



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-007

Application of the BOARD OF EDUCATION OF THE DRYDEN CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Hancock Estabrook, LLP, attorneys for petitioner, Lindsey H. Hazelton, Esq. and Whitney M. Kummerow, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, Courtney Haas, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district failed to offer an appropriate educational program to respondents' (the parents') son for the 2014-15 school year. The parents cross-appeal from those portions of the IHO's decision which denied their requests for reimbursement of privately obtained services and for compensatory educational services for the 2013-14 and 2014-15 school years. The appeal must be sustained in part. The cross-appeal must be sustained in part.¹

¹ In September 2016, Part 279 of the Practice Regulations were amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017.

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 entered the district elementary school in kindergarten (Tr. pp. 694-95). In first grade (2012-13 school year) the student received additional support in reading and mathematics; due to academic concerns, the parents referred the student to the CSE (Parent Ex. LL at p. 1; Joint Ex. 22 at p. 3). The CSE conducted a psychoeducational evaluation that reportedly showed that the student had average cognitive ability and academic skills, but suggested that he was struggling with anxiety, adaptability, self-control, hyperactivity, and impulsivity (Joint Ex. 22 at p. 3).² The student was found ineligible for special education and related services (id.). At the end of the 2012-13 school year the student's reading fluency and comprehension were below curriculum standards (Parent Ex. LL at p. 1).

During summer 2013, the student underwent several evaluations which resulted in diagnoses of anxiety disorder and attention deficit hyperactivity disorder (ADHD) inattentive type, and indicated concerns in the areas of sensory processing, social language, and auditory processing (Joint Ex. 22 at p. 2). The parents referred the student for accommodations pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504) in August 2013 (Joint Ex. 3). For the 2013-14 school year, the student attended a general education classroom and received daily academic intervention services (AIS) for English language arts (ELA) (Tr. pp. 244-45; Dist. Ex. 44; Parent Ex. XX at p. 1).³

A section 504 Committee convened on September 16, 2013 (second grade) for an initial eligibility determination meeting and found the student in need of section 504 services based on his anxiety and ADHD, which substantially limited his attention and significantly impacted his ability to focus (Joint Ex. 4 at pp. 1-2). The section 504 committee recommended that the student receive the following program accommodations and services: individual counseling, chunking of assignments, teacher check-in at the beginning of a task, breaking down directions, and special seating arrangements (id. at p. 2).

A section 504 Committee reconvened several times during the 2013-14 year to modify the student's 504 accommodation plan (Joint Exs. 5; 7; 9). The parents obtained an October 2013 occupational therapy (OT) evaluation, which showed that the student had difficulties with sensory processing, visual tracking, and visual perceptual skills (Parent Ex. O at p. 10). In a meeting held in November 2013, the section 504 Committee added the provision of class notes to the student's 504 accommodation plan (Joint Ex. 5 at p. 2). At a subsequent meeting in January 2014, the section 504 team added a sensory program to the student's 504 accommodation plan (Joint Ex. 7 at p. 2). Additionally, at a June 2014 meeting, the section 504 Committee reviewed the results of a March 2014 privately obtained auditory processing evaluation, and April 2014 private OT, counseling, and speech-language reports, and amended the student's 504 accommodation plan to include modified spelling lists, repeating and clarifying directions, and testing accommodations

² The student's first grade psychoeducational evaluation report was not entered in the hearing record.

³ As discussed more fully below, State regulations define AIS as additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance (8 NYCRR 100.1[g]).

(extended time, separate location, and directions repeated) (Parent Exs. R-T; Joint Ex. 9 at pp. 2-3).

The student's second grade report card showed that he consistently met curriculum standards in science and social studies (Dist. Ex. 4 at pp. 2-3). With respect to mathematics, the student met or was approaching curriculum standards in all measured areas; however, teacher notes indicated that the student had difficulty applying math strategies independently and sometimes required assistance when learning new concepts (*id.* at pp. 1-2). The report card also indicated that the student was approaching curriculum standards in reading and writing, with the exception of reading fluency, where the student consistently performed below curriculum standards (*id.* at p. 1). According to teacher comments, the student struggled throughout the school year to maintain focus and stay on task (*id.* at p. 3). Based on the student's AIS response to intervention (RtI)⁴ Tier Two progress reports and teacher progress reports, the student made some progress with his literacy skills during the 2013-14 school year, but according to the student's performance on the Developmental Reading Assessment, Second Edition (DRA-2),⁵ his independent reading level did not improve in the spring of 2014 (Dist. Ex. 44; Parent Exs. WW-XX; BBB). The student began working with a private tutor during summer 2014 (Tr. pp. 752, 827, 970).

The student attended a general education classroom for third grade (2014-15) (Dist. Ex. 19). A section 504 Committee convened on September 10, 2014 and amended the student's 504 accommodation plan, by removing ADHD inattentive type as an impairment and adding executive functioning deficits, auditory processing difficulties, anxiety disorder, and sensory sensitivity as impairments that limit a major life activity (Joint Exs. 11 at pp. 1-2; 12 at p. 3). The September 2014 section 504 Committee discussed setting up AIS for the student for mathematics (Joint Ex. 12 at p. 3). According to minutes from the section 504 committee meeting, the reading teacher reviewed the student's Tier Three RtI program which involved daily pull-out and small group reading instruction utilizing the Road to Reading program and progress monitoring (Tr. p. 548-49; Joint Exs. 12 at p. 1; 23). As recorded in the meeting minutes, the parents were considering a CSE referral (Joint Ex. 12 at p. 3). At the close of the meeting, the minutes indicated that in three weeks the team would follow-up regarding data and progress in order to make a determination regarding a referral to the CSE (Joint Ex. 12 at pp. 3-4).

The school psychologist and reading teacher testified that the student made progress in reading during fall 2014, but his reading fluency plateaued in November 2014 (Tr. pp. 407-08, 410-11, 518, 525, 556). On November 14, 2014, the parents made a written request for referral of the student to the CSE for an evaluation (Joint Ex. 14 at pp. 1-3). As part of their referral, the parents requested the initial evaluation of the student include the following: a neuropsychological evaluation (to identify executive functioning and processing concerns), a communication assessment, an occupational therapy evaluation (including a sensory profile), a speech-language

⁴ 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 [Oct. 2010], [available at http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf](http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf)).

⁵ The DRA-2 is described in the hearing record as an assessment that measures fluency (accuracy, phrasing, expression, words read correctly) reading rate, and comprehension (Tr. p. 512). The student's second grade teacher testified that her students are assessed using the DRA-2 three times per year (Tr. pp. 258-59).

evaluation (including phonological awareness and auditory processing), a reading assessment, and additional assessments identified by the team working with the student (id. at p. 3). A form seeking consent for initial evaluation was sent to the parents on November 19, 2014, which was signed by parents on December 7, 2014 and received by the district on December 8, 2014 (id. at p. 4).

The district conducted a comprehensive evaluation, including psychoeducational, speech-language, and OT evaluations in December 2014 and January 2015 (Dist. Exs. 7; 9; Joint Ex. 22). A CSE convened on February 3, 2015 to review the evaluation results and determined that the student was eligible to receive special education and related services as a student with a learning disability (Joint Ex. 16 at pp. 1-7). The February 2015 CSE recommended placement in a general education program with one hour of daily direct consultant teacher services in English language arts (ELA), 30 minutes of daily 5:1 resource room support, 30 minutes of individual counseling per week, and multiple program modifications and testing accommodations (id. at pp. 1, 13-15).

A neuropsychological evaluation was completed in March 2015 and results were reviewed with parents and district personnel via a conference call on April 15, 2015 (Tr. pp. 603, 799, 912; Joint Ex. 17).⁶ According to the results of the neuropsychological evaluation, the student exhibited weaknesses in auditory and language processing, phonological and orthographic coding, executive functioning, self-regulation, attention, and social interactions and demonstrated a depressed mood and generalized anxiety (Joint Ex. 17 at pp. 9-11). The evaluator determined that, based on the student's neuropsychological profile, he presented with developmental dyslexia and met the DSM-V diagnostic criteria for a specific learning disability in reading and ADHD-combined type (id.).

A CSE convened on June 17, 2015 to review the results of the April 2015 neuropsychological evaluation and the May 2015 assistive technology evaluation (Joint Ex. 18 at pp. 2-4). According to the meeting minutes, the CSE also discussed multisensory reading programs, IEP program modifications and accommodations, trial use of an FM system, annual goals, and functional behavioral assessment (FBA) data collection (Joint Exs. 18; 19 at pp. 1-6). The CSE modified the student's IEP by recommending the addition of two new reading goals (addressing the student's ability to read and spell words with long and short vowel patterns and improving the student's reading fluency and comprehension at his instructional level) and one new writing goal (addressing the student's ability to independently write a paragraph using correct grammar, punctuation, and spelling with the use of an editing checklist); new program modifications/accommodations including scaffolding math homework and allowing for breaks; assistive technology including a trial period for access to a word processor and use of an FM system; supports for school personnel including a monthly team meeting; and an additional testing accommodation of allowing breaks (compare Joint Ex. 16 at pp. 13-15, with Joint Ex. 19 at pp. 12-15).

According to a June 24, 2015 AIS progress report, the student continued to make gains in reading during spring 2015 (Dist. Ex. 21). However, based on his third grade report card, the student's ability to demonstrate numerous reading and writing skills remained below grade-level expectations throughout the school year (Dist. Ex. 19 at p. 1).

⁶ A copy of the neuropsychological evaluation report was stamped as received by the district on April 27, 2015 (Joint Ex. 17 at p. 1).

A. Due Process Complaint Notice

By amended due process complaint notice dated November 11, 2015, the parents alleged that the district failed to offer the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years (Joint Ex. 1).^{7 8} Relevant to this appeal, the parents asserted that the district failed to evaluate the student and find him eligible for special education and related services based on a lack of progress in his reading level during the 2013-14 school year, private evaluation reports indicating the student had weaknesses in the areas of writing, visual tracking and perception, auditory processing, sensory processing, and phonemic awareness, and diagnoses of anxiety disorder, ADHD inattentive type, reading and learning disabilities and a sensory processing disorder (*id.* at pp. 3-4). The parents further asserted that the district "continued to violate the child find provisions of the IDEA well into [the student's] third grade year (2014-15)" (*id.* at p. 4). The parents also contend that once the CSE met and found the student eligible for special education as a student with a learning disability in February 2015, the district denied the parents the opportunity to meaningfully participate by refusing to reconvene to discuss the student's annual goals and the results of an April 2015 neuropsychological evaluation report (*id.* at pp. 4-5). Additionally, the parents contend that the February 2015 IEP was substantively deficient because it was "silent with regard to [the student's] Dyslexia," did not appropriately address the student's deficits in the areas of reading, writing, and comprehension, and did not recommend multisensory reading instruction (*id.* at p. 5). The parents further contend that the February 2015 IEP did not adequately identify the student's present levels of performance, omitting significant classroom behavior problems, and did not include sufficient annual goals as the goals were not measurable, too vague, lacked specificity to guide instruction and evaluate progress, and the IEP did not include annual goals to address reading comprehension, following directions, distractibility, organization, reading fluency, behavioral concerns, anxiety, transcribing sentences, and turn taking.

As relief, the parents sought determinations that the district violated its "Child Find" obligation and denied the student a FAPE for the 2013-14 and 2014-15 school years (Joint Ex. 1 at pp. 3-6, 12). The parents requested an independent speech-language evaluation, compensatory speech-language services, 1:1 reading instruction, OT services, counseling services, and reimbursement of privately obtained services (*id.* at p. 12). The parents further requested a new IEP that included the recommendations made in the April 2015 neuropsychological evaluation, as well as OT, speech-language therapy, typing instruction, the use of word prediction software, and individual reading instruction (*id.*). The parents also sought an order that the district be required to fund professional development for teachers in providing instruction to and modifying curriculum for students diagnosed with dyslexia, central auditory processing disorder, executive dysfunction, and ADHD (*id.*).

The district responded to the parents' amended due process complaint notice on November 30, 2015 (Joint Ex. 2). Pertinent to the parents' claims regarding the 2013-14 and 2014-15 school years, the district denied any violation of child-find contending that it implemented "school-wide

⁷ The parent initially filed a due process complaint notice dated July 28, 2015.

⁸ During the impartial hearing, the parties settled the parents claims related to the 2015-16 school year and the parents withdrew those claims (Tr. p. 686). Consequently, the parents' claims related to the 2015-16 school year are not discussed herein.

approaches and pre-referral interventions" and further asserted that the parents participated in the development of the February 2015 IEP and that it was appropriate (id. at pp. 1-3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on January 11, 2016, which concluded on June 22, 2016, after seven days of proceedings (see Tr. pp. 1-1,061). In a decision dated December 23, 2016, the IHO determined that the district's section 504 accommodation plan for the 2013-14 school year was appropriate (IHO Decision at pp. 5, 10-11).⁹ However, the IHO found that "the District should have taken action by the end of the 2013-14 school year" towards identifying the student as a student with a learning disability (id. at p. 5, 11-12). The IHO found that the district failed to offer the student a FAPE from the beginning of the 2014-15 school year through the February 2015 CSE meeting when the student was found eligible for special education as a student with a learning disability (id. at pp. 5, 17).¹⁰

The IHO further found that the student's February 2015 IEP was appropriate until April 2015, when the parents provided the district with a private neuropsychological evaluation report (IHO Decision at p. 21). The IHO determined that the district's CSE failed to take sufficient action in response to the information contained in the April 2015 neuropsychological evaluation report and found the student should have received speech-language therapy beginning in May 2015 (id. at pp. 19-21). The IHO then reviewed the OT evaluations included in the hearing record and determined that the student did not require OT services (id. at pp. 21-23). The IHO awarded the

⁹ With respect to the student's section 504 plan, the hearing record indicates it was first developed for the student during the 2013-14 school year (Joint Ex. 4). The student's chronological educational history is relevant and included in the facts of this case, nevertheless it is important to note that the parents have not raised any claims relative to the student's section 504 plans and an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504. School districts are required to have policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review procedure, and districts may elect to satisfy the section 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36). However, in New York, the review procedure under section 504 does not include State-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Application of a Student Suspected of Having a Disability, Appeal No. 15-104; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). As the courts have recognized, the New York Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 hearings (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504 (see A.M., 840 F. Supp. 2d at 672). While the factual allegations underlying the parents' claims arising under the IDEA may involve information set forth in the student's section 504 plans, I make no findings relative to section 504.

¹⁰ As further discussed below, the IHO decision indicates that the district denied the student a FAPE beginning in both June 2014 and July 2014 (compare IHO Decision at p. 17, with IHO Decision at p. 5); however, considered together with the language that "the District should have taken action by the end of the 2013-14 school year," the IHO's decision is interpreted as meaning that the district denied the student a FAPE because it should have evaluated the student and had special education programming in place for the student by the start of the 2014-15 school year (id. at pp. 11-12).

parents reimbursement for their privately obtained speech-language, counseling, and tutoring services, including 1:1 reading instruction and math tutoring (id. at p. 23).

IV. Appeal for State-Level Review

The district appeals. As noted above, the district's request for review was served after January 1, 2017 and accordingly, the amendments to Part 279 of the Practice Regulations which became effective January 1, 2017 apply to this appeal. In a letter dated February 2, 2017, the district was notified that its request for review did not comply with 8 NYCRR 279.8[c][2], which requires "a clear and concise statement of the issue presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review," because the district failed to number each issue. To rectify that oversight, the undersigned directed that the headings in the district's request for review would suffice as the issues presented on appeal and a corresponding numbering scheme was provided to the parties as follows: (1) "The IHO Erred in Ruling that the District Committed a "Child Find" Violation when it did not refer the Student to the CSE prior to the 2014-2015 School Year"; (2) "The IHO Erred in Finding that the District Failed to Consider the Neuropsychological Report and Recommendations in a Proper and Timely Manner"; (3) "The IHO's Award of Compensation for Social Worker Services is Wholly Unsupported"; (4) "The IHO's Award of Compensation for Behavioral Psychologist Services is Wholly Unsupported" (5) "The IHO's Award of Compensation for Speech Therapy Services is Unwarranted due to District's Proper Consideration of all Recommendations for Speech Therapy"; (6) "The IHO Erred in Ordering Reimbursement for Reading Tutoring as the Record Does Not Support a Finding of a Denial of FAPE."

In an answer with cross-appeal, the parents respond to the district's allegations with admissions and denials and argue that the IHO's decision should be sustained in part. The parents contend that the IHO correctly determined that the district denied the student a FAPE; however, they further allege that the IHO should have found that the district denied the student a FAPE at some point during the 2013-14 school year and that the February 2015 IEP was not appropriate. Among other claims, the parents allege that the IHO applied the wrong legal standard when evaluating their child find claim, erred by failing to award any compensatory educational services and erred in failing to order reimbursement of OT services obtained by the parents. As relief, the parents seek a determination that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, reimbursement for OT services, 92 hours of compensatory reading instruction, 23 hours of OT (delivered in 30-minute sessions), and 46 hours of speech-language therapy (delivered in 30-minute sessions).

The district answers the parents' cross-appeal with admissions and denials. The district also alleges that the IHO applied the incorrect standard for the parents' child find claim and argues that its RtI process was utilized appropriately. The district contends that the student made meaningful progress in reading and writing from September 2012 through December 2014.

V. Applicable Standards

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

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). 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. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 2017 WL 1066260, at *11-*12 [Mar. 22, 2017] [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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

VI. Discussion

A. Child Find

Initially, the parties agree that the student is eligible to receive special education and related services as a student with a learning disability. The parties' dispute concerns the timeliness of the referral of the student to the CSE for evaluation and a determination of eligibility. The parents contend that the student should have been referred during the 2013-14 school year and that the IHO erred by finding that the student did not need special education until the end of the 2013-14 school year. Although the IHO alternately listed June 2014 and July 2014 as the point at which the student should have been referred to the CSE, considered within the context of his statement that "the District should have taken action by the end of the 2013-14 school year," and also that the student was ultimately recommended to receive a 10-month program, those seemingly conflicting dates are interpreted as contemplating an initial evaluation period that should have started at the end of the 2013-14 school year so that the student would have had an IEP in place by the student's first day of school for the 2014-15 school year.

While the district argues that it was not required to refer the student for an evaluation prior to the parents' referral of the student in November 2014, the district does not specify or discuss whether the student would have been found eligible for special education and related services if he were referred for an evaluation earlier. The district points to the student's progress during the 2013-14 and 2014-15 school years, while the student was participating in the district's RtI process, as a basis for why the district did not refer the student for an evaluation during the 2013-14 or 2014-15 school years.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, and particularly relevant in this case, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]). see also 8 NYCRR 100.2[ii]).

As the student was participating in the district's RtI process for the entire time period in question (see Dist. Exs. 21, 44), the student's participation in the district's RtI process is central to determining whether the district met its child find obligations (see 8 NYCRR 200.4[a]). Nevertheless, at times, incomplete information regarding the district's process was entered into the hearing record. For example, on the second day of the hearing, the district's social worker was

asked when a student participating in RtI would be referred to the CSE for an eligibility determination (Tr. p. 380). The district social worker began to answer, an interruption occurred and the witness never gave a complete answer to the question (Tr. pp. 380-81). It became apparent during review of the hearing record that additional evidence of the district's RtI process was required to determine whether the district followed its RtI process in deciding whether or when this student should have been referred for an evaluation for special education.

In accord with State regulation providing that a State Review Officer may request additional evidence upon a determination that such evidence may be necessary in order to render a decision (8 NYCRR 279.10[b]), the undersigned directed the district to provide a copy of its written policy called for by State regulation regarding its RtI process in effect during the relevant time periods of the 2013-14 and 2014-15 school years. The undersigned advised both parties that State regulations provide that an RtI process identifies the district's responsibilities regarding referral for special education, and the parties were permitted to present arguments in their respective responsive pleadings as to whether and to what extent the written policy should be considered and relied upon by the State Review Officer in rendering a decision.

In response to the request, the district provided a copy of its RtI process (SRO Ex. 1), and neither party objected to its consideration. As discussed above, I find the district's policy is necessary in order to render a decision on the parents' claims in this matter and the policy will be discussed in further detail below (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

A review of some of the purposes, objectives, and requirements of RtI is in order. According to State guidance, RtI is the practice of providing high-quality instruction/intervention matched to student needs and using learning rate over time and level of performance to make important educational decisions about an individual student ("Response to Intervention, Guidance for New York State School Districts," Office of Special Educ., at p. 1 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). RtI represents an important educational strategy that has been shown to lead to more appropriate identification of and interventions with students with learning disabilities (id.). Identifying whether a student has a learning disability must be based on extensive and accurate information that leads to the determination that the student's learning difficulties are not the result of the instructional program or approach (id.). The State Education Department has established a regulatory policy framework for RtI in relation to school-wide screenings, minimum components of RtI programs, parent notification and use of RtI in the identification of students with learning disabilities (id.).

State regulation provides that a school district's process to determine if a student responds to scientific, research-based instruction shall include the application of information about the student's response to intervention to make educational decisions about changes in the student's goals, instruction, services and the decision to make a referral for special education programs or services (8 NYCRR 100.2[ii][1][v]). State regulation further mandates that school districts shall select and define the specific structure and components of its RtI program, including, but not limited to, the criteria for determining the levels and types of intervention to be provided to students, the amount and nature of student performance data to be collected and the manner and

frequency for progress monitoring; and to set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[ii][2], see 200.2[b][7]).

According to the district's written policy in evidence in this case, the minimum requirements of the district's RtI process adhere to the requirements of State regulation (compare SRO Ex. 1 at p. 1, with 8 NYCRR 100.2[ii][1]). With regard to the process by which the district shall determine if a student responds to intervention, the district's written policy sets forth that "use of the Tier Level of instruction will be specific to each student's needs and will be an ongoing process, with students entering and exiting tiers of intervention according to the analysis of student performance data and progress monitoring" (SRO Ex. 1 at p. 2). According to the district's policy, monitoring of student progress shall be an ongoing part of the RtI program from the initial screening to completion of the RtI process as applicable (id. at p. 4). Additionally, the policy indicates that "[c]lear benchmarks will be established for student performance and performance charts will be plotted at the completion of the instructional period/intervention process" (id.).

The district's policy further describes Tier Two RtI instruction as consisting of "small group, targeted interventions for those students identified as being 'at-risk' who fail to make adequate progress in the general education classroom" (SRO Ex. 1 at p. 3). The policy also provides that at the conclusion of Tier Two instruction, the district's Student Support Team (SST) will review the student's progress and determine whether Tier Two interventions should continue, or, if satisfactory progress has been shown, return the student to the general education classroom, or, if satisfactory progress is not shown, refer the student for Tier Three RtI instruction (id. at p. 3).¹¹ Under the district's policy, the SST is required to determine the amount and nature of student performance data that will be collected to assess student performance results and address academic needs as warranted, on an ongoing basis (id. at p. 4). The SST is further required to monitor the progress of those students receiving intervention services beyond that provided to all students in the general education classroom (id.).

1. 2013-14 School Year

Turning to the application of the district's policy to the particular student in this case, the hearing record shows that during the 2012-13 school year (first grade) the student received additional reading support daily (Parent Ex. LL at p. 1). Although the classroom teacher reported that the student's reading had greatly improved between the first and second marking periods, the student's report card showed that he moved from "meet[ing] curriculum standards" for fluency and comprehension at the beginning of the school year to "approach[ing] curriculum standards" during the second marking period (id. at pp 1-2). By the time of the third marking period, the student was "below curriculum standards" in reading fluency and comprehension (id. at p. 1).

While the hearing record is not clear as to the type of daily reading support the student received in the 2012-13 school year (first grade), the evidence shows that during second grade the student participated in the district's RtI process and received small group Tier Two instruction throughout the 2013-14 school year (Dist. Exs. 4 at pp. 1-2; 44 at pp. 1-3). The use of the RtI process with the student was consistent with the district's policy, which states that students who

¹¹ The SST was described by district personnel as a committee of professionals that provided support to teachers by discussing at-risk students and offering additional interventions to try with students who were struggling academically and/or behaviorally (Tr. pp. 301-08; 590).

fail to make adequate progress in the general education classroom will be identified as "at-risk" and will receive targeted interventions (SRO Ex. 1). The hearing record provides evidence that the district provided reading instruction specific to the student's needs during second grade (see Dist. Ex. 44). For example, according to the December 2013 RtI Tier Two progress report, the student required reading support in the following areas: high frequency words, decoding, hearing sounds in words (encoding), fluency, strategies to aid reading, and writing a simple paragraph (*id.* at p. 1). Intervention focused on teaching the student strategies to use when he encountered unknown words, including looking through words to find known parts (blends, vowel patterns, parts of words/chunks); self-monitoring for meaning; rereading familiar texts to improve fluency; talking about story retells and structure, events, characters, and important details; and journal writing to improve writing on demand fluency (*id.*).¹²

During the impartial hearing, the student's second grade classroom teacher testified that the student's reading skills were below grade level at the start of the 2013-14 school year (Tr. pp. 272-73, 278-79). According to documentary evidence created during 2013-14, the student's second grade reading teacher indicated that the student made good progress with literacy skills in a guided reading group, scoring at an independent reading level 12 on the DRA-2 in October 2013 and being instructed at a level 16 in December 2013 (Dist. Ex. 44 at p. 1). In a March 2014 RtI Tier Two progress report, the student's reading teacher reported that the student continued to make good progress, scoring at a independent reading level of 16 on the DRA-2 in February 2014 and being instructed at a level 17/18 in March 2014 (*id.* at p. 2). In the March report, the reading teacher identified the same needs and strategies for the student as in the December 2013 progress report, but in order to support the development of the student's decoding skills and independent reading strategies, the teacher had begun to incorporate more word work (phonemic awareness) into the student's instruction (*id.*). In the June 2014 RtI Tier Two progress report the reading teacher reported that the student made progress in literacy skills over the course of the school year (*id.* at p. 3). The student's second grade classroom teacher testified that she had daily communication with the reading teacher and that the student was being instructed at a level 18 at the end of the 2013-14 school year; she also noted that the student's progress in the classroom was similar to his performance during AIS reading instruction (Tr. pp. 259, 263-64).

However, despite the student's reported gains in literacy skills, the student's independent reading level remained the same from February 2014 through the end of the 2013-14 school year (see Parent Ex. BBB). In the June 2014 RtI Tier Two progress report, the reading teacher also indicated that the student's independent level on the DRA-2 had remained at a level 16 since February 2014, partially due to fluency related (Dist. Ex. 44 at p. 3). During testimony, the student's second grade teacher confirmed that the student's independent reading level stagnated during the second half of the 2013-14 school year (Tr. pp. 261-64). When asked why she did not refer the student to the district's SST, she testified that the student had been found ineligible for special education during the prior school year and that the student was being supported with AIS and section 504 accommodations (Tr. p. 296).

According to State Education Department guidance, a district's use of Tier Two interventions includes direct, systematic instruction, which provides more teacher-directed

¹² The student's 2013-14 report card also indicated that he was working on high frequency words (Dist. Ex. 4 at p. 1).

instruction, carefully structured and sequenced to an individual student, than was provided in Tier One (see "Response to Intervention, Guidance for New York State School Districts," Office of Special Educ., at p. 13 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). "The determination of a student's achievement is well defined and mastery is achieved before moving on to the next step in the sequence" (*id.*). As noted above, the hearing record includes some information regarding the student's areas of need in reading and strategies the teacher worked on with the student to address those need areas; however, the evidence is lacking in terms of student performance data, which the district was required to collect while the student was receiving RtI. Such evidence is critical in a child find dispute of this nature insofar as such data is supposed to form the basis for the district's review and decision making in the RtI process, determinations regarding entering and exiting intervention tiers as defined by district policy, and most importantly in this case, deciding whether and when the student should be referred for special education under IDEA (see SRO Ex. 1 at pp. 1, 3-4).

In this case, the hearing record includes limited performance data for the 2013-14 school year, which consists of three DRA-2 scores, report card marks, and anecdotal comments from teachers regarding the student's academic progress (Parent Exs. WW; XX; BBB; Dist. Exs. 4; 44). The district's RtI policy states that the SST will determine the amount and nature of student performance data to be collected, monitor the progress of students receiving intervention services, and determine the intervention tiers (SRO Ex. 1 at pp. 2-3). As applied to the student in this instance, the evidence shows that the district did not follow that portion of the RtI policy inasmuch as the school social worker testified that the student was not referred to the SST during the 2013-14 school year (Tr. pp. 310, 333, 382).¹³ Without evidence of the SST's data collection plan for the student, or at least a far more comprehensive accumulation of the student's performance data than was presented by the district at the impartial hearing, it is difficult to determine how the student's progress was monitored on an ongoing basis and how decisions were made to either continue or discontinue specific interventions and intervention tiers.

With regard to progress monitoring, State Education Department guidance explains that Tier Two progress monitoring may vary from once every two weeks to once a week and the recommended length of time a student spends in the second tier of intervention will vary from approximately nine to 30 weeks, depending on such factors as the skill set to be learned, rate of the student's progress, and whether the student is making adequate progress ("Response to Intervention, Guidance for New York State School Districts," at pp. 13-14). When progress monitoring of a Tier Two intervention indicates lack of adequate response, schools should consider adjusting the intervention in terms of intensity (*id.* at p. 14).

¹³ However, it is noted that the student's classroom teacher and reading teacher communicated daily, the classroom teacher communicated regularly with the parents, and the section 504 committee met multiple times during the 2013-14 school year to discuss the student's needs/accommodations and progress (Tr. pp. 245, 259; Joint Exs. 4; 5; 6; 7; 8; 9; 10). The director of student services testified that the parents declined the service of the SST; however, since the student already had a 504 Plan, "we basically did what we would have done through SST through the 504 committee" (Tr. p. 590). Based on a review of the hearing record, a reading teacher was not present at the September 2013, November 2013, or the January 2014 504 meetings, and there is no record of reading progress reports being reviewed at these meetings (see Joint Exs. 4; 5; 7). However, a reading teacher was present and a reading progress report was reviewed at the June 2014 and the September 2014 504 meetings (see Joint Exs. 9; 11).

In this case, I can only infer from the evidence that any progress monitoring of the student's Tier Two intervention indicated a lack of adequate response because the evidence shows that the student was receiving Tier Three level instruction at the beginning of the 2014-15 school year (see Tr. pp. 453, 472-73, 548-49). How and when this move occurred is not clear. According to the district's policy, before a student is moved to Tier Three level instruction, the SST is supposed to conduct a review of the student's performance data and make a determination to refer the student for Tier Three instruction (SRO Ex. 1 at pp. 4-5). However, in this case, the hearing record does not include any documentary or testimonial evidence of such an SST review being conducted.

The evidence above leads me to conclude that that the district had an RtI policy, but it was not applying portions of the policy with regard to the student in this case during the 2013-14 school year. The evidence failed to show that the SST reviewed and determined the amount and nature of student performance data to be collected about the student and this defect continued to manifest itself because those determinations were supposed to guide the rest of the RtI interventions and establish triggers for the special education referral process. While there were sparse indications in the evidence of actual performance data collection on the student and there was certainly evidence of progress in some respects using Tier Two interventions, the picture under Tier Two was far from complete because there was no evidence that there was an SST review of the student's progress and the RtI strategies being employed, or that there were some kind of points or guidelines established for when it would be time to move the student in this case to Tier Three RtI interventions or refer him to the special education process.

As part of its argument, the district asserts that the parents' "emphasis on their desires for [the student] to meet grade-level expectations has no bearing on whether [the student] made meaningful progress under the law." This argument fails to address the standards set forth in State regulations, as an RtI program must include "repeated assessments of student achievement which should include curriculum measures to determine if interventions are resulting in student progress toward age or grade level standards" (8 NYCRR 200.2[i][1][iv]). Additionally, when using a RtI process, sufficiency of a student's "progress to meet age or State-approved grade-level standards" is one of the determining factors for consideration of whether a student is eligible for special education as a student with a learning disability (8 NYCRR 200.4[j][3][i][a]).¹⁴

While use of an RtI process is certainly appropriate before jumping straight into special education, the district's application of its RtI process with respect to the student in this case was very murky and one cannot tell with any reasonable degree of reliability if, following the process, the student should not have been referred to determine special education eligibility during the 2013-14 school year. Consequently, I disagree with the portion of the IHO's decision which found that the district was following RtI protocols and that the district made a "prima facie" case for the 2013-14 school year (IHO Decision at p. 10-11). In contrast, I find that the district failed to

¹⁴ This RtI progress standard is noticeably different from the standard for providing a FAPE after a student is identified, which the Supreme Court recently enunciated as "the degree of progress contemplated by the IEP must be appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 992 [2017]). One of the problems with the district's position is that while the limited data presented with respect to the 2013-14 school year may be able to show the student was making some progress and may have met the standard for provision of a FAPE, the data does not show that the student was progressing towards grade-level standards as during the 2013-14 school year the student remained at least one year behind grade-level curriculum (see Parent Ex. BBB).

establish that the student should not have been referred for special education during the 2013-14 school year and violated its own RtI protocols and the child find requirement.

2. 2014-15 School Year

Next, turning to the 2014-15 school year (third grade), the hearing record reflects that the student's third grade reading teacher conducted an assessment of the student's reading skills in September 2014 (Joint Ex. 23). The reading teacher presented the assessment results and an instructional plan to a section 504 committee in September 2014 (Joint Exs. 12 at p. 1; 23). The assessment report was comprised of multiple measures and descriptive data regarding the student's performance, including the student's recognition of sight words (36/37 kindergarten words; 49/73 first grade words), Road to Reading assessment (13/20 words with closed syllables, including digraphs; 5/20 final "e" syllables, including diagraphs and blends), and fluency assessments with the DRA-2 (level 14 with 89% accuracy; level 12 with 96% accuracy) (Joint Ex. 23). The instructional plan included 30-minute daily pull-out small group instruction utilizing the Road to Reading program, starting at the first level (Tr. p. 407; Joint Ex. 23). According to the reading teacher's notes, the first level of the program incorporated repeated practice and activities for students to identify all consonant sounds, short vowel sounds, read and spell closed syllable words, identify digraphs, and read and spell closed syllable words with digraphs (Joint Ex. 23). Instruction included reading isolated words and words in context, writing words and sentences, visual tracking exercises, and memory games (Joint Ex. 23). The instructional plan also included progress monitoring with a variety of assessments (such as word recognition, fluency assessments, spelling) every two weeks (Tr. pp. 407, 521-22; Joint Ex. 23).¹⁵ The school psychologist and the reading teacher testified that the Road to Reading program was chosen as an intervention for the student because it "had more strategic, built-in instruction having to do with phonemic awareness and phonics" and because of the multi-sensory component of the program (Tr. pp. 471-72, 516). Both the student's reading teacher and the school psychologist testified that the reading instruction provided in September 2014 met the qualifications as a Tier Three intervention (Tr. pp. 453, 458-59, 472-73, 548-49).

According to State Education Department guidance, Tier Three intervention is designed for those students who demonstrate insufficient progress in Tier Two and provides students with more intensive instruction in addition to their core instruction ("Response to Intervention, Guidance for New York State School Districts," at p. 14). Tier Three provides greater individualized instruction in a small group setting (generally one to two students) in sessions ranging from 30 to 60 minutes for a minimum of four days per week (id.). The progress of students at Tier Three is monitored more frequently, at least once a week, to determine the student's response to intervention (id.).

With respect to the district's RtI policy and the use of the SST, the school social worker testified that struggling students are typically referred to the SST even if they have a section 504 Plan, and the September 2014 section 504 committee discussed this option, but decided against it, because the parents had requested not to use the SST process (Tr. p. 333). While the district failed to follow its written policy which outlined the role of the SST in the RtI process, specifically with respect to making intervention decisions based on data collection, the school psychologist testified that during the September 2014 section 504 meeting, he discussed his training with various reading

techniques and ways to monitor a student's progress, and he offered to help collect data (Tr. p. 405). The school psychologist stated that, in addition to the reading teacher monitoring the student's progress with the Road to Reading assessment, he planned to use weekly progress monitoring techniques, with three-week and six-week check-in points to review progress and determine the next course of action (Tr. p. 407). Data collected from weekly monitoring of the student's progress (nonsense word fluency and correct words read) was included in the January 2015 psychoeducational evaluation report, and progress was noted from September 2014 through November 2014 (Tr. pp. 410-11; Joint Ex. 22 at pp. 4-6). The school psychologist stated that he communicated with the classroom teacher, reading teacher, and parents "at least on a weekly basis, if not more, in the fall of 2014" (Tr. p. 410). Based on progress monitoring data collected from mid-November 2014 through mid-January 2015, the school psychologist indicated that the student's progress appeared to have plateaued (Joint Ex. 22 at pp. 4-6). In the meantime, on November 14, 2014, the parents made a written request for the CSE to evaluate the student for special education services (Joint Ex. 14 at pp. 1-3).

Based on the testimony of the reading teacher and the school psychologist, it appears that the district followed the district's RtI written policy during the 2014-15 school year with respect to weekly data collection; however, similar to the 2013-14 school year above, the hearing record does not indicate how the student's performance would be evaluated, when interventions would need to be reviewed and/or modified, or what would trigger referral to special education. Once again, the hearing record only includes a small portion of the student's performance data, albeit there is slightly more indication that such data was being collected based on subsequent evaluation of the student after the parents' referral to the CSE. While the parties were given an opportunity to supplement the hearing record with respect to the district's RtI process, the district responded to a request for a copy of its written policy by submitting the policy, but did not offer further argument or evidence that explains why this student should not have been referred for special education under its RtI policy and the particular application of that policy to this student. The district's social worker testified that the student was referred to the SST in first grade by his teacher, because he was having difficulty with reading (Tr. p. 310). She was asked if she suspected the student might have a learning disability before February 2015 (Tr. p. 374). The district's social worker responded, "I would have to say yes. Yes. That's hard because he was making progress. In the reading, where we did a lot of focusing, with the program that he was in, he was making progress" (*id.*). When asked specifically when she suspected a learning disability, she testified, "probably after November based on he was making progress but then I think he got into an area where he was kind of plateauing" (Tr. pp. 375-76).

As noted above, the only evidence of performance data analysis and progress monitoring at the required frequency during the 2014-15 school year comes from the testimony of the reading teacher and the school psychologist, along with the appearance of some of that data in a January 2015 psychoeducational evaluation report (Joint Ex. 22 at pp. 4-6). The IHO found the testimony of these two individuals to be credible, nevertheless, although it is more substantial than the evidence presented for the 2013-14 school year, the testimony is not sufficient to conclude that there was compliance with the district's RtI policy and that referral to the CSE for special education evaluation was not required. Consequently, I agree with the portion of the IHO's determination that the district failed to satisfy its child find obligations during the 2014-15 school year and reject the district's arguments to the contrary.

I will turn next to the consequences of the child find violations in this case. This case is unlike those in which courts have interpreted the child find obligation as "distinct from the requirement [for a school district] to provide [a] FAPE to its residents" (E.T., 2012 WL 5936537, at *11, quoting District of Columbia v. Abramson, 493 F. Supp. 2d 80, 85 [D.D.C. 2007]; see also 20 U.S.C. § 1412[a][10][A][ii]; 8 NYCRR 200.2[a][7]), and those in which a student is ultimately deemed ineligible for special education (see D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]). In contrast, this student was found eligible for IDEA special education services by the February 2015 CSE as soon as his parents referred him, which makes the district's task of proving that the student would have been found ineligible earlier as alleged by the parents all the more difficult.

When examining the hearing record to consider whether the student would have been ineligible, the same problem of lack of student performance data in the hearing record that prevented the district from sustaining its burden as to child find/CSE referral also continues to plague any case that the district can make that the student would not have been found eligible for special education as a student with a learning disability prior to February 2015. State regulations specify that a student may be determined to have a learning disability if, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards, the student (a) does not make sufficient progress in one or more of the designated areas—oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving—when using a process based on the student's response to scientific, research-based intervention (i.e., RtI); or (b) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development that is determined, using appropriate assessments, by the CSE to be relevant to the identification of a learning disability (8 NYCRR 200.4[j][3][i][a]-[b]). When determining the eligibility of a student suspected of having a learning disability, where the student has participated in a process that assesses the students' response to scientific, research-based intervention, such as RtI, the CSE is required to prepare a written report containing, among other things, the instructional strategies used and the student-centered data collected (8 NYCRR 200.4[j][5][i][g][1]). In addition, specific to the consideration of the student's eligibility for special education as a student with a learning disability, the CSE was also required to consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the student's progress during instruction, and this assessment should have been provided to the student's parents (8 NYCRR 200.4[j][1][ii][b]).

The parties agreed that the student was ultimately eligible for special education, albeit at different times. The evidence in the case does not support the district's position, and, therefore the parents prevail on the timing issue. Just as the district did not offer sufficient evidence of the student performance data under its written RtI policy and State regulation to establish that referral of the student was not required during the 2013-14 and 2014-15 school years, the district similarly was unable to establish the student was ineligible for special education as a student with a learning disability during the 2013-14 and first half of the 2014-15 school years. Consequently, the child find violation in the 2013-14 and 2014-15 school years led to a denial of a FAPE to the student in this case.

B. February 2015 IEP

1. Evaluative Information

Turning next to an examination of the parents claims regarding the inadequacy of the student's February 2015 IEP, I note that there is no dispute regarding the sufficiency or consideration of the evaluative information before the February 2015 CSE and make no findings on those matters; however; a review of that information facilitates a discussion of the adequacy of the student's present levels of performance and the recommended educational placement. The hearing record reflects that the district's CSE convened on February 3, 2015 and had available to it for consideration a January 2015 psychoeducational evaluation and social history, a January 2015 OT progress summary from the student's private provider, a January 2015 speech and language evaluation, a January 2015 school-based OT evaluation, as well as prior evaluations that were reviewed by the committee during the meeting (Joint Ex. 16 at pp. 2, 3). The hearing record also reflects that during the meeting reports were received from the student's classroom teacher, a district occupational therapist, the student's reading teacher, a district school psychologist working with the student, a district social worker, a district special area teacher, a special education teacher, a district speech-language provider, the parent and the CSE conducted a record review of past evaluations (id. at p. 2).

According to the January 2015 psychoeducational evaluation, the student reached a plateau in AIS reading, beginning in mid-November 2014 and continuing through January 2015 (Joint Ex. 22 at p. 4). The evaluator noted that the student was not responding appropriately to a high level of reading intervention (id.). Cognitive testing yielded overall results in the average range (id. at p. 8-9). On the Kaufman Test of Educational Achievement, Third Edition (KTEA-III) the student's scores on the reading composite and writing composite fell in the below average range (id. at pp. 11-12). The evaluator reported that the student exhibited age appropriate skills in the areas of visual-spatial processing, visual and auditory working memory, verbal abilities, categorical reasoning, and most areas of executive functioning in school (id. at pp. 7-10, 13-14, 18-19). The parent and teacher completed the Behavior Assessment System for Children, Second Edition (BASC-2) and teacher ratings of the student's behavior were significant for hyperactivity, while parent ratings were significant for hyperactivity, externalizing problems composite, anxiety, depression, internalizing problems composite, behavioral symptoms index, adaptability, activities of daily living, and adaptive skills composite (Joint Ex. 22 at pp. 15-18). The evaluator concluded that the student exhibited delays in orthographic processing, attention, and inhibitory control (id. at pp. 13-14, 19).

The results of the January 2015 speech-language evaluation indicated that the student's overall speech and language skills were in the average range (Dist. Ex. 7 at pp. 1-3). Based on observations of the student in the classroom, the evaluator testified that the student's interactions with peers were "totally like a typical kid in that classroom" (Tr. pp. 238-39). The evaluator noted that it was possible that the student missed verbal information in the classroom at times when he was not focused, and accommodations were suggested to ensure classroom success, such as checking for understanding and repeating/rephrasing directions as needed (Dist. Ex. 7 at p. 4).

As noted above, the February 2015 CSE had before it two OT reports, an evaluation conducted by the district and a progress summary from the student's private occupational therapist. The results of the district January 2015 OT evaluation showed that the student exhibited average

skills in visual-motor integration, fine motor precision, manual dexterity, and handwriting (Dist. Ex. 9 at pp. 3-5). Teacher ratings of the student's sensory processing patterns indicated that the student sought movement much more frequently than his peers and he may be more sensitive to auditory and visual stimuli than his peers (id. at pp. 6-7). The evaluator opined that the student's current 504 Plan included accommodations to address his needs in these areas (id. at pp. 7, 9). The student's reading teacher rated the degree to which the student obtained, was bothered by, detected and/or missed sensory input as "just like the majority of others", while the student's parents reported that he did so "much more than others" (id. at pp. 6-7).

The January 2015 private OT progress summary indicated that the student was often dysregulated when he arrived to therapy, he required a significant amount of calming sensory input to engage in therapy activities, and his performance during therapy sessions varied from week to week (Parent Ex. Y at p. 1). The student's -parents and therapist noted that the student was responding to activities to improve his body awareness, he was able to self-correct when given verbal prompts, and differences were noted in his ability to self-regulate responses when he was engaged in those type of activities at home (id. at pp. 1-2). With this background information regarding the evaluative information and CSE meeting in mind, I will turn to the parties disputes below.

2. Present Levels of Performance and Annual Goals

The parents allege that the February 2015 IEP was substantively deficient; more specifically, they allege that the present levels of performance section of the IEP failed to include information regarding the student's social challenges, behavioral needs, learning style, strategies that worked for him, and how his disability affected his involvement and progress in the general education curriculum. The parents also argue that the annual goals in the February 2015 IEP were deficient because they failed to address the student's difficulties with reading comprehension, basic story retelling, and socialization.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

With respect to the parents' claim that the present levels of performance of the February 2015 IEP failed to include information regarding the student's social challenges and behavioral needs, the hearing record shows that the February 2015 IEP included test scores from parent and teacher ratings on the Behavior Assessment System for Children-Second Edition (BASC-2) and teacher comments regarding the student's behavior (compare Joint Ex. 16 at pp. 6, 9, with Joint Ex. 22 at pp. 3-4, 15-18). For example, results of teacher ratings on the BASC-2 reflected a t-score of 45 on the social skills scale, which was within normal limits, and the evaluator opined that the student socialized appropriately (Joint Ex. 22 at p. 16). Additionally, a teacher comment in the social development section of the present levels of performance indicated the student had friends in class (Joint Exs. 15 at p. 1; 16 at pp. 7, 10). Results of the BASC-2 also suggested that the student was at-risk for hyperactivity and attention problems, and the February 2015 IEP included a comment that the student often acted silly to get the attention of peers (compare Joint Ex. 16 at p. 9, with Joint Exs. 15 at p. 1; 22 at pp. 15-16).

At the time of the February CSE meeting, the student's parents were concerned by his behaviors at home, however, district personnel testified that the student did not exhibit significant behavior problems at school (Tr. pp. 82, 84, 152, 238-39, 245-46, 266, 273-74, 317-21, 417, 432-33, 534). According to the CSE meeting minutes, the parents acknowledged that the student was not a behavior problem in school, but reported that at home, the student "explode[d]" (Joint Ex. 15 at p. 4). With respect to the student's in-school behavior, the February 2015 IEP indicated that the student needed to learn to recognize when his behavior was becoming inappropriate and take steps to correct his behavior (Joint Ex. 16 at p. 10). According to the management needs section of the IEP, the student was noted to benefit from reminders to wait his turn and refrain from shouting out in class, as well as from short breaks to avoid frustration (id. at p. 12). A counseling goal was included in the February 2015 IEP that addressed communicating an understanding of a variety of feeling words and labeling an appropriate feeling connected to an experience/behavior (id. at p. 13).

Next, the present levels of performance in the February 2015 IEP specifically detailed the student's strengths and weaknesses, which reflected the student's learning style (Joint Ex. 16 at pp. 5-9, 12). Contrary to the parents' claim that the IEP failed to include strategies that had been successful for the student, the IEP reflected strategies recommended by the student's teacher and parents, such as: providing encouragement to go back to the text to find the answers to comprehension questions, using graph paper and/or visual references for letter size when writing, using a place value chart to show regrouping for multi-digit subtraction problems, reading math tests aloud, providing encouragement to show all the steps when solving math problems, checking for understanding, repeating/rephrasing directions as needed, providing reminders to wait his turn, breaking down assignments, providing breaks throughout the day, and providing seating on an "end" to allow the student to stand if needed (Joint Exs. 15 at pp. 6-7; 16 at pp. 8-12). Notably, the February 2015 IEP also included a statement regarding the "effect of student's needs on involvement and progress in the general education curriculum," that indicated the student's orthographic processing deficits adversely affected his educational performance, especially with regard to efficiently recognizing words and accurately spelling words (Joint Ex. 16 at p. 12).

Turning to the IEP annual goals—the parents allege that annual goals found in the February 2015 IEP were deficient in that they failed to address the student's struggle with reading comprehension, basic storytelling, and socialization. A review of the February 2015 IEP shows that it included three annual goals which addressed reading, writing, and

social/emotional/behavioral needs (Joint Ex. 16 at p. 13). The reading goal addressed the student's use of decoding and high frequency words to read passages at his instructional level (id.). According to CSE meeting minutes, the student's reading teacher reported that when the student was assessed in January he needed considerable prompting when retelling a story, although he was able to remember most of the important events (Joint Exs. 15 at p. 2; 24 at p. 1). The student also showed basic literal comprehension of a presented story, but had difficulty answering an inferential comprehension question (Joint Ex. 24 at p. 1). Although the present levels of performance included in the February 2015 IEP highlighted the student's difficulty with reading comprehension, the parents correctly assert that there are no goals on the IEP that addressed the student's reading comprehension or ability to retell a story (see Joint Ex. 16 at p. 8). The consequence of the lack of reading comprehension goals will be addressed below.

With respect to socialization, the February 2015 IEP included a goal that targeted the student's ability to label appropriate feelings (id. at p. 13). CSE meeting minutes show that the student's general education teacher reported that the student had friends and was friendly, but that he sometimes acted silly to get his friends' attention (Joint Ex. 15 at p. 1). The social worker reported that the student had confidence with peers (Joint Ex. 16 at p. 5). With respect to social development, the February 2015 IEP noted that the student "needs to recognize when his behavior is beginning to become inappropriate or is beginning to go too far and correct this behavior" (id. at p. 9). The school social worker testified that at times the student could say things to an adult in an unintentionally rude manner, which was embarrassing to peers who witnessed it, and the student would need to be reminded to say things in a different way (Tr. p. 349). The school social worker opined that the IEP goal targeting the student's ability to identify feelings could have addressed his rude mannerisms "some" (Tr. pp. 348-50). She further suggested that helping the student to identify and label feelings was the most important goal and would affect all others (Tr. pp. 350-52).

3. Reading Instruction

As noted above, when the CSE convened on February 3, 2015 it determined that the student was eligible to receive special education and related services as a student with a learning disability. The CSE recommended placement in a general education program with one hour of daily direct consultant teacher services in English language arts (ELA), 30 minutes of daily 5:1 resource room support, and 30 minutes of individual counseling per week (Joint Ex. 16 at p. 13). The February 2015 IEP included the following supplementary aids and services and testing accommodations: chunking of assignments, teacher check-ins, directions broken down, special seating arrangements, use of study carrel, information on board written on paper or provided next to student, sensory program, modification of spelling lists, repetition and rephrasing of directions, clarification of directions, use of visual aids, extended time for tests, tests in separate location, test directions repeated, and test questions and directions read to student (id. at pp. 13-15).

One of the primary concerns of the parents is their view that IEP, in addition to the programming listed above, should have also included a specialized, intensive reading program among the delineated services. The parents first allege that the February 2015 IEP made no mention of the basis of the student's learning disability. However, a review of the IEP shows that it included the student's classification of learning disability and indicated that the student presented with orthographic processing deficits and delays in overall reading abilities (Joint Ex. 16 at pp. 1, 7, 11) and their claim on that point is rejected. Next, the parents correctly allege that the February

2015 IEP did not recommend a specific reading program (see generally Joint Ex. 16). The February 2015 IEP included one hour/day of direct consultant teacher support, 30 minutes/day of resource room support, multiple program accommodations and modifications, testing accommodations, and one reading and one writing goal (Joint Ex. 16 at pp. 13-15). The reading goal focused on decoding words using known strategies and knowledge of high frequency words to read passages at the student's instructional level (id. at p. 13).

As noted by the parents, the student had received Tier Three level 1:1 daily reading instruction at the beginning of the 2014-15 school year, yet had reached a plateau in progress between November 2014 and January 2015. Given that the student was already receiving 1:1 reading instruction, the parents request could on the one hand be interpreted to mean that the district should have listed on the IEP the that student requires 1:1 daily reading instruction similar to what he received in the RtI process and failed to or, on the other hand, that he requires even greater supports than 1:1 daily reading instruction. The parents do not clarify anything more than they envision a specialized, intensive reading program on the IEP.

The hearing record shows that the AIS reading teacher continued to work with the student daily in a small group (2:1) after the February 2015 IEP was implemented (Tr. pp. 532-33; 654). According to district personnel, AIS reading was not listed on the February 2015 IEP because it was a general education service (Tr. pp. 148-50, 565-66, 654). As noted above, State regulations define AIS as additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance (8 NYCRR 100.1[g]). AIS is intended to assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments (id.). AIS is available to students with disabilities on the same basis as nondisabled students, provided such services are provided to the extent consistent with the student's IEP; however, according to the guidance, AIS does not include special education services and programs (id.). Additionally, while certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). On the other hand, Subsequent guidance by the United States Department of Education indicates 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]).

In this instance, the delivery of a specific reading program in a 2:1 setting for 30 minutes per day appears to align with the guidance from United States Department of Education because it meets the definition of "specially designed instruction" (34 CFR 300.39[b][3]). Specially designed instruction is defined in part, as the adapting the content, methodology, or delivery of

instruction to address the unique needs of the student that result from the student's disability (*id.*). In this instance, the reading teacher's report indicates that she developed a specific plan to address the student's need areas (Joint Ex. 23; *see* Tr. pp. 530-31) and was tailoring instruction to meet the student's individual needs (Joint Ex. 24). The CSE chairperson, school psychologist, director of student services, and reading teacher testified that the student's reading program included multisensory components, both prior to and after development of the February 2015 IEP (Tr. pp. 150, 446-48, 515-16, 592). As this adaptation of the content and delivery of instruction was being delivered in a small group setting, it is difficult to envision how it would not meet the definition of specially designed instruction, and in turn, special education. The school psychologist testified that a specific reading program was not listed on the student's IEP because it was up to the professional delivering the service to best determine how to meet the student's needs successfully (Tr. pp. 431-32). However, the CSE was responsible for determining the level of supplemental reading instruction needed to address this student's unique needs and should not have abdicated that responsibility by assuming the student's instruction in reading would be provided through AIS.¹⁶

With respect to the services recommended in the IEP, the school psychologist stated that the purpose of one hour per day of direct consultant teacher services for ELA in the February 2015 IEP was to make the content of instruction more accessible for the student, and 30 minutes per day of resource room was added to the IEP to provide the student with direct instruction to remediate deficits at the student's skill level (Tr. pp. 430-31; Joint Ex. 16 at p. 13). Accordingly, to the extent that the student required a program designed to address his specific learning disability in reading, the February 2015 IEP did not include such a program, and as the AIS services cannot be considered in determining the appropriateness of the IEP, the February 2015 IEP failed include sufficient supports in the area of reading to provide the student with a FAPE.

4. Related Services

The parents contend that the February 2015 IEP also did not provide the student with a FAPE because it failed to include OT and speech-language therapy to address the student's language, fine-motor, and sensory needs. However, upon review of the evaluative information available to the February 2015 CSE, the IEP included sufficient accommodations to address the student's needs in these areas and the IHO was correct in finding that student did not require OT or speech-language therapy to receive a FAPE.

Consistent with results of the January 2015 speech-language evaluation report, speech therapy was not recommended in the February 2015 IEP; however, the speech therapist recommended that the February 2015 IEP include accommodations taken from the student's then-current 504 plan and recommendations from the March 2014 CAP evaluation that addressed focusing, such as written lists to improve organization, requesting repetition and clarification of auditory directions, use of visual aids, hands-on activities, and preferential seating (Dist. Ex. 7 at

¹⁶ To the extent that the student continued to receive support through AIS after the district began implementing the February 2015 IEP, evidence of a service that was provided but was not included on an IEP is retrospective and may not be used to rehabilitate an otherwise defective IEP (*see L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 115 [2d Cir. 2016] ["Although the District Court attempted to distinguish this case from our long line of cases barring retrospective testimony because K.T. was actually educated at the IEP placement, this is a distinction without a difference"]).

pp. 3-4; Parent Ex. R at p. 2; Joint Exs. 11; 15 at pp. 3, 6, 7; 16 at pp. 9, 12-14; Tr. pp.192-93, 198-201). The February 2015 IEP included the following accommodations recommended in the January 2015 speech-language evaluation report: checking for understanding and repeating/rephrasing directions as needed (compare Dist. Ex. 7 at p. 4, with Joint Ex. 16 at p. 14).

Likewise, consistent with results of the January 2015 OT evaluation report, OT was not recommended in the February 2015 IEP; however, the evaluator recommended continuing the modifications taken from his then-current 504 plan, such as alternate seating, movement breaks, and use of graph paper for writing, as well as an assistive technology evaluation (Dist. Ex. 9 at p. 9; Joint Exs. 11; 15 at pp. 3-6; 16 at pp. 10-14; Tr. pp. 70-71). The February 2015 IEP included the following accommodations recommended in the January 2015 OT evaluation report: alternate seating, all information on the board provided at his seat, sensory program, use of a study carrel, use of visuals, separate location for testing, directions repeated for testing, and extended time for testing (compare Dist. Ex. 9 at p. 9, and Joint Ex. 11 at p. 2, with Joint Ex. 16 at pp. 12, 14-15).

Therefore, I find that the student's speech-language, fine-motor, and sensory needs were adequately addressed by the program and placement recommended by the February 2015 CSE.

The district appeals from the IHO's finding that it failed to offer the student a FAPE by not reconvening a CSE to review the private April 2015 neuropsychological evaluation and more specifically by failing to add speech-language therapy to the student's IEP by no later than May 2015. The district reconvened at the request of the parents to review the results of the April 2015 neuropsychological report and a May 2015 assistive technology evaluation on June 17, 2015 (see Joint Exs. 18-19). The parents and the district neuropsychologist participated in a conference call on April 15, 2015 and the report of the neuropsychological evaluation was completed thereafter and delivered to the district on April 27, 2015 (Tr. pp. 603-04). Under the circumstances, the lapse in time from the receipt of the report on April 27, 2015, to the reconvene of the CSE on June 17, 2015 was not so long as to have contributed to a denial of FAPE; however, as I have already found that the February 2015 IEP did not offer the student a FAPE based on the lack of sufficient support in reading, it is not necessary to make a precise determination as to when the CSE would have been required to reconvene to review the neuropsychological report in order to avoid denying student a FAPE on that basis.

C. Relief

The district appeals the IHO's award of reimbursement for privately obtained counseling services, speech-language therapy, and 1:1 tutoring in reading. The parents cross-appeal the IHO's determination that they were not entitled to reimbursement for privately obtained OT services, and not entitled to an award of compensatory educational services. The parents seek reimbursement for the OT services and an award of compensatory educational services in the areas of reading instruction, OT and speech-language therapy.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]), and may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see

Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M.,

478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Relevant to calculating an award of compensatory additional services to place the student in the same position he would have occupied, but for the district's failure to offer the student a FAPE, the evidence in the hearing record is insufficient to demonstrate that the district met its obligations pursuant to child find. As a result, the student was not timely referred to the district's CSE and was not timely found eligible to receive IDEA services. Thus, it is appropriate in this case to remedy the district's failure to find the student eligible for special education as a student with a learning disability during the 2013-14 school year, and for the time period beginning September 2014 through the student's eligibility determination in February 2015.

Here, because the student was approximately one and one-half years behind in reading, on or about July 1, 2014, the parent hired a private reading tutor to provide 1:1 reading instruction for the student (Parent Ex. AAA at p. 1). Given the lack of evidence of sustained progress over the 2013-14 school year while the student received RtI Tier Two services and the CSE's failure to find the student eligible for special education, the parents' acquisition of private reading tutoring was reasonable. Accordingly, I will not disturb the IHO's award of reimbursement to the parents. In addition, in order to provide a remedy for the child-find violation during the 2013-14 school year, the parents' request for 92 hours of compensatory reading instruction is reasonable considering the student's deficits and the district is directed to provide the student with 92 hours of 1:1 reading instruction in the school environment as an additional service.

To the extent that the parents request compensatory OT and speech-language therapy services, as discussed above, the February 2015 IEP sufficiently addressed the student's areas of need through accommodations without a specific recommendation for OT or speech-language therapy services. As the student did not have a need for OT or speech-language therapy services at the time he was found eligible, the IHO's decision not to award OT or speech-language therapy is upheld.¹⁷

The district also objects to the IHO's award of reimbursement for the parents' costs incurred for social worker services and the services of a behavioral psychologist as being wholly unsupported by the record. However, as noted in the February 2015 IEP, the student exhibited needs in the area of social/emotional/behavioral needs (Joint Ex. 16 at pp. 5, 9). As the student exhibited needs in these areas at the time he was found eligible for services, and because the district

¹⁷ The IHO found that the district should have begun providing the student with speech-language therapy in May 2015; however, the IHO did not award speech-language therapy services as relief (IHO Decision at pp. 20-21, 23; see Parent Ex. AAA).

has not presented sufficient evidence regarding its child-find obligations during the 2013-14 and 2014-15 school years, the IHO's decision to award reimbursement for these services is supported by the record and will not be disturbed. However, to the extent that the parents concede that the IHO calculated a monetary award that included reimbursement for services that were provided during a period of time in which the parents were not seeking reimbursement relief (prior to the beginning of the 2013-14 school year and after the beginning of the 2015-16 10-month school year), the IHO's reimbursement award is reduced by that amount (see Answer at pp. 2-3).

VII. Conclusion

In summary, the evidence in the hearing record shows that the district violated its child find obligation by failing to show that the student should not have been referred for special education during the 2013-14 and 2014-15 school years and denied the student a FAPE by failing to establish that the student was not eligible for special education as a student with a learning disability for those periods. I also find that the district denied the student a FAPE based on the CSE's failure to incorporate a program designed to address the student's needs in the area of reading on the February 2015 IEP. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 23, 2016, is modified by reducing the amount of reimbursement from \$8,465.00 to \$6,470.00; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with 92 hours of 1:1 instruction in reading as additional services. These services shall be delivered to the student in the school environment and shall be completed by May 1, 2019.

Dated: **Albany, New York**
 May 3, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER