The University of the State of New York

The State Education Department
State Review Officer
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No. 24-407

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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) issued after remand, which denied her request to be reimbursed by the respondent (the district) for her daughter's tuition at the Special Torah Education Program (STEP) for the 2021-22 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

This appeal arises from a remanded IHO decision. An SRO remanded the issue of whether the district failed to provide the parent with a school location letter for the 2021-22 school year and whether the claim accrued within the statute of limitations period (see Application of a Student with a Disability, Appeal No. 24-074). As the parties' familiarity with this matter is presumed, and given the limited nature of the issue on appeal, the student's educational history and the procedural history of this matter will not be recited here in detail.

Briefly, for the 2021-22 and 2022-23 school years CSEs determined the student was eligible for special education as a student with autism (Dist. Exs. 2 at p. 1; 4 at p. 1).[1] For a portion of the 2021-22 school year and for the 2022-23 school year, the parent unilaterally placed the student at STEP (see Parent Exs. O; Q; EE; FF; GG).[2] The parent filed a due process complaint notice dated June 26, 2023 asserting that the district failed to provide a FAPE to the student for the 2021-22 and 2022-23 school years (Parent Ex. A). As relevant to this appeal, the parent specifically asserted that the district failed to provide the student with a public school placement for the 2021-22 school year (id. at p. 1).

A. January 8, 2024 Impartial Hearing Officer Decision and Subsequent Appeal

After a prehearing conference on August 3, 2023, an impartial hearing convened on September 11, 2023, and concluded on November 28, 2023, after six days of proceedings (Tr. pp. 1-209).

In a decision dated January 8, 2024, the IHO determined, among other things, that the parent's claims for the 2021-22 school year were barred by the IDEA's statute of limitations (see Jan. 8, 2024 IHO Decision). The parent appealed and, as relevant here, asserted that the IHO erred in finding that the claims for the 2021-22 school year were time barred by the IDEA's two-year statute of limitations (Application of a Student with a Disability, Appeal No. 24-074).

In a decision dated April 22, 2024, an SRO found that the IHO did not consider the accrual date of the parent's claim that the district did not provide the parent with a school location letter for purposes of the statute of limitations (Application of a Student with a Disability, Appeal No. 24-074). The matter was remanded to the IHO to make a factual finding regarding the accrual date of the parent's claim and, if necessary, consider the substance of the claim that the district failed to provide the parent with a school location letter for the 2021-22 school year (see id.).

B. Impartial Hearing Officer Decision on Remand

After remand, the parties submitted written briefs to the IHO on June 20, 2024 (IHO Exs. IV-V).

In a decision on remand dated August 14, 2024, the IHO determined that a CSE meeting occurred on April 20, 2021, which the parent attended, and on April 27, 2021, the district sent a prior written notice to the parent (Aug. 14, 2024 IHO Decision at p. 4). The IHO noted that any claims related to a CSE meeting or the contents of an IEP developed as a result of the meeting accrued on the date of the CSE meeting (id.). The IHO found, therefore, that the parent's claims related to the development and recommendations in the April 2021 IEP accrued on April 20, 2021

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

[2] STEP 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).

at the time of the CSE meeting and, as the due process complaint notice in question was dated June 26, 2023, the claims asserted therein were barred by the statute of limitations (id.).

Additionally, the IHO found that, as of April 20, 2021, the student was still enrolled at the public school, despite having not attended the school for over a year, and that the student had never been withdrawn from the public school (Aug. 14, 2024 IHO Decision at pp. 4-5). The IHO further found that the April 2021 IEP recommended that the student continue to remain at the public school (id. at 5). The IHO determined that, under these circumstances, it was not necessary for the district to provide a school location letter as the parent was already aware of the public school location that the student was assigned attend (id.).

The IHO also noted that the parent did not testify at the impartial hearing either to reiterate the claims in the due process complaint, to clarify her belief as to what transpired at the April 2021 CSE meeting, or to rebut the testimony of the district witnesses (Aug. 14, 2024 IHO Decision at p. 5). The IHO concluded that the parent knew or should have known of any alleged violations on either as of the date of the CSE meeting on April 20, 2021, or at the latest on April 27, 2021 when the parent received a prior written notice (id.). As the parent filed her due process complaint notice on June 26, 2023, the IHO found that the parent's claims regarding the 2021-22 school year were barred by the statute of limitations (id.) The IHO further found that, even with the COVID-19 tolling period, the parent's claims for the 2021-22 school years were barred by the statute of limitations (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent's claims for the 2021-22 school year were barred by the statute of limitations. Specifically, the parent argues that there is no evidence in the hearing record that the April 2021 IEP or prior written notice were sent to or received by the parent and the IHO incorrectly assumed that the student was still enrolled at the public school. For relief, the parent requests direct funding of the student's tuition at STEP for the 2021-22 school year.

In its answer, the district responds to the parent's allegations and argues that the IHO's decision on remand should be upheld.

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]).[3]

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 and FAPE

The parent appeals from the IHO's finding that the claims asserted in the June 26, 2023 due process complaint notice with respect to the 2021-22 school year were barred by the 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]).[4] Because an IDEA claim accrues when the parent knew or

[3] 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).

[4] 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]).

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]).

The parent argues that the student was not enrolled at the public school for the 2021-22 school year and did not receive a school location letter from the district and that, therefore, the parent's claim did not accrued until, at the earliest, July 1, 2021, the first day of the 12-month 2021-22 school year. The district argues that the IHO correctly found the student was still enrolled at the public school for the 2021-22 school year and that, therefore, the district was not required to send the parent a school location letter, and the parent's claim accrued on April 20, 2021, the date of the CSE meeting. Thus, the point at which the parent knew or should have known of the school location that the district assigned the student to attend for the 2021-22 school year must be considered.

Once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.

The bricks and mortar location that the district assigned the student to attend is not stated in either the student's April 2021 IEP or in the prior written notice (see Dist. Exs. 1; 2). Both the student's April 2021 IEP and the prior written notice list "[the district] Specialized School" as the placement recommendation (Dist. Ex. 1; 2). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y. v. New York City Dep't of Educ., 584 F.3d 419, 420 [2d Cir 2009]). However, the district did not submit any evidence at the impartial hearing demonstrating that the location of the student's placement had ever been communicated to the parent,

by any means, before July 1, 2021.[5] In particular, it is undisputed that the district did not provide the parent with a school location letter prior to the 2021-22 school year.

With respect to the district's argument that the student was continually enrolled in the public school and that, therefore, it was understood that the student would attend the same location, the hearing record demonstrates that the student had not attended the public school since March 2020 and the CSE meeting occurred over a year later in April 2021 (Dist. Exs. 2 at p. 24; 14 at p. 2).[6] The parent testified that she told the student's teacher in March 2020 that remote education was not going to work for the student and that the parent would be homeschooling the student (Tr. p. 177).[7]

The district's special education service coordinator testified that, as of the April 2021 CSE meeting, the student was still enrolled at the public school even though she believed that the student attended a private school for the 2020-21 school year (Tr. pp. 115, 121-24). The district special education service coordinator testified that she had access to the student's IEP and that this indicated to her that the student was still enrolled at the public school (Tr. pp. 123-24). On the other hand, she testified that she did not have firsthand knowledge regarding whether the student was enrolled at the public school as of the date of the April 2021 CSE meeting and could not speak to how students get discharged (Tr. p. 123).

Other than the circumstantial evidence noted by the special education service coordinator regarding her ability to access the student's IEP, the district did not present any documentary evidence of the student's enrollment in the public school or the parent's awareness thereof, such as any communication from the school to the parent, an enrollment roster, or other documentation kept by the district. Although the district special education coordinator testified that at the April 2021 CSE meeting it was discussed that the recommended placement and services would not change (Tr. p. 110), she also acknowledged that a CSE does not "agree to a location" (Tr. pp. 112-13). Indeed, the Second Circuit has held that educational placement means "the general type of educational program in which the child is placed" and not the bricks and mortar location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]). As a final point regarding the parent's understanding, the April 2021 noted the parent's concern about toilet training and stated that "[t]he new school" would implement a schedule (Dist. Ex. 2 at p. 6 [emphasis added]).

Based on the foregoing, there is not sufficient evidence presented that the district provided the parent with notice of the assigned school location or that the parent knew or should have known that the district assigned the student to attend the same public school location for the 2021-22 school year that she had attended prior to March 2020. Accordingly, it was not until July 1, 2021, the first day of the 2021-22 school year, that the parent knew or should have known of her claim that the district failed to notify her of an assigned school location. Thus, the accrual date of the statute of limitations for the parent's claim pertaining to notice of the assigned school location for the 2021-22 school year was July

[5] Here, the district recommended that the student receive 12-month services (Dist. Ex. 2 at p. 20). As a matter of State law, the 12-month school year begins on July 1 and ends on June 30 (see Educ. Law § 2[15]).

[6] I note that in March 2020, school buildings were closed due to the COVID-19 pandemic.

[7] The hearing record does not reflect that the parent submitted an individualized home instructional plan or a notice of intent to instruct the student at home (see 8 NYCRR 100.10).

1, 2021. The IDEA's two-year statute of limitations would expire on July 1, 2023. The parent filed the due process complaint notice containing claims relating to the 2021-22 school year on June 26, 2023 (see Parent Ex. A). Accordingly, the parent's claim relating to the district's failure to provide notice of an assigned school location for the 2021-22 school year fell within the applicable two-year statute of limitations and, as a result, are not time-barred.[8]

Given that there is insufficient evidence in the hearing record to show that the district met its obligation to notify the parent in some form regarding where or how the student could access her IEP services, its failure to provide the requisite "bricks and mortar" school location to the parent constitutes a procedural error, which under the circumstances presented, resulted in a denial of FAPE (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., 132 F. Supp. 3d 522, 538-45 [S.D.N.Y 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., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014] [holding that "parents have a procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

As a result of such finding, I will now turn to whether the parent met her burden to demonstrate the appropriateness of STEP as a unilateral placement for the 2021-21 school year.

B. Unilaterally Obtained Services

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). 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 (Carter, 510 U.S. 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. v. Bd. of Educ. of Hyde Park, 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). When determining whether a unilateral

[8] The SRO in Application of a Student with a Disability, Appeal No. 24-074, previously determined that the parent's other claims pertaining to the 2021-22 school year, which related to the April 2021 CSE meeting and the resultant IEP, were barred by the statute of limitations, and nothing in this decision is meant to revisit this determination.

placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 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 reimburse-ment 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 not in dispute, a consideration of the student's needs is necessary to determine whether STEP was an appropriate unilateral placement for the 2021-22 school year. The student is a bilingual Yiddish speaker who has received diagnoses of a genetic disorder, autism, and seizure disorder (Dist. Ex. 3 at p. 1). As of December 2021, the student was 10 years old and she exhibited significant global delays, was distractible, and was difficult to engage in presented tasks (id. at pp. 1, 5).

In written testimony, the principal of STEP stated that, when the student began attending STEP in November 2021, she demonstrated an overall lack of understanding of the concept of the classroom, including following and complying with rules (Parent Ex. II ¶¶ 4, 22).[9] The principal testified that, at that time, the student demonstrated limited interest in tasks and activities, was

[9] The parent testified that at the start of the 2021-22 school year the student was homeschooled (Tr. p. 171). The student began attending STEP in November or December 2021 (see Tr. p. 147; Parent Exs. Q; R ¶ 3; II ¶ 22).

"extremely limited verbally," which affected her ability to communicate her wants and needs and with peers, and that her difficulty communicating caused her to become frustrated and, at times, she hit rather than used words (id. ¶ 22). Receptively, the student "seemed as if she did not notice what was going on around her," and she did not focus on people speaking to her, nor did she respond to questions asked of her (id.). According to the principal, the student exhibited difficulty focusing such that initially "she was unable to focus on a task for even one minute," would "wander off easily" did not understand basic concepts such as cause and effect, and ate "anything" both edible and non-edible, requiring "constant supervision" (id. ¶¶ 23, 24). Additionally, when the student first began attending STEP, she had "very few life skills" including that she was not toilet trained, she ate few foods with her fingers, she did not dress or undress herself, she did not tolerate having her hair or teeth brushed, and she required sensory input (id. ¶¶ 24, 25). Regarding behavior, the principal testified that the student would tantrum, and sit down in the middle of the street and refuse to walk when participating in "mainstream" outings (id. ¶ 26).

2. Unilateral Placement

In written testimony, the STEP principal described STEP as a "school for students with special needs serving children and young adults with academic, cognitive, physical and social and emotional disabilities" (Parent Ex. II ¶ 7). According to the principal, STEP typically enrolls approximately 35-50 students, who receive instruction in classrooms with ratios ranging between 2:1+1 to 12:1+3 depending on the student's cognitive ability and functioning level (id. ¶¶ 8, 14). Students attend STEP for four hours on Sundays, three hours on Fridays, and from 9 a.m. to 4 p.m. Monday through Thursday, and receive religious instruction for approximately 15 minutes per day (id. ¶ 13). Additionally, STEP offers academic classes and therapeutic services, prevocational and vocational services, and travel training (id. ¶ 12). STEP staff include licensed speech-language, occupational, physical, and mental health therapists who deliver speech-language therapy, OT, PT, counseling, and aqua therapy (id. ¶¶ 9-11).

During the 2021-22 school year at STEP the student's placement was a class with a 3:1+2 student to staff ratio (see Parent Ex. II ¶ 19). Evidence in the hearing record regarding the student's programming at STEP during the 2021-22 school year included a daily schedule that indicated the student received instruction in organization, pre-reading, pre-math, listening comprehension/ following directions, daily living, expressive/receptive language, and fine motor/writing skills (Parent Ex. D). Additionally, the student received individual sessions of PT, OT, and speech-language therapy (id.). The student's schedule also included allotted time for Davening, snack/circle time, table-top activities, swim and hygiene, sensory activities, arts and crafts, adapted physical education, interactive play, music and movement, shopping, and cooking/baking (id.). Another document described classroom daily routines such as entering the classroom, academic instruction time, hygiene, lunchtime and social interaction, and the behaviors the student was expected to exhibit (Parent Ex. C). During the 2021-22 school year STEP developed a sensory diet for the student to address her sensory processing difficulties, which were described as touching others and objects, putting things in her mouth, and becoming overly active or lethargic (Parent Ex. E). The sensory diet described the type of input, activity, and day/time and location of the sensory input activities (id.). STEP developed annual goals and objectives for the student to work on during the 2021-22 school year, which were designed to improve her receptive and expressive language, pre-math, play, pre-reading/comprehension, and pre-writing/fine motor skills (Parent Exs. F; G; H; I; J).

The principal stated that STEP addressed the student's needs as the class size provided her with a peer choice while limiting distractions and unsafe behavior, the high staff to student ratio allowed for individual and small group instruction and consistent attention, the goals were individualized and revisited, behavior modification techniques were implemented proactively and consistently, and the student was provided with "all related services as well as aqua therapy and sensory input" (Parent Ex. II ¶¶ 32, 34). Additionally, STEP provided the student with opportunities to participate in "mainstream" activities (id. ¶ 34).

The STEP principal testified that, during the 2021-22 school year, with prompting the student learned to say simple words to express some of her wants and needs and occasionally used two words together (Parent Ex. II ¶ 22). She benefited from sensory based activities in that she improved self-regulation and became "less lethargic and more able to participate in activities" (id. ¶ 25). According to the principal, the student "progressed significantly in many foundational areas" (id. ¶ 34). In May 2022, the student's teacher reported that the student was working on her communication skills and was "most able to interact" with peers during music sessions (Parent Ex. M at p. 1). The student used some single words with prompting and encouragement, and with "a lot of prompting" the student put together two words (id.). To improve the student's understanding of cause and effect, the teacher used "positive reinforcement, praise, and negative reinforcers when necessary" (id. at pp. 1-2). According to the teacher's report, the student had learned simple organizational and directional skills, to transition to a specific area according to her schedule, and to focus on a book for up to three minutes (id. at p. 2).

In May 2022, the student's occupational therapist prepared a progress report that described the student's deficits and indicated the student had "demonstrated improvement in most areas of basic" activities of daily living skills; however, she continued to exhibit skill deficits requiring continued OT services (Parent Ex. K). In the area of PT, the student's May 2022 progress report described her gross motor, gait, and mobility deficits, and indicated that she required close supervision, repetitive verbal and tactile cues, and hand-held assistance to negotiate stairs (Parent Ex. N at p. 1). The physical therapist developed short and long term goals to improve the student's eye-foot coordination, posture, sitting balance, ambulation, and endurance (id. at pp. 1-2). The student's speech-language pathologist prepared a May 2022 progress report that indicated the student exhibited "a multitude of language and social concerns," but had been "very mildly progressing on some of the short term goals" set for her (Parent Ex. L p. 1). Continued speech-language therapy was recommended to improve her communication skills (id. at p. 2).

Based on the foregoing, the evidence in the hearing record shows that STEP provided specially designed instruction to the student during the 2021-22 school year and was an appropriate unilateral placement to address her special education needs.

C. Equitable Considerations

Having found that STEP was an appropriate unilateral placement for the 2021-22 school year, I will now address equitable considerations.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The hearing record supports a finding that the parent cooperated fully with the IEP development process for the 2021-22 school year and attended the April 2021 CSE meeting. In addition, the parent, through her attorney, provided the district with a 10-day notice on November 29, 2021, in which she informed the district that the student had not received notice of an assigned public school location for the student to attend for the 2021-22 school year (Parent Ex. O). The parent signed an enrollment contract with STEP on December 14, 2021 (Parent Ex. P). As a result, there are no equitable considerations that weigh against the parent's requested relief of direct funding for cost of the student's attendance at STEP from December 14, 2021 to the end of the 2021-22 school year.

VII. Conclusion

As discussed above, the parent's claim relating to notice of an assigned school location for the 2021-22 school year was not barred by the IDEA's statute of limitations. The district failed to

provide the parent with information concerning the location of the student's public-school placement for the 2021-22 school year and this failure constitutes a denial of a FAPE. The parent's unilateral placement was appropriate and equitable considerations favor awarding the parent direct funding for the student's tuition at STEP from December 14, 2021, to the end of the 2021-22 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision on remand, dated August 14, 2024, is modified by reversing that portion which dismissed the parent's claim that the district failed to provide notice of an assigned public school location for the 2021-22 school year as time-barred by the statute of limitations; and

IT IS FURTHER ORDERED that the district shall directly fund the student's tuition at STEP from December 14, 2021, to the end of the 2021-22 school year.

Dated: **Albany, New York**
November 14, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER