The University of the State of New York

The State Education Department
State Review Officer
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No. 24-373

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:
Littman Krooks LLP, attorneys for petitioner, by Marion M. Walsh, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 denied her request to be reimbursed for her son's tuition at the Brehm Preparatory School (Brehm Prep) for the 2020-21 school year, Q&A Associates (Q&A) for the 2021-22 and 2022-23 school years. 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

A CSE convened on March 24, 2020, found the student eligible for special education as a student with an other health impairment and developed an IEP with a projected implementation date of April 7, 2020 (Parent Ex. A).[1] The March 2020 CSE recommended that the student attend a 12:1+1 special class in a State-approved residential nonpublic school and receive two 30-minute sessions per week of individual counseling services and two 45-minute sessions per week of individual occupational therapy (OT), all on a 12-month basis (id. at pp. 16-17, 20, 22). In the

[1] The student's eligibility for special education is not in dispute but the parent contended that the disability category of other health impairment was not the most appropriate (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]; see also Parent Ex. GG at p. 14).

interim while the district's central based support team (CBST) searched for an appropriate residential program, the CSE recommended that the student attend a 12:1+1 special class in a district specialized school (id. at pp. 16, 22).

In a letter dated June 22, 2020, the parent, through an attorney, notified the district of her disagreement with the March 2020 IEP and of her intent to place the student at Brehm Prep for the 12-month 2020-21 school year and seeking funding from the district (Dist. Ex. 4).[2, 3]

The student attended Brehm Prep, a residential school in Illinois, for the 2020-21 school year (eleventh grade) beginning on August 24, 2020 (see Parent Exs. C; D).

In an email to the district dated July 12, 2021, the parent noted the student would not be returning to Brehm Prep for the 2021-22 school year and, therefore, requested that the district refer the student's placement to the CBST to identify a residential therapeutic program (Parent Ex. O at p. 1). The district conducted an updated social history on July 27, 2021 (Dist. Ex. 1).

A CSE convened on July 27, 2021, found the student continued to be eligible for special education as a student with an other health impairment, and developed an IEP for the student with a projected implementation date of September 1, 2021 (Parent Ex. E). The July 2021 CSE continued the recommendations for the student to attend a 12:1+1 special class in a State-approved nonpublic residential school and receive counseling and OT services on a 12-month basis (compare Parent Ex. E at pp. 16-17, 21, with Parent Ex. A at pp. 16-17, 20).

For the 2021-22 school year, the student attended Q&A, a residential program in West Virginia for individuals over the age of 18 who had "struggled to reach independence" (see Parent Exs. P-T; V; HH at ¶¶ 20, 23).

In an email to the district sent on March 22, 2022, the parent inquired about the status of the CBST's search for a residential placement and noted that she had never received a copy of the student's "most recent IESP [sic] from last summer" (Parent Ex. O at pp. 2-3).

According to an email from the chief operations officer (COO) for Q&A, in early May 2022, the student would be taking "his equivalency test" and had "a very high likelihood of passing and getting his diploma" (Parent Ex. W). On May 12, 2022, the student was issued a high school equivalency diploma from the State of West Virginia (Parent Exs. X; Y).

[2] Brehm Prep has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] District's exhibits 2-4 submitted with the hearing record on appeal are marked differently than they were entered into evidence. This includes district exhibit 2, an April 2020 prior written notice (marked district exhibit 3); district exhibit 3, a February 2020 social history update (marked district exhibit 4); and district exhibit 4, a June 2020 ten-day notice (marked district exhibit 2) (see Tr. pp. 30-31, 95). For purposes of this decision, the exhibits are cited as entered, not as marked (see IHO Decision at p. 11; see also IHO Interim Decision at p. 8).

The district issued an exit summary, dated June 17, 2022, indicating that, as of May 12, 2022, the student was exited from special education as he had received a "Local Diploma" (Parent Ex. F).

The student continued at Q&A for the 2022-23 school year (Parent Ex. HH at ¶ 42).

A. Due Process Complaint Notice

In a second amended due process complaint notice dated April 11, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years (Parent Ex. GG).[4], [5] With respect to the 2020-21 school year, the parent argued that the statute of limitations should not apply to bar her claims since the district denied the parent information about the program it recommended for the student and made representations to the parent that it had resolved certain matters underlying the complaint (id. at pp. 1-2, 14, 20). For all school years at issue, the parent alleged that the district had failed to evaluate the student in all areas of need, inappropriately identified the student as eligible for special education as a student with an other health impairment, and "precluded parent input" (id. at pp. 13-14).

Specific to the March 2020 CSE and IEP, the parent alleged that the district failed to provide her prior written notice or a copy of the procedural safeguards notice and that the CSE was not properly constituted and did not recommend a functional behavioral assessment (FBA) despite the student's behavioral needs, developed an inappropriate post-secondary transition plan for the student, developed annual goals that were not aligned with the student's present levels of performance, and recommended an interim placement in a district specialized school that was not reasonably calculated to enable the student to receive educational benefit (Parent Ex. GG at pp. 10-11, 13-14). In addition, the parent contended that the district did not pursue a search for a State-approved residential placement for the student (id. at pp. 11, 14).

Turning to the July 2021 CSE and IEP, the parent asserted that the district failed to provide her prior written notice or a copy of the procedural safeguards notice and that the CSE was improperly constituted and inappropriately carried over the present levels of performance, annual goals, and program recommendations set forth in the March 2020 IEP and failed to recommend a speech-language therapy evaluation or services (Parent Ex. GG at pp. 12, 13-14). Further, the parent alleged that the district had still not identified a residential placement for the student to attend (id. at p. 12).

Finally, the parent contended that the district inappropriately exited the student from special education in June 2022 (Parent Ex. GG at pp. 13, 20).

[4] The original and first amended due process complaint notices were dated December 4, 2023 and January 18, 2024, respectively (see Jan. 18, 2024 Amend. Due Process Compl. Not.; Dec. 4, 2023 Due Process Compl. Not).

[5] The parent also claimed that the district violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794 (Parent Ex. GG at pp. 2, 20).

The parent alleged that Brehm Prep was an appropriate unilateral placement for the 2020-21 school year, that Q&A was an appropriate unilateral placement for the 2021-22 and 2022-23 school years, and that equitable considerations weighed in favor of an award of tuition reimbursement for all three school years (Parent Ex. GG at pp. 14-21). For relief, the parent requested tuition reimbursement for the costs of the student's tuition at Brehm Prep for the 2020-21 school year as well as related expenses and the costs of the student's tuition at Q&A for the 2021-22 and 2022-23 school years (id. at p. 21).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 4, 2024 and concluded on May 28, 2024 after six days of proceedings inclusive of prehearing and status conferences, a bifurcated hearing date devoted to the issue of the statute of limitations, and hearing dates devoted to the merits (Tr. pp. 1-242).

In an interim decision dated March 28, 2024, the IHO found that the parent's claims relating to the 2020-21 and 2021-22 school years were barred by the statute of limitations (IHO Decision at p. 7).[6] The IHO found that the parent knew or should have known about her claims relating to the March 2020 CSE and IEP no later than April 4, 2020, representing the date of the April 1, 2020 prior written notice plus three days for mailing (id. at p. 4). Taking "COVID tolling" into account, which was in effect until November 4, 2020, the IHO determined that the statute of limitations on the parent's claims pertaining to the 2020-21 school year expired on November 4, 2022 and that, therefore, the parent's assertion of such claims in the December 2023 due process complaint notice was untimely (id.). As for the 2021-22 school year, the IHO concluded the parent knew or should have known about her claims relating to the July 2021 CSE and IEP no later than the date on which the parent unilaterally placed the student at Q&A in September 2021 (id.). Accordingly, the IHO found that the parent's claims relating to the 2021-22 school year as raised in the January 2024 amended due process complaint notice were barred by the statute of limitations (id.).

Next, the IHO examined the exceptions to the statute of limitations and found that neither applied (Interim IHO Decision at pp. 4-6). Regarding the specific misrepresentation exception, the IHO determined that correspondence between the parties regarding the possibility of settlement did "not definitively state that claims for the 2020-2021 school year would be settled" (id. at p. 5). The IHO also found that the withholding information exception did not apply as the April 2020 prior written notice referred the parent to a website to download a copy of the procedural safeguards notice or notified her she could request a copy and, further, the parent was represented by her attorney before June 2020 (id. at p. 6). The IHO concluded that, even if the district did not provide the parent with a procedural safeguards notice, the evidence did not support a finding "that such failure was the cause of the Parent's decision to not file a [due process complaint notice] within the statute of limitations period" (id.).

In a final decision dated July 25, 2024, the IHO found that the district did not have an obligation to provide the student with a FAPE for the 2022-23 school year and, therefore, denied

[6] The IHO found that the parent's claims under section 504 could proceed for the 2021-22 school year (Interim IHO Decision at pp. 4, 7).

the parent's requested relief (IHO Decision at p. 3, 8).[7, 8] Specifically, the IHO found that there was no evidence in the hearing record to rebut the statement on the June 2022 exit summary that the student had earned a local diploma, which was the equivalent to receipt of a high school diploma according to State law, which terminated the student's entitlement to a FAPE (id. at p. 8).

Notwithstanding her finding that the student was not entitled to a FAPE for the 2023-24 school year, the IHO went on to consider the appropriateness of the unilateral placement and found that the parent did not meet her burden to prove that Q&A was appropriate (IHO Decision at pp. 8-). In particular, the IHO found that Q&A did not provide academic instruction for the 2022-23 school year and that the types of activities provided at the program were not appropriate for the student given his IQ score (id. at p. 9).

Based on the foregoing, the IHO denied the parent's requests for relief (IHO Decision at p. 10).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her request for tuition reimbursement for the 2020-21, 2021-22, and 2022-23 school years. The parent asserts that the IHO erred in finding that the parent's claims pertaining to the 2020-21 and 2021-22 school years were barred by the IDEA's statute of limitations. In particular, the parent claims that the IHO improperly decided the issue before the full impartial hearing completed, identified incorrect accrual dates, and improperly concluded that an exception did not apply.

Next, the parent contends that the IHO erred in finding that the June 2022 exit of the student from special education eligibility was appropriate and that, therefore, the student was not entitled to a FAPE for the 2022-23 school year. The parent asserts that the student earned a GED, not a local diploma, and that receipt of a GED does not end a student's entitlement to a FAPE. Finally, the parent argues that the IHO erred in failing to address the appropriateness of Brehm Prep for the 2020-21 school year or Q&A for the 2021-22 school year and in finding that the parent did not meet her burden to prove that Q&A was an appropriate unilateral placement for the 2022-23 school year.

In an answer, the district responds to the parent's allegations and argues that the IHO's interim and final decisions should be upheld in their entirety. In addition, the district asserts that the parent did not appeal certain of the IHO's findings and that, therefore, those determinations should be deemed final and finding.[9] In particular, the district contends that the parent did not

[7] The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-13).

[8] With respect to the 2021-22 school year, the IHO found that the district did not violate section 504 (IHO Decision at pp. 3, 5-7).

[9] The district alleges that the IHO's determination regarding section 504 should be deemed final and binding; however, in her appeal, the parent alleges that the IHO erred in her determinations and under section 504 but correctly notes that an SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA

appeal the IHO's finding pertaining to the withholding information exception to the statute of limitations that, even if the parent did not receive a procedural safeguards notice, the parent was aware of her procedural rights no later than June 2020 when the ten day notice was submitted by her attorney.

In a reply, the parent responds to the arguments and allegations raised in the district's answer.

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

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

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]).[10]

[10] 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).

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

A. Statute of Limitations

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]).[11] 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]).

Initially, regarding the bifurcation of the impartial hearing to separately address the district's motion on the statute of limitations, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the

[11] 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]).

IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004),[12] but generally regulations do not address the particulars of motion practice including the timing for such applications.[13] Instead, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "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. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

Here, the parent does not point to any specific evidence or argument that she was unable to present due to the IHO's decision to bifurcate the statute of limitations issue. It is not impermissible for an IHO, in the context of managing a particular hearing, to bifurcate a threshold, potentially dispositive motion based on a statute of limitations defense as it may obviate the need to proceed further into the evidentiary hearing, at least on claims that are stale.

1. Accrual

Contrary to the parent's allegation that the IHO took a "superficial analysis" of the accrual date, the IHO accurately identified documents in the hearing record that, on their face, reflect the parent's knowledge of her claims. For example, regarding the March 2020 IEP, the parent attended the CSE meeting with an attorney and received a copy of the IEP, the April 2020 prior written notice summarized the March 2020 CSE's recommendations and, in June 2020, the parent, through an attorney, notified the district of her disagreement with the March 2020 IEP and of her intent to unilaterally place the student at Brehm Prep (see Parent Exs. A at p. 22; N ¶ 8; Dist. Exs. 2; 4). Regarding the 2021-22 school year, the parent attended the July 2021 CSE meeting and unilaterally placed the student at Q&A as of the beginning of the school year (see Parent Exs. E at p. 23; N ¶

[12] While permissible, summary disposition procedures should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]).

[13] The exception is a sufficiency challenge, which addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA. The IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c-d]; 8 NYCRR 200.5[i][2]-[3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

27); accordingly, even if the parent did not receive a copy of the IEP after the CSE meeting, her actions in unilaterally placing the student demonstrate she knew of her claims. Courts in the Second Circuit have held that parents demonstrate that they know (or should know) about alleged deficiencies with a public school program when they enroll their child at a unilateral placement (see L.B. v. New York City Dep't of Educ., 2022 WL 704712, at *5 [S.D.N.Y. Mar. 8, 2022] ["the enrollment of [the student] in a new school combined with a substantial monetary commitment triggered the statute of limitations"]; M.D., 334 F.3d at 221 [withdrawal of student from public school constituted date when parents knew or should have known of injury]; R.B. v. New York City Dep't of Educ., 2011 WL 4375694, at *4 [S.D.N.Y. Sept. 16, 2011] [finding a parent "clearly had reason to know of his injury in September 2006 when he committed to sending [the student] to the private school of his choice"]).

The parent contends that the district failed to evaluate the student thereby depriving her of enough information to formulate an opinion about the IEPs. However, while the parent claims additional evaluations would have provided accurate measures of the student's functioning, here, "there is no reasonable dispute that she knew there may have been problems — that is, that [the student] was disabled and that the [district] was not adequately accommodating him" (N.J. v. NYC Dep't of Educ., 2021 WL 965323, at *10 [S.D.N.Y. Mar. 15, 2021] [rejecting a parent's claim that the statute of limitations accrued as of the date of a private evaluation that offered a different diagnosis for the student]). Moreover, the parent states that she came to understand the student's needs when the student began at Brehm for the 2020-21 school year, she saw him "begin to achieve" and he "received full evaluations and a review of his needs" (Parent Ex. N ¶ 25). Yet, the Brehm evaluations of the student were conducted in August and September 2020 and the student attended Brehm for the 2020-21 school year (see Parent Exs. C; D). Adopting these dates as dates of accrual would still support a finding that, as of the date of the December 4, 2023 due process complaint notice, the parent's claims fell outside the IDEA's two-year statute of limitations.

Finally, the parent asserts that it was not until June 2022, when the student was discharged from special education with "only life skills and an equivalency diploma," that she realized "the impact of the [district's] failure to evaluate and place [the student]." While the later acquired information about the student's diploma may have strengthened the parent's belief that the programs provided by the district during the disputed school years were inappropriate (see Parent Ex. N ¶ 39), the evidence in the hearing record demonstrates that the parent knew or should have known of the actions that formed the basis for her complaint as of as of the March 2020 and July 2021 CSE meetings or upon her unilateral placement of the student for each respective school year, at the latest.

Based on the foregoing, the IHO's calculations regarding when the parent knew or should have known are supported by the hearing record and the parent has not demonstrated that those dates were incorrect. As such, the parent's claims accrued more than two years prior to the filing of the December 4, 2023 due process complaint notice. Having determined that the parent's IDEA claims were not raised within the applicable limitations period, I turn to the question of whether or not the IHO erred in his application of the statutory exceptions to the IDEA's statute of limitations.

2. Withholding Information

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist. v. C.M., 744 Fed. App'x 7, 11 [2d Cir. Aug. 1, 2018]; R.B., 2011 WL 4375694, at *4, *6; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notice and procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulation, a district must provide parents with a copy of a procedural safeguards notice annually, as well as: upon initial referral or parental request for evaluation; the first occurrence of the filing of a due process complaint; and upon parental request (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Even if the district had not supplied the parent with notices for all of the school years at issue, the totality of the evidence in the hearing record demonstrates that she was sufficiently aware of her rights (see N.J., 2021 WL 965323, at *12; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45). A February 2020 social history update reflected that the "[p]arent's rights were reviewed and parent was offered a copy of the New York State Procedural Safeguards Notice but stated that she already had one" (Dist. Ex. 3 at p. 2). The evidence in the hearing record indicates that the parent received the prior written notice dated April 1, 2020 (Dist. Ex. 2). The notice stated that the parent could download a copy of the procedural safeguards notice from the district's website or call a provided phone number to request a copy (id. at p. 3). The notice gave additional sources to contact to obtain assistance in understanding the special education process (id. at pp. 3-4). Further, the prior written notice stated that, if the parent did "not agree with [the CSE's] recommendation, [she] ha[d] the right to request mediation or an impartial hearing" and provided addresses to submit such requests (id.). A July 2021 social history update stated that the parent was "well aware of her parental due process rights as well as special education procedures" (Dist. Ex. 1 at p. 1).

Further, the assistance of an individual holding him or herself out as a special education advocate or attorney creates a more compelling argument that knowledge of the limitations period and other due process rights should be imputed to a parent (see Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *10 [S.D.N.Y. June 20, 2017] [in reviewing the parent's knowledge of her rights, noting dates the parent engaged the services of an advocate, consulted

with an attorney, and acknowledged receipt of a procedural safeguards notice], aff'd, 744 Fed. App'x 7; R.B., 2011 WL 4375694, at *7 [noting that the parent attended a CSE meeting with an "attorney who specialize[d] in education law" as evidence of the parent's awareness of his rights]; Richard R., 567 F. Supp. 2d at 945 ["[I]n the absence of some other source of IDEA information, a [school district's] withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights."]). Here, the parent obtained representations and her attorney at that time attended the March 2020 CSE meeting and filed a 10-day notice on June 22, 2020, which she authorized the attorney to do (Tr. pp. 43-44, 51; Parent Ex. N ¶ 24; Dist. Ex. 4). Further, the parent testified that she had an attorney at that time because she was "trying to protect [her] rights" (Tr. p. 44).

As such, the hearing record supports the IHO's determination that the withholding exception does not apply as the parent knew her rights and was not prevented from filing a due process complaint notice.

3. Specific Misrepresentations

Next, the parent argues that the IHO erred in finding that the specific misrepresentation exception did not apply in light of evidence that the district represented that it was resolving the parent's complaint pertaining to the 2020-21 school year and settling the matter.

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, 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, the parent submitted 20 pages of emails to support her contention that the district made specific misrepresentations that it would settle this matter (see Parent Ex. H). However, a review of these emails does not demonstrate that the district ever made a settlement offer to the parent. Specifically, the first email regarding settlement was sent from the office of the parent's attorney at the time indicating that they were awaiting a settlement offer on July 7, 2022 (Parent Ex. H at p. 18). The district responded that they were working on a submission for the comptroller on that date (id. at p. 17). The office then continually emailed the district that they were awaiting an initial offer several time and the district only responded two times, with neither response being an offer of settlement (see id.). These emails do not support the parent's contention that the district made a specific misrepresentation that the matter was settled. Moreover, the parent testified that

she thought the district would pay for the 2020-21 school year but was not aware of a specific offer as she left it to her attorneys (Tr. pp. 46-47).

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 hearing record does not demonstrate that the district ever made the parent a settlement offer, the discussions of settlement did not prevent the parent's former counsel from filing a due process complaint notice, even while attempting to negotiate with the district, in order to preserve the parent's claims.

As neither exception applies, the IHO properly found that the parent's claim relating to the 2020-21 and 2021-22 school years are time barred.

B. 2022-23 School Year Eligibility for Special Education

In New York State, a student who is eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (Educ. Law §§ 3202[1]; 4402[1][b][3][c]; 34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1]; 4401[1]; 4402[5]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1]; [a][3][ii]).[14] Students with disabilities "who have graduated from high school but have not been awarded a regular high school diploma" remain eligible to receive a FAPE (34 CFR 300.102[a][3][ii]; 8 NYCRR 100.5[b][7][iii]). A regular high school diploma does not include a high school equivalency diploma, an IEP diploma, or either a skills and achievement commencement credential or a State career development and occupational studies commencement credential (8 NYCRR 100.5[b][7][iii]; see 34 CFR 300.102[a][3][iv]).[15]

While SROs have, at times, been compelled to address claims before them related to the validity of the graduation of or issuance of a diploma to a student with a disability, they must exercise caution with respect to the degree to which their jurisdiction over IDEA matters also allows them to make affirmative findings concerning whether or not a particular student has met the State requirements to obtain either a Regents or local diploma, particularly given that the

[14] Although not applicable in the instant matter, recently, the Second Circuit has held that Connecticut's state-administered, publicly funded adult education programs constituted "public education" under the IDEA, and thus, ending an entitlement to a FAPE for individuals who were eligible for special education and between the ages of 21 and 22 violated the IDEA (A.R. v. Conn. St. Bd. of Educ., 5 F.4th 155, 163-67 [2d Cir 2021]). While this holding has yet to be extended to New York and a State appellate court distinguished New York's Education Law from Connecticut's law (see Katonah-Lewisboro Union Free Sch. Dist. v. New York State Educ. Dep't, 207 N.Y.S.3d 891 [March 8 2024]), this State funds and administers adult education programs similar to those in Connecticut (see, e.g., Educ. Law §§ 3602[11]; 4604; 8 NYCRR 100.7; 157.1; 164.2; see also Office of Counsel's Formal Opinion No. 242 [July 2023], available at https://www.counsel.nysed.gov/sites/counsel/files/242.pdf).

[15] A school district cannot avoid its ongoing obligation to provide FAPE by classifying an equivalency diploma as a regular diploma (see Bd. of Educ. of Twp. of Sparta v. M.N., 258 N.J. 333, 354 [2024] [finding that a New Jersey school district could not avoid its ongoing obligation to provide FAPE to a teenager with a disability simply by classifying his state-issued GED diploma as a "regular high school diploma"]).

issuance of a diploma has historically been the province of the Commissioner of Education who has the authority to consider the validity of an award of course credit and the related issuance or revocation of a diploma (see, e.g., Appeal of K.D., 52 Ed Dept Rep, Decision No. 16,460). An impartial hearing is generally not the proper forum for disputes involving a district's decision to award or its failure to award academic course credit to a student with a disability because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 CFR. 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 10-124; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]). Further, graduation credits and requirements generally fall under the purview of the district's discretionary authority, again subject to the review of the Commissioner (see Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] [finding that "[a]fter a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]).

With that said, to the extent the student's eligibility for special education hinges on whether the student received a local diploma or an equivalency diploma, the threshold factual dispute is not foreclosed on jurisdictional grounds. Here, the hearing record includes conflicting evidence on the question. There is some indication that after the 2020-21 school year, the student was close to receiving his diploma (Parent Ex. J at p. 4). However, the hearing record does not establish whether the student obtained the additional credits needed. At the end of the 2021-22 school year, the student was issued a high school equivalency diploma from the State of West Virginia (Parent Exs. X; Y). Although the June 2022 exit summary references that the student had received a New York State local diploma (Parent Ex. F at p. 1), the district did not offer into evidence a copy of the diploma or the student's final transcript.

Ultimately, given the foregoing, it is not clear whether the student actually earned a local diploma; however, ultimately, I find it unnecessary to resolve this factual dispute in this instance because, even if the student was eligible for special education for the 2022-23 school year and the district failed to offer him a FAPE, the parent has not met her burden to prove that the unilateral placement of the student at Q&A was appropriate. It is it this issue that I now turn.

C. 2022-22 School Year—Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system

has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. The Student's Needs

While the student's needs are not at issue, a review is necessary in order to make a determination of the issue to be resolved – namely, whether Q&A Associates, Inc. (Q&A) was an

appropriate unilateral placement for the student during the 2022-23 school year. According to a June 2021 Brehm progress reports, the student attained passing grades in all subject areas and was on the honor roll for the 4th quarter (Parent Ex. J at p. 2). The report indicated that the student had a successful year in literary analysis and noted that he was able to follow the modules, write a research paper with citations, and construct a personal memoir (id.). Additionally, the report indicated that the student made progress in "his ability to tell a cohesive story from start to finish using appropriate tone, grammar, and mechanics" and that his language and word choice continued to mature as he practiced (id.). In math, the report indicated that the student struggled more during the second semester, and it was difficult to engage him in the material (id.). The teacher opined that the student "lost some of his innate curiosity and questions that were so prominent earlier in the year" (id.). The June 2021 progress report indicated that the student demonstrated weaknesses related to: transition and executive functioning; oral details; outline before essay writing; social pragmatics; abstract and figurative language; and rigid thinking patterns (id. at pp. 5-6). Furthermore, the June 2021 progress report indicated that the student struggled with self-regulation, communicating with peers, and taking other's perspectives (id. at pp. 9-10).

The June 2021 Q&A progress report included information from a January 2019 neuropsychological report which confirmed diagnoses of attention deficit hyperactivity disorder (ADHD) and Tourette's syndrome and noted that the student no longer met the criteria for a diagnosis of autism spectrum disorder (ASD) but continued to demonstrate "some residual features of ASD" (Parent Ex. J at p. 11). The progress report contained the results from an administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) which placed the student's verbal comprehension in the high average range, fluid reasoning and visual spatial skills in the superior to very superior range, working memory in the high average range, and processing speed in the borderline range (id.). The report further indicated that the student's performance was weaker on timed tasks, noting that visual and auditory attention were "grossly within the average range, but visual scanning in a timed measure fell in the borderline range" (id.). The June 2021 progress report further stated that the psychological testing indicated the student had average vocabulary, average written expression, mature grammatical structure, and superior spelling and noted that he had strong decoding skills and weaker comprehension in reading (id.). The report indicated that the residual expressions of ASD included difficulties in social pragmatics and cognitive and behavioral flexibility and noted that difficulty shifting and transitioning from one task or topic to another impacted his executive and social functioning (id.). Regarding social/emotional skills, the progress report indicated that the student expressed concern about social alienation and noted that he could misinterpret other's intentions and that he experienced circumstantial and tangential thinking (id. at p. 15). Further, it was reported that the student had difficulty understanding and incorporating feedback from others (id.).

Completion of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) Pragmatics Profile by the student's "dorm parent" in September 2020 indicated that the student's skills fell significantly below age expectations with a scaled score of 1 which fell within the .1 percentile (Parent Ex. J at p. 16). The report noted that the areas rated the lowest included: observing turn-taking rules in social interaction; eye contact; introducing appropriate topics; modifying language to fit situation and audience; apologizing and accepting apologies; responding to teasing and setbacks; and reading social situations correctly and responding to them (id.). With regard to managing emotions, the June 2021 progress report indicated that the student was a "very knowledgeable young man" who was "very well read and informed and . . . a great debater" and

noted that he asked very good questions and sought to understand things he did not (id. at p. 9). The report further noted that the student was very rigid in his thinking and that combined with his ability to express himself could cause problems for him socially (id.). Finally, the report indicated that the student had a difficult time monitoring his "air time" and seeing other people's perspectives (id.).

The June 2021 progress report contained the results of a September 2020 Theory of Mind Inventory -2 (ToMI-2) completed by the parent, which suggested a "significant delay in acquiring concepts underlying social pragmatics" (Parent Ex. J at p. 16). Based on parent response the student exhibited significant deficits in emotional introspection, true empathy, common sense in the area of social knowledge, complex social judgment, and complex emotion recognition (id. at p. 17). An informal assessment called "Double Interview" was also administered, which suggested the student had poorly developed social thinking skills (id.).

The hearing record contained a June 2022 level I vocational teacher assessment, completed by Q&A, which indicated that the student had maintained a job since October 2021 and had improved his social awareness, social skills and healthy boundaries as well as the skills needed to perform his job duties (Parent Ex. AA at p. 1; see Tr. pp. 101, 138). The vocational assessment report indicated that the student continued to need coaching in areas of completing tasks in a timely manner and being more self-motivated and aware of workload prioritization (id.). The vocational assessment report stated that the "appropriate post-secondary expectations" for the student were for him to continue learning applicable life and employment skills, noting that he did well in environments with well-defined schedules and expectations (Parent Ex. AA at p. 1). Additionally, the vocational assessment report indicated that the student had shown good progress in using appropriate social skills and healthy relationships; however, he continued to occasionally behave inappropriately with peers (id.).

According to a June 2022 report completed by the chief executive officer (CEO) of Q&A, the student learned primarily through visual and tactile styles and did not do well with only auditory instructions (Parent Ex. BB at p. 2). Additionally, the student needed to be shown a skill or task multiple times and provided with opportunities to practice the task with supervision and real time feedback (id.). The Q&A CEO reported that the student was a good reader with strong reading comprehension and estimated his reading level to be 12th grade (id.). In addition, she reported the student's math skills were at grade level (id.). The CEO opined that the student's biggest challenge was social skills, specifically noting that he did not have appropriate social boundaries, did not follow directions, was unable to have appropriate reciprocal conversations, did not read social cues, and was very argumentative when a peer disagreed, or his opinion was challenged (id. at p. 3). Finally, the teacher reported that the student had very rigid thinking, and limited interests, engaged in inappropriate behaviors, and required direct teaching and supervision of appropriate boundaries in all social and personal relationships (id. at p. 4).

2. Q&A

According to the hearing record, Q&A works with young adults ages 18 and up in developing life skills and obtaining consistent employment (Parent Exs. Q at p. 1, II at ¶ 13). The brochure included in the hearing record stated the program's "emphasis on learning and practicing applied life skills in a real world setting, along with healthy individual decision making, gives

clients the skills they need to cope with day to day responsibilities of adulthood in a successful and productive fashion" (Parent Ex. Q at p. 2).

In his written testimony, the chief operating officer (COO) of Q&A indicated that its mission was to "help young adults cultivate independence" (Parent Ex. II at ¶ 12). He explained that Q&A works with young adults 18 and older "who have struggled to reach independence for a variety of reasons such as the inability to develop and implement the life skills needed to be successful, or struggling to obtain consistent employment" (id. at ¶ 13). He further explained that, when the student began attending Q&A, he needed to work on transition goals and life skills, and he required support for his academics (id. at ¶ 15). The COO described that "Q&A and its services" provided academic support for high school completion (id. at ¶ 24); although the COO later acknowledged that the support staff at the program were not teachers (Tr. p. 134). The COO also indicated that the student participated in "SYMMETRY Neuro-Pathway Training," which he described as a "method to personalize and guide brainwave patterns . . . to help the brain better regulate, thus often alleviating unwanted symptoms and behaviors" (Parent Ex. II at ¶ 20). According to the COO, this method allowed the student to improve "his ability to manage thoughts and behaviors to better relate with the outside world in productive ways without relying on drugs and enhances other therapies" (id. at ¶¶ 19-20).

A March 10, 2022 "Education Plan" indicated the student's IQ scores were "between 44 and 60" and were "consistent with significant cognitive impairment" (Parent Ex. V at p. 1).[16] The education plan stated that "[r]ather than focusing on academic pursuits, the test results outline[d] the skills and support the [s]tudent will need to develop a safe and meaningful life" (id.). The education plan further stated that the approach of Q&A was to "incorporate [the student's] academic growth into a life skills curriculum so he c[ould] achieve some level of high school completion while also developing and practicing the real-life skills he so desperately needs" (id.). According to the education plan, the academic experience Q&A was providing was "educationally relevant based on [the student's] individual needs" (id.). The education plan indicated that in order for the student to reach his highest level of functioning he required "the right supports as well as academic instruction" (id.). According to the plan, this included the student residing in a residential setting with: a highly structured environment with predictable routines and rules, access to mental health care providers as needed, a therapeutic milieu, positive behavior support, support for activities of daily living, career training, and life skills instruction (Parent Ex. V at pp. 1-8; see Parent Ex. II at ¶ 18).

[16] A January 2019 neuropsychological evaluation reported that the student attained a full-scale IQ score of 120, in "the superior range of overall intellectual functioning and cognitive development" (Parent Ex. JJ at p. 4). Later an August and September 2019 evaluation reported results of administration of The Revised Beta III Examination, 3rd edition (Beta-III), which "is designed to measure the general intellectual ability of persons who are relatively illiterate or non-English speaking, or suspected of having language difficulties" or "as a non-verbal measure for members of the general population" (Parent Ex. KK at p. 6). The student received a BETA IQ score of 70, in the borderline intellectual range (id. at pp. 6, 9). The evaluation indicated that in completing the assessment, the student " struggled with cognitive flexibility and problem solving tasks that required timely planning and organization" (id. at p. 9). According to the Q&A education plan, the student's IQ was reported as "between 40 and 60" in a "psychological assessment report completed by [a] licensed psychologist"; however, it does not appear that the referenced assessment appears in the hearing record (Parent Ex. V at p. 1).

The COO testified that, following completion of his equivalency diploma, the student received daily instruction in the life skills curriculum described in the education plan, which he considered academic (Tr. pp. 185-86). He explained that the academic curriculum provided to the student included bookkeeping, banking activity and budgeting (mathematics) that was provided in a classroom environment in the program's life skills office, as well as during real time activities such as grocery shopping (Tr. pp. 186-87). The student worked in a number of businesses owned by Q&A primarily after he finished obtained his equivalency diploma (Tr. pp. 187-90). The COO explained that, after the student attained his GED, the instruction he received included: field trips designed to enhance his ability to work and operate in a community setting; arts and crafts; gardening; an equine assisted learning program; farm experiences and other "natured based programming" (Tr. pp. 195-96).

As noted above, while a parent need not show that a unilateral placement furnishes every special service necessary to maximize a student's potential, in order to qualify for reimbursement under the IDEA, a parent has the burden to establish that the unilateral placement provides specially designed instruction to meet the student's unique needs, as well as support services as necessary to allow the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39 [b][3]).

Here, the totality of the circumstances shows that Q&A was not an alternative schooling environment, but rather offered a program to support young adults struggling to make the transition to adulthood focused on supporting and developing life, social/emotional and pragmatic skills, and appropriate working behaviors (Tr. pp. 134, 185-196; see Parent Exs. J; P-S; AA; BB). Thus, while the student may have benefited from such support, the evidence does not support a finding that the program offered specially designed instruction and in particular, there is no indication that the supports were assisting the student to access the general education curriculum or to meet educational standards.[17]

[17] The circuit courts addressing the question of residential placements have offered several varying and at times conflicting tests for whether a school district must pay for medical or mental health services in residential settings under IDEA (see Mrs. B., 103 F.3d at 1122; Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 694 [3d Cir. 1983] [applying an "inextricably intertwined" test noting that a residential placement may be considered necessary for educational purposes if the medical, social or emotional problems leading to such placement are not segregable from the learning process]; Richardson Indep. Sch. Dist. v. Michael Z, 580 F.3d 286, 299 [5th Cir. 2009] [applying a primarily orientated test]; Clovis Unified Sch. Dist. v. California Off. of Admin. Hearings, 903 F.2d 635, 643 [9th Cir. 1990] [applying a "necessary for educational purposes" test]). All of the tests, however, require a clear relationship between the noneducational, medical or mental health services being provided and the educational opportunities such services were designed to support (see S.B. v. New York City Dep't of Educ., 2022 WL 3997016, at *6 [S.D.N.Y. Sept. 1, 2022] [noting that requiring such a relationship between the noneducational supports and the educational needs is "consistent with Second Circuit law, which focuses on 'whether the child requires the program to receive educational benefit'"], quoting see Mrs. B., 103 F.3d at 1122).

Although I am sympathetic to the parent's plight in her efforts to support the student; there is insufficient basis to disturb the IHO's determination that the parent did not meet her burden to prove the unilateral placement at Q&A was appropriate.

VII. Conclusion

Having found that the IHO correctly found that the 2020-21 and 2021-22 school year are time barred and that Q&A was not an appropriate unilateral placement for the 2022-23 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 4, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER