The University of the State of New York

The State Education Department
State Review Officer
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No. 18-069

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

Appearances:

The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Chrystal O'Connor, 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 those portions of a decision of an impartial hearing officer (IHO) which found that her claims arising from the 2004-05 school year through February 2008 were barred by the IDEA's statute of limitations and did not award all of the compensatory education requested. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that the parent's claims relating to the period from February 2008 through the 2011-12 school year were not barred by the statute of limitations. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

When the student was an infant, the hearing record reflects he received diagnoses of periventricular leukomalacia and mild cerebral palsy; the student also has a history of asthma, spasticity, dysplasia, and strabismus, as well as febrile seizures until he was four years old (IHO

Ex. I at pp. 60, 64, 68-70, 103, 106, 110-11).[1] The student received services through the Early Intervention Program and the Committee on Preschool Education as a young child and attended a special education classroom upon entering the public school system in kindergarten (IHO Exs. I at pp. 60, 70, 177; II at p. 91).

A September 28, 2004 "social update" indicated the student's mother believed the student may have been "in the wrong placement," and that he did not seem "to be making adequate progress in school" (IHO Ex. I at p. 109). Subsequently, a CSE convened to develop an IEP which identified as the student's placement, "defer to CBST" (id. at p. 116).[2] On April 5, 2005, the director of the CBST informed the CSE that a State-approved nonpublic school had accepted the student and the parent agreed with the placement (id. at p. 138). On April 18, 2005, the CSE convened without the parent to add the nonpublic school to the student's IEP (id. at pp. 140-41).

The student began attending the nonpublic school in June 2005 and continued to attend through the 2007-08 school year (IHO Exs. I at pp. 75-76, 163, 190; III at pp. 116-17, 148). In a January 5, 2007 "corrected" social update, the parent was reported to continue asserting that the student's current school was not meeting his needs (IHO Ex. I at pp. 112-13). The update reflected that there was a significant disparity between the "evaluation team's" understanding that the student's needs were serious and the parent's perception that the student had "general education needs" (id. at p. 113). The update reflected that the parent was given the option to refer the student for an evaluation outside the district due to her dissatisfaction with the student's program (id. at p. 112).

An IEP developed by a June 18, 2007 CSE for the 2007-08 school year reflected the CSE's recommendation that the student continue to attend the nonpublic school and participate in the New York State alternate assessment (NYSAA) as a result of global delays; the IEP indicated the student would be assessed through a portfolio of his work as well as teacher-made tests and assessments (IHO Ex. III at pp. 148-49, 165). In a letter to the CSE dated January 17, 2008, the parent informed the district that she believed the student was not being challenged academically as most of the students in his class were lower functioning (IHO Ex. I at p. 298). She also indicated that she was interested in having the student transferred to a school where he would be challenged and that was closer to the student's home (id.).

A March 9, 2008 social history update reflected that the student was being reevaluated because of the parent's concern with the quality and amount of services he received (IHO Ex. I at p. 300). The parent reported that the student's progress was limited and that the staff at the student's school "'bab[ied]'" him, he was not being challenged, and he did not receive homework (id. at p.

[1] The district's motion to dismiss, the parent's opposition to the motion, and the district's reply to the parent's opposition, were entered into the record as IHO Exhibits I, II, and III (see generally IHO Exs. I; II; III). However, because the IHO exhibits are paginated consecutively and the individual exhibits attached to the moving papers are not all separately paginated, this decision does not cite to the exhibits attached to the parties' moving papers, instead citing to the consecutive pagination of the IHO exhibits.

[2] The hearing record reflects that this indicated the student had been referred to the district's Central Based Support Team to find an appropriate State-approved nonpublic school placement for the student (IHO Ex. I at p. 137).

301). The update also reflected that the parent wanted to "explore" placements where the student would be challenged appropriately (id.).

On May 28, 2008, a CSE convened to develop the student's program for the 2008-09 school year (IHO Ex. I at pp. 212-13). The CSE continued to defer the student's placement location to the CBST but rejected continuing placement at the student's then-current nonpublic school placement on the grounds that the student's "social and emotional needs [would] be in jeopardy given the current conflict between school staff and [the student's] school" (id. at pp. 212-13, 237). The CSE also continued to recommend the student's participation in alternate assessment (id. at p. 238).

In a letter to the district dated September 25, 2008, the parent requested that the CSE reconvene "immediately" to provide the student with a less restrictive program, noting that the student's then-current program and the schools she had visited did not offer an appropriate program, either academically or socially (IHO Ex. II at p. 59). On October 7, 2008, the CSE reconvened and recommended placement in a special class in a community school (IHO Ex. I at pp. 75-76, 99). The October 2008 CSE continued the recommendation that the student participate in alternate assessment (id. at p. 101). Changes to the student's recommended placement were also documented in the minutes of the October 2008 CSE meeting, which reflected the parent's belief that the schools recommended by the CBST were "too low functioning" for the student and her request for a public school placement so the student would be "exposed to all diff[erent] types of kids" (id. at p. 303; see IHO Ex. I at p. 100).

A CSE convened on October 5, 2009 to conduct the student's annual review and continued to recommend placement in a special class in a community school, as well as the student's participation in alternate assessment (IHO Ex. III at pp. 166, 177). A CSE convened on September 27, 2010 for the student's annual review and continued to recommend placement in a special class in a community school and participation in alternate assessment (id. at pp. 181-82, 194; see IHO Ex. II at p. 77).

A CSE convened on May 31, 2011 to conduct the student's annual review (IHO Ex. I at pp. 282, 294). The CSE recommended the student continue to attend a special class in a community school for the remainder of the 2010-11 school year, and attend a special class in a specialized school at the beginning of the 2011-12 school year (id. at p. 291). The present levels of academic performance noted that the student had made "tremendous" improvements during the two and a half years in the district program and that he would benefit from a vocational high school setting (id. at pp. 282, 295). The CSE continued to recommend that the student participate in the alternate assessment (id. at pp. 293, 295). The student apparently attended this program from September 2011 until February 2016, when he began attending a credit-bearing program at a district high school pursuant to an agreement between the parties (see IHO Exs. I at p. 281; V at p. 2; VII at p. 2; VIII at p. 7; IX at p. 2; X at pp. 3, 8; XI at p. 2).

In a prior proceeding not at issue in this appeal, by amended due process complaint notice dated August 17, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, and 2014-15 school years (IHO

Ex. VII).[3] The parent set forth a number of claims, including that the district failed to conduct assistive technology and neuropsychological evaluations (id. at p. 4). The parent also argued that the IEPs failed to address the student's disabilities and diagnoses, and otherwise did not accurately describe his needs (id.). The parent further claimed that there was a "significant chance" the student had not been "properly diagnosed" and that he had "an underlying learning disorder that has not been identified" (id. at pp. 3-4). In addition, the parent asserted that the district placed the student in programs that "virtually took him off track to try to earn a regular high school diploma" (id. at p. 5). The parent further contended that the IDEA's statute of limitations did not bar her claims because, among other reasons, the student had been "misdiagnosed and not appropriately evaluated," and his disabilities had not been timely identified (id. at p. 6). For relief, the parent requested, among other things, an independent neuropsychological evaluation and an assistive technology evaluation, as well as compensatory education services (id. at p. 7).[4] Pursuant to an interim order in that proceeding, the IHO granted the parent's request for an assistive technology evaluation and an independent neuropsychological evaluation, which were completed between March 2015 and July 2015 (IHO Ex. VIII at pp. 2-3, 14, 25; see IHO Ex. III at pp. 44-71).[5]

The July 9, 2015 neuropsychological evaluation report identified that the student met the criteria for diagnoses of specific learning disorders with impairments in reading, written expression, and mathematics, as well as diagnoses of developmental coordination disorder and language disorder (IHO Ex. III at p. 57).[6] The evaluator indicated that the results of cognitive testing did not provide reliable descriptors of the student's functioning because of his visual and motor deficits and ruled out a diagnosis of an intellectual disability (id. at pp. 50, 58-59). The evaluator noted that the student had a "great deal of potential to improve his academic and cognitive skills," but that the student was limited in his abilities to process visual and verbal information (id. at p. 58). The evaluator recommended the student be provided with additional tutoring outside the classroom, and that an updated assistive technology evaluation and a central auditory processing evaluation be completed; the evaluator also noted that the student should be given the opportunity to take credit bearing courses (id. at pp. 59-60).

The May 5, 2015 assistive technology evaluation report indicated that a review of the student's records reflected "a possible need for assistive technology to access and compose written

[3] The parent, proceeding pro se, originally filed a due process complaint notice in February 2014 (see IHO Ex. VIII at p. 2).

[4] The parent subsequently initiated impartial hearings involving the 2015-16, 2016-17, and 2017-18 school years, which are also not at issue in this appeal (see IHO Exs. IX; XI; XIV). The IHO has issued final decisions with respect to the parent's claims for the 2012-13 through 2016-17 school years, none of which has been appealed by either party and have accordingly become final and binding on the parties (IHO Exs. VIII; X; XII). The parent's claims relating to the 2017-18 school year were still pending at the time of the IHO's decision in this matter (IHO Decision at p. 7 n.11; see IHO Ex. XIV).

[5] The IHO who rendered the decision on appeal in this matter also presided over each of the impartial hearings commenced by the parent (see 8 NYCRR 200.5[j][3][ii][a]).

[6] Between pages 57 and 58 of IHO Exhibit III there is an additional page that is unpaginated. For purposes of this decision, the unpaginated page is cited as page 57a.

materials (IHO Ex. III at pp. 66-67). The evaluators determined that the student had difficulty in the areas of visual accommodation, serial memory processing, and encoding/decoding, and noted that the student's "ability to dictate and comprehend far exceed[ed] his ability to spell and read" (id. at p. 70). The evaluators recommended assistive technology consisting of a text reader to support the student's access to written material, voice-to-text software to support his written expression, and word prediction software to support his "editing of written expression" (id.). The evaluator also recommended specific hardware and software (id.).

A. Due Process Complaint Notice

On September 21, 2015 the parent filed a due process complaint notice alleging a denial of a FAPE for the 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, and 2011-12 school years (IHO Ex. V).[7]

Regarding the parent's claims related to the 2004-05 through 2011-12 school years, the parent did not raise claims specific to any particular school year. Rather, the parent raised claims that were intended to address all of the school years and IEPs in question. As relevant here, the parent raised the following claims: the district failed to conduct adequate evaluations of the student and failed to evaluate him in every area of suspected disability; the CSE failed to identify all of the student's disabilities; the district never considered all the student's disabilities or diagnoses and incorrectly diagnosed the student; the district did not accurately address or describe his needs, including his strengths and weaknesses; the district never evaluated the student for assistive technology or implemented research-based strategies or supports and services such as assistive technology; the district failed to follow up on disparities in the student's evaluations; the district improperly found the student eligible to participate in alternate assessment; the district failed to develop an IEP for the student for some school years; and the district did not provide the parent with "legally adequate" prior written notices or procedural safeguards notices relating to the student's evaluations, IEPs, or the provision of a FAPE during all years at issue (see IHO Ex. V at pp. 1-3, 6-9, 11-12).

While the parent identified the 2004-05 through 2011-12 school years as being at issue, the parent also raised claims related to subsequent school years that were subject to other impartial hearings requested by the parent and need not be further discussed here. The parent also raised claims with respect to the student's placement during high school, asserting the following: the district incorrectly placed the student in a "District 75" school when he was transitioned to high school; and the student was incorrectly designated as "severely cognitively impaired" and the district incorrectly designated the student as New York State alternate assessment (NYSAA) eligible, which prevented him from being able to achieve a high school diploma (IHO Ex. V at pp. 7-8).[8] The parent contended that the district failed to provide her with sufficient notice about the student's designation as NYSAA eligible or the implications of such designation (id. at p. 7).

[7] The parent raised a multitude of claims, many of which were not addressed by the IHO and are not raised on appeal. To that extent, the claims raised by the parent are discussed herein only to the extent relevant.

[8] District 75 is New York City's designation for district-wide special schools, as opposed to community schools (see, e.g., IHO Ex. I at pp. 281, 295).

The parent also raised claims pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504), 42 U.S.C. § 1983 (section 1983), the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) (ADA), as well as systemic and discrimination claims regarding the district's adoption of "illegal blanket policies and practices" (IHO Ex. V at pp. 1-2, 5, 10-13).[9]

With respect to the IDEA's two year limitations period, the parent maintained that her claims were not time-barred by the statute of limitations because she was not aware of her claims "on a date that fell outside of the limitations period," and that she only learned of the student's misdiagnosis after evaluations were conducted in the 2014-15 and 2015-16 school years (IHO Ex. V at p. 12). The parent further asserted that the district misrepresented facts that prevented her from filing a due process complaint notice and she did not receive notice of her rights under the IDEA (id.).

For relief, the parent requested that the IHO order "extended eligibility . . . equal to the years that [the student] has been denied a FAPE" (id. at p. 13). The parent also requested that the IHO find that the student was entitled to independent evaluations and various forms of compensatory education (id. at pp. 13-14).[10]

B. Motion to Dismiss

On the first day of the impartial hearing, the district requested that the IHO apply the IDEA's two-year limitations period to bar the claims in the due process complaint notice (Dec. 17, 2015 Tr. pp. 4-7, 17-18). The parent objected, asserting that the district was required to "make a sufficiency motion under the IDEA within 15 days" (Dec. 17, 2015 Tr. p. 9). The IHO declined to rule on the motion at that time and indicated the parties would be given an opportunity to brief the issue and submit documentary evidence in support of their positions (Dec. 17, 2015 Tr. pp. 8, 18, 20-21).

1. The District's Motion to Dismiss

By motion to dismiss dated February 12, 2016, the district argued that the parent knew or should have known of the facts forming the basis of her claims by no later than the end of the school years on which they were based and that her claims were accordingly barred by the statute of limitations (IHO Ex. I at pp. 1-2, 6, 32-34). In particular, the district asserted that the parent was aware of the nature of the student's disabilities and diagnoses, participated in the development of the student's IEPs, and knew of the student's limited progress, and was notified of her due process rights—including the right to request independent evaluations—on multiple occasions between 2004 and 2011 (id. at pp. 8-10, 13-18, 28-29, 32, 34-35). The district also claimed that all of the parent's allegations were "phrased in general terms and [did] not raise specific challenges" to the district's actions for any particular school year (id. at p. 33). Moreover, the district contended that the parent had a duty "to exercise due diligence and consult with an attorney or other medical

[9] Because, as discussed below, SROs do not have jurisdiction over these claims, they will not be addressed in this decision and are not mentioned in reference to the parties' submissions.

[10] By interim decision dated October 1, 2015, the IHO declined to consolidate the parent's September 2015 due process complaint notice with the parent's previously filed April 2014 and August 2015 due process complaint notices (see Oct. 1, 2015 IHO Interim Decision at pp. 3-4; IHO Exs. V; VII; IX).

or educational professional to determine the existence of any claims" (id. at p. 36). With respect to the exceptions to the IDEA's statute of limitations, the district asserted that the parent raised only general and conclusory allegations and failed to identify any specific misrepresentations by the district that it had resolved any of the alleged problems that formed the basis of the parent's complaint (id. at p. 38). The district also argued that the parent failed to identify any specific information withheld from her by the district that it was otherwise required to provide such that she was prevented from timely requesting an impartial hearing (id. at pp. 39-40). Finally, the district maintained that the parent's claims were barred by the doctrine of laches as the district would be significantly prejudiced if the parent were permitted to proceed, as a result of witness and document unavailability (id. at 44-45).

2. The Parent's Opposition to the Motion to Dismiss

In her opposition to the district's motion to dismiss, the parent initially asserted that the district's motion was untimely because a challenge to the sufficiency of a due process complaint notice must be brought within 15 days of the complaint being filed (IHO Ex. III at p. 4).[11] The parent next asserted that the district had failed to establish that her claims accrued outside of the relevant limitations period and that, even if they claims had, the limitations period was tolled (id. at p. 5). With respect to specific claims, the parent argued that her claims related to misdiagnosis, inadequate evaluations, the designation of the student as NYSAA eligible, and the failure to conduct an assistive technology evaluation, did not accrue until the student was assessed in 2015 (id. at pp. 6-7). According to the parent, the July 2015 neuropsychological assessment was the "first time that any evaluator advised the parent that [the student] has the cognitive ability to earn a diploma," diagnosed the student with learning disabilities, and indicated that standard cognitive testing was not an accurate measure of the student's cognitive potential (id. at pp. 8, 11). The parent contended that following an "informal" assessment from a psychologist in February 2008 finding no evidence of mental retardation and noting that the student might have had a learning disability, there was no evidence showing the district followed "any of the procedures required" to determine whether the student had a learning disability (id. at pp. 9-10).[12] The parent also claimed that while prior IEPs and evaluations identified a possible need for assistive technology, the district never conducted an assistive technology evaluation until ordered to do so by the IHO (id. at p. 11). The parent argued that the July 2015 neuropsychological evaluation and May 2015 assistive technology evaluation reports were "central to the question of whether [the student] received a FAPE" and noted that, following consideration of these evaluations, the CSE "changed [the student] from eligible for the NYSAA to eligible for the standard assessment, which enabled him to enroll in a diploma track program" (id. at p. 12). The parent claimed that the district placed the student "on the NYSAA track," but failed to establish it provided information to the parent about NYSAA or that the district advised her of the impact a NYSAA designation would have (id.).

[11] While the declaration of counsel in support of the parent's opposition to the district's motion is dated August 12, 2016, the hearing record reflects that the memorandum in support was submitted on April 18, 2016 (IHO Ex. III at pp. 2, 28; see Feb. 22, 2016 Tr. pp. 58-59; Apr. 25, 2016 Tr. p. 71).

[12] The term "mental retardation" has been replaced in federal and State regulations by "intellectual disability" (34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

As to the evidence submitted by the district to support its position that the statute of limitations bars the claims raised in the parent's due process complaint notice, the parent argued that the evidence failed to support such a finding (IHO Ex. III at pp. 13-14). The parent also claimed that both exceptions to the statute of limitations applied to toll the time in which she could bring her claims (id. at p. 15). The parent argued that the evidence submitted by the district did not rebut the parent's arguments with respect to the "specific misrepresentations" or "withholding of information" exceptions because it was the district's burden to establish that the exceptions did not apply (id. at pp. 16-17). As to the "specific misrepresentations" exception, the parent claimed that district documentation indicating the student was "mentally retarded" and not capable of earning a diploma were "untrue" and that, when she expressed concern the district told her the student had limited academic potential (id. at p. 19). The parent maintained that with respect to the "withholding of information" exception, the district failed to establish that it provided prior written notices or procedural safeguards notices that complied with the IDEA and federal regulations (id. at pp. 17-18). The parent further asserted that laches did not apply to bar her claims (id. at pp. 24-25).

3. The District's Reply

In a reply dated June 24, 2016, the district initially asserted that its statute of limitations defense was properly raised in a motion to dismiss and was not required to be included in a challenge to the sufficiency of the due process complaint notice within 15 days of receipt of the complaint (IHO Ex. II at pp. 7-9). With respect to the parent's contention that her claims did not accrue until her receipt of the July 2015 neuropsychological evaluation when she became aware of the student's alleged misdiagnosis, the district argued that the parent knew or had reason to know of the basis of her claims by the time of the February 2008 psychological evaluation, which indicated that there was no evidence the student was "mentally retarded" (id. at pp. 11-12). Moreover, the district contended that the results of the July 2015 neuropsychological evaluation report were generally consistent with previous evaluative information (id. at pp. 15-21). With respect to the parent's claims that the exceptions to the statute of limitations applied, the district contended that both exceptions are "extremely narrow" (id. at pp. 28, 32). Moreover, the district argued that the inadequate or incorrect assessment of a student does not trigger the specific misrepresentations exception, nor do negligent misrepresentations; rather, the district must have intentionally misled or knowingly deceived the parent (id. at pp. 28-29). The district contended that while the parent raised general claims that the district misrepresented the student's cognitive deficits and academic potential, she did not allege that the district knowingly and intentionally misrepresented to the parent that it had resolved any specific issue that formed the basis for her claims that prevented her from requesting an impartial hearing, as required for the exception to apply (id. at pp. 29-30). Therefore, the district asserted the parent failed to establish that the misrepresentation exception applied (id. at p. 31). The district also contended that the parent failed to establish that the "withholding of information" exception applied, and asserted that it was the parent's burden to establish that she was entitled to the exception (id. at p. 32). The district argued the parent failed to establish that the district withheld written notice of the procedural safeguards such that it "prevented [the parent] from requesting a timely due process hearing" (id.). Furthermore, the district also asserted that the parent failed to establish that it was required to provide her with an explanation of NYSAA or notification of the applicable limitations period (id. at p. 33). Contrary to the parent's arguments, the district contended that the notices provided by the district showed that the parent was provided with notice of her due process rights and was

advised of the procedural safeguards and how to obtain additional information regarding her rights (id.). The district further noted that the parent had not denied receipt of the notices, and signed several, acknowledging receipt of the procedural safeguards notice (id. at p. 34).

4. The Parent's Surreply

The parent responded to the district's reply in a surreply dated August 12, 2016 (IHO Ex. IV). The parent contended that the burden of proof in this case was on the district, including regarding the statute of limitations, and that the district had not established that the parent knew or should have known of her claims (id. at pp. 1-2). The parent also contended that without proof of mailing, the district was unable to establish that it provided copies of documents entered into evidence to the parent (id. at pp. 3-4). The parent next claimed that any caselaw holding that the withholding of information exception only applied to the provision of procedural safeguards was "wrongly decided" based on the plain language of the exception (id. at pp. 4-8). The parent additionally asserted that the district incorrectly asserted that it was not required to provide information about the NYSAA (id. at p. 8). Further, even if the district "established that it provided the parent with some boilerplate documents," the parent maintained that it had "failed to address the [p]arent's claims that it has failed to comply with" the requirement to provide compliant procedural safeguards or prior written notices such that the parent was on notice of her rights or the applicable limitations period (id. at pp. 9-10). And, in any case, the parent claimed that a review of the IEPs in the hearing record did not establish that the parent knew or should have known of her claims or that the district explained "the meaning of the NYSAA designation" or articulated "the criteria upon which the IEP teams based their decision that [the student] was NYSAA eligible" (id. at pp. 10-12). Finally, the parent argued that the cases cited by the district to support their claim that the parent's misdiagnosis claims were not actionable were inapplicable (id. at pp. 13-17).

C. Impartial Hearing Officer Decision

The parties convened an impartial hearing on December 17, 2015, which concluded on December 26, 2017, after 14 days of proceedings (Dec. 17, 2015 Tr. pp. 1-42; Feb. 22, 2016 Tr. pp. 43-68; Apr. 25, 2016 Tr. pp. 69-111; July 6, 2016 Tr. pp. 1-68; Aug. 11, 2016 Tr. pp. 69-74; Sept. 20, 2016 Tr. pp. 1-60; Dec. 7, 2016 Tr. pp. 61-75; Jan. 9, 2017 Tr. pp. 76-98; Mar. 23, 2017 Tr. pp. 99-120; May 24, 2017 Tr. pp. 121-43; June 9, 2017 Tr. pp. 144-54; Aug. 8, 2017 Tr. pp. 155-161; Oct. 23, 2017 Tr. pp. 162-75; Dec. 26, 2017 Tr. pp. 176-88).[13]

By interim decision dated November 28, 2016, the IHO granted the district's motion in part and dismissed the parent's claims related to the 2004-05, 2005-06, 2006-07, and 2007-08 (through February 2008) school years on statute of limitations grounds (IHO Ex. VI at p. 6). The IHO determined that the parent's claim that the district had misdiagnosed the student's disability and inappropriately placed him accrued upon receipt of the July 2015 neuropsychological evaluation (id. at p. 4). The IHO further found that the results of psychological, psychiatric, and speech-language evaluations obtained by the parent in 2004, "which the [district] followed in making recommendations for [the student]" in the 2004-05 school year, did not "significantly misstate" the

[13] As the transcript is not consecutively paginated across all hearing dates, transcript citations are to both the day the hearing took place and the transcript pagination.

student's needs and it was reasonable for the district to follow the recommendations contained therein (id. at pp. 4-5). Moreover, the IHO determined that the record was "insufficient for a determination that the [district's] diagnosis of [the student's] educational disability was erroneous and the placement at [the nonpublic school] inappropriate" during the 2005-06 and 2006-07 school years (id. at p. 5). However, the IHO found that the February 2008 psychological evaluation put the district "on sufficient notice that it may have misclassified the student's educational disability and was continuing an inappropriate educational placement" (id.). The IHO further determined that because the February 2008 evaluation indicated a reading disorder was suspected and should be ruled out, the April 2008 psychological evaluation conducted by the district "was inappropriate, contrary to the recommendation of [the February 2008 evaluator], and negligent" in conducting only cognitive assessments, which "resulted in a gross loss of educational opportunity for [the student,] who then remained in an inappropriate placement for a number of years" (id.). The IHO "reject[ed]" the district's argument that the February 2008 psychological evaluation gave the parent notice of her claim for misdiagnosis because the district's April 2008 evaluation "continued to describe [the student] as intellectually impaired" (id. at pp. 5-6).

Subsequent to the IHO's decision on the district's motion to dismiss, the parties convened an additional eight hearing dates, at which they primarily discussed how to proceed with the hearing and the parties' attempts to negotiate a settlement but presented no additional documentary or testimonial evidence (Dec. 7, 2016 Tr. pp. 61-75; Jan. 9, 2017 Tr. pp. 76-98; Mar. 23, 2017 Tr. pp. 99-120; May 24, 2017 Tr. pp. 121-43; June 9, 2017 Tr. pp. 144-54; Aug. 8, 2017 Tr. pp. 155-161; Oct. 23, 2017 Tr. pp. 162-75; Dec. 26, 2017 Tr. pp. 176-88). On the penultimate hearing date, the IHO indicated that he had "enough in the record about this student" and, while he would permit the parent to submit additional documentation, would not allow the parent to call witnesses, stating that the dispute was over "a time period that either somebody's going to come in here now and speculate completely about, or they're just not going to have anything to do with it. Unless by some miracle, there's somebody around who really knows what's going on" (Oct. 23, 2017 Tr. pp. 167-69). The IHO indicated that if the parties had not reached settlement by the next hearing date, he would accept written closing submissions and render a decision (Oct. 23, 2017 Tr. p. 171). At the final hearing date, in response to counsel for the parent's request to "set a real date for next time," the IHO stated that he wanted the parties to make submissions on their positions but would not accept any more evidence on the now two-year-old case (Dec. 26, 2017 Tr. pp. 178-79 [emphasis added]).

By decision dated May 7, 2018, the IHO found that the district failed to provide the student a FAPE for the 2011-12 school year and awarded relief (see IHO Decision at pp. 1-11). Initially, the IHO explained that he had previously rendered decisions in other cases involving the student and had awarded compensatory relief for the district's failures to offer the student a FAPE (id. at pp. 4-7). In a previous case involving the 2012-13, 2013-14 and 2014-15 school years, the IHO awarded compensatory relief of "up to three years of extended eligibility for special education" beyond the student's 21st birthday, to include the 2018-19, 2019-20, and 2020-21 school years or until the student achieved a high school diploma, whichever came first (id. at p. 4; see IHO Ex. VIII). The IHO also awarded "additional compensatory services in the form of two one-hour periods of academic remediation in ELA and math for each school day" during the 2012-13, 2013-14, and 2014-15 school years, "or approximately 1,080 periods of instruction" (IHO Decision at p. 5). In a previous case involving the 2015-16 school year, the IHO awarded an additional half year of extended eligibility through half of the 2021-22 school year or until the student graduated

with a high school diploma, whichever came first (id. at pp. 5-6; see IHO Ex. X). In addition, the IHO awarded one hour of academic remediation in both ELA and math for each day in half of the 2015-16 school year (IHO Decision at p. 6). Finally, in a case involving the 2016-17 school year, the IHO ordered the district to fund "various services" including "80 hours of special education instruction for inappropriate [extended school year (ESY)] services," or an "additional summer of extended eligibility for special education," at the parent's choosing (id.; see IHO Ex. XII). Cumulatively, the IHO noted that the student had been awarded compensatory services including three and one-half years of extended eligibility "plus an additional ESY period," "approximately 2,060 [sic] hours of remedial special education instruction, and various other compensatory services" (IHO Decision at p. 7).

Turning to the school years at issue in this proceeding, the IHO found that there was "little or no evidence of a deprivation of FAPE while [the student] attended [m]iddle [s]chool from 2008 to 2011" (IHO Decision at p. 7). However, the IHO found that, because the district "misdiagnos[ed]" the student with an intellectual disability, the student was placed in a "non-credit bearing vocational program" for the 2011-12 school year and "was not permitted to achieve high school credit with an aim to achieve a high school diploma" (id.). Thus, consistent with his previous rulings in the other matters involving the student, the IHO found that the student was entitled to another year of extended eligibility beyond his 21st birthday, for a combined total of four and one-half years plus one summer session of extended eligibility (id.).[14] The IHO "decline[d] to award any other compensatory relief" as a result of his finding in a prior decision that the student made academic progress during the 2011-12 school year (id.; see IHO Ex. VIII at pp. 7, 10-11).

The IHO also found that the parent's requests for an additional four years of extended eligibility in addition to an "array of additional services, which the parent presumes will be necessary for [the student] to receive FAPE for up to 7.5 years in the future," were "wholly speculative and contrary to the award of compensatory education" in the previous case involving the 2012-13, 2013-14, and 2014-15 school years (IHO Decision at p. 8). Specifically, the IHO noted that during the period of extended eligibility, the student would receive services pursuant to an IEP that would be reviewed annually and subject to the due process procedures should any disagreements arise with respect to those IEPs during the compensatory period, which the IHO

[14] The IHO cited to no legal authority that either extended eligibility or the parent's right to continued due process based upon IEPs developed through a compensatory education award are appropriate remedies under the IDEA. As SROs have noted in previous decisions, it is not entirely clear that administrative hearing officers are imbued with the authority to award extended eligibility as a form of relief under the IDEA. The Second Circuit has described compensatory education as "prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education" (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2 [2d Cir. 2008] [emphasis added]; see French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011] [noting that "a disabled student who has attained the age of 21 is generally no longer eligible to receive state educational services under the IDEA"]). In any event, even if the student were entitled to extended eligibility under the IDEA, it does not follow that the district would be subject to due process procedures during the compensatory period, since State law does not require the district to provide the student with a free public education past the age of 21 (Educ. Law § 3202[1]). Nonetheless, in light of my resolution of this matter, there is no reason to address the appropriateness of extended eligibility as a remedy at this time.

indicated provided the mechanism for addressing any changes in the student's needs (id.).[15] As a result, the IHO determined that the "specifics of the extended eligibility remain subject to the IEP process and due process," and declined to award any specific "set of IEP recommendations for the compensatory education period" (id. at p. 9). The IHO also found that the parent's request for a "compensatory fund" in the amount of $969,000.00 had no basis in the hearing record (id.).[16]

Finally, the IHO stated that he considered all other requests and claims by the parties and found them to be without merit or insufficiently asserted (IHO Decision at p. 10). Moreover, the IHO found that any claims alleged in the due process complaint but not raised elsewhere in the record were deemed abandoned, and any issues not raised in the parent's due process complaint notice were waived (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in not awarding all of the relief requested in her due process complaint notice. Initially, the parent asserts that the IHO erred in dismissing her claims related to the 2004-05 school year through February 2008. In particular, the parent contends that the IHO did not apply the correct analysis to those school years by determining when the parent knew or should have known of her claims and instead based his decision on whether the district was on notice that it might have misdiagnosed the student. The parent further argues that the IHO failed to make findings regarding whether either of the exceptions to the statute of limitations applied to toll the parent's time to bring her claims.

The parent next asserts that the IHO did not allow her the opportunity to "compel witnesses" and present evidence after the IHO issued his decision on the district's motion to dismiss.[17] The parent also contends that the IHO denied the parent proper notice of the district's position with respect to FAPE because the IHO "did not force" the district "to make its position clear during the hearing" or require the district to answer the due process complaint notice. The

[15] The IHO gave the parent the choice of accepting a public school placement from the district, or a nonpublic school placement funded by the district (IHO Decision at pp. 7-11; IHO Exs. VIII at pp. 7-10; X at p. 8). In the event the parent chose the public school option, the IHO ordered that the district would be required to continue developing IEPs for the student, and that IDEA due process rights would attach (IHO Decision at pp. 8-10; IHO Exs. VIII at p. 9; X at p. 8). If the parent selected the nonpublic school option, the IHO indicated that the district would have no obligation beyond funding the cost of the student's attendance at the nonpublic school, including transportation (IHO Decision at p. 9; IHO Ex. VIII at p. 10).

[16] Additionally, while this request was included in the parent's closing brief, it was not included in the due process complaint notice (see IHO Ex. V; Parent Closing Br. at p. 24).

[17] The parent also includes several documents as additional evidence attached to the Request for Review. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The parent submits a number of evaluations that were available at the time of the impartial hearing, and the parent offers no explanation why this evidence is now necessary in order to render a decision. Accordingly, I deny the parent's request to accept additional evidence into the hearing record.

parent claims the IHO refused to allow the parent to develop a record with respect to her claims. The parent also argues that the IHO failed to take jurisdiction over her "policy and practice claims of a systemic nature," as well as her claims raised under section 504 and section 1983. The parent also asserts that the IHO should have deemed all unrebutted facts concerning denials of FAPE between the 2004-05 and the 2011-12 school years to be true, since the district failed to call witnesses and did not address any of the parent's specific allegations, and that the IHO failed to rule on "any of [her] specific claims."

Because the IHO failed to rule on the parent's claims, the parent requests that an SRO determine that the district failed to meet its burden and find a denial of a FAPE for each of the 2004-05 through 2011-12 school years. The parent specifically alleges, among other things, that the district's "misdiagnosis" of the student constituted a denial of a FAPE; the IEPs at issue were all based on erroneous evaluations that failed to assess the student in all areas of suspected disability; the district did not offer or consider assistive technology; a 12:1 special class was not appropriate; the parent was misled by the district's conclusion that the student was intellectually disabled; and there was no evidence the district provided the parent with appropriate prior written notice or an explanation of the NYSAA and its "implications." Regarding each of the 2004-05 through 2010-11 school years, the parent states that she "made the following allegations" and cites generally to her due process complaint notice, contending that the district "failed to address or rebut any of the allegations."[18]

With respect to relief, the parent maintains that the IHO incorrectly considered previous decisions and relief awarded when determining the appropriate relief in this case. Moreover, the parent claims that the IHO's award was "inconsistent" with the legal standards for determining a compensatory education award. The parent now contends that the provision of extended eligibility until the student turns 25 "was not appropriate relief" because it "is not clear he can attend either setting at the age of 25," and "it ignores the emotional/social impact of doing so in the event he cannot complete his diploma by that time." The parent contends that the IHO misconstrued the relief requested by focusing exclusively on whether the student could receive a diploma, which failed to consider that the student may not be able to obtain a diploma or that he may require "additional remediation and assistance beyond the receipt of his diploma in order to make him whole." The parent also contends that the IHO ignored the possibility that the student may need financial support.

The district, in an answer and cross-appeal, generally denies the parent's allegations. With respect to the cross-appeal, the district contends that all of the parent's claims are barred by the statute of limitations and that the IHO erred in finding that the parent's claim of misdiagnosis did not accrue until receipt of the July 2015 neuropsychological evaluation. Specifically, the district maintains that the hearing record established that the parent knew or should have known that the district had failed to identify the student as having a learning disorder based on her repeated expressions of concern that he was inappropriately placed and was not making progress, as well as the fact that multiple evaluations contained the information the parent claimed she learned only upon receipt of the July 2015 neuropsychological evaluation. With respect to the remainder of the parent's claims, the district asserts that all accrued no later than the end of the school year on which

[18] The parent references paragraphs 3-6, 7-25, and 69-140 of the due process complaint notice for each of the school years.

they were based, and thus accrued more than two years before the due process complaint notice was filed. In addition, the district maintains that the exceptions to the statute of limitations do not apply. The district contends that the parent failed to establish either that the district intentionally or knowingly concealed information from the parent regarding the student's misdiagnosis or that the district withheld notice of procedural safeguards such that the parent was unaware of her rights. The district also asserts that if either of these conditions was met, they did not prevent the parent from filing a due process complaint notice, as the hearing record established that the parent "was fully aware of the procedural options available to her." In the event its cross-appeal is not sustained, the district requests that the IHO's finding that there was no evidence of a denial of a FAPE for the time period from February 2008 through the 2010-11 school year and award of compensatory education should be upheld.

In an answer to the cross-appeal, the parent argues that the IHO's determination that her claims related to the time period from February 2008 through the 2011-12 school year were timely should be upheld. The parent also asserts that her claims that the district failed to provide notice related to "the implications and meaning of the NYSAA" were timely. In particular, the parent asserts that the IHO properly determined that the district failed to establish that the parent knew or should have known of the claims related to the student misdiagnosis; the NYSAA; "illegal tracking"; and the FAPE claims alleged in her due process complaint notice. Even if the parent knew or should have known of her claim of misdiagnosis, she asserts that the district intentionally misrepresented to her that the student was cognitively impaired. Further, the parent contends that her claims should be "tolled" pursuant to the withholding of information exception to the statute of limitations based on the district's failure to provide her with prior written notices and procedural safeguards notices that complied with the IDEA or notified her of the statute of limitations; "information about the special education process that would have enabled her to understand her rights"; or an explanation about the NYSAA as required by federal regulation. The parent also argues that the cross-appeal should be dismissed because it does not comply with the regulations governing practice before the Office of State Review.

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[19]

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. Scope of Review

1. Jurisdictional Issues

Initially, I address the parent's claim that the IHO improperly refused to address her section 504, section 1983, and ADA claims, as well as systemic claims related to district policies. The parent acknowledges that an SRO has no jurisdiction over these claims, but asserts she is required to exhaust them.

As noted by the parent, a State Review Officer lacks jurisdiction to consider the parent's challenge to the IHO's refusal to rule on her section 504, section 1983, or ADA claims or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov.

[19] 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., 137 S. Ct. at 1000).

12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither the IHO nor I have jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 or the ADA (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]).

Therefore, an SRO has no jurisdiction to review any portion of a parent's claims regarding section 504, section 1983, the ADA, or systemic policy claims and, to the extent such claims are asserted in this proceeding, they will not be further addressed.

2. Compliance with Practice Regulations

Both parties assert the other failed to comply with the provision of the regulations governing practice before the Office of State Review and request that the other's pleading be rejected (see 8 NYCRR 279.8[a]; 279.13). Notwithstanding the accuracy of the parties' respective contentions relative to the form of the opposing party's pleadings, I decline, as a matter within my discretion, to dismiss the request for review or answer and cross-appeal on these grounds, as the parties were able to respond to the arguments raised and there is no indication that either party suffered any prejudice as a result (Application of a Student with a Disability, Appeal No. 18-015).

3. Claims Raised on Appeal

Before reaching the substance of the statute of limitations arguments raised on appeal, I briefly address some of the claims raised by the parent. First, the parent claims that the IHO did not allow the parent to proceed with the hearing and develop the hearing record. She further argues that the district failed to address or rebut any of the parent's claims with respect to FAPE for the 2004-05 through 2010-11 school years at the impartial hearing. The IHO and the parties mutually agreed that the statute of limitations issue would be addressed first through the submission of the district's motion to dismiss and the parent's opposition to that motion; furthermore, the district and the parent agreed that evidence introduced at the hearing with respect to the motion would address the statute of limitations only, not the merits of the case (see Dec. 5, 2015 Tr. pp. 24, 26-27; Feb. 2, 2016 Tr. p. 46; Dec. 26, 2017 Tr. p. 183). Following the IHO's interim decision on the statute of limitations the "parties engaged in extensive settlement discussions," but once those discussions deteriorated, the IHO refused to allow the hearing to proceed on the merits (see Oct. 23, 2017 Tr. pp. 164-65, 168-69, 171-72; Dec. 26, 2017 Tr. pp. 178-79, 184). The evidence in the hearing record indicates that neither party was allowed to proceed with the hearing and develop a record on the merits of the case. To the extent that the IHO refused to allow the hearing to proceed, New York State regulations provide that the parties "shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing" (8 NYCRR 200.5[j][3][xii]). Thus, I agree with the parent that the IHO improperly interfered with the parties' due process rights to complete their presentation of evidence relevant to the merits of

this case. However, as discussed in detail below, it is unnecessary under these circumstances to remand the matter for further development of the hearing record.

With respect to the parent's claim that the district failed to meet its burden that it offered the student a FAPE for the 2004-05 through 2011-12 school years, the parent cites to the due process complaint notice without directly identifying the claims she intends to raise on appeal. The practice regulations provide that a party may not circumvent page limitations through incorporation by reference in the request for review (8 NYCRR 279.8[b]). To the extent that the parent does not set forth any specific claims related to those school years, they will not be addressed in this decision. Moreover, the practice regulations require that the parent, set forth a clear and concise statement of the issues presented for review, identifying the "precise rulings, failures to rule or refusals to rule presented for review" (8 NYCRR 279.8[b], [c][2]). To the extent that the parent now raises claims with respect to the district rather than the IHO's determination, it is also improper to raise these claims on appeal.[20]

The parent also claims that the IHO failed to address any of the parent's arguments raised in the due process complaint notice, and that the IHO's determination was not based on a well-reasoned analysis of the claims or application of facts to the law.[21] However, the parent does not identify on appeal which claims the IHO should have addressed.[22]

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[20] I also remind the parent that it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3d Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is insufficient to preserve a specific challenge]; N.L.R.B. v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 [11th Cir. 1998] [noting that "[i]ssues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived"]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [noting that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

[21] To the extent that the parent now relies on the IHO's determination that the several claims raised in the due process complaint spring from the student's misdiagnosis, the parent's general statements of error in the request for review that the IHO failed to address claims raised in the due process complaint notice with respect to "why the [district] failed to provide a FAPE" are not sufficient to raise these claims for review (see 8 NYCRR 279.4[a]; 279.8[c]; Req. for Rev. at p. 4; Parent Mem. of Law at pp. 12-14, 18, 20-22; Answer to Cross-Appeal at pp. 2-3). By way of example, setting forth as a single issue that "The DOE Failed to Meet its Burden that it Offered a FAPE During 2004-2005" does not present for review each of the subordinate claims raised in the parent's due process complaint notice, and as noted above, State regulation explicitly forbids incorporation by reference to circumvent the page limitations for pleadings (8 NYCRR 279.8[b]).

[22] To reiterate, the parent's claim that the district failed to meet its burden that it offered a FAPE regarding the "numerous procedural and substantive violations" raised in the due process complaint notice for each of these school years will not be addressed in this decision as they were improperly raised solely through incorporation by reference on appeal.

B. Statute of Limitations

1. Accrual of Claims

The parent asserts that the IHO erred in dismissing her claims with respect to the 2004-05 through 2007-08 school years on statute of limitations grounds by failing to "apply the correct criteria"; the parent argues that the IHO's analysis improperly centered on whether the district had sufficient notice that it may have misdiagnosed the student and continued to inappropriately place the student, rather than on whether the parent knew or should have known of her claims at a specific time. Generally, 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]). 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]). With respect to arguments related to the student's misdiagnosis, discussed in further detail below, for statute of limitations purposes the parent is correct that the IHO erred and that her claims related to misdiagnosis accrued at the time the parent knew or should have known of the alleged misdiagnosis.

Review of the parent's memorandum of law in conjunction with the request for review reveals that the crux of the parent's arguments on appeal relate specifically to the student's alleged misdiagnosis with cognitive impairments. In her memorandum of law, the parent states that the "gravamen of [the parent's] complaint is that the [district] wrongly determined that [the student] was 'moderately mentally retarded' and 'severely cognitively impaired' and, as such, the [district] tracked him in wholly segregated special education settings, relegated him to eligibility under the [NYSAA], denied him adequate services and accommodations, denied him access to the general education curriculum necessary for him to pursue a regular diploma" (Parent Mem. of Law at pp. 3-4). The parent asserts that her claims of a denial of a FAPE are also based on the district's failure to "diagnose, identify, and address [the student's] learning disabilities" and to evaluate or identify the student's auditory processing disorder, visual motor impairments, and need for assistive technology (id. at pp. 19-20). This is consistent with the position taken by the parent at the impartial hearing (see IHO Exs. III at p. 6; XVI at pp. 1-2, 13-14).

The parent argues that her claims did not accrue until she received the July 2015 neuropsychological evaluation, as she was not on notice of her claims relating to the student's misdiagnosis as cognitively impaired, the improper designation of the student as NYSAA-eligible, or the district's failure to adequately evaluate the student prior to that time. Accordingly, analysis of when the parent's claims accrued focuses on her claims relating to misdiagnosis, NYSAA eligibility, and the district's failure to evaluate the student's needs relating to auditory processing, visual motor needs, and assistive technology. In particular, the parent contends that the district "failed to establish that any of the contested IEPs accurately reflected the results of the" July 2015 neuropsychological evaluation, such that the parent was not aware the student was wrongly evaluated until her receipt of the evaluation (id. at pp. 4, 14).

In its cross-appeal, the district argues that the parent's claims with respect to the student's misdiagnosis accrued, at the latest, following receipt of the February 2008 psychological evaluation, by which time the diagnoses contained in the July 2015 neuropsychological evaluation

of which the parent asserts she was not previously aware had been identified in prior evaluations. The district also argues that the IHO relied on inapplicable caselaw to determine that the parent's claims related to misdiagnosis did not accrue until receipt of the July 2015 neuropsychological evaluation.

With respect to the parent's reliance on K.H. v. New York City Department of Education (2014 WL 3866430 [E.D.N.Y. Aug. 6, 2014]) and Draper v. Independent Atlanta School System (518 F.3d 1275 [11th Cir. 2008]), it is necessary to briefly discuss these cases before moving forward. The Court in K.H. held that a student's claims relating to inadequate evaluations, misdiagnosis, and inappropriate placement "did not accrue until [he] gained new information that made [her] aware of inadequacies in the student's prior special education program" (2014 WL 3866430, at *16-*20 [E.D.N.Y. Aug. 6, 2014]). The parent cites to the Court's ruling, following Draper, that "the parents 'did not have the critical facts to know that [the plaintiff] had been injured by this placement until they received the result of the testing'" (id. at *18, quoting Draper, 518 F.3d at 1288 [stating that "[s]ubstantive evidence supports finding that . . . [the student's] family did not know enough to realize that [the student] had been injured by his misdiagnosis and misplacement"). In K.H., the Court also held that "the family could not have been aware of the claim that their son had been misdiagnosed until they received the results of the new testing," and that the school district "never identified the specific learning disabilities that" were diagnosed in the subsequent evaluation (2014 WL 3866430, at *18, citing Draper, 518 F.3d at 1288). The Court further found that the student's parent could not have known of claims regarding the district's "failure to identify and address his learning disabilities until he received the evaluation . . . that diagnosed him with those learning disabilities" (K.H., 2014 WL 3866430, at *20). To the extent the parent argues that her claims did not accrue until she received the results of the July 2015 neuropsychological evaluation pursuant to the reasoning set forth in K.H. and Draper, I find this argument unavailing under the facts of this case.

A discussion of the July 2015 neuropsychological evaluation results is necessary to address the claims raised on appeal, and whether the parent knew or should have known of her claims prior to receiving the report of the evaluation. During the evaluation, the student was administered a battery of tests across developmental domains (IHO Ex. III). The evaluation also included a record review of previous medical and educational reports dated May 2011 through February 2015 (id. at pp. 44-48). The evaluation report indicated that on the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) the student achieved a full-scale IQ of 66 at the extremely low level (id. at pp. 49-50, 57). Furthermore, the student scored at the low average level on the verbal comprehension index, at the extremely low level on the perceptual reasoning and processing speed indices, and at the borderline level on the working memory and general ability indices (id. at pp. 57-57a). The student was also administered the Woodcock-Johnson III - Tests of Achievement (WJ-III) where he scored at the very low level for reading comprehension, math calculations, decoding, and spelling and at the low average level for oral comprehension (id. at p. 57a). With regard to neuropsychological functioning, the evaluator noted that the student's strengths included his ability to remember sequences of numbers and letters, word knowledge, semantic knowledge, ability to learn a word list, ability to remember narrative, and ability to remember sentences (id.). However, the student was noted to function at very low levels in visual spatial and visual motor skills, nonverbal reasoning and visual spatial reasoning, visual memory, and "both orthographic and phonological processing skills" (id.). The student also showed weakness with his ability to

"remember a sequence of numbers, verbal reasoning skills, and visual reasoning skills" (id.).[23] As to academic skills, the evaluation report noted that the student functioned at very low levels in all areas except for oral comprehension (id. at pp. 57a-58). With regard to adaptive functioning, the parent's responses on the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) indicated the student demonstrated weaknesses in expressive and written language skills, in all daily living skills, and in interpersonal relationships (id. at pp. 44, 57-57a). The evaluator offered several diagnoses of the student, including specific learning disorder with impairment in reading, reading comprehension; specific learning disorder with impairment in written expression, specifically grammar and punctuation accuracy, clarity or organization of written expression; and specific learning disorder with impairment in mathematics, specifically accurate or fluent math calculation and accurate math reasoning (id. at p. 57). Additionally, the evaluator diagnosed the student as having a developmental coordination disorder and a language disorder, specifically receptive and expressive language delays (id.).

While the student achieved a full-scale IQ of 66 at the extremely low level, the evaluator referenced a caution for interpreting low IQ scores from the Stanford-Binet manual; such scores may reflect conditions other than low intellectual disability, such as multiple handicaps and neuropsychological disorders, that may cause the student to appear less intellectually capable, and examiners should rule out potential rival hypotheses before determining a student is intellectually disabled (IHO Ex. III at p. 58).[24] The evaluator noted that the student's scores fell into a category where, when either processing speed or working memory indices are significantly below verbal comprehension and perceptual reasoning indices, the general ability index is often considered to be a better estimate of overall cognitive skills (id. at p. 50). The evaluator noted that the student's standardized score on the general ability index was 73, at the borderline level, and that his full-scale IQ was significantly weaker (id. at pp. 49-50). The evaluator further indicated that the student's best skills, which were at the average level, were in the areas of word knowledge and general fund of knowledge and were indicative of the student's true cognitive potential (id. at pp. 50, 55). However, the student's weakest areas included abstract spatial, nonverbal reasoning, attention to visual detail, and visual motor speed. As such, the evaluator opined that due to the student's significant difficulties with visual and fine motor skills, it was clear that the student's full-scale IQ was "not an accurate measure of his cognitive skills" and that "it was evident from the verbal IQ that he should not have been considered as deficient for classification or diagnostic purposes" (id. at pp. 58-59).[25] The evaluator also indicated that the student's general ability index score should be considered a "minimal estimate of [the student's] potential cognitive functioning" (id. at pp. 57-57a).

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[23] As evidenced above, the evaluator characterized the student's ability to sequence numbers as both a strength and a weakness. It is not clear if this is based on the student's performance on different measures of this skill or whether it is a reporting error (see IHO Ex. III at pp. 54, 57a).

[24] The student's cognitive skills were previously assessed in 2012 using the Stanford Binet – Fifth Edition (SB5). The evaluator dismissed the "deficient" full scale IQ obtained as a result of that evaluation, citing the caution found in the SB5 manual.

[25] The evaluator indicated that, as a result, the student missed the opportunity to take credit bearing courses (IHO Ex. III at p. 59). The evaluator recommended the student be given the opportunity to do so because it was likely that the student had the ability to complete such courses given proper accommodations (id.).

As noted above, the parent asserts that the district improperly failed to identify the student's auditory processing disorder, visual motor impairments, learning disorder, and need for assistive technology. However, review of the hearing record demonstrates that the parent had information related to each of these needs available to her several years before the July 2015 neuropsychological evaluation was conducted. In particular, the following evaluations and documents included in the hearing record contain information the parent alleged was first made known to her upon receipt of the July 2015 neuropsychological evaluation report: a September 2004 social update, a November 2004 psychological evaluation, a November 2004 psychiatric evaluation, a November 2004 speech-language evaluation, a December 8, 2004 speech-language progress report, a January 2007 "corrected" social update, February-March 2008 reports from the student's nonpublic school, a February 2008 psychological evaluation, a March 2008 social history update, a March 2008 psychoeducational evaluation update, and an April 2008 psychological evaluation update (IHO Exs. I at pp. 60, 70, 105, 108, 109, 112, 163, 177, 181, 190, 300).

With respect to the parent's claims relating to the student's visual motor deficits, the September 2004 social history reflected that the student "may need 'eye tracking supports'" (IHO Ex. I at p. 109). Similarly, the psychologist who conducted the November 2004 psychological evaluation indicated that the student's "visual motor integration skills are deficient" and opined that the student "would benefit from training with an ophthalmologist to strengthen his tracking skills" (id. at pp. 63, 65). The January 2007 corrected social history indicated that the student had "serious visual tracking problems" and "marked" "eye-hand/fine motor problems" (id. at p. 112). An OT annual report from the student's nonpublic school, dated February 4, 2008, reflected that the student presented with "Decreased Visual Motor Skills" and that the functional areas addressed by the student's program included visual motor (id. at p. 192). Accordingly, the hearing record reflects that the parent knew or should have known of her claims relating to the student's visual motor deficits more than two years prior to the time she commenced this proceeding.

The parent's claim that she was unaware of the student's auditory processing difficulties is also not supported by the hearing record. In particular, a November 2004 speech-language evaluation indicated that the student's auditory processing was below the average range (IHO Ex. I at p. 73). Similarly, a December 2004 speech-language progress report indicated that the student evidenced a "moderate auditory processing disorder" that was manifested in difficulty following two to three-step directions, answering questions based on a short story, and sequencing orally presented information (id. at p. 108). In addition, similar difficulties with language processing were noted on the student's IEPs developed in October 2008 and May 2011 (id. at pp. 243, 282). Accordingly, the hearing record reflects that the parent knew or should have known of her claims relating to the student's auditory processing deficits more than two years prior to the time she commenced this proceeding.

With respect to the parent's argument that her claims relating to the student's designation as eligible for the NYSAA did not accrue because the district failed to explain to her the basis for its determination that the student was eligible for the NYSAA and the implications of such a designation, including the ways it affected the student's ability to receive a diploma, federal regulation requires that States and districts "must ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards . . . are informed . . . that their child's achievement will be measured based on alternate academic achievement standards, and of how participation in such assessments may delay or otherwise affect

the student from completing the requirements for a regular high school diploma" (34 CFR 300.160[e]).[26] Contrary to the parent's contention, documents in the hearing record indicate the parent was provided with an explanation of the basis for the district's determination that the student was NYSAA-eligible. At the June 2007 CSE meeting, the CSE revised the student's IEP to reflect that he would participate in the alternate assessment (IHO Ex. III at p. 165). The IEP cited the reason for his participation in the alternate assessment as "global delays," and noted that the student would be assessed through a portfolio of his work as well as teacher-made tests and assessments (id.). In addition, this information was reflected in each of the student's subsequent IEPs included in the hearing records (IHO Exs. I at pp. 238, 266, 293; III at pp. 177, 194). With respect to the student's ability to receive a regular high school diploma, the October 2009 IEP identified the student's "diploma objective" as an "IEP diploma" (id. at pp. 166-67, 178).[27] As a result, the hearing record indicates that the parent's claims with respect to the NYSAA accrued more than two years before her receipt of the July 2015 neuropsychological evaluation.

Turning to the parent's primary contention, regarding the student's alleged misdiagnosis as cognitively impaired, the November 2004 psychological evaluation addressed the parent's concern that the student was not reading or writing (IHO Ex. I at pp. 60, 63, 65). Similar to the July 2015 neuropsychological evaluation report, the November 2004 psychological evaluation report noted that in terms of cognitive functioning, the student's verbal skills were significantly better developed than his nonverbal abilities (compare IHO Ex. I at pp. 61-62 66, with IHO Ex. III at pp. 49-50, 57). The psychologist who evaluated the student in November 2004 opined that the student's full-scale IQ of 67 did not reflect the disparity between the student's verbal and nonverbal abilities (IHO Ex. I at pp. 61-62, 64). The evaluating psychologist opined that the student's then-current classroom placement needed to be reevaluated and that the student required "an even smaller classroom with direct instruction that utilize[d] Orton-Gillingham techniques to teach literacy skills" (id. at p. 65). A November 2004 psychiatric evaluation also included a diagnosis of learning disorder, pervasive, but noted that the evaluator "was unable to fully assess current intellectual functioning" and that the student's "[a]ttention and concentration were impaired" (id. at p. 106).

The November 2004 speech-language evaluation report indicated that the parent's main concern was that the student was not learning to read or write and she did "'not understand how [the student] got promoted to 2nd grade'" (IHO Ex. I at p. 70). Consistent with the July 2015 neuropsychological evaluation, the speech-language pathologist explained that the student had a phonological processing impairment specifically in the areas of phonemic awareness and reading fluency, which she indicated impacted his reading and spelling skills (compare IHO Ex. I at p. 73, with IHO Ex. III at p. 53-54). The speech-language pathologist also noted that the student demonstrated deficits in receptive/expressive language and pragmatic language skills, for which she recommended speech-language therapy (IHO Ex. I at pp. 73-74).

[26] To the extent the parent's arguments regarding the accrual of her claims pertaining to the student's NYSAA eligibility also implicate the withholding of information exception to the statute of limitations, I find that her claims are similarly barred for the reasons set forth below.

[27] However, it appears this is the only IEP in the hearing record indicating the student's specific diploma objective.

In February 2008 the student underwent a psychological evaluation (IHO Ex. I at pp. 177-78).[28] Corresponding with the 2015 neuropsychologist's finding that the student's full-scale IQ as determined by a 2012 evaluation was "not an accurate measure of [the student's] cognitive skills," the psychologist who evaluated the student in February 2008 noted that, with regard to the student's cognitive development, there was "no evidence of mental retardation" (compare IHO Ex. I at p. 179, with IHO Ex. III at pp. 58-59). Moreover, the evaluator similarly found that the student "likely suffer[ed] from a Learning Disorder," and further noted that "[h]is vocabulary was such as to suggest a functioning within the average range" (IHO Ex. I at p. 179). The February 2008 evaluator also judged the student's intelligence as falling within the average range of functioning (id. at p. 180). The evaluator's diagnostic impressions included learning disorder NOS, R/O reading disorder, and R/O attention deficit hyperactivity disorder (id.). The evaluator also recommended the parent access "educational evaluation services" to more precisely diagnose the student's learning disability (id.). The evaluator also indicated, consistent with the parent's belief, that the student "clearly need[ed] to be in school with higher functioning peers" (id.).

Moreover, the hearing record reflects that the parent believed the services provided to the student were inappropriate for several years. As noted above, the hearing record reflects that the parent believed the student had a learning disability as early as 2004, reporting in a social update her belief that the student "may suffer from dyslexia" (IHO Ex. I at p. 109).[29] She also indicated that the student "may be in the wrong placement" as he was not making adequate progress in school (id.). In addition, a January 2007 "corrected social update" noted that the parent was critical of the student's program and her belief that the program was not providing enough support to the student or meeting the student's needs (id. at p. 113).

With respect to the parent's belief that the student did not have a cognitive impairment, in a letter dated January 17, 2008, the parent informed the CSE that she believed the student was not being academically challenged, partly as a result of his placement in a class with lower functioning students (IHO Ex. I at p. 298). A March 2008 social history update reflected that the parent wanted the student to be reevaluated due to her concerns with the lack of services and the quality of services he received (id. at p. 300). The parent reported that the student's progress was limited and that the staff at his school '"bab[ied]"' him and he was not challenged (id. at p. 301). The update reflected that the parent wanted to explore placements where the student could be challenged more (id.). With respect to the restrictiveness of the student's program, the parent sent a letter to the district dated September 25, 2008, requesting the CSE reconvene immediately to provide the student with a less restrictive program, noting that the student's current placement was not appropriate for the student, either academically or socially (IHO Ex. II at p. 59). Subsequently, the CSE convened on October 7, 2008, to discuss the student's needs (IHO Ex. I at pp. 75, 239, 302). The resultant IEP, as well as the minutes of the October 2008 CSE meeting, reflect the

[28] The February 6, 2008 psychological evaluation was completed by a licensed psychologist to assess whether the student suffered from clinical depression, as had been previously diagnosed by a school psychologist (see IHO Ex. I at p. 177). As such, it did not contain formal standardized cognitive testing (see id. at pp. 177-80).

[29] The November 2004 psychological evaluation also reflected the mother's report of a family history of dyslexia (IHO Ex. I at p. 60).

parent's concern that the nonpublic schools recommended for the student were "too low functioning" (id. at pp. 100, 303).[30]

The March 2008 psychoeducational evaluation report reflected that all of the student's academic skills were four to six years below age and grade level expectancy (IHO Ex. I at p. 169). Upon receipt of the February 2008 psychological evaluation from the parent, the district conducted a psychological evaluation update of the student in April 2008 to obtain a cognitive assessment (id. at p. 182). Administration at that time of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a full-scale IQ of 46, which was in "the moderate range of mental retardation" (id. at p. 183). The evaluator indicated that most of the student's subtest scores were in the mentally deficient range of functioning, with the exception of two scores in the verbal domain, which fell in the borderline range of functioning (id.). In addition, the April 6, 2008 psychological update reflected a similar constellation of scores as those evidenced in the July 2015 neuropsychological evaluation. The evaluation indicated that the student scored significantly higher and in the borderline range of functioning on subtests in the verbal domain, despite noting a full-scale IQ of 46, which was in the moderate range of mental retardation (compare IHO Ex. I at pp. 182-83, with IHO Ex. III at pp. 49, 57). Although the IHO found—and the parent argues—that the parent's claims regarding misdiagnosis did not accrue because the district identified the student as cognitively impaired subsequent to the February 2008 evaluation which indicated that the student was not, no authority is cited for this proposition. Furthermore, the minutes of the October 2008 CSE meeting contain the notation "V. low academics but MR ruled out by outside psychologist" (IHO Ex. I at p. 302). Accordingly, the hearing record does not support a determination that the parent was somehow made unaware of the possibility that the student may have had a learning disorder rather than a cognitive impairment by virtue of the district's psychological testing conducted in April 2008.

Thus, the hearing record demonstrates that the July 2015 neuropsychological evaluation did not present the parent with information with respect to the student's educational needs and/or diagnoses that was not already known to the parent by no later than the 2011-12 school year. In addition, the parent appeared to be aware that the student may have suffered from a learning disability and that he required an educational program more challenging and less restrictive than provided by the district. The Court in K.H. found that claims accrued when the parent became aware of new information that revealed inadequacies in the student's prior special education program related to the previous misdiagnosis of the student. In this case, even if the district misconstrued the cognitive functioning and abilities of the student based on a flawed analysis of the evaluative information available to it and, as a result, provided him with an inappropriate program, and while I certainly sympathize with the parent and can understand her sense of frustration with what she perceived as a continuing failure by the district to provide a program and placement consonant with the student's abilities, the hearing record nonetheless supports the district's contention that the parent knew or should have known of the alleged actions that form the basis of the complaint by no later than the end of the 2011-12 school year. As a result, I reverse

[30] The meeting minutes also reflect that the parent reported that the student "Does really well w/ computers AT eval paperwork given" (IHO Ex. I at p. 303). Accordingly, the parent's claim that she had no knowledge of the student's possible need for assistive technology until the student was evaluated in 2015 is not supported by the hearing record.

the IHO's determination with respect to the February 2008 through 2011-12 school years and find that all claims raised by the parent for the 2004-05 through 2011-12 school years are barred by the statute of limitations, including any arguments related to the appropriateness of educational programs developed in IEPs during those school years as a result of the student's misdiagnosis.[31]

2. Exceptions to Limitations Period

The parent asserts that the IHO erred in failing to determine whether either of the exceptions to the statute of limitations applied. Ultimately, I agree that the IHO erred by not addressing whether the exceptions applied, but find that neither applies in this instance.

a. Specific Misrepresentations Exception

The parent claims, with respect to the specific misrepresentations exception, that the district "repeatedly mislead [sic] the [p]arent by telling her [the student] was 'mentally retarded' and did not have the capacity to learn" (Parent Mem. of Law at p. 25).[32] In its cross-appeal, the district maintains that the misrepresentations exception requires that the district must have intentionally or knowingly misled the parent to believe that the alleged problem forming the basis of the parent's complaint had been resolved. As a result, the district contends that the parent was required to establish that the district knew the student was not cognitively impaired and could earn a diploma and that this information was intentionally concealed from the parent (id.).

The "specific misrepresentations" exception to the timeline to request an impartial hearing applies "if the parent was prevented from requesting the hearing due to . . . specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]). In order for the specific misrepresentations 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]; see Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds

[31] Other than her claims related to misdiagnosis and failure to evaluate, the parent has asserted no basis to find that any of the other claims raised in her due process complaint notice did not accrue upon development of the IEPs at issue. Generally, claims related to the conduct of a CSE meeting or the contents of an IEP accrue at the time of the CSE meeting or at the latest upon the parent's receipt of the IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd 2018 WL 3650185 [2d Cir. Aug. 1, 2018]). Accordingly, I decline to consider any of the parent's claims related to the contents of the IEPs or conduct of the CSEs during the relevant time period that do not relate to the misdiagnosis of the student or the district's failure to evaluate.

[32] The parent originally claimed in her due process complaint notice that the district misrepresented facts to the parent that prevented her from filing a due process complaint, including that the student did not have the potential to earn a diploma, was cognitively impaired, was making progress, and "other issues as set forth herein" (IHO Ex. V at p. 12). In her opposition to the district's motion to dismiss, the parent also claimed that the district "repeatedly created documents indicating that [the student] was 'mentally retarded' and did not have the capacity to earn a diploma" (IHO Ex. III at p. 19).

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 hearing record does not support the parent's claim that the district intentionally or knowingly misrepresented to the parent that the student was cognitively impaired, or that the student did not have the capacity to learn. The parent does not specifically allege facts or point to evidence tending to show the district made intentional misrepresentations regarding the student's cognitive functioning or that such misrepresentations prevented the parent from filing a due process complaint notice (see T.C. v. Lewisville Ind. Sch. Dist., 2016 WL 705930, at *10 [E.D. Tex. Feb. 23, 2016] [holding that the exception did not apply where plaintiff had not offered any factual allegations that would show what misrepresentations were allegedly made and cited no evidence in the record of specific and affirmative misrepresentations by the district]). Rather, the evidence in the hearing record indicates that the parent, at several instances throughout various school years, openly disagreed with the nature of the programs provided by the CSE and believed the student had a greater capacity to learn than was reflected by the services he received (IHO Exs. I at pp. 113, 298, 300-01; II at pp. 57-59; see Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *9 [S.D.N.Y. June 20, 2017]). Moreover, even if the district misrepresented to the parent that the student was cognitively impaired and did not have the capacity to learn, as noted above, the February 2008 psychological evaluation identified that there was no evidence of "mental retardation," and that the student was determined to be of average intelligence (IHO Ex. I at pp. 179-80).

The parent also seems to conflate her claim that the district misrepresented facts with her claims that the district made inappropriate recommendations on the student's IEPs (see D.K., 696 F.3d at 245-46 [identifying that a bare statement of "allegations comprising a claim that a FAPE was denied" would be an overly broad application of the exception]). Even if the district provided the student with an inappropriate and overly restrictive program for several years, this fact alone would not establish that the district misrepresented facts to the parent such that the exception applies (see C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments were sufficient to warrant application of the statutory exception, the exception would swallow the rule"]. Furthermore, as noted above, while the district had information available to it that was later reflected in the July 2015 neuropsychological evaluation, that the CSEs which developed the student's IEPs did not reach conclusions identical to those contained in the neuropsychological evaluation is not indicative of the district's intent to deceive the parent with respect to development of the student's IEPs (see, e.g., F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 2018 WL 4049074, at *2 [2d Cir. Aug. 24, 2018] [noting that "[a] professional disagreement is not an IDEA violation"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]). In conclusion, the hearing record does not support a determination 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 F.3d at 245). Therefore, the evidence in the hearing record does not warrant application of the specific misrepresentations exception to the limitations period.

b. Withholding of Information Exception

The parent claims that the district withheld information that it was required to provide under the IDEA. Specifically, the parent contends that the district failed to establish that it issued prior written notices or procedural safeguards notices and failed to establish that it ensured the parent understood the IEP process, including the applicable limitations period. The district argues that the parent was "fully aware of the procedural options available" and that she was provided with procedural safeguards and notice of her rights "throughout the years at issue."

Initially, to the extent the parent asserts she did not have an opportunity to rebut the district's submissions through testimony, the IHO explicitly informed counsel for the parent that she would be permitted to submit affidavits in opposition or call witnesses to resolve questions of fact, including permitting the parent to testify regarding whether she received procedural safeguards notices (Feb. 22, 2016 Tr. pp. 61, 63; Apr. 25, 2016 Tr. pp. 76-78, 88-89). The hearing record contains no indication that counsel for the parent ever offered any such testimonial evidence, whether in person or by affidavit, in an attempt to establish that the withholding of information exception applied.

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent" (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period 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 F. 3d at 246; C.H., 815 F. Supp. 2d at 986; R.B. 2011 WL 4375694, at *4, *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, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

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 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 2004-05 through 2011-12 school years.

In particular, the hearing record includes a consent for evaluation form dated September 23, 2004, that was signed by the parent on September 28, 2004 (IHO Ex. I at p. 102). The September 23, 2004 consent form stated that the law provided the parent with rights, including procedural safeguards, and that the parent's "Notice of Rights as a Parent of a Child with a

Disability [we]re attached" (id.). Additionally, for "a full description" of her rights, the parent was directed to "refer to the booklet, A Parent's Guide to Special Education for Children, 5-21"; if the parent did not have access to this booklet, the parent was informed that she could "get one from [the district]" (id.). The hearing record contains an identical consent form, dated February 7, 2008 and signed by the parent on March 9, 2008 (id. at p. 161). In addition, the hearing record contains a notice of recommendation dated October 28, 2008 that was signed by the parent on December 4, 2008 (id. at p. 267). The October 2008 notice transmitted a copy of the student's October 2008 IEP and explained that the parent had a right to request mediation or an impartial hearing if she did not agree with the recommendations made by the CSE (id.). The form also indicated that parents may "request an impartial hearing by writing" to the "Impartial Hearing Office" or mediation by writing to the CSE chairperson (id.).[33] Accordingly, the hearing record reflects that the parent knew of her due process rights by no later than December 2008 (see Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. Aug. 1, 2018] [finding that the hearing record established that the parent knew of her rights by no later than the time she signed an acknowledgment of receipt of procedural safeguards]; Avila v. Spokane Sch. Dist. No. 81, 2018 WL 616140, at *8-*9 [E.D. Wash. Jan. 29, 2018] [declining to apply the withholding of information exception where the parent signed an acknowledgement that she received a procedural safeguards notice]).

Critically, the parent does not assert that her purported failure to receive compliant prior written notices or procedural safeguards notices actually prevented her from filling a due process complaint. One of the documents signed by the parent included a description of the parent's right to request mediation and/or an impartial hearing, and to whom such requests should be directed (see IHO Ex. I at p. 267). Additionally, most of the IEPs contained in the hearing record identify the dates which the IEP and "notice of recommendation," were given or sent to the parent (IHO Exs. I at pp. 76, 117, 141, 213, 241; III at pp. 91, 100, 117, 149, 182). Based on the above information, the evidence contained in the hearing record does not support a determination that the parent was prevented from filing a due process complaint due to the district failing to provide her with information required by the IDEA and its implementing regulations and thus, does not warrant application of the withholding of information exception to the limitations period.

VII. Conclusion

Because I have determined that all of the parent's claims raised on appeal are time-barred under the IDEA and that the exceptions to the statute of limitations do not apply, it is unnecessary to address the district's other asserted affirmative defenses, or the remaining claims raised by the parent.

THE APPEAL IS DISMISSED.

[33] The hearing record contains numerous other documents indicating the district provided the parent with information regarding her due process rights on other occasions; however, it is unclear from the hearing record whether the parent received these notices (see, e.g., IHO Exs. I at pp. 115, 268, 281, 301; II at pp. 75-77). Review of the hearing record reflects that the evaluation consent forms which were signed by the parent were both signed on a date that the district conducted evaluations of the student (compare IHO Ex. I at pp. 102 [September 28, 2004], and 161 [March 9, 2008], with IHO Ex. I at pp. 109 [September 28, 2004], and 163 [March 9, 2008]).

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 28, 2016 is modified, by reversing the portions which found that the parent's claims arising from February 2008 through the 2011-12 school year were timely; and

IT IS FURTHER ORDERED that the IHO's decision, dated May 7, 2018 is modified, by reversing the portions which found that the district failed to offer the student a FAPE for the 2011-12 school year and awarded compensatory relief in the form of extended eligibility.

Dated: **Albany, New York**
August 30, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER