



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-012 & 16-013

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 Board of Education of the North Rockland Central School District

Appearances:

Littman Krooks LLP, attorneys for petitioner, Marion M. Walsh, Esq., of counsel

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Neelanjan Choudhury, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found that the parent's request for compensatory education arising from the 2005-06 through 2011-12 school years was barred by the IDEA's statute of limitations.¹ Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for a portion of the 2011-12 school year and, therefore, violated section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]). The appeal must be dismissed. The cross-appeal must be dismissed.

¹ Although the parent timely served the district with a notice of intention to seek review (see 8 NYCRR 279.2[a]), the parties initiated separate appeals from the same IHO decision. As a matter of discretion, the two appeals have been consolidated for purposes of this decision. The parent's request for review will be treated as the initiating appeal and the district's request for review shall be deemed a cross-appeal. The parties' answers responding to the respective appeals have been received and considered.

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

According to the hearing record, the student was adopted from a foreign country in 2003 and his early development included significant traumatic events (Dist. Exs. 9 at pp. 1-3; 75 at pp. 1-2; 157; 158 at p. 1; 159 at p. 1; 249).² Based on descriptions of the student's needs and abilities in the hearing record, the student demonstrated deficits in intellectual functioning, particularly in the areas of processing speed and working memory, as well as academic skills, receptive and expressive language skills, attention, self-control, social skills, and adaptive functioning (Dist. Exs. 9; 30; 31; 75; 77; 111; 114; 115; 157; 159). The student has received various diagnoses, including pervasive developmental disorder—not otherwise specified, attention deficit hyperactivity disorder—combined type, anxiety disorder—not otherwise specified, mild mental retardation, reactive attachment disorder, post-traumatic stress disorder, impulse control disorder—not otherwise specified, and alcohol-related neurodevelopmental disorder (Dist. Exs. 9 at p. 4; 25 at p. 1; 75 at p. 16; 259 at p. 8).

With regard to his educational history, the hearing record indicates that the student did not have any formal education prior to adoption and, upon entering the district elementary school in May 2003, he was initially placed in a first grade general education classroom with English as a second language (ESL) services (Dist. Exs. 75 at p. 3; 159 at p. 6).³

The student was referred for special education in October 2004, was identified as a student with an other health-impairment, and began receiving consultant teacher services in a general education classroom in December 2004 (Dist. Exs. 9; 161; 164 at p. 1).⁴ The student attended a 15:1 special class and received counseling services in the district during the 2005-06 school year, and again in the 2006-07 and 2007-08 school years; he also attended a 15:1 special reading class for the 2006-07 and 2007-08 school years (Dist. Exs. 128 at p. 1; 135 at p. 1; 143 at p. 1). A June 2008 CSE recommended 12-month services and a Board of Cooperative Educational Services (BOCES) 8:1+1 special class with counseling "as per program model" located in a district middle school for the 2008-09 school year (Tr. pp. 396-97; Dist. Ex. 97 at p. 1). In spring 2009, the student was hospitalized and, in April 2009, the student's IEP was amended to include 1:1 aide services (Tr. p. 1474; Dist. Ex. 74 at pp. 1-2). In May 2009, the student's IEP was amended to include speech-language therapy (Dist. Ex. 72 at p. 2).

In November 2009, the CSE recommended the student's transfer to an out-of-district BOCES 8:1+2 special class placement where he received 1:1 aide services, as well as the related services of counseling and speech-language therapy (Dist. Ex. 56 at pp. 1-2). This recommendation continued for the 2010-11 and the 2011-12 school years, except that, in May 2011, the 1:1 aide services were discontinued (Dist. Exs. 24; 27). A February 2012 CSE

² The hearing record reflects inconsistencies between student records, parent reports, and the opinions of health care providers regarding the student's date of birth and, thus, his exact age (Tr. pp. 1249, 1289-90; Dist. Exs. 30; 75 at pp. 1-2; 157 at p. 1; 159 at p. 1; 162; 163; 174 at p. 1; 228; 248).

³ The student was retained in first grade and again in fifth grade (Tr. pp. 1431, 1469; Dist. Ex. 81 at p. 4).

⁴ The student's eligibility for special education is not in dispute, although the parent may not have agreed at all times that other health-impairment was the most appropriate disability category for the student (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]; see also IHO Ex. 1 at p. 6).

recommended a 12-month 8:1+1 special class placement in a BOCES high school life-skills program, with counseling and speech-language services for the 2012-13 school year (Dist. Ex. 6 at pp. 1, 14-15). However, in September 2012, the parent declined to enroll the student in the district's recommended program and, instead, the student moved to an Office for People with Developmental Disabilities (OPWDD) group home, which was located in a different school district (district 2); the student was subsequently enrolled in district 2 (Tr. pp. 1642-46; Dist. 229 at pp. 1, 5, 7, 8).⁵ A CSE for district 2 convened in September 2012 and recommended a 12-month 12:1+1 life-skills program with counseling (Tr. pp. 1647-48; Dist. Ex. 242 at p. 1). The student was incarcerated for several months during the 2013-14 and 2014-15 school years (Tr. pp. 1648-50, 1652-54). In January 2015, per an agreement between the parent and district 2, the student was placed at Whitney Academy (Whitney), an out-of-state nonpublic residential school (Tr. pp. 1659-61; Dist. Ex. 202).⁶

A. Due Process Complaint Notice and Response

By due process complaint notice, dated January 9, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2005-06 through the 2011-12 school years (IHO Ex. 1 at pp. 24-26). In addition to IDEA violations, the parent also contended that the district discriminated against the student in violation of section 504 (id. at p. 25).

With respect to allegations of a denial of a FAPE under the IDEA, the parent set forth a detailed recitation of facts, from which certain claims might be ascertained, and then specifically listed claims by way of bolded headings (see IHO Ex. 1). For specifically asserted claims, the parent alleged that the CSEs failed to provide the student with a therapeutic residential placement, which the parent claimed the student required "as of at least 2011 or earlier" in order to make educational progress (id. at pp. 17-19, 21-22). In addition, the parent contended that the CSEs failed to address the student's academic and transition (post-secondary) needs and his diagnosed intellectual disability, pervasive developmental disorder, post-traumatic stress disorder, and other "severe emotional issues" (id. at pp. 14, 16, 21, 24). The parent also specifically alleged that the CSEs failed to recommend staff training and support for school personnel (id. at pp. 22-23). While not explicitly stated, the parent's due process complaint notice also contains allegations supportive of claims that district failed to sufficiently evaluate the student or consider a May 2009 neuropsychological evaluation report, failed to include an accurate description of the student's needs in the IEPs, inappropriately classified the student as a student with an other health-impairment, and that the programs recommended by the CSEs during the time period in question included insufficient or insufficient annual goals, ESL services, speech-language therapy, 1:1 support in the form of an aide, and behavioral

⁵ In November 2014, the parent initiated a due process complaint notice with respect to the program recommended by district 2 in a proceeding unrelated to the present matter (see Tr. pp. 1658-61). District 2 is not a party in this proceeding (IHO Ex. 1).

⁶ Whitney is an out-of-State nonpublic school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

intervention plans (BIPs) (id. at pp. 2-10-18).⁷ The parent also alleged that, during the time period in question, she was denied meaningful participation in the development of the student's IEPs and/or that she was prevented from timely requesting an impartial hearing because the district overstated the student's progress and abilities and withheld information from the parents concerning the student's needs and the district's obligations (id. at pp. 3-20).

The parent asserted that her claims against the district did not accrue, for the purposes of the statute of limitations, "until 2014 upon the student's incarceration and deep decline when [the parent] became aware of the district's failure to address [the student's] disabilities" (IHO Ex. 1 at pp. 2-3, 23-24). The parent further asserted that she was prevented from requesting an impartial hearing due to specific misrepresentations by the district that it had resolved the problems forming the basis of her complaints about the student's placements and recommended services, and by the district's withholding of information that it was required to provide under the IDEA (id. at pp. 23-24).

For relief, the parent requested, among other things, compensatory education and transitional services in the form of placement at Whitney for one "additional school year beyond the age of twenty one" or, in the alternative, specified amounts of compensatory education, transition services, counseling, parent counseling and training, and transportation services (IHO Ex. 1 at pp. 25-26).

The district submitted a response to the parent's due process complaint notice, dated January 20, 2015, which asserted, among other things, that the parent's due process complaint notice was untimely and barred by the statute of limitations and the doctrine of laches (IHO Ex. 2 at pp. 1, 4).⁸

B. Impartial Hearing Officer Decision

On March 2, 2015, the district submitted a motion to dismiss the parent's due process complaint notice, arguing that the parent's claims were barred by the statute of limitations and the doctrine of laches (IHO Ex. 4 at pp. 1, 9, 12). The parent submitted a memorandum in opposition to the motion to dismiss, dated March 10, 2015, and the district submitted a reply, dated March 18, 2015 (IHO Exs. 5 at pp. 1, 19; 6 at pp. 1, 10). On April 6, 2015, after considering the arguments of the parties, the IHO denied the district's motion without prejudice, finding that there was "insufficient evidence to support the district's assertion that the parent 'knew or should have known' about her due process rights with respect to the student's educational programming" (IHO Decision at pp. 4-5; Tr. pp. 14-15).⁹

⁷ The parent also stated facts sounding in implementation claims regarding the age range of the other students in the student's classroom and the lack of math instruction received by the student (IHO Ex. 1 at pp. 9, 12, 16).

⁸ On February 25, 2015 the district submitted an amended response to the parent's due process complaint notice asserting additional affirmative defenses (IHO Ex. 3 at pp. 1, 7-8).

⁹ A copy of the IHO's April 6, 2016 decision denying the district's motion to dismiss without prejudice is not contained in the hearing record on appeal. I remind the IHO that State regulation requires that "all written orders, rulings or decisions issued in the case" shall be included as part of the record of an impartial hearing (8 NYCRR 200.5[j][5][vi][c]).

The impartial hearing proceeded on May 26, 2015 and concluded on October 19, 2015, after 11 days of proceedings (Tr. pp. 1-1909). By decision dated January 27, 2016, the IHO dismissed the parent's claims brought under the IDEA as barred by the applicable two year limitations period (IHO Decision at pp. 29-31). However, the IHO determined that some of the parent's section 504 claims were asserted within the applicable three year limitations period and ordered the district to fund the student's placement at Whitney for one additional year as a remedy for violating the student's rights under section 504 (id. at pp. 31-33).

With respect to the parent's IDEA claims, the IHO found that the parent filed her due process complaint notice more than two years after she knew or should have known of the actions forming the basis of her complaint (IHO Decision at pp. 30-31). The IHO addressed the parent's contention that the IDEA's statute of limitations did not apply in this instance because she was prevented from requesting an impartial hearing due to specific misrepresentations by the district that it had resolved the problem forming the basis of the complaint and that the district withheld information from the parent that was required under the Act id. at pp. 24-31). Although the IHO agreed with the parent's contentions that the district had not provided her with procedural safeguards notices for every school year at issue and that the district misrepresented the student's level of academic functioning, progress, and behaviors at school, the IHO nonetheless concluded that the "parent's claim [could not] be tolled" and that her claims were time-barred, because the parent "did not request a hearing within two years from spring 2012, when she should have known that she had a legal right to contest the district's program recommendations" (id. at pp. 29-31). Specifically, the IHO found that the parent met with an attorney who practiced special education law, and that, while she did not retain this attorney, the parent knew or should have known about potential IDEA claims based on this conversation (id. at p. 30).¹⁰

With regard to the parent's claims brought under section 504, the IHO determined that the applicable limitations period was three years and that the district's failure to recommend a residential placement for the student as of January 2012, and through June 2012, denied the student a FAPE under section 504 (IHO Decision at pp. 31-32). The IHO found that the district was aware that the student required a small, structured setting with intensive 1:1 teaching for reading, writing and math and that two of the student's mental health providers recommended a residential placement, but it failed to provide that level of support (id.). The IHO further found that the district was aware of allegations of bullying but failed to investigate, and was aware of the parent's concerns about the student's BOCES placement, but failed to observe the student in that placement to confirm that it was meeting the student's needs (id. at p. 32). The IHO determined that the failure to provide the student with a residential placement at that time constituted "gross mismanagement" and ordered compensatory education in the form of funding for an additional year at Whitney as an equitable remedy (id. at pp. 32-33).

¹⁰ However, the IHO declined to credit testimony of a CSE chairperson that she advised the parent of her right to request an impartial hearing at a May 2011 CSE meeting; the IHO did not "credit" any of this witness's testimony (IHO Decision at p. 29).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in dismissing her claims brought under the IDEA as time-barred. Specifically, the parent asserts that her claims against the district did not accrue until February 2015 when the student enrolled at Whitney and she became aware of what constituted an appropriate placement for the student. Alternatively, the parent claims that her claims accrued, at the earliest, in November 2014, when the student was incarcerated and experienced a "deep decline," which the parent asserts was when she learned that the district had failed to properly "classify and serve" the student (Parent Pet. Mem. of Law at p. 10). Thus, the parent asserts that her due process complaint notice, dated January 9, 2015, was timely initiated against the district within the two-year limitations period. The parent also asserts that, in any event, the IHO erred in failing to toll the statute of limitations because the district misrepresented essential facts to the parent regarding the academic program the district provided the student during the school years in question, as well as the student's progress in those programs, such that matters appeared resolved. The parent also asserts that the IHO erred in failing to toll the limitations period on the ground that the district withheld required information because the district did not provide the parent with procedural safeguards notice in conformance with the IDEA. For relief, the parent requests that the SRO reverse the IHO determination that the parent's IDEA claims are barred by the statute of limitations and remand the case back to the IHO for additional proceedings to award additional compensatory education.

The district answers the parent's petition, denying the parent's material claims. As a preliminary matter, the district asserts that the parent's petition should be dismissed for failure to comply with the form requirements for pleadings in State regulations. The district asserts that the IHO correctly determined that the parent's IDEA claims were time-barred. The district contends that the parent's IDEA claims accrued in May or July 2011 and that none of the parent's asserted bases for tolling the statute of limitations have merit. The district asserts that the parent failed to demonstrate that there was a specific misrepresentation by the district that it had resolved the matter forming the basis of the parent's complaint, and also asserts that the district did not misrepresent the student's educational needs or abilities. The district also asserts that, contrary to the parent's assertion that the CSE refused to consider a residential placement for the student, the CSE did consider such a placement but determined that the student did not require a residential placement in order to achieve educational benefit. The district next contends that the parent's assertion that the district withheld required information from the parent is not borne out by the evidence in the hearing record, which shows that the parent received multiple copies of the procedural safeguards notice, that the presumption of mailing operates to show that the parent received a procedural safeguards notice during every school year in question, that the CSE always provided the parent with the required prior written notice, and that the parent was made aware of her legal rights to initiate a due process hearing by counsel and other assistance. Lastly, the district asserts as an affirmative defense that the parent's claims are barred by "any and all intervening and/or superseding events or actions" on the part of district 2, the school district the student resided in after departing the district in 2012 (Answer ¶ 99).

The district also interposes a cross-appeal, asserting that the IHO erred in finding that the district denied the student a FAPE under section 504. The district asserts that the SRO has subject matter jurisdiction over the parent's section 504 claims because the substance of those

claims is identical to the claims the parent brought under the IDEA and only concern the adequacy of the student's special education placements. The district next asserts that the IHO erred in finding that any of the parent's section 504 claims were timely raised because the applicable limitations period is two years—rather than the three year period the IHO employed—and the parent filed her due process complaint notice more than two years after the claims accrued. The district requests that the SRO reverse the IHO's determination to award compensatory education under section 504 and dismiss the parent's 504 claims as time-barred.

In an answer to the district's cross-appeal, the parent denies the district's material allegations and refutes the district's assertion that the SRO has subject matter jurisdiction to review the IHO's findings with relation to the parent's section 504 claims. The parent also asserts that the IHO correctly determined that a three-year limitations period applied to the parent's section 504 claims. The parent also asserts that, because the SRO has no jurisdiction over the parent's section 504 claims, and the district was not aggrieved by the IHO's determinations under the IDEA, the district's cross-appeal must be dismissed in its entirety.¹¹

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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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

¹¹ In a reply, the district responds to defenses asserted by the parent in her answer to the district's cross-appeal.

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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of

the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Form Requirements for Pleadings

The district contends that the petition should be dismissed because it fails to set forth all of the allegations in numbered paragraphs, but instead employs 15 footnotes containing factual allegations in an effort to circumvent the page limits contained in State regulations.

State regulation provides that "the petition, answer, or memorandum of law shall not exceed 20 pages in length" and that "[a] party shall not circumvent page limitations through incorporation by reference" (8 NYCRR 279.8[a][5]). In addition, "[a]ll pleadings and memoranda of law shall be in . . . 12-point type in the Times New Roman font (footnotes may appear as minimum 10-point type in the Times New Roman font)" (8 NYCRR 279.8[a][2]). Moreover, all pleadings must "set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][3]). State regulation provides that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015]).

Upon review of the parent's petition it appears that there are 11 footnotes, rather than the 15 asserted by the district (see Parent Pet. ¶¶ 2, 9, 10, 19, 23, 29, 31, 36, 46, 56, 73). Most of the footnotes are only a sentence or two in length and provide additional contextual detail regarding the material in the numbered paragraphs to which they correspond (see id.). It does not appear that the use of footnotes in the petition constitutes an effort to circumvent the page limitations and, as noted above, the pleading requirements specifically contemplate the use of footnotes in pleadings and memoranda (8 NYCRR 279.8[a][2]). Therefore, I decline to exercise my discretion to reject the parent's petition on this basis.

The district also contends that the parent's petition should be dismissed because certain facts supporting her argument that the statute of limitations should be tolled because the district withheld information from the parent that are located in a memorandum of law only, rather than in the petition.

It has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 12-223). State regulation provides that the petition for review "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). Further, State regulation directs that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). The parent submitted a memorandum of law with the petition for review (see Parent Pet. Mem. of Law at pp. 1-20). The parent's petition contains the assertion that the IHO erred in dismissing her IDEA complaints as time-barred and notes that the parent was unaware and not informed of her right to challenge the recommended IEPs through due process and sets forth many alleged misrepresentations by the district (Parent Pet. ¶¶ 3, 56-57, 71, 81; see, e.g. Parent Pet. ¶¶ 13, 17, 20, 61, 66, 69). The petition also notes that, at least on one occasion, that the district did not provide the parent with a procedural safeguards notice (Parent Pet. ¶ 68). The memorandum of law contains a fully reasoned argument with respect to the statute of limitations and, specifically, numerous citations to the hearing record to support the parent's assertion that the withholding of information exception to the statute of limitations should apply to allow the parent's claims (see Parent Pet. Mem. of Law at pp. 13-16). While perhaps not stated with perfect clarity, the parent's petition sufficiently establishes that one of the parent's reasons for challenging the IHO's decision was her disagreement with his determination that the withholding of information exception to the statute of limitations did not operate to allow her claims, and, therefore, the parent's elaboration upon the same in the memorandum of law is not improper in this instance.

B. Scope of Review

In its cross-appeal the district asserts that the SRO has subject matter jurisdiction over the parent's section 504 claims because the parent's section 504 claims are "nothing more than a restatement of their IDEA claims, challenging the adequacy of the district's placement decision" (Dist. Pet. Mem. of Law at pp. 4-6).

School districts are required to have policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review procedure, and districts may elect to satisfy the 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36). However, in New York, the review procedure under section 504 does not include State-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Application of a Student Suspected of Having a Disability, Appeal No. 15-104; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). As the courts have recognized, the New York Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 hearings (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"]; 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"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Therefore, an SRO has no jurisdiction to review any portion of a parents' claims or an IHO's findings regarding section 504 (see A.M., 840 F. Supp. 2d at 672).

In the instant matter, the IHO appropriately bifurcated his review of the parent's claims, subjecting claims raised under the IDEA to one statute of limitations analysis, and claims raised under section 504 to a different statute of limitations analysis (see IHO Decision at pp. 23-32). Moreover, after dismissing the parent's IDEA claims as time-barred, the IHO also applied a different legal standard of review of the parent's remaining section 504 claims, finding that the district's actions constituted "gross mismanagement"—a different standard from the IDEA (id. at pp. 31-32; see Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997), aff'd, 208 F.3d 204 [2d Cir. 2000] [reviewing the different protections provided by the two statutes and noting that "Section 504 provides relief from discrimination, whereas the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination"]). Accordingly, I disagree with the district's contention that the nature of the parent's section 504 claims in this matter operates to grant me subject matter jurisdiction to review the IHO's findings with respect to those claims, and I decline to do so.¹²

C. IDEA Statute of Limitations

The parent contends that the IHO erred in dismissing her IDEA claims as time-barred and asserts that her claims were timely brought and accrued within two years of the time she filed her due process complaint notice and that, in any event, exceptions to the timeline to request an impartial hearing apply. The district contends that the IHO correctly dismissed the claims because the parent failed to file her due process complaint notice within two years of the date she knew or should have known of the alleged action that formed the basis of her complaint and that neither of the statutory exceptions applies to the facts.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y.

¹² The lack of jurisdiction to review the IHO's section 504 findings includes the IHO's determination that the parent's section 504 claims were subject to a three-year limitations period, which the district also challenges in this appeal (see IHO Decision at p. 31). However, by way of dicta, I note that one district court recently rejected the same argument advanced by the district in the present case—that a two year, rather than a three year, limitations period should apply to section 504 claims (K.H. v New York City Dep't of Educ., 2014 WL 3866430, at *4 n.4 [E.D.N.Y. Aug. 6, 2014]).

2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]).

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

1. Accrual of Claims

The district contends that the parent's IDEA claims accrued in May 2011 when the CSE refused to recommend a residential placement. The parent claims that she first knew or had reason to know of the alleged action that formed the basis of her complaint in November 2014 when the student was incarcerated and began a "deep decline," or "more likely, February 2015," when the student enrolled at Whitney (Parent Pet. Mem. of Law at pp. 6, 10).

In her due process complaint notice, the parent asserted a variety of procedural and substantive claims concerning the educational programs recommended for the student during the 2005-06 through 2011-12 school years (IHO Ex. 1 at pp. 21-23). For example, the parent asserted that she was denied a meaningful opportunity to participate in the development of the student's IEPs and that the IEPs lacked appropriate transition services, post-secondary goals, annual goals, speech-language therapy, and supports for school personnel (*id.*). She also asserted that the placements recommended were inappropriate and that the student required a residential placement (*id.*). The parent's claims are such that they each likely accrued at the time of the respective CSE meetings or when the parent received a copy of each resultant IEP; in other words, "almost immediately" after each action underlying the complaint occurred, notwithstanding that the parent may have subsequently "acquired additional information" about her claims (Roges v Boston Pub. Schools, 2015 WL 1841349, at *3 [D. Mass. Apr. 17, 2015]).

The parent attended all of the relevant CSE meetings, with the exception of the May 18, 2009 CSE meeting (Dist. Exs. 6; 24; 46; 72; 97; 128; 135; 143). And according to the May 2009 IEP, the parent gave verbal permission to proceed without her for this CSE meeting (Dist. Ex. 72 at p. 5). Further, the parent's claims accrued when she knew or should have known about the complained of action (i.e., received an IEP that did not set forth transition services or post-secondary goals) and, not when the parent discovered that she could pursue a claim (see Keitt v. New York City, 882 F. Supp. 2d 412, 437 [S.D.N.Y. 2011] [explaining that plaintiff's "argument that his [IDEA] claims accrued at the time of 'discovery that [he had] grounds for such a suit' . . . must be rejected because accrual of the statute of limitations does not depend on plaintiff's knowledge of the law, but rather on a plaintiff's knowledge of the injury]; see also J.P. v Enid Pub. Schools, 2009 WL 3104014, at *6 [W.D. Okla. Sept. 23, 2009]). For example, the parent should have known about any objection with the December 2004 CSE's recommendation that the student be placed in a general education classroom with consultant teacher services (Dist. Ex.

164), particularly because, at the time, she had available to her an October 2004 educational evaluation recommending that the student be placed in a "small structured setting" with "intensive one-to-one teaching" for reading, writing, and math (Dist. Ex. 159 at pp. 1, 6). As to other claims, there is evidence in the hearing record indicating the parent's actual knowledge about her claims. For example, according to a January 2008 social history update, the parent reported her concern that the student was struggling and that he had not received math instruction because he was pulled out for ESL services (Dist. Ex. 116 at pp. 1, 3). Similarly, on May 22, 2011, the parent requested an emergency CSE meeting due to her concerns about the student's safety and lack of progress at school (Dist. Ex. 26).

Even viewing the parent's claims in a manner that would produce the most recent possible accrual date—which would be the most favorable view for the parent—her claims accrued, at the latest, at the time of the May 2011 and February 2012 CSE meetings or upon her receipt of the resultant IEPs. With respect to the May 24, 2011 CSE meeting, the evidence in the hearing record, including the parent's testimony, shows that the parent requested the CSE meeting, attended the meeting with an advocate from a therapeutic residential school, and the student's IEP was discussed (Tr. pp. 1147-51, 1232, 1542; Dist. Exs. 24; 26).¹³ According to the parent and the advocate, the May 2011 CSE was a contentious meeting wherein the CSE discussed the student's progress on annual goals and what placement and services the CSE intended to recommend for the following school year (Tr. pp. 1156, 1165-71, 1543-48, 1549-52, 1585). The parent testified that she presented a letter from the student's private licensed clinical social worker recommending a residential placement for the student and asserted that the student required such a placement, but was informed by the CSE that it did not intend to recommend a residential placement for the student (Tr. pp. 1170-71, 1233, 1538-42, 1585-87; Dist. Exs. 25; 26). The parent disagreed with this outcome at the CSE meeting (Tr. pp. 1172, 1237, 1585-86). On June 17, 2011, the parent received a letter from the CSE enclosing a copy of the student's IEP (Dist. Ex. 23).

With respect to the February 2012 CSE meeting, the evidence in the hearing record, including the testimony of the parent, indicates that the parent received notice of the meeting and attended the meeting with the licensed clinical social worker and a case worker from a respite program, and the student's IEP was discussed (Tr. pp. 921, 954, 959, 1608-11; Dist. Ex. 6 at p. 1). According to the testimony of the parent and the licensed clinical social worker, the February 2012 CSE discussed the student's progress and behavioral needs as well as what placement and services the CSE intended to recommend for the following school year (Tr. pp. 959, 961-64, 1610-17). The parent and the social worker testified that they both opined to the CSE that the student required a residential program, but were informed by the CSE that it did not intend to recommend a residential placement for the student (Tr. pp. 959-64, 1612). The parent disagreed with this outcome (Tr. pp. 960, 1614). Shortly after the February 2012 CSE meeting, the parent received a prior written notice dated February 24, 2013, informing the parent that the CSE had recommended a program for the 2012-13 school year (Tr. p. 1630; Dist. Ex. 5). The parent

¹³ The district contends that an adverse credibility determination made by the IHO with respect to a particular witness brought by the district must be overturned (IHO Decision at pp. 29-30; Dist. Answer Mem. of Law at p. 16 n.4; see Tr. pp. 315-400). However, I need not address the district's assertion with respect to the IHO's credibility finding because this witnesses' testimony is not essential to any factual determination reached in this decision.

testified that she did not receive the actual IEP until six months after the meeting (Tr. pp. 1630-32). The parent stated that she was "still waiting to hear what their ultimate plan was so that I could at least have something to contest" (Tr. p. 1633). A finding that the parent's claims concerning the February 2012 IEP did not accrue until she received a copy of the final IEP approximately six months later, in August 2012, would not alter the determination that the parent's IDEA claims are time-barred.

Finally, the parent testified that, in September 2012, she sought placement of the student in the group home through OPWDD as a consequence of the district's refusal to consider a residential group home and because she did not agree with the recommended BOCES placement (Tr. p. 965).¹⁴ This evidence, then, shows that the parent knew or should have known of any deficiencies with the May 2011 and February 2012 CSE meetings and the resultant IEPs, as well as any deficiencies with the student's earlier IEPs, by June 2011 and February 2012, respectively, or at the very latest, by September 2012, making her January 9, 2015 due process complaint notice untimely.

The parent argues, relying on K.H. v. New York City Dep't of Educ., that her IDEA claims "did not accrue until [she] gained new information that made [her] aware of inadequacies in the student's prior special education program" (2014 WL 3866430, at *19 [E.D.N.Y. Aug. 6, 2014]).¹⁵ K.H. is distinguishable from the instant case. In this matter, the information that the parent received in about the student's decline in November 2014 or about the student's progress subsequent to his enrollment at Whitney in February 2015 did not impact the her opinion as to whether the programs offered by the district during the disputed schools years were appropriate. As described above, as of May 2011 and the February 2012 CSE meetings, the parent requested that the CSE recommend a residential placement for the student (Tr. pp. 1522, 1536-40, 1585, 1611-12, 1643-45). While the later acquired information about the student's decline and/or progress may have strengthened the parent's belief that the programs provided by the district during the disputed school years were inappropriate, the parent knew of the actions that formed the basis for their complaint as of as of the May 2011 and February 2012 CSE meetings or upon her receipt of the resultant IEPs, at the latest.

Further, even if a student's progress in a new educational setting could rise to an accrual date for statute of limitations purposes (Somoza, 538 F.3d at 114; K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995]), the evidence in the hearing record does not support a finding that the student made such a degree of progress at Whitney that it should have triggered the parent's knowledge about the appropriateness of the programs recommended in the student's IEPs for the

¹⁴ Although the parent does not seek tuition reimbursement in this proceeding, courts in the Second Circuit have held that parents know (or should know) about alleged deficiencies with a public school program when they enroll their child at a unilateral placement (see 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., 2011 WL 4375694, at *4 [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 . . ."]).

¹⁵ The parent also relies upon Somoza v. New York City Dep't of Educ. (475 F. Supp. 2d 373, 386 [S.D.N.Y. 2007]) and K.P. v. Juzwic (891 F. Supp. 703, 716-17 [D. Conn. 1995]) for similar reasoning.

2005-06 through 2011-12 school years.¹⁶ According to a June 2015 first quarter report from Whitney, the student was functioning academically at a second to fourth grade level and was making some progress toward his education treatment plan goals and objectives (Parent Ex. Y). The special education teacher from Whitney reported that, although the student was typically quiet and compliant, he had difficulty remaining focused and generally needed frequent redirection to complete academic tasks (*id.* at p. 2). In addition, the teacher reported that the student had difficulty maintaining positive or appropriate relationships with peers (*id.*). A social worker from Whitney testified that the student transitioned slowly to the new placement, but had made improvement since he arrived and was making "small strides" toward his social skills goals with a lot of support and redirection from staff (Tr. pp. 1385-86, 1390-91). The admissions director from Whitney Academy testified that the student was "plugging along", but that "he still struggles with a lot of things" (Tr. p. 1423).

In light of the above, the parent knew or should have known about any action forming the basis of her IDEA claims more than two years prior to the filing of the January 9, 2015 due process complaint notice. Thus, 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. Specific Misrepresentation Exception

An exception to the timeline to request an impartial hearing applies 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] R.B., 2011 WL 4375694, at *6). 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).

The IHO determined that the district did make certain misrepresentations about the student's level of functioning, progress, and behaviors (IHO Decision at p. 29), which the parent reiterates on appeal. Specifically, the IHO found that the student made minimal progress academically and behaviorally during the disputed school years but that the district reported to the parent that the student was making appropriate progress (*id.*). As a consequence, the IHO found that the parent was misled to believe that the student was appropriately placed (*id.*). Without addressing the factual merits of the IHO's determinations, the misrepresentations that he

¹⁶ These cases, relied upon by the parents, are of questionable precedential value: in Somoza, the Court "[look] no position" as to whether a date was when the parent knew or should have known of her injury; it was stipulated to by the parties (Somoza, 538 F.3d at 114, n.9). And K.P., decided prior to enactment of the IDEA's statute of limitations, based its holding on the equitable doctrine of laches, characterizing its IDEA discussion as an "alternative" holding (891 F. Supp. at 716).

identified are not sufficient to toll the statute of limitations.¹⁷ The IHO did not examine whether or not the district had "knowledge that its representations of [the] student's progress or disability [we]re untrue misrepresentations" and whether the misrepresentations were "akin to intent, deceit, or egregious misstatement" (D.K., 696 F.3d at 245, 246). To the contrary, the misrepresentations identified by the IHO are more akin to "subjective and good-faith" interpretations of the student's needs and progress, whether accurate or not (T.C. v Lewisville Ind. Sch. Dist., 2016 WL 705930, at *10 [E.D. Tex. Feb. 23, 2016]). In hindsight, the parent might consider the district's assessment of the student's needs and progress to be wrong, but that does not give rise to a specific misrepresentation triggering the statutory exception (C.H. v. Northwest Independent Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011]). If these sorts of representations were sufficient to warrant application of the statutory exception, the exception would swallow the rule. Indeed, the Third Circuit in D.K. specifically identified "[m]ere optimism in reports of a student's progress" or the bare statement of "allegations comprising a claim that a FAPE was denied" as examples of overly broad applications of the exception (D.K., 696 F.3d at 245-46).

As with those identified by the IHO, on appeal, the parent describes additional alleged misrepresentations, none of which is characteristic of the intentional or knowing deception required for application of the exception (see D.K., 696 F.3d at 245-46). Nonetheless, the evidence in support for each of the misrepresentations alleged by the parent has been examined out of an abundance of caution.

First, the parent alleges that the IHO erred by finding that the district's misidentification of the student's age in evaluations was de minimis (IHO Decision at p. 29). However, the hearing record reflects that school personnel, as well as the parent, outside professionals, and the adoption agency were uncertain as to the student's exact date of birth; various reports in the hearing record reflect this confusion (Tr. pp. 231-32, 235-36, 412-15, 429, 699-702, 820-22; Parent Exs. A; I at p. 2; Dist. Exs. 75 at p. 2; 114 at p. 1; 116 at p. 3; 143 at p. 3; 145 at p. 1; 157 at p. 2; 158 at pp. 1, 5; 159 at p. 1; 162; 163; 186; 187). Nevertheless, evidence in the hearing record shows that, to the extent the district initially used of an incorrect birthdate, it did not significantly impact evaluation results in a manner that provided a misleading picture of the student's overall functioning because, regardless of the birthdate used, evaluation results indicated that the student was functioning significantly below average and was in need of special education support (Tr. pp. 430-34, 857-59, 873-75).¹⁸ For example, although the student's initial evaluation in October 2004 used the later birth year and subsequent evaluations in February 2008, April 2009, and March 2011 used the earlier birth year, results from multiple administrations of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV)

¹⁷ The district did not cross-appeal from the IHO's specific factual findings about the district's misrepresentations. It might plausibly be argued that the district was not aggrieved by the IHO's ultimate determination regarding the specific misrepresentation exception and, therefore, that it was not required to assert an appeal of the IHO's underlying adverse factual findings. Nonetheless, to the extent that the IHO's specific factual findings are final and binding on the parties at this point (8 NYCRR 200.5[j][5][v]), for the above stated reasons, it is unnecessary to examine whether or not the IHO erred in these specific findings of fact.

¹⁸ The hearing record reflects two different years of birth used for calculating the student's chronological age at the time of the evaluations (Dist. Exs. 30; 75; 112; 114; 115; 145; 156; 157; 158).

indicated that the student's overall level of intellectual functioning was at or below the first percentile (Dist. Exs. 30 at pp. 1-2; 75 at pp. 1, 7; 115 at p. 1; 158 at p. 1).

Next, the parent asserts that the district misrepresented its obligation to provide the student with a residential placement and informed the parent that it could not recommend a residential placement for the student. As noted above, the parent raised her desire for a residential placement for the student at the May 2011 CSE meeting because she felt the student's needs were not being met because he was complaining about being bullied, his behavior at home was not good, and he was not making academic progress (Tr. pp. 737, 1170-71, 1232-33, 1536-38, 1585). However, the hearing record reflects that the May 2011 CSE discussed the parent's request for a residential placement, but concluded that a residential placement was unnecessary because the student's then-current placement remained appropriate for him and constituted his least restrictive environment (LRE) (Tr. pp. 737-38, 1169-72, 1585; Dist. Ex. 24 at pp. 1, 11).¹⁹ According to the advocate who attended the May 2011 CSE meeting with the parent, both the parent and the advocate asserted the student's need for a residential placement at the CSE meeting, but were told that the other members of the CSE did not believe that a residential placement was appropriate (Tr. pp. 1169-72; see Tr. p. 770).

As with the May 2011 CSE meeting, the evidence in the hearing record does not support a finding that the district misrepresented its ability to recommend a residential placement at the February 2012 CSE meeting. The February 2012 CSE chairperson testified that, while the parent had concerns regarding the student's behavior at home and felt he needed a highly structured environment, the student's then-current placement provided a structured environment with a small student-to-teacher ratio and a high level of clinical support to which the student responded (Tr. pp. 524-26). In addition, the CSE chairperson denied informing the parent that the district "never places" a student in a residential setting, and testified that, while all options were considered, the then-current BOCES staff did not indicate that the student required a more restrictive program, and the health and safety risks described at home were not present in the school environment (Tr. pp. 528-31, 546, 550, 557, 560-61, 574). According to the licensed clinical social worker who attended the February 2012 meeting with the parent, both the parent and the social worker asserted the student's need for a residential placement at the CSE meeting, but were told that the other members of the CSE did not believe that a residential placement was warranted (Tr. pp. 920, 950-51, 953-55; 959-63; see Tr. p. 544-46; Dist. Ex. 6 at p. 1). The hearing record reflects that, ultimately, an 8:1+1 special class placement in a BOCES high school life-skills program was recommended for the 2012-13 school year (Dist. Ex. 6 at p. 14). This evidence does not lead to the conclusion that the CSE misrepresented its capacity to recommend a residential placement, as the parent asserts.

Finally, the parent asserts that the district engaged in a misrepresentation by not investigating allegations of bullying of the student. The parent testified that the student told her he had problems with being bullied and when she tried to get information from the student,

¹⁹ Consistent with this representation, once a CSE determines that a particular placement is the least restrictive environment in which a student can be educated, it is generally not required to thereafter consider other more restrictive placements along the continuum (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]).

"there was always plausible deniability" (i.e., no one saw anything or it was one student's word against another), which was compounded by the student's difficulty perceiving what was happening (Tr. pp. 1509-10). The parent testified that the student complained on a daily basis about incidences of bullying during the 2010-11 school year, and that she did not know if it was only his perception of things or if it was actually happening, so she eventually contacted the school and the school reported that they could not find any evidence that bullying was taking place (Tr. pp. 1528-29). The student's private social worker testified that, during the 2010-11 school year, the student would talk "about something another kid had done or said" and "it was pretty clear that he was feeling victimized and bullied and not able to grasp at all his part in those interactions" (Tr. p. 945). The social worker testified that the student and the parent told her of bullying incidents that occurred at school and on the bus, and that the parent told the social worker that she had received an anonymous letter regarding these incidents which was brought to the attention of the school (Tr. pp. 979-80; Dist. Ex. 25). Although the hearing record does not support a conclusive finding that bullying actually occurred, both the testimony of district personnel and the parent suggest the parent was aware of the allegations, that the district investigated the matter, and that the district informed the parent that it did not discover incidents of bullying. Further, even if a failure to investigate was established in this instance and assuming it could be deemed a "specific misrepresentation," it was not a misrepresentation that the district resolved an issue forming the basis for the parent's claim, because review of the due process complaint notice reveals that the parent did not assert a claim relating to allegations of bullying (IHO Ex. 1).

In conclusion, while I sympathize with all of the parent's concerns and frustrations, based on the high threshold for application of the exception, the hearing record does not support a conclusion that the district prevented the parent from filing a due process complaint notice due to an intentional or knowing deception that it had resolved any issues forming the basis for the due process complaint notice (see D.K., 696 F3d at 245). Therefore, the evidence in the hearing record does not warrant application of the specific misrepresentation exception to the limitations period.

3. Withholding of Information Exception

Despite finding that the parent's claims untimely, an exception to the timeline to request an impartial hearing 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 (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 WL 4375694, at *6). 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 (see D.K., 696 at 246; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 WL 4375694, at * 6; 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., 2008 WL 4791634, at *7). 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, regardless of whether a district has provided the parent with a procedural safeguards notice, 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).

The IHO determined that the district failed to demonstrate that it supplied the parent with notices for all of the school years at issue (IHO Decision at pp. 29-31).²⁰ However, the IHO nonetheless determined that the exception to the timeline to file a due process complaint notice did not apply because "the parent should have known that she could have pursued a claim against the [d]istrict" by spring 2012 based upon the parent's consultation with a special education attorney at that time (id. at p. 30).²¹

In accord with the IHO's ultimate determination, the totality of the evidence in the hearing record shows that, even if the parent did not receive every required procedural safeguards notice, she was made sufficiently aware of her rights (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45). The evidence in the hearing record indicates that the parent received at least some procedural safeguards notices over the course of the student's residence in the district and the IHO did not find otherwise (IHO Decision at p. 29). In particular, the hearing record includes three documents which the parent signed acknowledging her receipt of a procedural safeguards notice in December 2004, January 2008, and August 2012 (Dist. Exs. 119; 152; 245; see Avila, 2014 WL 5585349, at *8-*9 [declining to apply the withholding of information exception where the evidence showed that the parent signed an acknowledgement that she received a procedural safeguard notice]). Further, the parent did acknowledge at the impartial hearing that she signed a consent form indicating that she received a procedural safeguards notice from district 2 in August 2012 (Tr. pp. 1820-21; Dist. Ex. 245). In addition, various documents in the hearing record addressed to the parent either reference an enclosed notice (however, whether the notice was actually enclosed is disputed and the IHO declined to apply the presumption of mailing in the district's favor), or they remind the parent she previously received a notice and advised her where she could obtain an additional copy (Dist. Exs. 3; 5; 23; 45; 49; 55; 59; 60; 70; 71; 73; 76; 79; 82; 94; 104; 108; 110; 126; 129; 132; 137; 142; 147; 150; 153; 160). Further, the parent did not testify that she never received a procedural safeguards notice from the district; rather, she indicated that she could not recall (Tr. pp. 1241, 1631). A district's delivery of a procedural safeguards notice suffices to impute to parents "constructive knowledge of their various rights" under the IDEA, whether or not the parents examine the contents of the notice to acquire the actual knowledge (C.P. v Krum Ind. Sch. Dist.,

²⁰ As with the specific misrepresentation exception, the district did not cross-appeal from the IHO's determination that the district did not annually provide the parent with procedural safeguards notices. Again, to the extent that the IHO's specific factual finding is final and binding on the parties as a consequence (8 NYCRR 200.5[j][5][v]), it is unnecessary to examine whether or not the IHO erred in this finding of fact.

²¹ While the IHO used the language "knew or should have known" to describe the parent's awareness of her rights, I am aware of no authority applying this standard to the determination of whether an exception to the timeline to file a due process complaint notice has been established.

2014 WL 4651534, at *9 [E.D. Tex. Sept. 17, 2014], quoting Richard R., 567 F. Supp. 2d at 946).

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 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 hearing record indicates that the parent attended a special education law seminar in 2010 or 2011 (Tr. p. 1876). Further, an "advocate" from a residential program attended the May 2011 CSE meeting with the parent (Tr. pp. 1147, 1156; Dist. Ex. 24 at p. 1). The parent testified that this individual helped her with the process, that he was knowledgeable about the law, and that he "educated [her] a little bit about [the student's] rights" (Tr. p. 1542-43). According to the hearing record, the parent also contacted an attorney on or about June 11, 2012 and, subsequently, provided him with the student's IEP and "other documents" (Tr. p. 1641-42, 1748-49).

While one of the above facts may not have served as a sufficient basis on which to impute to the parent knowledge of her rights, the totality of the evidence supports the IHO's ultimate determination. Accordingly, the IHO correctly determined that the evidence in the hearing record does not demonstrate that the parent was prevented from filing a due process complaint notice due to the withholding of information which the district was required to provide.

VII. Conclusion

Because I have determined that the parent's claims raised under the IDEA are time-barred, I need not address the district's other asserted affirmative defense that the claims are also barred by the doctrine of laches and barred by intervening and/or superseding events or actions on the part of a subsequent school district of residence.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
May 2, 2016**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**