



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-017

**Application of the BOARD OF EDUCATION OF THE
HARRISON 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:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Diana Gersten, 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 the decision of an impartial hearing officer (IHO), which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2015-16 school year were inappropriate and awarded the parents reimbursement for the cost of their daughter's tuition at the Windward School for the 2015-16 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4).¹ 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]).

¹ In September 2016, Part 279 of the practice regulations were amended, effective January 1, 2017, which are applicable to all appeals served on 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 amendments, as this appeal was served upon the district after January 1, 2017, the amended provisions of Part 279 apply.

III. Facts and Procedural History

The student was the subject of a prior impartial hearing, which ended in a June 2015 stipulation of settlement between the parents and the district with respect to the student's education for the 2014-15 school year (Parent Ex K; Dist. Ex. 35). For kindergarten through second grade the student was parentally placed in a nonpublic general education parochial school (Tr. pp. 1068-69; Dist. Ex. 13 at p. 1; Parent Ex. L). In spring 2013 (first grade) the parents sought a private psychoeducational evaluation of the student due to her "inconsistent" academic functioning and an audiological evaluation of the student, due to her difficulties with reading comprehension and "hearing" spoken language (Dist. Exs. 6 at p. 1; 7 at p. 1). As a result of these and subsequent evaluations, the student was diagnosed with a specific learning disorder with impairment in reading, attention deficit hyperactivity disorder (ADHD) - hyperactive/impulsive presentation, an unspecified anxiety disorder and a central auditory processing disorder (Dist. Exs. 7 at p. 12; 8 at p. 6). During the 2013-14 school year, the student was classified as having an other health-impairment and an Individualized Educational Services Program (IESP) was developed (Tr. pp. 64-65; Parent Ex. L).²

The parents decided that the student would not return to the nonpublic general education school for third grade (Tr. p. 1074). In August 2014, they obtained a private neuropsychological evaluation for the stated purpose of determining the student's then-current level of academic functioning, as well as obtaining diagnostic clarification and educational and treatment recommendations (Dist. Ex. 13 at pp. 2, 8). Based on the administration of numerous standardized assessments and clinical observation, the evaluator concluded that the student's cognitive and academic profile were consistent with a severe language based learning disorder (*id.* at p. 9). The evaluator asserted that the student met the criteria for ADHD, combined presentation; dyslexia; and a specific learning disorder, with impairment in mathematics, specifically in relation to the memorization of arithmetic facts and fluent calculation (*id.* at pp. 8-9). In addition, the evaluator reported that the student's weaknesses in language skills and attention further impeded her learning skills and academic performance (*id.*). Lastly, the evaluator found that the student experienced symptoms of anxiety, situational to academics and feeling unsuccessful in her recent educational environment (*id.*). To address the student's needs the evaluator opined that the student required a small, full-time special education program in a small, language-based, special education school, as well as speech-language therapy and individual psychotherapy (*id.* at pp. 9-10).

The parents placed the student at the Windward School for the 2014-15 school year (*see* Tr. p. 1077; Parent Ex. V; Dist. Ex. 38 at p. 21).³ In September 2014, the parents contacted the district and requested that it develop an IEP and make a program recommendation for the student (Parent Ex. D).

Following the stipulation of settlement noted above, the district requested and obtained consent to evaluate the student (Dist. Exs. 22; 23). In June 2015, the district completed a psychological assessment, educational evaluation, and speech-language evaluation of the student

² Pursuant to the IESP, the district of location recommended that the student receive consultant teacher services for reading and math beginning in November 2013 and ending in June 2014 (Parent Ex. L at pp. 1, 8).

³ The Commissioner of Education has not approved the Windward School as a school with which school districts may contract for the instruction of students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

(Dist. Exs. 14, 15, 16). Notably, the psychological assessment indicated that the student's overall intellectual abilities fell within the average range with significant variability between the student's strong visual-spatial thinking skills and relatively weak verbal ability/comprehension knowledge skills (Dist. Ex 15 at p. 5). The educational evaluation revealed that many of the student's academic skills were within the average range; however, the student demonstrated below average skills in reading comprehension, word recognition fluency, nonsense word decoding and decoding fluency (Dist. Ex. 14 at p. 5). According to the speech-language evaluation, the student demonstrated average receptive and expressive language skills but exhibited relative weaknesses in inferential reasoning and language processing (Dist. Ex. 16 at p. 3).

On August 4, 2015, the CSE convened and found the student eligible for special education and related services as a student with a learning disability (Dist. Ex. 4 at p. 1).⁴ For the 2015-16 school year, the August 2015 CSE recommended a 10-month placement in the general education setting, in conjunction with one 45-minute period per six-day cycle of direct and indirect consultant teacher services and five 45-minute periods per six-day cycle of resource room services in a group of five students (*id.* at pp. 1-2, 9-10).

By 10-day notice letter to the district dated August 19, 2015, the parents maintained that the August 4, 2015 IEP and recommended "program" denied the student a FAPE on both procedural and substantive grounds, and rejected both the IEP and proposed placement (Dist. Ex. 28 at p. 2). The parents alleged that they were denied meaningful participation in the development of the student's IEP and that: the program recommendation was insufficient to meet the student's significant educational needs⁵, the CSE failed to conduct a social history and a classroom observation of the student, the August 2015 IEP mischaracterized the student's scores from the speech-language and educational evaluations as average when they were low average, and the incorrect listing of the student's birthdate on the district's psychoeducational evaluation called into question the validity of the test results (*id.* at pp. 2-3). The parents alleged that the noted mistakes highlighted the district's misunderstanding of the student's complex needs, which resulted in a minimal program recommendation, goals that were immeasurable and classroom accommodations that would be impossible to implement "throughout the day" in a general education class (*id.* at p. 3). The parents notified the district of their intent to place the student at Windward for the 2015-16 school year and seek funding for their placement from the district, if the district did not cure the procedural and substantive errors that resulted in a denial of FAPE and offer the student an appropriate school placement (*id.* at pp. 1, 3).

In response to the parent's letter, the district stated that it did not conduct a classroom observation of the student because she was evaluated when school was not in session (Dist. Ex. 29 at p. 1). The response indicated that a consent to conduct a classroom observation was enclosed and advised the parent that the district would conduct the observation when school resumed (*id.*). With respect to a social history, the district noted that the CSE reviewed the social history from the private neuropsychologist's evaluation and the parents confirmed that it was accurate and

⁴ The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[a][10]; 8 NYCRR 200.1[zz][6]).

⁵ More specifically, the parents asserted that per the recommended program the student would only receive nine minutes per day of specialized and direct instruction and she would be pulled out of specials in order to receive resource room (Dist. Ex. 28 at p. 2).

thorough (id.). Next the district reported that the school psychologist rescored her cognitive assessment using the student's corrected birthdate and the results would be shared with parent when school resumed (id.). The district stated it considered the parents' request for a full-day special class and determined that it would be overly restrictive (id.). The district explained that the student would not miss specials due to resource room (id.). The district further explained that the student's below average scores were indicated in the CSE meeting minutes and that all of the student's scores on speech and language assessments fell within the average range (id. at p. 2). Lastly, the district clarified that the student would receive 45 minutes of special education on five out of six days, not nine minutes as the parents claimed (id.).

On October 14, 2015, the district conducted a classroom observation of the student in her language arts class at Windward (Dist. Ex. 19).

On November 23, 2015, a subcommittee of the CSE convened to review the classroom observation and revised psychological evaluation (Dist. Ex. 5 at p. 1). Windward staff, including a CSE liaison and the student's 2015-16 (fourth grade) language arts teacher, participated in the CSE meeting via telephone (id.; see Tr. p. 215; Parent Ex. W at p. 2). Finding that the student remained eligible for special education and related services as a student with a learning disability, the November 2015 CSE subcommittee recommended four hours per day of integrated co-teaching (ICT) services in addition to five 45-minute periods per a six-day cycle of resource room services in a group of five students (Dist. Ex. 5 at pp. 1-2, 10-11). In addition, the November 2015 CSE subcommittee added annual goals to the student's IEP that targeted her needs related to mathematics and writing (id. at pp. 2, 9-10). The student's teachers from Windward "agreed that this level of services was appropriate," and the November 2015 IEP further reflects that the parent was also in agreement (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated January 26, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year (Dist. Ex. 1). More specifically, the parents asserted that the August 2015 CSE failed to consider "critical substantive information" provided by the parents, denying the parents the ability to participate in the development of the student's IEP (id. at p. 3). The parents also alleged that the August 2015 IEP was "deficient" because the CSE failed to conduct a social history and classroom observation of the student, which were required as part of the initial eligibility determination process (id.). In addition, the parents contended that the June 2015 educational evaluation and the August 2015 IEP inaccurately reported the scores achieved by the student and that the June 2015 psychological evaluation referred to an incorrect birthdate for the student, resulting in an invalid IEP (id. at p. 4). The parents next argue that the August 2015 IEP improperly characterized the student's disability as "mild" (id. at pp. 3-4). Further, the parents asserted that the recommended resource room program was inappropriate because it did not provide for sufficient specialized direct instruction, and would cause the student to miss classroom instruction (id. at p. 3). The parents also contended that the annual goals included in the IEP were immeasurable and that the classroom accommodations could not be implemented in a general education classroom (id. at p. 4). The parents asserted that because the district did not timely cure the deficiencies in the IEP, a valid IEP was not in effect at the beginning of the 2015-16 school year, and that the district could not rely on the November 2015 IEP to satisfy its obligation to offer the student a FAPE (id. at pp.

5-6). The parents alleged that they were "legally justified" in rejecting the August 2015 IEP and asserted that the unilateral placement of the student at the Windward School was appropriate (id. at p. 6). For relief, the parents requested reimbursement for the costs of the unilateral placement of the student (id.).

B. Impartial Hearing Officer Decision

On April 28, 2016, the parties proceeded to an impartial hearing, which concluded on November 18, 2016, after five nonconsecutive days of testimony (Tr. pp. 1-1149). In a decision dated January 12, 2017, the IHO found that the district failed to offer the student a FAPE and directed the district to reimburse the parents for the costs of the student's tuition at the Windward School for the 2015-16 school year (IHO Decision at pp. 21, 26). Initially, the IHO found that the district was not absolved of its obligation to ensure the provision of a FAPE to the student for the 2015-16 school year because the stipulation of settlement regarding the 2014-15 school year was not executed by the parents until June 2016 (id. at pp. 11-12). More specifically, the IHO found that the district had "no legal justification" to delay the process of obtaining evaluative information regarding the student until after the settlement agreement was executed (id. at p. 12). The IHO found that the lack of a classroom observation and participation from the Windward School at the August 2015 CSE resulted from the district failing to begin the evaluation process in a timely manner, and that the lack of either prevented the district from understanding how the student functioned in the classroom (id. at pp. 15-16). Similarly, the IHO found that the district could not determine if the recommendation for a regular education program was appropriate without having information regarding the student's then-current functioning at Windward (id. at p. 16). The IHO noted that the November 2015 CSE recommended a different program than the August 2015 CSE based entirely on information obtained from Windward staff, and found that "there probably would not have been a need for a modified IEP" if Windward staff had participated in the initial CSE meeting (id. at pp. 16, 20-21). Further, the IHO found that the August 2015 CSE relied upon the improperly scored June 2015 psychological evaluation in making its recommendations and that it should have been corrected "prior to making the recommendation" (id. at pp. 16-17). Although the IHO found that the resource room and consultant teacher program recommended by the August 2015 CSE would provide the student with "specialized and supplemental instruction in the areas that [she] showed weakness," the district failed to explain why the student did not require resource room services on a daily basis and how she would be able to succeed in a mainstream setting (id. at pp. 19-20). The IHO also found that the CSE did not discuss whether the student was "ready to transition into a large school setting," "the additional distraction that would result from a larger class," or "how a mainstream setting would [a]ffect her confidence or level of anxiety" (id. at p. 20). Finally, with respect to the recommended program modifications and testing accommodations, the IHO concluded that there was "no discussion" about whether they would be sufficient to address the student's needs in a general education setting, as opposed to a specialized school setting (id.).

With respect to the parent's remaining claims, the IHO found that the characterization of the student's disability as "mild" and lack of a current social history did not deprive the student of a FAPE (IHO Decision at pp. 17-18). The IHO also found that the parents were given "every opportunity to participate in a meaningful way" at the CSE meeting and that the August 2015 CSE considered the mother's input, explained its recommendations, ensured that the student's mother understood the evaluative information, and discussed why it did not recommend a special class

setting or ICT services (*id.* at pp. 18-19). The IHO also found that the CSE considered the private neuropsychological report and was not required to adopt its recommendations (*id.* at p. 19). The IHO further determined that the goals included on the August 2015 IEP were based on the evaluative information available to the CSE and sufficient to address the student's areas of need (*id.*).

The IHO concluded that the district did not offer the student a FAPE for the 2015-16 school year and the August 2015 IEP was both "procedurally and substantively inappropriate" (IHO Decision at p. 21). The IHO found that the district "did not have the appropriate documents" to make an appropriate recommendation for the student, or any input from Windward (*id.*). As a result, the IHO found that the district had "no information as to [the student's] ability to function in a mainstream setting," that the CSE failed to consider that the student had attended Windward for the 2014-15 school year, and that these oversights resulted in the failure to have a "valid IEP" in effect at the beginning of the 2015-16 school year (*id.*). The IHO found that the Windward School provided educational instruction specially designed to meet the student's unique needs, that the student made progress at Windward, and that equitable considerations did not preclude the parents' request for reimbursement (*id.* at pp. 23-25).

IV. Appeal for State-Level Review

The district appeals, and argues, in pertinent part, that it offered the student a FAPE during the 2015-16 school year, the IHO improperly decided issues not raised in the parents' due process complaint, and that the hearing record did not show that the Windward School was an appropriate placement for the student.

Initially, the district argues that the IHO addressed a number of issues that were not raised in the due process complaint notice. The district argues that, though it is not clear whether the IHO made a finding regarding a violation of the district's child find obligation, the student's eligibility for special education services was not in dispute at the impartial hearing. The district asserts that the parents raised the issue of a classroom observation only as a claim that the district did not conduct an observation as required for an initial eligibility meeting, rather than as a claim relating to the adequacy of the information available to the CSE. With respect to the absence of Windward staff from the August 2015 CSE meeting, the district asserts that the parents did not raise this issue in their due process complaint notice. Regarding the IHO's determination that the district did not act to obtain evaluations in a timely manner, the district argues that this issue was both not raised and that the parents did not provide consent until shortly before the evaluations were conducted. The district next contends that the IHO erred in finding that the August 2015 IEP did not address whether the recommended accommodations and supports would be sufficient to meet the student's needs in a general education setting, which was not raised in the due process complaint notice. The district also asserts that the IHO erred in "suggesting" that the student might experience anxiety in a larger classroom, as this was both not raised in the due process complaint notice and unsupported by the hearing record.

The district argues that the IHO "misinterpreted and mis-applied" the June 2015 settlement agreement, in particular contending that the settlement provided the district a release for any claims arising through June 30, 2015. The district further argues that the IHO's finding that the lack of a classroom observation from the Windward School resulted in an inappropriate IEP deprived the

district of the benefit of the settlement agreement and failed to acknowledge that the August 2015 CSE had an observation from the student's prior school, as well as report cards and progress reports from the Windward School.

The district asserts that the IHO erred in "faulting" the district for not inviting any representatives from the Windward School to the August 2015 CSE meeting, as Windward was not open at the time of the meeting. The district further alleges that the IHO's finding concerning the impact of the district's psychoeducational evaluation containing an incorrect birthdate for the student was "simplistic" and disregarded the fact that the CSE had two other psychological evaluations available to it which provided a similar profile of the student and that the June 2015 psychoeducational evaluation, when considered alongside the other evaluations, gave the CSE an accurate depiction of the student's cognitive functioning. The district also argues that the IHO erred in determining that the program recommended in the August 2015 IEP would not have addressed the student's individual needs and was not reasonably calculated to provide educational benefit to the student.

The district asserts that the IHO erred in finding that the November 2015 IEP was not at issue in the impartial hearing, and that because the parents did not challenge that IEP, the IHO was precluded from finding a denial of a FAPE for any time after its development. Finally, the district asserts that the IHO erred in finding that the parents established the appropriateness of their unilateral placement of the student at the Windward School, arguing that no one from Windward testified and the Windward progress reports "were vague and unreliable."

In an answer, the parents respond to the district's allegations, and argue to uphold the IHO decision in its entirety. In particular, the parents argue that the district did not have sufficient information regarding the student's functional performance and that the recommendation in the August 2015 IEP was not reasonably calculated to meet the student's needs.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated

that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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]).

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

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

VI. Discussion

A. Preliminary Matters—Scope of Impartial Hearing

As an initial matter, the district alleges that the IHO improperly based her decision that the district failed to offer the student a FAPE in part on issues that were not asserted in the parents' due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

The district alleges that, although it is not clear if the IHO ruled on whether the district violated its child find obligation, the student's classification was not in dispute at the impartial hearing and no child find claim was raised in the parents' due process complaint. Since a review of the parents' due process complaint does not show any allegation of a child find violation, to the degree the IHO addressed child find in her decision, such discussion was outside the scope of the impartial hearing (see B.M., 569 Fed. App'x at 59; N.K., 961 F. Supp. 2d at 584-86).

Upon review of the due process complaint notice, the issues considered by the IHO that relate to claims the district asserts were not raised by the parents, including the district's failure to conduct an observation, procure the presence of Windward staff at the August 2015 CSE meeting, the timeliness of the evaluations conducted by the district, the sufficiency of the recommended accommodations and supports in the recommended general education setting, and the possibility the student would experience anxiety in such a setting, can reasonably be seen to have been the proper focus of the impartial hearing and the IHO's decision. With respect to the IHO's determinations relating to a classroom observation and the timing of the evaluations obtained by

the district, each is contained within the claim that the district "failed to make any arrangements to observe" the student prior to the CSE meeting (Dist. Ex. 1 at p. 3). Similarly, the due process complaint notice indicates that the parents were claiming that the services and accommodations recommended to be implemented in a general education classroom would not meet the student's needs, which deficiency they asserted was a result of the district's failure to obtain and consider appropriate evaluative information (*id.* at pp. 3-5). Although no discrete claim was raised relating to the presence of Windward staff at the CSE meeting, the IHO did not find that their absence constituted a procedural violation in itself, but that it contributed to the failure of the CSE to have adequate evaluative information to develop a program that met the student's needs and, therefore, was relevant to the parents' broader evaluative information claims (IHO Decision at pp. 15-16). Accordingly, each of these determinations was properly part of the impartial hearing.

Additionally, to the extent the district alleges that the IHO misapplied the parties' June 2015 settlement agreement, a review of the IHO's decision shows that she did not base her finding that the district failed to provide the student a FAPE for the 2015-16 school year on the June 2015 settlement, but that she correctly noted that the settlement agreement did not release the district from its obligation to "take all necessary steps" to provide the student with a FAPE for the 2015-16 school year (IHO Decision at p. 11; *see* Dist. Ex. 35 at p. 6).

The IHO also made a number of findings that were not cross-appealed or asserted as alternate grounds for affirmance by the parents. In particular, the IHO's determinations that the August 2015 IEP's characterization of the student's disability as mild and the lack of a current social history did not deny the student a FAPE; that the parents were able to participate at the August 2015 CSE meeting; that the CSE adequately considered the private neuropsychological report; and that the goals included on the August 2015 IEP were sufficient to address the student's areas of need are not challenged by the parents in their answer. Accordingly, they have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see* M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Sufficiency and Consideration of Evaluative Information

The district argues that the IHO erred in faulting the district for not inviting a Windward School representative to the August 2015 CSE, asserting that Windward staff were not required members of the CSE and that the Windward School was closed for the summer at the time of the August 2015 CSE meeting. A review of the hearing record shows that the IHO correctly found that the district's failure to act in a timely manner resulted in the Windward staff not participating in the August 2015 CSE, and that this contributed to the CSE not having information regarding the student's functional performance.

The district director of special education, who served as the chairperson of the August 2015 CSE, testified that she did not recall whether she contacted the Windward School to inquire about the availability of its staff to participate in the CSE meeting; however, she "kn[e]w" from "past experience" that staff from the school are "not available over the summer" (Tr. p. 162; *see* Dist. Ex. 4 at p. 1). However, the CSE chairperson testified at the impartial hearing that the increase in services provided to the student following the November 2015 CSE meeting was based on information provided by Windward School staff (Tr. p. 195). The district school psychologist who conducted the June 2015 psychological evaluation similarly testified that input received from

Windward staff at the November 2015 CSE led to the changes in the student's recommended program (Tr. p. 312). Nonetheless, the hearing record reflects that the Windward teacher present at the November 2015 CSE meeting was the student's language arts teacher for the 2015-16 school year and provided information about the student's functioning during that school year (Tr. pp. 112-13; Dist. Ex. 5 at p. 2; Parent Ex. W at p. 2). Accordingly, that the CSE modified its recommendation based on her input cannot be taken to mean that the student's functional performance during the 2014-15 school year at Windward was different than reflected in the 2014-15 Windward progress reports. Furthermore, the CSE chairperson testified that the information provided by the student's language arts teacher was "discrepant from the other information" available to the November 2015 CSE regarding the student's "level of need" (Tr. p. 114). Similarly, the psychologist and the district teacher who conducted the June 2015 educational evaluation testified that the information provided by Windward at the November 2015 CSE meeting indicated that the student "was lower functioning and higher need than the way that her skills were represented in the report cards" (Tr. pp. 313, 556-57). In addition, the CSE chairperson testified that the CSE determined that the Windward progress reports were sufficient to determine the student's functional performance (Tr. p. 196), a conclusion supported by a review of the reports as discussed below.

The district next argues that the IHO's finding regarding the impact of the misscored psychological evaluation overlooked the fact that there were other psychological evaluations available to the August 2015 CSE. The district further asserts that the IHO erred by finding that the lack of a Windward School classroom observation rendered the August 2015 IEP inappropriate, and that the IHO disregarded that the CSE had progress reports from the Windward School. A review of the hearing record demonstrates that the district's reliance on an erroneous psychoeducational evaluation, and its failure to obtain input from Windward personnel, constituted procedural errors.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8

NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

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]). When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (see S.F., 2011 WL 5419847, at *10 [indicating that based upon 20 U.S.C. § 1414(c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [upholding a district's reliance upon information obtained from the student's nonpublic school personnel, including sufficiently comprehensive progress reports, in formulating the IEP]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at *23 [S.D.N.Y. March 29, 2013]).

In this case, the August 2015 CSE undertook an historical review of the student's performance across multiple years and multiple school settings (Tr. pp. 78-83, 263-64, 275-76, 1097; Dist. Exs. 4 at pp. 1-7; 7; 12; 13; 14; 16; 26). Specifically, the August 2015 CSE considered the results of a June 24, 2015 speech-language evaluation, a June 23, 2015 educational evaluation, a June 20, 2014 physical examination, a parent-obtained April-May 2013 psychoeducational evaluation, and an August 27, 2014 neuropsychological evaluation, which included a social history (Tr. pp. 78-82, 85-87; 275-79, 284, 1097; Dist. Exs. 4; 7; 12; 13; 14; 16; 26). The August 2015 IEP incorporated brief excerpts from the student's report cards issued between November 2014 and June 2015 by her nonpublic schools (Tr. pp. 83, 263; Dist. Exs. 4 at p. 3; 17; 26). In addition to the evaluative information listed above, the hearing record indicates the student participated in a June 24, 2015 psychological evaluation, but due to a clerical error in scoring the evaluation, the validity of its results was called into question (Tr. pp. 77-78; Dist. Exs. 15).

The August 2015 IEP presented the findings of these evaluations in a manner that centered on the student's academic achievement in reading, writing, and mathematics, intellectual functioning, and speech/language abilities (Dist. Ex. 4 at pp. 3-6). The IEP also provided assessment information regarding the student's social/emotional functioning as related to anxiety and self-concept (Dist. Ex. 4 at p. 7). The August 2015 IEP also provided limited input from the student's 2014-15 report card from Windward School (Dist. Exs. 4 at pp. 1, 3, 5; 17 at pp. 11, 14).

Within the academic skills domain of the August 2015 IEP, information regarding the student's reading abilities was primarily drawn from the June 2015 educational evaluation, during which the Kaufman Test of Educational Achievement (K-TEA) was administered (Dist. Exs. 4 at pp. 3-5; 14). As reported in the IEP, the student's performance on several K-TEA subtests fell within the average range (Dist. Exs. 4 at pp. 4-5; 14 at pp. 1-5, 7). Specifically, her performance

yielded the following standard scores and associated percentile ranks: letter-word recognition (91; 27th percentile), phonological awareness (99; 47th percentile), word recognition fluency (89; 23rd percentile), and naming facility (111; 77th percentile) (Dist. Exs. 4 at pp. 4-5; 14 at pp. 1-5, 7). The student's performance on a time-limited K-TEA task earned an above average standard score of 116 (86th percentile) (Dist. Exs. 4 at p. 5; 14 at pp. 4, 7). In contrast, the student earned the following below average standard scores on subtests assessing reading comprehension (82; 12th percentile), nonsense word decoding (83; 13th percentile), and decoding fluency (80; 9th percentile) (Dist. Exs. 4 at p. 5; 14 at pp. 2, 4, 7). As identified in the educational evaluation report, the August 2015 IEP stated the student experienced difficulty responding to questions assessing inferential comprehension (Dist. Exs. 4 at p. 5; 14 at p. 2). In addition, the IEP repeated the June 2015 educational evaluation report's description the student's specific challenges related to decoding words with a wide range of elements, including words with "single/double consonant, consonant blends, consonant digraphs, short vowels, long vowels, vowel teams/diphthongs, silent letters, prefixes, suffixes, and unpredictable patterns" (Dist. Exs. 4 at p. 5; 14 at p. 1). According to the August 2015 IEP, the student was similarly challenged when attempting to decode nonsense words on a speeded subtest (Dist. Exs. 4 at p. 5; 14 at p. 4). Consistent with the educational evaluation report, the IEP reflected that when confronted with a challenging word, the student would attempt to employ a chunking strategy of breaking the word into parts (Dist. Exs. 4 at p. 5; 14 at p. 1). An excerpt from the student's 2014-15 Windward report card included in the IEP pointed out the student was "decoding more accurately and reading with better fluency" and that she benefited from rereading to improve comprehension (Dist. Exs. 4 at p. 5; 17 at p. 11).

The August 2015 IEP reported that the student's performance on K-TEA measures of written language fell within the average range, with standard scores of 108 (70th percentile) on the written expression subtest and 92 (30th percentile) on the spelling subtest (Dist. Exs. 4 at pp. 4-5; 14 at pp. 3, 7). As stated in both the June 2015 educational evaluation report and the IEP, the student showed "strong skills in her ability to apply the rules for punctuation" and average skills with regard to capitalization, word form and structure (Dist. Exs. 4 at p. 5; 14 at p. 3). Per the IEP, the student's Windward report card highlighted the student's understanding of "the process of composing a paragraph," and noted her efforts to achieve "greater independence" (Dist. Exs. 4 at page 5; 17 at p. 11).

The depiction of the student's math skills on the August 2015 IEP mirrored the results of her performance on the K-TEA and were described as falling within the average range; specifically, the student earned a standard score of 92 (30th percentile) on the math concepts and applications subtest, and a standard score of 90 (25th percentile) on the math computation subtest (Dist. Exs. 4 at p. 5; 14 at pp. 2-3, 7). The IEP further explained that while the student showed average ability solving problems that involved multiplication, her ability to solve problems involving addition, subtraction, and measurement was less well developed (Dist. Exs. 4 at p. 5; 14 at p. 2). When the student had difficulty understanding problems that were read to her, she reportedly voiced her confusion (Dist. Ex. 4 at p. 5). The IEP also remarked on the student's use of strategies to solve problems, such as using drawings to assist her when "working through division problems" (Dist. Exs. 4 at p. 5; 14 at p. 3). According to her Windward report card, the student's "computations have become more accurate since she has started to internalize her math facts" (Dist. Exs. 4 at p. 5; 17 at pp. 14-15). As indicated in the Windward report card, the IEP emphasized that the student benefited from repeated practice, the use of manipulatives, and "her math reference folder" (Dist. Exs. 4 at p. 5; 17 at p. 15).

Although the IEP includes a discussion of the June 2015 psychological evaluation, the reported scores on the Woodcock-Johnson III Tests of Cognitive Abilities (W-J III) were based upon an error in the student's date of birth/chronological age, and the accuracy of the results regarding the student's functioning was compromised (Tr. pp. 77-78, 267-68, 270-72; Dist. Exs. 4 at pp. 4, 6; 15 at pp. 2-7; 18 at pp. 3-8). That is, while the student's chronological age at the time of testing was nine years, six months, her performance on the assessment was compared with that of a student who was ten years, six months (compare Dist. Ex. 18 at pp. 2, 4-8, with Parent Ex. M at pp. 1-7). Due to this error, the August 2015 IEP mischaracterized multiple aspects of the student's performance, such as characterizing her performance on one subtests as being within the borderline range, which when scored appropriately, was within the low average range (Dist. Exs. 4 at p. 6; 18 at pp. 5, 8, Parent Ex. M at pp. 5, 7).⁶ In several other instances where the student's performance appeared within the low average range, when the scores were recomputed with the correct date of birth, they were deemed within the average range, and in one case, the initial classification was identified as "average," but the corrected classification was "superior" (Dist. Exs. 15 at p. 7; 18 at p. 8; Parent Ex. M at p. 7).

Despite the concerns described above regarding the quantitative aspects of the June 2015 psychological evaluation, the August 2015 IEP carried over some the evaluator's observations of the student's behavior during the testing session (Dist. Exs. 4 at p. 6; 15 at p. 2). For example, the evaluator's observation that the student's "attention levels were variable throughout the session," was repeated in the IEP (id.).

The June 2015 speech-language evaluation results were also delineated in the August 2015 IEP, beginning with an assertion that the student's performance on the Clinical Evaluation of Language Fundamentals-5 (CELF-5), Comprehensive Test of Phonological Processing (CTOPP-2), and Test of Auditory Processing Skills-III (TAPS-3) "were all within the average range" (Tr. pp. 65, 355-56, 408, 410, 412, 415-16; Dist. Exs. 4 at pp. 4, 6; 16 at p. 3). However, the IEP states that while the student's listening comprehension skills were within the average range, she exhibited a "relative weakness in the area of language processing of lengthy, complex information when not provided with picture cues, print or answer choices," an observation also documented in the June 2015 speech-language evaluation report (Dist. Exs. 4 at p. 6; 16 at p. 3). The IEP also echoed comments from the speech-language evaluation report that described the student's use of metacognition and good attending skills, "even under conditions of background noise" (Dist. Exs. 4 at p. 6; 16 at pp. 2-3).⁷

In a brief overview, the August 2015 IEP listed the student's strengths as her use of metacognitive skills and her willingness to self-advocate when presented with something she did not understand (Dist. Ex. 4 at p. 6). In addition, per the student's 2014-15 Windward report card,

⁶ As the result of an apparent typographical error, the IEP indicated the student earned a score in the borderline range, but with a score at the 79th percentile (Dist. Ex. 4 at p. 6). However, in the psychological report, the standard score was 79, and the percentile rank was the 8th percentile (Dist. Ex. 4 at p. 6; Parent Ex. M at p. 5). When the DOB was corrected, the standard score was 83 (13th percentile) and in the low average range (Dist. Ex. 18 at pp. 6, 8).

⁷ The speech-language evaluator's assessment of the student's attending behaviors during testing appears in conflict with the observations reported in the psychological evaluation report (Dist. Exs. 4 at p. 6; 15 at p. 2; 18 at p. 3).

the student exhibited consistently good work habits, and had made "good progress" across all subjects (Dist. Ex. 4 at p. 6; 16 at p. 2; 17 at p. 2).

The August 2015 IEP further delineated the student's academic needs, including a call to employ an effective strategy to redirect her attention when she became distracted, improve phonics/word analysis, learn all symbol sound association, included with letter combos, syllabication, reading comprehension (text specific and inferential), automaticity with math facts (Dist. Exs. 4 at p. 6; 14 at p. 2; 15 at p. 2; 17 at pp. 14-15).

While the August 2015 IEP portrayed the student as "bubbly, friendly and an energetic girl with a playful demeanor," it also noted parental concern regarding the student's self-concept and anxiety as related to her "learning difficulties" (Dist. Exs. 4 at p. 7; 15 at p. 5). According to the August 2015 IEP, the findings of the Beck Youth Inventories-Second Edition indicated the student exhibited "average levels of anxiety for her age" (Dist. Ex. 4 at p. 7). The Beck Self-Concept Inventory was also administered and the resultant score fell within the average range, with "typical levels of positive and negative views about herself" (*id.*). Despite the parent's concerns mentioned above, the IEP asserted that there were "no social and emotional needs that should be addressed through special education" at the time of the August 2015 CSE meeting (Dist. Ex. 4 at p. 7). Nonetheless, a final comment addressing the student's social/emotional needs stated the student's self-concept would be "monitored" (*id.*).

The CSE conducted an array of evaluations to document the student's strengths and needs across multiple domains (Dist. Exs. 13; 14; 15). The August 2015 IEP incorporated an abundance of data drawn from these assessments, including estimates of the student's academic and speech-language functioning (Dist. Exs. 4 at pp. 4-7; 14; 16). In addition, the IEP included observations of the student's behavior during testing as detailed in the psychological evaluation (Dist. Ex. 4 at pp. 6-7; 15). The CSE also incorporated truncated quotes from the student's 2014-15 Windward report card that offered generally positive comments about the student's progress (Dist. Exs. 4 at p. 5; 17 at pp. 11, 14).

The student's 2014-15 Windward report cards, reviewed by the August 2015 CSE, provided an itemized list of discrete skills taught at the nonpublic school, including those that focused on reading decoding, reading comprehension, and math, with brief descriptions of Windward's course content or curricular focus accompanying the language arts, social studies, science, and special area subject areas (Dist. 17 at pp. 7-18). The language arts rubric identifies a specific methodological model for teaching reading, spelling, and handwriting, which is identified as "a basic Orton-Gillingham approach" (Dist. Ex. 17 at pp. 10). The report card also includes a rubric for each subject that reflected the student's progress across each marking period of the school year (Dist. Ex. 17 at pp. 7-18).

In addition to detailing the student's acquisition of academic skills, the 2014-15 Windward report card provided insights regarding the student's classroom behavior during academic and special area subjects (Dist. Ex. 17 at pp. 7-18). The report card listed teacher ratings of the frequency with which the student exhibited positive and prosocial school behaviors in each of her classes, using a scale of one to four, with one indicating the behavior was demonstrated "consistently," two indicating the behavior occurred "frequently," three indicating "occasionally,"

and four, reflected that the behavior was "rarely" demonstrated (id.). A fifth characterization was also noted, which signified a skill had "not yet [been] introduced" (id.).

While the report card reflects some mild variability in terms of how often the student exhibited preferred behaviors during the fourth quarter of the school year, all ratings were ranked as either "consistently" or "frequently" (Dist. Ex. 17 at pp. 7-18). Nonetheless, a few targeted behaviors were judged at the same level across all or most subjects (id.). For example, the report card indicated the student followed single-step directions and used class materials appropriately "consistently" across all classes (id. at pp. 8, 12, 15, 16, 18). The report card also denoted the student followed multi-step directions "consistently" in one subject (science) and "frequently" in all others (id.).

The August 2015 CSE concluded that, based upon these assessments, the student demonstrated "delays in reading decoding, reading comprehension, and math calculation which inhibits progress in the general education curriculum" (Dist. Ex. 4 at p. 7).

While the hearing record provides no basis to depart from the IHO's determination that the failure to obtain a classroom observation and the incorrect scoring of the cognitive testing on the June 2015 psychological evaluation constituted procedural violations,⁸ courts in the Second Circuit have long held that procedural violations will only render an IEP inappropriate if the violation affected the student's right to a FAPE, resulted in the loss of educational opportunity, or seriously infringed on the parents' right to participate in the IEP development process (see Grim, 346 F.3d at 381-82; J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69-70 [2d Cir. 2000]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 659 [S.D.N.Y. 2005]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 930 F. Supp. 83, 93-94 [S.D.N.Y. 1996]). This concept has since been explicitly adopted by Congress in amendments to the IDEA (20 U.S.C. § 1415[f][3][E][ii]; see Pub. L. No. 108-446, §§ 101; 302[a][1]).

The Second Circuit has recently held that the district must establish what evaluative materials were reviewed by the CSE in developing a student's IEP (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110 [2d Cir. 2016]). As noted above, the hearing record establishes that the district considered evaluative information that provided a considerable amount of information regarding the student's functioning, and the IHO specifically found that the CSE considered the privately-obtained August 2014 neuropsychological evaluation. State regulations provide that the purpose of a classroom observation is "to document the student's academic performance and behavior in the areas of difficulty" (8 NYCRR 200.4[b][1][iv]). As discussed above, the August 2015 CSE had adequate information regarding the student's academic performance such that the failure to obtain a classroom observation did not render it unable to develop an appropriate program. While the IHO and parents focus on the more supportive recommendation made by the

⁸ While the parties focus their arguments on whether the evaluation conducted by the district was part of an initial eligibility determination, State regulations provide that, prior to determining that a student has a learning disability, the CSE must conduct an individual evaluation including, among other things, "an observation of the student" (8 NYCRR 200.4[j][1][i]). While the IESP developed by the district of location indicated the student was eligible for special education as a student with an other health-impairment, the August 2015 IEP found the student eligible as a student with a learning disability (Dist. Ex. 4 at p. 1; Parent Ex. L at p. 1). Accordingly, the failure to obtain an observation constituted a procedural violation regardless of whether the August 2015 CSE was conducting an initial eligibility determination.

November 2015 CSE, as discussed above, the hearing record indicates that the basis for that determination was information that went beyond the student's performance at Windward during the 2014-15 school year, and that members of the CSE considered to be discrepant from their understanding of the student's needs. This was not a case where the district "displayed a pattern of indifference to the procedural requirements of the IDEA and carelessness in formulating [the student's] IEPs over the period of many years, repeatedly violating its obligations under the statute, which consequently resulted in the deprivation of important educational benefits to which [the student] was entitled by law" (L.O., 822 F.3d at 124). As discussed below, the program recommended by the August 2015 CSE was adequate to provide the student with the educational benefits to which she was entitled under the IDEA.

A review of the evidence in the hearing record does not establish that any procedural violations in this matter, individually or cumulatively, resulted in a denial of a FAPE to the student. The due process complaint notice did not challenge the present levels of performance set forth on the August 2015 IEP, other than the characterization of the student's disability as "mild" (Dist. Ex. 1 at pp. 3-4). Furthermore, as discussed above and as found by the IHO, the IEP reflected information from a variety of sources. The parents do not allege any specific harm caused by the inaccurate scores reported by the June 2015 psychological evaluation. Furthermore, the parents do not appeal from the IHO's determination that they were able to participate in the development of the student's IEP, nor do they contend that the incorrect scoring of the cognitive testing "deprived [them] of evaluative material so critical and insufficiently substituted at the CSE meeting that [they were] significantly hindered in [their] ability to advocate" for the student (A.A. v. New York City Dep't of Educ., 2015 WL 10793404, at *11 [S.D.N.Y. Aug. 24, 2015]). Rather, the parents asserted that the district failed to give sufficient credence to the recommendations of the private neuropsychological evaluation, an argument the IHO rejected (IHO Decision at p. 19). While the parents contend now that the district lacked sufficient information regarding the student's functional performance, as discussed above, the evaluative information available to the CSE, even if not meeting the procedural requirements for an initial evaluation, provided sufficient information regarding the student's functional performance to develop her IEP (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *16-*17 [S.D.N.Y. Feb. 14, 2017]; S.Y. v. New York City Dep't of Educ., 2016 WL 5806859, at *5 [S.D.N.Y. Sept. 28, 2016] [holding that procedural violations, including untimely evaluations and the failure to obtain required evaluations, did not rise to the level of a denial of a FAPE where the CSE had adequate information about the student's needs]; K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *7-*8 [S.D.N.Y. Mar. 31, 2016] [holding that where evaluative materials provided detailed information regarding the student's needs, the procedural violation of not conducting required evaluations did not rise to the level of a denial of a FAPE]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7-*8 [S.D.N.Y. Mar. 30, 2016]; M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 116 [S.D.N.Y. 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *5 [S.D.N.Y. Feb. 24, 2016]).

C. Resource Room and Consultant Teacher Program Recommendation

Turning to the substantive appropriateness of the August 2015 IEP, the district argues that the IHO erred in finding that the recommended program would not address the student's needs, and that the student required a greater level of support to be successful in a mainstream setting. A review of the hearing record supports the district's position.

The August 2015 IEP recommended a resource room program in a 5:1 ratio in 45-minute sessions on five days out of a six-day cycle (Dist. Ex. 4 at p. 9). The IEP also recommended consultant teacher services for one 45-minute session on one day out of a six-day cycle (*id.*). The consultant teacher services are described in the IEP as "Direct and Indirect Special education will push into the classroom and work directly with the student to ensure generalizability of skills into the classroom with natural materials. Special Education teacher will also consult with the general education teacher" (*id.*). The student was also recommended to receive a number of supplementary aids and services/program modifications/accommodations, including extra time to process and formulate responses; breaking down of instructions and directions; provision of additional examples during new lessons, visual cues, manipulatives for math, and graphic organizers for writing assignments; being asked to paraphrase during instruction; special seating near the source of instruction; and checks for understanding to include "a discreet cueing system with student should attention wane or if the student needs a way to communicate that she needs help" (*id.* at pp. 9-10). To the extent the parents asserted, and the IHO found, that the CSE did not have adequate reason to believe that the student could be successful in a mainstream setting with the foregoing supports, the hearing record does not support this determination.

The student's mother opined that the recommendation would be insufficient to meet the student's needs, and that she believed the student required a "small group setting" (Tr. pp. 1037, 1099-1101). Despite the mother's testimony, the chairperson of the August 2015 CSE meeting testified that while the student had difficulties, from the "professional opinion" of district staff "there were more strengths than difficulties," including "overwhelmingly average strong speech and language skills; cognitively average skills; many, many average skills in the academic testing and there were very discrete areas that needed to be addressed" (Tr. pp. 93-94, 173-74). The chairperson indicated, as found by the IHO, that "the resource room program would deliver the specialized and supplemental instruction in the areas that she showed weaknesses" (Tr. pp. 95-96). The chairperson testified that the same special education teacher who provided resource room services to the student would provide the recommended consultant teacher services, which would include observing the student to "ensure generalized ability and transferability of the skills she was learning in resource room in the general education setting," as well as consulting with the student's regular education classroom teacher "to ensure that the learning approach is implemented" with respect to the strategies and interventions that were used to address the student's needs in resource room (Tr. pp. 96, 99-100). The chairperson opined that, because the student had a number of "intact skills," the level of services recommended would address the student's needs (Tr. pp. 96, 103-04, 217). The chairperson acknowledged that the student would not receive resource room services on the sixth day of the district's six-day cycle, but that she would continue to receive each of the recommended program modifications and accommodations (Tr. pp. 182-85).

The district special education teacher who attended the August 2015 CSE meeting and conducted the June 2015 educational evaluation also testified that the resource room/consultant teacher program would be appropriate to meet the student's needs (Tr. pp. 545-46, 553-54, 630-31). The teacher opined that the program was appropriate because the student "could learn when given instruction . . . given practice" (Tr. p. 554). She described the manner in which the IEP would be implemented, in that the majority of the work on the student's annual goals would take place in the resource room program, while the consultant teacher portion of the program would push into the general education classroom (Tr. pp. 546-57). The teacher indicated that it was appropriate to have resource room five days out of each six-day cycle rather than every day,

because the student would still receive the recommended program modifications and accommodations (Tr. pp. 631-37).

The district school psychologist testified similarly that the recommendation for a resource room program, along with consultant teacher services, would be sufficient to address the student's needs because the Windward progress reports showed that the student had made progress with respect to academic skills and reflected that the student "was someone who when provided with strategies and given that explicit instruction was able to use and apply those strategies with success" (Tr. pp. 298-99).

The district speech-language pathologist indicated that, given the student's "difficulty with her reading and the automaticity of the math facts, and given that that was below average but consistent with the types of kids that we see in a resource room, that that was an appropriate program for her" together with the recommended program modifications and accommodations to be provided in the general education classroom (Tr. pp. 421-22). The pathologist opined that the student required "some wait time" to be able to access her skills and not answer impulsively, but that the student exhibited "strong metacognitive skills" (Tr. pp. 425-26).

The IHO found there had been "no discussion" at the August 2015 CSE meeting about the impact of enrollment in a mainstream setting on the student's distractibility and level of confidence (IHO Dec. at p. 20). A review of the record reveals inconsistent references to possible concerns in this domain (Dist. Ex. 13 at pp. 2-3, 5, 10; 17 at p. 1; 19 at p. 2; Parent Ex. M at p. 5). The student's report card from the nonpublic general education school indicated the student preferred clear expectations and asked for help at times when she felt "unsure" (Dist. Ex. 17 at p. 1). A classroom observation completed in June 2013 described the student as "at times inattentive, distracted and fidgety" (Dist. Ex. 9 at pp. 1-2). In addition, while the psychologist who completed the 2014 psychological evaluation described the student as hyperactive, the speech-language pathologist who evaluated the student in June 2015, reported the student was "attentive throughout this three hour evaluation[,] even under the condition of background noise" from multiple sources (Dist. Ex. 16 at p. 3). Such discrepant observations challenge the predictive validity regarding how the student would react to enrollment in a mainstream classroom in the public school.

Although the IHO found that the CSE had no basis to believe the student would be able to make progress in a general education environment, a review of the hearing record reflects otherwise. In particular, as noted above the CSE had available to it and considered the student's progress at her nonpublic general education school program. The hearing record includes the first semester report card from the student's second grade (2013-14) school year program at the nonpublic general education school (Dist. Ex. 17 at pp. 1-2).⁹ The report card denotes student progress on a rating scale of 1 to 4, in which a 4 indicated a student had met grade level expectations with excellence, a 3 signified a student met grade level expectations, a 2 indicated a student was progressing towards grade level expectations, and a 1 stated a student was performing below grade level expectations (*id.*). A review of the student's first semester report card shows that within language arts, the student was progressing towards grade level expectations in all areas, including reading accuracy and fluency, literal and inferential comprehension, written expression

⁹ Although it appears the student was enrolled at the nonpublic general education school for the entire 2013-14 school year, the record includes only the first semester grades for that school year.

and mechanics, and spelling (id. at p. 1). Within the area of math, the student's achievement was at grade level in three of the four subskills, including her ability to understand math concepts, compute accurately, and demonstrate problem solving skills (id.). Her ability to demonstrate a firm knowledge of math facts up to 20, was determined to be approaching grade level expectations (id.). Narrative comments regarding the student's classroom functioning portray the student as having well-developed social skills, and as being an active learner and frequent participant in literacy activities (id.). The report card also cautions that while the student was still "struggling with phonemic awareness and decoding," with continued growth in these skills, her literal and inferential comprehension would also improve (id.). In math, the student was described as "persistent," although she had yet to fully master her math facts (id.).

In testimony, the parent reported that while at the nonpublic general education school, the student was "pulled out" for support due to "mild issues," as opposed to "major red flags," adding she was "falling behind a little bit in the curriculum in the classroom" (Tr. pp. 1012-13). In contrast to her testimony, the neuropsychological evaluation completed in August 2014 indicates the parent reported the student had "struggled across several academic domains," particularly in second grade, and that the student had "regressed so much during this past year" that she had become resistant to engaging in reading and writing activities (Dist. Ex. 13 at p. 2).

As discussed above, the psychologist who completed the 2014 neuropsychological evaluation asserted the student "require[d] a small full time special education program . . . for children with good cognitive and academic potential" (Dist. Ex. 13 at p. 9). The evaluator further claimed the student would have been unable to function effectively within a general education setting, because within a third-grade setting, the student would not "have the time to look at a word and try to figure out what it is and not understand what she is reading" (Tr. p. 773). However, given the consistent testimony of the district witnesses that the program modification/accommodation of permitting the student extra time to process and formulate responses would be consistently implemented within the general education classroom, this assumption reveals the private psychologist's lack of familiarity with the district public school programs (Tr. pp. 809, 931; see Dist. Ex. 4 at p. 9). The district regular education teacher who attended the August 2015 CSE meeting testified and described the manner in which the modifications and accommodations recommended by the IEP could be implemented in a general education classroom, asserting that there would be no difficulty in implementing each (Tr. pp. 662-70). The district special education teacher indicated that the recommended modifications and accommodations aligned with the student's weaknesses as seen in the testing conducted in June 2015 (Tr. pp. 548-52; see Tr. pp. 506-25). The teacher further indicated that the recommended modifications "would be implemented throughout the school day and every subject area if it was applicable," and could be implemented in a general education environment (Tr. pp. 552-53, 636). The district speech-language pathologist specifically indicated that the recommended modifications and accommodations could be provided in a general education classroom and would address the student's "subtle relative weaknesses" relating to her language processing difficulties so as to permit her participation in the classroom (Tr. pp. 422-24). The CSE chairperson and school psychologist testified regarding the recommended program modifications and accommodations, how they would address the student's specific areas of need, and how those modifications would be implemented within a general education environment (Tr. pp. 101-03, 183-84, 300-01).

Accordingly, as the August 2015 CSE was in possession of adequate evaluative information regarding the student's functional performance, and developed a program reasonably calculated to address the student's needs reflected by that evaluative information, the IHO's determination that the district failed to establish the appropriateness of the recommended program must be reversed.

VII. Conclusion

In summary, the evidence in the hearing record does not support the IHO's finding that the district failed to offer the student a FAPE for the 2015-16 school year. Having determined that the district established the appropriateness of its recommendation for the 2015-16 school year, it is not necessary to determine whether the Windward School was an appropriate unilateral placement or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see T.P., 554 F.3d at 254; MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 12, 2017, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2015-16 school year and directed the district to pay for the costs of the student's tuition at the Windward School.

Dated: **Albany, New York**
 March 24, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER