



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-011

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

Appearances:

Law Office of Erika L. Hartley, attorneys for petitioner, Erika L. Hartley, Esq., of counsel

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Gail Eckstein, 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 the decision of an impartial hearing officer (IHO) which found that the student was ineligible for special education for the 2014-15 and 2015-16 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had timely evaluated the student for the 2014-15 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student attended a district general education kindergarten class during the 2014-15 school year (Tr. p. 197; Parent Ex. E at p. 1).^{1, 2} By letter dated November 20, 2014, the parent requested that the district conduct an initial special education evaluation of the student based upon the parent's concerns regarding the student's short attention span, difficulty concentrating, and hyperactivity (see Dist. Ex. 26; Parent Ex. E at p. 1). On January 8, 2015, the parent provided

¹ The hearing record contains multiple duplicative exhibits (compare Dist. Exs. 1, 7, 8, 15-17, 20-21, 24, with Parent Exs. A-H, S). For purposes of this decision, only Parent exhibits are cited in instances where both a Parent and District exhibit are identical. I remind the IHO that it is his responsibility to exclude evidence that he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

² The student began attending the district general education kindergarten class in October 2014 (Tr. p. 197).

consent for an initial evaluation to determine if the student was eligible for special education as a student with an educational disability (Dist. Ex. 23). Subsequently, the district conducted a psychoeducational evaluation and completed a social history and classroom observation of the student (Dist. Ex. 22; Parent Exs. B; E; F).

The CSE convened for the student's initial review on March 13, 2015, adjourned, and then reconvened on April 28, 2015 and determined the student was not eligible for special education (Tr. p. 52; Dist. Exs. 5 at p. 1; 6; 11; 12; 19). Following the initial CSE meeting, the parent advised the district, via letter dated March 18, 2015, that she was not in agreement with the findings of the district's psychoeducational evaluation (Parent Ex. G at p. 1). The parent requested independent educational evaluations (IEEs) "in order that the full range of [the student's] needs be considered and addressed appropriately" (id.). In particular, the parent requested neuropsychological, psychoeducational, occupational therapy (OT), visual skills, and visual perceptual evaluations at district expense (id.). Following the April 2015 CSE meeting, the parent again advised the district, via letter dated May 11, 2015, that she did not believe her daughter's needs had been appropriately assessed (Parent Ex. D at p. 1). Further, the parent expressed concern that the decision to deny her request for IEEs was made by the supervisor of psychologists, outside of the CSE process (id. at pp. 2-3). In her letter, the parent also indicated that the April 2015 CSE did not consider her concerns and that the section 504 coordinator's attendance at the meeting evidenced the CSE's predetermination of the student's eligibility for special education under the IDEA (id. at pp. 2, 3). Finally, the parent expressed that the April 2015 CSE's determination of ineligibility resulted in a denial of a FAPE to the student (id. at p. 3).

A. Due Process Complaint Notice

By due process complaint notice, dated May 21, 2015, the parent alleged that the district failed to offer the student a FAPE for the 2014-15 school year and that such denial would extend into the 2015-16 school year (Parent Ex. A). The parent alleged that the district failed to "satisfy its Child Find obligations" for the 2014-15 school year (id. at p. 2). The parent argued that the initial evaluation of the student exceeded "procedural timelines" (id. at p. 3). In addition, the parent asserted that the district had failed to appropriately evaluate the student in all areas of suspected disability, which served to hide the student's deficits (id. at p. 2). The parent also objected to the district's failure to respond to her request for additional evaluations or an IEE or to provide her with a prior written notice explaining why her request was denied (id.). Relatedly, the parent objected to the involvement of the district supervisor of psychologists in the CSE's determination to deny her requests for further evaluations of the student (id.). The parent alleged that she was denied meaningful participation in the CSE meetings and that her concerns about the student's needs were excluded from the both the CSE discussions and the decision to not find the student eligible for special education (id.). The parent further alleged that the district predetermined the outcome of the April 2015 CSE meeting (id. at pp. 2-3). Finally, the parent asserted that the district did not provide her with prior written notice regarding the April 2015 CSE's determination (id. at p. 3). As a result of the insufficiency of the evaluations, the parent argued that the April 2015 CSE inappropriately deemed the student ineligible for special education and caused her needs to go "unaddressed" for the 2014-15 school year and into the 2015-16 school year (id. at p. 2).

As a remedy, the parent requested an order requiring the district to fund neuropsychological testing, a hearing test, an OT evaluation with sensory integration testing, a vision skills evaluation, visual perceptual testing, and a central auditory processing evaluation (Parent Ex. A at p. 3). Additionally, the parent requested a determination that the district denied the student a FAPE and

that it failed to satisfy its child find obligation (*id.*). Finally, the parent requested a Nickerson letter (*id.*).³

B. Partial Resolution

According to the evidence in the hearing record, the parent and the district participated in a resolution meeting on June 5, 2015 (Dist. Ex. 2 at p. 2). On July 1, 2015 the district and parent entered into a resolution agreement whereby the district agreed to fund several IEEs including a neuropsychological evaluation, a visual skills and visual perceptual evaluation, an OT evaluation, and a audiological and central auditory processing diagnostic evaluation (*id.* at p. 1). As part of the resolution agreement, the district also agreed to reconvene the CSE upon completion of the evaluations (*id.* at p. 2). The agreement indicated that it constituted a "partial resolution of claims" included in the parent's due process complaint notice (*id.*).

C. Impartial Hearing Officer Decision

After preliminary proceedings on June 19 and July 27, 2015, the parties continued with an impartial hearing, which concluded on October 29, 2015, after two days of testimony (*see* Tr. pp. 1-407). In a decision, dated January 21, 2016, the IHO found that the district denied the student a FAPE as a consequence of its failure to timely conduct evaluations of the student (IHO Decision at p. 12). First, the IHO found that the district did not fail to satisfy its child find obligation since there had not been any evidence presented demonstrating that the district had failed in its duty to identify, locate and evaluate the student (*id.* at p. 8). In particular, the IHO noted that the parent's claim that the district failed to fully evaluate the student required a "separate analysis" than that which applied to a child find violation (*id.*). Next, however, the IHO found that the district's refusal to perform evaluations that the parent requested to be a procedural violation that significantly impeded the parent's opportunity to participate in the April 2015 CSE, thereby denying the student a FAPE (*id.* at p. 9).

Turning to the parent's request for relief, the IHO acknowledged that the evaluations sought in the due process complaint notice had been completed (IHO Decision at p. 9). Having found that the district failed to offer the student a FAPE—and thereby granting the parent's request for declaratory relief—the IHO examined the propriety of relief in the form of a Nickerson letter (*id.* at p. 10). The IHO found that, despite the district's argument to the contrary, it was within the scope of his jurisdiction to hear and determine the issue (*id.* at pp. 10-11). However, the IHO found that the language of the consent order that gave rise to remedy of a Nickerson letter specified that the relief be available only to students with disabilities (*id.* at p. 11). The IHO further found that the evidence in the hearing record did not establish that the student was a student with a disability (*id.*). Therefore, the IHO concluded that a Nickerson letter would not be "valid relief"

³ A "Nickerson letter" is designed as a remedy for a systemic denial of a FAPE imposed by a U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (*see R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The remedy of a Nickerson letter is intended to address the situation in which a student has not been evaluated or placed in a timely manner, and authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (*see Jose P. v. Ambach*, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]; *R.E.*, 694 F.3d at 192 n.5; *see also Application of the Dep't of Educ.*, Appeal No. 13-209; *Application of the Dep't of Educ.*, Appeal No. 13-190; *Application of a Student with a Disability*, Appeal No. 12-184; *Application of the Dep't of Educ.*, Appeal No. 09-114).

(id.). Based on the foregoing, the IHO concluded that "no other relief [wa]s outstanding" (id.). Nonetheless, the IHO directed the CSE to reconvene within fifteen days of his decision to "consider all evaluative data available and consider all possible services" for the student (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parent appeals and argues that, although the IHO correctly determined that the district denied the student a FAPE, he erred in several of his determinations. First, the parent argues that the IHO should have determined that the district violated its child find obligation. In support thereof, the parent asserts that the district should have performed the requested evaluations while the student's case was still before the CSE. The parent asserts that the student exhibited clear signs of a disability, that the district was negligent for failing to order evaluations to "assess the nature and extent" of the student's deficits, and that such negligence amounted to a denial of FAPE (Pet. ¶ 25).

Next, the parent argues that the IHO erred in making a factual determination that the student was not a student with a disability. The parent asserts that it was not appropriate for the IHO to make that determination while "questions of eligibility remain unanswered" at the time of the April 2015 CSE as a consequence of the district's failure to complete evaluations in all areas of suspected disability as requested by the parent and given the conflicting information before the CSE about the student's needs and abilities (Pet. ¶ 13). The parent asserts that, since the IHO found that the evaluations were not "timely offered," the IHO could not have appropriately determined the student's disability status. Finally, while not addressed by the IHO, the parent continues to assert that the district did not provide prior written notice explaining why the requested evaluations were not undertaken before the CSE determined the student was ineligible for special education services.

For relief, the parent requests that the IHO's decision be reversed on these points and that the CSE convene to determine the student's eligibility for special education.

In an answer, the district generally admits or denies the parent's allegations and argues that the parent's appeal should be dismissed. In addition, the district cross-appeals the IHO's decision that the student was denied a FAPE. In particular, the district argues that the IHO erred in applying a FAPE analysis in this case because the student had not been found eligible for special education as a student with a disability. In the alternative, the district asserts that the IHO erred in his determinations that the district did not provide timely evaluations and that the parent was denied a meaningful opportunity to participate in the April 2015 CSE.

By letter dated March 16, 2016, the Office of State Review requested additional information from the district as to whether the district complied with the IHO's order to convene a CSE meeting and, if so, whether the CSE determined the student was eligible for special education as a student with a disability. In letters to the Office of State Review, dated March 21 and March 17, 2016, respectively, both the district and the parent responded that the CSE had not convened within 15 days of the IHO's decision.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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, 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 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, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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]).

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. Preliminary Matters

In view of the relief requested by the parent and the parties' partial resolution agreement, only a certain subset of issues remain to be addressed in this appeal; therefore, rather than discussing the substance of the parent's claims at the outset, the IHO's conclusion about the availability of Jose P. relief shall be discussed first. In her due process complaint notice, the parent requested a Nickerson letter, evaluations at district expense, and declaratory relief (Parent Ex. A at p. 3).

1. Nickerson Letter

While the parent has not directly challenge the IHO's decision not to award a Nickerson letter in so many words, she does appeal the IHO's determination that the student was not a student with a disability and, therefore, was not eligible to receive a Nickerson letter in accordance with the Jose P. consent order (see IHO Decision at p. 11). Therefore, the availability of this form of relief will be examined briefly. In this case, and as the district correctly argued in its closing brief before the IHO (IHO Ex. II at pp. 7-8), jurisdiction over class action suits and consent orders (and

by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd R.E., 694 F.3d 167), and thus, contrary to the IHO's conclusion that he could rule upon an alleged Jose P. consent decree violation and attendant Nickerson letter relief, "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012]; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]). No provision of the IDEA or the Education Law otherwise confers jurisdiction upon administrative tribunals established in a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal.

Consequently—and contrary to the IHO's conclusion—neither an IHO, nor an SRO, has jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or an appropriate remedy for an alleged violation of the Courts order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Aug. 5, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd, R.E., 694 F.3d at 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *7-*9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson, 436 F.3d 52 [2d Cir. 2006] and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also E.Z-L., 763 F. Supp. 2d at 594; Dean v. Sch. Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).⁴ The IHO's reasoning that he was bound to observe the Court order was legally flawed, and the IHO was neither required or authorized to enforce the Court's order.⁵

Therefore, the IHO erred in determining that he had the jurisdiction to review the applicability of the Nickerson letter remedy to the present case, and it is unnecessary further address the merits of his finding that that particular remedy was unavailable to the parent due to his conclusion that the student was not eligible for special education (see IHO Decision at p. 11).

2. Resolution Agreement

As noted above, the parent and the district participated in a resolution meeting on June 5, 2015, which resulted in a partial resolution agreement executed by the parties on July 1, 2015

⁵ I do find it is very helpful for IHOs to understand the Jose P. consent decree and the parties respective positions regarding whether a particular student is subject to the consent decree so as to avoid issuing rulings that inadvertently contradict the Court's ruling; however, that is a far cry from enforcing the consent decree at the request of one party when its applicability is disputed matter.

(Dist. Ex. 2 at pp. 1-2). Pursuant to the agreement, the district agreed to fund several IEEs and reconvene upon completion of the evaluations (*id.* at p. 1). According to IDEA, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (20 U.S.C. § 1415[f][1][B][i][IV]; 34 CFR 300.510[a][2]; see also 8 NYCRR 200.5[j][2][i]). The Second Circuit described one purpose of the resolution session to be so that "[a] school district that inadvertently or in good faith omits a required service from the IEP can cure that deficiency during the resolution period without penalty once it receives a due process complaint" (*R.E.*, 694 F.3d at 188). Further, if parents continue to feel that a district failed to offer a student a FAPE after a resolution session, they may continue to an impartial hearing but, at that point, the Second Circuit indicated that "[t]he adequacy of the IEP will then be judged by its content at the close of the resolution period" (*id.*).

Applying this to the present case, if the CSE process is evaluated taking into account the completion of all of the evaluations agreed to in the partial resolution agreement, many of the parents' claims must be deemed resolved as they all revolve around the original inadequate evaluations and the district's actions and inactions surrounding the parent's request for additional evaluations and/or IEEs. This includes the parents claims related to (1) inadequate prior written notice, (2) inadequate child find procedures, and (3) allegations of initially inadequate evaluation of the student by the CSE.

Of particular note, the IHO correctly observed that the parent's child find claim was a dispute about the sufficiency of evaluative information (see IHO Decision at p. 8). The "child find" provision of the IDEA places an ongoing, affirmative duty on State and local educational agencies to develop policies and procedures to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111[a][1][i]; 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]).

Here, the parent did not allege that the district did not have in place policies and procedures to identify, locate, and evaluate students suspected of having disabilities. The parent also does not allege that the district had reason to suspect that the student had a disability and needed special education at any point earlier than the parent's referral of the student (see Dist. Ex. 26). Nor did parent allege that the district failed to conduct an initial evaluation of the student. To the contrary, the district obtained a medical report from the student's pediatrician, a report from the student's regular education teacher, and it conducted a social history, a classroom observation, and a psychoeducational evaluation (Parent Exs. B; E; F; H; see 8 NYCRR 200.4[b][1][i]-[v]). Rather, the parent argues that the assessments obtained by the district did not offer sufficient information about the student in all areas of suspected disability or sufficiently explain why the student was experiencing difficulty in school. Thus, the parent alleges that the district's failure to conduct

additional assessments, including an OT evaluation, as part of the student's initial evaluation amounted to a child find violation.⁶ To support a finding 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 the cases that discuss overlooking a sign of a disability or failing to order testing, these authorities do not appear to go so far as to hold that there is a child find violation when a district follows its policies and locates and evaluates a student to determine his or her special education eligibility, but the CSE does not conduct one particular assessment that the parent prefers or conducts a particular test or assessment in a manner with which the parent disagrees. Rather, the authorities indicate that a child find violation occurs as a result of the district's failure to conduct an "evaluation," as the term is used in the IDEA, encompassing the entire process during which assessments occur (cf. T.P. v. Bryan County Sch. Dist., 792 F.3d 1284, *5 n.13 [11th Cir. 2015] [discussing the awkwardness of referring to individual assessments as IEEs when "evaluation" is used in the IDEA to refer to the entire process of determining a student's needs]). Accordingly, as the IHO observed, the parent's objections to the evaluation process that were couched as "child find" actually target an area of inquiry that is distinct from child find—the alleged insufficiency of the evaluative information obtained by the district after following a process for initial evaluation.

Accordingly, given that the only basis appearing in the hearing record for the parent's child find and prior written notice claims was her dissatisfaction with the results of the initial evaluation process followed in this case, the partial resolution agreement resolved those claims and, consequently, there was no reason for them to resolved them further through the impartial hearing process (see R.E., 694 F.3d at 188). Thus, any inadequacies of the district's original evaluation of the student and/or its failure to respond to the parent's request for IEEs were also resolved and, therefore, the IHO erred in proceeding on that issue in the written decision and finding a denial of a FAPE on this basis. Accordingly, the district's cross-appeal is sustained.

3. Other Relief

Having addressed the parent's request for a Nickerson letter and the issues covered by the parties' resolution agreement, the remaining concern, which the IHO addressed by directing the district to reconvene the CSE, is the student's eligibility. The only other relief to be considered is the declaratory relief specifically sought by the parent in her due process complaint notice or other appropriate equitable relief that flows from the issues disputed by the parties. This case was premised upon the April 2015 CSE's determination that the student was not eligible for special education and, at the conclusion of the impartial hearing, the IHO required the district to reconvene the CSE. The district did not adhere to the IHO's order (albeit with some complicit behavior by the parent) and, therefore, the question of the student's eligibility for special education remains

⁶ In particular, the parent points to the fact that, subsequent to finding the student ineligible for special education, the district conducted an OT screening of the student (see Dist. Ex. 10).

unaddressed by the district's CSE.⁷ By agreeing to conduct additional evaluations but failing to convene the CSE to determine whether the student is eligible for special education, both parties are now acting unreasonably.

While, in many cases it is preferable to leave the question of the student's eligibility based on a review the district's evaluative material and IEEs to the CSE in the first instance—those who know the student best in a cooperative context that is less fettered by the legal trappings of due process—that approach in this case has led to extensive delay (now nearly a year) in addressing the fundamental question of whether the student is eligible for special education. To further delay determination on the student's eligibility would not serve the purpose of the IDEA and, if the student is deemed eligible for special education as a student with a disability, new delays will likely increase the difficulties that the parties are facing in addressing the student's needs. The student would best be served with some degree of certainty on this initial question of eligibility so that the parent and the district can return to the collaborative process called for by the IDEA (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [describing the cooperative process as the "core of the [IDEA]"], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

Thus, I will examine the student's eligibility based on the relevant information in the hearing record, including the evaluations completed pursuant to the parties' partial resolution agreement. To be clear, while the hearing record may or may not have supported a finding that the April 2015 CSE appropriately determined that the student was not eligible for special education as a student with a disability based the information that was available at the time of the CSE, the Second Circuit carved out an exception to the general prohibition on retrospective evidence in the case of resolution agreements reached by parties (R.E., 694 F.3d at 188).⁸ Under the unique

⁷ As noted above, the IHO, in his January 21, 2016 decision, ordered the CSE to reconvene within 15 days to consider evaluative data and services for the student (IHO Decision at pp. 11-12). To date, the CSE has not reconvened and the attorneys for both parties have submitted explanations for the delay in the process, which relate to the pendency of the present proceeding. Neither a school district nor a parent can, without consequence, delay a required process to await the results of an appeal proceeding. This is particularly so, here, where parent did not appeal that part of the IHO's decision ordering the CSE to convene, rendering such order final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The district was obligated to document its attempts to persuade the parent to attend a CSE meeting within the timeframe ordered by the IHO and, if the parent did not cooperate with those attempts, proceed with the CSE meeting without the parent in order to comply with the IHO's order. Nothing in the IHO's order would have precluded the district from continuing thereafter to attempt to convene the CSE with the parent to afford her an opportunity to provide input and participate in the process.

⁸ R.E. involved three cases in which the students' eligibility was not at issue but the students' IEPs were challenged, therefore, the Second Circuit discussed the facts in terms of evaluating an "IEP" prospectively and creating an exception to that rule in the context of resolution agreements. The facts of this case do not involve an IEP for an eligible student, but rather they revolve around the district's decision not to create an IEP because it believed the student was ineligible. However, R.E. does not explicitly limit its holding regarding prospective analysis and the resolution agreement exception to only those students who have previously been determined to be eligible (see R.E., 694 F.3d at 188). The Second Circuit's reasoning is equally applicable in this context, in which there is an evaluation and eligibility dispute; in other words, the general rule is that the CSE's decisions on how to initially evaluate the student and its decision regarding whether the student is eligible for special education must be evaluated prospectively at the time of the CSE's decision, with the exception of any amendments made to those decisions during the resolution period, which in this case there were several. To hold otherwise would render the resolution period provisions meaningless in any case in which evaluations or special education eligibility of the student are the primary disputed issues, a rule which is unsupported by either R.E. or the resolution period provisions of the IDEA.

circumstances, in which additional evaluative information is available as the result of the parties' agreement during the resolution period, an eligibility determination in the attendant administrative hearing process may be reached by relying not only upon the information that was before the CSE, but also any additional evaluative information that the district and parent agreed to acquire under their resolution agreement reached during the resolution period. Accordingly, I turn next to consider the question of the student's eligibility for special education from that particular vantage point.⁹

B. Eligibility

1. Learning Disability

With regard to the student's eligibility, the hearing record does not indicate which disability category or categories that the March or April 2015 CSEs considered for the student. Further, a review of the evidence in the hearing record shows that the only mention of a particular disability category appears in the parent's post-hearing brief (IHO Ex. I at p. 16). There, the parent indicated that the student should have qualified for special education as a student with a learning disability (*id.*). As support, the parent noted that the September 2015 neuropsychological evaluation report indicated that the student met the criteria for diagnoses of specific learning disorders in reading, written expression, and math (Parent Ex. J at p. 14; IHO Ex. I at p. 16).

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,

⁹ However, it is worth noting that the IHO's determination finding the student ineligible for special education in this case did very little to assist the parties going forward. The analysis regarding the student's eligibility consisted of a single sentence, namely "[t]he record created before me does not establish that this child is handicapped" (IHO Decision at p. 11). Without the benefit of any reasoning or a description of the consequences of his determination for the student's education, the IHO left the parties with little guidance. In particular, the IHO did not state whether his finding regarding the student's eligibility rested upon the information that was available to the April 2015 CSE only, or whether it was also based on the evaluative information subsequently obtained pursuant to the parties' partial resolution agreement and entered into evidence at the impartial hearing (*see* Parent Exs. I; J; L; U; V). One aspect of the decision was particularly puzzling insofar as IHO found the student ineligible for special education, but nevertheless ordered the CSE to reconvene to consider the new evaluations (IHO Decision at pp. 11-12), leaving the impression that the IHO rendered a decision of non-eligibility but did not intend that the parties would bound by his determination. Further clarity from the IHO may possibly have resulted in less hesitation from the parties to convene the CSE pursuant to his order absent State-level administrative review of the eligibility determination. As noted above, the parties' delay in convening the CSE—either in accordance with their binding July 2015 resolution agreement to do so upon completion of the evaluations or in accordance with the IHO's unappealed January 2016 order—is the main catalyst for my decision to proceed into the merits of the student's eligibility rather than leaving the matter to the parties in the CSE process.

or of environmental, cultural or economic disadvantage" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][ii]).

While many of the eligibility classifications require a determination that a student's condition "adversely affects [the student's] educational performance" (34 CFR 300.8[c][1][i], [3], [4][i], [5]-[6], [8], [9][ii], [11]-[13]; 8 NYCRR 200.1[zz][1]-[2], [4]-[5], [7], [9]-[13]), the learning disability classification does not contain a requirement expressed in such terms (34 CFR 300.8[10]; 8 NYCRR 200.1[zz][6]). Instead, consideration of whether a student has a specific learning disability must take into account whether the student achieves adequately for the student's age or meets State-approved grade-level standards when provided with learning experiences and instruction appropriate for the student's age (34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]), 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 identify a pattern of strengths and weaknesses determined by the CSE to be indicative of a learning disability (34 CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]).¹⁰ Additionally, a CSE may consider whether the student exhibits "a severe discrepancy between achievement and intellectual ability" in certain areas, including reading fluency skills; however, the "severe discrepancy" criteria cannot be used by districts to determine if a student in kindergarten through the fourth grade has a learning disability in the subject of reading (8 NYCRR 200.4[j][4]).

As part of its initial evaluation, 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, such 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]). Although a district is not precluded from determining a student is eligible for special education as a student with a learning disability in their first year of schooling, in most instances, a kindergarten student is just beginning to be exposed to the challenges of academia and the time to accumulate the data described in 8 NYCRR 200.4(j) has not transpired. Consequently, it is unusual for a child at the beginning point in their academic career to be classified with a learning disability. Here, where the student had attended the district's kindergarten class for less than five months at the time of the district's initial evaluation, the data required by 8 NYCRR 200.4(j) is not present in the hearing record to support a determination that the student is eligible for special education as a student with a learning disability (Dist. Ex. 5 at p. 1; Parent Ex. B at p. 2).

¹⁰ 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]). State Education Department guidance provides a form 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., Appendix B [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>).

2. Other Health-Impairment.

While neither of the parties specifically identified that the student might be eligible for special education as a student with an other health-impairment, a review of the entire hearing record indicates that it is an appropriate classification category to consider in this instance.

Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ., 322 Fed. App'x 20, 21-22 [2d Cir. April 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

The hearing record shows that the student received a diagnosis of and exhibited deficits consistent with ADHD. A December 2014 physical examination of the student, reviewed by the district school psychologist as part of his evaluation, indicated that the student had received a diagnosis of ADHD from her physician and that a "work up was in progress" (Tr. p. 49; Parent Ex. H at pp. 1, 3). In turn, the psychoeducational evaluation, completed by the school psychologist and reviewed by the March and April 2015 CSEs, indicated that, by school (teacher) report, the student had a medical diagnosis of ADHD (Parent Ex. E at p. 1). Moreover, the school psychologist indicated that, during his evaluation of the student, she exhibited "classic

symptomology or behaviors of students who would be diagnosed with ADHD" including hyperactivity, impulsivity, and lapses in attention and concentration (Tr. p. 65; see Dist. Ex. 11 at pp. 4-5).

All of the reports considered by the CSE support a finding that the student's difficulty attending interfered with her ability to learn (Parent Exs. B at p. 2; C at p. 3; E at p. 1; F). The present levels of performance developed at the April 2015 CSE meeting reflect the results of the student's performance on standardized testing but do not reflect the student's attending difficulties as described in the psychoeducational evaluation, classroom observation, or teacher's report (Dist. Ex. 11).

The district's psychoeducational evaluation showed that the student performed well on a formal measure of academic achievement but also noted that the student had "significant difficulty maintaining sustained focus and attention during instruction" (Parent Ex. E at p. 8). According to the February 2015 district psychoeducational evaluation report, as measured by the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), the student, who had a full scale IQ of 98, was performing solidly within the average to above average range of functioning in all academic areas (id. at p. 5). Specifically, the student's performance on the WJ-III ACH yielded standard scores of 107 (average) in letter word identification, 102 (average) in passage comprehension, 105 (average) in spelling, 114 (above average) in math computation, 104 (average) in math fluency, and 105 (average) in applied problems (id.). In addition to the testing results, the school psychologist noted that the student's "school performance is reportedly at or above grade level across various academic area including in math, reading and writing" (id. at p. 1). During his assessment of the student, the school psychologist observed that the student presented as pleasant and sociable, but also "appeared fidgety, restless, impulsive and highly distractible" (id. at p. 2). While the psychologist reported that, for the most part, the student was respectful and cooperative during the evaluation, he also noted that her attention span was inconsistent and she required redirection to remain focused on the task at hand (id.).

As detailed in a January 15, 2015 classroom observation, conducted in a general education English language arts (ELA) class of 24 students, the student demonstrated difficulties with concentration, initiating tasks, focusing, and remaining seated (Parent Ex. F at p. 1). According to the observation report, the student exhibited a short attention span and required teacher direction to remain on task, as well as 1:1 teacher intervention to understand instructions and persist with multi-step tasks (id. at p. 2). According to the observer, the student's teacher expressed concern that the student was unable to independently complete tasks that were part of the kindergarten curriculum or tasks that required organization skills, as well as the ability to multi-task and remain focused (id.).

Additionally, in January 2015, the student's kindergarten teacher completed a 2014-15 interim progress report rating the student's behaviors on a four-point scale using the descriptors of "rarely," "sometimes," "usually," and "always," wherein the student received low ratings (Parent Ex. Q). The teacher indicated the student rarely completed classwork and rarely moved easily between activities (id.). The teacher indicated the student sometimes followed directions, sometimes participated in class, and sometimes showed effort (id.). However, the teacher indicated the student always completed her homework (id.). The report indicated that the student's promotion to the next grade was in doubt (id.).

Moreover, the undated "Special Education Teacher Report Form," completed by the student's kindergarten teacher, also highlighted the student's difficulty attending within the classroom (Parent Ex. C).¹¹ In response to a prompt to describe how the student's disability affected her involvement and progress in the general education curriculum, the teacher stated that the student's behavior hindered her learning, that she was very inattentive, and that she bothered other students and had few social boundaries (id. at p. 3). When asked to describe the student's academic management needs, the teacher indicated that the student's behavior was distracting to herself and peers and that it was hard for the student to follow directions (id.). The teacher characterized the student's ability to concentrate, follow directions, and work independently as "poor" and her motivation and persistence as "fair" (id. at p. 4). The teacher noted that the student's peers did not accept the student, she annoyed her peers, and peers requested not to sit by her (id.). The teacher also noted the student was disruptive and easily frustrated (id.). With respect to academic skills, the teacher estimated the student's instructional level to be at an early kindergarten level in all academic areas (id. at p. 2). With respect to math, the student counted past 20 but exhibited much difficulty with grade level skills such as simple addition and subtraction (id.). Regarding ELA, the report indicated the student recognized some letters and sounds but she was unable to read text or sound out words and she demonstrated difficulties with reading comprehension, formation of sentences, and writing words (id.). With respect to whether the student was appropriately placed, the teacher noted the student "ha[d] the capability" but the class was too big (id. at p. 4). The teacher further noted that the student had potential but it was difficult for the student because she was so distracted (id.). Although the teacher provided the student with preferential seating and employed a classroom behavior chart, the student continued to exhibit maladaptive behaviors including inattention, impulsivity, and distractibility (see id. at pp. 3-4).¹²

On February 4, 2015, a "Promotion-In-Doubt" letter from the district advised the parent that the student was in danger of being held over in the same grade for the 2015-16 school year because she was not performing at the level needed to meet the requirements for promotion to the next grade based upon a review of the student's class work and assessments (Parent Ex. P at p. 1).

Turning to the evaluations completed as part of the partial resolution agreement, in August 2015, the student underwent a neuropsychological evaluation, the results of which were memorialized in a report dated September 10, 2015 (Parent Ex. J). The evaluating psychologist collected background information, reviewed records, and administered standardized tests in order to assess the student's cognitive, academic, and social/emotional/behavioral functioning (id. at p. 1). According to the psychologist, the parent reported that the student exhibited hyperactive

¹¹ The student's kindergarten teacher, who was a regular education teacher, testified that she was asked to complete the Special Education Teacher Report Form as part of the initial evaluation process (see Tr. pp. 232-34).

¹² The hearing record also includes the testimony of student's kindergarten teacher, indicating that the student demonstrated difficulties with attention, academics, and socialization throughout her kindergarten year (Tr. pp. 219-23, 225-227). The teacher reported that the student's academic functioning was below grade level and her behavior during social interactions was maladaptive and included distracting her classmates (Tr. pp. 222, 226). According to the teacher, the student demonstrated difficulties with focusing and remaining seated during instruction (Tr. p. 223). However, it is unclear if the CSE was aware of this particular teacher input that was later revealed in testimony and if the information did not come up in the context of the resolution agreement and, accordingly may run afoul of the prospective analysis principle and rule against retrospective testimony in R.E. Consequently, out of an abundance of caution, I have not considered these testimonial points in my analysis of whether the student is eligible for special education. However, if I had considered it, it would not affect my ultimate determination.

behaviors in that she could not sit still, was very fidgety, and exhibited difficulties with focusing (id. at p. 2). The psychologist indicated, based on completion of a questionnaire by the student's kindergarten teacher, that the student's literacy skills were below grade level and, although the student tried her best, she struggled to focus, which resulted in weak skills in the areas of decoding, fluency, and comprehension (id.). Similarly, the teacher reported that the student struggled to focus in math and her skills were below grade level (id.). According to the psychologist, the teacher noted that the student performed better when taught in a smaller group in the general education setting and with re-teaching was able to gain some understanding of a skill (id.). In the area of writing, the teacher reported the student was far below grade level and had a difficult time focusing in order to sound out words and use proper writing mechanics (id.). The psychologist indicated that, with respect to social/emotional functioning, the teacher indicated the student had difficulty relating to peers and lacked social skills (id.).

The psychologist noted that, during the neuropsychological assessment, the student established "easy" rapport with the evaluator but was very easily distracted, inattentive, very active, needed constant redirection, very impulsive, often grabbed at items, and was not particularly aware of social boundaries (Parent Ex. J at p. 5). Administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to the student yielded index standard scores of 95 (average) in verbal comprehension, 100 (average) in visual spatial, 109 (average) in fluid reasoning, 94 (average) in working memory, 77 (very low) in processing speed, and a full scale IQ of 91 (average) (id.). The psychologist indicated that the student's fluid reasoning was significantly greater than overall cognitive functioning and her processing speed was significantly weaker than overall cognitive functioning (id. at p. 6). The psychologist noted that a clinical evaluation of the student's profile suggested greater intellectual potential, possibly at a high average level (id. at p. 7).

With respect to academic achievement, administration of the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH), to the student yielded standard scores of 82 (low average) in letter-word identification, 68 (very low) in passage comprehension, 80 (low average) in word attack, 91 (average) in spelling, 81 (low average) in applied problems, and 100 (average) in calculation (Parent Ex. J at p. 7). The psychologist indicated that the student's decoding and word attack skills were below grade level and, although the student was able to read most upper and lower case letters, she had not yet learned to blend or segment words (id. at p. 8). The psychologist reported that the student's reading comprehension was below age level and noted that although the student was able to match rebuses, she lacked the decoding skills necessary to assess other areas of reading comprehension (id.). With respect to writing skills, the psychologist indicated the student wrote most upper and lower case letters and her first name but, due to spelling difficulties, was unable to write any words consistently (id.). According to the psychologist, the student's math calculation skills were at a high kindergarten grade level and math problem solving skills were at the low kindergarten grade level (id.).

The psychologist indicated the parent and school staff reported that the student exhibited marked attention difficulties and the evaluator noted the student's significant difficulties with attention throughout the evaluation (Parent Ex. J at p. 9). Regarding standardized testing results, the psychologist reported that the student's profile of scores and the response pattern of informants indicated that the student may have difficulties related to inattentiveness (strong indication), impulsivity (some indication), and sustained attention (some indication) (id.). With respect to language processing, the psychologist noted that the student demonstrated difficulties with

phonological processing which may affect her decoding and word attack skills (id. at p. 10). The psychologist also indicated the student demonstrated marked difficulties with orthographic processing which may interfere with her learning to read and spell (id.). According to the psychologist, the student's demonstrated high average verbal memory but low average to average skills in her ability recall narratives including a borderline level ability to understand story themes but a superior level ability to recall the factual details of a story (id.). With respect to executive functions, the student's cognitive flexibility and inhibition were areas of difficulty for the student throughout the evaluation process (id. at p. 11). According to the psychologist, completion of the Child Behavior Checklist (CBCL), with the student's mother serving as informant, yielded an Attention Deficit/Hyperactivity Problems score in the clinically significant range with notable difficulties related to the student's concentration, attention, ability to sit still, distractibility, ability to complete school work, and impulsivity (id. at pp. 11-12). Completion of the CBCL, with the student's kindergarten teacher serving as informant, yielded similar results with respect to attention and hyperactivity (id. at pp. 12-13). Responses provided by the student's teacher also identified additional problems related to social problems and rule-breaking behavior (id. at p. 13). According to the psychologist, the student's problems related to rule-breaking behavior included that the student did not appear guilty after misbehaving, broke social rules, interacted with students who caused trouble, and lied or cheated (id. at p. 13). Based on his assessment, the psychologist reported the following diagnoses of the student: specific learning disorder with impairment in reading-decoding, word attack skills, reading comprehension (severe); specific learning disorder with impairment in written expression-spelling, grammar and punctuation accuracy, and clarity or organization of written expression (severe); specific learning disorder with impairment in mathematics-accurate or fluent math calculation and accurate math reasoning (moderate); developmental coordination disorder; ADHD, combined presentation; and language disorder-receptive and expressive language delays (id. at p. 14).

In a November 20, 2015 speech-language and functional listening assessment, the evaluators assessed the student using the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4), the Clinical Evaluation of Language Fundamentals Fifth Edition (CELF-5), and the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) (Parent Ex. V at pp. 1-7). With respect to the results of the PPVT-4, the student achieved a standard score (percentile rank) of 100 (50) in the area of receptive vocabulary (id. at pp. 1-2). Administration of the CELF-5 to the student yielded a core language standard score (percentile rank) of 92 (30) and subtest scaled scores (percentile rank) of 10 (50) in sentence comprehension, 8 (25) in word structure, 9 (37) in formulated sentences, 8 (25) in recalling sentences, and 9 (37) in understanding spoken paragraphs (id. at pp. 2-3). The evaluators reported that, although the student's general language skills fell within the average range, assessments using the subtests provided a more precise profile of language strengths and weaknesses (id. at p. 4). Further, the evaluator opined that even though the subtest scores in the areas of formulated sentences, understanding spoken paragraphs, word structure, and recalling sentences all fell within the average range the percentile ranks suggested that the student would benefit from support and continued growth in these areas (id.). With respect to the CTOPP-2 results, the student achieved composite scores (percentile rank) of 94 (35) in phonological awareness, 88 (21) in phonological memory, 110 (75) in rapid naming, and 98 (45) in rapid non-symbolic naming (id. at pp. 4-5). The evaluator indicated the results of this administration of the CTOPP-2 should be interpreted with caution as the student received some subtests of the CTOPP-2 within the past six months as part of her September 2015

neuropsychological evaluation noting that the results of the previous administered subtests were comparable to his administration (id. at p. 5).¹³

In August 2013, the student participated in an OT evaluation, designed to assess her overall motor development and sensory processing (Parent Ex. L). The evaluating occupational therapist noted that, during the evaluation, the student's ability to maintain attention was limited and that, once the student was distracted, she was difficult to redirect (id. at p. 1). According to the occupational therapist, toward the end of the evaluation process, the student's attention decreased greatly and she required even more redirection (id.). With respect to the student's neuromotor development, the occupational therapist reported that both the student's active and passive range of motion were within normal limits and her muscle strength and muscle tone were at the low-end range of normal (id. at p. 2). In addition, the occupational therapist reported that the student's visual motor, fine motor and handwriting skills were "adequate," based on the results of the occupational therapy evaluation (id. at p. 6). However, the occupational therapist noted that, based on clinical observations during functional tasks, the student's sensory processing skills and visual motor skills were less than optimal (id.). The occupational therapist described the student's motor planning skills as "limited" (id. at p. 5). With respect to sensory-based needs, results of the sensory profile, with the student's mother serving as informant, indicated the student exhibited delays in the areas of vestibular and multisensory processing (id.). The evaluating occupational therapist opined that students with such a profile are active, continuously engaged in their environment, and "add sensory input to every experience in daily life" (id.). The occupational therapist concluded that, while the student scored in the average range on the majority of standardized tests administered, she continued to display sensory processing difficulties and a poor attention span (id. at p. 6). She opined that these difficulties would have a direct effect on the student's ability to follow instructions and complete tasks independently and ultimately affect her ability to functionally participate in an academic setting (id.).

In summary, the information available to the March and April 2015 CSEs, the February 2015 promotion in doubt letter and the interim progress report, and the information available in the IEEs performed as the result of the partial resolution agreement, lead to the conclusion that the student exhibited limited alertness with respect to the educational environment due to chronic or acute ADHD and that the student's academic performance and social behavior in the classroom had been adversely affected thereby.

3. Need for Special Education

In addition to meeting criteria for a specific disability category, in order to be deemed eligible for special education, a student must by reason of such disability, "need special education and related services" (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students"

¹³ Notably, a review of the CTOPP-2 results from the September 2015 neuropsychological evaluation reveals that the subtest scaled scores ranged from four through nine which appear to be somewhat lower than the later November 2015 scores (Parent Ex. J at p. 21).

(8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices . . . as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services] . . ." (Educ. Law § 4401[2][a]). In New York, the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, OT, physical therapy, and speech-language therapy (Educ. Law § 4401[2][k]).

The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students. For example, State law and regulation in New York also specifically contemplate the provision of academic intervention services, RTI support, or "additional general education support services" to students in the general education setting (*see* Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]). Upon receiving a referral to the CSE for a determination of a student's special education eligibility, within 10 school days 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, academic intervention services, and any other services designed to address the learning needs of the student (Educ. Law §4401-a[3]; 8 NYCRR 200.4[a][9]).¹⁴ State regulations define "academic intervention services" as "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" but does not include special education services and programs (8 NYCRR 100.1[g]).

The courts have grappled with this final criterion of eligibility in light of various state definitions of special education in cases similar to the one here, where a student with attention deficits needs support in the classroom, but such support might appropriately be deemed part of general education (*Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic progress and social success and, therefore, did not need special education]; *M.P. v. Aransas Pass Ind. Sch. Dist.*, 2016 WL 632032, at *5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need services under the IDEA]; *L.J. v Pittsburg Unified Sch. Dist.*, 2014 WL 1947115, at *15 [N.D. Cal. May 14, 2014] [finding that a student made academic and behavioral progress after receiving general education interventions and, therefore was not a "child with a disability" under the IDEA]; *Ashli C. v State*

¹⁴ A district may provide a response to intervention program in lieu of academic intervention services (8 NYCRR 100.2[ee][7]). Response to intervention 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]). Response to intervention 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-oct10.pdf](http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf)).

of Hawaii, 2007 WL 247761 at *10-*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]).

Here, taking into account the broad definition of special education within New York's Education Law and attendant regulation and given the number of supports and strategies attempted with or recommended for the student, the hearing record supports the conclusion that the student required special education services to perform adequately in the classroom beyond the provision of general education supports alone (see Tr. pp. 227-228, 230, 260; see also Parent Exs. C at pp. 1-7; R at pp. 1-2).¹⁵

As detailed above, information before the CSE detailed strategies and accommodations, which had been used with the student in the classroom, or from which the evaluators opined that the student might benefit, including preferential seating, breaks, a behavior chart, redirection, and teacher intervention to understand instruction and persist with multi-step tasks (Parent Exs. C at pp. 3-4; E at p. 2; F at p. 2).¹⁶ The kindergarten teacher testified that the student needed a smaller group in a general education classroom but later testified that the student required a smaller class size (Tr. pp. 201, 220-21). Despite the provision of some these supports to the student in the general education classroom, she continued to exhibit inattentiveness, lacked concentration, exhibited hyperactivity, and had difficulty with initiating and persisting with academic tasks, relating with peers, and constantly moved about the classroom distracting herself as well as others (Parent Ex. F at pp. 1-2; see Tr. pp. 260-61).

The April 2015 CSE developed a document summarizing the student's present levels of performance and individual needs and reported that the student required visual aids, manipulative tools, and graphic organizers (Dist. Ex. 11 at p. 2). The document also indicated that the student would benefit from a "multimodal approach" to teaching, provision of feedback, and "ample opportunity" for success (id.). The document also directed that teachers implement "timely use" of a reward and consequence system, physical proximity, and provision of verbal, visual, and physical cues, in addition to clear and simple directions (id.).

As for academic intervention services (8 NYCRR 100.1[g]), the district school psychologist testified that, rather than finding the student eligible for special education, the CSE attempted to address the student's ADHD through other means, by recommending counseling services for the student to "assist her and provide her with effective interventions . . . that could be taken back into the classroom and . . . assist her in terms of focusing and concentrating and remaining in her seat" during instruction (Tr. p. 66). Consistent with the psychologist's testimony, by letter dated May 19, 2015, the district informed the parent that the student was selected to participate in the "Educationally Related Support Service" of at-risk (short-term) counseling, provided in school by the guidance counselor (Dist. Ex. 7). In light of the fact that counseling is included within the definition of special education in New York, it was incumbent on the district

¹⁵ While the totality of the evidence in hearing record supports the conclusion that the student needs special education, it is less clear that the information available to the April 2015 CSE, alone, would have supported such a conclusion (see Tr. pp. 60, 62-66; Parent Exs. B; C; E; F; H).

¹⁶ The IEEs completed as a result of the partial resolution agreement reported the use of additional supports in the student's classroom, including small group instruction and re-teaching (Parent Ex. J at p. 2).

to factually distinguish (with supporting legal authority), how the particular counseling recommended should be considered a general education support versus a special education service if the district wanted take a position that the student did not require special education.¹⁷ Labeling it a short term educationally related support service may have had special meaning in New York at one point in time in the past, but that is no longer sufficient as that term has been repealed.¹⁸

Turning to the IEEs conducted during the impartial hearing, the September 2015 neuropsychological evaluation report recommended a small classroom setting in a "nonpublic school" for the student that would work at her skill level rather than grade level (Parent Ex. J at p. 17). The psychologist recommended that a program would need to address the student's social and attention deficits (*id.*). Further, the psychologist recommended an OT evaluation, a speech-language evaluation, and counseling to focus on "behaviors that interfere with learning," such as cognitive flexibility and esteem issues (*id.* at pp. 17-18). Finally, the psychologist recommended that the student receive additional 1:1 tutoring sessions to help her early reading and math development (*id.* at p. 18). The September 2014 speech-language and functional listening assessment recommended that the student receive speech-language therapy and "classroom support" to improve her use of morphosyntax, comprehension of sentence-level language, auditory memory for verbal information, sequencing and higher level language abilities, and social interactions (Parent Ex. V at p. 7). In addition, the August 2015 OT evaluation report included a recommendation that the student receive one session per week of OT in order to improve her sensory processing, attention, and visual motor skills (Parent Ex. L at p. 6).

In summary, the hearing record supports a finding that the student is in need of special education as indicated by her inability to function within the classroom setting, lack of academic progress despite the provision of accommodations, and difficulties interacting with peers. While there are many supports summarized herein that may be appropriately utilized as general education support services, the totality of the evidence and, in particular, the recommendations in the neuropsychological, speech-language therapy, and OT evaluations reflect that the student needs related services, as well as adaptation of "the content, methodology, or delivery of instruction" to ensure her access to the general curriculum (Educ. Law § 4401[2][k]; 8 NYCRR 200.1[vv]). Based

¹⁷ This is not to say that all students who appear to need counselling or speech services are automatically eligible for special education—the student must also meet one of the 13 disability categories as well.

¹⁸ "Educationally related support services," or ERSS, was a term of art previously set forth in Education Law § 4401-a, however, that section has since been amended and the term eliminated from State law. When the term appeared in the statute, the term was further specifically defined in State regulation as "curriculum and instructional modification services, direct student support team services, assessment and noncareer counseling services, special instruction to eligible students with disabilities as defined in Education Law section 4401, which does not generate excess cost aid including related services but excluding transportation and transition services, and to eligible, qualified persons pursuant to section 504 of the Rehabilitation Act of 1973. These services are provided to eligible students, individually or in groups, and may include those related consultation services provided to their families and related school personnel, in order to enhance the academic achievement and attendance of such students. Educationally related support services shall also mean speech and language improvement services as defined in subdivision (p) of this section. Any such services are to be provided by personnel certified pursuant to Part 80 of this Title; except that any audiology, physical therapy, or occupational therapy services, or medical services as defined in section 200.1(y) of this Title shall be provided by appropriately licensed professionals. Such personnel shall be deemed to be educationally related support service professionals for the purposes of this Part." (8 NYCRR 100.1 [r] [repealed]). Thus, ERSS services were intended for both special education students and their non-disabled peers.

on the foregoing, the hearing record supports a conclusion that the student meets the criteria for classification as a student with an other health impairment under the IDEA.

Consequently, I will direct the district to convene the CSE and develop an IEP that recommends an appropriate special education program and related services the student needs based on the evaluative information referenced in this decision, as well as based on any new information that has become available to the CSE regarding student's current strengths and deficits. The CSE shall not be bound to recommend any one particular support, service, or accommodation summarized above based on the evidence in the hearing record but, instead, should consider the student's present levels of academic achievement and functional performance, establish annual goals designed to meet the student's needs resulting from the student's disability and enable her to make progress in the general education curriculum, and provides for appropriate special education services (see 34 CFR 300.320[a][1], [2], [4]; 8 NYCRR 200.4[d][2][i], [iii], [v]).¹⁹

VII. Conclusion

In summary, a review of the hearing record supports a finding that the student is eligible for special education as a student with an other health-impairment. I have considered the parties' remaining contentions and find them unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 21, 2016, is modified by reversing those portions which determined that the district failed to offer the student a FAPE due to untimely evaluation of the student but that the student was not eligible for special education as a student with a disability; and

IT IS FURTHER ORDERED that the student is eligible for special education as a student with an other health impairment; and

¹⁹ It is worth noting that with regard to the parents' request for placement in a nonpublic special education school pursuant to a Nickerson letter, I understand that was among the relief available to class members described by the court in the Jose P. consent decree, however, independent from the Jose P. contentions and without expressing any opinion regarding whether the student is or is not a member or the class, there is no independent basis to conclude, based upon the information available in the hearing record, that the student should otherwise be removed from the public school and placed in a nonpublic, segregated special education setting, away from nondisabled peers. New information about the student would have to come to light before the CSE about the student's deficits lest the district violate the LRE requirement.

IT IS FURTHER ORDERED that the CSE shall convene within 10 days from the date of this decision to develop an IEP for the student.

Dated: **Albany, New York**
 May 4, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER