



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-087

Application of a STUDENT WITH 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 Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by William M. Meyer, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Windward School for the 2016-17 school year. The 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 was accepted into the district's gifted and talented program for her kindergarten school year (2012-13) (Dist. Ex. 13 at p. 2). Although the student's report card reportedly indicated that she met or exceeded standards in all subject areas, including reading and writing, the student's mother was concerned that the student struggled in reading and, in or around January 2013, the student began participating in an extra reading session for 40-minutes, four days per week, with her classroom teacher per week (Tr. p. 262; Dist. Ex. 13 at p. 2-3). In first grade (2013-14 school

year), the student continued to struggle with reading and continued her participation in the extra reading sessions per week (Dist. Ex. 13 at pp. 2-3).

In April 2015, while the student was attending second grade, the parents obtained a private psychoeducational evaluation due to their concerns regarding the student's ongoing struggle to read at grade level, despite intensive tutoring (Dist. Ex. 13 at p. 11).¹ Notably, the private evaluator found that the student met the criteria for a "Specific Learning Disability with Impairment in Reading-Moderate", as defined by the Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition (DSM-5) (*id.*; *see* Dist. Ex. 7 at p. 1). The evaluator indicated that the student was reading at a level that was "[w]ell [b]elow [a]verage compared to her same-age peers" and concluded that the student's difficulties "appeared during school-age years and based on interviews with [the student's mother] and reviewed documentation, [we]re not better accounted for by intellectual disabilities, uncorrected visual or auditory acuity, other mental/neurological disorders, psychosocial adversity, lack of proficiency in language of academic instruction, or inadequate educational instruction." (Dist. Ex. 13 at pp. 11-12). Among other things, the evaluator opined that the student required "highly specialized, expert reading instruction" and recommended that the student remain in the district's gifted and talented class (*id.* at pp. 12-13).² In addition to the private psychoeducational evaluation, in May 2015 the parents privately obtained a diagnostic English language arts (ELA) evaluation that recommended the use of Preventing Academic Failure (PAF) materials to support the student's reading development (Dist. Ex. 12 at pp. 1, 3).

In June 2015, the parents presented the district with the results of their private evaluations and requested an initial evaluation of the student by the district (Tr. pp. 145-46; Dist. Ex. 7 at p. 1). The district conducted a social history and classroom observation, along with speech-language and occupational therapy evaluations (Dist. Ex. 7 at p. 1; *see* Parent Ex. D; Dist. Ex. 9). According to the social history report, the parents wanted the student to remain in the district's gifted and talented program and to receive special education teacher support services (SETSS) on a pull-out basis for individualized or small group instruction to increase the student's reading skills (Dist. Ex. 9 at p. 4). Following its evaluation of the student, the Committee on Special Education (CSE) convened in September 2015 and found that the student did not meet the criteria for the category of learning disability and determined that she was ineligible for special education and related services (Dist. Ex. 7 at p. 1; *see* 8 NYCRR 200.1[zz][6]).

Following the CSE meeting, in September 2015, the student began receiving Tier III response to intervention (RtI)³ services three times weekly using a program based on the Orton-

¹ The private psychoeducational evaluation was dated April 2015; while testing was completed over three days in February and March of 2015 (Dist. Ex. 13 at p. 1).

² The evaluator made recommendations for both home and school; his recommendation for a "highly specialized, expert reading instruction" was listed as a home recommendation (Dist. Ex. 13 at pp. 12-13).

³ Although discussed in more detail later, briefly, RtI is described in State guidance "as a multi-tiered early prevention system designed to improve outcomes for all students" ("Response to Intervention, Guidance for New York State School Districts," Office of Special Educ., at p. 2 [Octo. 2010] [available at](http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf) <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). The student's special education teacher in this

Gillingham methodology (Recipe for Reading) to improve her decoding, fluency, and comprehension skills (Dist. Ex. 7 at p. 1). The Tier III intervention consisted of 20 minutes of intensive reading instruction, four days per week (Dist. Ex. 6).⁴ Additionally, during the 2015-16 school year, the student received individualized support from her classroom teacher (Dist. Ex. 7 at p. 1).⁵

In October 2015 the parents requested an impartial hearing (see Dist. Ex. 7 at p. 1).⁶ The parties reached a partial resolution agreement in December 2015 that mandated the completion of a new psychoeducational evaluation (Dist. Ex. 7 at p. 1).⁷ Subsequently, the district completed a psychoeducational evaluation of the student in February 2016 (Dist. Ex. 7 at pp. 1, 9). The results of the evaluation indicated that the student demonstrated general intellectual ability in the "[a]bove [a]verage range" with a significant weakness in long-term retrieval, and academic weaknesses in efficiency of word retrieval and oral reading fluency (Dist. Ex. 7 at pp. 9-10).

On March 2, 2016, the CSE reconvened and found the student eligible for special education and related services as a student with a learning disability (Dist. Exs. 3 at pp. 3, 18; 6).^{8, 9} The CSE members at the March 2016 meeting were: the special education teacher/coordinator who also acted as the district representative; the regular education teacher; the parent; the school psychologist; the parent's attorney; and the assistant principal (see Tr. pp. 75-76; Dist. Ex. 4).

The March 2016 CSE recommended that the student receive indirect SETSS in ELA one time per week direct SETSS in ELA two times per week and direct SETSS in math one time per week (Dist. Ex 3 at p. 12). Consistent with the district's evaluation of the student, the IEP developed as a result the CSE meeting stated that the student demonstrated a significant weakness

case testified that academic intervention services (AIS) was the same thing as RtI (Tr. p. 77).

⁴ The February 2016 psychoeducational evaluation indicated that the student was provided with Recipe for Reading three times per week, outside of the classroom, in a small group (Dist. Ex. 7 at p. 1). Although, the documentary evidence is contradictory regarding the number of days the student was receiving RtI, the testimony from the student's special education teacher, who provided RtI to the student, testified that as of November 2015, the student was receiving RtI three to four days per week (Tr. pp. 78-80).

⁵ The student also received tutoring outside of school during the 2015-16 school year (Dist. Ex. 8 at pp. 1-2).

⁶ The parents' October 2015 request for an impartial hearing is not in the hearing record.

⁷ The partial resolution agreement is not contained in the hearing record.

⁸ The March 2016 CSE was convened as part of the resolution agreement between the district and parent following the due process complaint notice filed by the parent in October 2015 (Dist. Ex. 3 at pp. 1-2).

⁹ The student's eligibility for special education and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). "[The student] was identified as having a learning disability based on the limited progress made with regard to response-to-intervention, an assessment of cognitive processing, and the determination of a pattern of strengths and weaknesses" (Dist. Ex 6). The student demonstrated significant weakness for oral reading fluency (id.). The benchmark assessments and a teacher evaluation indicated that the student was not meeting grade level state standards (id.).

for efficiency of word retrieval and oral reading fluency (compare Dist. Ex. 3 at p. 2 with Dist. Ex. 7 at p. 10). Further, the IEP noted that, although the student performed in the average range on standardized testing, according to a teacher evaluation, the student was performing below grade level with regard to reading comprehension and had some difficulty understanding word problems, particularly two-step word problems (Dist. Ex. 2 at p. 2). The IEP noted that the student became frustrated with challenging tasks and was learning to develop coping strategies, as well as to improve her self-confidence regarding academics (id. at p. 3).

Following the March 2016 CSE meeting, the student began receiving SETSS from a district special education teacher (Tr. pp. 83, 90, 113, 119). In addition, she continued to receive some RtI services (Tr. pp. 83, 90, 119). The student completed her third-grade school year in the district's gifted and talented class (see Tr. pp 27-28; Dist. Ex. 14). The student's 2015-16 final report card indicated that she was proficient in all areas except for "reads with sufficient accuracy and fluency to support comprehension" (Dist. Ex. 14 at p. 1). The teacher's comments provided that, as a reader, the student "steadily moved up levels and she [was] able to comprehend higher level texts through read alouds" (id. at p. 2).

The parents informed the district, via a letter dated August 22, 2016, that they did not agree with the programming proposed by the district and that the district could not appropriately implement the student's IEP and, therefore, they were unilaterally placing the student at Windward for the 2016-17 school year and intended to seek funding from the district (see Dist. Ex. 2).

A. Due Process Complaint Notice

The due process complaint notice dated December 13, 2016 asserted that the district failed to provide the student with a free and appropriate public education (FAPE) for the 2016-17 school year on procedural and substantive grounds (Dist. Ex. 1 at p. 1).

The parents argued that the CSE team was not duly constituted as several required members were not present (Dist. Ex. 1 at p. 2). The parents argued that they were denied the right to meaningfully participate in the process as their concerns and opinions were largely dismissed, as was their private psychoeducational evaluation (id.). Further, the parents asserted that the CSE "did not conduct, secure, or rely on sufficient evaluative measures to make a determination of the student's present levels of performance, educational and cognitive profile, and areas of need" (id.).

The parents challenged the March 2016 IEP asserting that the present levels of performance, management needs, and annual goals were insufficient and inappropriate (Dist. Ex. 1 at p. 2).

The parents asserted that the program recommended by the CSE consisted only of SETSS "despite evidence of [the student's] significant difficulties in her large class settings and the social-emotional impact these struggles were having" (Dist. Ex. 1 at p. 2). They argued that this recommendation was "not consistent with or supported by the information provided and available" to the CSE (id.). The parents asserted the district "failed to offer a placement suitable to implement [the student's] IEP, able to provide the student with an appropriate peer grouping, or reasonably calculated to provide her a FAPE" (id. at p. 3). The parents asserted the district failed to implement the recommended program during the 2015-16 school year as the student frequently did not receive

the services provided for on her IEP and the student failed to make meaningful progress in her areas of weakness (id.).

The parents asserted that the unilateral placement was appropriate and there are no equitable considerations that would bar reimbursement (Dist. Ex. 1 at p. 3). As relief, the parent's sought funding of the student's placement at Windward for the 2016-17 school year (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing was convened over four hearing dates in February, May and June of 2017 and the IHO rendered a decision on August 24, 2017 (IHO Decision at pp. 1 and 18).¹⁰

In her decision, the IHO found that the district did not deny the student a FAPE for the 2016-17 school year and denied the parent's request for tuition reimbursement and transportation services (IHO Decision at p. 17).

The IHO found that there were no procedural violations that denied the student a FAPE (IHO Decision at p. 12). The IHO found that the CSE team was duly constituted as the members were the appropriate and requisite members (id.). Further, the IHO found that the CSE had "sufficient evaluative information to determine the student's current strengths and weaknesses and functional performance" (id.) Additionally, the IHO found that the "the IEP is replete with examples of the student's strengths and weaknesses, "the parents were provided with ample opportunity to participate during the meeting and the IEP reflected the parents' input and concerns (id. at p. 13).

The IHO found that the management needs listed in the IEP were appropriate (IHO Decision at pp. 13-14). According to the IHO, the annual goals "met the applicable standards and were specifically designed to meet the student's needs" (id. at p. 14). Further, the goals "were appropriate as they directly addressed [the student's] academic areas of deficit, were sufficiently defined to measure accuracy and progress and listed various methods by which to measure progress" (id. at p. 14).

The IHO found that the program recommendation of SETSS was appropriate and the least restrictive way to address the student's weaknesses (IHO Decision at p. 14). Moreover, the IHO found that the program was properly administered and that the student made progress during the 2015-16 school year when the IEP was implemented (id. at pp. 14-15). The IHO found that the district "provided the student with an IEP and program that met the student's special education needs" (id. at p. 15).

Although concluding that the district offered the student a FAPE, the IHO went on and found that the unilateral placement was also appropriate as Windward met the student's special education needs for the 2016-17 school year (IHO Decision at p. 17). Further, the IHO found that "there was no evidence that the parents acted unreasonably or did not cooperate with the school

¹⁰ The hearing held in February 2017 was a pre-hearing conference conducted via telephone (Tr. pp. 1-2).

district" and had the district not provided the student with a FAPE, there would be no equitable bar to parents' request (*id.*) However, since the IHO concluded that the district offered the student a FAPE, the parents' requests for tuition reimbursement and transportation services were denied (*id.*).

IV. Appeal for State-Level Review

The parents appeal. In their request for review, the parents assert that the IHO erred in finding that the program recommended for the student was appropriate and argue that the IHO erred in finding that the student was making progress under her IEP.

The parents assert that the IHO disregarded the unchallenged evidence that the student received a similar, more intensive program for the first six months of the school year with RtI and failed to show a sufficient response to that program. The parents argue that the student required a "more supportive and intensive program" than was provided for on the IEP "to address her significant reading deficits and to support her emotional functioning with regard to the academic tasks." The parents argue that the failure to provide such a program denied the student a FAPE.

The parents argue that IHO erred by finding that the program was being properly implemented and that the student was making progress. The parents argue that the IHO disregarded the testimony that the district did not make all of the student's teachers aware of her IEP; that the district failed to ensure the student's management needs and accommodations were available during all parts of the school day; and that the district failed to reliably provide the student with services. They also allege that the district failed to report the student's progress at each marking period and failed to apply the measurement criteria provided on the IEP. The parents argue that the IHO failed to consider the impact of the numerous services not included on her IEP. According to the parents, the IHO focused on the student's report cards, but "incorrectly stat[ed] that the report showed proficient and excellent scores 'in all but one line item,' and disregard[ed] the unanimous testimony that the particular line of the report card, 'reads with sufficient accuracy and fluency to support comprehension,' correlated directly to [the student's] central area of deficit." The parents argue that this finding should be reversed by determining that the student "failed to make adequate progress under the IEP, and that the limited progress she did achieve does not demonstrate the adequacy of the program on her IEP."

The parents request reimbursement for the cost of the student's unilateral placement at Windward for the 2016-17 school year, as well as all further appropriate relief.

The district, in its answer, contends that the IHO correctly denied the parents' request for reimbursement. The district contends that the IEP, taken by itself, is appropriate and designed to allow the student to make progress.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹¹

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Scope of Review

As a preliminary matter, the parents do not appeal a number of findings made by the IHO, specifically, the IHO's findings that the CSE was duly constituted with the appropriate and

¹¹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

requisite members, the CSE had sufficient evaluative information, the parents had ample opportunity to participate at the CSE meeting, the student's management needs in the IEP were appropriate,¹² and that the annual goals were specifically designed to meet the student's needs and were appropriate (IHO Decision at pp. 12-14). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal, except to the extent that these issues may be related to the main issue on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Further, the parents argue that the student's social-emotional functioning was impaired by the lack of adequate support in school. However, the parents did not raise this issue in the due process complaint notice. In the due process complaint notice, the parents simply stated that there was "evidence of [the student's] significant difficulties in her large class settings and the social-emotional impact these struggles were having" as support for their assertion the recommended program of SETSS was insufficient (Dist. Ex. 1 at p. 2). Accordingly, the IHO did not make a specific finding regarding the adequacy of the student's social-emotional support listed in the IEP. Although, the issue was not raised in the due process complaint notice, the issue will be addressed as it pertains to the recommended program and the March 2016 IEP.

B. Challenges to the IHO's Decision

The parents allege that the IHO improperly determined that the student was provided with a FAPE for the remainder of the 2015-16 school year and a portion of the 2016-17 school year and that the March 2016 IEP failed to provide a sufficiently supportive special education program to meet the student's needs. Specifically, the parents allege that the SETSS recommended by the CSE failed to provide the student with a sufficiently supportive and intensive program to address her reading deficits and social emotional functioning. Further, the parents argue that the student was receiving a more intensive program through RtI than she received after implementation of the March 2016 IEP.

1. Evaluative Information and Student Needs

Although the student's needs are not directly in dispute, a discussion thereof provides context for the disputed issue to be resolved—namely, whether the March 2016 CSE recommended an appropriate educational program to meet the student's academic needs for the remainder of the 2015-16 school year, and part of the 2016-17 school year.

The March 2016 CSE convened to review its evaluation of the student and to develop an IEP for the remainder of the 2015-16 school year, and the beginning of the 2016-17 school year (see Dist. Ex. 3). The district psychologist recalled that the March 2016 CSE reviewed "all the assessments and [the student's] current classroom performance" (see Tr. p. 139-142, 160; Dist.

¹² The parents did assert in the request for review that the district failed to ensure that the student's management needs and accommodations were available during all parts of the day as support for their assertion that the student did not make progress under the district's program (Req. for Rev. at p. 2). The IHO explicitly found that the student's management needs listed in the IEP were appropriate and addressed her needs (IHO Decision at p. 13). The parents did not appeal the IHO's finding that the management needs were appropriate and, therefore, that finding has become final and binding. However, the student's management needs as they relate to the recommended program will be addressed below.

Exs. 7-13). As a result of its review, the CSE found the student eligible for special education as a student with a learning disability (Dist. Exs. 3 at pp. 1-3; 5; 6). Consistent with the information available to the CSE, the March 2016 IEP reflected the results of a February 2016 district psychoeducational evaluation report (district psychoeducational evaluation) which was "completed in response to an impartial hearing partial resolution agreement," along with information from the student's parents and teachers (compare Dist. Ex. 3 at pp. 1-3, with Dist. Ex. 7 at pp. 9-10).

With respect to the student's cognitive ability, the April 2015 private psychoeducational evaluation report indicated that the student's full-scale IQ was in the "[w]ell [a]bove [a]verage range," and similarly, the district psychoeducational evaluation report revealed that the student's general intellectual ability was in the "upper limits of the [a]bove [a]verage range" (Dist. Exs. 7 at p. 2; 13 at pp. 6, 11, 15).¹³ The private psychoeducational report indicated that student demonstrated significant strengths on the verbal comprehension index in similarities, and on the processing speed index in symbol search (Dist. Ex. 13 at pp. 5-7, 11, 15). The district psychoeducational evaluation showed that the student demonstrated significant weakness with respect to long-term memory and retrieval (Dist. Exs. 7 at pp. 2-4, 8-9). With respect to academic achievement, the student performed with variability across the subtests and measures (Dist. Exs. 7 at pp. 4-10; 13 at pp. 7-9, 11, 16).

According to the private psychoeducational evaluation report, the student's overall performance on measures of mathematics and written language achievement "fell within the [a]verage range," while her performance in reading achievement "fell in the [w]ell [b]elow [a]verage range," indicating a significant weakness in relation to same-age peers (Dist. Ex. 13 at p. 11). The student's performance on a measure of word reading efficiency (reading fluency) yielded a score in the "[l]ower [e]xtreme range" in the area of sight word efficiency and the "[w]ell [b]elow [a]verage range" in the area of phonemic decoding efficiency (id. at p. 8). In addition, on achievement testing, the student also performed in the "[w]ell [b]elow [a]verage range" on the broad reading cluster including letter-word identification and sentence reading fluency subtests (id. at pp. 7-8, 16). The evaluator opined that reading appeared to be a significant relative and normative weakness for the student, especially with respect to reading sight words and/or decoding with fluency (id. at p. 8). Based on the results of her assessment, the evaluator diagnosed the student with a "Specific Learning Disability with Impairment in Reading-Moderate" (id. at pp. 8, 11-12). Notably, the evaluator stated that the student's difficulties were not better accounted for by, among other things, "inadequate educational instruction" (id. at pp. 11-12). The evaluator provided numerous recommendations to be implemented at home and in school (id. at pp. 12-14). The evaluator's recommendations for the student's home included "highly specialized, expert reading instruction" (id. at p. 12). The evaluator also recommended the use of a language-based multi-sensory approach, along with audiobooks, pleasure reading, and websites for information on learning disabilities (id.). Further, recommendations for school included sharing the private psychoeducational evaluation with the school; keeping the student in the gifted and talented program; pairing the student with another student, aide, or teacher during reading to increase accountability and encourage practice; and, if available, pull-out services for reading (id. at p. 13).

¹³ As noted above, the CSE initially found the student ineligible for special education and related services based, in part, on the private psychoeducational evaluation provided by the parents (Dist. Ex. 7 at p. 1).

Additionally, the evaluator recommended that during one-to-one reading time in school, validation of the student's frustrations and celebrating her progressions were important, even if expectations set for the rest of the class were not met by the student (id. at p. 13). The evaluator further recommended strategies to use in school to reduce the student's frustration and aversion to reading tasks (id. at p. 14).

Concerning the student's mathematics ability, although the student performed in the average range overall, the private psychoeducational evaluation report indicated that the student scored in the "[w]ell [b]elow [a]verage range" on a task that required calculation of items that included a variety of problems and operations with one and two-digit numbers (Dist. Ex. 13 at pp. 8-9). The evaluator opined that the student's confusion regarding the choice of mathematical operations impacted her score (id. at p. 9). The private psychoeducational evaluation report included recommendations for mathematics at home, such as strategies for decreasing errors due to incorrect operation, using a checklist to check work, and websites to improve the student's mathematical skills (id. at pp. 12-13). For school, the report recommended that the student verbalize her decisions and solutions to math problems to assist in preventing careless mistakes and, consistent with the recommendation for home, that the student follow a checklist when checking her math work (id. at p. 14).

With respect to social/emotional functioning, the private psychoeducational evaluation report indicated that the student's teacher and parents were concerned with the student's ongoing struggle to keep up with the reading curriculum (Dist. Ex. 13 at p. 9). According to the evaluator, the parents expressed concern regarding hyperactivity, frequent tantrums, and aggressive and "obsessive" behaviors in the home setting; however, these behaviors were not observed by the student's teacher or the evaluator (id. at pp. 9, 11). The evaluator noted that the student held and expressed a particularly negative attitude with respect to attending school and its related activities, indicating that it seemed probable that the student's difficulty with reading contributed at least somewhat to her frustration with school, and inattentive and externalizing behaviors (id. at p. 10). The evaluator recommended a book on problem behaviors for the parents and a behavior contract at home to address the parent-reported student behaviors (id. at p. 13).

With respect to the privately obtained May 2015 ELA evaluation report, the evaluator stated that the diagnostic evaluation was initiated to "look more closely" at the student's reading comprehension, reading fluency, spelling, and handwriting in order "to determine an appropriate longer-term plan for targeted instruction to address areas of relative weakness"(Dist. Ex. 12 at p. 1). To assess the student's ELA skills, the evaluator used a PAF placement test, an elementary spelling inventory from Words Their Way, benchmarks from the Teacher's College Reading and Writing Project, and Handwriting Without Tears (id. at pp. 1-3). The evaluator provided a detailed description of the student's performance during the evaluation; however, he did not interpret the student's performance in light of grade level standards.

The ELA evaluation report also indicated that the student struggled with encoding and decoding the /qu/sound, spelled 40 percent of cvc (consonant-vowel-consonant) nonsense words incorrectly, spelled 30 percent of nonsense words with digraphs and final blends incorrectly, and spelled 31 percent of nonsense words with short vowels with initial blends incorrectly (see Dist.

Ex. 12 at pp. 1-2).¹⁴ With respect to spelling and word study, the report indicated that the student misspelled seven of 33 non-phonetic real words and although the student spelled only six of 25 increasingly complex words accurately in the spelling inventory from Words Their Way, the evaluator characterized the student's errors as "reasonable" for all but two of the misspelled words (id. at p. 2). The ELA evaluation report noted that the student's performance placed her in the developmental spelling stage of "within word patterns" and specified that the student's word study should focus on long vowel patterns and vowel pairs with various digraphs and blends at the beginning or end of words, as well as continued practice with short vowel sounds coupled with digraphs and blends (id. at p. 2). The evaluator opined that this spelling "leveling" from Words Their Way was consistent with the findings from the PAF placement test (id. at p. 2). With respect to reading comprehension, the evaluator noted that according to the Teacher's College Reading and Writing project, kindergarteners are expected to read at levels D/E, first graders are expected to read at levels J/K/L, and second graders at levels M/N (id. at p. 2). The report indicated that the evaluator tested the student through Level K, and although the student was hesitant to attempt Level I and Level K books, she was able to do "a lot of the reading and comprehending" (id. at p. 3). The evaluator noted that level K "seemed to take [the student] to her instructional edge, but she was also fatiguing" (id. at p. 3). With respect to handwriting, the report indicated that the student's handwriting was well sized and legible throughout the assessment (id. 12 at p. 3). The evaluator recommended the use of PAF materials to support the student's reading development and indicated that based on his diagnostic findings the student should begin at "level 97" which would introduce her to the six-syllable types (id. at pp. 3-4). The evaluator further recommended that instruction take place 3-4 times per week for one hour over the summer "in order to provide intensive reading intervention and to close gaps" before the student began third grade (id. at p. 4). The district psychologist testified that the first four pages of the ELA report was a "qualitative report in that they don't report any quantitative information," and "that there are no scores that can be used to compare her performance to a normative sample" (Tr. pp. 146-48; see Dist. Ex. 12 at pp. 1-4). While the psychologist noted that the last few pages of the ELA report was a summary of the April 2015 private psychoeducational evaluation report and contained scores, the ELA report itself was "like a snapshot" of the child's performance on a particular day, without scores, and could not be used to determine how the student was performing throughout the school year (Tr. pp. 148-49; see Dist. Ex. 12 at pp. 1-7).

The social histories reviewed by the March 2016 CSE showed that according to the parent, the student was distractible, fidgety during most reading assignments, demonstrated off-task behavior and had difficulty focusing to process reading and writing assignments (Dist. Exs. 8 at p. 2; 9 at pp. 1-2).¹⁵ The parent reported that the individualized and small group instruction provided by the teacher had made a "world of difference" (id. at p. 2). As reported by the parent at home, the student required coaching and prompting to get through daily reading homework assignments,

¹⁴ The evaluator indicated that the student was asked to write a total of 33 phonetic nonsense words in this portion of the test and reported that the student spelled 22 correctly, demonstrating 67 percent accuracy (Dist. Ex. 12 at pp. 1-2).

¹⁵ In February 2016 the district conducted a second social history evaluation (Dist. Ex. 8). According to the evaluator, the parent indicated that the initial social history, conducted in June 2015, was accurate and therefore he attached it to the February 2016 social history (see Dist. Exs. 8 at pp. 1-2; 9 at pp. 1-4).

which sometimes resulted in the student kicking and throwing pencils (*id.* at p. 2). The parent further reported that while the first half of the student's first grade year went well, as the school year progressed, reading assignments became more challenging and difficult for the student; and she continued to experience the same reading difficulties in second grade (*id.* at p. 3). The social history noted that the parents wanted the student to stay in the gifted and talented program and to receive SETSS on a pull-out basis for individualized or small group instruction to increase her reading skills (*id.* at p. 4). Although the social history stated that "all parties agreed" that the student should receive evaluations for occupational and speech-language therapy, the student's mother testified that the student was physically capable and did not have speech issues, that the student had a documented reading disability and that the occupational and speech-language therapy evaluations were a waste of taxpayer money; however, the parents obliged (Tr. pp. 268-69; Dist. Ex. 9 at p. 4).

The June 2015 classroom observation indicated that during an independent "Do Now" assignment, the student looked around the room following the movements of the teacher and appeared distractible; the other students were writing and reading through the assignment (Parent Ex. D at pp. 1-2). The student also "struggled with trying to articulate her thoughts in writing," and "had a fearful look, as she was totally unsure how to best write information" (*id.*). The observer noted that the student opted to not write anything during the independent classroom assignment until the teacher provided her with assistance (*id.* at p. 1). According to the observer, the teacher reported that the student worked diligently on reading and writing assignments, but became frustrated and gave up, no longer had faith in her own abilities, was afraid, and her self-esteem remained low (*id.*). Further, the teacher commented that she spent time throughout the student's second grade year providing her with individualized and small group instruction (*id.*) The teacher opined that this approach to learning enabled the student to feel somewhat better about her attempts to focus on reading and writing (*id.*).

The February 2016 district psychoeducational evaluation, reviewed by the CSE, showed that the student demonstrated significant strength for listening comprehension at word, sentence, and discourse levels, as well as for expressive vocabulary, as measured by the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (Dist. Ex. 7 at p. 9). The student demonstrated significant weakness and performed with below average ability in oral reading fluency, oral reading accuracy, and oral reading rate (*id.* at pp. 8-9). The evaluator noted that although the student performed in the average range on the WIAT-III reading comprehension measure, benchmark assessments, administered by the student's teachers indicated that she performed below grade level in reading comprehension (*id.* at pp. 9-10). With respect to the oral language subtest of the WIAT-III, the student performed in the average range overall, but she demonstrated a significant weakness in the task of oral word fluency, which measures efficiency of word retrieval and required that the student name as many things as possible belonging to a given category (*id.* at pp. 7-8). The evaluator opined that the student's performance on the task indicated that the student may have difficulty producing language on demand in order to solve problems and answer questions across a variety of situations (*id.* at p. 7). With respect to mathematics, the student performed in the average range on the WIAT-III math problem solving task; however, the teacher evaluation indicated that the student had "some difficulty understanding word problems and [was] particularly challenged by two-step word problems" (*id.* at pp. 6, 10). With respect to written expression, the student performed in the average range of ability (*id.* at p. 9). However, the

evaluator noted that the student "did not always use correct capitalization and punctuation throughout sentences, and also made several spelling errors" on sentence completion tasks (id. at pp. 6, 9). Further, the February 2016 evaluation provided that the student's then-current classroom teacher noted that the student was "performing at a level 2.5 (out of 4.0), as per a recent Writing on Demand assessment," and that the student had difficulty "using what she knows to check spelling" (id. at p. 6).

The district psychologist who performed the February 2016 psychoeducational evaluation testified that the parent requested an IEP in June 2015, expressing particular concern about the student's reading and writing (Tr. pp. 145-46). The district psychologist further testified that based on the cognitive testing conducted as part of the parents' private psychoeducational evaluation the student demonstrated "several strengths, but no deficits" (Tr. p. 151; see Dist. Ex. 13 at p. 15). According to the district psychologist, the private psychoeducational evaluation report indicated that the student performed within normal limits on the majority of achievement measures, while demonstrating relative weaknesses in letter/word identifications, sentence-reading fluency, and math calculation (Tr. 151; see Dist. Ex. 13 at p. 16). However, the district psychologist also noted that "contradictory results" existed between the May 2015 ELA report and private psychoeducational evaluation report; and she "didn't have a clear picture from either report of what [the student's] performance [was] in that area" (Tr. pp. 151-52; compare Dist. Ex. 13 at pp. 8, 16, with Dist. Ex. 12 at p. 2). Specifically, the private psychoeducational evaluation report identified sight word efficiency as a weakness for the student and the May 2015 ELA report identified it as a strength (Tr. pp. 151-52; compare Dist. Ex. 13 at pp. 8, 16, with Dist. Ex. 12 at p. 2).

The student's third grade gifted and talented teacher (regular education teacher) testified that in February 2016 she completed a teacher report form that detailed the student's classroom performance (Tr. pp. 35-36; Dist. Ex. 10 at pp. 1-3).¹⁶ According to the regular education teacher, a reading evaluation, completed on January 7, 2016, indicated that the student demonstrated strengths in her ability to self-correct errors by sounding out and in monitoring for meaning, and that the student's level of comprehension was high and she had strong "retelling" skills (Tr. pp. 36-39; Dist. Ex. 10 at p. 2). The student's weaknesses in reading included miscues, "lower fluency - sometimes choppy," and "lower reading stamina - slower pace" (Dist. Ex. 10 at p. 2). The regular education teacher reported that the student was below grade level in her ability to read basic sight words, decode multi-syllable words, and display oral reading fluency (id.). The teacher conducted an assessment of the student's math skills on December 11, 2015 and January 25, 2016 and found that the student demonstrated strengths in her ability to use multiple strategies to solve problems and understand all four operations, while demonstrating weaknesses in her ability to understand what a (math) question was asking, performing two-step word problems and fluency of multiplication facts (id. at pp. 2-3). In math, the student performed below grade level with respect to her ability to solve multi-step math tasks and analyze and execute word problems (id. at p. 3). The regular education teacher conducted a writing evaluation of the student on January 19, 2016 and found that the student demonstrated strengths in her ability to understand the format/purpose of writing genres and was able to organize a writing piece using section parts (id.). However, the

¹⁶ According to the report, the teacher based the student's performance on the following benchmark assessments: reading level: the Teacher's College reading assessment; math level: the "end of module assessments"; and writing level: "literary essay post on-demand" (Tr. p. 36; Dist. Ex. 10 at pp. 2-3).

student demonstrated writing weaknesses in "elaboration - adding more details/examples" and "spelling - using all she knows to check spelling" (*id.*). The teacher indicated that in writing the student was performing below grade level in her ability to write basic and familiar words, phonetically spell unfamiliar words, and write multi-syllable words (*id.*). Additionally, the teacher commented that the student did not always feel confident and this hindered her from fully participating with her peers (*id.*). Further, the teacher testified that the student had difficulty encoding and decoding, struggled with her reading and writing; was not performing at the same rate as her peers, was giving the appearance of reading independently (while actually pretending to read), and opined that any academic work associated with reading would be difficult for the student (Tr. pp. 29-30, 53-54). The teacher further opined that with respect to the student's social-emotional needs, the student would get nervous and frustrated at times in anticipation of her assignments being too difficult for her (Tr. pp. 45-46). She testified that the student was not always confident, which hindered the student from fully participating in class with her peers (Tr. pp. 29, 45-46; Dist. Ex. 10 at p. 3).

2. March 2016 IEP

The March 2016 IEP reflected the findings from the February 2016 district psychoeducational evaluation regarding the student's cognitive abilities and academic strengths and weaknesses (Dist. Ex. 3 at p. 2). Additionally, the IEP included information from the student's regular education teacher's evaluation of the student in reading, writing, and math (*id.*) The IEP stated that "[o]verall, [the student] [was] a cooperative and hard-working third grader whose cognitive and academic weaknesses impact[ed] her academic performance and require[d] intervention" (*id.*). The March 2016 IEP also reflected information provided by the student's regular education teacher and RtI providers regarding her then current educational performance.

The IEP, under the social development heading, noted that the student presented as cooperative and pleasant (Dist. Ex. 3 at p. 2). Further, the student reported that reading was "hardest for her" (*id.*). The student responded well to positive reinforcement and with encouragement, she persisted when challenged (*id.*). The IEP indicated that the student's regular education teacher described the student as a "hard-working, determined student who always tries her best" (*id.*). The IEP stated that the student did not always feel confident in her abilities, which hindered her participation in class and group activities (*id.*). The regular education teacher reported that independent work was the most challenging for the student (*id.*). The RtI providers reported that the student became frustrated with challenging tasks and that she responded well to encouragement and praise (*id.* at p. 3). Further, the IEP reported that the student was learning to improve her self-confidence regarding academic tasks (*id.*). The IEP indicated that the student can become frustrated with challenging tasks and was learning to develop coping skills (*id.*).

The IEP indicated the student's parents expressed concerns about of the presence of dyslexia and difficulty with writing (Dist. Ex. 3 at p. 2). The IEP detailed common characteristics of dyslexia, noting that during testing the student made some omissions and substitutions that were recorded during oral reading; however, no additions, transpositions, or reversals were observed (*id.*). Additionally, it was noted that the student's comprehension score was within normal limits; however, the student's teacher indicated that she was performing below grade level in this area and that the student needed to improve her stamina for reading (*id.*). According to the IEP, the student's mother indicated she would like her daughter to remain in the gifted and talent program (*id.*).

To address the student's weaknesses in reading and writing including sight word efficiency, decoding, oral reading rate and fluency, elaboration and spelling, the March 2016 CSE recommended that the student receive two direct SETSS periods per week in ELA (Dist. Ex. 3 at p. 12). Additionally, the CSE recommended the following environmental and human or material resources related to the student's ELA management needs: pre-teaching and priming; repetition of lessons; frequent review of previously taught strategies; opportunities for drill and practice of sight words; modified homework assignments; chunking; checklists and organizers for writing assignments (*id.* at p. 3). To more specifically address the student's ELA needs, the March 2016 CSE created three annual goals which targeted the student's use of "phonic awareness" and word analysis skills to decode new words and identify sight words; reading accuracy, fluency and stamina to support comprehension; and organization of writing so as to convey ideas clearly with sufficient detail and elaboration (*id.* at pp. 4-6).

To address the student's math needs, the March 2016 CSE recommended one SETSS period per week in math and, in addition to the management needs indicated above, the CSE recommended that the student be provided with opportunities for drill and practice of math facts (Dist. Ex. 3 at p. 3). Further, the CSE created three annual goals to address the student's math needs including her ability to demonstrate fluency with single-digit multiplication facts to solve two-step equations; explain her solution to a word problem and provide rationale for choosing a particular strategy; and use of comprehension strategies to determine operation, quantities, and steps to solve word problems involving all four operations (*id.* at pp. 7-9).

In addition to the three direct periods of SETSS each week, the CSE recommended one period per week of indirect SETSS for ELA and math to provide special education support to the student's regular education teacher (Tr. p. 88; Dist. Ex. 3 at p. 12). To address the student's social/emotional needs, the March 2016 CSE recommended the following management strategies: modification of homework assignments; encouragement to participate in group activities and tasks perceived as difficult; "labeled praise" for efforts; frequent feedback on performance; and the provision of strategies for coping with frustration (Dist. Ex. 3 at p. 3). To further address the student's social/emotional needs, the March 2016 CSE created two goals that targeted the student's ability to use positive self-talk and identify personal strengths to improve confidence in her academic abilities, and the use of coping strategies to deal with frustration when challenged (*id.* at pp. 10-11). Additionally, the March 2016 CSE recommended several testing accommodations including extended time (time and a half), separate location/room (to minimize distractions), revised test directions (directions read and reread) and test questions (questions read aloud, except for exams assessing reading comprehension), breaks (1 to 2-minute stretch break for every 25 minutes of testing), and on-task focusing prompts (verbal and visual cues and prompts as needed) (*id.* at p. 14).

The special education teacher testified that as a result of the March 2016 CSE meeting the student was given SETSS for ELA and math, to the extent that it had ELA components (Tr. p. 85). The special education teacher explained that direct services meant "remediation directed to the student," while indirect services meant conferring with the classroom teacher to make sure that the student was getting the supports she needed in the classroom (Tr. p. 88).

The district's school psychologist testified that as a result of the March 2016 CSE meeting the CSE generated annual goals to address the student's academic weaknesses (Tr. p. 162).

According to the school psychologist, the IEP goal that required the student to "read with sufficient accuracy, fluency, and stamina to support comprehension" targeted the student's weaknesses in decoding and sight-word recognition (accuracy); efficiency (fluency); ability to read for longer periods of time (stamina); and ability to understand what she was reading (comprehension) (Tr. pp. 162-63). The psychologist testified that the CSE determined that the goal was appropriate based on the student's weaknesses as identified in the various assessments and by various members of the CSE team and in consideration of curriculum standards (Tr. p. 163). The psychologist further testified that each of the recommended annual goals addressed a weakness identified at the CSE meeting (Tr. p. 163).

The special education teacher testified that SETSS were recommended because they were thought to be the best service available for the student with the least amount of restriction (Tr. p. 88). She went on to explain that the difference between SETSS and RtI was that SETSS were mandated under the law (Tr. p. 89). The reading program that the SETSS teacher was providing to the student was Recipe for Reading, which was the same reading program that the student had received in her RtI instruction (Tr. pp. 116-17).

With regard to the parent's argument that the IEP services were less intensive than the RtI services that were provided to the student prior to having an IEP, the hearing record does not establish the duration or length of the student's direct SETSS services, beyond the fact that the student received two periods of SETSS in ELA and one period of SETSS in math each week (Tr. pp. 90, 113; Dist. Ex. 3 at p. 12). The special education teacher did not testify to the length or duration of the SETSS sessions that she provided to the student. The hearing record only indicates that the student received Tier III RtI in reading for several months, which consisted of 20 minutes of intensive instruction four days per week (Dist. Ex. 6). However, there is no information definitively establishing the length or duration of the SETSS or the length or duration of RtI services that the student received subsequent to March 2016 when the IEP was implemented. In addition, RtI services were not explicitly included in the IEP. The hearing record only establishes that the student received services denominated as "SETSS" and "RtI" by her providers from March to June 2016 (Tr. at pp. 58, 83, 90, 113).¹⁷

¹⁷ One of the difficulties with this hearing record is the consistent reference to "RtI" services that the student received even after the student was found eligible for special education. Typically, RtI is a term used as a pre-referral strategy. As noted above, the RtI in this case was treated by the district as synonymous with AIS (Tr. p. 77). AIS services are available to both nondisabled students and students with disabilities, but if a component of the AIS meets the definition of "specially designed instruction" the United States Department of Education's Office of Special Education Programs has clarified that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]). It might have clarified matters to a degree if the district had not excluded the "RtI" instruction from the IEP, which the teacher testified was the same program as the SETSS instruction (Tr. pp. 89, 116-17).

In addition, the hearing record demonstrates that the student began receiving RtI services in September 2015 of her third-grade year (Tr. pp. 156, 272-74; Dist. Ex. 7 at p. 1).¹⁸ Further, the hearing record establishes that RtI was insufficient to remediate the student's academic difficulties and the student's limited progress in RtI was used as the justification to find her eligible for special education services (Dist. Ex. 6). Specifically, the school psychologist testified that the March 2016 CSE had "evidence of low achievement" based on the implementation of RtI and the student's insufficient response (Tr. p. 161, 170-71). However, the evidence establishes that the student's SETSS simply continued the Recipe for Reading program and the only difference between the student's SETSS and RtI was that one was mandated by law and the other was not (Tr. pp. 89, 116-17). It is noted that the district did not provide any documentary evidence regarding the student's RtI instruction, such as progress reports. As a result, the district did not establish that its recommendation of SETSS was reasonably calculated to provide educational benefit given the student's demonstrated lack of progress while receiving reading instruction utilizing the identical reading program—Recipe for Reading—from September 2015 to March 2016 as RtI.

Also, it did not establish the length or duration of the SETSS provided to the student or how the quantity of SETSS recommended by the March 2016 CSE, subsequent to the student's lack of progress with RtI services, addressed the student's well-established academic needs. Finally, while the student's IEP provided for group instruction in SETSS (Dist. Ex 3 at p. 12),¹⁹ the SETSS teacher testified that while the student was receiving RtI services, she provided instruction on an individual basis and conceded that she was not sure if the other SETSS teacher provided individual or group instruction (Tr. pp. 98-100, 103), and it would tend to support the parents' contention that the IEP services, which called for group instruction only, were less intensive than the services that the student was receiving under RtI. Therefore, the district failed to establish that the March 2016 IEP was reasonably calculated to provide the student with educational benefit and, accordingly, denied the student a FAPE for the 2016-17 school year.

C. IEP Implementation

In addition to their IEP design claims, the parents contend that the IHO erred in finding that the student's special education program was being properly administered during the spring of the 2015-16 school year, and specifically assert that the district failed to make all of the student's teachers aware of her IEP, failed to ensure that the student's management needs and accommodations were available during all parts of the school day, and failed to reliably provide the student's services. Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992,

¹⁸ The special education teacher testified that the student's RtI began in November 2015 (Tr. pp. 78-79, 83). This contradicts the testimony of the parent and the school psychologist, who testified RtI began in September 2015.

¹⁹ The group size for SETSS was not specified on the IEP (Dist. Ex 3 at p. 12).

at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

With regard to the first assertion, the parents argue that the district failed to inform or educate the student's teachers about her IEP or special education needs and as a result the student endured continuing struggles in school. In support of this assertion, the parents cite to testimony given by the student's mother, in which she describes an encounter between the student and her science teacher. According to the student's mother, "one time the student came home very upset because she had been shamed by the science teacher" (Tr. p. 283). The student's mother reported that the student could not complete a worksheet she had been given and that the science teacher had no idea that the student had a reading disability and could not read the worksheet (Tr. p. 283). The student's mother explained that the student loved science and was fascinated by the topic, but could not fill out the worksheet (Tr. pp. 283-84). As a result of the incident, the student was in tears and did not want to go to school the next day (Tr. pp. 283-84). The student's mother testified that she had to call the science teacher and "explain what was going on" (Tr. p. 284). The district did not respond to this claim during the course of the impartial hearing.

With regard to the parents' second assertion—that the district failed to ensure that the student's management needs and accommodations were available during all parts of the school day—a review of the evidence in the hearing record shows that modifications and accommodations were discussed with respect to the student's program at Windward, but there are no records or testimonial evidence regarding the implementation of modifications and accommodations as they related to the district's IEP and recommended placement (see Tr. pp. 223-25, 241).

Lastly, the parents assert that the district failed to reliably provide the student's IEP services. The parents argue that the student continued to struggle to keep up in her large general education classroom and missed different portions of the school day, seemingly at random, in order to receive her SETSS (and RtI services.) In support of this claim, the parents refer to testimony offered by the student's mother regarding her conversations with the student's third grade regular education teacher. Specifically, the parent testified that the student's regular education teacher was struggling to work with the student in a class of 28 students and that the teacher "was relying on these pull-out services, which were – happened at random. I mean she never knew when it was going to happen" (Tr. p. 285). However, the parent also testified that "it became a little bit better at the end of the year" (Tr. p. 285). The regular education teacher testified that for the 2015-16 school year, she taught the student for all subjects (Tr. p. 28). She recalled that she participated in the March 2016 CSE meeting, and knew that the student had an IEP as a result of that meeting (Tr.

pp 39-40). The regular education teacher confirmed that the student received SETSS following the CSE meeting, however, noted that with "regard to the time or the amount of times, I don't keep records of that and I don't recall that" (Tr. p. 58). The special education teacher testified that she provided the student with SETSS four times per week, "three times a week with an indirect service speaking with the teacher and conferring with her" (Tr. pp. 90, 112-113; see Tr.pp.92-94, 113-114).

Overall, the evidence regarding implementation of the IEP during the 2015-16 school year is scant. The student had a negative experience in science class on a particular day, but that instance alone does not rise to the level of a denial of a FAPE. The SETSS teacher's specific testimony indicates that SETSS were provided at the prescribed intervals and, taken together with regular education teacher's general statements corroborating that the student was removed for SETSS, the evidence leans sufficiently toward the conclusion that there was no material or substantial deviation from the IEP. However, this helps the district's case but little due to the conclusion above that the IEP was inappropriate for the student.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2016-17 school year. As the District did not cross-appeal the IHO's adverse determinations that the Windward School constituted an appropriate unilateral placement for the student and that equitable considerations weigh in favor of the parents' request for relief, those findings have become final and binding on the parties. I have considered the parties' remaining contentions and find no need to address them further in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 24, 2017, is reversed to the extent that it found the district offered the student a FAPE for the 2016-17 school year and denied the parents' request for reimbursement of the cost of the student's tuition at the Windward School for the 2016-17 school year; and

IT IS FURTHER ORDERED that, upon submission of proof of payment, the district shall reimburse the parents for the full cost of the student's tuition at the Windward School for the 2016-17 school year.

Dated: **Albany, New York**
 December 4, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER