The University of the State of New York

The State Education Department
State Review Officer
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No. 21-191

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:
Liz Vladeck, General Counsel, attorneys for petitioner, by Mitchell L. Pashkin, Esq.

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, by Gregory Cangiano, Esq. and Linda A. Goldman, 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 the decision of an impartial hearing officer (IHO) which ordered the district to reimburse respondents (the parents) for the costs of the student's tuition at the Lindamood-Bell Academy and the Children's Academy for the 2018-19 school year.[1] 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];

[1] The Commissioner of Education has not approved either the Lindamood-Bell Academy or the Children's Academy as schools with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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[a]). 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and they will not be recited here in detail. In a "[c]orrected" due process complaint notice, dated June 8, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year, contending that,

after the student's transfer into the district, the CSE failed to fully evaluate the student, convene a CSE meeting, and "issue a recommendation of placement" within the "prescribed time period" (Dist. Ex. 1 at pp. 1-2).[2, 3] According to the allegations in the due process complaint notice, the parents had unilaterally placed—and the student had attended—"Academic West" for the 2018-19 school year (id.).[4] As relief for the district's failure to offer the student a FAPE, the parents requested reimbursement for the costs of the student's attendance at "Academic West" for the 2018-19 school year (id.).

On December 7, 2020, the parties proceeded to an impartial hearing (see Tr. p. 1). Although the IHO and an attorney for the district appeared, neither the parents nor their attorney appeared (see Tr. pp. 1-4). The IHO continued with the impartial hearing and asked the district's attorney for a status update (see Tr. p. 2). The district's attorney indicated that "both parties [were] still interested in settling" the matter, but although the parties were "on the same . . . pages," more information was needed to continue to "work out the issues" (id.). The IHO scheduled the impartial hearing to resume on January 20, 2021; on that date, the IHO and the parents' attorney appeared, but neither the parents nor the district's attorney appeared (see Tr. pp. 3, 5). When asked the status of the case, the parents' attorney advised that the district's attorney had informed him that the "[d]istrict had approved the matter for settlement" and the parents were "awaiting an offer" (Tr. p. 7). At that point, the IHO scheduled the next impartial hearing for February 26, 2021 (id.).

On February 26, 2021, the impartial hearing resumed with the IHO, the parents' attorney, and the same attorney for the district who appeared at the first impartial hearing date held on December 7, 2020 (compare Tr. p. 10, with Tr. p. 1). The parents did not attend (see Tr. p. 10). The district's attorney reported that the case had been "reassigned [to her], and as part of that process," she had to "determine the appropriateness of the settlement" and hoped to make that determination "soon" (Tr. p. 12). After further discussion, the district's attorney clarified that another attorney had previously approved the case for settlement and an "agreement in principle" had been reached (Tr. pp. 12-14). But now, she—as the settlement attorney—had to "make sure that [she] c[ould] stand by that recommendation," and noted that she was moving the case forward to the best of her ability (Tr. pp. 14-16). Next, the parents' attorney gave a brief opening statement, and the IHO closed the impartial hearing by scheduling the case for April 7, 2021 (see Tr. pp. 16-18).

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[2] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] The evidence in the hearing record reflects that the student had been attending public schools prior to the 2018-19 school year (see Tr. p. 78; see also Dist. Ex. 1 at p. 2). At the impartial hearing, the student's mother testified that, due to concerns about the student's "ability to speak and learn," the student initially received approximately 122 hours of services (or 12 weeks) at Lindamood-Bell during summer 2017 (Tr. pp. 80-81, 83). During summer 2018, the student could not attend Lindamood-Bell, but the parents had privately obtained speech-language therapy services for the student (see Tr. pp. 82-83).

[4] Approximately two years prior to the date of the "[c]orrected" due process complaint notice, the parents—in a letter dated August 21, 2018—notified the district of their intentions to unilaterally place the student at "Academic West" for the 2018-19 school year and to seek reimbursement for the costs of student's tuition (see Dist. Ex. 2 at p. 1).

On April 7, 2021, the impartial hearing continued (see Tr. p. 20). A new attorney for the district appeared, together with the parents' attorney and the IHO (compare Tr. p. 20, with Tr. pp. 1, 10). Both parties proffered documentary evidence to enter into the hearing record (see Tr. pp. 21-22, 24-25). As to the status of settlement, the parents' attorney confirmed that an agreement had been reached, but "some issue . . . was precluding the advancement of the settlement," and he was uncertain as to whether that issue had been resolved (Tr. p. 26). The district's attorney stated, however, that the parties were "not going to be able to effectuate a settlement" and therefore, the matter had to proceed to an impartial hearing (id.).

At that point, the IHO confirmed with the parents' attorney that this was a tuition reimbursement case and asked the parents to identify the school for which they sought reimbursement; the parents' attorney responded, "[t]here's two programs, it's Lindamood-Bell and Children's Academy" (Tr. pp. 26-27). The IHO then scheduled the next impartial hearing date for May 5, 2021, and asked the parties to confer prior to that date to set up a schedule for witnesses (see Tr. p. 27). The district's attorney stated that the district would not be presenting any witnesses, and would not present a "Prong I case," clarifying that the case was "going to be a question of the sufficiency of the parent[s'] unilateral placement" (Tr. pp. 27-28). Shortly thereafter, the proceeding for that day concluded (see Tr. pp. 28-29).

On May 5, 2021, the impartial hearing resumed with the parents' attorney, the IHO, and the same attorney for the district who appeared at the most recent impartial hearing date held on April 7, 2021 (compare Tr. pp. 20, 31, with Tr. pp. 1, 10). When the IHO asked the parents' attorney if the parents were seeking tuition, the parents' attorney responded "[c]orrect" and that the parents sought reimbursement for the student's attendance at the "Lindamood-Bell Academy and the Children's Academy" for the 2018-19 school year (Tr. pp. 34-35). The parents' attorney then noted that there was an "error in the due process complaint" notice, and further indicated that the parents sought to "amend the due process complaint on the record with regard to the relief sought" (Tr. p. 35). He also noted that he could present the "new [due process complaint notice] . . . [w]ithin the hour" (Tr. p. 36).

The district's attorney objected, stating "there [was] no authority to amend the [due process complaint notice] on the record" (Tr. p. 35). The district's attorney further noted that the due process complaint notice already requested tuition reimbursement "at Academics West," and "no documentation" had been submitted for that school (id.). Instead, "documentation [had been] submitted for two different schools" (id.).

After a terse exchange between the IHO and the district's attorney, the IHO asked if an IEP had been developed for the 2018-19 school year (see Tr. pp. 35-36). The parents' attorney stated their position that the district failed to create an IEP but noted that the district had disclosed a "comparable service plan" for the 2018-19 school year as part of the district's documentary evidence (Tr. p. 36).[5] After scheduling the next date for the impartial hearing—June 8, 2021—the IHO asked the parents' attorney if he had any objections to the district's proffered evidence; the parents' attorney had no objections (see Tr. pp. 36-37). The IHO posed the same question about

[5] At the impartial hearing, the student's mother testified that she never received the comparable service plan that the district entered into the hearing record as evidence (see Tr. pp. 79-80; see generally Dist. Ex. 3).

the parents' evidence to the district's attorney, who objected to all of the parents' proffered documents, except for those marked as exhibits "A and B," on the grounds that "everything else ha[d] no relation to the current [due process complaint notice]" (Tr. pp. 37-38). The IHO overruled the objection but noted that the district's attorney had an "exception to [his] ruling" (Tr. p. 38). The district's attorney also objected specifically to the parent exhibit "O," which consisted of an email exchange "regarding settlement negotiations" (Tr. p. 38).

The parents' attorney argued that parent exhibit "O"—the email exchanges in question—was "only relevant to overcome any argument made by the [d]istrict that it did not have notice of the [p]arent's request for funding at Children's Academy and Lindamood-Bell, as the matter ha[d] been in settlement negotiations for over a year" (Tr. p. 38). The IHO admitted parent exhibit "O" "for that limited purpose only" (id.).

Next, the IHO proceeded to review and consider whether the parents' documents would be entered into the hearing record as evidence (see Tr. pp. 39-42). The IHO then asked the parents' attorney when he had realized that he would need to "correct the hearing request" (Tr. p. 42). The parents' attorney stated "[w]hen the [d]istrict indicated that it was going forward," and further acknowledged that it was a "mistake on [his] part" (id.).

The IHO turned, next, to review and consider whether the district's documents would be entered into the hearing record as evidence (see Tr. pp. 42-44). As part of this review, the IHO questioned whether district exhibit "1"—a "corrected" due process complaint notice dated June 8, 2020—was the same or similar to parent exhibit "A," a due process complaint notice dated June 5, 2020, which had already been entered into the hearing record as evidence (Tr. pp. 42-43). The parents' attorney stated that the documents were "similar," and the district's attorney stated that he obtained the June 8, 2020 corrected due process complaint notice from the "IHS," as the "one actually on file in the system" (Tr. pp. 43-44). The parents' attorney explained that a "correction [had been] made to the student's OSIS number," and that it had been the "only correction that was made" (Tr. p. 43). Based upon an agreement by the parties, the IHO entered district exhibit "1"—the "[c]orrected" due process complaint notice dated June 8, 2020—into the hearing record as evidence and withdrew parent exhibit "A" (Tr. pp. 43-44).

After further discussions concerning the parents' request to amend the due process complaint notice, the IHO granted the parties an opportunity to address this issue, as well as any related statute of limitations issue, both in writing before the next impartial hearing date and on the record at the next impartial hearing, which was scheduled for June 8, 2021 (see Tr. pp. 44-52).

In a motion to dismiss, dated May 19, 2021, the district argued that "no legal right" existed upon which the parents could "file a 'corrected'" due process complaint notice (SRO Ex. C at pp. 2-5).[6] Alternatively, the district argued that, if the IHO deemed the "'corrected'" due process

[6] In addition to the documents entered into the hearing record as evidence at the impartial hearing (Parent Exs. B-P; Dist. Exs. 1-4), the district also submitted the following, unmarked documents to the Office of State Review as part of the administrative hearing record on appeal: a due process complaint notice, dated June 5, 2020; a "Corrected" due process complaint notice, dated May 5, 2021; the district's Motion to Dismiss, dated May 19, 2021; the Parent Statement, dated May 19, 2021; and the IHO's Consolidation Order, dated October 30, 2020. For ease of reference, these documents will be referred to in citations as follows: the June 5, 2020 due process

complaint notice to be an "'amended'" due process complaint notice, the district did not consent to such a filing and the IHO had "no right to allow [the] parent[s] to file an amended" due process complaint notice (id. at p. 2). As a final point, the district contended that, even if the parents were allowed to file an amended due process complaint notice at this juncture, the statute of limitations barred those claims (id. at pp. 2, 5-9). Given the foregoing, the district argued that the parents' June 8, 2020 due process complaint notice must be dismissed because the parents' evidence did not support an award of tuition reimbursement at the school identified within that due process complaint notice (i.e., Academic West), which rendered the June 8, 2020 due process complaint notice moot (id. at pp. 2, 9-11).

In opposition to the district's motion to dismiss, the parents argued that they should be allowed to amend the due process complaint notice because, as a matter of course, corrections to the due process complaint notice—resulting from a "typographical error"—had been allowed in a recent decision issued by an SRO (SRO Ex. D at pp. 2-3, citing Application of the Dep't of Educ., Appeal No. 20-131, n.10). According to the parents, the parents in the SRO decision had listed the "wrong school in their 10-day notice and due process complaint" notice (SRO Ex. D at p. 2). Here, the parents contended to the IHO that the SRO "treated this as nothing more than an inadvertent oversight and accepted the fact that it was simply (as the parents described it) a 'typographical error,'" and moreover, the district was not prejudiced "because the district was aware of which school was really at issue" (id.).[7] The parents further argued that, in this case, the district had been on actual notice of the parents' request for tuition reimbursement at the Lindamood-Bell Academy and the Children's Academy "since at least January 3, 2020, as the parties ha[d] been actively discussing settlement for both Lindamood[-]Bell Academy and Children's Academy" (id. at p. 3, citing Parent Ex. O at p. 8). The parents also asserted that the district was on actual notice of the request for reimbursement for the Lindamood-Bell Academy and the Children's Academy as of "June 18, 2019," and pointed to the email exchanges in support of this contention (SRO Ex. D at p. 3, n.2, citing Parent Ex. O at p. 9). In addition, the parents asserted that, at the impartial hearing held on April 7, 2021, they had stated "on the record" that they sought reimbursement for Lindamood-Bell Academy and Children's Academy," and the district's attorney "remained silent" (SRO Ex. D at p. 4). Alternatively, the parents argued to the IHO that they should be allowed to amend the due process complaint notice under the relation back doctrine (id. at pp. 4-7).[8]

In a decision dated June 8, 2021, the IHO denied the district's motion to dismiss and permitted the parents' "correction" to the due process complaint notice to accurately reflect the names of the schools the student attended during the 2018-19 school year (Interim IHO Decision at p. 3). The IHO found that the parents were not seeking to supplement the hearing record on appeal or asking to amend the due process complaint notice "for relief not originally sought," but

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complaint notice, "SRO Ex. A"; the May 5, 2021 "Corrected" due process complaint notice, "SRO Ex. B"; the district's Motion to Dismiss, "SRO Ex. C"; and the Parent Statement, "SRO Ex. D."

[7] The SRO also noted in that decision, however, that the parents had explained the reason for the typographical error at the impartial hearing (see Application of the Dep't of Educ., Appeal No. 20-131, n.10).

[8] Although the IHO intended to hear oral arguments at the impartial hearing scheduled for June 8, 2021, related to the parties' motion papers, both parties rested on their written submissions and no testimony was taken on that day (see Tr. pp. 54-68).

instead, only sought to "correct the names of the schools that were incorrectly listed in the original complaint" (id.). The IHO also noted that this type of correction did not "harm" the district "in presenting its case either through witnesses or documents, as the district had already "decided not to present a Prong I case" (id.). According to the IHO, any "harm to the parent[s] far outweigh[ed] any prejudice . . . to the district," especially since the parents were required to "present evidence" to establish the appropriateness of the student's unilateral placement at both schools and with regard to equitable considerations (id.).

On July 1, 2021, the impartial hearing resumed, and concluded on July 26, 2021 (see Tr. pp. 69, 140-61).[9] In a decision dated August 9, 2021, the IHO found that the parents sustained their burden to establish the appropriateness of the unilateral placement of the student at both the Lindamood-Bell Academy and the Children's Academy during the 2018-19 school year (id. at pp. 5-7). In the decision, the IHO recited portions of the testimonial evidence presented by the parents' three witnesses, noting that the district did not conduct a cross-examination of any of these witnesses or present any testimonial evidence of its own (id. at pp. 2-5, 7). With respect to equitable considerations, the IHO also found that the parents presented "sufficient credible evidence" to support an award of tuition reimbursement (id. at p. 7). However, the IHO was troubled by the parents' failure to present a witness to "attest to the tuition for the three months" the student attended the Children's Academy from April 2019 through June 2019, which had been provided in an affidavit entered into the hearing record as evidence (id. at pp. 7-8; see generally Parent Ex. M). The IHO also noted that the hearing record contained "contradictory testimony" regarding which program the student attended in April 2019, and the IHO indicated that he would not have the district "pay each program for April of 2019" (IHO Decision at pp. 7-9). Turning to the payment affidavit itself, the IHO pointed to its lack of clarity absent a witness to testify to the amounts listed within the document regarding the tuition costs at the Children's Academy (id. at p. 8; see Parent M). In addition, the IHO noted that the hearing record did not include any "attendance documents for this student for either program" (IHO Decision at p. 8). The IHO further noted that the hearing record failed to include any "testimony from any person" from the Children's Academy who could provide a "credible explanation as to how that program cost over $9,000 a month," especially when compared to the 1:1 program provided to the student at the Lindamood-Bell Academy, which purportedly cost "$5,000 a month" (id. at pp. 8-9). Consequently, the IHO found that the hearing record failed to contain sufficient evidence to establish that "$9,166.66 [was] a reasonable cost of the program at the Children's Academy" notwithstanding the information in the payment affidavit and the enrollment contract with the Children's Academy (id. at p. 9; see Parent Exs. E; M). As to the Lindamood-Bell Academy, the IHO found that the hearing record failed to contain sufficient evidence to establish the student's exact start date and departure date, and the enrollment contract with the Lindamood-Bell Academy listed different costs for September, April, and May (IHO Decision at p. 9; see Parent Ex. C). In addition, the IHO found that although the hearing record lacked evidence "as to what [the parents]

[9] At the impartial hearing held on July 1, 2021, the parents' attorney stated that the parents specifically sought tuition reimbursement for the student's attendance at the Lindamood-Bell Academy from September 10, 2018 through March 22, 2019, and thereafter, for his attendance at the Children's Academy from April 1, 2019 through June 30, 2019 (see Tr. pp. 73-74). The student's mother testified that they decided to remove the student from Lindamood-Bell Academy because he had a "very competitive personality," and "at the beginning of 2019, he started getting frustrated and acting out," which the student's mother attributed to the student being bored and "unchallenged" at the Lindamood-Bell Academy (Tr. pp. 87-88).

paid Lindamood-Bell," the IHO understood that the "parents did not owe them any of the fees requested" (IHO Decision at p. 9).

Therefore, in light of the foregoing, the IHO ordered the district to, upon receipt of proof of the parents' payments to each school, reimburse the parents for the costs of the Lindamood-Bell Academy and the Children's Academy at the rate of $5000.00 per month for those months the student attended each school during the 2018-19 school year (see IHO Decision at pp. 9-10).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by denying the motion to dismiss and by permitting the parents to correct the due process complaint notice. The district requests that, in addition to reversing the IHO's decision denying the motion to dismiss, the SRO also reverse the IHO's final decision on the merits. However, in a footnote, the district affirmatively states that it did not present a "Prong I case or present any arguments as regards whether or not [the] [p]arents met their Prong II burden as regards either unilateral placement and did not present any equitable defenses. Thus, those findings should now be considered final and binding" (Req. for Rev. p. 4, n.1).

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision denying the district's motion to dismiss.

V. Discussion

With respect to reversing the IHO's decision denying the motion to dismiss, the district contends that, although State regulation—8 NYCRR 200.5(i)(7)—allows a party to "amend" a due process complaint notice, there is no basis in either State or federal statutes or regulations that allows a party to "correct" a due process complaint notice. The district argues that, as a result, the parents' "corrected" due process complaint notice, dated May 5, 2021, is a nullity, and the IHO erred by accepting the corrected due process complaint notice. The district also argues that, because the IHO should not have accepted the corrected due process complaint notice, the parents' original due process complaint notice was moot, as a party may not seek relief different from the relief in the original due process complaint notice—that is, tuition reimbursement at a uniliteral placement the student never attended—and the IHO erred by failing to dismiss the original due process complaint notice as well. Additionally, the district argues that, contrary to the IHO's finding, the corrected due process complaint notice did seek different relief because the corrected due process complaint notice set forth a different set of facts, to wit, that the student attended two unilateral placements (Lindamood-Bell Academy and Children's Academy) during the 2018-19 school year that were different from the unilateral placement previously identified (Academic West). According to the district, the parents requested different relief by correcting the due process complaint notice to identify these two unilateral placements.

In addition, the district argues that the IHO erred by finding that the district was not prejudiced by the corrections made to the due process complaint notice. On this point, the district asserts that, in preparing for litigation, a district relies on the specific unilateral placements named in the due process complaint notice, in part, to issue subpoenas for information to "mount a defense." As a result, the district argues that such "eleventh hour" substantive amendments to a

due process complaint notice undermines and disadvantages a district's "ability to investigate and properly prepare for a hearing." Moreover, the district argues that the parents had no good cause for any delays in amending the due process complaint notice.

As a final argument, the district contends that, even if the IHO properly allowed the parents to correct or amend the due process complaint notice, the statute of limitations barred the parents' claims concerning the 2018-19 school year in the corrected due process complaint notice dated May 5, 2021. Using the date of the parents' 10-day notice of unilateral placement as the accrual date, August 21, 2018, the district contends that the two-year statute of limitations expired "as early as August 21, 2020," and neither exception to the statute of limitations applies to excuse the parents' late filing of the corrected due process complaint notice.

There is merit to the district's position that the parents were not permitted to amend their due process complaint notice without the district's consent after the impartial hearing had commenced (see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]). However, here, the parents did not seek to include additional claims relating to the district's denial of a FAPE but instead sought to correct an error in the statement of relief sought. Generally, with respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice to state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). To be sure, the parents knew that they were seeking tuition reimbursement at Lindamood-Bell Academy and the Children's Academy as of the time of filing the due process complaint notice. However, IHOs have broad discretion to manage the conduct of the impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]), as well as to craft appropriate equitable relief (see Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 243 n.11 [2009]), and under the circumstances of this manner, the hearing record does not demonstrate that the IHO abused his discretion in addressing the parents' request for tuition reimbursement for the student's attendance at Lindamood-Bell Academy and the Children's Academy despite the erroneous reference to a different private school in the due process complaint notice.[10]

That is, notwithstanding the district's arguments on appeal, the district does not address at least two factors that weigh in favor of upholding the IHO's decision to deny the motion to dismiss: first, the evidence in the hearing record demonstrates that the district had actual notice of the parents' intention to seek tuition reimbursement at the two unilateral placements for several months prior to filing their original due process complaint notice and for nearly one year prior to their request to amend or correct the due process complaint notice at the impartial hearing held on May 5, 2021; and, second, the district's attorney was present at the impartial hearing held on April 7, 2021—when the parents' attorney first stated on the record that the parents sought tuition

[10] While an award of relief not explicitly requested in a due process complaint notice may be appropriate in some circumstances, parties should not wait until after the hearing is complete to articulate the relief sought (see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [declining to address the parent's request for compensatory education that was raised for the first time in a post-hearing brief]).

reimbursement for the student's attendance at the Lindamood-Bell Academy and the Children's Academy for the 2018-19 school year—and the district's attorney remained silent.

In this case, it is undisputed that the parents' due process complaint notices—dated respectively June 5, 2020 ("original") (see SRO Ex. A) and June 8, 2020 ("corrected") (see Dist. Ex. 1)—both incorrectly identified the student's unilateral placement for the 2018-19 school year as "Academic West" (compare SRO Ex. A, with Dist. Ex. 1).[11] It is also undisputed that the parents' 10-day notice of unilateral placement, dated August 21, 2018, incorrectly identified the student's unilateral placement as "Academic West" for the 2018-19 school year (Dist. Ex. 2 at p. 1). However, it is also undisputed that, beginning in or around June 2019, the parties attempted to resolve the matter prior to the parents filing the original due process complaint notice, dated June 5, 2020 (compare Parent Ex. O at p. 11, with SRO Ex. A). According to the evidence in the hearing record, from June 2019 through April 2020, the parties exchanged documents and information, which included providing the district with a payment affidavit for Lindamood-Bell Academy, dated June 5, 2019, which indicated that the student had attended Lindamood-Bell Academy from September 10, 2018 through March 22, 2019 (see Parent Ex. O at p. 8). This was the same information contained in the payment affidavit the parents entered into the hearing record at the impartial hearing (compare Parent Ex. O at p. 8, with Parent Ex. N). In addition, when the district asked the parents where the student had attended school after March 22, 2019, the parents advised the district that he had attended the Children's Academy "as of April 2019" (Parent Ex. O at p. 8). At the same time, the parents noted that they were "seeking full tuition at Linda Mood Bell [sic] in the amount of $34,830 and tuition at Children's Academy in the amount of $27,500" (id.). As the evidence in the hearing record reflects, these were the same amounts of tuition reimbursement the parents sought at the impartial hearing (see Parent Exs. M-N). Ultimately, in an email dated April 21, 2020, the district proposed the following terms to resolve the matter: "[redacted] tuition for Lindamood Bell for 2018-19 and . . . [redacted] tuition for Children's Academy for 2018-19" (id. at p. 1). Notwithstanding this proposed resolution, the parents filed their original due process complaint notice, dated June 5, 2020 (see SRO Ex. C at p. 1).

On appeal, the district does not address the evidence in the hearing record demonstrating that the district had actual notice of the student's unilateral placements at Lindamood-Bell Academy and the Children's Academy during the 2018-19 school year and that the parents were seeking tuition reimbursement for the student's attendance at the unilateral placements (see generally Req. for Rev.).

[11] The district fails to address on appeal the fact that the district had already accepted the "corrected" due process complaint notice, dated June 8, 2020, and submitted the same into evidence at the impartial hearing when arguing that no legal authority exists to allow parties to "correct" a due process complaint notice (see generally Req. for Rev.). When the parties and the IHO were reviewing the evidence at the impartial hearing, the parents' attorney explained that the "corrected" due process complaint notice entered into evidence by the district had been altered to change the student's "OSIS number" (Tr. pp. 42-43; see Dist. Ex. 1 at p. 1). The district's attorney also acknowledged that the "corrected" due process complaint notice was "filed in HIS," and he obtained the document from that system (Tr. p. 43). The district's attorney did not express any concerns about the document as a "corrected" due process complaint notice either at that time or at any time during the entire impartial hearing or now on appeal, and similarly failed to express any concern that the parents' "correction" to the due process complaint notice lacked any legal basis (see generally Tr. pp. 1-161).

Next, when the parents' attorney stated at the April 7, 2021 impartial hearing that the student had attended the Lindamood-Bell Academy and the Children's Academy for the 2018-19 school year, the district's attorney was present and never objected to, or questioned, this information (see Tr. pp. 20, 26-27). It was only one month later, at the impartial hearing held on May 5, 2021, when the parents' attorney acknowledged an error in the due process complaint notice and sought to amend it on the record that the district's attorney objected to the parents' request to amend the due process complaint notice to correct the name of the unilateral placements for the 2018-19 school year (see Tr. pp. 31, 34-35, 38). Thereafter, there is no indication that the district suffered prejudice as a result of the IHO's acceptance of the corrected due process complaint notice. On appeal, the district argues, generally speaking, that its defense to the appropriateness of a unilateral placement could be compromised due to late identification of the particular nonpublic school but it offers no detailed argument in support of its position. For example, the district does not allege that it was actually unable to subpoena documents or witnesses or prepare for the impartial hearing in this matter as a result of the correction to the due process complaint notice.

Therefore, in light of the foregoing evidence, there is no reason to disturb the IHO's decision denying the district's motion to dismiss on the basis that the parents corrected the due process complaint notice to accurately reflect the unilateral placements the student attended during the 2018-19 school year. Rather than pursuing technical "gotcha" tactics and attempting to avoid funding private school tuition by taking advantage of easily correctable typographical errors, the district's time may be better spent defending its provision of a FAPE to students with disabilities. With that said, the parents' attorneys are cautioned to pay greater attention to details of the documents they prepare on their clients' behalf in future matters.

VI. Conclusion

Having found that the IHO did not abuse his discretion in considering the parents' request for tuition reimbursement for the costs of the student's tuition at the Lindamood-Bell Academy and the Children's Academy for the 2018-19 school year, despite the erroneous reference in the due process complaint notice to a different nonpublic school, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 3, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER