The University of the State of New York

The State Education Department
State Review Officer
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No. 24-074

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:
Gulkowitz Berger LLP, attorneys for petitioners, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Frank J. Lamonica, 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 pertaining to their daughter's education program for the 2021-22 school year based on the IDEA's statute of limitations. Respondent (the district) cross-appeals from the IHO's determination that the district failed to demonstrate it had offered to provide an appropriate educational program to the student for the 2022-23 school year. The appeal must be sustained in part and the matter remanded to the IHO for further proceedings. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received diagnoses including autism spectrum disorder and a seizure disorder (Dist. Exs. 2 at pp. 5-6; 3 at p. 5; 9 at p. 1). The CSE convened on April 20, 2021, to formulate an IEP for the student with an implementation date of May 4, 2021 (see generally Dist. Ex. 2). The April 2021 CSE found the student eligible for special education services as a student with autism and recommended a 12-month program consisting of a 6:1+1 special class placement for ten periods per week in math, ten periods per week in English Language Arts (ELA), five periods per week in social studies, and five periods per week in science, with the language of

service listed as Yiddish for all classes except for ELA which was to be provided in English (Dist. Ex. 2 at p. 19).[1] The April CSE additionally recommended related services consisting of three 30-minute sessions of individual occupational therapy (OT) per week, two 30-minute sessions of individual physical therapy (PT) per week, three 30-minute sessions of individual speech-language therapy per week to be delivered in Yiddish, and two 30-minute sessions of vision education services (id.). The April 2021 CSE also recommended that the student receive the support of daily individual paraprofessional services on a "0.8" basis for health and seizures and that the parents receive parent counseling and training "as needed" for speech development (id. at pp. 19-20).

In a letter dated November 29, 2021, the parents indicated they had not received an IEP for the student or a public school placement for the 2021-22 school year and, as a result, they notified the district of their intent to unilaterally place the student at the Special Torah Education Program (STEP) and seek public funding for that placement (see Parent Ex. O). The student began attending STEP on December 13, 2021 (Parent Ex. Q).

The CSE next convened on May 23, 2022 to formulate an IEP for the student for the 2022-23 school year (see generally Dist. Ex. 4). The May 2022 CSE recommended a 12-month program consisting of a 6:1+1 special class in all subjects for 35 periods per week in a district specialized school, with instruction delivered in Yiddish, and related services consisting of two 30-minute sessions of individual OT per week, one 30-minute session of OT in a group of two per week, two 30-minute sessions of individual PT per week, three 30-minute sessions of individual speech-language therapy per week delivered in Yiddish, and two 30-minute sessions of vision education services per week (Dist. Ex. 4 at pp. 17-18).[2] The May 2022 CSE also recommended that the student receive the support of full-time daily individual paraprofessional services for health, safety, toileting, feeding, and seizures and that the parents receive four sessions per year of group parent counseling and training (id.).

The district sent the parents a school location letter dated June 10, 2022, which identified the particular public school to which the district had assigned the student to attend for the 2022-23 school year (Dist. Ex. 11).

In a letter to the district dated August 22, 2022, the parents indicated they disagreed with the educational program recommended for the student (Parent Ex. EE). The parents also notified the district of their intent to unilaterally place the student at STEP and to seek public funding for that placement (id.).

On September 6, 2022, the parent entered into a contract with STEP for the student to enroll at STEP for the 2022-23 school year (Parent Ex. FF). The student began attending STEP on September 6, 2022 and continued to attend through the 2022-23 school year (Parent Ex. GG).

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

[2] The recommended language of service for PT, OT, and vision education services was English (Dist. Ex. 4 at pp. 17-18).

A. Due Process Complaint Notice

In a due process complaint notice, dated June 26, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (see Parent Ex. A). According to the parent: the last IEP created for the student was on November 21, 2018; for the 2021-22 and 2022-23 school years the parents did not receive an IEP for the student; for the 2021-22 school year the parent did not receive a public school placement; and for the 2022-23 school year, the proposed public school placement was delayed, and the parent did not have an opportunity to visit the proposed placement to determine its appropriateness (Parent Ex. A at pp. 1-2). Additionally, the parent alleged the student required a full-time special class in a small school setting with less than six students in her class, that the student's program be goal focused with individualized goals for each student based on their strengths and needs, and that the class contain only students with "the same cognitive, social and emotional levels as the student" and a "strictly enforced behavioral program" (id. at pp. 1-2). Further, the parent alleged that STEP was an appropriate program for the student and that they provided the district appropriate notice of their intent to seek a unilateral placement for the student as a result of the district's failure to offer the student a FAPE for both the 2021-22 and 2022-23 school years (id.). The parent sought a determination that any program developed for the student for the 2021-22 and 2022-23 school years be found inappropriate for the student and that it was appropriate for the student to remain at STEP for those school years (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

After appearing for a preliminary conference on August 3, 2023, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on September 11, 2023, at which time the district raised statute of limitations as a defense (Tr. pp. 1-47).

Following a status conference on September 11, 2023 (Tr. pp. 48-57), the district filed a motion to dismiss, dated October 16, 2023, in which the district alleged that the parent's claims related to the 2021-22 school year were barred by the IDEA's two-year statute of limitations because they accrued as of the April 2021 CSE meeting or the April 2021 prior written notice, which were both more than two years prior to the filing of the due process complaint notice in this matter (IHO Ex. I at pp. 2-7). In an October 23, 2023 response to the district's motion, the parent alleged her claims for the 2021-22 school year were timely asserting that because the requested relief for the 2021-22 school year was for funding for the students unilateral program at STEP, her claims did not accrue until December 2021 when the student began attending STEP, that the district's failure to recommend a public school placement for the student during the 2021-22 school year was "ongoing" and did not end with the development of an IEP, the delivery of a prior written notice, or the commencement of the school year; that an exception to the statute of limitations applies because the district withheld specific information regarding the student's public school placement for the 2021-22 school year; and that the district's motion to dismiss was not timely raised prior to the commencement of the impartial hearing (IHO Ex. II at pp. 1-3).

Following another status conference on October 23, 2023, the hearing occurred on November 8, 2023 and November 16, 2023, followed by the parties presentation of closing arguments on November 28, 2023 (Tr. pp. 58-209).

In a decision dated January 8, 2024, the IHO determined that the parent's claims for the 2021-22 school year were barred by the IDEA's two-year statute of limitations, that the district failed to offer the student a FAPE for the 2022-23 school year, that STEP was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement/direct payment minus five percent for the portion of the student's program dedicated to religious instruction (IHO Decision at pp. 6-11). As relief, the IHO ordered the district to fund the cost of the student's tuition at STEP in the amount of $104,050 for the 2022-23 school year and to fund the student's transportation to and from STEP for the 2022-23 school year (id. at p. 13).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals from the decision of the IHO. The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer with cross-appeal, and the parent's answer thereto is presumed and, therefore, the allegations and arguments will not be repeated in detail. Generally, the parent's appeal concerns whether the IHO erred in finding that her claims for the 2021-22 school year were barred by the IDEA's two-year statute of limitations.[3] The district's cross-appeal challenges the IHO's finding that the district did not offer the student a FAPE for the 2022-23 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

[3] In this matter, the parent did not file her notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review within two days after service of the request for review was completed pursuant to Part 279 of State regulations (see 8 NYCRR 279.4[e]). The IHO issued her decision on January 8, 2024 and the parent through her attorney properly served the district with the notice of intention to seek review and case information statement on January 30, 2024 and the notice of request for review, request for review, and verified request for review on February 20, 2024; however the parent did not file her notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review until March 7, 2024 making the filing 14 days late. Since all of these documents were nonetheless received by the Office of State Review and the district was able to respond to the allegations raised in the request for review in an answer and cross-appeal and there is no indication that the district suffered any prejudice as a result, I decline to exercise my discretion to reject the parent's pleading due to this irregularity in this instance.

York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

VI. Discussion

A. Preliminary Matters - Statute of Limitations

The parent alleges that the IHO erred in finding that her claims related to the 2021-22 school year were barred by the IDEA's two-year 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,

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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).

The parent, on appeal, reasserts the arguments alleged in her response to the district's motion to dismiss (compare IHO Ex. II, with Req. for Rev. ¶¶ 18-35). In particular, the parent argues that her claims did not accrue earlier than November 29, 2021, when she incurred the financial obligation to pay tuition at STEP for the 2021-22 school year.

However, as noted above, the CSE convened on April 20, 2021 to formulate an IEP for the student with an implementation date of May 4, 2021 (Dist. Ex. 2). Additionally, the parent was present at that CSE meeting (Dist. Exs. 2 at p. 27; 13 at ¶5) and the district sent the parent a prior written notices outlining the CSE's recommendations on April 27, 2021 (Dist. Ex. 1). Accordingly, the parent knew, or should have known, of the program recommended at the CSE meeting and any challenges to the recommended program accrued as of the April 2021 CSE meeting. Generally, claims related to the conduct of a CSE meeting or the contents of an IEP accrue at the time of the CSE meeting or, at the latest, upon the parent's receipt of the IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd, 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd, 2018 WL 3650185 [2d Cir. Aug. 1, 2018]).

In addition to challenges to the student's recommended educational programming, the parent's due process complaint notice also included assertions that the parent did not receive an IEP or a public school placement (Parent Ex. A at p. 1). On appeal, the parent claims that the IHO failed to address this allegation and further contends that the district's failure to provide a school location for the implementation of the April 2021 IEP was a continuing violation.

Here, the district did not introduce a school location letter into evidence for the 2021-22 school year, but provided evidence through witness testimony indicating that a school location letter was not necessary because the parent knew what school the student would have attended for the 2021-22 school year (see Tr. pp. 104-06, 113, 115, 120, 122-23; Dist. Exs. 14 ¶¶ 5). Additionally, in its motion to dismiss, the district did not address accrual of the parent's claim regarding a school location letter, referring only to the prior written notice package (IHO Ex. I at p. 3). Further, the IHO did not address the issue of the lack of school location letter in her decision (see generally IHO Decision at pp. 6-8). It is worth noting that the start of the 2021-22 school year, in July 2021, would be the latest date at which the parent should have known of the district's alleged failure to provide her with a school location letter prior to the start of the school year; however, if the accrual date is the start of the 2021-22 school year, the due process complaint

notice was filed within two years from July 2021 and the claim would be within the applicable limitations period.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Accordingly, I find this matter should be remanded to the IHO to make factual findings with regard to the accrual date of the parent's claim that the district failed to provide the parent with a school location letter for the 2021-22 school year and that if the claim accrued within the statute of limitations period, the IHO should make a finding on the merits of that claim.

B. May 2022 IEP

Turning now to the district's cross-appeal, the district argues that the IHO erred by finding that the May 2022 IEP failed to offer the student a FAPE for the 2022-23 school year. The district argues the May 2022 CSE created an IEP that was reasonably calculated to provide the student meaningful benefit and that the district offered the student a timely public school placement for the 2022-23 school year.

Initially, the district argues in its cross-appeal that the IHO's FAPE analysis for the 2022-23 school year was not well reasoned. In the IHO's decision, the IHO set forth the reasons why the district failed to offer the student a FAPE for the 2022-23 school year in one paragraph, which read as follows:

> The evidence failed to demonstrate [the district] provided Student with a FAPE for the 2022-2023 school year. Additionally, the [district] did not object to or contest the evidentiary material submitted by the Parent in support of [her] claims, and it offered no rebuttal to the testimony provided by the Parent's witnesses. Consequently, the Parent is entitled to a presumption as to the truth of the asserted facts underlying their claims that are contained in the documentary evidence and testimony to the extent those facts are credible and are not contradicted by the hearing record. Based on that presumption and the [district]'s failure to sustain its burden under the Education Law, the record establishes that the [district] failed to provide the Student with a FAPE for the 2022-2023 school year.

(IHO Decision at p. 9).

The IHO did not further indicate what documentary evidence she relied on in making her determination nor did she cite to any documentary evidence in the hearing record to support her

decision as to FAPE (id.). Accordingly, the district is correct in its argument that the IHO's decision with respect to the district's provision of a FAPE to the student for the 2022-23 school year was conclusory with no factual references to the record and a complete review of the parties' arguments, including all of the allegations regarding FAPE for the 2022-23 school year contained withing the parent's due process complaint notice, must be addressed.

1. Student Needs

Although the sufficiency of the student's present levels of performance and individual needs as described in the May 2022 IEP are not in dispute, a discussion thereof provides context for the issues to be resolved, namely, whether the 6:1+1 special class placement was appropriate to meet the student's needs. According to the May 2022 IEP, the student's overall cognitive and academic functioning could not be formally assessed due to her global delays and distractibility (Dist. Ex. 4 at p. 1). Administration of the Vineland Adaptive Behavior Scales-Third Edition (Vineland-III) yielded an adaptive behavior composite standard score of 26 (<1st percentile) (id.).

The May 2022 IEP identified that based on teacher reports, the student had "extremely limited" verbal communication skills and when trying to interact with others tended to hit rather than use words or other ways of communicating (Dist. Ex. 4 at p. 2). She was most able to interact with her peers during music sessions (id.). With prompting, the student could say "more, sorry, cheerios, yogurt, banana, cookies, milk, nana (music)," and some numbers between one and ten, and was working on expressing basic wants and needs (id.). With "a lot" of prompting, the student could put together two words (id.). The student was working on focusing on a task for greater than one minute (id.). According to the IEP, the student would eat anything she found, including non-edibles, would grab and spill things, and wander off, and she required constant supervision (id.). The student was working on gaining an understanding of the cause and effect of behaviors and was learning to "understand the classroom setting as well as a visual daily schedule" (id.). She could complete simple classroom skills, such as hanging up her coat and transitioning to a specific area by following her visual schedule but could become anxious during transitions (id.). The student could not dress or undress herself, ate mostly with her fingers, and used utensils to eat small amounts with assistance and encouragement (id.). She was "not toilet trained and [wa]s unaware of the concept of going to the bathroom," was unable to wash her hands independently, and "put up a fight" when staff attempted to assist her with washing (id.). The student also required sensory input and benefitted from activities in the "Snoezlen room" and vestibular swinging (id.). She needed "a lot" of tactile input and often pinched herself and others (id. at p. 4).

According to the May 2022 IEP, speech provider reports identified that the student's speech abilities, language development, social/personal skills, cognitive abilities, and self-help skills were impacted by her expressive and receptive language impairments, and the student's difficulty maintaining focus during therapy sessions affected her progress (Dist. Ex. 4 at pp. 2-3). The student used some signs to request desired activities and objects, responded to her name, and "at times" followed one-step commands (e.g., sit down, stand up) (id. at p. 3). Because of "behavioral issues," the student required "maximum verbal and visual prompts and cues" for most tasks including "following directions, requesting and using a PECS board or signing, and responding appropriately to inhibitory words" (id.).

The student's overall scores in the socialization domain of the Vineland-III, according to the parent, were in the low range, as were her scores for interpersonal relationships, coping, and play and leisure skills (Dist. Ex. 4 at p. 3). The May 2022 IEP indicated that the student recognized family members, smiled in response to a smile, praise or compliments, enjoyed and smiled at peers but did not engage in age-appropriate play with peers or parallel play, and preferred to play alone (id.).

Speaking to the student's motor skills, the May 2022 IEP indicated that the student had an "anomaly of the bones of her hands," notably at the thumbs and index fingers of both hands and while she could move them, she required help to grasp objects functionally (Dist. Ex. 4 at p. 3). Based on OT provider reports reflected in the IEP, the student exhibited poor visual perceptual and bilateral coordination/grasping skills, needed hand-over-hand assistance to feed herself, and additionally had poor oral motor control, which resulted in drooling and having food fall out of her mouth (id. at pp. 3-4). The student had poor scissor skills and required hand-over-hand assistance (id.). She held writing tools in a fisted grasp for less than one minute and could scribble on paper but could not imitate lines or shapes, or color between lines (id.).

The May 2022 IEP also noted that, as per PT provider reports, the student presented "abnormalities of gait and mobility," and required very close supervision due to her impulsivity and wandering (Dist. Ex. 4 p. 4). She exhibited deficits in strength, balance, and her posture leaned to the right (id.). The student ambulated with a slow pace, slightly flexed knees and hips, and without placing her left foot completely on the ground at times, but she was beginning to tolerate walking with her feet flat on the ground (id.). The student required assistance negotiating stairs, with one hand on the railing and mild/moderate adult assistance with the other hand (id.). Regarding the student's gross motor strengths, the May 2022 IEP noted that the student could propel a tricycle and scooter board independently but needed to work on being safe and aware of her environment (id.).

2. 6:1+1 Special Class

On appeal the district argues that the IHO erred in finding that it failed to rebut the parent's evidence regarding an appropriate class size for the student. The parent asserts that there was no evidence that a 6:1+1 special class would have enabled the student to receive an appropriate education, and maintains that the student required a special class with a 3:1+2 ratio to allow for constant individual and small group instruction, constant attention to the student, and "appropriate peer choice" in settings that "would not cause unsafe conditions" considering the student's individual needs. For the reasons discussed below, the IHO's finding that the May 2022 IEP failed to offer the student a FAPE must be reversed.

The district special education teacher provided affidavit testimony that, at the May 23, 2022 CSE meeting, the CSE reviewed the student's May 2022 STEP teacher progress, OT, speech-language therapy, and PT reports, a December 2021 district psychoeducational evaluation report, previous IEPs, and information obtained during the CSE meeting to determine the student's present levels of performance (Dist. Ex. 13 ¶¶ 4, 6, 8). According to the special education teacher's testimony and the IEP, the May 2022 CSE discussed the student's "strengths, weaknesses, learning challenges, interests and needs" and based on the evaluative data, identified the student's management needs that included the use of a "multi-modality approach using visual, auditory,

tactile, [and] kinesthetics approaches, [f]requent repetition and shorter increments of time spent on a given activity, as well as, frequent verbal praise and encouragement throughout the day" (Dist. Exs. 4 at p. 5; 13 ¶¶ 6, 7). According to the testimony of the district special education teacher, the IEP management needs "address[ed] [the student's] unique deficits by incorporating modalities and methods most likely to promote improvement given her limitations and challenges" (Dist. Ex. 13 ¶ 15).

The May 2022 IEP also included 12 annual goals with short-term objectives which focused on increasing: the student's safety and independence in activities of daily living; ability to point to pictures in a book, demonstrate one-to-one correspondence, visually identify and point to familiar objects or pictures, and use scissors to snip; and improve functional visual motor and visual perceptual skills, fine motor and gross motor coordination, balance and gait, and expressive language, receptive language, and social/pragmatic skills (Dist. Ex. 4 at pp. 6-16). In her testimony by affidavit, the district special education teacher testified that the IEP annual goals were designed to address the student's needs "with focus on improving independence in activities of daily living, toileting independence, posture and gait, functional visual motor and perceptual skills, participation in classroom activities, receptive language skills, social and pragmatic skills and safety and independence" (Dist. Ex. 13 ¶ 14). A comparison of the May 2022 IEP annual goals and the evaluative information available to the May 2022 CSE revealed that the annual goals reflected the student's identified needs and, in several places, mirrored language from the private school reports (compare Dist. Ex. 4 at pp. 6-16, with Dist. Exs. 7; 8; 9; 10). In addition, the district special education teacher testified that the May 2022 IEP annual goals and management needs would have addressed the student's deficits (Dist. Ex. 13 ¶¶ 14, 15).

As for a placement, the May 2022 CSE recommended that the student receive instruction in a 6:1+1 special class in a district specialized school, with the additional assistance of full-time individual paraprofessional services to support the student's health, safety, toileting, feeding, and seizure-related needs (Dist. Ex. 4 at pp. 17-18). State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social, and physical development (8 NYCRR 200.1[ww][3][i][d]).

In addition to the identified management needs, annual goals, and the paraprofessional services and other supports inherent in a 6:1+1 special class, the May 2022 CSE also recommended that the student receive two 30-minute sessions per week of individual OT, one 30-minute session per week of group OT (2:1), two 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual vision education services (Dist. Ex. 4 at pp. 17-18). The CSE also recommended four group sessions of parent counseling and training per year (id.).

The May 2022 IEP indicated that the CSE considered placing the student in 8:1+1 and 12:1+(3:1) special classes in a specialized school, but rejected those placements as insufficient to meet the student's needs and too restrictive (Dist. Ex. 4 at p. 25). According to the district special education teacher, the recommended programming, including a 6:1+1 special class placement, 1:1 paraprofessional services, related services, and management needs "[wa]s able to address [the student's] deficits and needs in a nurturing and safe environment that provide[d] all necessary supports" (Dist. Ex. 13 ¶ 15; see Dist. Ex. 4 at pp. 17-18). Further, a review of the evaluative information available to the May 2022 CSE revealed that none of the information indicated that the student required a class with fewer than 6 students or a special class with a 3:1+2 ratio (see Dist. Exs. 7; 8; 9; 10).

Although the parent may have preferred the delivery of the student's instruction in a special class with a 3:1+2 ratio, for the reasons stated above, review of the May 2022 IEP shows that it was specifically tailored to meet the student's needs and supports a finding that, contrary to the IHO's determination, the 6:1+1 special class, together with the additional support of the 1:1 paraprofessional and related services described above, was appropriate for the student for the 2022-23 school year.

C. Assigned Public School Site and School Location Letter

Lastly, the district asserts on appeal that the IHO erred in finding that the district did not timely offer the student a public school placement for the 2022-23 school year. The parent argues in her reply to the district's cross-appeal that even if the May 2022 IEP was appropriate, the district needed to have provided an actual physical placement that could implement the IEP to meet its burden, which it failed to do.

In her reply, the parent claims that the June 10, 2022 school location letter (Dist. Ex. 11) should have been excluded from evidence, arguing that it was unreliable and was not disclosed properly pursuant to the five business day disclosure rule. Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an 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]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]).

Here, the district originally introduced its documentary evidence at the first impartial hearing on September 11, 2023 but subsequently introduced four additional documents at the second impartial hearing held on November 8, 2023 (Tr. pp. 28-29, 76-83). The parent through her attorney objected to the additional four documents being introduced but was overruled by the IHO who noted "[t]he [district] made it clear that [is was] going to submit additional documents" at the previous status conference held on October 23, 2023 (Tr. p. 74; see Tr. pp. 60-65). Specifically, regarding the school location letter, the IHO stated "I haven't reviewed the evidence

substantively for that location letter to hold any weight against the totality of what [wa]s being claimed here . . . I'm allowing the location letter in" (Tr. pp. 81-82). As it is the IHO's duty to ensure that there is an adequate and complete hearing record, I find the IHO acted within her discretion in allowing the district's exhibits into evidence given the district's failure to comply with the five-day disclosure rule. Moreover, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. Apr. 9, 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

To the parent's argument that the district's offer of a public school location was unreliable, the IHO did not address or cite to the school location letter anywhere in her decision and ultimately ruled that the district did not offer the student a FAPE for the 2022-23 school year (IHO Decision at p. 9). However, the IHO did not provide any further explanation for her finding of a denial of FAPE and it is unclear if the IHO's finding was based on the perceived lack of a school location letter (id). I am not convinced that because the parent questioned the date the school location letter was created based on a print-out date and asserted the district failed to provide evidence that the school location letter was sent to the parent, that rendered the June 2022 letter unreliable (see Reply to Cross-Appeal ¶ 11). Moreover, with respect to the 2022-23 school year, in her due process complaint notice the parent affirmed that she did receive a "public-school placement sent by the [district]" but such school placement "was delayed" (Parent Ex. A at p. 2). Accordingly, even without proof by the district that the school location letter was sent to the parent, there is an admission that the parent received a school location letter and the parent has not asserted that she did not receive the school location letter included in the hearing record.

Turning to the argument raised in the parent's due process complaint notice, that the school location letter was delayed, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir.

2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, the June 10, 2022 school location letter specified the specific public school that was assigned to implement the program developed at the May 2022 CSE meeting (Dist. Ex. 11). The parent's own due process complaint notice confirms that the district offered a public school placement , however the parent did not elaborate as to the delay or how it could have impacted on her visiting the proposed public school (see generally Parent Ex. A at p. 2). Review of the school location letter shows that it identified a district staff person for the parent to contact (Dist. Ex. 11 at p. 1). The hearing record further shows that the parent had previously contacted this district staff person as she had delivered her November 29, 2021 letter to this staff person (Parent Ex. O). Nevertheless, there is no indication that the parent attempted to contact the identified district staff person regarding the public school placement for the 2022-23 school year, other than a letter sent on August 22, 2022 rejecting the district's recommended program (Parent Ex. EE). Nothing in that letter indicated that the parent sought information about the assigned public school site (id). As such, the hearing record does not support the parent's contention that the June 2022 school location letter was unreliable or that any delay in providing the letter impeded her ability to obtain information about the assigned public school.

The parent also argues that there was no witness testimony or document introduced during the impartial hearings that showed there was a seat available for the student at the public school identified in the school location letter or that the school had the program and services the student required.

The parent's claims regarding the provision of the special class and related services to the student is not borne out by the evidence, as the student never attended the assigned public school site pursuant to the May 2022 IEP. Any conclusion that the district would not have implemented the student's IEP or that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's programming under the IEP or to refute the parent's claims (R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 187 & n.3]). Further, any claim that the recommended educational program would not have been able to be implemented without a recommendation for an extended school day is really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[]

to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 244, 245 [2d Cir. 2015]). In view of the foregoing, the parent cannot prevail on her claims regarding the assigned public school's ability to implement the program recommended in the student's May 2022 IEP.

Accordingly, I find that the IHO erred in her determination that the district failed to offer the student a FAPE for the 2022-23 school year and that such determination, including the IHO's order directing the district to fund the student's tuition at STEP for the 2022-23 school year are reversed.

VII. Conclusion

In summary, having found the IHO erred by not addressing the parent's argument regarding the lack of a school location letter for the 2021-22 school year and what effect such may have on the IDEA's two-year statute of limitations, the matter is remanded to the IHO for such consideration. In addition, having determined that the evidence in the hearing records supports a finding that the district offered the student a FAPE for the 2022-23 school year, the IHO's decision that the district failed to offer the student a FAPE is reversed. Having found that the district offered the student a FAPE for the 2022-23 school year, I need not reach the issue of whether the IHO properly awarded transportation services as part of the award for a denial of FAPE and the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 8, 2024, is modified by reversing that portion which found that the that the district failed to offer the student a FAPE for the 2022-23 school year and ordered funding for the cost of the student's tuition and transportation at STEP; and

IT IS FURTHER ORDERED that the matter is hereby remanded to the IHO to consider the accrual date of the parent's claim regarding a school location letter for the 2021-22 school year under the statute of limitations, and, if necessary, consider the substance of the parent's claims.

Dated: Albany, New York
April 22, 2024

STEVEN KROLAK
STATE REVIEW OFFICER