



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-094

**Application of a STUDENT SUSPECTED OF HAVING A
DISABILITY, by her parents, for review of a determination of
a hearing officer relating to the provision of educational services
by the New York City Department of Education**

Appearances:

Law Office of Regina Skyer & Associates, attorneys for petitioner, Regina Skyer, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent,
Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to classify their daughter as a student with a disability, reimburse them for private therapy and tutoring and award them with compensatory services. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student was enrolled in a third grade general education classroom in a district public school at the time of the impartial hearing (Tr. pp. 47-48; Dist. Exs. 10 at p. 1; 11 at p. 1). Reportedly, the student is in good health and her childhood developmental milestones were "within the normal range" (Dist. Ex 6 at p. 1). According to the student's mother, she became concerned about the student's learning during kindergarten, particularly with regard to reading (Tr. p. 377). Based on her observations during play dates and when volunteering in the classroom, the student's mother became concerned that the gap between the student's abilities and those of her peers widened in first grade (*id.*). In March 2013, during the student's first grade year, the student's mother enrolled the student in a tutoring program offered by the Kumon Math and Reading Center (Kumon), which provided reading instruction to the student (Tr. pp. 382-83; Dist. Ex. 6 at p. 2;

Parent Ex. F). In second grade (2013-14 school year), the student received math instruction from Kumon and participated in her school's extended day program (id.).

The parents obtained an auditory-language processing evaluation of the student in May 2014 at a private hearing and communication center, the results of which found that the student displayed weaknesses in auditory comprehension, memory, and reasoning (Dist. Ex. 14). The evaluation recommended the student receive "listening-language therapy" and accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (Section 504) (id. at pp. 7-9). The parents further retained the hearing and communication center to perform an auditory processing evaluation of the student in July 2014, the results of which indicated that the student "displayed much strength in auditory processing" with weaknesses exhibited on tasks assessing processing speed and listening-in-noise skills (Dist. Ex. 13 at p. 5). The July 2014 evaluation report recommended management strategies to strengthen the student's auditory memory, auditory therapy to facilitate the student's comprehension of rapid speech, and training to strengthen the student's speech-in-noise listening skills (id. at p. 6). The student began receiving auditory therapy from the private hearing and communication center in September 2014 (Tr. p. 392; Parent Ex. D at p. 1).

By letter dated September 4, 2014, the parents referred the student to the district for evaluation, enclosing the private evaluation reports and requesting that the district consider the student for special education services (Dist. Ex. 5). In response, the district conducted a September 2014 social history, an October 2014 psychoeducational evaluation, and a November 2014 classroom observation and prepared a November 2014 speech-language therapy progress report (Dist. Exs. 6 at pp. 1-2; 11; 12 at pp. 1-2; Parent Ex. C pp. 1-4).¹ In October 2014, the district began providing the student speech-language services, both in and out of the classroom, to assess her receptive and expressive language skills and assist in determining whether she required speech-language therapy as a special education service (Tr. pp. 91, 132, 135-38, 146-50; Dist. Exs. 4 at p. 1; 12 at p. 1). Also in October 2014, the parent privately obtained home-based tutoring for the student to address the student's weaknesses in writing and mathematics (Tr. pp. 392-93; Parent Ex. E).

On November 12, 2014, a CSE² convened to consider the student's eligibility for special education (Dist. Ex. 9). The November 2014 CSE summarized the student's present level of functioning and determined that the student was not eligible for special education as a student with a disability (see id.). At the conclusion of the CSE meeting, the parents were advised they could apply for Section 504 accommodations to address the student's needs (Tr. pp. 63-65, 85-86, 134, 169). By prior written notice dated November 12, 2014, the district described the evaluative

¹ The district and the parents both submitted the October 2014 psychoeducational evaluation report into evidence (Dist. Ex. 7; Parent Ex. C). The content of the exhibits is the same (compare Dist. Ex. 7, with Parent Ex. C). For the purposes of this decision, Parent Exhibit C will be cited when referring to the psychoeducational evaluation report.

² In some portions of the hearing record, the November 2014 CSE is referred to as a school based support team or SBST. Because the team served the function of a validly constituted CSE and the parents do not object that the CSE was improperly composed, all further references to the team in this decision shall be to the November 2014 CSE.

material considered by the CSE and informed the parents of the CSE's determination that the student was not eligible for special education services (Dist. Ex. 10).

After the CSE meeting, the parents submitted a request for accommodations for the student under Section 504 (Tr. pp. 400-401; Dist. Ex. 8). The student's teacher testified that the student received accommodations to address her slow processing speed including preferential seating, a separate location for taking tests, and extended time on exams (Tr. pp. 99, 105, 119). In addition, the teacher testified that the district provided the student with response to intervention services in English language arts and mathematics (Tr. pp. 105, 117).³ The district school psychologist who conducted the October 2014 psychoeducational evaluation and attended the November 2014 CSE meeting testified that, subsequent to the CSE meeting, the district provided the student with eight weeks of "at-risk support" during which a special education teacher worked with the student every day for 45 minutes (Tr. pp. 64-65).⁴

In addition to the above accommodations and services, the student's third grade teacher testified that the student received additional support in the classroom including modifications and small group and individual targeted instruction (Tr. pp. 97-98). The student's teacher also indicated she used strategies including providing the student with checklists, visual organizers, math manipulatives, and planning sheets (Tr. pp. 99, 117). Further, the teacher indicated she collaborated with the response to intervention teacher and the speech-language pathologist (Tr. p. 98).

A. Due Process Complaint Notice

In a due process complaint notice dated February 12, 2015, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see Parent Ex. A at p. 1). Specifically, the parents alleged that the district violated the child find provision of the IDEA, failed to apprise the parents of their rights, and failed to advise the parents of available services (id. at p. 2). Further, the parents alleged that although the district "recognized" the student's need for additional support, it failed to properly evaluate the student's needs in order to determine an appropriate educational program (id. at p. 3).

Additionally, the parents raised several allegations regarding the November 2014 CSE meeting, mainly centering around the parents' contention that they were denied the opportunity to meaningfully participate in the development of the student's educational program (Parent Ex. A at pp. 5-6). First, the parents alleged that the district's failure to provide them with a copy of the report of a district psychoeducational evaluation until the CSE meeting impeded their ability to participate in the meeting (id.). Further, the parents asserted that the outcome of the CSE meeting

³ The teacher, apparently incorrectly, referenced "Tier 1" response to intervention services (Tr. p. 117). Guidance indicates that Tier 1 interventions are "commonly identified as the core instructional program provided to all students by the general education teacher in the general education classroom" ("Response to Intervention - Guidance for New York State School Districts," Office of P-12 Educ., at p. 12 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). Additional services beyond the core instruction provided to all students are classified as Tier 2 interventions (id. at pp. 13-14).

⁴ The hearing record is unclear regarding what the response to intervention and at-risk support services consisted of, and whether they were the same or different services (Tr. pp. 64-65, 105, 117).

was predetermined by the district and that the district failed to engage in any meaningful discussion regarding their concerns about the student's needs (id.).

For relief, the parents sought funding for privately obtained evaluations and the costs of services they privately obtained as a "supplemental education program" for the 2014-15 school year, including private tutoring, therapy sessions from the private hearing and communication center, and services from Kumon (Parent Ex. A at p. 7). The parents also requested 250 hours of compensatory educational services (id.).

B. Impartial Hearing Officer Decision

After a prehearing conference held on March 18, 2015, the parties proceeded to an impartial hearing on May 6, 2015, which concluded on June 3, 2015, after three days of proceedings (see Tr. pp. 1-457). In a decision dated August 10, 2015, the IHO found that the district provided the student with a FAPE for the 2014-15 school year (see IHO Decision at p. 10).

First, the IHO found that, although not providing the parents with the report of the district psychoeducational evaluation prior to the November 2014 CSE meeting was an "error" on the district's part and placed the parents at a disadvantage, it did not significantly impede the parents' opportunity to fully participate in the CSE meeting (IHO Decision at p. 10). The IHO next held that the outcome of the November 2014 CSE meeting was not predetermined and was the result of "a consensus of school professionals" based upon the information and evaluations available to them (id. at p. 12). Regarding the parents' assertion that the district failed to meet its child find obligation, the IHO held the hearing record did not support a finding that the district was negligent in not conducting testing of the student or that it overlooked any "clear signs" of a disability (id. at pp. 10-11). Additionally, the IHO held that there was nothing in the hearing record to support a finding that the district knew or should have known that the student had a disability, and credited the testimony of district witnesses that while the student had areas of weakness, they could be addressed in the general education environment and the student made academic progress (id. at p. 11).

The IHO next found that the district took steps to provide the student with informal support after receiving the private evaluations, and that following the parents' request that the student be evaluated for special education services, the district conducted the requisite evaluations (IHO Decision at p. 12). Furthermore, the IHO held that the private evaluations were not conclusive with regard to whether the student had a disability (id. at p. 11). The IHO noted that the district provided speech-language therapy services to the student and, based upon the opinion of the therapist after working with the student, the district found that the student's needs did not warrant speech-language therapy (id. at p. 12). Finally, the IHO credited the testimony of district witnesses that the student's weaknesses in writing and math did not impede her ability to make academic progress and that she did not require speech-language therapy, and noted that the members of the November 2014 CSE who had worked with the student were in agreement that the student did not need special education services and her needs could be met with accommodations in the general educational environment (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO erred in denying their request that the district classify the student as a student with a disability, reimburse them for tutoring and therapy expenses, and award compensatory education.

Initially, the parents contend that the district failed to comply with its child find obligation because it did not evaluate the student despite being aware that she was receiving special education supports. The parents next allege that the district denied them the opportunity to meaningfully participate in a discussion of the student's eligibility at the November 2014 CSE meeting. The parents also assert that because the district psychoeducational evaluation, conducted prior to the November 2014 CSE meeting, concluded that the student was not eligible for special education services, the November 2014 CSE's eligibility determination was predetermined.

The parents contend that the November 2014 CSE failed to appropriately assess the student in all areas of suspected disability. Further, the parents argue that by improperly assessing the student and dismissing the results of the private evaluations, the November 2014 CSE failed to adequately consider the effects of the student's auditory processing deficits upon her ability to perform in the classroom. The parents next assert that the student is eligible for special education as a student with a learning disability and that the IHO failed to adequately address the regulatory criteria for making an eligibility determination. Additionally, the parents contend that the IHO erred in not finding that the student made academic progress as a result of privately-obtained services the student received outside of school. The parents allege that the IHO failed to give sufficient consideration to the student's auditory processing deficits and found her ineligible for IDEA classification because of the existence of potential Section 504 accommodations.

In an answer, the district responds to the parent's allegations with admissions and denials, interposes a counterstatement of facts, and generally argues to uphold the IHO decision in its entirety. The district also asserts that the parents' due process complaint notice did not raise the claim that the student should have been classified as a student with a disability.⁵

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

⁵ While the district is arguably correct that the parents did not explicitly assert that the CSE should have found the student eligible for special education as a student with a disability, this claim is at least implied by the parents' assertion that the district failed to comply with its child find obligation to identify all students with a disability and their request for relief to remedy the district's failure to provide the student with special education services during the 2013-14 and 2014-15 school years (Parent Ex. A at pp. 2-5). Accordingly, the district received sufficient notice of this claim for its consideration during the administrative process (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 77-78 [2d Cir. 2014]). In any event, counsel for the district raised the issue of whether the CSE properly found the student to be ineligible in her opening statement and on direct examination of its first witness (Tr. pp. 32, 67), thus opening the door to its consideration (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 249-51 [2d Cir. 2012]).

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][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [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 [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 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at

192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Child Find

The parents contend that the district neglected its obligation under the child find provision of the IDEA. The parents also argue that the district failed to apprise them of their rights or advise them of services available for the student. The district argues that it did not have reason to suspect that the student had a disability or that special education services were needed to address a suspected disability. Further, the district argues, the district responded in a timely fashion to the parents' request for a referral for special education services to evaluate the student.

The "child find" provision of the IDEA places an affirmative duty on State and local educational agencies to develop policies and procedures to identify, locate, and evaluate students with disabilities, "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a]; see Forest Grove, 557 U.S. at 245; 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]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 659-60 [S.D.N.Y. 2011]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 224-25 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). Courts have interpreted the child find obligation as "distinct from the requirement [for a school district] to provide [a] FAPE to its residents" (E.T., 2012 WL 5936537, at *11, quoting Dist. of Columbia v. Abramson, 493 F. Supp. 2d 80, 85 [D.D.C. 2007]; see also 20 U.S.C. § 1412[a][10][A][ii]; 8 NYCRR 200.2[a][7]). The "child find" requirements also apply to "[c]hildren 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 CFR 300.111[c][1]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S., 826 F. Supp. 2d at 660).

A district's child find duty is triggered when the district "has a 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, quoting New Paltz, 307 F. Supp. 2d at 400 n.13). Additionally, the district must initiate a referral and promptly request parental consent to evaluate a student to determine whether 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 programs (8 NYCRR 200.4[a]). To determine that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent in failing to order testing,' or there must have been 'no rational justification for not deciding to evaluate'" (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

In this case, a review of the hearing record does not indicate that the district overlooked any clear signs of disability prior to the parents' initial referral of the student to the CSE or that it was negligent in failing to evaluate the student prior to the 2014-15 school year. Rather, the hearing record reflects that, at the time of the parents' September 2014 initial referral, the student had met expected developmental milestones (Dist. Ex. 6 at p. 1). The hearing record further reflects that the student's second grade teacher reported that the student made progress during the 2013-14 school year, was "approaching grade level," and that by the end of the year, the student had met grade-level standards in most areas (id. at p. 2; see Dist. Ex. 2 at pp. 1-4, 6). The parents have cited to no authority to support the proposition that the student's receipt of extended day and tutoring services triggered the district's child find obligation, despite the student meeting or approaching grade-level standards and making progress during the 2013-14 school year (see D.K., 696 F.3d at 249 [holding that "[c]hild [f]ind does not demand that schools conduct a formal evaluation of every struggling student"]; J.S., 826 F. Supp. 2d at 662-63). Furthermore, the hearing record contains no indication that the district was aware the student received tutoring services from Kumon prior to September 2014.

However, even if the district had overlooked clear signs of disability or negligently failed to evaluate the student, a review of the hearing record supports the IHO's determination that the

parents' ability to participate in the CSE meeting was not significantly impeded and the CSE correctly found the student ineligible for special education services after it conducted its evaluation of the student at the parent's request. Because the CSE appropriately determined that the student was not eligible for special education services under the IDEA, and the parents were able to participate in that determination, as discussed further below, any alleged child find violation by the district did not result in a denial of FAPE to the student (D.K., 696 F.3d at 249-50; D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]; A.P., 572 F. Supp. 2d at 225-26).

B. Parental Participation/Predetermination

The parents allege that, by failing to provide them with the October 2014 psychoeducational evaluation report in advance of the November 2014 CSE meeting, the district impeded their ability to participate in the decision-making process regarding the student's eligibility for special education services. Additionally, the parents argue the outcome of the November 2014 CSE meeting was predetermined because the October 2014 psychoeducational evaluation report stated that the student did not require special education services. The district argues that the parents had a full opportunity to participate in the November 2014 CSE meeting. Further, the district argues that the determination was not predetermined and the November 2014 CSE properly took into account the results of private evaluations provided by the parents and the parents' concerns.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, parental disagreement with a school district's recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]).

In this case, the evidence in the hearing record indicates that the following individuals attended the November 2014 CSE meeting: a district school psychologist (who also served as the district representative), a district special education teacher, the student's then-current regular education teacher, the parents, an additional parent member, a district speech-language pathologist, and a district audiologist (Dist. Ex. 9 at p. 4). At the impartial hearing, the district school psychologist testified that prior to the November 2014 CSE meeting, she shared all of the evaluative information regarding the student with all the district staff members of the November 2014 CSE, asked for opinions and discussed the student's classroom performance with her then-current teacher (Tr. pp. 58-59). In addition, the district school psychologist testified that at the beginning of the November 2014 CSE meeting, she told the parents that district staff "shared information" among themselves and that they "want to hear what you think and have concerns about and ideally, we'll come to a consensus at this meeting" (Tr. p. 59).

The parents argue that the district's failure to provide them the October 2014 psychoeducational evaluation report prior to the November 2014 CSE meeting denied them the opportunity to meaningfully participate in the CSE meeting. District staff, at the impartial hearing, admitted the failure as an error on the part of the district (Tr. p. 55). Though it is undisputed that the district should have provided the October 2014 psychoeducational evaluation report to the parents in advance of the November 2014 CSE meeting and the omission did leave the parents at a disadvantage, this failure did not significantly impede the parents' opportunity to meaningfully participate in the meeting. The student's father testified at length during the impartial hearing regarding the discussions he had with district staff at the November 2014 CSE about the student and about voicing his concerns (Tr. pp. 415-424, 431-434). Accordingly, although it would have been better practice for the district to ensure that all relevant documentation was provided to the parents prior to the CSE meeting, the parents' ability to express their concerns indicates that their right to participate in the development of the student's IEP was not significantly impeded (A.P., 2015 WL 4597545, at *10 n.7; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]).

Turning to the parents' contention that the November 2014 CSE impermissibly predetermined that the student was not eligible to receive special education services, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The evidence in the hearing record supports a finding that although the district members of the November 2014 CSE discussed the appropriate conclusions to draw from the evaluative information prior to the November 2014 CSE meeting—and may have arrived at the meeting with a pre-formed opinion regarding the best course of action for the student—the November 2014 CSE did not merely determine that the student was ineligible for special education services and then abruptly end the discussion. Rather, the evidence in the hearing record reveals that the November 2014 CSE maintained the requisite open mind by discussing the evaluation reports and by listening to the parents' concerns, as well as informing the parents of other options to address their concerns regarding the student's need for accommodations (see Tr. pp. 58-64, 102-04, 133-35, 166-69, 181, 196-97, 211-12, 415-424, 431-434). Accordingly, the hearing record indicates that the district did not impede the parents' ability to participate in the November 2014 CSE meeting (G.B. v. New York City Dep't of Educ., 2015 WL 7351582, at *10-*11 [S.D.N.Y. Nov. 5, 2015]).

C. Sufficiency and Consideration of Evaluative Information

The parents allege that the district failed to properly evaluate the student's needs by not assessing the student in all areas of suspected disability and failed to adequately consider the results

of the private evaluations and the effects of the student's auditory processing deficits upon the student's ability to perform in the classroom. The district argues to uphold the IHO's decision. Upon review, the evidence in the hearing record does not support the parents' allegations.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In response to the parents' referral of the student for consideration for special education services, the district conducted a September 2014 social history, an October 2014 psychoeducational evaluation, and a November 2014 classroom observation (Dist. Exs. 6; 11; Parent Ex. C). The student's then-current speech-language pathologist also completed a November 2014 speech-language progress report (Dist. Ex. 12). The district representative who participated in the November 2014 CSE meeting testified at the impartial hearing that the November 2014 CSE considered and relied upon the October 2014 psychoeducational evaluation report, the May 2014 auditory-language processing evaluation report, the July 2014 auditory processing evaluation report, the September 2014 social history, and the November 2014 classroom observation report (Tr. pp. 58-62; Dist. Ex. 9; see Dist. Exs. 6; 11; 13; 14; Parent Ex. C). In addition, the November 2014 CSE considered the input of the student's then-current classroom teacher and speech-language pathologist, who both participated in the meeting (Tr. pp. 67-68, 96, 102, 131-33).

The October 2014 psychoeducational evaluation report indicated that administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) to the student yielded a full-scale IQ of 104, which fell within the average range, but noted significant disparity between the student's scores, with individual subtest scores ranging from superior in the areas of verbal abstract reasoning and social/moral judgment, to borderline in the areas of visual motor planning and coordination (Parent Ex. C at pp. 1-2, 4). The evaluator noted that although the student's score in working memory was in the average range, when she was required to listen to and rearrange numbers and letters combined, her performance was in the borderline range (id. at pp. 2-3). The evaluator opined that increased auditory stimuli or multistep verbal instructions "may" be more challenging for the student to process (id. at p. 3). The student's overall performance was in the low average range on tests measuring processing speed, with her performance on graphomotor coordination and visuomotor speed and accuracy tasks in the borderline range (id. at pp. 2-3).

The October 2014 psychoeducational evaluation report also included the student's achievement on the Wechsler Individual Achievement Test, Third Edition (WIAT-III) which according to the evaluator, was administered to compare the student's academic achievement to her intellectual strengths and weakness (Parent Ex. C at p. 3). The evaluator stated that the student's performance on the WIAT-III indicated that her word reading and pseudoword decoding subtest scores were "significantly higher than what would be predicted based on her cognitive skills" (*id.* at pp. 3-4). Further, the October 2014 psychoeducational evaluation report indicated the student's performance on subtests that measured reading comprehension, math problem solving, and spelling were consistent with the student's cognitive ability (*id.*). The October 2014 psychoeducational evaluation report noted that although the student's numerical operations subtest score was lower than expected given her "cognitive capacity," the evaluator indicated the student's performance was consistent with grade level expectations (*id.*). Additionally, the evaluator reported that the student's performance on the numerical operations subtest indicated the student's understanding of math concepts and math calculations was within an average range (*id.*). The student's sentence composition score, however, was lower than predicted and below grade level (*id.*). The October 2014 psychoeducational evaluation report noted that the student's spelling skills, grammar, syntax, semantics, and mechanics, and ability to use a prompt word, were average (*id.*). The evaluator noted that the student's performance was "generally consistent" with her classroom performance and the student's reading, writing, and mathematic skills were within the range of what was expected of a third grade student (*id.* at p. 4). Further, the evaluator noted that the student understood and followed class rules and routines, followed multistep directions, enjoyed class discussions, was "active in making sense of what she [was] hearing," and quickly embraced new concepts and language (*id.*). The October 2014 psychoeducational evaluation report also indicated that the student referred back to relevant material from past lessons and integrated that information into new material (*id.*).

The May 2014 auditory-language processing evaluation report noted that the student exhibited strengths in and performed in the high average range on subtests measuring auditory memory of sentences, content memory, and following directions (Dist. Ex. 14 at pp. 2, 6).⁶ The evaluating speech-language pathologist reported the student's strengths in receptive and expressive vocabulary, word discrimination, phonological segmentation, and phonological blending (*id.* at pp. 2, 6-7).

The May 2014 auditory-language processing evaluation report also indicated the student demonstrated weakness in auditory comprehension, auditory reasoning, and auditory memory for words and numbers (Dist. Ex. 14 at pp. 2, 6). The evaluator reported that the student needed improvement in the area of narrative comprehension, story retell, sequential narrative, and centered narrative skills (*id.* at pp. 2-3, 5). The May 2014 auditory-language processing evaluation report indicated that the student's weaknesses reflected difficulty in retaining auditory information and answering questions based on what she heard, difficulty comprehending high-order level vocabulary, and difficulty retaining and repeating word sequences as they were heard (*id.* at p. 6). The evaluator opined that, although the student demonstrated strong receptive and expressive

⁶ The May 2014 auditory-language processing evaluation report identified the student's performance on the auditory memory of sentences subtest as in the high average range with a percentile rank of 84 (Dist. Ex. 14 at p. 2). In the impressions portion of the evaluation report, the evaluator indicated the student's percentile rank on the auditory memory of sentences subtest as 37 (*id.* at p. 6).

vocabulary, her weakness in auditory memory would cause the student to have difficulty in the classroom and in social situations (*id.* at p. 7). Further, the evaluator reported that student's poor scores reflected difficulty in gathering small pieces of auditory information and retaining them for later comprehension (*id.*). Additionally, the May 2014 auditory-language processing evaluation report indicated that the student showed difficulty comprehending small, paragraph-length auditory information for both concrete as well as abstract information, and difficulty with auditory sequential information; noting that "proficiency in academics relies on auditory memory and auditory sequential memory" (*id.*). The May 2014 auditory-language processing evaluation report also noted the student demonstrated word-finding difficulties reflected by the student's delayed responses during expressive vocabulary tasks (*id.* at pp. 6-7).

In the July 2014 auditory processing evaluation report the evaluator noted that, although the student demonstrated a number of strengths in relation to auditory processing skills, the student also exhibited weaknesses on tasks examining processing speed and listening in noise (Dist. Ex. 13 at pp. 2-5). The evaluator noted that while the student's ability to understand speech in noise on an auditory figure ground subtest was within an age appropriate range, additional testing of words in noise showed below age appropriate performance (*id.*).

The September 2014 social history, based on interviews with the parents, reported that in second grade the student received extended day services and outside tutoring in reading and mathematics (Dist. Ex. 6 at p. 2). The social history also noted that the student's second grade teacher indicated that the student was "approaching grade level" (*id.*). However, the social history report noted that at the time of the report the student demonstrated difficulty with expressive communication (*id.* at pp. 1-2).

On November 7, 2014, the district conducted an observation of the student in her general education classroom, on a day when a substitute teacher provided instruction (Dist. Ex. 11). The November 2014 classroom observation report noted that the student was quiet and attentive during the morning meeting and explained a class rule, and she independently read a book during reading time and maintained concentration despite the noisy environment (*id.*). The classroom observation report indicated the substitute teacher could neither confirm nor deny if the student's performance reflected that of a typical day because the substitute teacher was not familiar with the student (*id.*).

As detailed above, the November 2014 CSE considered and relied upon sufficient evaluative information regarding the student's auditory processing difficulties. Further, there is no indication in the hearing record that it was necessary for the district to conduct any further evaluations of the student prior to the November 2014 CSE meeting or that its failure to do so impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or deprived the student of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]). Based on the information discussed above, the hearing record supports the IHO's holding that the November 2014 CSE had sufficient evaluative information available to it to determine the student's needs and to make a determination whether the student was eligible for special education services.

D. Eligibility

The parents allege that the district failed to establish that the student is not eligible for classification as a student with a disability under the IDEA. The parents allege that the evaluative information available to the November 2014 CSE was sufficient to demonstrate the student's eligibility for special education services. The district argues that the November 2014 CSE properly determined that the student was not eligible for special education services.

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; 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 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 34 CFR 300.8[c][10][i]). 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 34 CFR 300.8[c][10][ii]).

A determination that a student is eligible for special education services as a student with a learning disability must be based on a conclusion that the student does not achieve adequately for the student's age or meet State-approved grade-level standards in one of eight specified areas when provided with appropriate learning experiences and instruction (34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]),⁷ and either the student does not make sufficient progress or meet age or State-approved grade-level standards when provided with a response to intervention process, or assessments of the student identify a pattern of strengths and weaknesses in performance or achievement determined by the CSE to be indicative of a learning disability (34 CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]).⁸ Additionally, a CSE may consider whether the student exhibits "a severe discrepancy between achievement and intellectual ability" in one of the eight specified areas (8 NYCRR 200.4[j][4]).

⁷ The eight specified areas are oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematical calculation, and mathematical problem solving (8 NYCRR 200.4[j][3]).

⁸ When determining whether a student should be classified as a student with a learning disability, a CSE must also create a written report documenting the student's achievement according to the above, along with other information, including: the basis for the CSE's determination, any relevant student behaviors, any relevant medical findings, the effects of other factors on the student's achievement, and whether the student has participated in a response to intervention program (34 CFR 300.311[a]; 8 NYCRR 200.4[j][5][i]). The State Education Department has issued guidance including forms for CSEs to use in ensuring that a proper written record is maintained (see "Response to Intervention: Guidance for New York State School Districts," Office of P-12 Educ., pp. 17-18, 23-24, Appendix B [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). The hearing record contains no indication that the district complied with these regulations; however, this does not affect the ultimate determination that the student is not eligible for special education.

Federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i], [2]; see 34 CFR 300.308[a], 300.310).⁹

Although the November 2014 CSE had before it information indicating that the student had difficulties in the areas of listening comprehension and written expression, and that her achievement in written expression and math calculation was below that expected based on her cognitive ability (see Dist. Exs. 2 at pp. 1-3; 13 at pp. 4-6; 14 at pp. 2, 6-7; Parent Ex. C at pp. 3-4), potentially indicating the presence of a learning disability, this is insufficient to warrant a determination of eligibility for special education (see Letter to Prifitera, 48 IDELR 163 [OSEP 2007]). Assuming for the sake of argument that the student met the criteria for a learning disability on the basis of her auditory processing difficulties, and thereby qualified under one of the enumerated conditions in the IDEA, the hearing record does not indicate that "by reason thereof" she needed special education and related services within the meaning of the IDEA (20 U.S.C. § 1401[3][A]; see Educ. Law § 4401[1], [2][k]; see also D.A. v. Meridian Joint Sch. Dist. No. 2, 618 Fed. App'x 891, 893 [9th Cir. July 6, 2015]; Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 639-40 [7th Cir. 2010]). As previously discussed, at the time of the 2014 CSE meeting the student achieved scores on standardized testing within the average range of academic functioning and was approaching or meeting expectations in all core academic subject areas in school in all areas except sentence composition (see Dist. Ex. 2 at pp. 1-4; Parent Ex. C at pp. 3-4).¹⁰

In addition to the standardized evaluative information regarding the student's strengths and needs, the hearing record also contains information about the student's performance in the classroom. The student's third grade teacher, who also participated in the November 2014 CSE meeting, testified regarding the student's academic performance at the time of the CSE meeting

⁹ In addition, 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 a 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 the student's progress during instruction, which was provided to the student's parents (34 CFR 300.309[b]; 8 NYCRR 200.4[j][1][ii]).

¹⁰ In particular, the October 2014 psychoeducational evaluation report indicated that the student's ability to compose sentences using appropriate grammar, syntax, semantics, and mechanics using a prompt word (sentence building subtest) was in the average range, while her ability to combine provided sentences into one sentence of the same meaning (sentence combining subtest) was in the low range (Parent Ex. C at pp. 3-4; see Tr. p. 53). The district psychologist testified that the sentence-combining subtest required the student to combine sentences into one sentence that retained the same meaning as the sentences presented and that the student composed sentences that were grammatically and tactically correct but that the student did not follow the directions when combining sentences and added details which changed the meaning of the sentences, so that she did not receive credit for those sentences (Tr. pp. 53-54).

(Tr. pp. 96-102). The student's teacher indicated that based on informal assessments, the student was approaching grade level performance "in certain areas" upon entering the third grade (Tr. p. 97). The teacher also stated that at the beginning of the 2014-15 school year, the student's overall reading comprehension was meeting grade level expectations, although she noted the student demonstrated need in the area of retelling a story (Tr. p. 100). With regard to mathematics, the student's teacher testified there were "more areas that [the student] was approaching grade level, especially with speed and double-checking her work to avoid computational errors" (*id.*).

The student's speech-language pathologist also attended the November 2014 CSE meeting and testified that she provided non-mandated speech-language therapy to the student for a 12-week period beginning in October 2014, following a referral to the school's pupil personnel team previously initiated by the student's second grade classroom teacher (Tr. pp. 132-33, 146-47).¹¹ The speech-language pathologist testified that she saw the student for speech-language therapy one time per week in the classroom and one time a week out of the classroom in a small group for 30 minutes per session to work on receptive and expressive language skills (Tr. pp. 135-36, 149-50). The speech-language pathologist testified that the speech-language services were "more of an evaluation period to see where the student's skills were" and she determined the student did not have receptive language "issues" (Tr. pp. 137, 140-50). However, the speech-language pathologist testified that the student had a weakness in formulating narrative retell, which could be addressed in the classroom through use of graphic organizers and checklists (Tr. p. 137; *see* Tr. pp. 99, 117, 123; Dist. Ex. 12 at p. 1).

Through the weeks of therapy prior to the November 2014 CSE meeting, the speech-language pathologist determined that the student processed new information slowly and required extra time to process and complete tasks, but the speech-language pathologist testified she did not find that the student demonstrated difficulty listening in noise as indicated in the auditory processing evaluation (Tr. pp. 138, 140-41). In regard to listening in noise, the speech-language pathologist indicated the student followed multistep mathematics directives given by the teacher even in the presence of background noise and repeated the directions to a peer (Tr. pp. 140-41; Dist. Ex. 12). The speech-language pathologist also testified that the student was able to listen for information in text that was at or above grade level and answer factual questions as well as predictive and inferential questions relating to the text (Tr. pp. 139-40; Dist. Ex. 12 at p. 1). The speech-language pathologist also stated that when given a prompt to re-read directive information, the student realized errors and corrected the mistakes previously made in following the directions (Tr. pp. 139-40). The speech-language pathologist testified that the student did not demonstrate any expressive language deficits, rather, she expressed her thoughts clearly and appropriately, so that peers understood her point of view and the speech-language pathologist could understand the student's thinking (Tr. p. 140). The speech-language pathologist concluded that the student did not require speech-language services to make academic progress nor did the student's identified weakness impede her from progressing academically (Tr. pp. 141-42; Dist. Ex. 12 at p. 2). The speech-language pathologist testified that the recommendations from the July 2014 auditory processing report, including strengthening auditory skills, speech in noise listening, auditory memory, verbal rehearsing, chunking, visuals, and auditory therapy could be targeted within the

¹¹ The pupil personnel team is described in the hearing record as "a team of special educators [who] try to problem solve and discuss students who might be having trouble in their classrooms" (Tr. p. 132).

student's classroom by the teacher (Tr. pp. 143-44). The November 2014 speech-language progress report recommended that the student receive extra time to complete assignments and tests, and noted that it might be helpful for directions to be read and reread aloud to her during testing (Dist. Ex. 12 at p. 2).

The evaluator who conducted the July 2014 auditory processing evaluation opined that with environmental noises in the classroom it would "potentially" be harder for the student to follow along with the spoken message, especially when the teacher did not provide visual cues (Tr. pp. 345-46). To the contrary, the district audiologist testified that the noise used in that assessment was "cafeteria noise, multi-talker babble" and questioned if that represented a "typical level of noise in the classroom" (Tr. pp. 191-92). Therefore, the district audiologist did not view the student's below age appropriate norms on the word in noise subtest as a weakness or major concern given that the student did "very well" on the auditory figure ground subtest (*id.*). The July 2014 auditory processing evaluation report also indicated that the student performed below age appropriate norms in relation to time compressed sentences (Dist. Ex. 13 at p. 4). The evaluator indicated the student's performance on the time compressed sentences subtest suggested a "possible" deficit in processing speed and the student's significant delays in response time throughout the testing suggested a "possible" deficit in auditory memory skills (*id.* at p. 5). Alternatively, the district audiologist testified that she was unsure of the practical application of the compressed sentences subtest to a classroom environment as she "never heard a teacher in a classroom speak very fast" (Tr. p. 186).

After consideration of the evaluative data available at the November 2014 CSE meeting and discussion amongst those in attendance including the student's then-current teacher and speech-language pathologist, the November 2014 CSE determined that the student did not require special education services and therefore did not meet the eligibility criteria for an educational disability (Tr. pp. 60-62, 67-68; Dist. Exs. 9 at p. 1; 10 at p. 1). The district school psychologist testified that the November 2014 CSE determined the student did not need formal special education services to perform adequately in the classroom stating that, according to the student's classroom teacher, the weaknesses identified in the evaluative information were consistent with what she saw in the general education classroom (Tr. p. 62). Further, according to the school psychologist, the student's teacher indicated that the student's weaknesses were deficits she worked on with students in the general education classroom (*id.*). The school psychologist further opined that because the student's needs were consistent with grade level performance, the student did not require formal special education services (*id.*). In particular, although the student had areas of weakness, the school psychologist indicated that the student had a number of "very strong skills" and that her areas of weakness could be "very efficiently and effectively handled within a general education class" because her level of need was "consistent with that of a general education student" (Tr. pp. 63, 67).

Although the hearing record demonstrates that the student's profile exhibited a number of relative strengths and weaknesses, it also demonstrates that overall, the student's academic functioning fell in an average range (Dist. Ex. 1 at pp. 1-3; Parent Ex. C at pp. 1-4). Additionally, after working with the student for several weeks prior to the November 2014 CSE meeting, the student's teacher testified that the student performed at grade level expectations and both the teacher and speech-language pathologist stated that the student's weaknesses did not impede her ability to make academic progress (Tr. pp. 97, 100-112, 112, 141-42). Accordingly, despite the

indications of the student's weaknesses in several areas, these weaknesses did not operate to impede the student's functioning in the classroom setting. Therefore, the hearing record supports the November 2014 CSE's determination that the student was not eligible for special education services at the time of the CSE meeting and that the student's needs could be addressed in a general education setting through the use of accommodations and strategies without the additional support of special education services (see A.P., 572 F. Supp. 2d at 225-26 [noting "the fact that a child may have a qualifying disability does not necessarily make him 'a child with a disability' eligible for special education services under the IDEA"]¹²).

VII. Conclusion

In summary, and consistent with the IHO's conclusion, a review of the evidence in the hearing record establishes that the student is not eligible for special education services under the IDEA and thus the district did not violate its child find obligation or fail to offer the student a FAPE for the 2014-15 school year.

In light of the determinations made herein, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 7, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

¹² In addition, although not necessary to my determination regarding the student's eligibility for special education, the hearing record contains evidence regarding the student's progress during the 2014-15 school year while receiving accommodations under Section 504, further supporting the conclusion that the student did not require special education to receive educational benefits (Tr. pp. 97-99, 105, 109-11, 117-18; Dist. Ex. 1).