The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 16-006

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

Appearances:
Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, Esq., of counsel

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at a nonpublic school for the 2013-14 school year. The appeal must be sustained in part and the matter remanded to the IHO for further administrative proceedings.

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

With respect to the student's educational history, the hearing record reflects that the district evaluated the student and, in February or March 2012, the student began receiving five hours of special education itinerant teacher (SEIT) services per week in the home through the Committee on Preschool Special Education (CPSE) (Tr. pp. 89-90; Parent Ex. B at p. 2). During the 2012-13 school year, the student received SEIT and related services while attending a preschool program (see id.).

On February 26, 2013, the CSE convened and developed an individualized education services program (IESP) for the 2013-14 school year, noting on the IESP that the student "is being parentally placed in a [nonpublic school] next year" (Dist. Ex. 1 at pp. 1-2). Finding the student

eligible for special education and related services as a student with a speech or language impairment, the February 2013 CSE recommended that, beginning in September 2013, the student receive seven periods of special education teacher support services (SETSS) per week in a general education classroom with the following related services: three individual 30-minute sessions per week of speech-language therapy; three individual 30-minute sessions per week of occupational therapy (OT); and two individual 30-minute sessions per week of counseling services at the nonpublic school (id. at pp. 4, 6).[1]

On September 9, 2013 the parents enrolled the student at a nonpublic school for the 2013-14 school year (Tr. pp. 99, 114; Parent Ex. C at pp. 1-3).[2]

A. Due Process Complaint Notice

By due process complaint notice, dated July 9, 2015, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. A at p. 1). The parents alleged that the CSE failed to conduct "up to date testing or evaluations" and failed to "offer further evaluations for the student" (id. at p. 2).[3] The parents also alleged that the CSE was improperly composed because neither the student's general education teacher nor his SEIT attended the CSE meeting (id.). The parents claimed that the CSE "did not explain" to the parents "the difference between an IEP and an IESP" and that, at the time of the meeting, the parents did not yet know "where the student would attend school in September" (id.). The parents further contended that the CSE never discussed the possibility of a full-time special education placement (id. at p. 2). With respect to the services recommended in the IESP, the parents asserted that the CSE did not discuss other possibilities for the student and "premeditated" a "denial of a FAPE" (id. at p. 3).

Next, the parents assert that the IESP developed by the February 2013 CSE was "procedurally and substantively flawed" (Parent Ex. A at p. 2). Specifically, the parents alleged that the CSE incorrectly found the student eligible for special education as a student with a speech or language impairment, "noting that he had previously received diagnoses of autism and pediatric autoimmune neuropsychiatric disorders associated with streptococcal infections (PANDAS) (id.). The parents also alleged that seven periods of SETSS in a general education setting was neither appropriate for the student nor reasonably calculated to result in progress (id. at p. 3). Furthermore, the parents contended that the recommendation for SETSS was misleading and inconsistent because other sections of the IESP identified that the student was entitled to five hours of SETSS, rather than seven periods (id.). In addition, the parents alleged that the CSE "inexplicably reduced"

[1] The student's eligibility for special education is not in dispute, although the parent alleged that speech or language impairment is not the most appropriate disability category for the student (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The Commissioner of Education has not approved the nonpublic school in which the student was enrolled as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

[3] Specifically, the parents argued that the CSE failed to conduct a psychoeducational evaluation and a classroom observation (Parent Ex. A at p. 2).

the student's level of speech-language therapy and "removed the student's physical therapy mandate" (id.).

Next, the parents claimed that the February 2013 IESP did not contain appropriate or sufficient annual goals (Parent Ex. A at p. 3). In particular, the parents alleged that the IESP failed to include annual goals that addressed the student's academic and sensory needs, language or social skills, or activities of daily living (ADL) skills (id.). Additionally, the parents asserted that the February 2013 IESP's speech-language therapy, OT, and counseling annual goals were vague (id.). Moreover, the parents claimed that there were no "short term objectives or benchmarks" and that the IESP failed to include a sensory diet (id.). The parents also contended that the CSE failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) for the student (id.). Finally, the parents alleged that the CSE failed to reconvene to hold an "IEP meeting" upon their request and, in particular, after they obtained a private evaluation of the student (id.).

For relief, the parents requested "prospective payment/reimbursement" for the cost of the student's tuition and related services at the nonpublic school for the 2013-14 school year (Parent Ex. A at pp. 1, 4). The parents also requested that the district "prospectively pay or reimburse the parent for transportation" to the nonpublic school (id. at p. 4).

B. Impartial Hearing Officer Decision

On September 24, 2015, the parties proceeded to an impartial hearing, which concluded on December 1, 2015, after three days of proceedings (see Tr. pp. 1-144). In a decision dated January 5, 2016, the IHO dismissed the parents' due process complaint as barred by the IDEA's statute of limitations (IHO Decision at pp. 13-14). However, the IHO also reached the merits of the dispute and made a number of factual findings (see id. at pp. 8-14). Initially, the IHO found that the testimony of the student's mother was not credible (id. at pp. 9-10, 11). In particular, the IHO determined that the parent's "testimony was vague, contradictory," and that she did not "have an independent recollection of the [February 2013 CSE] meeting" (id. at p. 9).

With regard to the statute of limitations, the IHO found that the parents' filed their claim on July 9, 2015, which was more than two years after the disputed February 2013 CSE meeting (IHO Decision at p. 13). The IHO suggested that the claim may have accrued at a different time had the parents contacted the CSE to "stat[e] that there was an error in the document titled IESP" or to "request[] a new meeting" or "a public school placement" (id.). However, the IHO found that the parents presented no evidence during the impartial hearing to support this contention (id.). Moreover, the IHO found the parent's contention that she "informed the CSE [that] she wanted to change [the student's placement] from a private school to a public school" not credible (id. at p. 14).

As to the propriety of the CSE's development of an IESP instead of a IEP, the IHO found that, based on the parent's lack of recollection about the February 2013 CSE meeting, the fact that the student attended a nonpublic school from September 2013 through the date of the impartial hearing, and the fact that the parents' other children attended nonpublic schools, that the parents informed the CSE that they would send the student to a nonpublic school (id. at p. 11). In addition, the IHO stated that he "could only assume" that the parent read the three places in the IESP that

indicated that the student was being parentally placed in a nonpublic school and found that there was "no evidence from the parent that she requested a new IEP or informed the [district] that the listing of a parentally placed placement was incorrect" (id.). The IHO found the parent's testimony to the contrary not credible (id.). Accordingly, the IHO found that the CSE's development of an IESP was appropriate (id.).

Next, the IHO found that the February 2013 IESP was "valid" based upon the "credible evidence presented at the hearing" (IHO Decision at p. 11). The IHO found that parent did not "contradict" the accuracy or appropriateness of the present levels of performance and the annual goals included in the IESP (id.). Further the IHO determined that the parent "failed to present any evidence" that a reduction in related services occurred (id. at p. 10). With respect to a CSE reconvene, the IHO questioned the parent's testimony and noted a lack of evidence about the district's receipt of the private neurodevelopmental evaluation report subsequent to the February 2013 CSE meeting (id. at p. 10).

The IHO also found that the nonpublic school was not an appropriate unilateral placement for the student (IHO Decision at pp. 11-12). Specifically, the IHO found that there was no evidence that the student's teacher, the paraprofessionals—who were high school graduates and college students—or any other school personnel had sufficient training or experience providing applied behavioral analysis (ABA) services or collecting data relating thereto (id. at pp. 11-12). The IHO also noted that the parents "failed to present any witness who actually provided the student with 1:1 services or instruction" (id. at p. 11). Additionally, the IHO found that the student's classroom contained students with "totally different cognitive and physical disabilities" and that the testimony of the director of the nonpublic school that the students were placed together based upon cognitive skills rather than by age was not credible (id.).

With regard to equitable considerations, the IHO found that nonpublic school charged an inappropriate amount of tuition (IHO Decision at pp. 12-13).[4] Specifically, the IHO found that tuition reimbursement would be inappropriate to pay for the nonpublic school building, swimming pools, music room, and two sensory gyms (id.). As for relief, the IHO found that the parents failed to present any evidence that they "lacked [the] financial resources to pay the tuition" (id. at p. 14).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding that their claims regarding the 2013-14 school year were barred by the IDEA's statute of limitations, that the February 2013 IESP was appropriate, that the unilateral placement was not appropriate, and, if applicable, that equitable considerations would warrant a reduction in a tuition reimbursement award. As for the IHO's decision, the parents contend that the IHO incorrectly applied the burden of proof and made inappropriate credibility determinations.

As for the statute of limitations, the parents argue that the district failed to offer any evidence regarding when the parent "knew or should have known" of the alleged violations. The

[4] In regard to the services provided and the facility itself, the IHO noted that there "was no evidence presented that this student required swimming therapy or music therapy" and that, even if he had, "[the student] could only be in one pool at a time and could only be in one sensory gym at a time" (IHO Decision at p. 13).

parents assert that, rather than the date of the CSE meeting or the unsubstantiated date of the parents' receipt of the IESP, the statute of limitations did not begin to run until the date that the parents enrolled the student at the nonpublic school. In the alternative, the parents assert that an exception to the statute of limitations should apply because the parents had "no knowledge of the procedure or what to expect at the conclusion" of the CSE meeting and they never received a procedural safeguards notice from the district.

The parents assert that the IHO erred in finding that the February 2013 CSE appropriately developed an IESP, instead of an IEP. The parents also allege that the IHO erred in finding that the February 2013 IESP was appropriate, asserting that the CSE was not properly composed, had insufficient evaluative information, recommended an inappropriate eligibility classification for the student, and developed inappropriate and insufficient annual goals.

The parents also argue that the IHO erred in finding that the nonpublic school was not an appropriate unilateral placement for the student for the 2013-14 school year. Specifically, the parents contest the IHO's finding that the students at the nonpublic school were placed together by age, not cognitive ability. In addition, the parents argue that the IHO's focus on the credentials of staff at the nonpublic school ignored the totality of circumstances surrounding the nonpublic school.

With regard to equitable considerations, the parents assert they were cooperative at all times in the process. As to the tuition charged, the parents argue that, since the district never alleged that the amount of tuition was unreasonable, any findings by the IHO must be reversed as outside the scope of the impartial hearing and unsupported by the facts in evidence. For relief, the parents request direct payment or reimbursement of the costs of the student's tuition and related services at the nonpublic school for the 2013-14 school year.

In its answer, the district asserts admissions and denials, and requests that the IHO's decision be upheld in its entirety.

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 v. T.A., 557 U.S. 230, 238 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119,

129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6

[S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

VI. Discussion

For the reasons set forth below, this matter should be remanded to the IHO to determine, based upon an adequate hearing record, when the parents knew or should have known about the facts underlying each claim in their due process complaint notice to establish the date of accrual for their claims, to determine whether an exception to the statute of limitations should apply, and—if necessary—to address the merits of the parents' claim that the district denied the student a FAPE or offered inadequate equitable services to the student for the 2013-14 school year.

A. Preliminary Matters

At the outset, it is necessary to discuss the challenges faced in reviewing the hearing record and the IHO's decision. At the impartial hearing, the district submitted a single exhibit—the February 2013 IESP—and offered no witness testimony. The student's mother testified regarding the February 2013 CSE meeting and the unilateral placement, and the parents presented two witness that offered additional testimony about the nonpublic school that the student attended during the 2013-14 school year. The IHO reached the merits of the claims and defenses before

him largely by resorting to credibility determinations regarding the parent's testimony and by relying on the content of the disputed February 2013 IESP (IHO Decision at pp. 8-14).

Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16-*17 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). The IHO determined that the parent's testimony was vague and contradictory and that she did not have an independent recollection of the CSE meeting (IHO Decision at p. 9). The IHO also opined about the parent's credibility with regard to her receipt of the IESP, her provision of a private evaluation report to the district, and her communication to the district of her desire for a public school placement recommendation (id. at pp. 9-10, 11, 14). Here, there is insufficient evidence in the hearing record, either testimonial or documentary, against which to review the IHO's credibility determinations.

However to embrace the IHO's credibility finding as the basis for a finding in the district's favor as a consequence of an inadequate hearing record—which, in turn is the district's fault as the party carrying the burden of proof—results in circular logic that is counter to the spirit of due process. This is particularly so since the IHO found that "based on the credible evidence presented at the hearing," the IESP was "valid" (IHO Decision at p. 11). It is unclear how the IHO reached this determination relying only on the IESP—the very document challenged in the parents' due process complaint notice. The district presented no testimony or other documentary evidence at the impartial hearing regarding the IESP and, thus, there is no basis to determine whether the IESP was an accurate representation of the CSE's recommendations, whether the IESP was contemporaneously developed at the CSE meeting, or indeed, from who or what source the information set forth in the IESP originated. Without such a foundation, it was improper for the IHO to rely on such a document, without more, to find in the district's favor (K.R. v New York City Dep't of Educ., 107 F. Supp. 3d 295, 308 [S.D.N.Y. 2015] [finding reliance on CSE meeting minutes improper absent any evidence establishing a foundation for the document]).

This inadequate reasoning in the IHO's decision, compounded by explicit examples where the IHO supported his conclusion by noting the parent's failure to present evidence (IHO Decision at pp. 10, 11), supports the parents' contention that the IHO impermissibly shifted the burden of proof to the parents, requiring them to establish that their claims were not barred by the statute of limitations and that the student had not been provided a FAPE or appropriate equitable services (IHO Decision at pp. 8-14). This is inconsistent with New York State law, which places the burden of proof on a school district at an impartial hearing (Educ. Law § 4404[1][c]).

Based on the foregoing, the matter is remanded to the IHO, who should ensure the development of an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]) and make a determination as to the parties' claims and defenses on substantive grounds based on a

determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).[5] With this in mind, it is necessary to review additional aspects of the IHO's decision in order to highlight certain errors in the IHO's reasoning so that, on remand, the parties' claims and defenses may be resolved on legally sound and factually supported grounds.

B. Statute of Limitations

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]). 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]).

As noted above, the IHO found that the parents' due process complaint was time-barred because the request was made "28 plus months after the CSE meeting" and the parents did not present evidence that they "wanted a public school placement" prior to "the allowable period under the statute of limitations" (IHO Decision at p. 13). This analysis improperly faulted the parents for failing to prove that they should not or did not know of the alleged action that formed the basis of their complaint at the time of the February 2013 CSE meeting (K.H. v. New York City Dep't of Educ., 2014 WL 3866430 at *15 [E.D.N.Y. Aug. 6, 2014]). It may indeed be the case that the parents knew or should have known of the alleged actions of some or all of their claims at the time of the CSE meeting. For example, since the student's mother attended the February 2013 CSE meeting, she was aware of who else attended the meeting and, therefore, probably knew or should have known about the alleged improper CSE composition (Tr. p. 91; see Dist. Ex. 1 at p. 6).

In contrast, it is far less clear from the hearing record that the parents knew or should have known about the actions underlying some of their other claims, which may have accrued at the CSE meeting, upon the parents' receipt of a copy of the IESP, or at some other time. For example, the parents contest the adequacy of the February 2013 IESP's annual goals, and it is unknown whether the goals were developed at the CSE meeting or, as permitted by the IDEA, sometime after the meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388-89 [S.D.N.Y. 2009]). Similarly, there is no evidence as to when the parents' alleged request that the CSE reconvene accrued; it is unlikely that this request was made at the CSE meeting. Without any information as to when these claims accrued, it is impossible to determine whether the statute of limitations applies to bar some of all of the parents' claims in this instance.

Moreover, the IHO did not consider whether or not an exception to the statute of limitations

[5] State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). An IHO also has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

should apply in this case. The IDEA states that the statute of limitations does not apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or if the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception essentially applies to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 WL 4375694, at * 6; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notice and a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]).

The student's mother testified at the impartial hearing that she did not recall receiving an explanation of her rights or a "booklet about [her] rights" (Tr. p. 97). I leave it to the IHO on remand to determine whether or not the parents received a procedural safeguards notice and, if not, whether or not the parents were prevented from timely filing a due process complaint notice as a result.[6]

I will not attempt to guess at these conclusions without the benefit of the evidence necessary in order to accomplish the required fact-specific inquiry (see K.H., 2014 WL 3866430, at *16 [noting that, because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry"]).

C. February 2013 IESP

Turning to the parents' claims, the parties dispute whether or not the February 2013 CSE should have developed an IESP or an IEP for the student for the 2013-14 school year. The parties assert different versions of the February 2013 CSE meeting, varying most prominently with respect to whether or not the parents expressed an intent to place the student in a nonpublic school at their own expense. The district indicates that the parents' expression of such intent altered the district's obligation to the student.

[6] On appeal, the district argues that the parents were required to raise the withholding of information exception to the statute of limitations in their due process complaint notice. This overstates the requirements of a due process complaint notice, which need only contain "a description of the nature of the problem of the child" and "a proposed resolution of the problem" (20 U.S.C. 1415[b][7][A]; 34 CFR 300.508[b][5], [6]; 8 NYCRR 200.5[i][1][iv], [v]). Moreover, the IDEA's statute of limitations is an affirmative defense which only applies if raised at an impartial hearing (M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304 [S.D.N.Y. 2014]). Thus, parents cannot be required to plead specific exceptions to an affirmative defense, which the district may or may not assert, in a due process complaint notice.

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.). Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

While the IHO reached the merits of the parents' claim on this point, again, by relying on the IESP itself and the lack of credibility afforded the parent's testimony, the hearing record lacks crucial evidence necessary to resolve this claim. In particular, the district did not present any evidence at the impartial hearing that it received the statutorily required "written request" from the parent by June 1 for equitable services for a parentally placed student (Educ. Law § 3602-c[2]**)**. It is far from clear that, under these circumstances, the district was divested of its obligation under the IDEA to develop an IEP for the student notwithstanding any verbal expression of intent by the parent at the CSE meeting (see 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii] cf. E.T. v Bd. of Educ., 2012 WL 5936537, at *15 [S.D.N.Y. Nov. 26, 2012] [noting that "the issue of parental intent vis-àvis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a disabled child"]). Upon remand to the IHO, if the district does not present evidence that the parents filed such a written request but instead argues that the parent made a verbal expression of intent to place the student in a nonpublic school, it should be prepared to provide the IHO with guidance and citation to relevant legal authority concerning the CSE's obligations under these circumstances.

On appeal, the parents also continue to assert that the CSE was not properly composed, that the student was improperly classified, that the CSE failed to consider appropriate evaluative material, and that the recommended annual goals and objectives were insufficient. Upon remand,

assuming that the IHO reaches the merits of the parents' claims and finds that the district appropriately developed an IESP for the student, each of these issues should also be addressed.

D. Unilateral Placement

Finally, the IHO also reached, in the alternative, questions of the appropriateness of the unilateral placement and whether equitable considerations weigh in favor of the parents' request for the costs of the student's tuition. I am disinclined at this juncture to make final determinations on either of these issues given that the parties may choose to present additional evidence—including evidence about the student's needs—or argument on remand. However, the evidence in the hearing record in its current state, as well as relevant legal authority, does not support the IHO's reasoning. Therefore, it is left to the IHO to address the appropriateness of the unilateral placement and equitable considerations taking into account any new evidence as well as the following.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006], see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and

> regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The student's needs may be ascertained in the current hearing record to the extent that they are described in the testimony of staff from the nonpublic school, the January 2013 private pediatric neurodevelopmental report, and results of tests administered by staff at the nonpublic school (see Tr. pp. 61-62, 67-68, 71; Parent Exs. B; H).[7]

Consistent with recommendations included in the January 2013 private pediatric neurodevelopmental report, the director of the nonpublic school testified that the school had an ABA program—supervised by a behavior analyst—and provided the student with one-to-one instruction throughout the course of the school day (Tr. pp. 36-37; Parent Ex. B at p. 5). The behavior analyst explained that the classroom teacher and she would write the ABA programs that were used with the student and that the programs were conducted by the classroom paraprofessionals through the guidance of the classroom teacher and herself (Tr. p. 61). According to the director, the staff, which included the student's classroom teachers, paraprofessionals, the behavior analysist, and his therapist, had weekly team meetings regarding the student and his progress (Tr. pp. 36-37).

Regarding the student's academic needs, the nonpublic school staff reported that the student had mastered a number of his annual goals which were designed to address his needs in the areas of answering "what" questions, identifying and labeling shapes and colors, matching 20 items independently, sorting three sets of identical items from an array of 50, identifying missing items in pictures, understanding the conventions of print, and counting rote to ten and up to eight using 1:1 correspondence (Tr. pp. 66-67; Parent Ex. H at p. 2). To expand the student's "thinking skills"

[7] As noted above, during the impartial hearing, the district did not elect to enter into the hearing record any evaluative information or assessments from the student's records, thus effectively abandoning its foremost opportunity to put forth its own viewpoint of the student's special education needs and the extent to which the unilateral placement either addressed or failed to address those needs. Accordingly, to the extent this review is based upon the hearing record in its current state, if the reports and assessments relied upon by the nonpublic school in developing the student's educational program were not sufficiently accurate or complete for the purposes of determining the student's needs, at this point in the proceedings, the responsibility for such deficiency lies with the district and not the parent (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

and address his receptive vocabulary deficits, the school initiated an auditory discrimination program in which the student "[listened] to a description of an item and then chose the correct item from an array of [five]" (Parent Ex. I at p. 2). In addition, a December 2013 progress report stated that the school implemented a "manding" program to expand the student's expressive vocabulary and to build his communication skills (Parent Ex. H at p. 2). A May 2014 speech progress report stated that the student was working on recognizing objects in pictures, answering "wh" questions appropriately through the use of common pictures and increasing the sentence length of his answers in order to address the student's needs and annual goals with respect to receptive and expressive language skills (Parent Ex. N at pp. 1-2). To further mitigate the student's deficits in language and vocabulary, the student was learning to discriminate among different shapes and colors, answering "who" questions, and learning the prerequisite skills for prepositional concepts, quantitative concepts, categorizing, sequencing and patterning skills (Parent Ex. H at p. 2).

With respect to social development, the director stated that the staff at the nonpublic school worked with the student to develop his social skills and social integration (Tr. p. 36). For example, a December 2013 progress report stated that an "on task play program" was implemented to teach the student how to sustain play activities; the student was also learning to take turns and request items from his peers (Parent Ex. H at pp. 2-3). The December 2013 progress report also stated that the student was engaged in motivating activities to increase awareness of his surroundings (id. at p. 3). To further address the student's limited awareness of his surroundings and his inability to identify people around him, a June 2014 progress report noted that the student was engaged in a program that introduced him to his peers each day and taught him "to look from side to side to identify who was sitting near him" (Parent Ex. I at p. 2). The December 2013 progress report noted that the school implemented "contrived trials" to address the student's non-compliance and to teach the student "appropriate responses to activities [and] actions which he resist[ed]" (Parent Ex. H at p. 3). In addition, the December 2013 progress report reported that the school implemented a behavior strategy in conjunction with a social cognitive strategy to address the student's stimulatory behaviors (id.). According to an October 2013 student behavior protocol, the nonpublic school developed programs to address the student's non-compliant behavior, his self-stimulating behavior, chewing on his clothing, and sliding off the toilet (Parent Ex. L at pp. 1-2). The October 2013 protocol also indicated that the nonpublic school developed programs to address the student's speech behaviors such as echolalia, vocal stimulation, and scripting (id. at p. 1). The director also testified that the school met often with the parent to discuss different behavior plans which could be integrated in the home to address the parent's concerns (Tr. p. 37).

Turning next to the student's motor development, the June 2014 OT progress report from the nonpublic school indicated that the student worked toward his goal of improving his proximal stability and strength during the 2013-14 school year (Parent Ex. M at pp. 1-2). The staff noted that the student was "extremely fearful" on stairs and had difficulty in ambulating stairs appropriately—using a step-over-step pattern, instead of a reciprocal pattern that would have been appropriate for his age—and so the physical therapist worked with the student on developing his comfort level on stairs during transitions (Tr. p. 45; Parent Ex. P at p. 1). In addition to working on negotiating stairs, a June 2014 PT progress report identified that the student worked at completing an obstacle course, which included jumping, climbing and riding on a scooter board (Parent Ex. O at pp. 1-2). A January 2014 PT progress update indicated that the student was participating in "heavy work" activities in order to "promote calmness and focus when [the student returned] to the classroom" (Parent Ex. P at p. 1). The June 2014 OT progress report indicated

that the student worked toward improving focus and attention skills; furthermore, the student had made progress and was able to attend to a task for two minutes at a time (Parent Ex. M at p. 1). As part of the student's PT program, he participated in aquatic therapy swim sessions which included "kicking, splashing, ball catching and aquatic games" (Parent Ex. P at p. 2).

To address the student's needs in activities of daily living, the December 2013 progress report indicated that the student was learning to keep his cup, fork and spoon at the table until his meal was completed rather than throwing each away after each use; the student was also learning to zipper (Parent Ex. H at p. 3).

To further support the student and address his areas of need during the 2013-14 school year, the nonpublic school provided the student with the following related services: three 30-minute sessions per week of individual OT, four 30-minute sessions per week of individual speech-language therapy, and three 30-minute sessions per week of individual PT (Parent Exs. M at p. 1; N at p. 1; O at p. 1). Regarding counseling services, the director testified that the counselor at the nonpublic school did not feel the student had enough awareness to benefit from counseling even though the student's February 2013 IEP recommended two counseling sessions per week (Tr. p. 43). The director further explained that the staff, along with the behavior analysist, put together a plan for the student to work on his counseling annual goals of increasing his focus, attention, and appropriate behaviors in the classroom (Tr. p. 43).

Turning to the IHO's reasoning underlying his determination of the inappropriateness of the unilateral placement, the IHO found that the director's "claim" that the students at the nonpublic school were grouped by cognitive skill level was not credible and further opined that the students were placed "according to age, in a school that only had seven students" (IHO Decision at p. 12). However, the IHO did not first consider whether or not a unilateral placement must comply with functional grouping requirements in the first instance. On the contrary, parental placements generally "need not meet state education standards or requirements" to be considered appropriate to address the student's needs (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14).

Finally, the IHO focused much of his analysis regarding the unilateral placement on the teacher and paraprofessionals' level of training or experience with ABA (see IHO Decision at p. 12). However, this focus on the training and experience in a particular methodology fails to examine whether the instruction, ABA or otherwise, was specially designed instruction to meet the student's needs.[8] Furthermore, the IHO apparently relied on his independent knowledge about the methods of ABA, rather than the evidence in the hearing record, to reach some of his conclusions (IHO Decision at p. 12).

[8] Moreover, the IHO's concern that the student would receive "1:1 instruction from a high school graduate" (IHO Decision at p. 11) fails to take into account State regulation, which provides that a temporary license may be issued to a teaching assistant candidate without any requirement of collegiate study and, further, that teacher assistants may provide "direct instructional services to students" while under the supervision of a certified teacher (see 8 NYCRR 80-5.6[c][1][i]; [2][i][a][1]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). While such State education requirements do not apply to the unilateral placement, the nonpublic school should not be held to requirements more stringent than those applied to the district.

Based on the foregoing, rather than applying the "totality test" referenced in his decision, the IHO based his conclusion on a handful of inconsequential factors in order to determine that the unilateral placement was not appropriate for the student (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Accordingly, absent additional evidence or argument on remand that warrants a different conclusion, the parents have met their burden of demonstrating the appropriateness of the unilateral placement.

E. Equitable Considerations

Finally, as to equitable considerations, the IHO's alternative finding with respect to reasonableness of the tuition at the unilateral placement is without sufficient support in the hearing record. The parties are encouraged to introduce and the IHO is encouraged to consider evidence regarding whether the tuition charged by the nonpublic school was unreasonable or regarding any segregable costs charged by the nonpublic school for services that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016]; Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 429-430 [S.D.N.Y. 2011]). While the IHO identified services that he believed were inappropriate (i.e., the nonpublic school having more than one swim therapy pool or sensory gym), the hearing record is insufficient to establish that the costs of these services were segregable and exceeded the services that the student required to receive a FAPE (IHO Decision at p. 13).[9]

VII. Conclusion

For the reasons set forth above, the matter is remanded to the IHO to take evidence relevant to the district's statute of limitations defense and the parents' asserted exception thereto, determine whether the claims are timely and, if any claims remain, render a decision on the merits of the parents' claims and the parents' request for relief in a manner consistent with the body of this decision.

In this instance, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]). As to the additional evidence required in order to make the necessary findings of fact and of law, the IHO is strongly encouraged to work with the parties to gather evidence, as necessary, in order to develop a complete hearing record (see 8 NYCRR 200.5[j][3][vii]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 5, 2016, is vacated; and

IT IS FURTHER ORDERED that that the matter be remanded to the same IHO who issued the January 5, 2016 decision to take evidence and determine when each of the claims raised in the parents' July 9, 2015 due process complaint notice accrued, whether these claims are time-

[9] The IHO was, however, correct that the hearing record lacks reliable evidence establishing the parents' financial resources, or lack thereof (IHO Decision at p. 14). Therefore, if the parents continue to seek a remedy in the form of direct payment of the costs of the student's tuition at the nonpublic school, upon remand, they may wish to offer appropriate evidence on this point (see Mr. and Mrs. A., 769 F. Supp. at 428).

barred by the statute of limitations and, if any claims remain, reach a determination on the merits; and

IT IS FURTHER ORDERED, if the IHO who issued the January 5, 2016 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
April 22, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER