the student would receive a local diploma.

The parent also argues that the IHO did not address her assertion that the district's motion to dismiss her complaint was untimely as the motion was not made in writing or within 15 days of the parent's due process complaint notice. The parent's argument that the IHO erred in allowing the district to proceed with a motion to dismiss on the ground of statute of limitations, because the motion was untimely, is not persuasive. To the extent that the parent argues that such a motion should have been brought within 15 days of the filing of the due process complaint notice, the parent's argument relates to a challenge to the sufficiency of the due process complaint notice, rather than to a motion to dismiss on statute of limitations grounds (see 200.5[i][1], [3], [6] [a due process complaint notice is deemed sufficient unless the party receiving it notifies the IHO and opposing party within 15 days of receipt that the party believes the due process complaint notice is insufficient).[9]

[8] The parent's alleged violations of section 504 of the Rehabilitation Act of 1974 (section 504) and the Americans with Disabilities Act (ADA) contained in the due process complaint notice, are not reasserted in the request for review. Even if those claims were not abandoned, State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding section 504, discrimination or retaliation (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

[9] The Court in R.B dispensed with the notion that a sufficiency challenge within the first 15 days of a proceeding and a statute of limitations defense were one and the same, holding that a statute of limitations defense did not need to be raised in a response to the due process complaint notice and that the sufficiency provision was "inapposite" to the issue (R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 n.6). A sufficiency challenge addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA. The IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR

The parent also contends that the district failed to comply with the IHO's interim order to conduct a thorough review of the student's transcript to determine whether the student was eligible to receive a local diploma. The district representative alleged on the record that the district had complied with the IHO's interim order and had provided the student's credit audit via email to the parent and the IHO (Tr. pp. 38-39). The parent argued that she believed the district's credit audit was incomplete (Tr. p. 38). The email referenced by the district representative does not appear to be in the hearing record; however, the discussion during the hearing is consistent with the information provided to the parent by the deputy director of the CBST, who had contacted each of the student's prior schools to obtain his transcript information (compare Tr. pp. 38-39, with Parent Ex. B at pp. 1-2).[10]

B. Statute of Limitations

The parent alleges that the IHO erred in finding that her claims for the 2009-10, 2010-11, and 2011-12 school years were barred by the IDEA's two-year statute of limitations.

In this matter, the parent seeks an accounting of the student's high school credits, which the district appears to have been in the process of completing.[11] The parent also requests compensatory education for any credits missing in order to obtain a local diploma or that the district be directed to issue a local diploma to the student.

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]).[12] 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

300.508[b]).

[10] The parent argues that the district representative's claim that he had not received a response from the "Office of Legal Services" relates to the IHO's interim order directing the credit audit and determination of the student's diploma eligibility (Req. for Rev. at p. 3). A review of the transcript reveals that the district representative stated that he had contacted the Office of Legal Services in order to "get more information and figure out a way how we can help [the parent] advocate for her son" (Tr. p. 32).

[11] In its answer the district agrees with the parent that the IHO erred in finding that the district had conducted a thorough review of the student's transcript, however the district representative asserted that the review had been completed (see Tr. pp. 38-39) and the record also indicates that the deputy director of the CBST obtained transcripts from each of the school's the student attended to determine what credits had been completed (Parent Ex. B at pp. 1-2). Further the email exchange between the parent and the deputy director of the CBST included the additional courses that the parent believed were not credited by the district, demonstrating that the deputy director of the CBST was aware of the alleged additional credits on June 1, 2016, when she advised the parent that she would forward the information to "Central Office" (id. at p. 1).

[12] 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]).

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 parent alleges that the IHO misapplied the law and that her claims related to the school years at issue are timely because she did not learn that the student was not eligible to receive a local diploma until May 31, 2016. The district argues that the parent's claims are barred by the IDEA's two-year statute of limitations and further that the parent conceded that neither of the exceptions to the statute of limitations applies.

Turning to the specific claims raised by the parent in her due process complaint notice, the parent alleged that every IEP developed for the student was substantively and procedurally deficient and that the district made recommendations pursuant to illegal blanket policies and practices. Among the specific claims related to a denial of a FAPE, the parent alleged that the district failed to offer 1:1 tutoring, remediation and executive functioning support; failed to offer behavioral support and social skills training; failed to conduct a functional behavior assessment, develop a behavioral plan and/or implement positive behavioral supports; failed to provide appropriate transition services and transition planning; inappropriately predetermined the student's recommended program and placement; failed to conduct timely and thorough evaluations and reevaluations; failed to consider adequate evaluative information; failed to develop IEPs that accurately described the student's strengths, weaknesses, and ability to make progress, and addressed all of the student's disabilities and diagnoses and were based upon evaluations that met the standards required under the IDEA and New York State law; failed to offer l:1 instruction, multi-sensory instruction, behavioral and social support, tutoring, accessible texts, books on tape, a scribe, OT, transition services, assistive technology and training, vocational education, life skills training, employment readiness and "several other services legally required for FAPE" (Parent Ex. A at pp. 6-7). The parent further alleged that the student's IEPs failed to address how the student's disabilities impacted his ability to make progress in the general curriculum or make progress in cognitive, developmental, academic, and functional areas; that the CSEs were not properly constituted and participants did not possess the required knowledge, training, or independence to properly formulate a legal IEP; and that the IEP team members did not have the expertise to ensure the student was programmed for and satisfying the graduation requirements" (id. at p. 7). Finally, the parent alleged that the IEPs failed to include peer-reviewed research-based methods (id.).

The parent does not tie the above claims to any specific IEP, however the hearing record in this matter includes two IEPs one dated June 9, 2009 and one dated April 20, 2010. The parent alleges that the CSE never met after the April 20, 2010 IEP was developed and that no annual

review was conducted for the 2011-12 school year.[13] The claims associated with the June 9, 2009 IEP and the April 20, 2010 IEP accrued in close proximity to the corresponding events surrounding the June 2009 and April 2010 CSE meetings that the parent attended. The CSE's failure to conduct an annual review for the 2011-12 school year accrued at the time the student's annual review was due, which according to the April 2010 IEP was June 30, 2011, or at the latest when the student was no longer eligible for special education due to age prior to the start of the 2012-13 school year (Parent Ex. H at p. 2; see Hall v. Knott County Bd. of Educ., 941 F.2d 402, 408 [6th Cir. 1991] [cause of action for denial of educational services accrued at the latest when the student was no longer eligible for special education services due to age]).[14] The parent's claims accrued approximately seven, six or five years, respectively, prior to the parent's filing of her due process complaint notice on May 30, 2018. Additionally, although the parent asserts that she did not know about these claims until she was advised that the student did not receive a diploma, as discussed below, the student's receipt or non-receipt of a diploma is a separate issue from the identification, evaluation, educational placement, or the provision of a FAPE to the student. Therefore, the IHO correctly determined that the parent's claims related to the 2009-10, 2010-11 and 2011-12 school years were beyond the IDEA's two-year statute of limitations.

Thus, unless one of the exceptions to the statute of limitations period applies, the parent's claims related to the provision of FAPE to the student are time-barred. The exceptions to the two-year statute of limitations period for requesting an impartial hearing apply in circumstances in which a parent has been: (1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or (2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

The parent argues that the district "misrepresented" its compliance with the regulatory criteria for issuing a local diploma and that she relied on communications from the principal of Westbrook indicating that the student was "on track" to receive a local diploma. The parent further argues that the student completed additional credits that were not acknowledged or counted by the district when they determined that the student was not eligible for a local diploma on May 31, 2016. Very clearly, the parent believes that when she was informed by the deputy director of the CBST that the student was not eligible for a local diploma on May 31, 2016, that is the date that

[13] In her March 28, 2016 email to the deputy director, the parent indicated that she had an IEP from 2011, but the student's records with the district did not include that IEP (Parent Ex. B at p. 5).

[14] As of the start of the 2012-13 school year, the student was no longer eligible for special education due to graduation or due to the student's age. As of the date of the student's diploma—June 22, 2012—the student was not yet 21; however, he turned 21 shortly thereafter and was 21 prior to the start of the 2012-13 school year at which time he was no longer eligible for special education services (Parent Exs. G at p. 1; H at p. 1; J; see Educ. Law § 3202[1]). Although the parent asserts that she believed the student had graduated as of June 2012, a belief that was reasonable considering the diploma provided to the student in June 2012 (see Parent Ex. J), the student was no longer eligible for special education as of the start of the 2012-13 school year due to the student's age. Accordingly, regardless of whether the student received a diploma in June 2012, the student was not eligible to continue attending public school in the district (Educ. Law § 3202[1]).

she knew or should have known about the alleged action that forms the basis of the complaint. The district correctly asserts that it is not.

Initially, the parent's arguments related to the issuance, or non-issuance, of a diploma to the student are entirely results oriented and it is clear from the hearing record that she was aware of the issue with the diploma more than two years prior to filing the due process complaint notice. In essence, the parent contends that because she did not know that the student did not achieve the expected benefit from his educational programming, the parent could not have known of any defect in the student's programming. However, the parent was first notified of a potential problem with the student's diploma prior to the May 31, 2016 email she identifies as the point at which her claims accrued. According to the due process complaint notice, in Spring 2016 the student "was advised that [he] was not eligible for admission [to college] based on his diploma" (Parent Ex. A at p. 5). The parent then contacted the deputy director of the CBST on March 28, 2016 attempting to clarify the status of the student's diploma (Parent Ex. B at p. 5). In her email to the deputy director the parent expressed her knowledge that the student did not have a diploma from the district and further expressed that she "did not know at the time that his Westbrook Prep Diploma was not a local diploma" (id.). Accordingly, as the parent expressed her knowledge of the issue with the diploma from Westbrook in March 2016 (more than two years prior to the filing of the due process complaint notice on May 30, 2018), her claim related to the issuance of a diploma accrued at the latest at that time and is therefore barred by the applicable two-year statute of limitations.

Further, an exception does not apply to the statute of limitations in this instance. The "specific misrepresentations" exception to the timeline to request an impartial hearing applies "if the parent was prevented from requesting the hearing due to . . . specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. 2018][noting that the district's refusal to accede to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments were sufficient to warrant application of the statutory exception, the exception would swallow the rule"]; [see also Application of a Student with a Disability, Appeal No. 13-215).

In this matter, the parent's arguments that the district failed to comply with the regulations governing the issuance of a local diploma and failed to explain the type of diploma the student received—while clearly indicating her view that the district's actions were impermissible—does not meet the criteria for the specific misrepresentation exception, which requires that the district specifically misrepresent that it had resolved the problem forming the basis of the complaint, such

that the parent was prevented from requesting an impartial hearing (C.H. v. Northwest Indep. Sch. Dist., 2011 WL 4537784, at *5 [E.D. Tex. Sept. 30, 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2011 WL 3273203, at *11 [S.D. Ind. July 29, 2011]).

Additionally, the parent, by her own admission, was informed as early as the 2010-11 school year that the student was required to attempt each Regents exam in order to receive credit toward graduation from a passing score on a corresponding RCT (Parent Ex. A at p. 4). Even assuming that the parent did not understand that the student had to first attempt the Regents exam before taking the RCT, the record indicates that she was aware that the student's teachers at REACH (which he attended from September 2009 through May 2011) decided that the student would be less likely to take the RCT if he was first required to take a Regents exam "as they thought he would get so flustered and then not take the RCTs" (Parent Ex. B at pp. 1-2). This is not a case where the parent first learned of a potential denial of a FAPE after the statute of limitations had expired (see K.H. v. New York City Dep't of Educ., 2014 WL 3866430 *16 (E.D.N.Y. Aug. 6, 2014).

Consequently, the parent's arguments are insufficient to overcome the IHO's conclusion that there was no specific misrepresentation that provided an exception to the limitations period (C.H., 2011 WL 4537784, at *6), such that the district intentionally misrepresented that it had resolved the problem on which the due process complaint notice was based (Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar.24, 2009], aff'd 2011 WL 1289145 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]).

Finally, even if the parent's claim related to the issuance of a diploma were not barred by the statute of limitations, it has historically been the province of the Commissioner of Education to consider the award of course credit and the related issuance of issuance or revocation of a diploma as a result (see, e.g., Appeal of K.D., 52 Ed Dept Rep, Decision No. 16460), and generally, outside of instances where a student's graduation is a determinative factor as to the student's continuing eligibility for special education, an impartial hearing is not the proper forum for disputes involving a district's decision to award or its failure to award academic course credit because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 CFR. 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 10-124; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]). Further, graduation credits and requirements generally fall under the purview of the district's discretionary authority, again subject to the review of the Commissioner (see Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith

v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]).

Having determined that the parent's due process complaint notice was not filed within two years of the accrual of the parent's claims and that neither of the exceptions to the statute of limitations apply, I find that the parent's allegations against the district are barred by the statute of limitations and there is no reason to disturb the IHO's decision.

VII. Conclusion

Based on the foregoing, I find that the IHO properly found that the statute of limitations barred the parent's claims. I have considered the parties' remaining contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 8, 2019

STEVEN KROLAK
STATE REVIEW OFFICER