The University of the State of New York

The State Education Department
State Review Officer
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No. 23-243

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

**Appearances:**
Law Office of Michelle Siegel, PLLC, attorneys for petitioner, by Jared Stein, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parent's claims pertaining to her son's educational program for the 2020-21 school year based on the IDEA's statute of limitations. The appeal must be dismissed.

### II. Overview—Administrative Procedures

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

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

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

## III. Facts and Procedural History

Due to the disposition of this matter, the parties' familiarity with the student's educational history is presumed and will not be repeated in detail. As relevant to the issues herein, the CSE convened on April 29, 2020, to develop the student's IEP for the 2020-21 school year (see generally Dist. Ex. 1).[1]

[1] The district's exhibits correspond to the "appendices" cited in its written motion to dismiss (Dist. Mot. to Dismiss at pp. 1-2). Although the district stated in its written motion that the appendices were not offered into evidence, they were submitted with the motion to dismiss (id.). The IHO admitted both parties' supporting documentation as exhibits and they were included in the hearing record (IHO Decision at pp. 1-2; see 8 NYCRR

According to the parent, she filed a due process complaint notice on September 10, 2020 regarding the 2020-21 school year, which was subsequently withdrawn (Prehr'g Br. in Opp'n at pp. 3-4).

In correspondence dated September 17, 2020, the district wrote to the parent's attorney acknowledging receipt of an August 27, 2020 letter, which had advised the district of the parent's disagreement "with the program and/or placement recommendations for [the student]" and her intention to unilaterally enroll the student in a private school for the 2020-21 school year and to seek public funding (Parent Ex. iv at p. 1).[2] The September 17, 2020 district letter further stated that the district "would like to work with [the parent's attorney] to resolve [the] 10 day notice of unilateral placement claim for the 2020-2021 school year" and identified information and documents for the parent's attorney to provide "[t]o facilitate settlement " (id.). The September 17, 2020 letter also advised the parent's attorney to "be aware that there [wa]s a two year statute of limitations on all claims under the IDEA, including claims submitted to the [district] through ten-day notice letters" (id.).

The September 17, 2020 letter further provided that:

> although the [district] w[ould] continue to try to resolve claims based on ten-day notice letters, [the] claim must be settled with Comptroller approval or [the parent] must file a Due Process Complaint before the expiration of the statute of limitations to preserve [the parent's] rights. Submissions of ten-day notice letters do not toll the statute of limitations. Settlement negotiations and/or reaching a settlement agreement that is subject to Comptroller approval also do not toll the statute of limitations.

(Parent Ex. iv at p. 1). The September 17, 2020 letter then listed required documentation and information for consideration of a potential settlement (id. at pp. 1-2).

By email dated April 7, 2021, an IHO from a previous matter involving the student wrote to the parent's attorney to advise that IHO Case Number 193793 remained opened and that IHO Case Number 200523 was considered decided (Parent Ex. i at p. 1).[3, 4] The parent's attorney replied on the same day and stated that the IHO (who had sent the email) had issued a final decision

200.5[j][5][vi][b]).

[2] The parent's August 27, 2020 letter was not included as a separate exhibit in the hearing record.

[3] According to the parent the matter involving IHO Case Number 193793 concerned the 2019-20 school year and the parent's unilateral placement of the student at the Gersh Academy for the 2019-20 school year, which resulted in the parent receiving funding from the district (Due Process Compl. Not. at p. 3).

[4] According to the parent the matter involving IHO Case Number 200523 involved the September 2020 due process complaint notice regarding the 2020-21 school year (Prehr'g Br. in Opp'n at pp. 3-4).

in December 2020 on IHO Case Number 193793 and had mislabeled that decision as relating to IHO Case Number 200523 (id.).[5]

**A. Due Process Complaint Notice and Subsequent Correspondence**

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 2020-21 school year (Due Process Compl. Not. at pp. 1, 2).[6] In particular, the parent asserted that the student's April 29, 2020 IEP was procedurally and substantively deficient, that the April 2020 CSE failed to consider sufficient evaluative information, failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP), and failed to provide a sufficiently supportive program and related services (id. at pp. 3-6). The parent also alleged that the assigned school site was closed during the summer and the parent was unable to visit the site and determine its appropriateness for the student prior to the start of the 2020-21 school year (id. at p. 6). As a result, the parent argued that she unilaterally enrolled the student at the Smith School for the 2020-21 school year (id.).

Relevant to the present appeal, within the due process complaint notice, the parent asserted that she previously "filed and the [district] subsequently accepted her 2020-2021 due process claim for settlement negotiations" (Due Process Compl. Not. at p. 7). According to the parent, the district had "accept[ed] the case for settlement" and exchanged "in excess of 50 emails" between September 17, 2020 and June 12, 2023 (id.). The parent asserted that, between April 21, 2021 and June 23, 2021, "the parties identified and corrected a clerical error by a prior IHO which mistakenly awarded relief for the 2019-2020 school year claim under the case number assigned to the 2020-2021 school year claim" (id.). The parent further asserted that "[o]n September 15, 2022, the parent withdrew her complaint without prejudice in reliance upon the [district]'s stated intention to settle the case" (id.). The parent then contended that there were changes in district staff and "the settlement process" was not reassigned until April 2023, and the parent alleged that at that time district staff "confirmed the case was still being processed for settlement authorization" (id.). The parent next asserted that on June 12, 2023, the same district employee stated that the district had no intention of making a settlement offer because the statute of limitations was about to expire (id.). The parent alleged that the district deliberately misled her so as to "'run out the clock' despite having given her repeated assurances that the case was moving toward settlement" (id.).

[5] On June 14, 2023, the parent filed an amended due process complaint notice, which purported to amend a July 5, 2022 due process complaint notice concerning the 2022-23 school year (IHO Case Number 228377), to include the parent's claims related to the 2020-21 school year (Parent Ex. iii at pp. 1, 2, 13). According to the parent, her attempt to amend her complaint in IHO Case Number 228377 was "unsuccessful[]" (Due Process Compl. Not. at p. 8). In that matter, on June 26, 2023, an IHO issued a decision resolving the parent's claims related to the 2022-23 school year (Parent Ex. ii at pp. 1, 2, 3). The June 26, 2023 IHO decision does not mention the parent's June 14, 2023 amended due process complaint notice (id. at p. 3; see also Prehr'g Br. in Opp'n at p. 7). Further, the hearing record does not include any evidence indicating whether or not the district received the June 14, 2023 amended due process complaint notice.

[6] The parent's due process complaint notice also alleged violations of section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (see Due Process Compl. Not. at p. 2).

The parent further asserted that, because she had timely raised her claims in a previous and subsequently withdrawn due process complaint notice, she "[wa]s entitled to relief that ma[de] her whole for the entire period of the alleged FAPE deprivation" (Due Process Compl. Not. at p. 7). The parent further argued that she met an exception to the statute of limitations in that she was deliberately misled by the district's "repeated and recent assurances that the case was awaiting settlement authorization when in fact the [district] was merely avoiding, not seeking such authority" (id. at p. 9).

As relief, the parent sought "[r]etroactive prospective tuition reimbursement for [the student's] placement at the Smith School" during the 2020-21 school year, or "compensatory services in the form of retroactive prospective tuition reimbursement for [the student's] placement at the Smith School" in the 2020-21 school year (Due Process Compl. Not. at p. 9).

In an email dated July 27, 2023, the district wrote to the parent's attorney indicating receipt of the parent's due process complaint notice related to the 2020-21 school year (IHO Case Number 249277) (Parent Ex. v at p. 1). The July 27, 2023 email further stated that the parent's attorney had been previously notified of the district's intent "to work with [the parent's attorney] to resolve [the] ten-day notice of unilateral placement for the school year" and listed documentation to provide to the district for consideration (id. at pp. 1-2).

**B. Impartial Hearing and District's Motion to Dismiss**

On August 9, 2023, the parties convened for a prehearing conference before the IHO, at which the district indicated that it was investigating the matter (Tr. pp. 2-3). The parties reconvened on August 24, 2023, the district stated that the matter would go forward for an impartial hearing on the merits, and the IHO scheduled a hearing for September 18, 2023 (Tr. pp. 7-8).

By written motion to dismiss dated September 6, 2023, the district asserted that the parent's claims set forth in the June 26, 2023 due process complaint notice were barred by the IDEA's two-year statute of limitations and that neither of the exceptions to the statute of limitations applied to the parent's claims (Dist. Mot. to Dismiss at pp. 1-4, 5-10). The district alleged that, even applying the Governor's executive orders on tolling issued during the COVID-19 pandemic, the parent's filing deadline was November 4, 2022 (id. at pp. 1, 2, 5-6).

The parent filed a prehearing brief in opposition to the district's motion to dismiss on September 14, 2023 (Prehr'g Br. in Opp'n at pp. 1-2, 16). The parent argued that she should be allowed to advance her claims because "[m]ultiple permutations of IDEA's accrual date, the three-year statute of limitations" relating to section 504, "tolling by agreement between the parties, and/or IDEA statutory exceptions weigh[ed] against" the district's motion to dismiss (id. at p. 2). The parent also argued that "November 4, 2022 reflect[ed] the first but not the last potential filing deadline" (id. at p. 4). In particular, the parent alleged that her claim that the district failed to implement the April 2020 IEP did not accrue until the last day of school of the 2020-21 school year, and therefore, the statute of limitations did not expire until June 30, 2023 (id. at pp. 4-7). In addition, the parent advanced arguments that the statute of limitations period was tolled equitably or by agreement between the parties and extended the parent's filing deadline to November 8, 2024 (id. at pp. 7-9). The parent next alleged that the specific misrepresentation exception to the statute of limitations applied to her claims because, according to the parent, the district represented that it

was submitting a settlement of the prior due process complaint notice to its comptroller for approval (id. at pp. 9-10). Lastly, the parent argued that her "unchallenged" section 504 claims were timely (id. at pp. 10-16).

On September 18, 2023, the parties reconvened (Tr. p. 12). The IHO stated that the matter had been scheduled for an impartial hearing on the merits but that the purpose had been changed to hearing oral arguments on the district's motion to dismiss based on the statute of limitations (Tr. p. 14). The district argued that the parent's due process complaint notice was filed after the expiration of the statute of limitations and that none of the exceptions to the statute of limitations applied to the parent's claims (Tr. pp. 14-22). The parent argued that the matter should proceed to an impartial hearing on the merits and that the IHO could later determine whether tolling or an exception to the statute of limitations applied to the parent's claims (Tr. p. 23). The parent asserted that the hearing record was "not sufficiently developed [for the IHO] to reach a conclusion that the parent was not entitled to bring the claims when she brought them" (id.). The parent further argued that her section 504 claims were timely and that the district engaged in gross misjudgment and bad faith (Tr. pp. 23-26). The parent also argued that the district stating that it was in the process of requesting approval from the Comptroller, when it was not doing so, constituted a specific misrepresentation exception to the IDEA's statute of limitations (Tr. pp. 26-27). The parent further argued that the parent's implementation claims did not accrue at the time of the April 2020 CSE meeting, and that "the parent certainly [wa]s entitled to look back at least two years . . . from spring 2023" (Tr. pp. 27-28). The parent next argued that a motion to dismiss was improper and that the parent should be allowed to present evidence of her "continuing violations" and "discrete violations" theories (Tr. pp. 30-31).

In rebuttal, the district argued that the parent failed to meet the pleading requirements to establish a prima facie violation of section 504 and that the cases cited by the parent during argument were factually distinguishable from this matter (Tr. pp. 37-38). With regard to the parent's assigned school claims, the district argued that the student had been unilaterally placed for the 2020-21 school year and that the parent had provided the district with a ten-day notice letter dated August 27, 2020, which was the date the parent's claims related to the appropriateness of the assigned school began to accrue (Tr. p. 38). The parent reargued that her section 504 claims should be heard in an impartial hearing on the merits (Tr. pp. 40-44). The parent also disagreed that a unilateral placement suggested that the district could not continue to violate the IDEA (Tr. pp. 44-45).

### C. Impartial Hearing Officer Decision

By decision dated, October 7, 2023, the IHO granted the district's motion to dismiss the parent's June 26, 2023 due process complaint notice with prejudice (IHO Decision at p. 7). The IHO found that the parent's arguments were not persuasive (id. at p. 5). With regard to the parent's section 504 claims, the IHO found that the parent did not submit sufficient evidence to substantiate a claim of gross misjudgment by the district (id.). The IHO further found that the evidence submitted by the parent in support of her brief in opposition to the motion to dismiss did not individually or cumulatively provide evidence of gross misjudgment by the district in the development of the April 2020 IEP and that the parent "did not meet the requisite burden for said law to be applied in this matter" (id. at pp. 5-6). Next, the IHO determined that settlement negotiations between the parent and the district were "not an exception to the timeline to request

an impartial hearing under the IDEA, nor d[id] they toll the applicable two-year statute of limitations" (id. at p. 6). The IHO recounted the plain language of the district's September 17, 2020 letter and found that "[r]egardless of whether the [district] misrepresented that it was seeking settlement approval from the Comptroller, [p]arent's counsel should not have withdrawn the previous [due process complaint notice] based upon that information until the settlement agreement was finalized," or should have, "if possible, refiled the [due process complaint notice] in question prior to the expiration of the applicable statute of limitations" (id.).

The IHO then determined that the parent's argument that her claims accrued on the last day of the 2020-21 school year was "in direct contradiction to the applicable law, and therefore without merit" (IHO Decision at p. 6). The IHO further found that, in cases in which a parent seeks tuition reimbursement based on a claim that the district failed to provide a FAPE, authority from the Second Circuit Court of Appeals provides that the cause of action accrues at the time the parent withdrew the student from the district's placement and unilaterally enrolled the student in a private school (id.). The IHO found that it was undisputed that the student attended the Smith School for the entire 2020-21 school year and that the parent had provided ten-day written notice of her intention to unilaterally enroll the student at the Smith School and seek public funding in a letter dated August 27, 2020 (id. at pp. 6-7). The IHO further determined that, even when applying the additional time allotted by the Governor's executive orders on tolling due to the COVID-19 pandemic, the statute of limitations expired on November 4, 2022 and the parent's claims related to the 2020-21 school year, as set forth in the June 26, 2023 due process complaint notice were time barred (id. at p. 7).

## IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in determining that her claims were barred by the IDEA's two-year statute of limitations and erred in granting the district's motion to dismiss the due process complaint notice. The parent asserts that the IHO erred in that the parent's claims did not accrue until June 30, 2021. In the alternative, the parent alleges that the IHO erred in failing to apply a tolling period to the parent's claims or a tolling agreement between the parties. The parent further contends that the IHO failed to apply the specific misrepresentation exception to the statute of limitations for the parent's IDEA claims and failed to consider the district's material misrepresentations and bad faith in dismissing the parent's section 504 claims. As relief, the parent requests that the IHO's order be reversed, and the matter remanded for an impartial hearing on the parent's IDEA and section 504 claims.

In an answer, the district denies the parent's claims and requests that the IHO's order be affirmed, and the parent's appeal be dismissed. Specifically, the district argues that the IHO correctly determined that the parent's claims were barred by IDEA's two-year statute of limitations and that no exceptions to the statute of limitations applied to the parent's claims. The district also argues that the IHO correctly dismissed the parent's section 504 claims.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 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 parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 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]).[7]

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

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

**VI. Discussion**

Initially, with regard to the parent's appeal of the IHO's dismissal of her section 504 claims, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, as 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,

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

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. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the parent's claims regarding section 504, and accordingly such claims will not be further addressed.

Next, a review of the IHO's order granting the district's motion to dismiss the parent's June 26, 2023 due process complaint notice shows that the IHO did not err in determining that the parent's claims were barred by the IDEA's two-year statute of limitations and the IHO properly granted the district's motion.

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[8] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

In this matter, the alleged action that formed the basis of the parent's claims related to the development of the April 29, 2020 IEP, and the program recommendations set forth therein accrued at the time of the CSE meeting (see Due Process Compl. Not.). The district provided evidence that the status of the April 2020 IEP was changed from draft to final on June 3, 2020 and that a prior written notice summarizing the recommendations of the April 2020 CSE was sent to the parent on July 21, 2020 (Dist. Exs. 2; 3).

[8] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

Regarding the parent's claims that the district continued in its failure to implement the IEP throughout the 2020-21 school year, this was not the nature of the parent's allegation in this matter. Rather, in the due process complaint notice, the parent alleged that, although the district identified a particular public school site for the student to attend to receive the program and services recommended in the April 2020 IEP, the school was closed during the summer, so the parent did not have an opportunity to learn about the school prior to the beginning of the school year (Parent Ex. A at p. 6).[9] The parent did not allege any violation on the part of the district after the beginning of the 2020-21 school year. For example, the parent did not allege that, after the school year began and, presumably, the assigned school reopened, she was still unable to learn about the school. Nor did the parent allege that the student attended the assigned school but the district did not implement the IEP. Rather, the action that formed the basis of the parent's claim was the district's alleged failure to provide the parent an opportunity to assess the appropriateness of the assigned public school prior to the beginning of the school year and accrued at the time the parent knew of the district's alleged failure, which was no later than the first day of the school year when the parent stopped waiting for an opportunity to assess the assigned public school and, instead, enrolled the student at the unilateral placement. Based on the above, the parent's June 26, 2023 due process complaint notice was filed more than two years after her claims accrued. The parent will not be able to pursue her claims further unless an exception to the statute of limitations applies.

As summarized above, the parent's argument for an exception to the statute of limitations centers around the parties' settlement negotiations (see Due Process Compl. Not. at p. 7). The parent claims that the district's conduct—which induced her to withdraw her prior due process complaint notice—constituted a specific misrepresentation exception to the statute of limitations and also tolls the statute of limitations.

In order for the specific misrepresentation exception to apply, the district must have intentionally misled or knowingly deceived the parent regarding a relevant fact (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,

[9] While parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191–92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]). On the other hand, 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]).

2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; see also Application of a Student with a Disability, Appeal No. 13-215). In Application of a Student with a Disability, Appeal No. 20-082, an SRO found that evidence that the district had made an offer of settlement to a parent and that the offer was accepted did not support a finding that the district made a specific misrepresentation that the district had resolved the problem forming the basis of the complaint. In that case, the district's settlement offer included the limiting language that it was contingent upon approval from the Comptroller. The SRO in that matter found that the proposed settlement subject to comptroller approval was not a misrepresentation of the district's intentions sufficient for the parent to rely on it in failing to commence another proceeding for over one year (Application of a Student with a Disability, Appeal No. 20-082).

Here, there is no evidence in the hearing record that an offer of settlement was made to the parent; further, as correctly relied on by the IHO, the district's September 17, 2020 letter explicitly notified the parent that any settlement negotiations or agreements subject to comptroller approval would not toll the statute of limitations (Parent Ex. iv at p. 1).[10] Further, there is no evidence in the hearing record to support the parent's claim that the district stated it was requesting comptroller approval when it was not. The parent's own summary of the course of the parties' settlement negotiations does not allege that the negotiations reached that point (see Due Process Compl. Not. at p. 7). Even if the district had made a representation that it was seeking comptroller approval, a contingent proposal for settlement is not the kind of statement that includes the characteristic of the intentional or knowing deception required for application of the "specific misrepresentation" exception to the statute of limitations (see D.K., 696 F.3d at 245-46). The IHO was correct in his assessment that "[p]arent's counsel should not have withdrawn the previous [due process complaint notice] based upon [settlement negotiations] until the settlement agreement was finalized" (IHO Decision at p. 6).

Turning to the parent's remaining tolling arguments, the IHO correctly determined that applying the Governor's executive orders on tolling during the COVID-19 pandemic gave the parent until November 4, 2022 to file her due process complaint notice (see IHO Decision at pp. 5, 7). The parent's argument that a clerical error, that occurred between April 21, 2021 and June 23, 2021, caused the accrual date of her claims to shift to June 23, 2021 is without merit. The prior proceeding was filed in September 2020 and withdrawn in August or September 2022 (Prehr'g Br. in Opp'n at pp. 3, 4; Dist. Mot. to Dismiss at p. 1). Any clerical errors that occurred while that case was pending would not support a finding that the statute of limitations would be tolled or, as apparently argued by the parent, that the limitations period would begin to run anew on June 23, 2021 and continue for an additional two years

Here, the parent withdrew her due process complaint notice without a finalized settlement in place, and as a consequence, the statute of limitations continued to run as if that earlier due process complaint notice had never been filed (Application of a Child with a Disability, Appeal No. 06-126; see A.B. Dick Co. v. Marr, 197 F.2d 498, 502 [2d Cir. 1952] [finding that a "voluntary

[10] The parent argues that the September 2020 letter stated that a due process complaint notice tolled the statute of limitations; however, this is factually inaccurate. As summarized above, the letter stated that neither a 10-notice letter, settlement negotiations, nor a settlement agreement subject to comptroller approval tolled the limitations period and that a due process complaint notice would have to be filed "before the expiration of the statute of limitations to preserve your rights" (Parent Ex. iv).

dismissal of a suit leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought, thus vitiating and annulling all prior proceedings and orders in the case, and terminating jurisdiction over it for the reason that the case has become moot"] [internal citations omitted]; Long v. Card, 882 F. Supp. 1285, 1288-89 [E.D.N.Y. 1995] [finding a claim time-barred after plaintiff's voluntary discontinuance]; see also Hollenberg v. AT&T Corp., 2001 WL 1518271, at *1-*2 [S.D.N.Y. 2001]).

In summary, review of the evidence in the hearing record demonstrates that the parent's claims, which accrued, at the latest, on or before the first day of the 2020-21 school year, are time barred due to the statute of limitations, the specific misrepresentation exception does not apply to parent's claims, and no tolling periods, other than the tolling created by the executive orders related to the COVID-19 pandemic, apply to the parent's claims. Therefore, the IHO properly granted the district's motion to dismiss the parent's June 25, 2023 due process complaint notice on statute of limitations grounds.

## VII. Conclusion

Having determined that the IHO correctly found that the parent's claims related to the 2020-21 school year were barred by the IDEA's two-year statute of limitations and that no exceptions or tolling periods applied to allow the claims to go forward, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**December 8, 2023**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**