



The University of the State of New York

The State Education Department
State Review Officer
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No. 22-003

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Law Offices of Regina Skyer and Assoc., LLP, attorneys for respondents, by Sonia Mendez-Castro, Esq. and Linda A. Goldman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered the district to reimburse the parents for the cost of the student's tuition at the Windward School (Windward) for the 2020-21 school year.¹ The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C.

¹ The Commissioner of Education has not approved Windward as a school with which districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).

§ 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 in a general education classroom in a dual-language nonpublic school from preschool through third grade (Parent Exs. C at p. 1; O at ¶¶4, 5, 7; Dist. Exs. 4 at p. 2; 6

at ¶9).² During the 2019-20 school year (third grade), the student demonstrated "some difficulties in school" and, the parents expressed concerns about the student's limited progress in English language arts (ELA), "particularly with phonetics and processing" (Parent Ex. O at ¶7; Dist. Ex. 4 at p. 2). The student received spelling and writing instruction at the nonpublic school in a small group approximately three times a week from fall 2019 into March 2020, and, with the onset of remote instruction due to the COVID-19 pandemic, some small group instruction took place remotely (Dist. Exs. 4 at p. 2; 5 at p. 3). In January 2020, the parents began the process for having the student evaluated privately by a clinical neuropsychologist due to their concerns that the student showed a lack of educational progress in reading (Parent Exs. C at p. 1; M at ¶¶2, 18; O at ¶¶ 11-12). In January 2020, the private neuropsychologist evaluated the student over four dates and found the student had "language-based learning vulnerabilities" and recommended individual tutoring two times per week with an Orton-Gillingham specialist (Parent Exs. C at pp. 1-2; D at p. 1; O at ¶17). According to the parents, the student began Orton-Gillingham tutoring in or about February 2020 (Dist. Ex. 5 at p. 3). The private neuropsychologist reevaluated the student in May 2020 to track the student's progress and determine her needs (Parent Exs. C at p. 1; M at ¶¶44-47; O at ¶¶18-19).

In February 2020 the student stopped attending the "immersion program" at the nonpublic school to permit the student to focus her efforts on instruction in English (Dist. Exs. 3 at p. 5; 5 at p. 2). The hearing record indicates that Windward assessed the student's reading skills on February 24, 2020, as part of its admission screening (Tr. pp. 181-82; Parent Ex. H). On March 9, 2020, the parents executed an enrollment agreement with Windward and paid the student's full tuition for the 2020-21 school year to Windward on May 1, 2020 (see Parent Exs. G, L).

In or about April 2020, the parents referred the student to the CSE for an initial evaluation and indicated the student had difficulties in phonics and with processing speed (Dist. Ex. 4 at pp. 1-2). On April 27, 2020, the district conducted a social history and in the process obtained parental consent to conduct an initial evaluation of the student (see Dist. Ex. 4).

A CSE convened on June 17, 2020 for an initial review of the student's eligibility and determined that the student was not eligible for special education (Dist. Exs. 5 at p. 5; 6 at ¶¶ 6-21, 63-64, 66). In a letter dated June 17, 2020, the district notified the parents of the June 2020 CSE's determination that the student was not eligible for special education services, set forth the evaluative information considered by the CSE, and advised the parents of their due process rights (Dist. Ex. 1 at p. 1).³

² The mother of the student testified that the student repeated preschool when she started at the nonpublic school "because her birthday fell on the cut-off date" (Parent Ex. O at ¶6).

³ The letter specifically referred to a social history, a psychoeducational evaluation, and a classroom observation (Dist. Ex. 1 at p. 1); however, only the reports from the April 2020 social history evaluation and the private May 2020 neuropsychological evaluation were included in the hearing record (see Parent Ex. C; Dist. Ex. 4).

By letter dated August 25, 2020, the parents disagreed with the June 2020 CSE's determination that the student was not eligible for special education and notified the district of the parents' intent to unilaterally place the student at Windward for the 2020-21 school year at district expense (see Parent Ex. B at pp. 2-3; Parent Ex. O at ¶¶ 37, 39-40).

A. Due Process Complaint Notice

In a due process complaint notice, dated January 13, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

The gravamen of the parents' complaint was that the June 2020 CSE should have found the student eligible for special education services (Parent Ex. A). More specifically, the parents argued that the June 2020 CSE's ineligibility determination was not supported by evaluative or anecdotal information provided to the CSE and the student was not evaluated in all areas of suspected disability (id. at pp. 3-4). The parents further argued that the June 2020 CSE failed to consider the social/emotional impact of the student's learning disability on her functioning in the classroom and ignored the student's need for a specialized reading program, writing services, and counseling services (id. at p. 4).

Moreover, the parents asserted that Windward was an appropriate unilateral placement as it was a small, structured setting to address the student's academic and emotional needs, and that equitable considerations favored an award of tuition reimbursement (Parent Ex. A at p. 4). As relief, the parents sought tuition reimbursement for the student's placement at Windward for the 2020-21 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

After five prehearing conferences were held between April 28, 2021 and August 3, 2021, an impartial hearing convened and concluded on September 20, 2021 (Tr. pp. 1-226). In a decision dated November 27, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that Windward was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 19-46). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Windward for the 2020-21 school year (id. at pp. 46-47).

Initially, the IHO rejected the district's argument that the hearing should be limited in scope and that the due process complaint notice had "to comply with a certain degree of specificity" and, therefore, found that the district's arguments on this point were "unavailing" and the allegations in the due process complaint notice were of "sufficient specificity" (IHO Decision at pp. 4-6). Further, the IHO found that the district failed to identify those claims abandoned by the parents (id. at p. 6).

After reviewing applicable standards, the IHO proposed four questions that needed to be answered to determine if the district provided the student "a FAPE in the context of 'child find' and evaluation":

- 1) What are the policy and procedures that [the district was] required to follow to identify and evaluate a student and were the[y] followed?
- 2) Was the Student evaluated in accordance with applicable statutes and regulations?
- 3) Does the Student have characteristics of one or more of the thirteen enumerated disability conditions?
- 4) Does the disability condition adversely affect the Student's educational performance?

(IHO Decision at p. 11).

First, the IHO held that the district had "an affirmative duty to conduct a child find and evaluation analysis" (IHO Decision at p. 11). The IHO then determined that the district failed to identify the regulations it was required to follow (*id.*) to satisfy its child find and evaluation obligations. The IHO referred to the parents' argument that the district is responsible to ensure that it has sufficient evaluative material and the district should be held "accountable" for the failure to do so (*id.* at p. 12). The IHO held that the district "failed to meet its non-delegable burden of proof and production in delineating the applicable policies and procedures it is required to follow and that the policies were in fact, followed" (*id.*).

Second, the IHO held that the district had "the burden of proof and production to demonstrate that it followed all of the applicable rules and regulations" in fulfilling its child find and evaluation process (IHO Decision at p. 13). The IHO recounted the arguments presented by the district in support of the June 2020 CSE's conclusion that the student was not eligible for special education as a student with a learning disability (*id.* at pp. 13-15). The IHO then referenced the parents' arguments with respect to procedural violations committed by the district during the initial evaluation of the student and in determining eligibility of a student suspected of having a learning disability (*id.* at pp. 15-18). Ultimately, the IHO held that the district failed to meet its burden of proof because "it failed to cite to the specific regulations that it was required to adhere to, which if any they failed to adhere to, failed to provide any analysis whatsoever as to which of the requirements it failed to follow were procedural and why they did not rise to the level of a deprivation of a FAPE" (IHO Decision at p. 19).

The IHO then analyzed whether the student met one of the thirteen defined disability categories, focusing on the learning disability category (*see* IHO Decision at pp. 19-37). Again, the IHO recited the arguments presented by the district in support of the June 2020 CSE's determination that the student did not have a learning disability, and the parents' argument that the student had a learning disability as diagnosed by the private neuropsychologist (*id.* at pp. 20-36). The IHO held it was a "derogation of [the district's] duty

to observe and evaluate the Student" in accordance with State regulations (id. at p. 36). The IHO found that the district focused its efforts at the impartial hearing on "attacking" the private neuropsychologist's evaluation, which the IHO held does not satisfy the district's burden of proof and "d[id] not constitute evidence" (id.). The IHO found that the neuropsychological evaluation report demonstrated that the student had a learning disability and found the testimony of the district representative unpersuasive, specifically noting that the assertion that the neuropsychological evaluation report relied on "an out of date discrepancy mode[l]" was "meritless" (id. at p. 37). Finally, the IHO concluded that the student met the definition of a student with a learning disability and the district's failure to classify the student was a denial of a FAPE (id.).

The IHO then discussed whether the student's learning disability adversely affected her educational performance (IHO Decision at pp. 38-39). The IHO referenced that the student stopped the dual-language "immersion program" during the third grade to focus on ELA (id. at p. 38). In addition, the IHO found the hearing record demonstrated that the student was one year older than her peers having repeated prekindergarten and, citing teacher progress reports, found the student remained behind her peers in "age and grade equivalencies in core areas of reading and writing" (id.). Further, the IHO found that the student was reading at a second-grade level with low reading fluency, and in the areas of writing, spelling, and math the student was "nearly two grade levels behind" with "challenges in executive functioning skills" (id.). The IHO also examined the scores reported in the private neuropsychological evaluation which showed inconsistent reading subtest scores in fluency and decoding, both of which were "below age and grade level expectations" (id.). Based on this, the IHO held that the "Student's disability affected [her] educational performance in an adverse manner" (id. at p. 39).

Since the IHO found that the district denied the student a FAPE for the 2020-21 school year, the IHO proceeded to determine whether Windward was an appropriate placement for the student (see IHO Decision at pp. 39-43). The IHO found that the parents met their burden of demonstrating that Windward was appropriate through the Windward progress reports and testimony of the Windward CSE liaison (IHO Decision at pp. 40, 42). He further found that the district did not rebut the parents' evidence that Windward was appropriate for the student (id. at p. 40). Finally, the IHO held that the parents cooperated with CSE and provided timely notice of the unilateral placement, and therefore, equitable considerations supported the parents request for tuition reimbursement for the 2020-21 school year (id. at pp. 43-46).

Ultimately, the IHO directed the district to reimburse the parents for the cost of the student's tuition at Windward for the 2020-21 school year in the amount of \$61,550 (IHO Decision at p. 47).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the June 2020 CSE should have found the student eligible for special education services as a student with a learning disability.

The first issue raised by the district on appeal is whether the IHO erred by placing the burden on the district to define the scope of the hearing. The district argues it did not have the burden to "specify the regulations it did or did not follow" as found by the IHO. Rather, the district claims that the parents had the obligation to raise issues for review in their due process complaint notice. The district seeks to reverse the IHO's finding it failed to specify policies and procedures it was required to follow and that the district was required to assert those regulations it failed to adhere to and why.

In addition, the district alleges that the IHO's finding that it violated its child find obligations should be overturned. The district argues that the parents did not assert child find violations in their due process complaint notice, and furthermore, the district satisfied its child find obligations when it conducted a social history and held a CSE meeting in a timely manner.⁴ The district asserts that the direct affidavit testimony of the student's mother supports this conclusion as she testified that the district "responded quickly" in conducting the social history and holding a CSE meeting.

The next issue raised by the district is that the IHO erred in finding that it committed procedural errors that rose to a level of a denial of FAPE. First, the district argues that the June 2020 CSE "reviewed sufficient evaluative data" (social history, physical examination, neuropsychological report, teacher report) to determine that the student was not eligible for special education services. In connection with a classroom observation, the district contends that the nonpublic school teacher report was available to the June 2020 CSE and a "classroom observation would have been duplicative." The district alleges it had "adequate information" pertaining to the student's "academic performance" during "routine classroom instruction" to make an eligibility determination. Further, the district argues that the nonpublic school failed to provide all of the requested information in the teacher report, and the "CSE satisfied its burden of showing it requested the information such that any procedural failure is not a denial of FAPE." The district also argues that a psychological evaluation would have been "duplicative" because the June 2020 CSE had a private neuropsychological evaluation for review and consideration. The district additionally relies on the private neuropsychologist's

⁴ Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Here, the parents did not make a specific child find claim in their due process complaint notice, nor did they assert that the student should have been referred for an evaluation prior to the student's initial evaluation, therefore, the issue was outside the scope of the impartial hearing and should not have been addressed by the IHO.

statement that the dual-language program at the nonpublic school "likely exacerbated the difficulties [the student] experienced in developing reading automaticity."

The district then argues that it properly considered the private neuropsychological evaluation at the June 2020 CSE meeting.⁵ The district argues that the June 2020 CSE was not required to "adopt" the conclusions or recommendations of the private neuropsychological evaluation in determining eligibility. In addition, the district asserts that the student's progression from grade to grade "was consistent with the average scores on the neuropsychological evaluation." Lastly, the district argues that any procedural violations did not individually or cumulatively constitute a denial of FAPE to the student.

The third issue raised by the district on appeal is that the IHO erred in finding that the student should have been classified with a learning disability and such failure to classify the student resulted in a denial of a FAPE. The district argues that the private neuropsychologist's diagnosis of dyslexia "does not equate to educational classification for purposes of special education eligibility." The district argues that the private neuropsychologist improperly "relied on a discrepancy between intellectual ability and achievement" therefore, the diagnoses and testimony of the private neuropsychologist lacked credibility. Again, the district argues that the scores in the private neuropsychological evaluative report may have demonstrated some struggles with academics, but it "did not impact her educational performance" such that the student required special education services. The district contends that the neuropsychological evaluation report did not demonstrate "a pattern of strengths and weaknesses" and the student's "struggles were primarily the result of attending a dual-language program which would have resulted in limited English proficiency." The district argues that the student's average test scores demonstrate that her needs can be addressed in a general education setting with "accommodations and strategies" without the requirement of special education services. Lastly, the district asserts that the IHO "incorrectly applied the 'adversely affect educational performance' standard."

As relief, the district seeks reversal of the IHO decision and a finding denying the parents tuition reimbursement for Windward for the 2020-21 school year.

In their answer, the parents deny the district's material allegations in its request for review. The parents argue that the district did not sustain its burden of proof with objective evidence that student was ineligible to be classified as a student with a learning disability. The parents maintain that the district failed to adequately evaluate the student to determine her eligibility for special education services. Specifically, the parents argue that the district failed

⁵ A CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

to conduct academic, social/emotional/behavioral, cognitive, or functional assessments including a classroom observation or psychoeducational evaluation of the student. The parents contend that the district failed to comply with statutory obligations regarding identification, classification, and placement of the student.

The parents argue that the IHO correctly found that the district failed to sustain its burden of proof. According to the parents, the IHO "aptly found" that instead of meeting its burden of proof, the district attacked and attempted to discredit the private neuropsychological report without putting on an affirmative case or submitting proof that the student was incorrectly diagnosed with dyslexia or a learning disability. Moreover, the parents argue that the district disregarded the private neuropsychologist's report that detailed the student's difficulties in reading, language-based tasks, writing, spelling, executive functioning, and fluency. The parents further argue that the IHO's reference to child find obligations were "instructive" and "not dispositive" of the IHO's final conclusion. Furthermore, the parents contend that the IHO correctly found that procedural and substantive violations led to district's improper ineligibility determination which resulted in a "significant deprivation of the student's rights" as she was denied special education services.

The parents next address the fact that the district failed to conduct a classroom observation in connection with the initial evaluation and instead relied on the nonpublic school teacher report, which demonstrated the student's difficulties. The parents also assert that the district first raised in its request for review the fact that the nonpublic school failed to provide all information requested by the CSE. The parents argue that it was the obligation of the district to obtain "sufficient evaluative material to appropriately assess a student and this non-delegable burden cannot be shifted." The parents argue that the evidence in the hearing record failed to support the district's ineligibility determination. They argue that contrary to the district's position, the student's advancement from grade to grade is not dispositive on the issue of denying the student special education services. Therefore, the district's ineligibility determination was "flawed" and denied the student "her right to meaningful educational opportunities."

Next, the parents argue that the teacher report together with the private neuropsychological evaluation supported a finding that the student was eligible for special education services. Moreover, the parents assert that there was no evidence presented by the district that the student's struggles were a result of the dual-language program and that, rather, the evidence supported the diagnosis of a learning disability warranting special education services. The parents seek to uphold the IHO decision.

The district submitted a reply, asserting that the parents' argument that "the record does not support the [district's] unpreserved, unsubstantiated and untimely allegation, raised [f]or the first time in its [request for review], that [the student's] school did not provide requested information" is incorrect. Although the district has no obligation to raise issues as the parents do in the due process complaint notice, the district argues that this relates to issues raised in the due process complaint notice, to wit, whether the district "considered sufficient evaluative information." The district contends that the nonpublic school teacher report was only partially filled out and it did not include data to support the teacher's grade level estimates. Accordingly,

the district argues it is not precluded from arguing that CSE requested information from the nonpublic school and to the extent the nonpublic school did not comply with the district's request, the lack of information does not amount to denial of a FAPE.

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" (Andrew 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]).⁶

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

⁶ 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).

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

At the outset, I note that the district did not appeal from the IHO's findings on the appropriateness of Windward or equitable considerations, therefore, the IHO's findings on these issues are final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the only issue for review is whether the IHO erred in finding that the June 2020 CSE should have found the student eligible for special education as a student with a learning disability.

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

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[c][10]; 8 NYCRR 200.1[zz][6]).⁷ 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 an response to intervention process, or assessments identify a pattern of strengths and weaknesses determined by the CSE

⁷ The IHO articulated and relied on the "adversely effects" standard, which was error, but because of the conclusions I reach in this decision, it is not outcome determinative.

to be indicative of a learning disability (34 CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]). 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]).

In addition to drawing on a variety of sources including "aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]), federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).⁸

In this instance, participants at the June 2020 CSE meeting included a district school psychologist who also served as the district representative, a district special education teacher, a district regular education teacher, a school psychologist from the student's nonpublic school, and the student's mother (Dist. Exs. 5 at p. 6; 6 at ¶7). The June 2020 CSE considered the January/May 2020 private neuropsychological evaluation, the district April 2020 social history, and a June 3, 2020 teacher report from the nonpublic school in determining the student's eligibility for special education (Tr. pp. 91, 104; Dist. Ex. 6 at ¶8; see Parent Ex. C; Dist. Exs. 3-4; 5 at pp. 1-4).⁹ In a prior written notice dated June 17, 2020, the district indicated that "the IEP team conducted a social history, psychoeducational evaluation, classroom observation, and other appropriate assessments or evaluations" (Dist. Ex. 1 at p. 1). However, the hearing record does not contain reports from a psychoeducational evaluation, classroom observation, or any assessments conducted by the district other than the April 2020 social history report (Tr. p. 90; see Dist. Ex. 4).

Based on the above, the evidence in the hearing record does not support departing from the IHO's determination that the June 2020 CSE did not follow the specific procedures set forth in State and federal regulations for consideration of the eligibility of a student suspected of

⁸ More specifically, the CSE must consider data that demonstrates that the student was provided appropriate instruction by qualified personnel in a "regular education setting," and data-based documentation of "repeated assessments of achievement at reasonable intervals, reflecting formal assessments of student progress during instruction" (8 NYCRR 200.4[j][1][ii][a]-[b]).

⁹ The June 2020 teacher report discussed the student's reading, reading comprehension, written language, spelling/organization, math, expressive language skills, handwriting, and social/emotional functioning within the classroom setting (see Dist. Ex. 3).

having a learning disability (see 34 CFR 300.308[a]; 300.310; 8 NYCRR 200.4[j][1][i]; [2]). It does not escape me that there may be valid reasons why a traditional in-person classroom observation was not conducted prior to the June 2020 CSE meeting,¹⁰ or why the student's regular education teacher did not attend the CSE meeting; however, the district has failed to present evidence in the hearing record to explain why the process for this student deviated from the process set forth in State and federal regulations.

While the district argues that the June 2020 teacher progress report sufficiently made up for the lack of a classroom observation, the district nevertheless appears to concede that the CSE did not have "data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction," which was required to ensure that the student's underachievement was not due to lack of appropriate instruction (Req. for Rev. at ¶¶ 13-14; see 8 NYCRR 200.4[j][1][ii]). The district argues that the CSE should not be held accountable for the nonpublic school's failure to provide this information to the CSE. However, in connection with an initial evaluation, the CSE is required to review existing data including classroom assessments pertaining to the student and, based on that review, the CSE must identify what additional data, if any, is necessary to determine whether a student has a disability (see 8 NYCRR 200.4[b][5][i]). Therefore, the district had the obligation to obtain and review any necessary information regarding how the student was functioning in school, and a public school district cannot shift that responsibility to the parents or the nonpublic school. A parent is obligated to cooperate with the CSE by facilitating the district's efforts to obtain information from a nonpublic school that the parent selected, but before the district calls foul and points the finger at the parent or the nonpublic school the district should be able to demonstrate that it made meaningful efforts to gather the information from the nonpublic school that required by the CSE. Sufficient evidence of those efforts is missing from the district's case here.¹¹

Additionally, in determining whether a student should be classified as a student with a learning disability, a CSE must also create a written report documenting information, including, among other things, whether the student "does not achieve adequately for the student's age or to meet State-approved grade-level standards" and whether "the student does not make sufficient progress to meet age or State-approved grade-level standards" or "exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development" (34 CFR 300.311[a]; 8

¹⁰ Under normal circumstances, a school district should be prepared to send district personnel into the nonpublic school to conduct an observation of a student who is attending a non-public school setting as part of an evaluation. Due to the Covid-19 pandemic that erupted in March 2020, school buildings statewide were closed by pursuant to an executive order issued by Governor Cuomo that was extended past the time of the June 2020 CSE meeting. But there no explanation or documentation of the district of the efforts by the evaluating district personnel that described their efforts to comply with the obligation to observe the student in the learning environment, even if that observation was conducted through virtual means.

¹¹ The district's argument would be more relevant in the context of weighing equitable considerations and the determination of appropriate relief, but as noted above the district has not challenged the IHO's findings regarding the parent's cooperation or the district's "unclean hands" in its request for review.

NYCRR 200.4[j][5][i]).¹² There is no evidence that the required documentation was prepared by the CSE (see Dist. Ex. 5). The only documentation in the hearing record pertaining to the CSE's learning disability eligibility determination was the statement that the student was "able to participate in the general education curriculum without special education supports" (Dist. Ex. 5 at p. 5).

Turing to the evaluative information reviewed by the June 2020 CSE, the student was initially seen by a private neuropsychologist in January 2020 who determined the student had "language-based learning vulnerabilities" and recommended individual tutoring two times per week with an Orton-Gillingham specialist (Tr. pp. 162-63; Parent Exs. C at pp. 1-2; O at p. 2). After receiving the specialized reading instruction, the private neuropsychologist saw the student again in May 2020 (Parent Exs. C at p. 1; O at p. 2).¹³ The private neuropsychologist observed that during the evaluation the student was "cooperatively engaged" and put forth "notable" effort but also that she exhibited a "heightened concern regarding her performance, particularly during academic tasks" (Parent Ex. C at p. 2; see Parent Ex. M at p. 3). He indicated that the student was shy but did not note any behavioral concerns (Tr. p. 140; Parent Ex. M at p. 3).

Administration of the Wechsler Intelligence Scale for Children- Fifth Edition (WISC-V) yielded a full-scale IQ of 105 which was in the average range of intellectual functioning (Parent Exs. C at pp. 3-4, 15; M at pp. 2-3). However, the private neuropsychologist noted that there was "significant variability in [the student's] performance" and therefore, the student's full-scale IQ was "not an accurate representation of her abilities" (Parent Ex. C at pp. 3, 15).¹⁴ Based upon these noted discrepancies, the private neuropsychologist calculated a General Ability Index "to capture [the student's] intellectual functioning in the absence of processing speed and working memory demands" (Parent Exs. C at p. 3; M at p. 3). Her general abilities were found to be in the high average range (Parent Ex. C at p. 3). Although the student's cognitive proficiency was found to be in the average range it "was markedly lower" which the neuropsychologist opined indicated "that her higher-order reasoning abilities [we]re significantly stronger than her ability to process information efficiently" (*id.*). He further surmised that the educational implication of the noted variabilities was the likelihood that the student would demonstrate "inconsistent performance within the classroom setting with respect

¹² In addition, each CSE member must certify whether the written report accurately reflects that member's conclusion; where it does not reflect the member's conclusion, that CSE member must also submit a statement identifying their own conclusions (8 NYCRR 200.4[j][5][ii]). State 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," Appendix B).

¹³ The neuropsychologist reported that the May 2020 testing occurred remotely due to the COVID-19 pandemic and advised that the "results must be interpreted with caution given the non-standardized nature of the administration" (Parent Ex. C at p. 3).

¹⁴ The student attained the following indices scores on the WISC-V: fluid reasoning, standard score (SS) 118, 88th percentile; verbal comprehension, SS 106, 66th percentile; visual spatial SS 100, 50th percentile; working memory, SS 100, 50th percentile; and processing speed SS 95, 37th percentile (Parent Ex. C at pp. 3, 15).

to her ability to demonstrate her knowledge in a reliable and efficient manner" (Parent Ex. M at p. 3).

Based on the student's performance on the verbal domain of the WISC-V, the neuropsychologist reported that her expressive and receptive language abilities were in the average range (Parent Exs. C at pp. 3-4; M at p. 3). He noted that the student had an "age-appropriate capacity for conceptual and abstract thinking" which indicated a "solid ability" for making "meaningful connections between seemingly disparate concepts" (Parent Ex. C at p. 4). In addition, the student exhibited a strong capacity "to provide oral definitions of increasingly complex vocabulary words" and "age-expected capacity" "for accessing and communicating her general fund of knowledge" (*id.*). Further, the neuropsychologist indicated that the student's ability to articulate an understanding of social norms and conventions was found in the "upper" average range (*id.*). The neuropsychologist concluded that based upon the student's performance on the WISC-V and the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) the student was "expected to keep pace with her peers in activities that require[d] verbal skills, including reading and writing, as well as communicating logically and efficiently" (*id.*). With regard to the student's performance in the non-verbal domain, the neuropsychologist reported that the student's abilities in visual perception, organization, visual-spatial problem solving, and visual motor coordination were average and within the expected range (Parent Exs. C at p. 4; M at p. 3). The student's nonverbal problem solving, and reasoning abilities were in the high average range indicating a "significant strength" (Parent Ex. C at p. 4).

Next, the neuropsychologist found the student's attention, concentration, and ability to exert mental control to be within the average range which he explained demonstrated the student's ability to maintain concentration and "to hold information in her mind for brief periods of time, as well as to organize information according to task demands" (Parent Exs. C at p. 5; M at p. 4). The neuropsychologist administered the Conners' Continuous Performance Test, Third Edition (CPT-3) to determine the student's ability to sustain attention over an extended period of time and found that the test "did not reveal a clinical pattern of atypical scores"; although the student demonstrated lapses in attention during the test administration, her scores did not indicate a problem with sustained attention (Parent Exs. C at p. 5; M at p. 2). Overall, the neuropsychologist concluded that the findings with respect to attention and memory showed that the student had an "adequate working memory" and "age-appropriate capacity to maintain focus for longer timeframes when tasks [we]re less engaging" (Parent Ex. C at p. 5). Additionally, the student's processing abilities fell within normal expectations indicating the student's ability to "to efficiently process, learn, and produce information" (Parent Exs. C at p. 5; M at p. 4). However, the neuropsychologist noted that the student's ability "to engage in tasks relying on speed of processing [wa]s less developed than her higher order reasoning skills" and her globally reflective approach to tasks, which prioritized accuracy over speed, likely resulted in the student working at a slower pace than expected (Parent Ex. C at pp. 5-6). Additionally, the neuropsychologist employed the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2) to assess the student's memory and found she had a "solid capacity" in her short-term and long-term abilities "to encode and retrieve linguistic information" (*id.* at p. 6). He noted, however, that the student's level of comfort and self-confidence could mediate this process (*id.*).

To assess the student's academic functioning, the neuropsychologist administered select subtests from the Wechsler Individual Achievement Test, Third Edition (WIAT-III), the Kaufman Test of Educational Achievement, Third Edition (KTEA-3; Form A), and the Gray Oral Reading Tests, Fifth Edition (GORT-5; Form A), and later in May 2020, he administered subtests from the KTEA (Form B), GORT-5 (Form B), and an additional subtest from the WIAT-III (Parent Exs. C at p. 6; M at pp. 2, 4). In reading, the student's ability to decode and read aloud new nonsense words or pseudowords was within expectations as was her ability to recognize and read common words in isolation and name familiar objects under time constraints (Parent Exs. C at p. 6; M at p. 4). The neuropsychologist reported that the student's "reading rate was measured to be inconsistent across word, sentence, and paragraph-length level, highlighting vulnerabilities in visual scanning, processing speed, as well as efficient decoding" (Parent Exs. C at pp. 6-7; M at p. 5). He found the student's ability to read short passages without any time constraints and answer concrete and inferential questions to be within the expected age range (Parent Ex. C at p. 7). According to the private neuropsychologist, the student benefitted from context when reading words, and when she did not have access to the text to reference her scores decreased but remained in the expected range (*id.*). In May 2020, when the neuropsychologist reevaluated the student, her sight word recognition, nonsense word decoding skills, naming of objects, decoding of words efficiently, oral reading proficiency all declined (*id.*). The neuropsychologist concluded that there were "clear vulnerabilities" in the student's "foundational reading skills, inclusive of her basic phonics and sight word reading vocabulary, which [we]re less developed and more variable than would be expected, particularly given her strong intellectual potential" (Parent Ex. C at p. 7; M at p. 6).

The neuropsychologist reported that in math, the student's calculation skills and fluency in computational facts were below grade-level (Parent Ex. C at p. 8). Based on the student's performance on mathematical tasks, the neuropsychologist found that the student demonstrated "vulnerabilities" in math specifically when time constraints were imposed (Parent Exs. C at p. 8; M at p. 6). In writing, the neuropsychologist found that the student demonstrated weak spelling abilities (Parent Ex. C at p. 8). The student performed better when creating new sentences as opposed to combining sentences where she performed below expectations (*id.*). When combining sentences, the student was found to exclude key details and neglect basic grammar, which contrasted with "her solid verbal fluency" (*id.*). The neuropsychologist noted that the student's original sentences were often simplistic and although her spelling errors did not affect comprehensibility the student's written language was, "at times," vague (*id.*). According to the neuropsychologist, on a timed writing task the student's "written productivity was limited," she failed to use any pre-writing strategies, and struggled to organize and develop her ideas (*id.*). The private neuropsychologist concluded that the student weakness in writing (primarily below grade level abilities) was "markedly discrepant with her intellectual potential" and "verbal fluency" (*id.* at p. 9).

The student and her mother completed the Behavior Assessment System for Children, Third Edition (BASC-3) as a means of assessing the student's social, emotional, and behavioral functioning (Parent Exs. C at p. 9, M at p. 2;). The neuropsychologist reported that the parent's responses did not yield clinically significant scores, however, the student's mother reported that the student worried about making mistakes and about what her peers thought (Parent Ex.

C at p. 9). The parent also noted the student's shyness, especially around adults (Parent Ex. C at p. 9). According to the neuropsychologist, the student denied any clinical symptomology in her responses but endorsed feeling nervous and stressed (*id.*). He stated that the student's "vulnerabilities" in "self-confidence" and "self-esteem" were evident (Parent Ex. C at p. 9; Dist. Ex. 5 at p. 4).

In conclusion, the private neuropsychologist found that when factoring out skills that underlie cognitive proficiency, the student had "strong cognitive potential," but her academic testing showed "unevenly developed skills" (Parent Ex. C at pp. 9-10). He opined that "[c]ollectively, [the student's] academic profile is consistent with language-based learning disabilities, notably dyslexia" (*id.* at p. 10). Finally, the private neuropsychologist diagnosed the student with Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5) diagnoses of specific learning disorder with impairment in reading and specific learning disorder with impairment in written expression (Parent Exs. C at p. 11; M at p. 7).

The private neuropsychologist made certain recommendations based upon the evaluative results (Parent Exs. C at pp. 11-14; M at p. 7). He concluded that despite the interventions the student received inside and outside of school during the 2019-20 school year, the student continued "to display academic difficulties aligned with language-based learning challenges" and was not making "basic appropriate progress" (Parent Ex. C at p. 11). He opined that the student was at risk for greater learning and social-emotional decline (*id.*). Based on the student's strengths and weaknesses, the private neuropsychologist stated that the student required placement in a "small, full-time specialized environment that offers a small student-teacher ratio, significant structure, and scaffolding to bolster her academic achievement, her self-confidence, and her classroom engagement" (*id.*). He recommended that the student place with an appropriate peer group of students with "solid cognitive potential and no disruptive behavior issues" (*id.*). The neuropsychologist stated that in the interim it was vital that the student be provided with appropriate curriculum and aids as were available at her school and that she continue to receive specialized instruction with an Orton-Gillingham trained provider to address her language-based learning difficulties (*id.*). With respect to the student's difficulties with pace, the private neuropsychologist recommended extended time for assignments and tests, separate location for tests, and test instructions and questions read (*id.* at p. 12). In connection with the student's social/emotional development, the private neuropsychologist recommended educating the student with respect to emotion words to help her express her feelings, the use of consistent praise by teachers and treatment providers, and helping the student learn coping strategies for challenging tasks (*id.*). The private neuropsychologist stated the student required "multi-sensory reading interventions" to address, among other things, the development of her reading fluency, phonics drills to assist with decoding skills, and continual monitoring of her reading progress (*id.*). He recommended that instruction be delivered in smaller sections with time to process and respond, opportunity for preferential seating away from distracting stimuli, exposure to classroom material in advance, frequent teacher check-ins, multimodal presentation of information in the classroom, and organizational tools, i.e., graphic organizers (*id.* at pp. 13-14). Although the June 2020 CSE considered the January/May 2020 private neuropsychological evaluation, along with the June 2020 teacher report and the April 2020 district social history, the CSE determined that the student was not eligible for special education services.

When provided with the neuropsychological evaluation of the student, the CSE was presented with a documented diagnosis of a specific learning disorder in accordance with the DSM-V criteria (Parent Ex. C at p. 10). The clinical neuropsychologist's medical diagnosis alone is not a sufficient substitute for the educational eligibility determination made by a CSE. However, that is not a panacea because in order to move forward with finding that the student was not eligible for special education as a student with a learning disability under IDEA, the CSE was required to produce evaluative data to support its conclusion. However, instead the rationale provided by the district amounts to conjecture that merely attacks the amount of weight to be accorded to the private evaluation. For example, the district focuses on a statement in the neuropsychological evaluation report indicating that the student's participation in a dual-language program "likely exacerbated the difficulties she has experienced in developing reading automaticity" (Parent Ex. C at p. 10). However, the neuropsychological evaluation report also noted that "[d]espite receiving specialized interventions both in and out of school," the student's foundational reading skills "evidenced decline" (*id.* at pp. 7-8). It is not uncommon in disputed cases that private experts hired by parents and district personnel will have a difference of opinion, but without having input from a classroom observation or the student's teacher showing how the student was functioning in class, it is unclear how the district can argue that the student's "struggles were primarily the result of attending a dual-language program" (Req. for Rev. at ¶26). In these circumstances, the degree of weight that the CSE should have accorded to the private evaluation decreases in relevance when the CSE has not shown though evidence that it followed the evaluative procedure.

In conclusion, the January/May neuropsychological evaluation report provided support for the diagnosis of dyslexia and it may well be that the student requires special education as a result thereof. But the district's criticism of the neuropsychological report and the CSE's ability to rely upon it is not entirely unfounded. As noted by the district, the private neuropsychologist did attempt to rely on a discrepancy between the student's achievement and intellectual ability to justify his opinions, but as noted above the severe discrepancy model cannot be relied upon to determine a student's eligibility under the category of specific learning disability. The private neuropsychologist also appeared to stop short of characterizing the difference as a "severe" discrepancy in his testimony, but then only noting that in his view the discrepancies required intervention (Parent Exs. C at p. 9; M at p. 7; Tr. 148-49; 159). The private neuropsychologist tended to rely on a soft term like "vulnerabilities" to reach the conclusion that the student should be placed in a small, structured, and supportive learning environment within a special education school (Parent Ex. C at pp. 1, 6, 8-9).

Because the CSE was presented with legitimate concerns, yet ultimately did not have the appropriate evaluations and data to determine the student's eligibility under the specific learning disability category, the CSE should reconvene to follow the unique procedures for the specific learning disability category and issue a new eligibility determination.

The problem for the district in this case is that to avoid the parents tuition reimbursement request, in my view it had had to establish that the student was not eligible to receive a FAPE when faced with a private evaluation that at the very least expressed legitimate concerns. I am unconvinced that there are sufficient grounds to overturn the IHO's decision based on the evidence showing the district's failure to follow the evaluation and CSE meeting

procedures by conducting a classroom observation, including a regular education teacher of the student at the June 2020 CSE, and the CSE's failure to document its findings in writing in compliance with 8 NYCRR 200.4(j). This resulted in the CSE's failure to engage in an appropriate analysis of the student's eligibility that addressed the concerns raised in the neuropsychological evaluation and, in this instance, the failure supports the IHO's determination that there was a denial of a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2020-21 school year, the IHO's award of tuition reimbursement for Windward in the amount of \$61,550 shall be upheld.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 25, 2022**

**JUSTYN P. BATES
STATE REVIEW OFFICER**