The University of the State of New York

The State Education Department

State Review Officer

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No. 23-004

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

Appearances:
Wilkinson Stekloff LLP, attorneys for petitioner, by Ralia Polechronis, Esq., and Robert Laird, Esq.

Advocates for Children of New York, Inc., attorneys for petitioner, by Rebecca Shore, Esq., and Diana Imbert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's claims related to the 2014-15 through 2018-19 school years as barred by the IDEA's statute of limitations and denied the parent's request for compensatory education services. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

As a young child, the student received services through the Early Intervention Program, consisting of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Exs. G at p. 2; Q at p. 5). The student attended district public schools from pre-kindergarten through sixth grade (2018-19 school year) (see Parent Ex. Q at p. 5).

During the 2013-14 school year (first grade), the district conducted an initial evaluation to determine the student's eligibility for special education, including a psychoeducational evaluation conducted in April 2014, and a speech-language evaluation conducted in May 2014 (Parent Exs. I; J; P).

According to the parent, a CSE convened on September 4, 2014, developed an IEP for the student's 2014-15 school year (second grade), and recommended a general education classroom placement with integrated co-teaching (ICT) services and special education teacher support services (SETSS) (Parent Ex. A at pp. 2-3).[1] The parent further indicated that, on May 27, 2015, a CSE convened to develop the student's IEP for the 2015-16 school year (third grade) and recommended ICT services but removed SETSS from the student's IEP (id. at p. 3).

On March 17, 2016, the district conducted a psychoeducational evaluation of the student in response to the parent's request for a reevaluation due to her concerns about the student's academic functioning (Parent Ex. S at p. 1). On April 20, 2016, a CSE convened and, after determining that the student was eligible for special education as a student with a learning disability, developed an IEP for the student with a projected implementation date of April 25, 2016 (Parent Ex. K at pp. 1, 13).[2] For the remainder of the 2015-16 school year, the April 2016 CSE recommended that the student continue to receive ICT services in a general education classroom (id. at pp. 8-9). For the 2016-17 school year (fourth grade), the CSE recommended that the student attend a 12:1 special class in a district "Non-Specialized" school (id. at pp. 9, 12). On April 4, 2017, a CSE convened and developed an IEP for the student with a projected implementation date of May 5, 2017 (Parent Ex. L at pp. 1, 12). The April 2017 CSE continued to recommend a 12:1 special class for the student (id. at p. 8).

At the beginning of the 2017-18 school year (fifth grade), the parent obtained a private psychoeducational evaluation of the student, which was conducted on several dates between September and November 2017 ("fall 2017 private psychoeducational evaluation") (Parent Ex. G at p. 1). The parent obtained the private evaluation because the student continued to experience academic challenges and the parent wanted a more comprehensive evaluation to make sure the student was placed in the "best possible academic environment" (id.). The evaluator found that the student met the criteria for diagnoses of attention deficit hyperactivity disorder, adjustment disorder, and specific learning disorders with impairments in reading, written expression, and mathematics (id. at p. 12). The evaluator recommended that the student be placed "in a small . . . structured, and supportive classroom setting housed within a small and nurturing school environment" and receive OT, counseling, and specialized reading instruction (id. at pp. 12-13). The evaluator further identified several accommodations and techniques to help the student succeed (id. at pp. 14-15).

On March 20, 2018, a CSE convened to discuss the fall 2017 private psychoeducational evaluation and developed an IEP for the student with a projected implementation date of May 15,

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[1] Given the state of the hearing record, some facts recited herein are derived from the parent's August 19, 2021 due process complaint notice (Parent Ex. A).

[2] 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]).

2018 (Parent Ex. M at pp. 1, 12). The March 2018 CSE continued the recommendation for a 12:1 special class (id. at pp. 1, 8).

In November 2018, the district conducted an educational evaluation and an assistive technology evaluation of the student as part of "a mandated re-evaluation process at her mother's request" (Parent Ex. H). According to a social history report included in the hearing record, a CSE convened on November 26, 2018 and recommended a 12:1+1 special class as well as group counseling for the student (Parent Ex. Q at pp. 1, 6).[3]

In May 2019, at the parent's request, a private neuropsychologist conducted updated testing of the student, the results of which were set forth in an "Academic Update Report" ("May 2019 private academic update") (Parent Ex. F). The parent obtained the May 2019 private academic update because she wanted to assess the student's academic achievement and present levels of cognitive and academic functioning in efforts to facilitate the student's ongoing academic needs for educational planning (id. at p. 1). The evaluation report contained several recommendations including that the student attend "a specialized program" in a class with a small student-to-teacher ratio and a "comprehensive evidence-based reading intervention program," "likely" in a nonpublic school (id. at p. 5).

The district conducted a social history update on August 2, 2019, as part of the parent's request for a reevaluation, "in order to consider a more restrictive setting and deferment to [the central based support team (CBST)] for non-public school placement" (Parent E. Q at p. 1). The social history update summarized the parent's concerns over the student's "limited educational progress" over the years and that the 12:1+1 special class the student attended included students with "behavioral challenges," which affected the student's anxiety (id. at pp. 1-2). The parent also reported that the student experienced anxiety in response to academic demands and changes in routine (id. at p. 2). On August 2, 2019, a CSE convened to develop the student's IEP for the 2019-20 school year (seventh grade) and continued to recommend a 12:1+1 special class for the student (Parent Ex. O).[4]

In August 2019, the parent entered into a tuition contract with Tiegerman School for the student's attendance for the 2019-20 school year (seventh grade) (Parent Ex. D).[5, 6]

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[3] The parent references an IEP dated December 17, 2018 (Parent Ex. A at p. 6). It is unclear if this is the IEP that resulted from the November 2018 CSE meeting.

[4] While a copy of the August 2019 IEP was not included in the hearing record, a prior written notice dated August 15, 2019, which summarized the recommendations of the August 2019 CSE, was received into evidence (Parent Ex. O).

[5] Although the copy of the tuition contract entered into the hearing record is not executed by the parent, the parent testified during the impartial hearing that she was required to pay a deposit as well as "sign a []contract" for the student's placement at Tiegerman School (Tr. p. 83; Parent Ex. D).

[6] The Commissioner of Education has approved Tiegerman School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

In a letter to the district dated August 19, 2019, the parent stated her disagreement with the educational programs recommended for the student and provided to the student leading up to and including the August 2019 IEP and provided the district with notice of her intent to unilaterally place the student at Tiegerman School for the 2019-20 school year and seek tuition reimbursement from the district (Parent Ex. B at p. 4).

According to the parent, she placed the student at Tiegerman School on September 3, 2019 and the student attended Tiegerman School for the 2019-20 school year (Parent Ex. A at p. 8). On September 10, 2019, the CSE reconvened and recommended a 12:1+3 special class for the student in a State-approved nonpublic school along with group counseling services (Parent Ex. N at pp. 9, 13). The CBST referred the student to Tiegerman School for placement (see Parent Ex. C). In correspondence dated September 26, 2019, Tiegerman School informed the CBST that it could provide the student a program, and the CBST, in turn, informed the district school psychologist who served as the district representative at the September 2019 CSE meeting that a spot at Tiegerman School had been secured for the student (Parent Exs. C; R; see Parent Ex. N at p. 16).

At the end of the 2019-20 school year, the student and her family moved to a different state (see Tr. pp. 46-47).

A. Due Process Complaint Notice

By due process complaint notice dated August 19, 2021, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) "from the 2014-2015 school year through the first part of the 2019-2020 school year" (Parent Ex. A at p. 2).[7]

For the 2014-15 school year, the parent argued that the September 2014 IEP was "procedurally and substantively deficient" (Parent Ex. A at p. 3). Specifically, the parent argued that the CSE inappropriately recommended ICT services and SETSS in a group setting for the student given the student's need for "full time individualized instruction" (id. at p. 3). The parent also argued that the IEP included inappropriate annual goals (id.). The parent asserted that, when the student attended the district public school for the 2014-15 school year, the district "offered [the student] what was available," ignoring the CSE's recommendations (id.).

For the 2015-16 school year, the parent argued that the May 2015 CSE "failed to recommend an appropriate program and placement for the student" (Parent Ex. A at p. 3). The parent argued that the May 2015 IEP failed to include specific information about the student's academic levels (id.). Additionally, the parent asserted that the district failed to recommend a more supportive setting or any additional reading support for the student, and removed SETSS from the student's program, notwithstanding that the student had struggled academically during the 2014-15 school year (id.). The parent also argued that the May 2015 IEP lacked annual goals that reflected the student's ongoing struggles with phonemic awareness (id.). The parent asserted that, for the 2015-16 school year, the student continued in a classroom with 25 students where she could not receive individualized instruction (id.).

[7] The parent also alleged that the district violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (Parent Ex. A at p. 2).

Turning to the 2016-17 school year, the parent alleged that the April 2016 IEP was "procedurally and substantively deficient" (Parent Ex. A at p. 4). The parent argued that the recommended 12:1 special class was not appropriate for the student because she needed highly individualized support (id.). The parent also argued that the annual goals in the April 2016 IEP were inappropriate and that the CSE failed to recommended counseling for the student (id.).

For the 2017-18 school year, the parent argued that the "May 5, 2017 IEP" set forth an inappropriate recommendation for a 12:1 special class, notwithstanding that the student struggled in that setting during the 2016-17 schoolyear (Parent Ex. A at p. 4). The parent also argued that the CSE failed to recommend counseling for the student and the annual goals were inappropriate because the CSE focused on skills that were far out of the student's academic reach (id.).

The parent alleged that, although she provided the fall 2017 private psychoeducational evaluation to the district in January 2018, the CSE did not convene until March 2018 (Parent Ex. A at p. 5). For the 2018-19 school year, the parent argued that the March 2018 IEP was procedurally and substantively deficient because it failed to include recommendations from the private evaluation (id.). The parent also asserted that the CSE inappropriately recommended a 12:1 special class despite the student's struggles in that setting over the past two years, failed to recommend counseling services, developed inappropriate annual goals, and removed specialized transportation from the student's IEP (id.). The parent alleged that, in fall 2018, the district placed the student in a 12:1+1 special class rather than a 12:1 special class as mandated on the March 2018 IEP and notwithstanding recommendations in the fall 2017 private psychoeducational evaluation that the student not be placed with students with "behavioral issues" (id. at pp. 5-6).

Next, the parent argued that a CSE failed to incorporate the recommendations from the fall 2017 private psychoeducational evaluation in the "December 17, 2018 IEP," such as the recommendation for "intensive reading remediation" (Parent Ex A at p. 6). The parent also argued that the CSE inappropriately recommended a 12:1+1 special class notwithstanding the caution against grouping the student with students who were disruptive (id.). In addition, the parent argued that the December 2018 CSE recommended counseling in a group, which would be insufficient for the student, and developed inappropriate annual goals (id.).

The parent asserted that, although she provided the May 2019 private academic update to the district in June 2019, the CSE did not convene until August 2019 (Parent Ex. A at p. 7). The parent alleged that the district failed to conduct a classroom observation of the student as part of her reevaluation (id. at p. 8). The parent argued that the August 2019 CSE was composed of district members who did not know the student (id. at p. 8). The parent asserted that the August 2019 CSE failed to incorporate the recommendations from the fall 2017 private psychoeducational evaluation and May 2019 private academic update into the student's IEP and, instead, relied on teacher reports about the student's progress, with which the parent disagreed (id. at p. 7). The parent also argued that the CSE inappropriately failed to defer the student's placement to the CBST to identify an appropriate State-approved nonpublic school (id.). The parent asserted that the CSE again inappropriately recommended a 12:1+1 special class despite information before the CSE that the student had experienced anxiety in such a setting (id. at p. 8). Next, the parent argued that the CSE largely carried over the same annual goals from the previous IEP, which were inappropriate (id. at p. 8).

As relief, the parent requested district funding for the student's tuition at Tiegerman School for the student's attendance from September 3, 2019 to September 26, 2019, at which point the student was placed there pursuant to a recommendation from the CSE (Parent Ex. A at p. 9). The parent also requested compensatory, evidence-based tutoring services by a provider of the parent's choosing at market rate with no expiration (id.). Additionally, the parent requested reimbursement for transportation costs to and from the student's tutoring services or if tutoring services were provided remotely, the parent requested a learning device with a data plan (id.). Lastly, the parent requested the costs of the student's breakfast and lunch on school days from September 3, 2019 to September 26, 2019 (id.).

B. Impartial Hearing and Impartial Hearing Officer Decisions

On February 1, 2022 an impartial hearing convened in this matter, which concluded on October 27, 2022, after eight days of proceedings (Tr. pp. 1-99). On February 8, 2022, the district filed a motion to dismiss the parent's due process complaint notice, arguing that the IDEA's two-year statute of limitations barred the parent's claims related to the 2014-15 through 2019-20 school years and that no exceptions to the statute of limitations applied (Dist. Mot. to Dismiss). Specifically for the 2019-20 school year, the district asserted that the parent "knew or should have known" of any deficiencies in the student's August 2019 IEP, at the latest, when the parent received a copy of the IEP, which was mailed with the prior written notice on August 15, 2019 (id. at pp. 2-3). Thus, the district asserted that the latest date the parent could have filed a due process complaint notice related to the August 2019 IEP would have been August 18, 2021 (id. at p. 3). Therefore, the district argued that the parent's due process complaint notice filed on August 19, 2021 was time-barred by the statute of limitations and should be dismissed (id.).

In a response to the district's motion to dismiss dated March 10, 2022, the parent argued that the district's motion to dismiss should be denied as "untimely" and "time-barred" because the district waived any defense based on the statute of limitations by not asserting it at the initial impartial hearing date (Parent Response to Dist. Mot. to Dismiss at p. 2). The parent also asserted that her claims relating to the 2014-15 through 2019-20 school years were timely because the statute of limitations did not begin to accrue until she placed the student at Tiegerman School and the district recommended a nonpublic school placement for the student (id. at p. 5). In the alternative, the parent claimed that her claims fell within the exceptions to the statute of limitations (id. at p. 7). Specifically, with respect to the "specific misrepresentation" exception, the parent argued that the district misrepresented that the student's program was meeting her needs, and that such assurances prevented the parent from requesting an impartial hearing (id.). With respect to the "withholding of information" exception to the statute of limitations, the parent argued that the district never provided the parent with a copy of the procedural safeguards notice (id. at p. 8). Lastly, the parent alleged that her section 504 claims were timely because of the three-year statute of limitations for section 504 (id. at p. 9).

In an interim decision, dated April 22, 2022, the IHO granted the district's motion to dismiss in part (IHO Ex. 1). Initially, the IHO found that the district's motion to dismiss was "timely and appropriate" because it set forth an affirmative defense to claims asserted in a due process complaint notice and did not have to be submitted within 15 days from the filing of the due process complaint notice like a sufficiency challenge (id. at pp. 6-7). As to the merits of the motion, the IHO dismissed the parent's claims related to the 2014-15 through 2018-19 school years

as being outside the applicable statute of limitations but found that the claim for the 2019-20 school year was not time-barred by the statute of limitations and could continue to be litigated (id. at pp. 8-9). The IHO determined that the parent "knew our should have known" about deficiencies in the IEPs developed for the 2014-15 through 2018-19 school years at the time of the CSE meetings but not later than the start of the school years, making those claims, as stated in the August 2021 due process complaint notice, barred by the statute of limitations (id. at pp. 3-4, 9). The IHO also found that the exceptions to the statute of limitations did not apply, specifically noting that the due process complaint notice did not allege that the district engaged in any misrepresentation (id. at pp. 4-6). With respect to the student's 2019-20 school year, the IHO found the issue of whether the parent's claims were barred by the statute of limitations to be "less clear" (id. at pp. 8-9). The IHO noted that since the prior written notice for the August 2, 2019 IEP was sent to the parent on August 15, 2019, the district claims the reasonable accrual date for the statute of limitations would be August 18, 2019, which included three days for the presumption of mailing (id. at pp. 4, 9). However, the IHO noted that, because August 18, 2019 was a Sunday, the parent would have received the prior written notice on August 19, 2019, which was a Monday (id. at p. 9). Accordingly, the IHO found that the parent's due process complaint notice, dated August 19, 2021, was filed within two years from the date the parent knew or should have known about the claims related to the 2019-20 school year and they were timely (id.).

In a final decision dated November 24, 2022, the IHO found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 school year (IHO Decision at p. 6). The IHO also found that Tiegerman School was an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition reimbursement (id. at p. 7).

As relief, the IHO awarded district funding for the costs of the student's attendance and related services at Tiegerman School for the 2019-20 school year from September 3, 2019 to September 26, 2019 (IHO Decision at pp. 8, 10). The IHO denied the parent's request for 700 hours of compensatory education for the month of September 2019, finding it to be excessive and unsupported by the testimony (id. at p. 10). The IHO also denied the parent's request for the costs of student's breakfast and lunch on school days at Tiegerman School for the 2019-20 school year because the parent did not submit receipts or evidence as to the price of an average cost of breakfast and lunch (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that her claims related to the 2014-15 through 2018-19 school years school years were barred by the IDEA's two-year statute of limitations.[8] Initially, the parent argues that the IHO erred in not finding that the district waived

[8] The parent also argues that the IHO erred in not considering and applying the three-year statute of limitations for section 504 claims. An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ.,

its statute of limitations defense. Next, the parent argues that the IHO applied an incorrect accrual date for the parent's claims. Additionally, the parent argues that the IHO erred in not applying COVID-19 tolling and exceptions to the statute of limitations to find that the parent's claims remained timely. As relief, the parent requests 700 hours of compensatory tutoring services based on a denial of FAPE for the 2014-2019 school years.

In an answer, the district denies the allegations contained in the parent's request for review and generally argues to uphold the IHO's decision in its entirety. Additionally, the district submits six documents for consideration on appeal as additional documentary evidence (see Answer; SRO Exs. 1-6).

In a reply, the parent responds to the arguments set forth in the district's answer and argues that the additional evidence offered by the district should not be considered.

V. Discussion--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 300.511[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 the 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]).

Exceptions to the timeline to request an impartial hearing apply if a parent was 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

A. Waiver

Initially, the parent asserts that the IHO erred in finding that the district did not waive the statute of limitations as an affirmative defense.

2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504 and they will not be further discussed.

Case law indicates that a statute of limitations defense is timely interposed so long as it is raised at some point during the impartial hearing (M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B., 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

Here, the district complied with this requirement as it raised the affirmative defense after the first hearing date on February 1, 2022 and filed its motion to dismiss on February 8, 2022 (Tr. pp. 1-6; Dist. Mot. To Dismiss). In the parent's memorandum of law, the parent cites to M.G. v. New York City Dept. of Educ., 15 F. Supp. 3d. at pp. 14-15, to support her assertion that the district waived the statute of limitations defense by not raising it at the "initial" hearing date held on February 1, 2022 (Parent Mem. of Law at pp. 14-15). However, the parent misconstrues the caselaw cited in support of this argument. In M.G., the district raised the statute of limitations as an affirmative defense for the first time at the SRO level (M.G., 15 F. Supp. 3d. at pp. 19). The district court found that the district's failure to raise the statute of limitations—as an "affirmative defense"—at the impartial hearing or "initial administrative hearing," resulted in a waiver of that argument on appeal (id. at pp. 14-15). In M.G., the term "initial administrative hearing" refers to the impartial hearing conducted at the local level before an IHO. However, the parent's interpretation of "initial administrative hearing" as the first date of the impartial hearing is not supported by a review of the district court's decision. Therefore, applying M.G. to the instant case, as long as the district raised the statute of limitations as an affirmative defense at any time during the impartial hearing, the district did not waive its defense. Accordingly, as the district filed its motion to dismiss after the first hearing date during the impartial hearing, the district's defense was not waived.

B. Accrual

1. 2014-15 through 2018-19 School Years

The parent contends that the IHO identified an incorrect accrual date when applying the two-year statute of limitations. Specifically, the parent contends that she first knew or had reason to know of the alleged actions that formed the basis of her allegations included in the due process complaint notice in August 2019 when she enrolled the student in Tiegerman School (Parent Mem. of Law at p. 19). The district argues that the IHO correctly found that the parent's claims for the 2014-15 through 2018-19 school years were time-barred and that the claims accrued as of the date of the CSE meetings.

A review of the parent's due process complaint notice reveals that the parent asserted several procedural and substantive claims concerning the educational programs recommended for the student during the 2014-15 through 2018-19 school years (Parent Ex. A at pp. 2-7). For example, the parent challenged the various CSEs' recommendations for ICT services with or

without SETSS or a 12:1 or 12:1+1 special class (id. at pp. 3-6). In addition, the parent testified that she attended all of the student's CSE meetings, with the exception of one (Tr. p. 77). The parent also testified that she brought any concerns about the CSEs' recommendations to the district "every opportunity [she] could" (Tr. p. 75). Thus, a review of the parent's claims from the 2014-15 through 2018-19 school years reveal that they likely accrued at the time of the respective CSE meetings or when the parent received a copy of each resultant IEP; in other words, "almost immediately" after each action underlying the complaint occurred, notwithstanding that the parent may have subsequently "acquired additional information" about her claims (Roges v Boston Pub. Schools, 2015 WL 1841349, at *3 [D. Mass. Apr. 17, 2015]).

The parent also argues that the May 2019 private academic update demonstrated the student's weaknesses in academics (Parent Mem. of Law at p. 19). The parent argues that it was the first time that an independent professional made it clear that the student's needs would be met in a nonpublic school with a reading intervention program where the student could receive individualized attention (id.). However, a review of the hearing record reveals that the parent was also aware of the student's academic struggles from the student's fall 2017 private psychoeducational evaluation (Parent Ex. G). Moreover, the fall 2017 private psychoeducational evaluation included a recommendation for a research-based reading program that was individualized and provided as frequently as possible (id. at p. 13). While the later acquired information about the student's weaknesses may have strengthened the parent's belief that the programs provided by the district during the disputed school years were inappropriate, as stated above, the parent knew of the actions that formed the basis for her complaint as of the CSE meetings for each school year or upon her receipt of the resultant IEPs, at the latest.

The parent argues, as an alternative, that she first knew or had reason to know of the alleged actions that formed the basis of her complaint in August 2019 when she enrolled the student in Tiegerman School and sent the district notice of her intent to enroll the student at district expense (Parent Mem. of Law at p. 19). While the hearing record shows that the parent believed that the district was not providing the student with an appropriate and adequate education as of August 2019 when she placed the student at Tiegerman School, that is the same time period as when the IHO found that the parent's claims related to the 2019-20 school year accrued and the IHO addressed those claims. There is no basis for finding that the parent's claims related to the educational programs recommended and delivered to the student during the prior school years, from the 2014-15 school year through the 2018-19 school year, accrued in August 2019.

In light of the above, the parent knew or should have known about any action forming the basis of her IDEA claims more than two years prior to the filing of the August 19, 2021 due process complaint notice.

2. COVID-19 Tolling

With respect to the parent's claims related to the 2018-19 school year, the parent argues that the IHO erred by failing to apply the tolling of the statute of limitations due to the COVID-19 pandemic.

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]

The parent argues that, based on Governor Cuomo's executive orders tolling the statute of limitations during the COVID-19 pandemic, her claims should be tolled for 7 months and 13 days from the accrual date (Parent Mem. of Law at p. 23). Therefore, the parent argues that the two-year statute of limitations plus the COVID-19 tolling from her asserted August 19, 2019 accrual date (the date of the parent's notice to the district of her intent to enroll the student at Tiegerman School and the date of the student's enrollment at Tiegerman School) meant that the parent had until May 2, 2022 for her claims related to the 2018-19 school year (id.). However, as noted above, the accrual date for when the parent first knew or had reason to know of the alleged actions that formed the basis of her claims related to the 2018-19 school year was the date of the May 2018 and/or November 2018 CSE meetings or, at the latest, upon the parent's receipt of the IEPs (see Parent Ex. M at p. 12; Q at p. 1).[10] Accordingly, even applying the COVID-19 tolling, the claims related to the 2018-19 school year had expired as of the date of the parent's August 19, 2021 due process complaint notice.

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[9] 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] Even if the date of the IEP, which the parent references in her due process complaint notice as December 17, 2018, served as the date of accrual (see Parent A at p. 6), accounting for the tolling for the COVID-19 pandemic applied in the manner suggested by the parent, the statute of limitations would have expired on or around the first week of August 2021.

C. Specific Misrepresentations

As to the "specific misrepresentations" exception to the statute of limitations, the parent argues that her claims should not be barred by the IDEA's two-year statute of limitations because the district made specific representations to the parent that it was providing the student with an appropriate education.

The "specific misrepresentations" exception to the timeline to request an impartial hearing applies "if the parent was prevented from requesting the hearing due to . . . specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 744 Fed. App'x 7, 11 [2d Cir. Aug. 1, 2018] [noting that the district's refusal to accede to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]). In order for the specific misrepresentation exception to apply, the district must have intentionally misled or knowingly deceived the parent regarding a relevant fact (R.B., 2011 WL 4375694, at *4, *6; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments were sufficient to warrant application of the statutory exception, the exception would swallow the rule"]; see also Application of a Student with a Disability, Appeal No. 13-215).

In the instant matter, the parent argues that the district actively reassured her throughout the school years that the district was offering the student an appropriate program in order for the student to make progress. Specifically, the parent points to a December 17, 2018 CSE meeting,[11] at which the parent expressed concern with respect to the student's IEP but the district assured her that the program at the district school would meet the student's needs. The parent argues that the district made "specific representations" to the parent that it was providing the student with an appropriate education. However, the parent does not allege that the district had "knowledge that its representations of [the] student's progress or disability [we]re untrue misrepresentations" or that the district's representations were "akin to intent, deceit, or egregious misstatement" (D.K., 696 F.3d at 245, 246). To the contrary, the type of misrepresentations alleged by the parent are more akin to "subjective and good-faith" interpretations of the student's needs and progress, whether accurate or not (T.C. v Lewisville Ind. Sch. Dist., 2016 WL 705930, at *10 [E.D. Tex. Feb. 23, 2016]). In hindsight, the parent might consider the district's assessment of the student's needs and progress to be wrong, but that does not give rise to a specific misrepresentation triggering the statutory exception (C.H., 815 F. Supp. 2d at 985). If these sorts of representations were sufficient

[11] As noted above, the hearing record is unclear whether a CSE convened in December or if the parent's reference to a December 2018 IEP is to the plan that was generated at a November 26, 2018 CSE meeting (see Parent Ex. Q at pp. 1, 6).

to warrant application of the statutory exception, the exception would swallow the rule. Indeed, the Third Circuit in D.K. specifically identified "[m]ere optimism in reports of a student's progress" or the bare statement of "allegations comprising a claim that a FAPE was denied" as examples of overly broad applications of the exception (D.K., 696 F.3d at 245-46).

Based on the foregoing, the evidence in the hearing record does not warrant application of the specific misrepresentation exception to the limitations period.

D. Withholding of Information

The parent claims that the withholding of information exception to the statute of limitations applies because the district withheld information that it was required to provide under the IDEA. Specifically, the parent contends that the district failed to apprise her of her due process rights and did not provide her with a copy of the "Procedural Safeguards Notice" for the 2014-15 through 2018-19 school years. The district argues that it advised the parent of her due process rights throughout the school years and therefore the withholding of information exception of the statute of limitations should not apply.

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (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]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist., 744 Fed Appx at 11; R.B., 2011 WL 4375694, at *4, *6; see D.K., 696 F.3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

During the impartial hearing when asked by the parent's attorney whether the parent was ever informed of her right to an impartial hearing, the parent responded, that she was not aware until "at least four years into th[e] process" and that she found out about her options "by taking trainings and going to the library" (Tr. pp. 87-88). Following the parent's testimony indicates that she learned of her rights four years into the process and counting four years after the student was referred for an initial evaluation in February 2014 (see Parent Ex. P) would indicate the parent knew about her due process rights in or around 2018; accordingly, the parent's testimony indicates she knew of her due process rights at or around the same time as her claims accrued and therefore,

the withholding of information exception would not shield the parent from application of the statute of limitations.

Additionally, documentary evidence in the hearing record indicates that in August 2019, as part of the social history evaluation, the district provided the parent with the procedural safeguards notice and the parent's due process rights were reviewed (Parent Ex. Q at pp. 1-2).

In addition to the foregoing, with its answer, the district offers documentary evidence for consideration on appeal to demonstrate that the parent was aware of her due process rights (see generally Answer). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

Here, all the proffered exhibits annexed to the district's answer were available at the time of the impartial hearing; however, they include additional support to render a determination regarding whether the parent was prevented from filing a due process complaint notice due to the district withholding specific information that it was required to provide to the parent under the IDEA. Therefore, under the circumstances, and in the interests of due process, the district's additional evidence will be considered to determine whether the withholding exception to the statute of limitations should apply.

Review of the additional evidence demonstrates that the parent signed a consent for evaluation of the student dated March 14, 2014, which indicated that the parent's due process rights were explained to her and a procedural safeguards notice was provided (SRO Ex. 1). The additional evidence proffered by the district also includes a prior written notice dated May 29, 2015, summarizing the recommendations from the May 27, 2015 CSE meeting, a prior written notice dated April 21, 2016 summarizing the recommendations from the April 20, 2016 CSE meeting, a prior written notice dated April 26, 2017 summarizing the recommendations from the April 4, 2017 CSE meeting, a prior written notice dated May 22, 2018 summarizing the

recommendations from the March 20, 2018 CSE meeting, and a prior written notice dated December 3, 3018 summarizing the recommendations from the November 26, 2018 CSE meeting (SRO Exs. 2-6). All of the prior written notices included instructions for obtaining a copy of the procedural safeguards notice as well as contact information for assistance with understanding the special education process (id.). Therefore, the hearing record shows that, even if the parent did not receive a procedural safeguards notice for at least one of the school years at issue, the district had previously advised the parent of her due process rights (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45). Based on the foregoing, there is not a sufficient basis to disturb the IHO's determination that the withholding of information exception does not apply to the parent's claims related to the student's 2014-2019 school years and therefore, the parent's claims are barred by the IDEA's two-year statute of limitations.

VI. Conclusion

Having determined that the parent's due process complaint notice was not filed within two years from the date of accrual of the parent's claims related to the 2014-15 through the 2018-19 school years and that neither of the exceptions to the statute of limitations apply, I find that the parent's allegations are barred by the statute of limitations and there is insufficient basis to disturb the IHO's decision on this point.[12]

I have considered the parties' remaining contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 12, 2023

STEVEN KROLAK
STATE REVIEW OFFICER

[12] In this instance, neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year from September 3, 2019 to September 26, 2019, that Tiegerman School was an appropriate unilateral placement for the student for the 2019-20 school year, or that equitable considerations weighed in favor of granting the parent's request for relief in the form of tuition reimbursement for that portion of the 2019-20 school year prior to the district's placement of the student at Tiegerman School. Furthermore, the parent does not challenge the IHO's finding rejecting the parent's request for reimbursement for the student's breakfast and lunch expenses. As such, these determinations have become final and binding on both parties 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]).