The University of the State of New York

The State Education Department
State Review Officer
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No. 18-106

**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 Suffern Central School District**

**Appearances:**
Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at two nonpublic schools for the 2012-13, 2013-14, 2014-15, and 2015-16 school years, and Barnstable Academy (Barnstable) for the 2016-17 and 2017-18 school years. The appeal must be sustained in part.

### 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

The student in this matter was has been the subject of a prior administrative appeal (see Application of a Student with a Disability, Appeal No. 18-016). The hearing record shows that the student attended a district elementary school for kindergarten through the beginning of the 2012-13 school year (second grade) (see Dist. Exs. 12 at p. 6; 14 at p. 1). At the start of the 2012-13 school year, the student received special education supports and services as a student with an other health impairment in the district's "Inclusion Program," and two 30-minute sessions per 8 day cycle of group occupational therapy (OT) services (Dist. Exs. 3 at p. 3; 9 at p. 1).[1] By January 31, 2013, the student had been unilaterally placed by the parent in a nonpublic school where he

[1] For the 2012-13 school year, the district had recommended that the student receive counseling services, to which the parent did not provide consent (Dist. Exs. 3 at pp. 1, 3; 8 at p. 1).

was "put back to" first grade and completed the 2012-13 school year (see Parent Ex. A at pp. 2-3; Dist. Exs. 3 at p. 2; 12 at p. 6; 14 at p. 1). The student thereafter continued attending the same nonpublic school for the 2013-14 and 2014-15 school years (second and third grades), and then attended a different nonpublic school in New Jersey for the majority of the 2015-16 school year (fourth grade) (see Dist. Exs. 3 at p. 2; 4 at pp. 1-2; 5 at p. 1; 14 at p. 1).[2] The student attended Barnstable for the 2016-17 (fifth grade) and 2017-18 (sixth grade) school years (see Parent Ex. C; Dist. Ex. 6 at p. 1).[3]

On June 7, 2016, the CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (Dist. Ex. 5). Finding the student remained eligible for special education and related services as a student with an other health impairment, the June 2016 CSE recommended a full time 12:1+1 special class therapeutic support center (TSC) placement with the related services of one 30-minute session per 8-day cycle of individual counseling and one 30-minute session of counseling per 8-day cycle in a small group (Dist. Ex. 5 at pp. 2, 7, 9; see Tr. p. 65).

On June 13, 2017, the CSE convened to conduct the student's annual review and to develop an IEP for the 2017-18 school year (Dist. Ex. 6). Continuing to find that the student was eligible for special education and related services as a student with an other health impairment, the June 2017 CSE continued to recommend a full time 12:1+1 special class TSC placement with the related services of one 30-minute session per 8-day cycle of individual counseling and one 30-minute session of counseling per 8-day cycle in a small group (Dist. Ex. 6 at pp. 1, 7, 10).

In a letter dated April 12, 2018, the parent provided the district with 10-day notice of her intent to seek tuition reimbursement at Barnstable, asserting that the district failed to provide the student with an appropriate placement, and therefore denied him a free appropriate public education (FAPE) (Dist. Ex. 16).

**A. Due Process Complaint Notice**

The parent filed a due process complaint notice on September 28, 2017. After conducting a prehearing conference, the IHO (IHO 1) granted the district's motion to dismiss on February 3, 2018, prompting the parent's appeal in Application of a Student with a Disability, Appeal No. 18-016. An SRO reversed IHO 1's decision in part, finding, among other things, that it would be permissible for the parent to file an amended due process complaint to clarify her claims. Upon remand, the parent filed an amended due process complaint notice dated April 13, 2018 (Dist. Exs. 1, 17; see IHO Decision at p. 4). In her April 2018 due process complaint, the parent briefly recounted the student's educational history, asserted numerous claims, and requested an impartial hearing (see Dist. Ex. 1).

[2] The hearing record indicates that the student left the nonpublic school in New Jersey that he attended during the 2015-16 school year in April 2016 and was "home schooled" for the remainder of the school year (see Dist. Exs. 5 at p. 1; 6 at p. 1-2; 14 at p. 1).

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

As for her claims against the district, the parent asserted that the student attended the district's school from kindergarten through second grade, but the student did not know the alphabet and could not read or write legibly (id. at pp. 2-3). The parent also asserted that the district "constantly denied" her requests for additional reading support for the student because she was told that the student "was not eligible to see the reading specialist[] because he was in an inclusion class and already [] receiving additional reading support via the special education teacher in the room," such that providing further additional reading support would be "double dipping" (id. at p. 3). The parent further asserted that the district refused to provide the student with additional reading support, but the parties agreed to move the student into a self-contained class (id.). The parent alleged that the student was being bullied and teased because he could not read and, as a result, he began having behavioral issues and the district recommended counseling services in response (id.). At that time, the parent noted that she removed the student from the public school and unilaterally placed him in a nonpublic, parochial school (id.). The parent alleged that the nonpublic school agreed to grant the student admission provided he was returned to first grade due to his inability to read (id.). According to the parent, the student was able to read and write within the first year of attendance at the parochial school and he was no longer in need of OT (id.). In a different statement in her complaint, the parent contended that because the student was in a "handwriting class" at the nonpublic school, he no longer qualified for the OT he received while attending the public school and the parent had to bear the cost of privately obtained OT for the four-year period of 2012-2015 (id.). The parent further alleged that while the student successfully attended the nonpublic school through fourth grade, "due to the nature of his disability (ADHD) and the structure and class size at [the nonpublic school], his needs were no longer being appropriately met and he was not able to focus" (id. at pp. 3-4).[4] The parent then unilaterally placed the student at Barnstable, where he attended fifth (2016-17 school year) and sixth grades (2017-18 school year) (id. at p. 4).

Next, the parent contended in her April 2018 due process complaint notice that Barnstable was appropriate because it provided: small class sizes; individual attention "whenever needed"; executive functioning classes; social skills classes; and the services of a school psychologist who helped students "navigate any issues" and promoted "kindness and understanding" (Dist. Ex. 1 at p. 4).

Finally, the parent asserted that while she had been paying tuition at the student's nonpublic schools for the previous six years, doing so was causing a hardship (Dist. Ex. 1 at p. 4). For relief, the parent requested reimbursement for tuition costs at Barnstable for the 2016-17 and 2017-18 school years, and "[c]onsideration of reimbursement[] for the preceding four years," due to her belief that the statute of limitations "should run from the date of discovery of the district's culpability and failure" (id. at p. 5). The parent also requested that Barnstable be considered "for the approved NYS list," and that placement at Barnstable be granted going forward (id. at p. 5).

**B. Impartial Hearing Officer Decision**

Upon remand from the SRO, a second IHO (IHO 2) was appointed. The impartial hearing reconvened on July 12, 2018 and concluded on July 25, 2018, after three days of hearing (Tr. pp.

[4] It is during this period that the student transferred from one nonpublic school to another for the fourth grade.

1-456). The parent appeared pro se. In a decision dated September 10, 2018, IHO 2 first addressed the parent's request for tuition reimbursement for "the four prior years to the 2016/17 school year" (IHO Decision at p. 11). IHO 2 noted the IDEA's two-year statute of limitations and the statutory exceptions thereto (id. at pp. 11-12). IHO 2 found that neither exception to the statute of limitations applied, noting that under the withholding information exception, the parent testified that she had been provided a copy of her procedural rights and, furthermore had been previously represented by an education attorney sometime during the 2012-13 school year in connection with a CSE meeting and had attempted to resolve her disagreement with the district regarding her request for reading support (id. at p. 12). With regard to the specific misrepresentation exception, IHO 2 determined that the district had not made specific misrepresentations "during the four prior school years to the 2016-17 school year, to warrant an exception to the statute of limitations" (IHO Decision at pp. 11-12).

IHO 2 next addressed the parent's FAPE claims regarding the 2016-17 and 2017-18 school years. With respect to the 2016-17 school year, IHO 2 found that the hearing record demonstrated that the student had significant behaviors that interfered with his learning, noting that even the parent acknowledged the behaviors in her testimony and on her parent rating scales (IHO Decision at p. 14). IHO 2 found that the parent's belief that the student was not in control of his actions and that his behaviors were a manifestation of his disability supported the proposition that the student lacked control over his actions, which in turn bolstered the district's recommendation for placement in 12:1+1 therapeutic program (id.). In support of the district's recommended 12:1+1 special class TSC placement, IHO 2 referenced evidence concerning the student's management needs, including distractibility (in both public and nonpublic schools), behavior incidents, impulsivity, hyperactivity, inattention, and departure from the parochial school because he was a distraction to other students (id. at pp. 14-15). IHO 2 also noted that the 12:1+1 special class TSC placement was designed for students with average cognitive abilities who also have "behavioral issues, including attention, impulsivity and distractibility issues" (id. at p. 15). IHO 2 also found that the 12:1+1 special class TSC placement would have provided students with interventions to help them be more self-aware, be positive about learning, gain self-esteem, take breaks, and be aware of others in the classroom (id.). Finally, IHO 2 found that the 12:1+1 special class TSC placement was taught by a certified teacher, and that the student would have been grouped with other students with similar needs and have had opportunities to mainstream throughout the day (id.).

Regarding the 2017-18 school year, IHO 2 found that the June 2017 IEP was procedurally and substantially appropriate and adequate (IHO Decision at p. 15). IHO 2 noted that while the CSE reviewed the student's most recent evaluations, it did not have updated information from the nonpublic school (id.). However, IHO 2 determined that the hearing record "was clear" that the student required a high level of intervention (id. at p. 16). IHO 2 also determined that the student's strengths as well as his continued management needs in all areas of concern, including related services, were noted in detail on the June 2017 IEP, and that the CSE maintained the same goals because there was no indication that the student mastered any of the goals, or that Barnstable staff had worked on the goals (id.). IHO 2 noted that 12:1+1 special class TSC placement was taught by a certified teacher, and the student could be grouped with other students with similar needs and would have had additional opportunities to mainstream throughout the day (IHO Decision at p. 16). IHO 2 found that witnesses who knew the student agreed that the 12:1+1 special class TSC placement would meet the student's social/emotional and behavioral needs (id.). IHO 2 further noted that the witnesses' testimony revealed that the recommended program—which was designed

for students with average cognitive abilities with behavioral issues, was highly structured, with class wide and individual management systems to deal with the student's behavioral needs, and also taught academic and social/emotional coping skills—would meet the student's needs (id.). IHO 2 concluded that the district offered the student a FAPE in the least restrictive environment (LRE) (id.).

Although finding that the district offered the student a FAPE in the LRE, IHO 2 provided the parent with alterative findings regarding the student's unilateral placement at Barnstable. IHO 2 found that the hearing record lacked evidence of the program provided to the student at Barnstable, and that based on the limited information that was provided, IHO 2 found that Barnstable appeared similar to the district's 12:1+1 special class TSC placement in that it provided the student with small classes that included other students with ADHD (IHO Decision at pp. 16-17). However, IHO 2 determined that the hearing record lacked information as to: (a) the curriculum being used; (b) whether the student was being taught by a certified special education teacher; (c) what supports were in place to address the student's ADHD, behavioral needs, or reading deficits; and, (d) what goals, if any, were being addressed (id. at p. 17). IHO 2 noted that it was typical to have someone from a unilateral placement testify, but that the parent had indicated that no one was available from Barnstable to testify (id. at p. 17). Therefore, IHO 2 concluded that "the limited information provided in the record did not meet the [] standard," and opined that she did "not believe the burden was met" with regard to the appropriateness of the parent's unilateral placement (id. at pp. 16, 18).

Lastly, IHO 2 noted that she did not have jurisdiction to address the parent's request that she place Barnstable on the list of State-approved nonpublic schools, and she denied the parent's request for tuition reimbursement at Barnstable (IHO Decision at p. 19).

## IV. Appeal for State-Level Review

The parent appeals from IHO 2's decision.[5] In her request for review, the parent asserts that IHO 2 erred in finding that the student was provided with an appropriate IEP for the "years 2010, 2011, and 2012" while he attended public school and that the hearing record supported the tolling of the statute of limitations due to the district's "deception" in misreporting the student's progress for those school years and hiding records from the parent. For the years 2013, 2014 and 2015 when the student was placed in the parochial school, the parent disagrees with IHO 2 that the student had appropriate IEPs. Next the parent contends that IHO 2 erred in finding the 2016-17 and 2017-18 IEPs were appropriate. The parent challenges IHO 2's determination that Barnstable

[5] In Application of a Student with a Disability, Appeal No. 18-016, the SRO noted that the parent did not comply with the practice regulations in Part 279 when fashioning her request for review. When the parent attempted to appeal IHO 2's decision in a request for review dated September 27, 2018, the undersigned rejected her request for review by letter dated October 3, 2018, due to the failure to conform with Part 279, the practice regulations governing appeals to a State Review Officer. However, I granted the parent leave to correct the deficiencies in her request for review and resubmit before the time for an appeal elapsed. In a letter to the Office of State Review dated October 11, 2018, the parent requested additional guidance. By letter dated October 11, 2018, the Office of State Review responded to the parent, by sending sample forms and providing directions to the website of the Office of State Review containing a copy of the practice regulations, and a parent appeal guide. Thereafter, the parent served and filed an amended request for review on a timely basis.

was not appropriate for the student and asserts that IHO 2 improperly compared Barnstable's program to the district's recommended special education program "simply because there are similar numbers of students," noting that Barnstable is a general education program with a "small class size by design." The parent next expresses her disagreement with IHO 2's finding that the student required counseling and behavioral supports. According to the parent, IHO 2 erred in excluding certain exhibits that the parent sought to enter into evidence and improperly admitted a district exhibit over her objections.[6] Further, the parent contends that IHO 2 erred in failing to address the district's failure to update its list of "Free or Low Cost Legal or other Services available in the area."[7] In addition, the parent also contends that IHO 2 improperly excluded parent exhibit "P" 1-10 and attaches additional evidence for consideration to her request for review. Finally, the parent asserts that the district failed to provide her with access to all the student's educational records, including disciplinary records, if any.

For relief, the parent requests that an SRO order the district to: (a) provide the student with an appropriate IEP, as recommended by the student's developmental pediatrician; (b) remove any notes on the student's IEP that are not relevant to the student's placement; (c) add at least one hour of reading support per week with a reading specialist to the student's IEP; (d) reimburse the parent for the cost of the student's unilateral placements for the 2013-14, 2014-15, 2015-16, 2016-17, and 2017-18 school years; (e) fund the student's tuition at Barnstable for the 2018-19 school year under pendency (stay-put); (f) require the district to make a "reasonable effort [] to provide a correct list of Low Cost Legal and other relevant Services in the area" and provide it to the parent; (g) discontinue its policy of "Do not respond" so that parents can get answers regarding their concerns about their child; and, (h) discontinue its policy of "mis[]reporting behavioral incidents." Finally, the parent requests an investigation of the district's records and disciplinary measures taken against it for misreporting and engaging in deceptive behaviors regarding the student, as well as possibly other students with disabilities, within the district.

The district answers, asserting admissions and denials, as well as that it is "virtually impossible" to meaningfully or substantively respond to many of the parent's claims due to the parent's failure to cite to specific IHO rulings as set forth in IHO 2's decision and specific portions of the hearing record, and her attempt to advance issues that were not properly before IHO 2.

The district asserts that the SRO should not consider the additional documents that were attached to the parent's amended request for review and were not admitted into evidence during the underlying hearing. The district also argues that the parent's claims should be dismissed as the pleading fails to comply with the form and content requirements of the practice regulations in Part

[6] In this case, the hearing record shows that an apparent off the record discussion concerning the parent's exhibits occurred, and on the record IHO 2 noted that the parent had submitted exhibits A through T; however, IHO 2 excluded those documents that were deemed duplicative or irrelevant (Tr. p. 9; see IHO Decision at p. 5 [noting that the parties reviewed and discussed the proposed exhibits despite the scheduled stenographer's emergency absence]). The remaining parent exhibits were either renumbered or taken apart and made into multiple exhibits (id.). A review of the hearing record does not support a finding that IHO 2 improperly excluded the parent's exhibits.

[7] The parent also identifies at least one alleged factual inaccuracy in IHO 2's decision, the identity of the student's special education teacher at the public school.

279. The district also argues that the parent's claims should be dismissed to the extent that they were not raised in the due process complaint notice.

The district further contends that the hearing record demonstrates that the district offered the student a FAPE for the 2016-2017 and 2017-2018 school years, and that the parent failed to meet her burden to demonstrate that Barnstable was an appropriate unilateral placement for the student for the 2016-2017 and 2017-2018 school years. The district further maintains that IHO 2 properly determined that the 2010-11, 2011-12, and 2012-13 school years were beyond the applicable two-year statute of limitations and that there was no legal or factual basis for tolling the statute of limitations.

Finally, the district argues that equitable considerations dictate that the parent's request for relief be denied. The district asserts that the parent failed to provide the district with any notice of her dissatisfaction with the district's proposed IEPs, nor did the parent provide the statutorily required notice of unilateral placement for the 2016-2017 and 2017-2018 school years, either during the CSE meetings or with a ten-day notice of unilateral placement. The district also asserts that despite the parent's testimony that she had just recently learned of the requirement to provide such notice to the district, the parent acknowledged that she had previously received the Procedural Safeguards from the district advising her of this notice requirement. The district contends that other equitable considerations that weigh against granting tuition reimbursement included the parent's failure to provide accurate information relating to the student's current functioning and management needs in relation to his removal from a prior nonpublic school program, and the parent's failure to consent to requested evaluations or to accept related services intended to address the student's management needs.

## 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]).[8]

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. Preliminary Matters

#### 1. Compliance with Practice Regulations

I will first address the district's assertion that the parent's amended request for review must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.4[a]; 279.8[a][2]-[3]). The first four and one half pages of the pro se parent's request for review are concise statements that purport to number and identify rulings of IHO 2 with which she disagrees.[9] While her allegations may not be as artfully drawn as those that might be prepared by a skilled attorney practicing in the field of special education law, the numbered issues identify the parent's areas of dissatisfaction with particular points in IHO 2's decision in clear sentences which are not difficult to follow. The parent makes reference to several exhibits in the hearing record, but her citation to the relevant pages of IHO 2's 19-page decision (excluding the exhibit list appended to the decision) is poor. While the amended request for review is certainly not pristine, such a high standard is not required, especially from a pro se parent. It is not "virtually impossible" to meaningfully respond to the parent's request for review as the district suggests (Answer ¶ 1). The

[8] 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).

[9] The district is correct that the parent's first and second numbered issues in the request for review are duplicative. While an error, it is hardly a reason to dismiss the request for review – it is a mere technicality.

request for review is a functional pleading and, as a matter within my discretion, I find that the district's argument that it must be dismissed for noncompliance with Part 279 is rejected.

The last five and one half pages of the parent's request for review are neither clear nor concise and are, frankly, meandering prose about the case and the hearing. I accept this section of her request for review as factual argument in support of her enumerated claims on pages one through five, as her references to the hearing record in this later section are considerable, but I find no additional claims of error on the part of IHO 2, other than the enumerated ones, that must be addressed.

**2. Scope of Impartial Hearing**

As a preliminary matter, it is necessary to determine which claims are properly before me. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]).

The district asserts in its answer that the parent attempts to advance issues that were not before IHO 2 (Answer ¶ 1). However, the district does not provide a single example of the parent advancing a claim that was outside the scope of her April 2018 due process compliant notice, and nothing of the kind stands out upon my independent review. All of the enumerated issues appear to relate back to allegations in her due process complaint notice, matters involving the conduct of the hearing, or interim and final determinations by IHO 2.

**B. Statute of Limitations**

Turning next to the parent's assertions that IHO 2 erred in finding that the parent's claims were barred by the IDEA's statute of limitations and that the exceptions to the limitations period did not apply, federal and state law and regulations require that a party must request a due process hearing within two years of the date the party "knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]).

In this case, the parent's due process complaint notice is dated April 13, 2018 (Dist. Ex. 1), and her earliest claims—that the district denied her requests for adequate reading support, the student made inadequate reading and writing progress in the district, the student was asked to repeat first grade to make up for past deficiencies, the removal of the student from the district to a nonpublic school due to disability-related bullying by other students, and the discontinuance of publicly funded OT services and the parent's consequent need to privately fund OT services—all

constitute claims that accrued at times prior to April 13, 2016. Therefore, the claims described above are not within the two-year statute of limitations and she cannot pursue them further unless one of the exceptions to the statute of limitations applies.

**1. Specific Misrepresentations**

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]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. 2018][noting that the district's refusal to accede to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; 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]; 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 Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; 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"]; [see also Application of a Student with a Disability, Appeal No. 13-215).

On appeal, the parent asserts that the district's "misreporting of [the student's] progress was a deception that calls for accountability" (Pet. ¶¶ 1, 2). In her amended due process complaint notice, the parent asserted that, as of the second grade, the student could not read or write legibly, but was receiving additional reading support through a special education teacher (Dist. Ex. 1 at pp. 2-3). The parent also asserted that the district denied her request for additional reading support and instead recommended the student attend a self-contained class (id. at p. 3). In a letter to the district dated January 16, 2013, the parent notified the district that she removed the student from the district's schools as of January 7, 2013, because the district denied her repeated requests for additional reading support, and as a result, the student was reading well below grade level (Parent Ex. A at pp. 1-2). The parent also asserted in her January 2013 letter that the student was being targeted for behavioral issues once she retained the services of a lawyer, and that the student required "principal intervention" on a weekly basis (id. at p. 1). The parent also testified that the reason she removed the student from the district was that the student "also wasn't progressing. I wasn't getting the progress, I wasn't getting the reading support, and it just -- I went back to no progress" (Tr. p. 439).

Even assuming for the sake of argument that that the parent is correct that the district inaccurately described the student's progress in reading and writing when he attended the public school, it does not satisfy the exception because the evidence shows that the parent disagreed with the district's refusal to provide additional support and the student's progress and that after her efforts to effectuate a change in the situation were unsuccessful, she removed the student from the public school (see Parent Ex. A; Tr. p. 439). The evidence does not support the conclusion that

the district made a specific misrepresentation that the problem forming the basis of the parent's complaint had been resolved. To the contrary, the available evidence tends to show that the district, if anything, was unwilling, for whatever reason, to make changes that would satisfy the parent's concerns and, consequently, the specific misrepresentations exception does not apply in this case.

**2. Withholding of Information**

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]. Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. Sch. Dist. 2018 WL 3650185, at *3; R.B. 2011 WL 4375694, at *4, *6; see D.K. 696 F. 3d at 246; C.H., 815 F. Supp. 2d at 986; 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).

In this case, the parent's amended request for review specifically indicates that the district misreported the student's progress as a deception, which implicates the specific misrepresentation exception. However, there is nothing in the request for review that challenges IHO 2's findings that the withholding of information exception was not applicable because the parent received the procedural safeguards notice. Accordingly, IHO 2's determination that the parent received a procedural safeguards notice and that the withholding information exception did not apply is final and binding and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Based on the above, I find that the alleged violations by the district while the student was attending the public school and the parochial school are barred by the statute of limitations and there is no reason to disturb IHO 2's decision on that basis.

**C. 12:1+1 Special Class TSC Placement**

The remaining substantive issue regarding the adequacy of the student's proposed public programing is the parent's challenge to IHO 2's findings that the 12:1+1 special class TSC placement offered the student a FAPE in the LRE for the student for the 2016-17 and 2017-18 school year. Because it bears on how the placement was selected in this case, a brief discussion of the evaluative information and present levels of performance set forth in the June 2016 and June

2017 IEPs provides context for the discussion of the disputed issue to be resolved—namely, the appropriateness of the 12:1+1 special class TSC placement recommended by the June 2016 and June 2017 CSEs (Dist. Exs. 5 at 7; 6 at p. 7). In reaching the decision to initially recommend the 12:1+1 special class TSC placement, the director of pupil personnel services (director)—who acted as the CSE chairperson at the June 7, 2016 CSE meeting—testified that the June 2016 CSE reviewed the student's recent evaluative information, specifically, the results of a May 2016 social history completed by the parent, a May/June 2016 educational re-evaluation report, and a May/June 2016 triennial psychological evaluation report (Tr. pp. 40, 52-59; Dist. Exs. 5 at p. 1; see Dist. Exs. 4 at p. 10; 12-14). The hearing record shows that as of June 13, 2017—the date the CSE convened to conduct the student's annual review and develop his IEP for the 2017-18 school year—the June 2017 CSE did not have any information indicating that the student's strengths and weaknesses had changed since the June 2016 CSE meeting (Tr. pp. 76-77, 232-34).

The student's abilities and needs, as indicated in the evaluative documents available to the CSEs, support the determination that a 12:1+1 special class TSC placement and counseling services were appropriate to address the student's academic and social/emotional needs. The May/June 2016 educational re-evaluation and triennial psychological evaluation results considered by the CSEs indicated that the student exhibited overall cognitive skills in the average range, and that most of his reading scores were in the low average or below average range (Dist. Exs. 13; 14 at pp. 3, 8). Specifically, according to the educational re-evaluation report, reading "represented [the student's] most challenging domain," and he was observed to rush as he read and exhibited low perseverance (Dist. Ex. 13 at pp. 2, 4). As part of the psychological evaluation, the parent completed the Conners 3 Parent Rating Scale - Long Form (Conners 3) (see Dist. Ex. 14 at pp. 7-8). The parent's assessment of the student's behaviors at home yielded scores in the very elevated range for both the hyperactivity/impulsivity and learning problems subscales, and in the elevated range for the defiance/aggression subscale (id. at p. 7).[10] The parent also reported as part of the hyperactivity/impulsivity subscale that the student "[o]ften" "is constantly moving, is excitable-impulsive, gets overstimulated, and has difficulty waiting his turn" (id. at p. 8). The parent also reported that the student exhibited traits such as having difficulty with reading, requiring extra explanation of instructions, being inattentive and easily distracted, not paying attention to details, making careless mistakes, having difficulty starting tasks, and struggling to complete hard tasks (id.). The social history reflected the parent's concerns about the student's reading and executive functioning difficulties, and inattention (Dist. Ex. 12 at pp. 1, 4, 6-7).

Both the June 2016 and June 2017 IEPs reflect the evaluative information available to the CSEs (compare Dist. Ex. 5 at pp. 3-5 and Dist. Ex. 6 at pp. 3-5, with Dist. Exs. 12; 13; 14). Specifically, the June 2016 and June 2017 IEPs indicated that the student's cognitive skills were in the average range, he exhibited difficulty with reading, and was easily distracted, impulsive, and had a low frustration tolerance (see Dist. Exs. 5 at pp. 3-5; 6 at pp. 3-5). Meeting information attached to the IEPs indicated that the CSEs discussed that the student needed a smaller class environment and behavioral support (see Dist. Exs. 5 at p. 2; 6 at p. 1). Specific to the June 2016 meeting, information attached to the IEP reflected the parent's report that the student's "impulsivity can affect his performance at times," and that he "is easily distracted in the classroom and in large

[10] The parent's rating of the student's executive functioning and inattention behaviors yielded scores in the average range (Dist. Ex. 14 at p. 7).

groups of students" (Dist. Ex. 5 at pp. 1-2). Meeting information from June 2016 also reflected that parent responses to the Conners 3 scale revealed "very elevated scores for hyperactivity/impulsivity and learning problems," which the CSE concluded "may be due, at least in part, to [the student's] ADHD" (id. at p. 1). Additionally, the CSE discussed that the student's performance could be "inconsistent" and that he "need[ed] redirection in the classroom" (id.).

Both the June 2016 and June 2017 CSEs determined that the student would benefit from receiving services in a small, supportive therapeutic setting and recommended the 12:1+1 special class TSC placement with counseling services (see Dist. Exs. 5 at pp. 2, 7; 6 at pp. 1, 7). State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

The director testified that the June 2016 CSE initially recommended the 12:1+1 TSC placement based upon the evaluative information including the results of the Conners 3 assessment, and discussion held at the meetings about the student's impulsivity and distractibility in the classroom (Tr. pp. 66-67, 72). According to the director, the 12:1+1 TSC placement was "specifically designed for students who are cognitively intact but have behavioral issues in the classroom," including attention difficulties, distractibility, organizational issues, and for those students who need management strategies and behavior management plans (Tr. p. 66). She further indicated that the TSC class used a "class-wide behavior management system as well as individual management systems if needed" (Tr. pp. 68-69). Also, according to the director, the TSC class was "highly structured, transitions were eased for the students by using classroom agendas and schedules," and that "[t]here was a lot of predictability in the classroom in order to assist those students" (Tr. p. 69). The school psychologist testified that the TSC class was "very well-structured," for students with "attentional issues," in that the seating and sensory environment, how breaks and instructions were provided, and the frequency with which students were "check[ed] on," helped students (Tr. p. 226). Additionally, the school psychologist testified that a "very skilled teacher" would provide the student with "both reading services and supports for social-emotional growth" (Tr. pp. 229-30).

The June 2017 CSE continued to recommend the 12:1+1 TSC placement, which for the 2017-18 school year was located at the district's middle school (Tr. pp. 77-78). The director testified that teachers in the special class program at the middle school could have addressed the student's reading needs, and opined that the TSC placement—that offered class-wide behavior management system—remained appropriate for the student due to his behavioral and attentional issues that continued to exist (Tr. pp. 78-80; see Dist. Ex. 6 at pp. 1, 3-5). The school psychologist opined that because the student had been educated in a smaller, private placement, she recommended that when he returned to the district that he "go into a supportive classroom" where he would receive academic and counseling supports (Tr. pp. 233-34). For both the 2016-17 and 2017-18 school years, the CSEs also recommended that the student receive counseling services,

which the director and school psychologist testified was to address the student's need to improve his social and executive functioning skills (Tr. pp. 70, 228-29; Dist. Exs. 5 at p. 7; 6 at p. 7).

Specific to the parent's question during the impartial hearing regarding the rationale the CSEs used when recommending the TSC placement rather than ICT services in a small class, less restrictive setting (see e.g. Tr. pp. 105-07, 113-14, 168-70, 190-91, 234, 392), the director testified that the CSEs did not recommended that the student receive ICT services, because "his management needs indicated that he would benefit from the support of a therapeutic support center" placement (Tr. p. 106). Additionally, the director testified that the special education teacher who conducted the 2016 educational re-evaluation reported that the student exhibited impulsivity, low perseverance, and inattention during the assessment (Tr. pp. 114-15; see Dist. Ex. 13 at p. 1). The special education teacher testified that she thought the TSC placement was a "better" recommendation for the student than ICT services, because he exhibited behaviors that interfered with his learning that could be addressed "much better" in the TSC than in another type of class (Tr. p. 190-93). The school psychologist testified that when the student was in an "inclusion class" in the district, staff were concerned about his behaviors, the large class size, and his need for more supports in the classroom (Tr. pp. 236). She further testified that a discussion occurred regarding whether or not the district could have supported the student with ICT services or "something less restrictive than the therapeutic class," but that he "did not do well in large classes" and he was "distractible," therefore, it appeared to district staff that the student "learn[ed] best in a smaller classroom where there would be a chance to give him that more flexible support of supportive instruction" (Tr. pp. 241-42).

Regarding the parent's concern about the level of "integration" the student may have been exposed to in the 12:1+1 special class TSC placement, I note that the director further testified that "by design" the 12:1+1 special class TSC placement had "a lot of inclusion opportunities including in lunch and recess, but also all of the elective specials" including art, music, and physical education, so that students "mainstream with their age range peers" (Tr. p. 73). Also, depending on management needs and abilities, students in the 12:1+1 special class TSC placement have the opportunity to mainstream into "core" classes such as reading, math, science and social studies (id.).

Based on the information available to the CSE at the time the student's IEP for the 2016-17 school year was created, the hearing record supports that the 12:1+1 special class TSC placement with counseling services was an appropriate and the least restrictive setting to address the student's needs related to academics and social/emotional/behavioral functioning. Therefore, I find that the June 2016 IEP created by the CSE offered the student the least restrictive placement that was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

However, I am not persuaded that the district's case is as strong for the 2017-18 IEP, after the student had spent a year at Barnstable and the CSE met to conduct an annual review of the student's IEP in June 2017. As noted above, IHO 2 held that the June 2017 CSE did not have any updated information regarding the student. That finding cuts both ways. Although both the director and the school psychologist testified that the June 2017 CSE did not have new information available to it to indicate that the student's needs had changed since the June 2016 CSE meeting

(see Tr. pp. 76-77, 174, 232-34), I note that the hearing record contains a Barnstable second trimester report card dated March 2017 that the parent appears to have faxed to the district on March 23, 2017 along with her request for an "IEP meeting" and transportation for the student to attend Barnstable for the 2017-18 school year (Dist. Ex. 15 at pp. 1-3). The report card reflects that the student's grades in academic subjects ranged from a high of 90 to a low of 79, and teachers reported comments such as that the student was "[c]ourteous and cooperative; [p]articipates effectively; [d]emonstrated good effort; and [e]xhibits a positive attitude" (id. at p. 3). Additionally, June 2017 CSE meeting information attached to the IEP reflects that the parents reported that the student "had a wonderful year this year" at Barnstable (Dist. Ex. 6 at p. 1). There is no indication that the CSE considered the parent's submission,[11] and there is also no indication that the CSE attempted to obtain any information from Barnstable at all. The district blames the parent for the fact that there was no updated information from Barnstable, citing it as a factor in equitable considerations. However, at least one court has explained that a CSE's failure to consider a student's progress in a private placement in a subsequent IEP is grounds for finding the substantive IEP inappropriate (E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 441 [S.D.N.Y. 2010], aff'd, 487 F. App'x 619 [2d Cir. 2012]; Application of the Dep't of Educ., Appeal No. 16-057 [noting the that the CSE is charged with making efforts to obtain information about student's private schooling]). The hearing record does not indicate that the CSE made any effort to obtain information from Barnstable to consider in developing its 2017-18 IEP, despite the parent producing at least one piece of documentation for the CSE's consideration. Such a failure in this case is attributable to the district, not the parent.[12] While I am not willing to go so far as to say that the report card and parent comments are in and of themselves are by themselves sufficient to conclude that the CSE should have changed course for the 2017-18 school year because district's 12:1+1 special class TSC placement would not provide educational benefit, it is sufficient to call into question whether a less restrictive environment was feasible for the student as the parent believes, at least in light of the limited consideration given by the June 2017 CSE. I also find it troubling that the district went so far as to elicited testimony to suggests that the student could be

[11] The district indicates that a prior written notice was created (Dist. Ex 2 at p. 1), which among other things, must include "a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action" (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]) when addressing the concerns of parents. However, the district failed to put the prior written notices into evidence.

[12] When conducting an annual review, the CSE must, for example "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (34 CFR 300.324[a][2][i], [b][2]). The parenthetical notation in the special factors section on the student's IEPs "(parent is rejecting this service)" appears to just carry over from one IEP to the next without explanation (Dist. Exs. 3 at p. 9; 4 at p. 8; 5 at p. 5; 6 at p.5), District also points to the parents repeated failure of the parent to provide consent, but such consent refusal is not borne out by the hearing record. The parent did not consent to a functional behavioral assessment (FBA) in 2012, and revoked consent for an aide on the playground in 2012 and counseling services in 2013 (District Ex. 3 at pp. 1-3). Aside from those instances, which are not relevant for purposes of the June 2017 CSE meeting, the only other indication that consent was not received with regard to an FBA during a brief moment during the testimony at the impartial hearing (Tr. pp. 63-34), but the testimony is not reliable—there is no documentary evidence of the district's attempt to obtain consent and even IHO 2 had to clarify the time period. In response to that request for clarification, only counsel for the district, not the witness, makes the clarification (id.). The remainder of the documentary evidence shows that the parent consented to reevaluations and an observation of the student while attending one of the nonpublic schools (Dist. Exs. 3 at p. 2; 4 at p. 1).

mainstreamed with nondisabled peers for lunch, recess, elective specials, and up to four core classes (Tr. p 73). The IEP itself provides no indication whatsoever that the student would have access to non-disabled peers, listing only the 12:1+1 special class TSC placement, and the section that of the IEP that addresses the extent to which the student will or will not be placed with nondisabled peers is marked "not applicable" (Dist. Ex. 6 at pp. 7, 9). Parents are entitled to rely on the written IEP, and to the extent that this evidence was elicited, it is impermissible to rely on it to rehabilitate the IEP after the fact through testimony (R.E., 694 F.3d at 185).[13] That said, I am not convinced, based upon the limited evidence, that simply switching the student to an ICT setting would work either, especially when the parent suggests that a smaller class size is critical (Tr. pp. 168-69, 386-87, 426-26), because the public school may, but is not required, to reduce the number of nondisabled peers in classroom with ICT services to the number that the parent may find ideal.[14] The question left unanswered by the evidence in this case is, when considering information about the student's progress over the 2016-17 school year at Barnstable, could the CSE have placed the student in a larger, less restrictive ICT setting, or otherwise been offered a placement with greater access to nondisabled peers than what was provided on the June 2017 IEP. On this record, I cannot conclude, as IHO 2 did, that the district has established that the 12:1+1 special class TSC placement offered the student a FAPE in the LRE for the 2017-18 school year.

**D. Unilateral Placement**

I have considered the evidence of whether Barnstable is an appropriate placement for her son. However, for much the same reason as IHO 2, I cannot conclude that the parent has established that it is appropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably

[13] I have no quarrel with program's laudable objective of mainstreaming students as described by the witness, only the fact that it is not described in that manner in the student's IEP.

[14] ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students," and the only restriction in terms of class size is that the number of students with disabilities in the class typically cannot exceed 12 (8 NYCRR 200.6[g]).

calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for 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).

According to information in the hearing record in this case, Barnstable is an out-of-State private college preparatory school that provides students with "individual attention, specialized learning programs, and [a] safe environment" (Parent Ex. F). The school is "small," and the average class size is 10 students, some of whom exhibit "mild learning differences such as ADHD, mild dyslexia, and anxiety" (id.). The information indicated that teachers at Barnstable provide "individual attention to each student to address unique strengths and areas needing improvement," and each class "includes auditory, visual, and exploratory teaching methods to meet the demands of a variety of learners" (id.). Additionally, "[e]xecutive function skills are built into the Barnstable curriculum" to ensure the development of students' "study, organizational, and time management skills" (id.). Students at Barnstable complete the Measure of Academic Progress (MAP) in reading, math, and language arts twice per year as one measure of their instructional levels, and to identify skills students are ready to learn, check for evidence of learning, and of skill mastery (Parent Ex. B at p. 1). The parent testified that Barnstable offers classes to students in 5th through 12th grade, and opined the student was placed in classes with other students based on performance on MAP testing (Tr. pp. 415, 420). The parent further testified that Barnstable offers an executive functioning workshop (EFW) that is part of the learning management course where students address executive functioning, self-monitoring, planning, organization, emotional control,

initiation, shifting and working memory difficulties related to their learning differences (Tr. pp. 423-425; see Parent Ex. C at pp. 1-2). During the 2016-17 and 2017-18 school years, the student received instruction in math, reading, social studies, science, language arts, and elective courses including social skills (see Parent Ex. C at pp. 1-2).

However, the parent also was unclear which grades were considered middle school versus. high school (Tr. p. 416), how students were grouped within classes (Tr. pp. 416-18), what grade level curriculum was provided in the student's class (Tr. pp. 418-19), or how many students were in her son's class (Tr. pp. 419-20, 425-27). Although the student acquired 47 and 39 tardy designations during the 2016-17 and 2017-18 school year respectively, the parent testified that Barnstable did not have "a plan put in place" with regard to the student's tardiness (Tr. pp. 420-22). Critically, the parent testified she did not know if Barnstable provided any special education services (Tr. pp. 441-42). On this record I cannot conclude that the parent established that Barnstable offers appropriate special education services to address the student's needs.

**E. Equitable Considerations**

While I decline to hold that Barnstable is appropriate for the student, thus foreclosing the possibility of an order for tuition reimbursement for the 2017-18 school year, even if the parent had prevailed on that point, I would nevertheless deny her request for tuition reimbursement.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 [2d Cir., 2014]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public

expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The evidence in this case shows that the parent had previously followed the requirement to place the district on notice that she was removing the student from the district's school and stated her intention to seek tuition reimbursement for a parochial school, even though her awareness of this procedure had apparently faded by the time of her testimony at the impartial hearing (Parent Ex. H; see Tr. p. 285). The hearing record lacks any evidence that the parent placed the district on notice that it was potentially liable for the student's tuition costs at Barnstable for the 2016-17 school year. For the 2017-18 school year, the hearing record shows that on March 23, 2017, the parent requested transportation to and from Barnstable (Dist. Ex. 15). However, the parent did not provide notice to the district that she would be seeking tuition reimbursement for Barnstable until over a year later, on April 12, 2018 (Dist. Ex. 16). Further, the notice does not specify a school year, leaving the one to guess which school year is in question. Given these circumstances, I would decline to award the parent tuition reimbursement for Barnstable for either the 2016-17 or 2017-18 school years.

**F. Other Relief**

The parent has asked me to order the district to discontinue its policies of "Do not respond" and "mis[]reporting behavioral incidents." The parent also requests an investigation of the district's records and disciplinary measures taken against it for misreporting and engaging in deceptive behaviors regarding the student, as well as possibly other students with disabilities within the district. These requests for systemic relief are beyond the jurisdiction of an SRO.

The parent also asserts that the district has failed to provide her with copies of the student's educational records. Under Federal regulations, parents must be given the opportunity to inspect and review their child's education records (34 CFR 300.613). However, the district is not required under the IDEA to provide parents with a copy of the student's education records unless "failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records" (34 CFR 300.613[b][2]). The evidence in the hearing record does not support the conclusion that the district prevented the parent from exercising her right to inspect and review the student's education records. Therefore, I find this assertion to be without merit.

Lastly, the parent asserts, without providing any documentary proof, that the district has failed, after repeated requests, to update and provide to the parent its list of free or low-cost legal and other relevant services, citing to a provider on the list that has not been available for many years. Under the federal regulations, the district is required to inform parents about the availability of free or low-cost legal and other relevant services, when either, the parent requests such

information, or the parent or district requests a due process hearing (34 CFR 300.507[b]). School districts are required to maintain an accurate list of available free and low cost legal and other relevant services. U.S. Department of Education's 2006 Analysis of Comments rejected a commenter's proposal to remove the requirement and provide lists on a voluntary basis, noting that the requirement is also in the IDEA itself (Filing a Due Process Complaint Fed. Reg. 71 46697 [August 14, 2006]; see 34 CFR 300.507[b]). The Education Department determined that the requirement was of sufficient importance to enough to retain, as it would ensure parents have easy access to information about any free or low-cost legal and other relevant services in their area (id.). Because the requirement was specifically retained by the U.S. Department of Education, I will direct the district to review and update its "list" to remove any inaccuracies and provide the parent with the updated list within 10 calendar days of the date of this decision. I also remind the parent that under the category of "other relevant services" she may find assistance through the special education parent service center in her region, information about which may be obtained on the web site of the New York State Education Department (http://www.p12.nysed.gov/specialed/techassist/parentcenters.htm).

**VII. Conclusion**

Based on the foregoing, I find that IHO 2 properly found that the statute of limitations barred all claims prior to April 13, 2016, and that the district offered the student a program and placement that was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances for the 2016-17 school year (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). Further, I find that, regardless, equitable considerations would preclude the parent from an award of tuition reimbursement (Greenland, 358 F.3d at 160; Ms. M., 360 F.3d 267; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V.; 2007 WL 3085854, at * 13).

I have considered the parties' remaining contentions and find that I need not address them in light of my decision herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portion of IHO 2's decision dated September 10, 2018 that determined that the district offered the student a FAPE for the 2017-18 school year in the LRE is reversed, and

**IT IS FURTHER ORDERED** that the district review its list of free and low cost legal services for errors or outdated information and provide the parent with a copy of the resulting list of free or low-cost legal and other relevant service providers in the geographic area within 10 calendar days of the date of this decision.

**Dated:** **Albany, New York**
**November 23, 2018**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**