The University of the State of New York

The State Education Department
State Review Officer
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No. 21-135

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

The Law Office of Steven Alizio, attorneys for respondents, by Steven J. Alizio, Esq., and Justin B. Shane, 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 district) appeals from those portions of a decision of an impartial hearing officer (IHO) which determined that the IDEA's statute of limitations did not bar respondents' (the parents') claims relating to their daughter's 2018-19 school year and which required the district to reimburse the parents for the costs of an independent educational evaluations (IEE) of the student. The parents cross-appeal from that portion of the IHO's decision which rejected their specific arguments relating to the application of the statute of limitations and which limited the amount that the district would be required to fund for the costs of the IEE. The appeal must be dismissed. The cross-appeal must be sustained.

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

Toward the end of the 2015-16 school year (preschool), the parent referred the student to the district for an initial evaluation due to "fine and gross motor concerns" (see Parent Ex. S at p. 1). A Committee on Preschool Special Education (CPSE) convened on July 8, 2016, found the student eligible for special education as a preschool student with a disability, and recommended that the student receive related services of occupational therapy (OT) and physical therapy (PT)

(Dist. Mot. to Dismiss Ex. 2 at pp. 1, 9).[1] A CSE convened on August 9, 2016 to conduct the student's "Turning-5" review (i.e., her transition to school-aged programming), found the student eligible for special education as a student with an other health-impairment, and recommended OT and PT services (Dist. Mot. to Dismiss Ex. 3 at pp. 1, 9). A CSE convened the following year on June 13, 2017 to conduct the student's annual review and again recommended OT and PT services (Dist. Mot. to Dismiss Ex. 6 at pp. 1, 11). For both the 2016-17 (kindergarten) and 2017-18 (first grade) school years, the student attended a general education classroom with integrated co-teaching (ICT) services, but as one of the regular education students that do not specifically have ICT services listed on an IEP (see Tr. p. 206).[2]

A CSE convened on June 8, 2018 to conduct the student's annual review (Dist. Ex. 22). Finding that the student continued to be eligible for special education as a student with an other health-impairment, the CSE recommended that the student receive one 30-minute session per week of group (3:1) OT to work on her graphomotor skills (Dist. Ex. 22 at pp. 1, 3, 5). According to the IEP, the parents questioned whether the recommended "placement" was "correct" for the student (id. at p. 1).

The student began the 2018-19 school year (second grade) in a general education classroom with ICT services but as a regular education student (see Dist. Ex. 27 at p. 1). The parents obtained a private neuropsychological IEE of the student, which was completed on September 20, 2018 (Parent Ex. B). The neuropsychologist found that the student met the criteria for diagnoses with a specific learning disorder with impairments in reading, written expression, and mathematics (id. at p. 8). In addition, the neuropsychologist indicated that the student's reading difficulties could be "described as dyslexia" (id.). The neuropsychologist noted that there were "many reasons to believe that [the student's] [then-]current educational placement [wa]s a good fit for her" but opined that she required "substantial supports" including "intensive, multisensory reading instruction using empirically supported methodologies, such as the Orton-Gillingham approach" (id. at p. 9). The neuropsychologist recommended that such instruction could be delivered through special education teacher support services (SETSS) (id.).

On October 23, 2018, a CSE reconvened, considered the September 2018 private neuropsychological IEE report, and changed the student's eligibility category to learning disability (Dist. Ex. 27 at p. 3; compare Dist. Ex. 27 at p. 1, with Dist. Ex. 22 at p. 1).[3] The CSE

[1] Exhibits attached to the district's motion to dismiss were not separately entered into evidence and were only considered by the IHO in addressing the merits of the district's motion (see Dist. Mot. to Dismiss Exs. 1-15; see also Interim IHO Decision). In addition, during the impartial hearing, the IHO limited the purposes for which several of the exhibits entered into evidence would be considered (i.e., for purposes of impeachment or for adjudicating the statute of limitations issue) (see Tr. pp. 144-45, 149-52, 155-58; Dist. Exs. 21-24; 26-30). Here, the documents are cited for background purposes to outline the student's educational history, which is not seriously in dispute, and to address the issues raised by the parties on appeal, which issues are sufficiently consistent with the limited purposes outlined by the IHO.

[2] According to the student's mother, every class at the district public school the student attended was "an ICT classroom" (Tr. p. 206).

[3] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

recommended that the student receive ICT services five times per week in English language arts (ELA) and five times per week in mathematics, as well as one 30-minute session per week of group OT services (Dist. Ex. 27 at p. 11). As supports for the student's management needs, the IEP indicated that the student would benefit from preferential seating, reduced auditory distractions, teacher check-ins, being asked to repeat or paraphrase what she has heard to check accuracy, repeated directions, visual guides/trackers for reading, opportunities to talk about concepts and information taught, tasks broken into smaller steps, and use of multiple modalities (id. at p. 5).

After the October 2018 CSE meeting, the student continued to attend a classroom with ICT services but unlike before a special education teacher was responsible to implement ICT services for the student in accordance with the terms of her IEP (Tr. pp. 219-20; see Dist. Ex. 27). Beginning in fall 2018, the student was privately pulled out of her classroom in order to receive services during the school day from EBL Coaching at parent expense (Tr. pp. 210-11, 276-77).

In a letter dated February 14, 2019, the district notified the parents that, as of the mid-point of second grade, the student might "not be [on] pace to move up to third grade after June" (Parent Ex. C).

The student was ultimately promoted to the third grade and continued in the class with ICT services in the district public school for the 2019-20 school year (see Tr. pp. 224-25). The student continued to receive pull-out services from EBL Coaching during the 2019-20 school year at parent expense (Tr. pp. 226-28, 276-77, 284).

A CSE convened on October 21, 2019 to conduct the student's annual review (Dist. Ex. 31). Having found that the student remained eligible for special education as a student with a learning disability, the CSE recommended a similar program as set forth in the October 2018 IEP, including ICT services in ELA and math and OT services (compare Dist. Ex. 31 at pp. 1, 13, with Dist. Ex. 27 at pp. 1, 11). The October 2019 IEP set forth supports for the student's management needs similar to those set forth in the October 2018 IEP with the addition of small group instruction (compare Dist. Ex. 31 at p. 6, with Dist. Ex. 27 at p. 5).

On April 3, 2020, the district provided the parents with a special education remote learning plan for the student to be implemented during school closure related to the COVID-19 pandemic (Dist. Ex. 34). The remote plan provided that the student would receive two 30-minute sessions of ICT services in ELA and two 30-minute sessions of ICT services in math on a 1:1 basis via phone or video, with work assigned through google classroom (id. at p. 1).

The parents executed an enrollment contract with The Churchill School (Churchill) for the student's attendance during the 2020-21 school year (fourth grade) (Parent Ex. E).[4, 5]

In a letter dated August 21, 2020, the parents notified the district that they did not believe the district could meet the student's needs as described in the September 2018 private

[4] The parents executed the contract on April 18 and June 10, 2020, respectively, and the school executed the document on June 12, 2020 (Parent Ex. E at p. 4).

[5] Churchill has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

neuropsychological IEE, that the program and placement that the student had been attending was not appropriate, and that the district had not offered an alternative placement for the 2020-21 school year (Parent Ex. F at pp. 1-3). Based on the foregoing, the parents stated their intent to enroll the student at Churchill for the 2020-21 school year and seek reimbursement from the district for the costs thereof (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated January 5, 2021, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, 2018-19, 2019-20, and 2020-21 school years (see Parent Ex. A).

Regarding the 2016-17 school year, the parents alleged that the district violated its child find obligations to the student (Parent Ex. A at pp. 2, 9). Specifically, the parents asserted that despite the student's difficulties with reading and writing, the district failed to evaluate the student to determine whether she required special education (id. at p. 2). The parents contended that, without special education support, the student failed to make meaningful progress during the 2016-17 school year (id.).

For the 2017-18, 2018-19, 2019-20, and 2020-21 school years, the parents alleged that the district failed to thoroughly assess the student in all areas of suspected disability and that the IEPs set forth predetermined recommendations, incomplete or inappropriate present levels of performance, annual goals that were not appropriate or measurable, and program recommendations with an inappropriate level of related services (Parent Ex. A at pp. 9-10).

Specific to the June 2017 CSE meeting, the parents alleged that the CSE did not rely on sufficient evaluative information and predetermined the services recommendations (Parent Ex. A at p. 3). The parents asserted that, despite the student's demonstrated need for special education support, the CSE "did not mandate or even consider a special education setting" for the student (id.). The parents stated that, for the 2017-18 school year, the student failed to make meaningful progress (id.).

Next, the parent alleged that, leading up to the June 2018 CSE meeting, the district again failed to evaluate the student in the area of academics (Parent Ex. A at p. 4). The parent asserted that the June 2018 CSE predetermined its recommendations and inappropriately failed to recommend special education support for the student and did not include counseling as a mandate on the IEP (id.).

As for the October 2018 CSE, the parents asserted that the CSE predetermined its recommendations, failed to consider the full continuum of special education placements, and failed to meaningfully consider the recommendations set forth in the September 2018 private neuropsychological IEE report (Parent Ex. A at p. 5). The parents further argued that the October 2018 IEP failed to "address each of [the student's] special education and related service needs," specifically noting the lack of recommendation for specialized reading instruction using a methodology such as Orton-Gillingham or counseling (id. at pp. 5-6). The parent alleged that, during the remainder of the 2018-19 school year, the student continued to struggle and failed to make meaningful progress during the 2018-19 school year (id. at p. 6).

Turning to the October 2019 CSE, the parents alleged that the CSE again predetermined its recommendations and considered no other options on the continuum of services other than the ICT services (Parent Ex. A at pp. 6-7). The parents asserted that the annual goals included in the October 2019 IEP did not address each of the student's unique needs, including her needs relating to writing and spelling, and included only one reading goal that was vague and carried over from the October 2018 IEP (id. at p. 7). As for the program recommendations, the parents contended that it was "inexplicable" that the CSE would recommend the same program from the year prior despite the student's lack of progress (id.). The parents alleged that the student again struggled and failed to make meaningful progress during the 2019-20 school year (id.).

The parents alleged that, given the student's struggles in the district placement during the previous school years, the district should have convened prior to the beginning of the 2020-21 school year to develop a new IEP (Parent Ex. A at pp. 7, 10). Further, the parents indicated that the district had previously represented that it could not deliver services by a provider with training in multisensory reading methodologies and that, therefore, the district could not address the student's needs (id. at p. 8).

The parents asserted that Churchill was an appropriate unilateral placement for the student for the 2020-21 and that equitable considerations weighed in favor of an award of relief related to all school years at issue (Parent Ex. A at pp. 8-9). For relief, the parents requested compensatory education, reimbursement for the costs of the September 2018 neuropsychological IEE, reimbursement for the costs of the student's tuition at Churchill for the 2020-21 school year, and provision of transportation (id. at pp. 10-11).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 13, 2021, and concluded on May 3, 2021, after five days of proceedings (see Tr. pp. 1-400).[6] In a motion dated April 16, 2021, and supplemented on April 22, 2021, the district requested that the parents' claims relating to the 2016-17, 2017-18, and 2018-19 school years be dismissed as outside the IDEA's two-year statute of limitations and that the child find claims relating to the 2016-17 school year be additionally dismissed as failing to state a claim (Dist. Mot. to Dismiss; Dist. Supp. Mot. to Dismiss). The parents responded to the district's motion in an opposition dated April 28, 2021 (Parent Opp. to Mot. to Dismiss).

The IHO issued an interim decision on the district's motion dated April 29, 2021 (Interim IHO Decision). Initially, the IHO found that, according to the exhibits submitted with the district's motion, a CPSE and a CSE convened and found the student eligible for special education as a student with a disability in July 2016 and August 2016 respectively and that, therefore, it "appear[ed]" that the district had met its child find obligation (Interim IHO Decision at pp. 1-2). As for the statute of limitations, the IHO found that as of October 23, 2018—the date of the CSE meeting during which the September 2018 private neuropsychological IEE was considered—the parents knew or should have known about their claims (id. at p. 2). In addition, the IHO indicated

[6] After two initial hearing dates on April 13 and April 16, 2021 (see Tr. pp. 1-16), a new IHO was assigned and conducted a prehearing conference on April 21, 2021, a status conference on April 29, 2021, and a substantive hearing on May 3, 2021 (Tr. pp. 17-400). The IHO issued a prehearing conference order dated April 27, 2021 (Prehearing Conf. Order).

that it could be determined from "the face of" the due process complaint notice that neither of the exceptions to the statute of limitations applied in that the parents did not allege that the district made misrepresentations or withheld information that it was required to disclose (id.). The IHO also noted that the Second Circuit had rejected application of the continuing harm document in cases arising under the IDEA (id.). The IHO went on to note the circumstances of the COVID-19 pandemic and the effect of Executive Order 202.8 signed by the Governor of New York, which tolled statutory time limits in the State during the declared state of emergency, but observed that the State statute mirrored the IDEA's statute of limitations, which was not affected by the Executive Order (id. at pp. 2-3). Based on the foregoing, the IHO dismissed the parents' claims relating to the 2016-17 and 2017-18 school years without prejudice as barred by the statute of limitations (id. at p. 3). The IHO "reserved" decision on the district's motion relating to the 2018-19 school year so that the IHO could receive evidence regarding the date by which the parents knew or should have known about their claims, that is the date of accrual (id. at p. 4). The IHO further noted that evidence about the September 2018 private neuropsychological IEE, the October 2018 CSE meeting, and the "conduct of the parties in its aftermath" would, in any event, be permitted "in equity" as relevant to the parents' claims relating to the 2019-20 and 2020-21 school years and as related to "any potential remedy" if necessary (id.).

The IHO issued a final decision dated May 11, 2021 (see IHO Decision). The IHO reiterated that the parents' claims relating to the 2016-17 and 2017-18 school year were barred by the IDEA's two-year statute of limitations and rejected the parents' argument that the IHO should revisit these findings, citing the doctrine of law of the case (id. at p. 6). As for the 2018-19 school year, the IHO found that the parents' claims were not barred by the statute of limitations (id. at pp. 6-7). The IHO determined that in late September or early October 2018—when the parents were first informed of the district's inability to provide the type of services recommended by the September 2018 private neuropsychological IEE, met with an educational lawyer, and began funding private tutoring—the parents knew or should have known about their claims pertaining to the 2018-19 school year but noted some ambiguity and the potential for a later date in February 2019 when the parents received a promotion in doubt letter (id. at p. 7). In addition, the IHO noted that there was no substantive testimony that either of the exceptions to the statute of limitations applied to the matter (id. at pp. 7-8). However, the IHO opined that equitable factors should be weighed and that, given the nature of the relief sought to remedy the alleged denial of a FAPE for the 2018-19 school year, i.e., compensatory education, a qualitative award tailored to the student's needs would take into account "the actual number of years" that the student was deprived of a FAPE (id. at p. 8). Thus, weighing the ambiguity regarding the date the parent knew or should have known about her claims, the district's failure to present a witness to challenge the parents' timeline, and the balance of equities, the IHO found that the statute of limitations did not bar the parents' claims relating to the 2018-19 school year (id.).

Turning to the merits, the IHO found that the district denied the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years (IHO Decision at pp. 8-9). The IHO noted "unchallenged" documentary and testimonial evidence that the student "was not progressing to grade level especially in the area of reading and to a lesser extent in the area of math" and that the district could not "implement the recommendations" in the October 2018 IEP, which "mirrored the recommendations" in the September 2018 private neuropsychological IEE (id. at p. 8). The IHO opined that the October 2018 and October 2019 IEPs appeared to be reasonably calculated to enable the student to make progress appropriate in light of her circumstances but that the district

"failed . . . in the implementation of these IEPs" in that the testimony showed that the district had only one teacher trained "in the recommended methodology" and that teacher "couldn't be spared to assist the student" (id. at p. 9). In addition, the IHO found that no CSE convened to develop an IEP for the student for the 2020-21 school year (id.).

As for relief, the IHO found that an award of 400 hours of compensatory multisensory instruction in reading and math using Orton-Gillingham methodology by a provider of the parent's choosing was supported by the evidence in the hearing record (IHO Decision at pp. 9-10, 13). Turning to the parent's request for tuition reimbursement, the IHO found that Churchill offered specially designed instruction to meet the student's unique needs (id.at pp. 10-11). In weighing equitable considerations, the IHO noted that the parents gave the district notice of their intent to unilaterally place the student, cooperated with the district, and "went above and beyond to make the Student's public placement fit" (id. at pp. 11-12). The IHO noted that the cost of the tuition at Churchill was "not unreasonable" and that the evidence showed that the parents could not afford the tuition (id. at p. 11). Therefore, the IHO ordered to district to fund the student's tuition at Churchill for the 2020-21 school year (id. at p. 13). The IHO also found that the costs of the private services delivered by EBL Coaching were for "implementation of the Student's IEP" and that the parents were entitled to be reimbursed for the costs of these services "under the Burlington/Carter standard" (id. at pp. 12, 13).

Finally, the IHO addressed the parents' request for reimbursement for the costs of the September 2018 neuropsychological IEE (IHO Decision at pp. 12-13). The IHO found that, in the absence of evidence from the district to the contrary, testimony that the neuropsychologist had "numerous disagreements with the evaluation that had been conducted by the school" and that the parents sought the evaluation only after the student failed to make progress was sufficient to establish the parents' disagreement with a district evaluation of the student (id. at p. 12). The IHO identified a question of fact regarding the cost of the evaluation and, based on a balancing of equities, ordered the district to reimburse the lesser amount (id. at pp. 12-13).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the parents' claims relating to the 2018-19 school year were not barred by the IDEA's two-year statute of limitations and in ordering the district to fund the September 2018 neuropsychological IEE.

Specifically, as to the statute of limitations, the district argues that any claims pertaining to the June 2018 IEP accrued as of the date of the CSE meeting and, therefore, were untimely asserted in the parents' January 2021 due process complaint notice.[7] Similarly, the district asserts that the

[7] The district also appears to argue that the parents' due process complaint notice did not set forth claims relating to the June 2018 IEP. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the parents' due process complaint notice sets forth general allegations that

parents' claims relating to the October 2018 IEP accrued no later than the date of the October 2018 CSE meeting when the parents learned that the CSE would not recommend SETSS or 1:1 multisensory reading instruction and that, therefore, the claims in the January 2021 due process complaint notice relating to the October 2018 IEP were untimely raised. Based on the foregoing, the district requests that the IHO's compensatory award should be proportionally reduced by half to reflect an award that remedies a denial of a FAPE for one school year (the 2019-20 school year) rather than two school years. In addition, the district argues that the IHO's award of district funding for the costs of services delivered by EBL Coaching should be limited to the costs of services delivered during the 2019-20 school year.

Turning to the IEE, the district argues that the IHO erred in ordering district funding of the September 2018 neuropsychological evaluation. The district argues that the hearing record does not support a finding that the parents ever expressed to the district that they disagreed with a district evaluation. The district also argues that there is no equitable basis for the IHO's award.

In an answer, the parents respond to the district's allegations with admissions and denials. The parents also interpose a cross-appeal, alleging that, although the IHO correctly determined that the statute of limitations did not bar the parents' claims relating to the 2018-19 school year, he erred in rejecting the parents' argument that the Governor's Executive Order 202.8, as extended thereafter, operated to toll the applicable statute of limitations and/or that an exception to the statute of limitations applied due to the district's failure to provide the parents with a copy of a procedural safeguards notice.

The parents also cross-appeal that portion of the IHO's decision that placed a cap on the amount that the district would be required to reimburse the parents for the costs of the neuropsychological evaluation. The parents argue that, in limiting the amount to be reimbursed, the IHO erred in finding the testimony regarding the amount the parents paid for the evaluation to be contradictory; the parents argue that, instead, the neuropsychologist could not recall the amount charged. Relating thereto, the parents offer additional evidence in the form of an invoice for the evaluation and request that it be considered on appeal.

In an answer to the parents' cross-appeal, the district responds to the parents' allegations relating to the statute of limitations and the cost of the IEE. The district also argues that the parents were not aggrieved by the IHO's decision pertaining to the application of the statute of limitations for the 2018-19 school year and, therefore, had no right to cross-appeal the IHO's decision. Further, the district objects to the consideration of the invoice for the neuropsychological IEE as additional evidence.

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encompassed the IEPs developed for the student during the 2018-19 school years, including claims relating to sufficiency of evaluations, predetermination, present levels of performance, annual goals, and program recommendations (Parent Ex. A at pp. 9-10), as well as claims specific to the June 2018 CSE meeting and resultant IEP relating to the sufficiency of evaluative information, predetermination, and the lack of recommendations of special education support and counseling (id. at p. 4). Accordingly, there is no merit to the district's position that claims relating to the June 2018 IEP were not raised for review at the impartial hearing. To the extent the "parties also did not address this IEP at the impartial hearing" (Req. for Rev. ¶ 18), the district, as the party bearing the burden of production and persuasion on the issue of the offer of a FAPE to the student (see Educ. Law § 4404[1][c]), is at fault for any lack of evidence relating to the June 2018 IEP.

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).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

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

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

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

VI. Discussion

A. Scope of Review

First, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "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 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, I decline to dismiss the parent's cross-appeal on the grounds cited by the district. The IHO's discrete findings relating to the applicability of the Governor's executive orders and exceptions to the statute of limitations were adverse to the parents, and State regulation requires a pleading to identify each issue which a party presents for review, including the precise rulings, failures to rule, or refusals to rule presented for review (8 NYCRR 279.8[c][4]). While the parents were not aggrieved by the IHO's ultimate determination that the statute of limitations did not bar their claims relating to the 2018-19 school year, it was appropriate for the parents to identify their appeal of the IHO's findings with which they disagreed, and which could form an alternative basis for the IHO's ultimate determination.

In addition, neither party has appealed the IHO's findings that the parents' claims pertaining to the 2016-17 and 2017-18 schools year were barred by the statute of limitations, that the district denied the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years, that the student was entitled to compensatory education and the parents were entitled to reimbursement of the costs of services delivered by EBL Coaching to remedy the district's denial of a FAPE for the 2019-20 school year, and that Churchill was an appropriate unilateral placement and equitable considerations support an award of tuition reimbursement for the 2020-21 school year. Therefore, the IHO's determinations on these issues have become final and binding and they will not be reviewed on appeal (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]).

B. Statute of Limitations

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[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 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).

New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "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]). Exceptions to the timeline to request an impartial hearing apply if a parent was prevented from filing a due process complaint notice due to: 1) 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 withholding 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).

Here, the IHO found that as of the October 2018 CSE meeting, at which the September 2018 neuropsychological evaluation was considered, the parents knew or should have known about their claims, although in his final decision, the IHO considered the possibility of a later accrual date in February 2019 when the district sent the promotion in doubt letter to the parents (IHO Decision at p. 7; Interim IHO Decision at p. 2; see Parent Ex. C). Ultimately, in deciding that the parents' claims were not barred by the statute of limitations, the IHO rested on equitable factors relating to the nature of the relief sought by the parents as well as the ambiguity in the accrual date (IHO Decision at p. 8). On appeal, the district argues for the October 2018 accrual date but does not grapple with the IHO's reasoning pertaining to the February 2019 promotion in doubt letter or the equitable factors he weighed in finding that the parents' claims were not barred (see Req. for Rev. ¶ 18). Ultimately, however, it is unnecessary to further discuss the IHO's findings on this point as there is a dispositive alternative basis for upholding the IHO's decision.

As the parties already know, the Governor of the State of New York issued several executive orders during the COVID-19 pandemic; within one such order, Executive Order 202.8 ("Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency)," the Governor "temporarily suspend[ed] or modif[ied] any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency" (9 NYCRR 8.202.8). More specifically, the Governor, via Executive Order 202.8, "temporarily suspend[ed] or modif[ied], . . . the following:"

> In accordance with the directive of the Chief Judge of the State to limit court operations to essential matter during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, or notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules,, the court of claims act, the surrogate's court procedural act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020

(9 NYCRR 8.202.8). The Governor repeated the same language in subsequent executive orders until the issuance of Executive Order 202.67 on October 4, 2020, which specifically terminated these tolling provisions as of November 3, 2020 (9 NYCRR 8.202.167).[9]

As codified in Education Law § 4404 and the State's implementing regulations, the statute of limitations applicable for filing a due process complaint notice appears to fall within the statutes and regulations tolled by Executive Order 202.8 through Executive Order 202.67 as the parents' attorneys argue in this case (see Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]; see also Application of the Dep't of Educ., Appeal No. 21-157; Application of the Dep't of Educ., Appeal No. 21-153). In his interim decision, the IHO opined that Executive Order 202.8 did not apply as the State statute mirrored the IDEA's statute of limitations, and the IDEA provisions were unaffected by the Executive Order (Interim IHO Decision at pp. 2-3). In its answer to the cross-appeal, the district makes a similar argument. However, the IDEA left it open to a state to establish its own limitations period (20 U.S.C. § 1415[b][6][B]; [f][3][C]; 34 CFR 300.507[a][2]; 300.511[e]). However, the reasoning of the IHO and the district does not adequately address the fact that the State of New York, for whatever legislative purpose, nevertheless explicitly brought the matter under the State's influence by adopting a two-year period in its State law statute of limitations (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).[10] Given the federal delegation to the states to adopt their own limitation periods in state law, it would seem that the New York State statute controls in this instance and the Governor would have the authority to toll the State's explicit limitations period.[11] Neither the IHO nor the district has cited any authority from a court of competent jurisdiction that would warrant a different finding.

Consequently, the parents' January 5, 2020 due process complaint notice—which included claims pertaining to the 2018-19 school year that may have otherwise been untimely and subject to dismissal—remained timely pursuant to Educ. Law § 4404(1)(a) as tolled under the provisions of the COVID-19 Executive Orders. Thus, the IHO's ultimate determination that the statute of limitations did not bar the parents' claims related to the 2018-19 school year must be upheld, albeit on different grounds. Having found that the parents claims were timely raised based on the tolling, it is unnecessary to address the parties' other arguments pertaining to the statute of limitations, including the parents' allegation regarding the withholding information exception. In addition, as the statute of limitations was the only grounds stated by the district to support its request for a

[9] In a recent case, the New York State Appellate Division, Second Department, discussed the Governor's authority to alter or modify a statute by tolling the time limitations and found that the executive orders constituted a tolling of the statute of limitations, as opposed to a suspension of the statute of limitations (Brash v. Richards, 195 A.D.3d 582, 585 [2d Dep't 2021]).

[10] The express language in the State statute that references federal law, that is, "in accordance with federal law and regulations" appears to apply to the clause that reads "a party presenting the complaint or their attorney provides a due process complaint notice" (i.e. the requirements for the contents of a due process complaint notice) rather than the clause regarding the two-year statute of limitations, but even if it applies to both clauses, I am not convinced that would alter the outcome as it remains an explicit State statute (Educ. Law § 4404[1][a]).

[11] The district argues that New York's adoption of the federal two year limitations period is different than a state establishing an explicit time period. Had the State legislature decided not to include a specific time limitation in State law, the district's argument would be more persuasive. However, while the time limitation in State law is the same as that set forth in federal law, I am aware of no authority that would interpret this to mean that the State had not explicitly set its own limitations period consistent with the authority set forth in the IDEA for it to do so.

modification of the relief awarded, the IHO's order for 400 hours of compensatory multisensory instruction using Orton-Gillingham methodology and reimbursement to the parents for the costs of private services delivered by EBL Coaching will not be disturbed (IHO Decision at pp. 12-13).

C. Independent Educational Evaluation

Turning to the parties' allegations regarding the district's obligation to fund the September 2018 neuropsychological evaluation, the IDEA provides parents with a number of procedural safeguards. Among them is the "right . . . to obtain an independent educational evaluation of the child," which in turn means "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 CFR 300.502[a][1], [3][i]; see 8 NYCRR 200.1[z]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense that was sought for additional information]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 2019 WL 3021232, at *3 [3d Cir. July 10, 2019]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]).

The students' mother testified that the parents sought the private neuropsychological evaluation due to the student's lack of progress in the district public school (Tr. p. 203). The mother testified that she shared her concerns with district staff and was advised by a district special education paraprofessional to have the student privately evaluated "to understand how her mind was working" (Tr. pp. 203-04). The parents obtained the private neuropsychological evaluation of the student, which was completed on September 20, 2018 (see Parent Ex. B). The parents provided the evaluation report to the district when they received it, and it was discussed and relied upon at the October 2018 CSE meeting (Tr. pp. 207-08, 213; see Dist. Ex. 27 at p. 3).

The district's only argument pertaining to the IEE was that the parents did not express disagreement with a district evaluation; however, in their 10-day notice to the district, dated August 21, 2020, the parents indicated that they had obtained the neuropsychological evaluation of the student due to the district's "failure—and admitted inability—to thoroughly assess [the student] in all areas of her suspected disability" (Parent Ex. G at p. 1). As noted above, a parent's expression of disagreement with a district's failure to evaluate a student in all areas of suspected disability may form the basis for a request for an IEE (Letter to Baus, 65 IDELR 81). The parents reiterated their view that the district had failed to thoroughly assess the student in their January 2021 due process complaint notice (Parent Ex. A at pp. 3-4, 9-10). The parents did not explicitly request district funding of the September 2018 neuropsychological evaluation until their January 2021 due process complaint notice (id. at p. 10); however, in arguing that the IHO erred in ordering district funding of the IEE, the district has not focused on the parent's lack of an earlier request for the public funding of the IEE.[12] Having found that the evidence in the hearing record shows that the parents expressed their disagreement with the district's evaluation of the student, the district has not alleged any other error on the part of the IHO in ordering the district to fund the September 2018 neuropsychological IEE. Briefly, however, the evidence in the hearing record otherwise supports the IHO award.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Thereafter, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability,

[12] In past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094). This is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), and, in most instances it is likely that a parent would be in a better position to elicit an agreement from the district to fund an IEE if the IEE was requested outside of the more formal context of an impartial hearing. However, here, where the parents requested the IEE in the due process complaint notice, it was incumbent on the district to respond, yet there is no evidence in the hearing record that the district took advantage of the resolution process to agree to fund the IEE (see 34 CFR 300.510[a]) or set out to defend its evaluation of the student during the impartial hearing.

including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). [21-113]

Here, after the parent referred the student for an initial evaluation in 2016, the district conducted a psychoeducational evaluation on May 13, 2016, which consisted of administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), clinical observation, and "informal pre-academic assessment" (Parent Ex. S). The evaluating psychologist noted that the student had been referred for an evaluation by the parents "due to fine and gross motor concerns" (id. at pp. 1, 3). The psychologist reported that the student obtained a full scale IQ of 108 (average range) and scored within the very high range of scores on subtests of the WPPSI-IV measuring verbal comprehension, fluid reasoning, and the average range on subtests measuring visual spatial skills and working memory (id. at pp. 1-3). The psychologist indicated that the student scored in the low average range on subtests measuring processing speed (id. at pp. 2-3). The psychologist opined that "[h]igher cognitive potential [wa]s estimated" (id. at p. 3). The psychologist's informal assessment of the student's pre-academic needs revealed that the student was able to sing the alphabet, recognized letters, counted from 1 to 39, recognized numbers from 1 to 10, and identified basic geometric shapes, basic colors, and her name (id. at pp. 2-3). The psychologist noted that the student "encountered difficulties with fine motor activities," including drawing basic geometric shapes and writing letters, but that no gross motor weaknesses were observed (id. at pp. 2-4).

The neuropsychologist who conducted the September 2018 neuropsychological IEE of the student offered testimony regarding the May 2016 district psychoeducational evaluation. The neuropsychologist testified that he did not see the purpose of the evaluating psychologist's use of an "informal pre-academic assessment" given the availability of standardized measures to evaluate a student's pre-academic skills (Tr. pp. 332-33). The neuropsychologist opined that, had a standardized assessment of preacademic skills been administered, the evaluating psychologist may have "picked up on [the student's] challenges with reading, or at least challenges with pre-reading skills that then could have been identified and addressed" (Tr. pp. 333-34). The neuropsychologist also indicated that the psychoeducational evaluation did not represent an assessment of all of the areas of the student's suspected disability, in that it did not assess the student's skills which may underlay observed motor skill deficits, including pre-academic skills such as letter and sound identifications (Tr. p. 334).

Other than the May 2016 psychoeducational evaluation, no other district evaluations were included in the hearing record. Further, the district presented no witness testimony during the impartial hearing to defend the appropriateness of its evaluation of the student. In fact, during the impartial hearing, the district's attorney objected to the May 2016 psychoeducational evaluation being entered into evidence (Tr. pp. 325-31, 372). The district's attorney argued, in part, that the psychoeducational evaluation should not be entered into evidence since "that psychological report did not form the basis of the latter IEPs that were developed" and that the "testing data" relied upon by the CSEs was that set forth in the September 2018 neuropsychological evaluation report (Tr. p. 374). Indeed, the prior written notice that the district sent the parents after the October 2018 CSE

meeting lists the September 2018 neuropsychological evaluation as the only evaluation considered by the CSE (see Dist. Ex. 20).[13]

Based on the foregoing, the district did not meet its burden to defend the appropriateness of its evaluation of the student and there was no error in the IHO's finding that the district should reimburse the parents for the costs of the September 2018 neuropsychological IEE.

Regarding the maximum reimbursement rate for the neuropsychological evaluation, the parents cross-appeal the IHO's determination to limit reimbursement to $2,500 based on what he characterized to be "contradictory testimony" of the parent and the neuropsychologist regarding the amount paid for the evaluation (IHO Decision at pp. 12-13). When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]; Letter to Petska, 35 IDELR 191 [OSEP 2001]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In their due process complaint notice, the parents requested that the district fund the neuropsychological IEE and specified that the cost of the evaluation was $4,500 (Parent Ex. A at p. 10). During the impartial hearing, the district made no argument that the $4,500 was outside of district cost criteria or that the $4,500 was excessive.[14] If the district has cost criteria polices with respect to IEEs, it is incumbent on the district to share such polices with parents who seek IEEs and offer such polices as evidence. Thus, even if the testimony was less than clear regarding the

[13] The October 2018 IEP references an educational evaluation of the student purportedly conducted as part of the student's "mandated three year re-evaluation," as well as classroom assessments and teacher reports (Dist. Ex. 27 at pp. 2-3). However, such evaluations and reports were not included in the hearing record. Further, the results of standardized academic testing included in the IEP were those results reported in the neuropsychological evaluation (compare Dist. Ex. 27 at p. 2, with Parent Ex. B at p. 14) so it is unclear if the district conducted a separate "educational evaluation" of the student.

[14] State regulation concerning IEEs provides that, if a parent requests an IEE, the district must either ensure the IEE is provided at public expense "or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria" (8 NYCRR 200.5[g][1][iv] [emphasis added]; see 34 CFR 300.502[b][2][1]-[ii]).

amount the parent paid for the evaluation,[15] the issue of the cost was not raised by the district and the IHO erred in reducing the amount to be reimbursed.[16]

VII. Conclusion

Based on the foregoing, the statute of limitations did not bar the parents' claims relating to the 2018-19 school year. Further, the evidence in the hearing record supports the IHO's order requiring the district to reimburse the parents for the costs of the September 2018 neuropsychological evaluation. However, for the reasons set forth above, the IHO erred in finding that the parents were only entitled to reimbursement of $2,500 for the IEE.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 11, 2021 is modified to provide that the district shall reimburse the parents for $4,500 paid for the September 2018 neuropsychological IEE.

Dated: **Albany, New York**
October 25, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[15] The student's mother recalled that the evaluation "cost about $4500, which covered multiple sessions of the evaluation because [the student] was too little to do it all at once" (Tr. p. 204). During direct examination by the parents' attorney, the neuropsychologist testified that he believed the parents paid $2,500 for the evaluation but indicated he "could look at [their] records to find that out more exactly" (Tr. p. 361). He indicated that he charged different rates for neuropsychological evaluations, specifically, either $2,500, $4,500, or $6,900, depending on how much time he (as opposed to a doctoral student) spent conducting the evaluation and that it was "possible" that the parents paid the $4,500 rate (Tr. pp. 361-66). Contrary to the IHO's characterization, the testimony of the neuropsychologist represents his imprecise recollection but is not contradictory to the parent's testimony per se.

[16] To address his concern regarding this undisputed issue—the different amounts and poor recollections referenced in testimony, the IHO could have ordered the district to reimburse the evaluation upon receipt of an invoice and/or proof of the parents' payment. However, with their request for review, the parents proffer a copy of the invoice showing $4,500 in payments in August and September 2018 as additional evidence (Req. for Rev. Ex. A).