



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-037

**Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Dryden Central School District**

### **Appearances:**

Hancock Estabrook, LLP, attorneys for respondent, Melinda B. Bowe, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the respondent's (the district's) Committee on Special Education (CSE) appropriately found that the parent's son was not eligible for special education and related services as a student with a learning disability for the 2013-14 school year. The district cross-appeals from that portion of the IHO's decision that awarded compensatory additional services. The appeal must be sustained. The cross-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**

With respect to the student's educational history, the evidence in the hearing record reflects that the student attended a general education classroom in a district public school since kindergarten (Dist. Ex. 9 at p. 2; see Dist. Ex. 13 at p. 1).<sup>1</sup> During the 2010-11 and 2011-12 school years (second and third grades), the student began receiving academic intervention services

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<sup>1</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

(AIS)/response to intervention (RTI) tier 2 services (Dist. Exs. 9 at p. 2; 12 at p. 2; see generally Dist. Ex. 15).<sup>2</sup>

On October 24, 2012, the parent attended a parent-teacher conference, at which she expressed her concerns about the student's academic struggles and progress (see Tr. pp. 187, 208). On or about October 27, 2012, the student began to receive reading instruction from a private reading tutor (Parent Ex. 9; see also Dist. 13 at pp. 3-4).

By email to the district, dated October 29, 2012, the parent indicated that, due to the student's lack of progress, she wanted to have him "tested for a possible learning disability" and that such testing move forward as quickly as possible (see Parent Ex. 1). The parent also requested information about "the process" (id.).

On October 31, 2012, the district responded to the parent via email, indicating that a student support team (SST) meeting had been scheduled for the student and that "unfortunately the earliest opening was December 20th" (Parent Ex. 2). On the same date, the parent responded to the district, stating that she was appreciative of the efforts that had been made over the past few years to help the student but that the timeline suggested was not acceptable (Parent Ex. 3). The parent also stated that she thought there was "more than enough evidence to support the need for testing and that it should be scheduled immediately" (id.).

On November 27, 2012, the SST convened and discussed the student's strengths and needs, teacher concerns, and interventions in place at that time (both in and out of school) and developed an "intervention plan" to further address the student's word attack skills, reading comprehension, and spelling (see Dist. Exs. 2 at pp. 1-2; 3 at p. 1). The SST provided the parent with a request for referral to the CSE form (Tr. p. 87).

On December 10, 2012, the district received the request for referral to the CSE form, which the parent signed and dated on December 1, 2012 (Dist. Ex. 5 at pp. 1, 7; see also Tr. p. 37). By

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<sup>2</sup> The hearing record refers to AIS and RTI services in combination or interchangeably. As defined in State regulation AIS "means additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards . . . and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance; provided that such services shall not include . . . special education services and programs as defined in Education Law, section 4401(1) and (2)" (8 NYCRR 100.1[g]). RTI is a multi-level educational approach to targeted academic and behavioral intervention—adjusted and modified as the student's needs require—to provide early, systematic, and appropriately intensive assistance to students who are at risk or who are not making academic progress at expected rates (see 8 NYCRR 100.2[ii][1]). According to State-issued guidance, RTI seeks to prevent academic and behavioral failure through early intervention, frequent progress monitoring, and increasingly intensive research-based instructional interventions for students who continue to have difficulty in the general education setting (see Response to Intervention, Guidance for New York State School Districts, Office of Special Educ., at p. 1 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance/cover.htm>). While tier 1 RTI consists of the "core instructional program provided to all students by the general education teacher in the general education classroom" and includes "differentiated instruction based on the abilities and needs of the students in the core program," the more-intensive tier 2 RTI "is typically small group (3-5) supplemental instruction" provided in addition to the core instruction provided in tier one (id. at pp. 12-13). For purposes of consistency and accuracy, this decision refers to the services received by the student as RTI services.

prior written notice, dated December 10, 2012, the district requested the parent's consent to evaluate the student (Dist. Ex. 6).

On December 17, 2012, the parent emailed the district to inquire about the status of her request for evaluation of the student (Parent Ex. 5). On December 19, 2012, the parent signed the consent for initial evaluation form, which was marked as received by the district on January 2, 2013 (Dist. Ex. 7). On January 22 and 28, 2013, the parent emailed the district again to inquire about the status of the student's initial evaluation (Parent Exs. 6; 7).

During January and February 2013, the district conducted an initial evaluation of the student that included a psychoeducational evaluation, among other assessments (see generally Dist. Exs. 9-11). On February 22, 2013, the CSE convened to review the evaluations and to determine the student's eligibility to receive special education (see generally Dist. Ex. 12). Minutes from the February 2013 CSE meeting reflected the CSE's determination that the student was "not eligible" to receive special education (see id. at p. 3). By prior written notice, dated February 25, 2013, the district informed the parent that the student did not meet the criteria to be classified as a student with a learning disability and that he was, therefore, not eligible to receive special education services (Dist. Ex. 20 at p. 1).

By letters dated March 10 and March 24, 2014, the parent requested an independent educational evaluation (IEE) at public expense because she believed that the district "relied on insufficient and inaccurate testing when making its [eligibility] decision" and because she believed that the results of the administration of achievement testing "completely contradicted all other testing and assessment provided by the district in the last five years" (Dist. Ex. 22 at pp. 1-2). By letter dated March 31, 2014, the district informed the parent that the district would reimburse her for the cost of an IEE for achievement testing (id. at p. 4). In July 2014, a private neuropsychological evaluation was conducted, after which the evaluator concluded that the student met the criteria for diagnoses of a reading disorder (developmental dyslexia), a disorder of written expression, and an anxiety disorder (Dist. Ex. 23 at pp. 1, 4). Among other things, the evaluator recommended that the student receive academic and testing accommodations through a 504 accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (see id. at pp. 4-7).

### **A. Due Process Complaint Notice**

By due process complaint notice, dated October 23, 2014, the parent alleged that the district failed to identify, evaluate, and classify the student as a student with a disability eligible for special education and, therefore, failed to offer the student a free and appropriate public education (FAPE) for the 2013-14 school year (IHO Ex. 2 at pp. 2-6).<sup>3</sup> Initially, the parent alleged, that despite the student's lack of progress in school since kindergarten, the district failed to initiate a referral to the CSE for an evaluation of the student (id. at pp. 2, 4). The parent also alleged that, after her October 29, 2012, written request to the district for an initial evaluation of the student, the district: failed to request the parent's consent to evaluate the student within 10 days; unnecessarily convened a meeting of the SST; failed to timely evaluate the student within 60 days after receiving parental consent; and failed to provide the parent with a procedural safeguards notice (id. at pp. 2-3). The

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<sup>3</sup> Citations in this decision to the parent's due process complaint notice will conform to the consecutive pagination of the exhibit, rather than the page numbers included on the document (see generally IHO Ex. 2).

parent further alleged that the initial evaluation of the student was incomplete and insufficiently comprehensive and that the February 2013 CSE inappropriately determined that the student was not eligible for special education as a student with a learning disability (id. at p. 3).

The parent averred that the district failed to provide the student with appropriate RTI services and that the student's prolonged receipt of RTI tier 2 services delayed the referral of the student to the CSE for an initial evaluation (IHO Exs. 2 at pp. 3-5). The parent also contended that the district inappropriately refused to consider the use of alternative methodologies for reading instruction (id. at p. 4).

As relief, the parent requested a review of the district's practices regarding the referral of students suspected of having a disability; the imposition of sanctions on the director of student services and the superintendent of the district; and compliance with the State requirements regarding the RTI process and the referral of students suspected of having a disability (IHO Ex. 2 at p. 6). In addition, the parent requested that the district offer the student a FAPE and find the student eligible for special education (id.). Finally, the parent requested "additional support" for the student during his transition to middle school and reimbursement for the past and future costs of the student's private reading specialist (id.).

### **B. Events Post-Dating the Due Process Complaint Notice**

The district director of student services confirmed that the district received the results of the IEE in late October 2014, at which point a CSE meeting was scheduled (Tr. p. 68). On November 24, 2014, the CSE convened to review the July 2014 private neuropsychological evaluation and again determined that the student was ineligible for special education; however, a section 504 committee convened immediately following the CSE meeting and developed a 504 plan for the student (see Dist. Exs. 24; 25). According to the section 504 plan, the student's needs related to diagnoses of a reading disorder, a disorder of written expression, and an anxiety disorder adversely impacted his learning and warranted testing and program accommodations and supports (see Dist. Ex 26 at pp. 1-3). By prior written notice, dated December 10, 2014, the district informed the parent that, after careful consideration and review of all evaluative materials and school reports, the November 2014 CSE determined that the student was not eligible for special education (Dist. Ex. 28).

### **C. Impartial Hearing Officer Decision**

On December 2, 2014, the IHO conducted a prehearing conference to discuss the issues that would be addressed at the impartial hearing (IHO Ex. 4 at p. 1).<sup>4</sup> The IHO determined that she lacked jurisdiction over certain claims raised by the parent, including the choice of reading programs or methodology that the district employed, the parent's request for the imposition of sanctions, and the appropriateness of the RTI program (id. at p. 2; see IHO Decision at p. 4).

On December 22, 2014, an impartial hearing was conducted (see Tr. pp. 1-416). By decision, dated February 9, 2015, the IHO determined that, as the district conducted a

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<sup>4</sup> State regulations provide that one of the purposes conducting a prehearing conference is for "simplifying or clarifying the issues" (8 NYCRR 200.5[j][3][xi][a]).

"comprehensive evaluation" on which it based a finding that the student was not eligible for special education, the district did not deny the student a FAPE (see IHO Decision at p. 10).

With respect to the district's compliance with timelines for evaluation and referral, the IHO determined that, although there appeared to be some "misunderstanding" as to the intent of the parent's October 2012 request, it was "clear" that the parent requested that the student be evaluated for a possible learning disability (IHO Decision at p. 10). Thus, the IHO found that completion of the initial evaluation of the student was delayed by "at least 50 days" (id.). Due to the delay in evaluating the student and because the student remained over a grade level behind in reading, the IHO directed the district to provide individualized 1:1 reading services for "at least 25 hours (one half hour for each day delayed in evaluation)" (id.).

Finally, the IHO found that the parent did not assert in her due process complaint notice a claim relating to the February 2013 CSE's failure to find the student eligible for special education and, therefore, that the issue was not properly before the IHO (IHO Decision at p. 10).

#### **IV. Appeal for State-Level Review**

The parent appeals, seeking to overturn the IHO's determination that the district provided the student with a FAPE. Initially, the parent asserts that the IHO erred by failing to address in her decision the claim that the district failed to meet its child find obligation and refer the student to the CSE. The parent argues that, despite the student's lack of progress and receipt of RTI for at least two years, the district failed to initiate a referral to the CSE. The parent also argues that the district violated its child find obligations by failing to maintain a system of notices, outreach efforts, staff training, and referral processes to ascertain when there are reasonable grounds to suspect a disability and the need for special education services.

In addition, the parent asserts that, while the IHO correctly found that the district violated regulatory timeframes for the student's referral to the CSE and initial evaluation, she failed to order appropriate compensatory additional services related to this violation. The parent reiterates that, upon submitting a request for an evaluation in writing on October 29, 2012, the district failed to provide the parent with a consent-to-evaluate form within 10 days and failed to conduct an evaluation of the student within the required 60-day timeframe. The parent also argues that the IHO erred in finding that the district's initial evaluation of the student was comprehensive. The parent further argues that the results of administration of achievement testing obtained by the district were not an accurate measure of the student's performance and contradicted other evaluative data and, therefore, should not have been considered as the sole measure of student's academic abilities.

The parent also argues that the February 2013 and November 2014 CSEs should have found the student eligible for special education as a student with a learning disability and that the November 2014 CSE failed to consider the July 2014 private neuropsychological evaluation, which reflected that student had received diagnoses of dyslexia and a disorder of written

expression. The parent also alleged that the IHO misinterpreted the results of the July 2014 private neuropsychological evaluation as not indicating that the student had a disability.<sup>5</sup>

As relief, the parent requests an order requiring the district to find the student eligible for special education as a student with a learning disability, and develop an appropriate IEP for the student. In addition, the parent requests compensatory additional services in the form of reimbursement for the costs of tutoring services obtained by the parent since October 2012.

In an answer and cross-appeal, the district responds to the parent's petition by admitting and denying various allegations therein and asserts that the IHO correctly determined that that the district did not deny the student a FAPE. As an initial matter, the district contends that the parent's petition for review is procedurally defective in that it contains no numbered paragraphs and fails to reference the evidence in the hearing record.<sup>6</sup> The district also argues that the IHO correctly limited the issues at the impartial hearing on jurisdictional bases and correctly deemed the parent's claim regarding the February 2013 CSE's eligibility determination to be outside of the scope of the impartial hearing. The district further asserts that the parent includes additional claims in her petition that did not appear in her due process complaint notice.

The district cross-appeals from the IHO's finding that completion of the initial evaluation of the student was untimely by "at least 50 days" and from that portion of the IHO's decision ordering the district to provide at least 25 hours of individualized 1:1 reading services. In particular, the district asserts that, given the IHO's finding that the district did not deny the student a FAPE, it was improper to award relief related to a solely procedural violation.

## **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

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<sup>5</sup> The parent submitted additional documentary evidence for consideration on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the parent's supplemental exhibits include a March 6, 2015, addendum to the July 2014 private neuropsychological evaluation and a homework assignment completed by the student, dated March 10, 2015 (Pet. Exs. 1; 2). While these exhibits could not have been offered at the time of the impartial hearing, the evidence in question is not necessary to render a decision in this matter; as such, the parent's request is denied.

<sup>6</sup> While the district is correct that the parent's petition fails to set forth allegations in numbered paragraphs, "set forth citations to the record on appeal" or "identify the relevant page number(s) in the hearing decision, a State Review Officer has to the "sole discretion" to accept or reject any pleading that does not conform to the form pleading requirements (8 NYCRR 279.8[a], [b]). In this case, although the parent's petition is procedurally defective, it will not be rejected because the parent, proceeding pro se, has raised challenges to the decision of the IHO and referenced the evidence in the hearing record in a manner adequate to permit review of the issues.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly 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][iii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Impartial Hearing**

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. The district asserts that the IHO correctly determined that the parent's due process complaint notice did not include a claim relating to the February 2013 CSE's eligibility determination. In addition, the parent continues to pursue this claim on appeal.

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. 13-151). However, 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 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint 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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]).

Upon review, I find that the parents' due process complaint notice can be reasonably read to include the issue of the February 2013 CSE's eligibility determination (see IHO Ex. 2 at p. 3). Specifically, the parent stated in her due process complaint notice that the February 2013 CSE determined that the student was not learning disabled and that it "was clear at that point that he was not to receive the appropriate instruction he needed to succeed from the [d]istrict" (id.). Moreover, a review of the parent's due process complaint notice demonstrates that the gravamen of the parent's complaint was that the district failed to acknowledge that the student was not making adequate progress over a period of time, to refer the student to the CSE for an evaluation, and to offer the student special education as a student with a learning disability (id. at pp. 2-5). Furthermore, in her due process complaint notice, the parent requested that the district immediately provide the student with a FAPE and "adequate instruction in reading and writing and implementation of" an appropriate educational program (see id. at p. 6). Thus, the IHO erred in finding that the issue of the February 2013 CSE's eligibility determination was not included in the parent's due process complaint notice (see IHO Decision at p. 10).<sup>7</sup>

However, to the extent that the parent argues on appeal that the district violated its child find obligations by failing to maintain a system of notices, outreach efforts, staff training, and referral processes to ascertain when there are reasonable grounds to suspect a student's disability and the need for special education services, these claims were not raised in the parent's due process complaint notice and may not be permissibly raised now for the first time on appeal (see generally IHO Ex. 2). However, because the student was ultimately evaluated for special education eligibility by the CSE, I have briefly discussed child find below to note that the failure to include such claims in the due process complaint notice did not ultimately have a significant effect upon the outcome of the case in this instance due to the resolution of the parent's other claims in her favor.

## **B. Child Find and Parental Referral**

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<sup>7</sup> In light of the determination below—that the February 2013 CSE inappropriately determined that the student was ineligible for special education as a student with a learning disability—it is unnecessary to determine whether the November 2014 CSE's consideration of the July 2014 private neuropsychological evaluation or eligibility determination are issues properly within the scope of review (see generally Dist. Exs. 23; 24; 28). As discussed below, because the student should have been classified as a student with a disability by the February 2013 CSE, State regulations mandate that the student remain eligible for special education until the a new evaluation is completed, followed by a determination that the student is no longer eligible for special education, along with provision of a copy of the evaluation report and the documentation of eligibility to the student's parent (8 NYCRR 200.4[c][3]).

The parties dispute whether the district failed to timely initiate a referral of the student for special education or to timely respond to the parent's request by seeking consent to evaluate the student and timely conducting the student's initial evaluation.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. Of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (see, e.g., Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132).

A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, citing Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

In addition, a referral may be made by a student's parent or person in parental relationship (34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal

No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).<sup>8</sup> Once a building administrator or employee of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]; see also 34 CFR 300.300[a]).<sup>9</sup> State regulations also provide that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate), to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, AIS, and any other services designed to address the learning needs of the student (8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (8 NYCRR 200.4[a][9][iii][a]–[b]). Upon receiving the parent's consent to conduct an initial evaluation of the student, the district must complete that evaluation within 60 days (see 20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1][i]–[ii]; 8 NYCRR 200.4[b][1]).

As noted above, the parent did not assert in her due process complaint notice that the district failed to have procedures in place to recommend students it suspects of being eligible to receive special education to its CSE for an evaluation (see generally IHO Ex. 2). In addition, while it is arguable that the district should have initiated a referral of the student for special education prior to the parent's October 2012 email, it is unnecessary to reach this conclusion because, as described below, the evidence shows that the parent is entitled to her requested relief due to a denial of a FAPE based on the other grounds.

The evidence in the hearing record does, however, demonstrate that the parent affirmatively requested that the district evaluate the student and determine whether he was eligible for special education. Specifically, in her email to the district, dated October 29, 2012, the parent wrote to the student's teacher, reading teacher, the school psychologist, and the school principal and indicated that, due to the student's lack of progress during the previous two school years, she wanted to have him "tested for a possible learning disability" and move forward as quickly as possible (see Parent Ex. 1). Therefore, once the principal, teachers, or school psychologist—all of whom were either building administrators or employees of the district—received the parent's email, those individuals were required to immediately forward the parent's request to the CSE chairperson, triggering the district's obligation to, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]; see also 34 CFR 300.300[a]). Here, the evidence in the hearing record reflects that the district did not request the parent's consent to initiate the evaluation of the student until the parent met with the SST on November 27, 2012, which was well beyond the 10-day period (see Dist. Exs. 2; 3). Furthermore, by email dated October 31, 2012, the parent again requested

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<sup>8</sup> State regulations require a written request for a referral, submitted by persons other than the student or a judicial officer, to include: the reasons for the referral, including any test results, records or reports upon which the referral is based; a description of the intervention services, programs or instructional methodologies used to remediate the student's performance prior to referral, including any supplementary aids or support services provided to the student (or an explanation as to why no support services were provided); and a description of the extent of parental contact or involvement prior to the referral (8 NYCRR 200.4[a][2][iii]).

<sup>9</sup> State regulations provide that the date of receipt of a referral means the date on which either the CSE chairperson or the building administrator receives the referral, whichever is earlier (8 NYCRR 200.4[a][3]).

that the student be tested for a learning disability (see Parent Ex. 3). Specifically, the parent responded to the school psychologist's email of that same date and stated that she was appreciative of the efforts that had been made over the past few years to help her son but that there was "more than enough evidence to support the need for testing and that it should be scheduled immediately" (id.).

Once the parent made her request for the district to evaluate the student and to determine whether he was eligible for special education under the IDEA, the district was required to follow procedures set forth in State regulations requiring the district to timely request the parent's consent to evaluate the student and then either (1) timely evaluate the student and convene the CSE or (2) inform the parents that it was denying their request to evaluate the student for eligibility under the IDEA and provide prior written notice to the parents explaining why the district refused to conduct an initial evaluation and the information that was used as the basis for the decision (34 CFR § 300.503[a], [b]; 8 NYCRR 200.5[a]; Letter to Zirkel, 56 IDELR 140 [OSEP 2011]).<sup>10</sup> Accordingly, I will not disturb the impartial hearing officer's conclusion that the district violated its obligation to timely evaluate the student.

### **C. Sufficiency of Evaluative Information**

Turning to sufficiency of the evaluative data before the February 2013 CSE, the parent argues that the evaluative data and information obtained by the district was insufficient and that the results of achievement testing obtained by the district were not an accurate measure of the student's performance and contradicted other evaluative data before the February 2013 CSE and, therefore, should not have been considered as the sole measure of student's academic abilities. When a student suspected of having a disability is referred to a CSE, the CSE, upon receipt of consent, must ensure that an evaluation of the referred student is performed (20 U.S.C. § 1414[a][1][A]; see 34 C.F.R. § 300.301[a]), which must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i-v], [j][1]). The student must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation, the CSE must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i]).

In addition, as relevant to the present case, federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student

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<sup>10</sup> Once the district received the parent's consent to evaluate the student on January 2, 2013, the district was required to complete its initial individual evaluation of the student within 60 days, which the district did in this case (see 20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1][i]-[ii]; 8 NYCRR 200.4[b][1]).

suspected of having a learning disability (see 34 CFR 300.307–300.311; 8 NYCRR 200.[j]; see also 8 NYCRR 200.4[c][6]). As part of its initial evaluation of the student, to ensure that underachievement exhibited by a student suspected of having a learning disability is not due to lack of appropriate instruction in reading or mathematics, the CSE must consider data that demonstrates that, prior to the referral process, the student was provided appropriate instruction in general education settings, delivered by qualified personnel, and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents (8 NYCRR 200.4[j][1][ii][a]-[b]).

In January 2013, the district conducted a psychoeducational evaluation of the student as part of his initial referral to the CSE (see Dist. Ex. 9 at p. 1). The evaluation included social and educational histories, a behavioral (classroom) observation, and the results of standardized intelligence testing (id. at pp. 1-7). As part of the social history, the evaluating psychologist reported that school vision (with glasses) and hearing screenings yielded results that were within normal limits (id. at p. 1). The psychologist also noted that, based on a November 2012 questionnaire completed for the SST, the parent indicated that the following behaviors described the student: excessive worrying/fearful, poor attention span, and self-critical/feels inferior (id.). According to the psychologist, the parent further reported that that the student was easily distracted, had difficulty staying focused, and was becoming more concerned about academics and "his sense of failure despite his efforts to succeed" (id.). The psychologist reported that the student was receiving tutoring outside of school and that he had a prior history of school related anxiety, for which he had, on occasion, received informal counseling (id. at p. 2).

The psychologist recounted the student's educational history, notably that he consistently met curriculum standards in kindergarten and first grade but that he began receiving RTI services in second grade (Dist. Ex. 9 at p. 2). According to the psychologist, the student's second grade report card indicated that he "me[t] curriculum standards" for math but that his reading fluency and comprehension were rated as "below curriculum standards" for each marking period (id.). In addition the report card indicated that the content of the student's writing "me[t] curriculum standards," but the mechanics of his writing did not (id.). During the second grade school year, the student worked on reading skills including chunks, blends, vowel sounds, fluency and comprehension, and writing skills including spelling and writing mechanics (id.). The psychologist reported that the student continued to receive RTI services in third grade (id. at p. 3). The student's report card reflected that his reading fluency and comprehension were "below curriculum standards," as were his writing mechanics (id.). However, the student's writing content was rated as "approaches curriculum standards" (id.). Teacher comments noted that the student was approximately one year below grade level (first trimester) and that he was using learned strategies to answer reading comprehension questions, including supporting details in writing and memorizing multiplication facts (second trimester) (id.). According to the psychologist, the report card noted the student's good effort and persistence (id.).

Next the psychologist noted that, at the time of the evaluation in January 2013, the student was receiving daily RTI support for reading, along with 2 additional sessions per week of "word work/phonics" support and a weekly math support group (Dist. Ex. 9 at p. 3). She recounted the student's referral to the SST due to concerns with regard to his below grade level performance in reading fluency and comprehension, as well as the results of SST meetings (id.). According to the psychologist, a February 2013 report from the student's reading teacher indicated that, based on

the results of an updated Diagnostic Reading Assessment 2 (DRA2), the student showed good progress in all areas since October 2012 (id.).<sup>11</sup>

As part of her assessment, the psychologist observed the student in his fourth grade classroom (Dist. Ex. 9 at p. 4). She described the student's participation in a mathematics class where he contributed to the class discussion and correctly responded when called on, but also had difficulty spelling math vocabulary words (id.). According to the psychologist's observations, the student was also an active participant during an English language arts (ELA) vocabulary lesson, in which he volunteered frequently to explain the meaning of given words (id.). The psychologist noted that the student occasionally required prompts and cues to expand on his responses (id.). Following the ELA vocabulary lesson, the student proceeded to "Reading Theater" with 8 other students (id. at pp. 4-5). The psychologist observed that the student appeared to follow along when other student's read their parts and was typically ready to read his part (id. at p. 5). She reported that the student was slightly dysfluent when reading one line and struggled to read two words of a second line (id.). The psychologist indicated that, as the lesson went on, the student was somewhat less focused and was not paying attention when it was his turn; however, when redirected, he stayed focused for the remainder of the story and continued to contribute to the group discussion (id.).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following standard scores (and percentiles): verbal comprehension 112 (79), perceptual reasoning 112 (79), working memory 94 (34), processing speed 103 (58), and a full scale IQ of 109 (73) (Dist. Ex. 9 at p. 5). According to the psychologist, the student's performance on the WISC-IV fell in the average to high average range (id. at p. 6). The psychologist noted, but did not explain, an 18 point discrepancy between the student's working memory and his verbal comprehension and perceptual reasoning scale scores (id.). She referenced, but did not include, the results of February 2013 academic achievement testing (id.).

In her summary, the psychologist stated that the student had struggled with reading and writing since second grade, that he had performed between one and two years below grade level on DRA2 assessments since second grade, and that there was a consistent drop in the student's performance on DRA2 testing between the end of the school year and the beginning of the next school year (Dist. Ex. 9 at p. 6). However, she noted that, based on DRA2 assessments, the student had made progress during the course of each school year (id.). According to the psychologist, in addition to daily RTI support and additional weekly sessions, the student received outside tutoring twice a week and, as measured by the DRA2, had made progress during the 2012-13 school year (id.). The psychologist further reported that the student was functioning within the average to high average range of intellectual functioning and that based on her testing there were no significant weaknesses with regard to the student's cognitive development (id.).<sup>12</sup>

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<sup>11</sup> Evidence in the hearing record interchangeably refers to the DRA and DRA2. For purposes of consistency, this decision will use DRA2 to refer to both instances.

<sup>12</sup> The psychologist reported that the student's performance on a WISC-IV subtest requiring short-term auditory memory, auditory processing, math computation and concentration fell within the low average range (Dist. Ex. 9 at p. 6).

With regard to the student's social/emotional adjustment, the psychologist stated that the student was consistently described as a hard worker and motivated to learn and that no concerns with regard to the student's interpersonal relationships or behavior had been reported (Dist. Ex. 9 at p. 6). The psychologist noted that, each year, school reports indicated that the student lacked confidence in his abilities and was hesitant to take risks, particularly through the first two trimesters of the school year (id. at pp. 6-7). However, by the end of each school year, reports indicated growth in self-confidence (id. at p. 7).

As part of the initial CSE evaluation and to assess the student's academic achievement, the district administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to the student in February 2013 (Dist. Ex. 10 at p. 1). Administration of 13 subtests of the WIAT-III yielded standard scores ranging between 87 and 115, all of which fell within the average range (id.). The special education teacher indicated in her report that the student worked hard through each part of the WIAT-III and did not show any sign that he was nervous or anxious (id. at p. 3). She reported that, when unsure of a task direction, the student asked the evaluator to repeat the directions for more information (id.).

With respect to the student's ability to read a list of increasingly difficulty words, the evaluator reported that, when the student made a miscue it was visually similar, starting with the initial consonant (for example, room for ruin) (Dist. Ex. 10 at p. 1). The student scored in the average range on a subtest that required him to read aloud a list of increasingly difficult nonsense words, including words with vowel combinations, long and short vowels, beginning consonant blends and digraphs (id.). In addition, the evaluator reported that, on the reading comprehension subtest, which required the student to read sentences and paragraphs and respond to questions, the student looked back in the text to in order to find information or details and that he took his time with higher-level thinking questions, looking for sentences that would support the answer that made sense (id. at p. 2). With respect to written language, the student received his lowest subtest score in spelling, where the evaluator reported that the student was able to spell some dictated words but struggled with others (id.). According to the evaluator, on the essay composition subtest, the student combined basic sentences into more complex sentences using linking expression but lost points when he connected two sentences but did not include proper punctuation (id.). The evaluator stated that, in response to a writing prompt, the student wrote a paragraph that was indented and included a topic sentence, several detailed examples, transition words, and a closing sentence (id.). The evaluator indicated that, on the numerical operations subtest, the student did well with basic addition, subtraction and multiplication, but struggled with long division (id. at pp. 2-3). The evaluator stated that, on the problem solving subtest, the student thought through each question, using computations or drawing pictures to solve problems (id. at p. 3). Finally, the evaluator reported that the student was able to listen to longer passages and answer both basic and detailed comprehension questions on the listening comprehension subtest and repeat back long sentences on the oral expression subtest (id.). The evaluator noted that, when the sentences became more complex on the oral expression subtest, the student tried his best to repeat as much information as he could (id.).

The February 2013 CSE also considered a January 2013 medical update form, which indicated that the student's last physical was in May 2012 and the findings of the physical were within normal limits (Dist. Ex. 11). The medical updated indicated that according to an October 2012 assessment the student's vision was 20/30 with glasses and his hearing acuity was within normal limits (id.).

On February 22, 2013, the CSE convened to conduct the student's initial review (see generally Dist. Ex. 12). Meeting participants included the CSE chairperson, the school psychologist, the student's general education teacher, the district special education teacher that administered the WIAT-III, a district reading teacher, the elementary school principal, the district secretary, a parent representative, the parent, and a family friend (id. at p. 1; see Tr. pp. 52, 59). According to meeting minutes, the February 2013 CSE noted that the student received RTI services in second and third grades, identified the support services being provided to the student at the time of the CSE meeting, and reviewed the results of intelligence and achievement testing (Dist. Ex. 12 at p. 2). The parent indicated that she was concerned about the student's writing and brought examples with her to the CSE meeting (id.). The student's reading teacher reported that the student could read independently at a DRA2 level 30, which was a year and half below grade level (id.). However, the teacher also reported that the student had shown great improvement over time (id.). According to the meeting minutes, the reading teacher reported that the student had begun the year at DRA2 level 24, had made gains in fluency, and looked at each word when he read aloud (id.). The teacher further reported that the student was doing word work and that, based on the DRA2 word analysis, the student had three areas of need, among them blends and initial consonants, and spelling (id.). As reflected in the CSE meeting minutes, the parent reported that the student almost always did well on spelling tests but there was no carry over when writing (id.). The student's regular education teacher reported that the student did well with peers and did not have any behavior issues (id.). The teacher further reported that the student was stronger in mathematics than in reading and writing (id.). She explained that she was concerned with the student's writing, that he needed support in class, and that his spelling was "written as he hears it" (id.). The regular education teacher stated that the student would only ask for clarification in a small group setting and had anxiety when reading in front of new people (id. at p. 3). According to the meeting minutes, the parent requested more help for the student with writing and that the school look at alternative methods (id.). The reading teacher responded that the student worked on writing in her group and that she was going to look into other interventions (id.). The student's regular education teacher indicated that the student's spelling impeded his writing (id.).

The foregoing demonstrates that the February 2013 CSE had sufficient and recent evaluative information regarding the student's cognitive abilities, social/emotional functioning, academic achievement, and reading and writing skills to satisfy the requirements for an initial evaluation (see generally Dist. Exs. 9-12). However, as noted above, specific to the consideration of the student's eligibility for special education as a student's with a learning disability, the CSE was also required to consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the student's progress during instruction, which was provided to the student's parents (8 NYCRR 200.4[j][1][ii][b]).

Here, the hearing record shows that the student began receiving RTI services in second grade and continued to receive them at the time of the February 2013 CSE meeting (see Dist. Ex. 9 at pp. 2-3). Documentary evidence includes individualized RTI plans for the student for the 2011-12 and 2012-13 school years, as well as reports of the student's progress (see generally Dist. Exs. 15, 17). In addition, the hearing record includes the student's assessment folder chronicling the student's performance on the DRA2 from kindergarten to the time of the February 2013 CSE meeting (see generally Dist. Ex. 13). The hearing record also contains the student's general education report cards and interim progress reports, as well as the results of State assessments (see generally Dist. Exs. 14-17; Parent Ex. 12). In the February 2013 prior written notice, the district provided the following description of each evaluation, procedure, assessment, record or report



used by the CSE: classroom teacher report, educational evaluation, parent input, reading teacher report and psychoeducational evaluation, and social history (Dist. Ex. 20 at p. 1). While the district collected and recorded data reflecting formal assessment of the student's progress during classroom and RTI instruction, it is not clear from the hearing record if this information was before the CSE and whether the CSE considered this information when determining the student's eligibility for special education services.

The district's CSE referral form included a section titled "Other Interventions Attempted to Resolve Referral Concerns" with instructions to "mark all that apply," comment on benefits/progress, and in some instances "attach documentation" (Dist. Ex. 5 at p. 3). The interventions listed include: alternative programs, speech improvement services, modified assignments, schedule adjustments, individualized curriculum based on skills, alternative approaches to learning, suspension from school, counseling, behavioral intervention plan, other, and consultation with school staff (*id.*). Although the parent completed parts of the referral form, the "other interventions" section was not completed; however, it included handwritten notations stating "see attached" and "[t]o be completed by [name of school]" (*id.*). Included with the CSE referral form was documentation from the November 2012 SST meeting (*id.* at pp. 10-13, 15-21). The referral form tends to indicate that the CSE had this information.

In any event, while it is not entirely clear the extent to which the February 2013 CSE considered the foregoing assessments of the student's achievement, review of the documentation before the CSE, including summaries of the student's assessments in the psychoeducational evaluation and from meeting participants, supports a finding that the February 2013 CSE at least had available to it sufficient evaluative information about the student.

#### **D. Eligibility for Special Education**

The parties' dispute the February 2013 CSE's determination that the student was not eligible for special education as a student with a learning disability. The IDEA defines a "child with a disability" as a child with a specific physical, mental, or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2]). "Such term does not include a child whose educational needs are due primarily to unfamiliarity with the English language, environmental, cultural or economic factors" (Educ. Law § 4401[1]). A learning disability, according to State and federal regulations, means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations" (8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]). A learning disability "includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" (8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]). A learning disability does not "include learning problems that are primarily the result of visual, hearing or motor disabilities, of an intellectual disability, of emotional disturbance, or of environmental, cultural or economic disadvantage" (8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]).

State regulations specify that a student may be determined to have a learning disability if, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards, the student (a) does not make sufficient progress in one or more of the designated areas—oral expression, listening comprehension, written expression, basic

reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving—when using a process based on the student's response to scientific, research-based intervention (i.e., RTI); or (b) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development that is determined, using appropriate assessments, by the CSE to be relevant to the identification of a learning disability (8 NYCRR 200.4[j][3][i][a]-[b]). When determining the eligibility of a student suspected of having a learning disability, where the student has participated in a process that assesses the students' response to scientific, research-based intervention, such as RTI, the CSE is required to prepare a written report containing, among other things, the instructional strategies used and the student-centered data collected (8 NYCRR 200.4[j][5][i][g][1]).

As noted above, the hearing record was unclear as to the extent to which the February 2013 CSE actually reviewed the data-based documentation of repeated assessments of the student's progress during instruction (see 8 NYCRR 200.4[j][1][ii][a]-[b]). However, an examination of that documentation provides a sufficient basis to conduct an independent review of the February 2013 CSE's eligibility determination in this instance and render a decision using the same material that was available to the CSE.

For kindergarten and first grade the student met all curriculum standards for reading, writing, and mathematics, and, according to the DRA2, his reading skills were at grade level (Dist. Exs. 9 at p. 2; 13 at p. 1). In second grade, the student began receiving RTI services (see Dist. Ex. 9 at p. 2). The student's second grade report card indicated that the student was performing "below curriculum standards" in reading fluency and comprehension and that his writing mechanics were "approach[ing] curriculum standards" (Parent Ex. 18 at pp. 1-2). At the beginning of second grade, the student's teacher commented that, in reading, the student was working on vowel sounds, fluency, and comprehension and that staff continued to remind the student to use the strategies that he had been taught (*id.* at p. 1). She noted that the student was below grade level in this area (*id.*). With respect to writing, the teacher reported that the student was working on spelling, mechanics, and expanding sentences by adding more details (*id.*). She noted that, when the student slowed down, his spelling and mechanics were much better (*id.*). As the year progressed, the teacher reported that the student was starting to gain confidence in his reading abilities and that staff continued to give him the extra support he needed to work on his strategies and fluency (*id.*). She noted that, in writing, the student was starting to expand on his sentences but that he often forgot to use capitals and periods (*id.*). At the end of second grade the teacher reported that the student was getting better at using the reading strategies he had been taught (*id.*). She reported that the student had continued to work on chunks, blends, vowel sounds and fluency (*id.*). In writing, the student continued to work on adding details, using a variety of sentence starters, spelling and mechanics (*id.*). The student's DRA2 reading assessment folder showed that, at the beginning of second grade, the student was performing at an DRA2 independent reading level of 10 (Dist. Ex. 13 at pp. 1-2). By the end of the school year the student was at a DRA2 independent reading level of 18 (*id.*).

For third grade (the 2011-12 school year), the district developed an RTI tier 2 individualized plan, dated October 21, 2011, to support the student in ELA (Dist. Ex. 15 at pp. 1-2). The plan indicated that RTI support was being provided to the student based on teacher referral and, more specifically, because, although the student was beginning third grade, his DRA2 independent reading level was 16 (end of first grade level) and he was reading 50 correct words

per minute (cw)/minute) when the goal was to read 98 correct words per minute (id. at p. 1; see Dist. Ex. 13 at p. 1). The RTI plan indicated that the student would receive 30 minutes of small-group reading instruction daily in order to develop word attack skills, phrasing and fluency in oral reading, literal comprehension, and inferential comprehension (Dist. Ex. 15 at p. 1).

An RTI progress report, dated March 8, 2012, indicated that the student had gained two new levels on the DRA2 assessment since October 2011 and that he was now reading at a DRA2 reading level of 20 (second grade) (Dist. Ex. 15 at p. 2; see Dist. Ex. 13 at pp. 1-2). The progress report indicated that the student made "steady progress" in word attack skills, phrasing and fluency in oral reading (reading 90 cw/minute, goal 98 cw/minute), literal comprehension, and inferential comprehension (Dist. Ex. 15 at p. 2). The student's teacher noted the student's increased reading level and reported that he had especially shown progress in his accuracy and reading rate (id.). The teacher stated that the student's reading comprehension was "generally solid," although he tended to need prompting and questions provided by the teacher when retelling a story (id.). Additional teacher comments indicated that the student would continue to receive support in word work (spelling patterns and phonics skills) every other day (id.). According to the teacher, the student made good progress in sight word recognition and knowledge of spelling patterns (id.). She noted that, based on the DRA2, the student was reading one year below grade level (id.).

A second RTI progress report, dated June 25, 2012, indicated that the student had gained an additional two levels on the DRA2 and was now reading at DRA2 independent reading level of 28 (end of second grade level) (Dist. Ex. 15 at p. 3; see Dist. Ex. 13 at p. 1). The student's teacher reported that the student made steady progress in word attack skills, phrasing and fluency in oral reading (reading 72 cw/minute, goal 110 cw/minute), literal comprehension, and inferential comprehension (Dist. Ex. 15 at p. 3). According to the teacher, at level 28 (approximately one year below grade level), the student was able to read with good accuracy, phrasing and expression (id.). She noted, however, that the student would need to keep working on his reading rate (id.). The teacher characterized the student's reading comprehension as strong (id.). She reported that, since the beginning of the school year, the student had gained four DRA2 levels, "which shows that he [wa]s steadily becoming a stronger reader" (id.). According to the teacher, as measured by the DRA2 Word Analysis assessment, the student made excellent progress identifying high frequency words, understanding vowel patterns, and reading words with suffixes (id.). However, some spelling patterns remained difficult for the student, such as those with initial consonant blends (id.). The teacher noted that, at times, the student reversed "b" and "d" and that he difficulty spelling words that ended with "ck" and other "tricky endings" (id.). The teacher opined that the student would "likely continue to receive reading support next year (2012-13 school year) (id.).

In addition to the RTI progress reports, the hearing record includes other documentary evidence regarding the student's academic performance during the 2011-12 school year. The student's third grade report card reflected that the student's reading fluency and comprehension were "below curriculum standards" for the duration of the school year, as were his writing mechanics (Dist. Ex. 14 at pp. 1-2). At the same time, the student's reading engagement, writing engagement, and writing content "approach[ed]" but did not meet curriculum standards (id. at p. 1). In addition, the report card indicated that at the end of the school year the student was "approach[ing]" but not meeting curriculum standards for mathematics skills, including number sense and operations and algebra and measurement (id.). At the beginning of the school year, the teacher described the student as a hard worker who gave school his "all" (id.). She noted that reading and writing continued to be difficult for the student and that he was approximately one

year below grade level (id.). The teacher reported that, during his word work sessions, the student was working in spelling patterns, work families and sight words, and that the student was making good progress with sight word recognition (id.). According to the teacher, the student needed extra time and support with writing words and sentences (id.). With regard to mathematics skills, the teacher indicated that the student's "algebra" grade was slightly below grade level due to his work with number patterns (id.). She noted that he needed additional practice with clocks and money (id.). As the year progressed, the teacher reported that the student continued to make progress in all academic areas (id.). With respect to reading, the teacher reported that the student was working hard to use taught strategies to complete reading comprehension questions (id.). She noted that it was important for the student to memorize his multiplication facts (id.). Grade three interim progress reports from October 2011, January 2012, and April 2012 all indicated that the student's reading and writing performance was below grade level (see id. at pp. 3-5). On State testing, the student performed at level one on the third grade math assessment and at level two on the third grade ELA assessment (Dist. Ex. 1 at p. 6; Parent Ex. 12).

For fourth grade (the 2012-13 school year), the district continued to provide the student with RTI tier 2 services to support him in ELA (Dist. Ex. 17 at p. 1). The RTI individualized plan indicated that the reason for the additional support was that the student scored below standards on the New York State assessments (id.). In addition, the plan indicated that the student was reading at a DRA2 independent reading level of 20 (mid-second grade level), reading 73 cw/minute of the goal of 108 cw/minute (id.; see Dist. Ex. 13 at p. 2).<sup>13</sup> The RTI plan indicated that the student would receive 30 minutes of small-group reading instruction daily, as well as word work sessions with the reading teacher (Dist. Ex. 17 at p. 1). The goals outlined in the individual plan were the same as in the previous school year, and targeted word attack skills, phrasing and fluency in oral reading, literal comprehension, and inferential comprehension (compare Dist. Ex. 15 at p. 1, with Dist. Ex. 17 at p. 1). In addition, a new goal was added to the RTI tier 2 individualized plan for the 2012-13 school year targeting the student's need to improve self-confidence/independence in reading (Dist. Ex. 17 at p. 1). According to the student's daily schedule for the 2012-13 school year, the student received RTI small group word work with the reading teacher/RTI provider two mornings per week for 30 minutes, 15 minutes daily of guided reading with his classroom teacher in a small group at his instructional level, and 30 minutes daily of RTI small group reading instruction with a reading teacher "tailored to meet [the student's] learning goals" (Dist. Ex. 16 at p. 1). In addition, the student participated in 30 minutes daily of RTI small group "[m]ath [l]unch" with the reading teacher/RTI provider (id.).

In an RTI progress report, dated December 2012, the student's reading teacher reported that, although she expected the student to show steady progress in his reading skills, so far, results of the DRA2 showed that the student had "jumped back two levels since last spring" (Dist. Ex. 17 at p. 2). The teacher reported that the student had made "steady progress" in phonics skills while working with another teacher several times a week (id.). She noted that the student seemed to be gaining confidence in his oral reading, and was beginning to read with improved phrasing, at a faster rate, and better accuracy (id.). The student's DRA2 student assessment folder showed that, following the student's regression in reading, it took him approximately six months (February

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<sup>13</sup> The student's grade level expectation at the time was level 38 (see Dist. Ex. 1 at p. 6).

2013) to return to the reading level he achieved at the end of the 2011-12 school year in June 2012 (Dist. Ex. 13 at pp. 1, 3).

Teacher comments included in the student's fourth grade report card indicated that, based on the DRA2, the student continued to perform below grade level in reading throughout the school year (Dist. Ex. 16 at pp. 2-3; see Dist. Ex. 13 at p. 3). At the beginning of the school year, the teacher reported that staff was working with the student on reading fluency, finding support for his answers in the text, and making inferences about what he was reading (Dist. Ex. 16 at p. 2). The teacher reported that staff continued to work with the student on adding details to his writing to make it stronger and noted that the student went to "math lunch" to help support his learning (id.). As the year progressed, the teacher reported that, in reading, the student continued to show good understanding of concepts presented and comprehension skills with texts that were at his ability level (id.). In writing, the teacher reported that the student continued to work on the writing process and that he struggled with remembering to include both topic and concluding sentences, as well as with adding details to his writing (id.). The teacher stated that spelling in content areas were difficult for the student, as he did not correctly carry over words from his spelling tests (id.). Despite the student's difficulties, his report card indicated that, for the first two marking periods, the student met curriculum standards in reading (id.). At the end of the second marking period, the student was "approach[ing] curriculum standards" with respect to his: use of the writing process; ability to organize and develop ideas with supporting details; and ability to use correct grammar, punctuation, capitalization, and spelling (id.). The student's knowledge of basic math facts was "below curriculum standards" (id. at p. 3).

Two interim reports for the 2012-13 school year (October 2012 and January 2013), completed by the student's teacher, indicated that, by the second trimester, the student had made good progress but that he continued to "struggle with reading," particularly with fluency and comprehension (Dist. Ex. 16 at pp. 4-5). In addition, the second interim report reflected that the student's good spelling grades did not carry over into his writing (id. at p. 5). According to the interim report, the student also struggled with math concepts and required multiple repetitions of instruction in order to understand (id.). The teacher stated that the student needed to master multiplication facts (id.).

By January 2013, the student was at a DRA2 level 30, which at the time, was a year and a half below grade level (Dist. Ex. 12 at p. 2). According to the reading teacher's report, summarized in the February 2013 CSE meeting notes, the student had progressed from the DRA2 reading level of 24 since October 2012 (id.). However, the February 2013 CSE meeting minutes do not reflect that the CSE took into account a June 2012 RTI tier 2 progress report, completed at the end of the previous school year (third grade), showing, at that time, the student was at a DRA2 independent reading Level of 28 (end of second grade) (Dist. Ex. 15 at p. 3; see Dist. Ex. 13 at p. 1). Therefore, by October 2012 the student had regressed to an instructional reading level of 24 and needed to regain the skills that he had lost.

Significantly, State guidance indicates a student should spend approximate 9 to 30 weeks with tier 2 interventions, at which point adjustment of intervention intensity or additional interventions should be considered (see Response to Intervention, Guidance for New York State School Districts, Office of Special Educ., at p. 14 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance/cover.htm>). The hearing record indicates that the student received RTI tier 2 service for over a two-year period. In view of the foregoing, the

evidence in the hearing record demonstrates that, despite advancing from grade to grade, the student did not make and sustain sufficient progress in the areas of reading and writing to meet age or State-approved grade-level standards when receiving RTI tier 2 services provided to the student over a two-year period (see 8 NYCRR 200.4[j][3][i][a]; see also 8 NYCRR 200.4[c][5]). Therefore, the I find that February 2013 CSE erred in determining that the student was ineligible to receive special education as a student with a learning disability.

### **E. Relief**

On appeal, the parties dispute whether the IHO erred in directing the district to provide "at least 25 hours" of individualized 1:1 reading services to remedy the district's failure to timely conduct an initial evaluation of the student. The parent also requests the costs of additional private reading tutoring services obtained for the student. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at \*12-\*13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably

calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Relevant to calculating an award of compensatory additional services to place the student in the same position he would have occupied, but for the district's failure to offer the student a FAPE, the evidence in the hearing record demonstrates that the student sustained delays in the areas of reading and writing and that the district failed to adequately address those delays. Thus, it is appropriate in this case to remedy not only the district's failure to timely request the parent's consent to evaluate the student but also the February 2013 CSE's failure to find the student eligible for special education as a student with a learning disability.

Here, because the student was approximately two full years behind in reading, on or about October 27, 2012, student began to receive reading instruction from a private reading tutor, who the parent hired, for one-to-three hours per week (Dist. 13 at pp. 3-4; Parent Ex. 9; see also Tr. p. 31). Given the student's lack of sustained progress over the course of two years while receiving RTI tier 2 services and the February 2013 CSE's failure to find the student eligible for special education, the parent's acquisition of private reading tutoring was reasonable. Accordingly, the district is ordered to reimburse the parent in the amount of \$3,715 for the cost of the private tutoring services that the parent obtained from October 2012 through December 3, 2014 (see Parent Exs. 9; 19). In addition, upon the parent's submission to the district of proof of payment for the \$450 tutoring services obtained since December 2014, the district will be ordered to reimburse the parent for those tutoring services as well. Finally, because the district will be ordered to reimburse the parent for the cost of the private reading services obtained by the parent and to reconvene to develop an appropriate educational program in an IEP for the student, that portion of the IHO's

decision directing the district to provide individualized 1:1 reading services for "at least 25 hours" is unnecessary and is annulled.

## **VII. Conclusion**

In summary, the evidence in the hearing record shows that the initial evaluation of the student for special education was untimely and that the district denied the student a FAPE for the 2013-14 school year by failing to find the student eligible for special education as a student with a learning disability. I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

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

**IT IS ORDERED** that the IHO's decision, dated February 9, 2015, is modified by vacating that portion which ordered the district to provide individualized reading services for at least 25 hours.

**IT IS FURTHER ORDERED** that the district is ordered to reimburse the parent in the amount of \$3,715.00 for the cost of the private tutoring services that the parent obtained from October 2012 through December 3, 2014;

**IT IS FURTHER ORDERED** that, upon submission to the district of proof of payment, the district is ordered to reimburse the parent in the amount of \$450.00 for the cost of the private tutoring services that the parent obtained since December 2014; and

**IT IS FURTHER ORDERED** that the student is eligible for special education as a student with a learning disability and, within 30 days of this decision, the CSE shall convene to develop an IEP offering a FAPE to the student.

**Dated:**           **Albany, New York**  
                          **April 20, 2015**

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