The University of the State of New York

The State Education Department
State Review Officer
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No. 17-069

Application of a BOARD OF EDUCATION OF THE SCARSDALE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:
Keane & Beane, PC, attorneys for petitioner, by Stephanie M. Roebuck, Esq.

Barger & Gaines, attorneys for respondent, by Paul Barger, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tutoring costs for the 2015-16 school year and tuition costs at the Windward School ("Windward") for the 2016-17 school year, along with the costs of transportation. The appeal must be sustained in part.[1]

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and is 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 some of 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; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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

As a young child the student received occupational therapy (OT), physical therapy (PT) and speech-language therapy through the Early Intervention Program (EIP) while attending a nursery school program five mornings a week (Joint Ex. 4 at p. 2). In June 2011, the student participated in numerous evaluations in preparation for the transition from the EIP to the Committee on Preschool Education (CPSE (see Joint Exs. 3-7-7). On July 6, 2011, the CPSE convened for an initial eligibility determination meeting and found that the student was eligible for special education services as a preschool student with a disability; the CPSE determined that the student should continue to receive OT and PT services for the 2011-12 school year (see Joint Ex. 8 at pp. 1-2, 8). On April 16, 2012, a CPSE convened for the student's annual review and determined that the student's fine motor skills were developing in a manner commensurate with her age and that her gross motor skills had improved, as her scores on a standardized measure of motor development were in the low average range (Joint Ex. 9 at p. 2). However; the April 2012 CPSE noted that there continued to be concerns regarding the quality of the student's gross motor skills relative to strength and endurance for gross motor activities (id.). The April 2012 CPSE determined that the student continued to be eligible for special education services and recommended that PT services continue (id. at pp. 1-2).

The hearing record lack documentary evidence regarding the student's transition from CPSE to kindergarten. However, the district director of special education testified that the CSE had an initial eligibility determination meeting to determine if supports were necessary for the student during the 2013-14 school year (kindergarten) (Tr. pp. 29-30). The director of special education stated that, at the meeting, the committee determined that the student was not eligible for special education services but that the student continued to need PT, which was provided for in an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (Tr. p. 30; see Tr. pp. 65-66).[2] According to the hearing record, during the student's 2013-14 school year, a child study team met and determined that it would be beneficial for the student to receive "local effort support" in English Language Arts (ELA) (Tr. pp. 31, 132).[3]

According to school psychologist, the student continued to receive PT pursuant to a section 504 plan during the 2014-15 school year (first grade) (Tr. p. 66). In addition, the school psychologist testified that the student came before the child study team again during the 2014-15 school year, at which time the team recommended that the student be screened for possiblesupport from the Learning Resource Center (LRC) (Tr. p. 64). Based upon the results of that screening, the student was provided with supports in the LRC (Tr. p. 65).[4]

[2] The student's 504 plan for the 2013-14 school year was not included in the hearing record.

[3] While there is little direct explanation in the hearing record, local effort supports are alternatively referred to as response to intervention (RtI) services (see Tr. p. 33).

[4] Although the hearing record refer, at times interchangeably, to "LRC," "resource room," "RtI," and "local effort

On June 10, 2015, the parents and district staff convened to review the student's 504 plan for the 2015-16 school year (second grade) (Joint Ex. 10 at p. 1). During this meeting, the team discussed the student's need for continued LRC support for the 2015-16 school year, but also determined that the student no longer required PT services (id.). The resultant 504 plan provided for classroom accommodations to address the student's attending weaknesses, but included no direct services (id. at pp. 1-2). The hearing record indicates that the student continued to receive response to intervention (RtI) support in the LRC during the 2015-16 school year in the areas of reading, writing, and math (Tr. p. 34; Ex. 13 at p. 1).

The parents obtained a private neuropsychological evaluation, which was completed by January 25, 2016, and, on March 17, 2016, the parents sent the district a copy of the evaluation report with a request that the "CSE immediately consider [the student's] need" for special education services (Joint Exs. 11 at p. 1; 20). In preparation for the CSE meeting, the district completed an educational evaluation and a classroom observation of the student (see Joint Exs. 13; 21; see also Joint Exs. 12; 22).

A CSE convened on May 6, 2016 to consider the student's eligibility for special education (Joint Ex. 14 at p. 1). According to the meeting information document, the CSE discussed that the student had become an active learner, participated in class, and followed classroom routines and that, while the student required redirection at times, she redirected without difficulty (Joint Ex. 14). The CSE also noted that the student was beginning to self-monitor when reading and writing and that her verbal skills were considered a strength (id.). For those reasons and based on the results of recently completed evaluations, the CSE determined the student was not eligible to receive special education but noted that the student would continue to receive accommodations through the 504 plan (Tr. pp. 46, 359-60; Joint Ex. 14).

The student's mother testified that she began considering private school options for the student in the middle to end of 2015-16 school year (Tr. pp. 472, 480). According to the mother, the parents ultimately decided to send the student to Windward because they did not believe that the district was meeting the student's needs (Tr. p. 481).[5] The student began attending Windward for the 2016-17 school year (see Tr. pp. 480-81, 513; Joint Ex. 27).

A. Due Process Complaint Notice

By due process complaint notice dated July 19, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 and 2016-17 school years (Joint Ex. 1 at p. 8). The parents claimed that the May 2016 CSE failed to classify

supports," the director of special education explained the RtI process and clarified that "[t]he second tier of RtI is a pull-out service that is held in the [LRC] by special education teachers" where students can "receive help in math and ELA" (Tr. pp. 21-22). The director later testified that LRC "is a resource room setup, five to one ratio" (Tr. p. 20). Therefore, as best can be understood, when a student requires local effort supports, he or she may, at some time, be referred to the LRC—a resource room—to receive Tier 2 services from a special education teacher as part of the district's RtI program.

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

the student as a student with a disability despite having "sufficient evidence to the contrary" (id. at p. 6). Further, the parents maintained that the district had been aware of the student's "educational deficits in reading, math, and writing," including deficits in literacy skills and decoding, since she first attended school in the district but that the district chose to ignore those deficits (id. at pp. 3, 7). For relief, the parents requested that the district be held "responsible for all costs associated with" the student's placement at Windward "for the 2016-17 school year and for so long as the program remains appropriate," including the costs for tuition, transportation, family visits, and student home visits (id. at p. 7). The parents also requested "compensatory education" for the district's failure to provide the student with a FAPE for the 2015-16 school year (id. at p. 8). Finally, the parents requested that the district reimburse them for all costs associated with the private neuropsychological evaluation of the student that they obtained in January 2016 (id. at pp 3, 8).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 4, 2016, which concluded on April 24, 2017, after three days of proceedings (see Tr. pp. 1-533). In a decision dated July 16, 2017, the IHO determined that the district failed to provide the student with an "appropriate education" for the 2015-16 and 2016-17 school years (IHO Decision at p. 28).

The IHO first determined that the district did not violate its obligation under child find by failing to identify and evaluate the student during the 2015-16 school year (IHO Decision at p. 18). Specifically, the IHO found that there was no evidence in the hearing record that the district "ignored clear signs" of the student's disability; to the contrary, the IHO noted that, once the student transitioned to "school age," the district conducted an evaluation of the student, which satisfied its child find obligation, and determined that the student's OT and PT services could be provided through a 504 plan (id. at pp. 18-19). The IHO also cited the LRC and "resource room support services" provided to the student through the 2015-16 school year and evidence that the student met her PT and OT goals (id. at p. 19). The IHO also found that the district did not utilize the 504 plan to "delay the evaluation procedures required to identify a child with a disability[] or deny special education services" (id.).

Notwithstanding his determination regarding child find, the IHO found that the district failed to provide the student with an "appropriate education or FAPE" for the 2015-16 school year, as a result of the student's "slow progress" with RtI services during the 2013-14 and 2014-15 school years and the district's continuation of the same services for the 2015-16 school year (IHO Decision at pp. 20-21). The IHO noted that "RTI or resource room services [are] designed to offer temporary support for a student who is struggling for a six to eight week period," and that an assessment is supposed to be conducted to determine if the interventions were successful or if additional services are warranted (id. at pp. 21-22). While the IHO found that the student performed in the average range on assessments and was promoted from grade to grade, the IHO also found that FAPE "requires more than de minimis progress from year to year," and a program providing slow progress is not designed "to make progress appropriate for [the student]" (id. at p. 22).

For the 2016-17 school year, the IHO found that the district conducted a "perfunctory CSE review evident by its failure to classify" the student as a student with a disability; specifically, the

IHO noted that, while there was testimony in the hearing record that the CSE had reviewed the criteria for classifying a student with a learning disability, there was no indication whether the CSE had a discussion about the student having received a dyslexia diagnosis or how it might relate to a learning disability classification (IHO Decision at p. 23).[6] However, the IHO determined that it was "undisputed [that the student] ha[d] dyslexia" and, as a result of her dyslexia, the student met the criteria for a learning disability (id. at p. 24). The IHO found that the district failed to classify the student, create an appropriate IEP, or offer an appropriate program (id.).

As to the appropriateness of the unilateral placement, the IHO determined that Windward was an appropriate placement with curriculum that was designed to meet the student's needs (IHO Decision at pp. 25, 27). The IHO found that the student benefited from the small school environment at Windward, as well as the "language based program" and the a "multi-sensory curriculum," which addressed the student's needs related to dyslexia (id. at pp. 25-26). Moreover, the IHO found that the student had been progressing since she began attending the Windward (id. at p. 26).[7] The IHO also determined that the parents were not required to keep the student in a public school where it was clear that the "recommended services would be another wasted year of actual failure" and, therefore, that there were no equitable considerations barring reimbursement of tuition at Windward (id. at pp. 27-28).

For relief, the IHO ordered the district to reimburse the parents for the cost of tutoring services and transportation to and from tutoring provided to the student during the 2015-16 school year and for the cost of tuition at Windward during the 2016-17 school year (IHO Decision at p. 28). The IHO also directed the district to reimburse the parents for the cost of transportation to and from Windward during the 2016-17 school year (id. at p. 29).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO's decision was "legally and substantively deficient, except to the extent that the IHO found . . . the [d]istrict did not violate its child find obligation." The district claims that for the 2015-16 and 2016-17 school years it provided a "program of educational services designed to meet [the student's] . . . needs, and thus, provided" the student with a FAPE under section 504 and the IDEA. For the 2015-16 school year, the district claims that the student's reading and math services in the LRC, as well as the recommendations on the student's 504 plan, including the accommodations provided to address the student's attentional difficulties, provided the student with a FAPE under both section 504 and the IDEA. The district also notes that the IHO dod not clarify how the student could be denied a FAPE when the IHO also found that the student had "made steady growth" and received "grade level scores" with the supports she received during the 2015-16 school year.

[6] The IHO also noted that there was vague testimony reflecting that "the CSE considered classifying [the student] as either learning disable[d] or other health impaired" (IHO Decision at p. 23).

[7] Additionally, the IHO noted that the district failed to refute the testimony and evidence in the hearing record regarding whether Windward was an appropriate unilateral placement for the student (IHO Decision at p. 26).

The district also claims that the May 2016 CSE appropriately determined that the student was not eligible for special education as a student with a disability. The district maintains that the CSE appropriately determined not to classify the student as a student with an other health-impairment because the student made "more than adequate progress" with the LRC supports and the supports she received pursuant to her 504 plan and, therefore, "did not require special education and services." The district also claims that the IHO incorrectly found that the student met the criteria for a learning disability because the student had dyslexia, asserting that the CSE correctly determined that the student did not qualify for special education as a student with a learning disability since the student made "more than adequate progress while receiving support" in the LRC. The district also maintains that the IHO inappropriately relied solely on a "diagnosis" of dyslexia to support his finding that the CSE should have found the student eligible for special education.

Regarding the student's unilateral placement for the 2016-17 school year, the district argues that Windward was not appropriate for the student. The district claims that the parents presented, and the IHO relied upon, general information related to the unilateral placement, and that the parents failed to demonstrate the placement provided educational instruction specially designed to meet the student's unique needs. The district also claims that the IHO placed undue weight on an August 2016 private psychoeducational evaluation—which the district points out post-dated the May 2016 CSE meeting—and testimony from the private psychologist related to his observation of Windward. Further, the district claims that there was nothing in the private psychologist's testimony to show that the program at Windward was specifically tailored to the student or that she required the supports Windward offered. The district also claims that the IHO "inappropriately considered whether the [d]istrict had refuted [the private psychologist's] testimony." Additionally, the district argues that Windward was "too restrictive an environment" for the student as it did not provide access to nondisabled peers. As for equitable considerations, the district contends that the parents impermissibly predetermined the student's placement at Windward before the May 2016 CSE meeting. Finally, the district claims that the IHO improperly found the parents were entitled to reimbursement for the cost of private tutoring for the 2015-16 school year, as the parents did not meet their burden of proving that they were entitled to such relief.

In an answer, the parents generally respond to the district's allegations with admissions and denials and argue to uphold the IHO's determinations in their entirety.[8] The parents also maintain that the district raises procedurally deficient assertions of error pertaining to the IHO's determinations that equitable considerations supported reimbursement of the costs of the tuition at Windward for the 2016-17 school year and that the parents were entitled to reimbursement of the

[8] Although the parents assert that the district violated its child find obligations by failing to properly evaluate the student and identify the extent of her disabilities, they do not assert a cross-appeal in order to challenge this aspect of the IHO's decision, which was adverse to the parents (8 NYCRR 279.4[f]). Accordingly, the IHO's determination that the district did not violate its obligation under child find by failing to identify and evaluate the student during the 2015-16 school year (see IHO Decision at p. 18) has become final and binding on the parties and shall not be further reviewed on appeal except to the extent discussed below (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

costs of tutoring services provided to the student during the 2015-16 school year.[9] In a reply to the answer, the district asserts that the claims identified by the parents are not procedurally deficient.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of

[9] In their memorandum of law, the parents elaborate that the district's arguments are procedurally deficient because the district fails to specify reasons for overturning the IHO's determinations. Without dwelling on the fact that it was necessary to refer to the parents' memorandum of law to locate their specific argument—that the district impermissibly detailed the reasons for its claims of IHO error in its memorandum of law—suffice it to say that the district's arguments were sufficiently detailed in the request for review such that the parents were not impeded in their ability to respond to the allegations (see 8 NYCRR 279.4[a]; see also 8 NYCRR 279.8[c]). While the district's request for review shall not be rejected based on the form requirements, I note that the request for review does not comply with 8 NYCRR 279.8(c)(2), which requires that the request for review set forth "a clear and concise statement of the issues 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." The request for review does not number and set forth the issues the district wishes to be reviewed; instead, each paragraph is numbered in accordance with the regulations in effect prior to January 1, 2017 (see 8 NYCRR 279.8[a][prior 3]). Counsel for the district is reminded to, in the future, comply with the form requirements set forth in the State regulations, as amended.

Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[10]

[10] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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

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

VI. Discussion

A. Preliminary Matters—Additional Evidence

The hearing record indicates that the student received RtI services from the latter half of the 2013-14 school year to the end of the 2015-16 school year (see Tr. pp. 134, 141-42, 177, 260-61) and, therefore, her 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]), as well as relevant to the below discussion of the student's eligibility for special education as a student with a learning disability (see 34 CFR 300.309[a][2][i]; 8 NYCRR 200.4[j][3][i][a]). However, a preliminary review of the hearing record showed that the evidence presented at the impartial hearing related to the district's RtI process was incomplete. Thus, the district was directed to provide a copy of its written policy regarding its RtI process that was in effect for the 2014-15 and 2015-16 school years, as well as the district's RtI plan and any other pertinent documentation (see 8 NYCRR 100.2[ii][2], see also 8 NYCRR 200.2[b][7]).[11] Both parties were permitted to brief their positions as to whether and to what extent the written policy should be considered and relied upon by the undersigned in rendering a decision.

In its response to the request, the district provided documents describing its policy regarding its RtI process, including: the district's RtI plan; a document describing the district's RtI model entitled "Response to Intervention: A Multi-Tiered Academic Support Program"; as well as

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setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

[11] In accordance with State regulations, a State Review Office may request additional evidence upon a determination that such evidence may be necessary in order to render a decision (8 NYCRR 279.10[b]).

two letters from the district to parents regarding STAR assessments (SRO Ex. 1; 2; 3).[12] In its supplemental brief, the district does not object to consideration of the additional evidence; however, the parents object to the additional evidence, specifically asserting that the RtI policy and related documentation is not relevant because it does not identify whether it was "(i) used appropriately in [the student's] case, or (ii) compliant with State regulations" (Parent Supp'l Br. at p. 4). The parents also contend that, if accepted, the RtI policy is further evidence that the district did not follow its own protocol in failing to refer the student for an evaluation after an extended time receiving RtI supports (id. at pp. 2-3). While the parents' concerns regarding the district's RtI policy have been taken into consideration, I find the district's policy and related documentation 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 NYCRRR 279.10[b]).

B. 2015-16 School Year—Child Find

The district appeals from the IHO's finding that the district failed to offer the student a FAPE for the 2015-16 school year (IHO Decision at pp. 18-19). The district contends that it "provided [the student] a FAPE under Section 504 and the IDEA, as it addressed her attentional issues with continued local effort support and a Section 504 Plan" (Req. for Rev. ¶21).

Initially, the IHO did not make specific findings related to section 504; however, the district's argument that it "provided [the student] a FAPE under Section 504" may stem from the IHO's seemingly contrary conclusions that the district did not violate its child find obligations during the 2015-16 school year and, during the same period, failed to offer the student a FAPE (IHO Decision at pp. 18-19, 20-22).[13] One of the purposes of the IDEA is "to ensure that all children with disabilities have available to them a [FAPE]" (20 U.S.C. § 1400 [d][1]A]). As part of this goal, school districts are required to "identify, locate and evaluate . . . all students with disabilities in such district who are in need of special education" (N.Y. Educ. Law § 4402[1][a]); however, only students who have a qualifying disability and need special education are entitled to a FAPE (20 U.S.C. §§ 1400 [d][1]A]; 1401[3][A]). Accordingly, a district's child find obligations

[12] For purposes of this decision, the district's RtI Plan is referenced as "SRO Exhibit 1," the document entitled "Response to Intervention: A Multi-Tiered Academic Support Program" is referenced as "SRO Exhibit 2," and the letters to parents are referenced as "SRO Exhibit 3."

[13] Even assuming that the IHO did make findings related to section 504, in New York, the review procedure under section 504 does not include State-level review by an SRO, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (e.g., 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) and, to the extent such claims were or are asserted in this proceeding, they shall not be further addressed in this decision.

and its obligations to offer a FAPE are mutually exclusive. Nevertheless, in examining the IHO's rationale for finding a denial of FAPE for the 2015-16 school year, the IHOs purported FAPE determination may more accurately be treated as an additional child find determination.

The IHO found that the district denied the student a FAPE for the 2015-16 school year when it continued to recommend the same RtI services for the student that the district had provided during the 2013-14 and 2014-15 school years, which the IHO found "yielded 'slow' progress" (IHO Decision at pp. 20-21). The IHO explained that RtI services are designed to offer temporary support and that the continuation of RtI services on an indefinite basis resulted in the district's failure to "conduct an assessment . . . to determine if the intervention was successful or if additional services [were] needed" (id. at p. 21). To ensure that a school district has complied with its child find obligations, State regulation requires that the school district 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 the district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]). Based on the above, although the IHO determined that the student was denied a FAPE for the 2015-16 school year, that determination is more appropriately treated as a determination that the district should have initiated the referral process at the start of the 2015-16 school year after the student exhibited two school years of "slow progress" in an RtI program. In asserting that the IHO erred, the district claims that the student made progress during the 2015-16 school year with the support the student received in the LRC and through his 504 plan.

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 ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 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. of Fayette County 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, as noted above and as 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 RtI program (8 NYCRR 200.4[a]). see also 8 NYCRR 100.2[ii]).

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 set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[ii][2], see 8 NYCRR 200.2[b][7]).

In this matter, the district's written policy identified that the district utilized a three-tiered framework for providing RtI services to students (SRO Ex. 1 at p. 5). According to the policy in effect for the relevant time frame, the district offered Tier 1, considered the primary level of intervention, after a screening process, which consisted of differentiated instruction provided to all students and targeted instruction for those students evidencing signs of academic struggle (id. at p. 6). The district policy provided that such instruction, which was supplemental, would be delivered in a group format or individually for a minimum of three 20- to 30-minute sessions in a six-day cycle for six to eight weeks; the policy provided that data on student performance would be collected weekly during this time (id. at pp. 6-7). Tier 1 services could be discontinued when the student had met "stated targeted needs and [wa]s achieving satisfactorily" (id. at p. 7). Otherwise, the student could be referred for Tier 2 services "if the teacher believe[d] a more intensive program [wa]s required" (id.). While services in Tier 1 could be continued for another six to eight week cycle if the student continued to require support, the district policy provided that students who received two or more cycles of Tier 1 support services "should be referred for Tier 2 services" (id.).

According to the district's RtI policy, Tier 2 services included small group or individual instruction provided outside of the general education classroom by an LRC teacher or other designated professional (SRO Ex. 1 at p. 8). The policy provided that Tier 2 services were intended for those students who, according to "data collected and teachers' opinions," made inadequate progress in Tier 1 and "continue[d] to require supplemental instruction" (id.). The district policy described instruction provided at this Tier as "designed to address the needs or weaknesses of the student relative to the curricula demands in reading, writing, and/or mathematics" (id.). Moreover, Tier 2 services could "be provided up to 3 times in the six day cycle for 30-minute periods," and services could be provided for six to eight weeks, at which point the LRC teacher would determine if the student's services should be terminated or continued for another cycle (id. at pp. 8-9). If the student continued to have "persistent delays" after six to eight weeks of Tier 2 intervention or had received two cycles of Tier 2 services, the student could qualify for Tier 3 services (id. at p. 10).

As described in the district's policy, Tier 3 services were designed for those students who made limited progress in response to Tier 2 interventions or who demonstrated significant needs that warranted more intensive instruction or intervention (SRO Ex. 1 at p. 9). If the student received Tier 3 services, such services could be provided "up to 5 times in the six day cycle for 30-40 minute periods," and could be provided for six to eight weeks after which the LRC teacher would terminate the student's services or determine that the student needed more support; in the event the student received two cycles of Tier 3 services and continued to need support, the policy provided that the district should refer the student to the CSE (id.).

The policy indicated that a student who continued to require intervention could only receive services in "any combination of Tier 1, Tier 2, and Tier 3" for a maximum of 32 weeks before the policy required the district to refer the student to the CSE for an initial evaluation (SRO Ex. 1 at pp. 8, 10, 11, 15, 21, 23).[14] Additionally, the written policy included referral forms and intervention plan forms to be completed by the district at each of the Tiers (see id. at pp. 15-23).

At the impartial hearing,the director of special education also summarized the district's RtI process. The director testified that, when an elementary school student demonstrated difficulty with reading, he or she was often brought to the attention of the child study team by the student's regular education teacher or the student's parents (Tr. pp. 22-23). If the child study team determined that the student required additional support, the student would begin receiving Tier 1 services (Tr. pp. 21, 23). A student would receive Tier 1 intervention from the regular education teacher in the general education setting during the portion of the day referred to as "creative and critical thinking time"; after a student had received approximately six to eight weeks of Tier 1 support, he or she would be reassessed and, if necessary, provided with more intensive supports in Tier 2 (Tr. pp. 21, 23).[15] However, according to the director, "that [did not] happen often" (Tr. p.

[14] Moreover, State guidance explains that the recommended length of time a student spends in the second tier of intervention will vary from approximately 9 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).

[15] The student's LRC teacher for kindergarten and first grade also testified that teachers worked with students

23). The director described Tier 2 as a "pull-out service that [wa]s held in the [LRC] by special education teachers," where students could "receive help in math and ELA" (Tr. pp. 21-22).[16]

Turning to the application of the district's policy to the student in this case, the hearing record shows that, during the 2013-14, 2014-15, and 2015-16 school years, the student received RtI services in the form of instruction by a special education teacher in the LRC (see Tr. pp. 128-29, 134, 141-42, 177, 258-61). The student's LRC teacher for kindergarten and first grade testified that the student was originally referred to LRC at the end of the 2013-14 school year due to the student's challenges with letters, sounds, numbers, and "number sense" (Tr. p. 132). The director of special education also testified that the student first received "local effort supports" in ELA during the 2013-14 school year (Tr. p. 31).[17] The director reported that the student continued to receive RtI throughout the first and second grade school years (Tr. pp. 33-35). The student's LRC teacher for kindergarten and first grade stated that she would "pull [the student] out" of the classroom three times in a six-day cycle for instruction in math, reading, and writing; she would also push into the student's classroom two times in a six-day cycle (Tr. pp. 134, 141, 177-78). The teacher further stated that students could only be pulled out a maximum of three times per six-day cycle without an IEP; however, the district policy indicates that students could receive services up to five sessions per six-day cycle in Tier 3 before being referred to the CSE (compare Tr. p. 177, with SRO Ex. 1 at p. 10). The LRC teacher testified that she utilized the Preventing Academic Failure (PAF) program, a "multisensory program based on Orton-Gillingham approach" (Tr. pp. 135, 142).[18]

The student's LRC teacher for second grade testified that he saw the student three times in a six-day cycle for 40 minutes and pushed into the general education classroom once in a six-day cycle (Tr. p. 260). The second grade LRC teacher also opined that, if a student needed reading instruction more than three times per six-day cycle, the student had to be referred to the CSE (Tr. p. 313). He testified that he utilized the PAF program (Tr. p. 261).

Based on the testimony from both the student's LRC teachers—that they provided the student with three pull-out and one or two push-in sessions every six day cycle—and based on the district's RtI policy describing the three tiers of RtI services, it can be inferred that the student was receiving Tier 2 and/or Tier 3 services during part of the 2013-14 school year, which continued during the 2014-15 and 2015-16 school years. Regardless of whether the student received services

"they [we]re worried about for a period of time, six to eight weeks, and then they br[ought] up the student at a [child study team] meeting" (Tr. p. 131).

[16] The district's document describing its RtI model indicated that Tier 1 supports took place in the student's classroom and were provided by the student's regular education teacher, whereas Tier 2 and Tier 3 supports consisted of pull-out instruction provided by the LRC teacher (SRO Ex. 2 at p. 2).

[17] The district's document describing its RtI model indicated that the services the district provided as Tier 2 were previously identified as "local effort supports" (SRO Ex. 2 at p. 2).

[18] According to the LRC teacher, the PAF program included pretests and posttests that she administered to the student (Tr. pp. 182-83). Although the LRC teacher recalled presenting some of the test results to the parents at parent/teacher conferences, she did not think that she had retained the documentation (id.).

in Tier 1, Tier 2, or Tier 3, the district violated its own policy when it continued RtI services for the student after 32 weeks of continuous support without referral to the CSE (SRO Ex. 1 at pp. 8, 10, 11). The director of special education testified that, from the time the student entered kindergarten until the impartial hearing, no district staff members had referred the student to the CSE, even though they could have done so if they believed it to be appropriate (see Tr. p. 56). The student was ultimately referred to the CSE in March 2016 by the parents (Tr. pp. 23, 35-36, 68, 359; Joint Ex. 20). The student's mother testified that, at that time, the student was "struggling for three years in school" before the CSE meeting had taken place (Tr. p. 479).

In summary, rather than refer the student to the CSE, the district violated its own RtI policy by continuing to provide RtI services for an extended period of time before the parents referred the student to the CSE in March 2016. As the district's own documentation of its RtI model describes, while use of an RtI process is certainly appropriate before considering the provision of special education under the IDEA (i.e., "RTI ha[s] been effective in preventing a deficit from being a disability"), "the process is also critical in the identification of students with learning disabilities" (SRO Ex. 2 at p. 2). In order to make the determination whether a student has made adequate progress in an RtI program—for the purpose of deciding whether or not a student receiving RtI services should be referred for an evaluation—the district must be able to show that it followed its own RtI process, and, in this instance, the district has not done so. Additionally, as the IHO noted, RtI is designed to offer temporary support for a student in order for the district to make important educational decisions related to the student, including whether referral to the CSE is necessary (see IHO Decision at p. 21; see also "Response to Intervention, Guidance for New York State School Districts," at p. 1, Office of Special Educ. [Oct. 2010], available at http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf). Based on the foregoing, the evidence in the hearing record shows that the student should have been referred to the CSE for evaluation and for a determination as to whether the student was eligible for special education by the start of the 2015-16 school year. Accordingly, the evidence supports a finding that the district failed to satisfy its child find obligations during the 2015-16 school year.

C. 2016-17 School Year—Eligibility

The district argues that the May 2016 CSE's decision not to classify the student as a student with a learning disability or an other health-impairment for the 2016-17 school year was appropriate because the student made adequate progress with LRC supports and supports pursuant to a 504 plan; the district also claims the IHO incorrectly found the student was learning disabled solely as a result of her dyslexia.

1. Learning Disability

The district asserts that the May 2016 CSE was required to take into consideration the student's response to intervention prior to classifying the student as a student with a learning disability and that the student's progress based on performance in the LRC, on standardized tests, and in the classroom justified the decision not to classify the student. Additionally, the district points out that a CSE is required to undertake an extensive analysis before deciding whether a student has a learning disability.

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

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

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

the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).[19]

With respect to the relationship between RtI and the learning disability category of eligibility, State guidance describes that RtI is the practice of providing high-quality instruction or 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," at p. 1). The guidance describes RtI as an important educational strategy that has been shown to lead to more appropriate identification of and interventions with students with learning disabilities (id.). The guidance provides that 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.).

Although the sufficiency of the evaluative and other materials considered by the May 2016 CSE is not in dispute, a review of the materials considered is necessary to assess the CSE's determination not to find the student eligible for special education. The district chairperson for the May 2016 CSE meeting testified that the CSE considered a January 2016 neuropsychological evaluation report, an April 2016 Fountas and Pinnell assessment report, a May 2016 educational evaluation report, a May 2016 classroom observation report, and the student's test scores on a February 2016 STAR assessment (Tr. pp. 361-66, 371; Joint Exs. 11-13; 21; 28). The chairperson also stated that the student's second grade teacher shared the student's then-current performance in class with the committee during the CSE meeting (Tr. p. 366).[20]

The January 2016 neuropsychological evaluation included: a behavioral observation; assessment of motor/psychomotor functions, sensory-perceptual functions, laterality and right/left orientation, language functions, academic functions, memory functions, intellectual functions, and personality functions; interpretation of results; and recommendations (Joint Ex. 11). Based on the results of the assessments, the evaluator found that the student demonstrated impairments in higher

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

[20] The district points out that the August 2016 psychoeducational evaluation and testimony from the private psychologist related to his observation of Windward in October 2016 post-dated the May 2016 CSE meeting. To the extent that the parents intended to utilize the psychoeducational evaluation or the psychologist's testimony to support claims relating to the May 2016 CSE meeting, such evidence would constitute retrospective evidence that cannot be used to assess the CSEs' recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]). However, to the extent that the parents utilized the evaluation and testimony to support their claims that Windward was an appropriate placement for the student, such evidence is appropriate for that specific purpose. Moreover, to the extent the district expressed concern that the IHO considered this evidence, the IHO only relied on it in making a determination regarding the appropriateness of Windward (see IHO Decision at p. 25 n. 6).

cortical functioning including visual spatial reasoning, processing speed, academic functions, memory functions, motor functions, and executive functions (id. at p. 21).

Relative to cognition, the January 2016 neuropsychological evaluation report indicated that the student's full-scale IQ as measured by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) was 89, falling in the "low average" range (Joint Ex. 11 at p. 15). With respect to academic functioning, the student's performance on the Wechsler Individual Achievement Test-Third Edition (WIAT-III) yielded a "below average" standard score of 85, percentile rank 16, for total reading ability (id. at p. 8). The student also attained below average standard scores of 87 (percentile rank 19) for ability in basic reading and 86 (percentile rank 18) for reading comprehension and fluency (id.). However, the student demonstrated average ability in written expression, mathematics, and math fluency (id.).[21] The evaluator noted that the student's early reading skills were unimpaired but that her decoding skills were "significantly less robust" (id. at p. 9). According to the evaluator, the student's decoding skills were significantly below expectations based on capacity and grade level and, regardless of obtained scores, the student's decoding was significantly impaired (id.). Moreover, while the student could decode initial letters in a word, the evaluator reported that the student had difficulty with vowel sounds, vowel blends, and consonant blends, as well as sequencing of letter and syllable sounds; the evaluation also indicated that decoding multi-syllabic words was beyond the student's capacity at the time of the assessment (id. at pp. 9-10).[22] Regarding the student's abilities in oral reading, the evaluator found that the student's decoding was slow and laborious, requiring the student to focus on decoding rather than the content of the text; the student also inaccurately substituted words, which interfered with her comprehension, and demonstrated a lack of attention to punctuation, omitted words or parts of words, and was unaware that her decoding errors altered the meaning of a sentence (id. at p. 10). The evaluator opined that the student's average range performance in reading comprehension was "misleading" as the student did not derive main ideas or details from what she just read (id.). Moreover, as the content and vocabulary of the passages became more difficult, the student had greater difficulty answering questions, and her ability to paraphrase, infer, or predict was limited (id.).

With respect to the student's behaviors, the evaluator reported that, during testing, the student's frustration tolerance was low, her response style was "somewhat impulsive," and her attention was significantly reduced on tasks she disliked (Joint Ex. 11 at pp. 3, 19-20). As a result of the student's overall performance, the evaluator diagnosed the student with a specific reading disorder (id. at p. 24). At the impartial hearing, the neuropsychologist who conducted the January

[21] The student demonstrated variability on the individual subtests of the WIAT-III (standard scores ranging from 80-105) with below grade level performance reported on the subtests measuring math problem solving, math fluency (addition), word reading, pseudoword decoding, oral reading fluency, oral reading accuracy, and oral reading rate (Joint Ex. 11 at pp. 8-9). However, the evaluator also described the student's performance on the word reading subtest as being "at the lowest limits of the Average range" (standard score 90) (id. at p. 9).

[22] The evaluation also indicated that the student guessed at words based on the initial consonant sound (Joint Ex. 11 at p. 10).

2016 neuropsychological evaluation testified that the student had "classic dyslexia" and that, while the student's auditory and visual perception were intact, she could not integrate the two; the neuropsychologist further testified that, with respect to integrating different modalities, "visual and auditory integration [wa]s the sole area that [the student] [wa]s having trouble with" (Tr. pp. 437-39; see Joint Ex. 11 at p. 23). Additionally, she opined that the student's "decoding difficulty [wa]s not caused by an attention deficit disorder" (Tr. p. 461).[23]

On April 20, 2016, the student's LRC teacher for second grade assessed the student's reading relative to her performance on the Fountas and Pinnell benchmark assessment (Tr. pp. 265-67; Joint Ex. 12). The April 2016 report indicated that the student's reading level was at the end of second grade and that the student's reading accuracy was in the 99th percentile; additionally, the student's comprehension of the presented text was determined to be satisfactory (Joint Ex. 12 at p. 1). While the student read at a slow pace with little expression, the student only made four mistakes when reading (id.). The report also indicated that the student sounded out challenging, unknown words, and had some initial difficulty answering reading comprehension questions (id. at p. 2). However, once the student began responding to comprehension questions, she could retrieve more details as time went on, and was able to answer most question with "at least one detail from the story" she read (id.). While the student read with below average fluency and expression, and slightly below average reading comprehension, the report noted that the student had begun to independently use strategies she was taught to increase her academic success in the classroom (id.). According to the report, the student's writing reflected a partial understanding of the text (id.). The student was capable of writing details based on her prior knowledge, but her writing improved when she referred to the text (id.). The LRC teacher confirmed that the student's fluency score on the evaluation was a one out of four, which was at the low end (Tr. p. 270; Joint Ex. 12 at p. 1). The LRC teacher also reported that the student had limited comprehension when reading during the assessment and that, at that time, the student read at a slower pace "compared to the majority of the kids" that the teacher worked with (Tr. pp. 271-72). However, based upon his work with the student in the LRC, the teacher agreed with the assessment that the student could read a book at the end of second grade level (Tr. p. 276).

The May 2016 CSE also reviewed the May 2016 educational evaluation completed by the district, including the student's performance on the Woodcock-Johnson IV Tests of Achievement, Form B (WJ-IV) (Tr. p. 364; Joint Exs. 13; 22).[24] The results of the WJ-IV indicated that the

[23] The January 2016 neuropsychological evaluation report indicated that the student's pattern of performance on tests of neuropsychological functions was significant for two main findings: (1) tests of phonemic perception and tests of visual perception were within the normal range but impairment was present at the level of cross-modality association specific to auditory-visual integration, and (2) indices of impaired executive functions were demonstrated including sustained attention, impulse control, novel problem solving, cognitive flexibility, processing speed, and memory (Joint Ex. 11 at p. 23).

[24] The May 2016 educational evaluation is simply dated May 2016; however, the score report for the WJ-IV referenced in the evaluation is dated May 5, 2016, one day prior to the May 2016 CSE meeting (Joint Exs. 13 at p. 1; 22 at p. 1). The evaluation was conducted by the LRC teacher for fourth and fifth grade because the student's LRC teacher for second grade was out of school due to an injury, but the educational evaluation report was written by the student's second grade LRC teacher (Tr. pp. 277-79, 299-300). The student's correct birthdate and age are

student's reading, writing, and mathematics skills fell primarily in the average range, while the student's writing samples fell in the high average range; however, academic fluency, math facts fluency, and sentence writing fluency fell in the low average range (see Tr. pp. 161-62; Joint Ex. 22 at p. 1). Despite these findings, the narrative, completed by the student's second grade LRC teacher, diverged from, or elaborated upon, some key aspects from the findings reported in the WJ-IV, including some apparent inconsistencies in the student's scores. The qualitative observations of the student's performance on the WJ-IV indicated that the student was able to solve problems quickly with no observed difficulties on the calculations subtest and described the student's performance as "fluent and automatic" (Joint Exs. 13 at p. 2; 22 at p. 1). Similarly, the qualitative observations of the student on the applied problems subtest indicated that the student solved problems with no observed difficulties and that she demonstrated good comprehension and analytic abilities (Joint Exs. 13 at p. 2; 22 at p. 1). However, as noted above, the student's performance on the math facts fluency subtest of the WJ-IV was below average (Joint Ex. 13 at p. 2). The LRC teacher noted that the student showed difficulty with short-term working knowledge of mathematical calculations, reasoning, and problem-solving strategies; however, it is not clear if he was basing this assessment on the student's performance on the WJ-IV during RtI instruction or in the classroom (id. at p. 4). The teacher also reported that the student benefited from lessons being retaught each day (id.). Regarding reading, the LRC teacher indicated that the student was developing her ability to decode unfamiliar words, as well as her "word knowledge and vocabulary," to improve "her reading fluency" (id.). The teacher explained that the student's weakness in this area was related to her inability to "break the code" and read the words and not a result of her inability to understand the meaning of unfamiliar words or vocabulary (id.). Further, while the teacher noted that the student read for meaning and could comprehend text, the student's reading fluency was low and required attention due to the student's struggle with phonemic awareness (id.). The LRC teacher also indicated that the student struggled to apply spelling rules to produce written words; however, the student's score on the spelling subtest of the WJ-IV was at the 48th percentile and qualitative observations indicated the student spelled words easily and accurately (Joint Exs. 13 at pp. 2, 4; 22 at p. 1). The evaluation indicated that the student benefited from LRC support in reading, writing, spelling, and mathematics as the student needed practice, repetition, structured activities, and a multisensory approach (Joint Ex. 13 at p. 4).

Finally, on May 5, 2016, the district school psychologist completed a classroom observation, which was also reviewed during the May 2016 CSE meeting (see Tr. pp. 92, 95, 365-66; Joint Ex. 21). The psychologist's observation detailed the student's engagement in writing and time-telling activities during the observation (Joint Ex. 21). The psychologist noted that the student was busy writing and appeared focused on the task (id. at p. 1). The psychologist described the student's participation in the time telling activity and the student's positive response to the teacher's instructions (id.).

noted on the WJ-IV score report, but, while the student's age is correctly reported on the educational evaluation report, her birthdate is incorrect (compare Joint Ex. 13 at p. 1, with Joint Ex. 22 at p. 1).

When determining whether a student should be classified as a student with a learning disability, a CSE must also create a written report documenting information, including, among other things, whether the student has participated in an RtI program (34 CFR 300.311[a]; 8 NYCRR 200.4[j][5][i]).[25] As noted above, a student may be found to have a learning disability if the student has not made sufficient progress to meet age or State-approved grade level standards in certain areas when provided with appropriate instruction consistent with an RtI model (8 NYCRR 200.4[j][3][i][a]). To determine whether a student is responding to RtI, the district's process must include "repeated assessments of student achievement which should include curriculum-based measures to determine if interventions are resulting in student progress toward age or grade level standards" (8 NYCRR 100.2[ii][1][iv]). The purpose of such progress monitoring is to assess students on a "repeated basis" to provide data of a student's growth over time to determine "if the student is progressing as expected in the curriculum" ("Response to Intervention, Guidance for New York State School Districts," at p. 19). This data should be utilized in a district's RtI process to "inform student movement through tiers" (id. at p. 20). State guidance has set out specific steps to ensure accurate progress monitoring; guidance identifies that the district should establish a benchmark for performance and plot it, establish the student's current level of performance, monitor the student's progress frequently, and analyze the data and determine trends that arise from such data (see id. at p. 21). State guidance further identifies that progress monitoring should occur no less than once every two weeks in Tier 2, and no less than every week in Tier 3 (id.).

As discussed above, during the 2015-16 school year, the student was receiving Tier 2 and/or Tier 3 RtI supports (see SRO Ex. 1 at pp. 8-10). Additionally, according to the forms attached to the district's RtI policy, district staff were supposed to be tracking student performance data on a weekly basis, which is consistent with State guidance indicating that, for students receiving Tier 2 and Tier 3 interventions, districts should monitor progress either weekly or bi-weekly (compare SRO Ex. 1 at pp. 21, 23, with "Response to Intervention: Guidance for New York State School Districts," at pp. 13-14). Included with the materials relating to the district's RtI policy, are communications from the district to parents noting that the district would use the "STAR digital assessment system"—initially, as a pilot program during the 2014-15 school year—to replace the developmental reading assessment (DRA) (SRO Ex. 3; see Tr. p. 248).[26] According to the CSE chairperson, the May 2016 CSE had the results of the STAR reading and mathematics assessments available during the CSE meeting (Tr. p. 371; Joint Ex. 28). The STAR reading and

[25] In addition, each CSE member must certify whether the written report accurately reflects that member's conclusion; where it does not reflect the member's conclusion, that CSE member must also submit a statement identifying their own conclusions (8 NYCRR 200.4[j][5][ii]). State guidance provides a form for CSEs to use in ensuring that a proper written record is maintained (see "Response to Intervention: Guidance for New York State School Districts," Appendix B).

[26] The student's first grade teacher testified that she utilized a DRA for the student during the school year (Tr. pp. 247-48, 251). However, the teacher only evaluated the student through the DRA on three occasions during that school year and thereafter destroyed any documentation related to the DRA (Tr. p. 251). Additionally, the student's second grade regular education teacher testified that she "did a lot more informal assessments" with the student including "a running record," but the running record is not in evidence (Tr. p. 328).

mathematics assessments were administered to the student in September 2015, February 2016, and June 2016 of the 2015-16 school year (Joint Ex. 28). The student's second grade teacher testified that the STAR assessments were used as a district-wide screening tool for measuring where students are at the beginning of the year and how they progress throughout the year (Tr. pp. 333-34).[27] While testimony indicated that the May 2016 CSE had the results of the February STAR assessment available during the meeting, it could not have had the end of year, June 2016 assessment (see Tr. pp. 367, 370-71).[28] The STAR growth report indicated that the student's reading scaled score in September 2015 was 78, with a percentile rank of four (Joint Ex. 28). By February 2016, the student's reading scaled score was 127, with a percentile rank of 10 (id.).[29] For mathematics, the growth report indicated that the student's scaled score in September 2015 was 328, with a percentile rank of 16 (id.). By February 2016 the student's mathematics scaled score was 390, with a percentile rank of 16 (id.).

Other than the STAR assessment reports, the hearing record does not include other documentation about the student's progress with RtI. Although the hearing record suggests that the student's LRC teachers may have collected data related to student's response to intervention, the teachers testified that they did not retain much of the data and the district did not offer any collected data into evidence (Tr. pp. 182-83, 237-39, 289-96). In particular, the hearing record does not contain the completed forms attached to the district's RtI policy or any written documentation regarding weekly or bi-weekly progress monitoring.[30]

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[27] The director of special education also noted that the STAR assessments were based upon the "common core" curriculum (see Tr. p. 48).

[28] In addition, although the hearing record does not indicated that the May 2016 CSE considered these scores, the hearing record includes student's "local effort test scores" from 2014 and 2015 (Joint Exs. 18; 19). In 2014, the student was evaluated in April and May 2014 over the course of six days on the Stanford Early School Achievement Test, Form S, by the LRC teacher for kindergarten and first grade (Joint Ex. 18). The teacher's comments note that the student "made nice progress this year," and that the student knew "all of her letters, and the majority of her sounds" (id.). In 2015, the student was evaluated in March and April on the Stanford Achievement Test, 10th Edition, by the same LRC teacher (Joint Ex. 19). The teacher's comments indicated that the student had "grown in her ability to decode" and was applying strategies that she had been taught; the teacher's comments also indicated that the student had "built her stamina" in writing and was "applying more sounds when writing" (id.). It is unclear whether the local effort test scores were utilized to monitor the student's progress in RtI.

[29] The reports available for the February 2016 administration of the STAR reading and mathematics assessments do not include the student's grade equivalents (see Joint Exs. 23; 28). The September 2015 reports reflected grade equivalents of 1.2 in reading and 1.3 in math (Joint Ex. 28).

[30] In addition to collecting data, a CSE is also charged with creating a written report documenting the student's achievement and describing the basis for its determination, including whether the student has participated in an RtI program. Both the CSE chairperson and the school psychologist testified that the CSE "went through the different classifications" at the CSE meeting and determined by consensus that the student "[did not] fit into any of the categories and that she did not meet the criteria for" eligibility for special education as a student with a disability (Tr. pp. 95-96, 368). The CSE chairperson also explained that "New York State has a form . . . to use" to determine if " a child meets this criteria . . . and we went through [the form] as a committee" (Tr. p. 368).

Notwithstanding the lack of documentation, district staff testified that the student had made progress and that, as a result, the CSE's decision not to classify the student was correct. The student's LRC teacher for kindergarten and first grade testified that the CSE determined the student should not be classified because she "[did not] qualify due to her performance and test scores"; moreover, the LRC teacher agreed with the CSE's decision because of "what was presented at the meeting" (Tr. pp. 165-66). The student's second grade LRC teacher testified that, at the beginning of the 2015-16 school year, the student demonstrated "very little intrinsic motivation" with respect to reading; however, he reported that he saw progress in the student's reading abilities once she was able to "break[] through" and became more of an active learner (Tr. pp. 264-65).[31] Similarly, the student's regular education teacher testified that, at the beginning of the year, the student was an emerging reader and learner, who did not implement her skills independently and needed "quite a bit of redirection [and] reinforcement" as she "wasn't necessarily always engaged" in the class activities (Tr. pp. 326-327). However, according to the teacher, as the year progressed, the student became more vested in her work (Tr. pp. 332-33). With respect to reading, the regular education teacher observed that the student made progress during the 2015-16 school year, specifically in "her fluency and rate of reading, [and] in her understanding of the meaning of books" (Tr. pp. 343-44). The teacher further testified that the student made over a year's worth of growth in reading and, by the end of the year, was reading at grade level (Tr. pp. 344-45). The teacher felt the student's growth in the "classroom setting" showed that support in the LRC was sufficient to meet the student's needs (Tr. pp. 345-46).[32] Furthermore, the regular education teacher testified that she did not believe that the student required classification because the student made sufficient growth in a general education setting with the supports provided in the LRC (Tr. pp. 345-46). The school psychologist testified that the CSE determined the student did not meet the criteria for a learning disability "based on the progress [the student] had shown . . . especially, in second grade and [the] result of . . . academic testing" (Tr. pp. 125-26).[33]

The information provided in the neuropsychological evaluation, the STAR growth reports, the educational evaluation, and the classroom observation demonstrated that the student had academic needs in the areas of mathematics and reading, particularly with decoding. However, as

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However, this form was not included in the hearing record.

[31] The student's LRC teacher for the 2015-16 school year was not present at the May 2016 CSE meeting; instead, the student's LRC teacher from the prior school year attended (see Joint Ex. 14 at p. 1). Even though the second grade LRC did not attend the CSE meeting, he also believed that the CSE correctly determined that the student should not be classified (see Tr. pp. 283-85).

[32] The CSE chairperson also testified that the student's regular education teacher reported to the May 2016 CSE that the student had become a "real active participant" in the community and classroom, was openly sharing, and was having what seemed to be a very positive experience in second grade (Tr. p. 366).

[33] The director of special education also believed that the decision not to classify the student was appropriate because the student's cognitive profile matched her performance in the classroom, and the RtI procedures in place allowed the student to progress (Tr. pp. 49-50).

a result of the variability, and at times contradictions, in the results reported in the evaluations, the extent of the student's needs was never fully developed.

2. Other Health-Impairment

Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]).[34]

Here, the IHO did not make a determination that the May 2016 CSE should have found the student eligible for special education as a student with an other health-impairment, relying instead on her determination regarding the learning disability category of eligibility. On appeal, the district nonetheless argues, as with the learning disability category, that "the CSE's determination not to classify [the student] as a student with an Other Health Impairment was appropriate because [the student] made more than adequate progress with local effort support under her Section 504 Plan, and, accordingly, did not require special education and services" (Req. for Rev. 31 [emphasis in the original]). In other words, the district does not allege that the student did not meet the regulatory definition of a student with an other health-impairment in terms of her limited alertness with respect to the educational environment due to ADHD or the adverse effect of the condition on her educational performance. The district's assertion regarding the student's progress with LRC or section 504 supports is sufficiently discussed above and need not be further elaborated upon

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

herein. The student's need for special education is discussed below as it relates to both disability categories. In sum, there is little to discuss with respect to the other health-impairment category of eligibility. Nevertheless, by way of background, evidence in the hearing record pertaining to the student's limited alertness and attention deficits is summarized.

The hearing record reflects the student's history of attentional difficulties and the impact it had on the student's academic performance. According to the school psychologist, the student's kindergarten teachers noted that the student had difficulty focusing and needed redirection and tended to work better when she had directions repeated and worked in a small group, a sentiment that was reiterated to the child study team (Tr. pp. 66-67). The school psychologist reported that as a result of this description of the student, her 504 plan was modified to add "focusing and redirection" (Tr. pp. 66-67; see Tr. pp. 83-84). The school psychologist testified that additional accommodations were added to reflect the student's needs in the classroom and that the student's biggest impediment in school was attending to the task at hand (Tr. pp. 83-84). The school psychologist also testified that the student's decoding was inconsistent because of her difficulty remaining focused and engaged; moreover, the task the student worked on dictated the extent to which she was able to focus and engage (see Tr. pp. 120-21). The student's LRC teacher in kindergarten and first grade also testified that the student needed redirection and refocusing in the general education classroom due to inattentiveness (Tr. pp. 141). However, she also testified that the student responded well to refocusing and redirection and could learn in the larger group (id.). She further testified the May 2016 CSE discussed the student's attentional needs, specifically noting that the student "needed some refocusing and redirection" as well as "some teacher support from her general education teacher" (Tr. p. 165).

The student's regular education teacher for first grade testified that the student was distracted in the school environment, specifically as a result of "the room around her, particularly by friends" but that, "when [the student's] attention was better," her performance improved (Tr. p. 233). The teacher also reported that accommodations were added to the June 2015 504 plan to address the student's difficulty with school work as it related to the inability to focus on a task, social distractibility, and a need for support to follow directions and refocus (Tr. p. 241). Similarly, the school psychologist testified that the student's need for focusing and redirection was added to the 504 plan as a result of the student's teachers descriptions of her functioning in the classroom (Tr. p. 67). The June 2015 504 plan stated that the student's "biggest impediment" was attention and that the student tended to lose focus and become distracted which negatively impacted her early literacy skills (Joint Ex. 10 at pp. 1-2). To address these concerns, the 504 plan included repetition of directions/instructions, teacher prompting and refocusing, seating in the front of the classroom, refocusing and redirection, and movement breaks throughout the school day (Tr. pp. 240-41; Joint Ex. 10 at p. 2). The student's LRC teacher in kindergarten and first grade further noted that the 504 plan accommodations were included to help the student sit and attend to tasks; she also noted that, when the student was provided with the accommodations, the student performed grade level work (Tr. pp. 154-57).

The hearing record also shows that the student received a diagnosis of ADHD, unspecified in January 2016 (see Joint Ex. 11 at pp. 3, 22, 24). The January 2016 neuropsychological evaluation identified that the student's attention and ability to concentrate were significantly reduced when the task was not to her liking (id. at p. 3). The evaluation also noted that the student's

response style was "somewhat impulsive" and the student demonstrated a low frustration tolerance resulting in diminished compliance (id.). The evaluation indicated that "measures specific to attention and impulsivity were performed with significant impairment," and the student's performance on the Continuous Performance Test II (CPT II) suggested that a diagnosis of ADHD could not be ruled out (id. at p. 19).[35] Further, tests of the student's executive functions demonstrated "rigidity of problem solving, difficulty with changing set, perseverative thinking, and diminished self-monitoring" (see Tr. pp. 459-60; Joint Ex. 11 at p. 20). Results of a test of sustained visual attention were also significant for impaired performance on "measures pertaining to sustained attention and impulsivity" (Joint Ex. 11 at p. 20).[36]

The student's regular education teacher in second grade also testified that the issues that impeded the student's performance at the beginning of the 2015-16 school year were the absence of a sense of engagement and sense of responsibility and a lack of attending and investment in the work (Tr. p. 327). The teacher further testified that the much of the work done with the student was "one-on-one" and related to self-monitoring (Tr. p. 329). Additionally, the teacher stated that, in math, the student became more engaged during whole group instruction but sometimes lost attention; in these instances, the teacher had the student "stay behind" to reinforce lessons and assess if the student understood (Tr. p. 330). The students report card for the 2015-16 school year indicated that the student "benefit[ed] from reminders to focus and benefit[ed] from one-on-one attention" (Joint Ex. 24 at p. 2).

The student's LRC teacher for kindergarten and first grade testified that the May 2016 CSE discussed the student's attention, including that "she needed some refocusing and redirection" and "some teacher support from her general education teacher" (Tr. p. 165). Without elaboration, the CSE chairperson testified that the CSE considered the disability category of other health-impairment and "deemed at that point" that it was not appropriate (Tr. p. 369).

In summary, the IHO's observation that there was "vague testimony reflecting that the CSE considered classifying [the student] as . . . other health impaired" is supported by the review of the hearing record (IHO Decision at p. 23). The nondescript references to the CSE's consideration of this category of eligibility has continued on appeal and, as summarized above, the district has not set forth a detailed position that the student did not meet the regulatory definition of a student with an other health-impairment in terms of whether or not the student exhibited limited alertness with respect to the educational environment due to ADHD or the extent to which the student's academic performance in the classroom had been adversely affected thereby. Accordingly, turning to the crux of the district's assertions on appeal, the final criterion of eligibility shall be examined next; to wit whether or not the student needed special education.

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[35] The neuropsychologist reported that "the overall assessment of data obtained on the CPT II [wa]s equivocal," (Joint Ex. 11 at p. 19). She did not include the student's scores on this test in her evaluation report (see Joint Ex. 11).

[36] While the neuropsychologist testified that the student had many indices of difficulty with sustained attention, she also stated that the student's difficulty with decoding was not caused by an attention deficit disorder but rather that the student's attentional difficulties may be related to, and may be improved by addressing, the student's reading difficulties (see Tr. pp. 459-61).

3. Need for Special Education

In addition to meeting criteria for a specific disability category, to be deemed eligible for special education, a student must "need special education and related services" by reason of such disability (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices . . . as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services] . . . ." (Educ. Law § 4401[2][a]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, OT, PT, and speech-language therapy (Educ. Law § 4401[2][k]).

The courts have grappled with this final criterion of eligibility in light of various state definitions of special education in cases similar to the one here, where a student needs support in the classroom, but such support might alternatively be deemed part of general education (Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic progress and social success and, therefore, did not need special education]; M.P. v. Aransas Pass Ind. Sch. Dist., 2016 WL 632032, at *5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need services under the IDEA]; L.J. v Pittsburg Unified Sch. Dist., 2014 WL 1947115, at *15 [N.D. Cal. May 14, 2014] [finding that a student made academic and behavioral progress after receiving general education interventions and, therefore was not a "child with a disability" under the IDEA]; Ashli C. v State of Hawaii, 2007 WL 247761 at *10-*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]). Likewise, a 504 plan might provide for services or supports that meet the definition of special education under the IDEA and, more specifically, State law and regulation For example, as in this case, State law and regulation in New York specifically contemplate the provision of RtI support or "additional general education support services" to students in the general education setting (see Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]).

Here, given the broad definition of special education within New York's Education Law and State regulations and given the length of time the student has consistently received supports in the LRC and under a 504 plan, the hearing in the hearing record supports the conclusion that the student requires special education to perform adequately in the classroom. As noted in detail above, the student demonstrated weaknesses in reading, writing, and mathematics and required

redirection, refocusing, repetition of directions/instructions, preferred seating, and movement breaks to address difficulties with attention and executive functions (see Joint Exs. 10 at pp. 1-2; 11 at pp. 21, 21-23; 13 at p. 4; 19; 23; 24). The student also received RtI services and supports pursuant to a 504 plan from the district beginning in the 2013-14 school year and continuing throughout the 2014-15 and 2015-16 school years.

In particular, the services received as part of the district's RtI program included instruction in a resource room in varying amounts over the course of the three school years. During the 2013-14 and 2014-15 school years the student received three sessions per six-day cycle of RtI services in the LRC—a resource room, separate from the general education classroom—from a special education teacher to address the student's needs in reading and mathematics (Tr. pp. 33-34, 127-28, 135, 137, 141-42). In addition, through RtI, the methodology and delivery of the student's academic instruction was adapted to ensure the student's access to the general education curriculum. During the 2013-14 and 2014-15 school years, the student also received two sessions of classroom-based "push in" support in a small group where the special education teacher used PAF to work with the student on guided reading, dictation, or sight word practice, dependent on the regular education teacher's suggestions (Tr. pp. 146-47). For mathematics, the special education teacher testified that she pre-taught the regular education teacher's upcoming lessons, reinforced class lessons, repeated lessons, and broke the lessons down into steps for the student (Tr. pp. 147-48). For the 2015-16 school year, the student continued to receive three sessions per six-day cycle of RtI services in a resource room from a special education teacher, as well as one session of push-in support in the general education classroom (Tr. pp. 258-61). During "push in" sessions the special education teacher also worked on lessons in reading, writing, and mathematics, which were similar to the lesson being taught by the regular education teacher (Tr. pp. 262-63).

The definition of special education in New York specifically includes instruction in a resource room. A resource room is defined as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr] [emphasis added]). While the district maintains that the services provided in the LRC were provided as part of the district's RtI program, the student's continued need for the resource room services supports, rather than undermines, the conclusion that the student needed special education. In particular and as highlighted above, despite the district's understanding that support services were being provided as part of the district's RtI program, there was never any indication from district staff that such services would or should be terminated at some point; rather, there was general agreement that the student would continue to receive services in the LRC over the course of several school years (see Tr. pp. 34, 157-58; Joint Ex. 10 at p. 1).

The district also points to the supports the student received under her 504 plan as evidence that the student did not require special education. As summarized above, the 504 plan included supports of repetition of directions/instructions, teacher prompting and refocusing, seating in the front of the classroom, refocusing and redirection, and movement breaks throughout the school day (Joint Ex. 10 at p. 2). Even if the student received benefit from the 504 plan, the foregoing discussion otherwise supports the student's eligibility for special education under the IDEA and the district has no flexibility to opt to provide services and accommodations under section 504 when the student is eligible for special education under the IDEA; rather, a district must comply

with both statutes (see Yankton Sch. Dist., 93 F.3d at 1376; see also Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 105 [2d Cir. 1998] [finding that the district's section 504 plan "was not an adequate substitute" for devising an IEP for the student pursuant to the IDEA]).

The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students. However, the continuous provision of services to the student by a special education teacher in a resource room for more than two school years supports a determination that the student required special education under the circumstances of this case. In conclusion, given the supports and services that the student required and received from special education teachers in the LRC, the weight of the evidence supports a finding that the district denied the student a FAPE as result of the May 2016 CSE's failure to find the student eligible for special education for the 2016-17 school year.

D. Appropriateness of the Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "[e]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

1. 2015-16 School Year—Tutoring Services

Before reaching the merits of the IHO's award of reimbursement for the costs of tutoring services, further comment is necessary regarding this form of relief. In their due process complaint notice, the parents sought "compensatory education" to remedy the district's alleged failure to offer the student a FAPE during the 2015-16 school year. There was no further comment regarding the parents' request during the impartial hearing (see Tr. pp. 1-556) and, in their post-hearing brief to the IHO, the parents did not seek compensatory education or reimbursement for the costs of tutoring services (Parent Post-Hr'g Br. at pp. 1-27). Instead, the parents perplexingly argued that Windward was an appropriate unilateral placement for the student for both the 2015-16 and 2016-17 school years, even though the student did not attend the school during the 2015-16 school year (id. at p. 23) and, ultimately, requested reimbursement for the costs of tuition for the 2016-17 school year "and for so long as that program remains appropriate" (id. at p. 27). Nevertheless, the IHO ordered the district to reimburse the parents for the cost of tutoring services and transportation to the student's tutor for the 2015-16 school year (IHO Decision at p. 28). The clarity regarding the relief sought and/or awarded for the 2015-16 school year has not improved on appeal. The district argues that the IHO's order was inappropriate as the parents did not demonstrate that they were entitled to such an award "which is their burden in this proceeding" (Req. for Rev. ¶ 54).[37] As briefly addressed above, the parents respond by alleging that the district's request for review inadequately raised this issue but do not offer further elucidation regarding the nature of the relief sought or awarded or the specifics of the tutoring services received by the student (which, as summarized below is inadequately described in the hearing record).

The IHO offered no legal standard or analysis to support her award of reimbursement for the costs of tutoring services and, therefore, it is not possible to discern her intent or reasoning. The district, by reference to the parents' burden of proof, appears to understand the relief as falling

[37] In a footnote in its memorandum of law, the district points out that the parents originally sought compensatory education but that the IHO awarded reimbursement (Dist. Mem. of Law at p. 18 n.4).

under the rubric of tuition reimbursement pursuant to the Burlington/Carter framework (Carter, 510 U.S. 7; Burlington, 471 U.S. 359, 369-70; see R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). As noted above, 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). On the other hand, while compensatory education—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])—generally takes the form of prospective services (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n. 2 [2d Cir. 2008] [noting that compensatory education is "prospective equitable relief"]), some courts in other circuits have found that the relief may take the form of reimbursement for private services the parents obtained to make up for deficiencies in the student's IEP (Foster v Bd. of Educ. of City of Chicago, 611 Fed App'x 874, 879 [7th Cir. May 11, 2015]; I.T. v. Dep't of Educ., 2013 WL 6665459, at *5 [D. Haw. Dec. 17, 2013]).[38]

Under some circumstances, the distinction between the remedy of reimbursement versus compensatory education may have consequence. For parents seeking reimbursement, the parents have the burden of proof regarding the appropriateness of a unilateral placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85). On the other hand, as the burden of proof has been otherwise placed on the school district during an impartial hearing by State law, SROs have consistently allocated to districts some burden of going forward with respect to a parental request for compensatory education and have expected a district to address such a burden by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see Application of a Student with a Disability, Appeal No. 17-015; Application of a

[38] The purpose of an award of compensatory education is to provide an appropriate remedy for 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]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Reid, 401 F.3d at 524 [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]). Accordingly, an award of compensatory education 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"]; L.M., 478 F.3d at 316 [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"]).

Student with a Disability, Appeal No. 16-050; Application of a Student with a Disability, Appeal No. 16-033; Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-168).

In this case, however, review of the parties positions throughout the administrative proceedings and the evidence in the hearing record supports treatment of the relief as one for which the parents bore—at the very least—some initial burden to articulate their requested relief. In other words, like a unilateral placement, the tutoring services obtained by the parents represent a remedy chosen by the parents. Under such circumstance, it would be equitable to expect the parents—and not the district—to offer proof at least of the delivery of such services. Moreover, the parents did not press their request for compensatory education and never actually asked for the costs of the student's tutoring services at the impartial hearing. Finally, despite the district's clear articulation on appeal that the parents failed to meet their burden of proof regarding the appropriateness of the tutoring services, the parents have not responded by either disputing that they carried the burden or by pointing to evidence in the hearing record to dispute the district's evidentiary point.

Ultimately, the IHO's award of the costs of the student's tutoring services are unsupported by evidence in the hearing record. The student's LRC teacher for kindergarten and first grade testified that the parents had asked for a tutor at some point during "one of the conferences," and both testified that the LRC teacher provided the parents with the name of a tutor (Tr. pp. 175-76, 469). While the student's mother testified that the LRC teacher "suggested" that she get a tutor toward the end of the 2013-14 school year, the LRC teacher testified that she did not make this suggestion (see Tr. pp. 176, 469). The LRC teacher further stated that the parents had been working with a tutor in the summer "before first grade or in first grade," though she did not "recall exactly when [the tutor] started" (Tr. p. 176). The student's mother further testified that the tutor was hired to "help [the student] out for . . . once a week for an hour, which . . . increased as time went on" (Tr. p. 469). According to the LRC teacher, the tutor worked with the student throughout the 2014-15 school year, but she was unsure whether the tutor worked with the student during the 2015-16 school year (Tr. p. 176).

In summary, there is no evidence in the hearing record that the student received tutoring services during the 2015-16 school year. Further, if the student had received such services, there is no indication what particular areas of need the tutor was assisting working on with the student. There is also no evidence concerning the tutor's hourly rate or the number of hours he or she spent tutoring the student during the 2015-16 school year. While reimbursement for tutoring services may, under different circumstances, be an appropriate remedy for the district's failure to meet its child find obligations, there is simply not enough evidence to make that determination in this case.

As a final point, were I to consider whether or not equitable relief was warranted in the form of some, as of yet delineated compensatory education, I would be inclined to take into consideration the services the student received during the 2015-16 school year under RtI or her 504 plan that might otherwise mitigate the very deficiencies suffered by the student (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [noting that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], report and recommendation adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see

Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). While the district ultimately failed to meet its child find obligations during the 2015-16 school year, in the manner summarized above, the student did receive supports and services in the district school such that it is unclear what if any award of compensatory education would put the student in the same position but for the district's failure to refer the student for special education at the beginning of the 2015-16 school year.

Based on the foregoing, the IHO's award of reimbursement of tutoring services and transportation to remedy the district's violation during the 2015-16 school year is reversed.

2. 2016-17 School Year—Windward

The district claims the parents did not meet their burden to establish that Windward was appropriate for the student. The district maintains the IHO relied on "general" information that the student received supports provided to all other students and that there was no evidence the student required such support. The district also claims that Windward was too restrictive for the student because the school exclusively instructs special education students.

As presented in detail above, the hearing record substantiates the student's needs relative to reading fluency, decoding, reading comprehension, mathematics, and executive functions (Joint Exs. 10; 11; 12; 13). The January 2016 neuropsychological evaluation noted the student's weaknesses in decoding skills and reading comprehension, writing, math facts, processing speed, sustained attention, impulse control, novel problem solving, cognitive flexibility, and memory (Joint Ex. 11 at pp. 8-11, 23). Educational assessments performed by the district indicated the student demonstrated below average: reading fluency and needs related to decoding, phonemic awareness, writing, spelling; and mathematic skills in calculations, reasoning, and problem solving (Joint Exs. 12 at pp. 1-2; 13 at p. 4). The student's June 2015 504 plan also noted the student's work habits needed continued improvement, the need to increase attention and focus to tasks (Joint Ex. 10 at pp. 1-2).

According to a document from Windward, the school provides a program for students with learning disabilities of "average to superior intelligence who have been unable to achieve academic success . . . because they have not had the benefit of appropriate teaching methods" (Joint Ex. 17 at p. 5). Classes at Windward are grouped "according to the students' educational needs"; the groups are small to ensure a low student to teacher ratio is maintained (id.). Windward provides a "language-based curriculum" that emphasizes development of a student's "vocabulary, word-retrieval skills and grammatical maturity" in order to promote "accurate comprehension and expressive abilities" (id. at p. 1). Windward's language arts curriculum is carefully structured and sequenced based upon the "Orton-Gillingham method" of instructions for reading, handwriting, and spelling; students are taught in integrated lessons with a heavy emphasis on accurate word decoding and comprehension (id. at p. 2). Moreover, teachers are "specially trained in multisensory techniques" and instruction is "carefully individualized" to ensure that each student progresses at "his or her own optimal rate" (id.). The language staff and reading teachers collaborate to "facilitate reading comprehension of a story and informational texts" (id. at p. 1). Windward also offers a writing program that is designed to enable students to "express themselves

clearly and accurately in written form, by learning to write linguistically complex" sentences through the provision of organizational strategies for writing paragraphs and longer compositions (id. at p. 3). Additionally, some lessons focus on a "variety of sentence types, including compound and complex sentences" (id.).

The psychologist who conducted the August 2016 psychoeducational evaluation also observed the student at Windward in October 2016 (Tr. p. 513). The psychologist described Windward as a small school with small classes; the psychologist also testified that the student was provided with literacy instruction throughout the day from two special education teachers in a class of ten similarly grouped students (see Tr. pp. 513-16, 525).[39, 40] The psychologist stated that homogeneous grouping in class provided the student with an environment where she was on the same level as her peers (see Tr. p. 514). The psychologist opined that Windward generally conformed to the "Orton-Gillingham approach" and that the school's manner of immersing students in reading instruction was very successful (Tr. pp. 514-15, 526). The psychologist also opined that the program was tailored to the student because she was being provided with instruction that included "a lot of scaffolding, [and] a lot of prompting"; there was also a "tremendous amount of work previewing of words," and reviewing outlines of stories that the class was preparing to read (Tr. p. 515). The psychologist further testified that Windward's small size provided the student with an environment that met her learning and attending needs (Tr. p. 516).

The 2016-17 Windward report card noted that, by April 2017 the student demonstrated progress in her ability to consistently follow class routines maintain attention, and spell various types of words (Joint Ex. 27 at pp. 1, 4). The report card also showed that the student demonstrated progress in 6 out of 10 areas of decoding skills, 3 out of 5 areas relative to reading comprehension, and 1 of 2 areas related to listening comprehension (id. at p. 4). Notably, the student consistently decoded words with consonant blends and words with suffixes, and she could read phonetically irregular words (id.). In mathematics the student progressed in a majority of the whole number skills that were introduced, and the student's teacher noted that the student was making steady progress toward solving word problems (see id. at p. 1). Furthermore, the student was consistently able to compare and order whole numbers (id.).

The student's mother testified that since the student entered Windward in September 2016, the parent had received three quarterly reports form Windward and attended some teacher meetings; she further testified that she had informal conversations with some of the student's teachers (Tr. p. 484). The mother opined that she believed the student was making progress and that the student was learning to read, learning "math facts," and generally meeting expectations (Tr. pp. 484-85). The mother also indicated that the student could complete her homework independently and had learned strategies to decode (Tr. pp. 485-86).

[39] The psychologist testified that the student's teacher was a special educator and that the assistant teacher was working toward a master level degree (Tr. p. 524).

[40] The psychologist testified that he was familiar with Windward and had visited it many times; he had also testified that he worked with teachers and the admissions staff, stating he had "worked with [the school] a lot over the years" (Tr. p. 513).

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K., 932 F. Supp. 2d at 486-87; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[41] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Regarding the district's claims related to LRE, although the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364).

Overall, the hearing record contains little evidence on this issue; however, the evidence it does contain suggests that the student did not have any opportunities to interact with nondisabled peers at Windward. Evidence in the hearing record described Windward as a school "dedicated to providing a[n] . . . instructional program for children with language-based learning disabilities" (Joint Ex. 17 at p. 4). Moreover, testimony from the psychologist that observed the student at Windward identified that the student was in a homogenous classroom with other children that "were working on similar kinds of goals and needs" (Tr. pp. 514, 516, 526). Thus, the evidence suggests that the student likely did not have access to nondisabled peers at the school. Nonetheless, because parents are not as strictly held to the standard of placement in the LRE as are school districts, the district's argument on this factor does not preclude tuition reimbursement.

In summary, the district's contention that the parents only provided general information regarding Windward and failed to demonstrate that the placement provided educational instruction

[41] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

specially designed to meet the student's unique needs are well-taken. While I share some of their concern, courts have recently deemed evidence about the general milieu of a unilateral placement sufficient, at the risk of interpreting the parents' burden to establish the appropriateness of a unilateral placement as little more than tripping hazard (see, e.g., T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *26-*36 [S.D.N.Y. Nov. 23, 2016]), appearing to signal a retreat from whether, in fact, the parents demonstrated, as articulated in Gagliardo, that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[42] Moreover, the evidence in the hearing record identified that Windward provided a language based curriculum through multi-sensory techniques and addressed areas of the student's need in decoding, reading comprehension, and writing. Furthermore, the psychologist that observed the student noted that the school was addressing her needs related to attentional difficulties. Thus, despite the district's concerns, the evidence provided in the hearing record is sufficient to conclude that the Windward met the student's unique needs. Therefore, the IHO's determination that Windward was an appropriate placement is affirmed.

E. Equitable Considerations

The district claims that the parents' decision to place the student at Windward was determined before the May 2016 CSE met, barring tuition reimbursement. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The hearing record reflects that the parents cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the

[42] Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). While, the mother testified that the student was offered a placement at Windward just before the May 2016 CSE meeting, the mother also noted that she had not accepted Windward's offer at that time (Tr. p. 480). Moreover, once the parents had accepted the school's offer, they notified the district "at some point" before the student began attending Windward (Tr. pp. 479-81). Although the mother was "not sure when [she] notified the district," (Tr. p. 480), as the district does not allege that it received insufficient notice of the unilateral placement, I find no reason to disturb the IHO's determination that there are no equitable factors that weigh against awarding tuition reimbursement in this instance.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district violated its child find obligation by failing to refer the student for special education during the 2015-16 school year. The evidence in the hearing record also shows that the district failed to establish that the May 2016 CSE appropriately found the student ineligible for special education and, therefore, supports the IHO's finding that the district failed to offer the student a FAPE for the 2016-17 school year. I further find that the parents' unilateral placement of the student at Windward was reasonably calculated to meet her educational needs, and that equitable considerations weighed in favor of an award of reimbursement to the parents for the total tuition costs at Windward for the 2016-17 school year. However, the evidence in the hearing record does not support the IHO's award of reimbursement for the costs of tutoring services and transportation for the 2015-16 school year. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision, dated July 16, 2017, is modified by reversing that part which ordered the district to reimburse the parents for the costs of the student's tutoring and transportation for the 2015-16 school year.

Dated: **Albany, New York**
October 18, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER