



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-088

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Bedford Central School District

Appearances:

Law Office of Peter D. Hoffman, PC, attorneys for petitioners, by Peter D. Hoffman, Esq.

Keane & Beane, PC, attorneys for respondent, by Stephanie Roebuck, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered the student a FAPE for the 2015-16 and 2016-17 school years and denied their request to be reimbursed for their son's tuition costs at the Winston Preparatory School (Winston) for a portion of the 2015-16 school year and for the 2016-17 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student presents with delays in reading, written expression, processing speed, organization, fine and visual motor integration, and executive functioning skills (Dist. Exs. 4 at pp. 2-4; 7 at pp. 2-7; 8 at pp. 4-26). He has received diagnoses of an attention deficit disorder (ADD), specific learning disability with impairment in reading, and specific learning disability with impairment in written expression (Dist. Exs. 2 at p. 13; 8 at p. 26). He received tiered intervention support through the school district's response to intervention (RtI) program beginning in first grade during the 2012-13 school year, continuing until he was referred to the CSE by his

parents in October 2015 and began receiving special education services (Tr. pp. 196-97, 200, 474; Parent Exs. P; Q; Dist. Exs. 2 at p. 3; 8 at p. 2; 17).

In November 2013, during the student's second grade school year, the parents received information from the district that the student was receiving assistance with reading, and the student's mother expressed her concern that the student might have a form of dyslexia to the student's teacher (Tr. p. 318; Parent Ex. P at p. 1).

In March 2014, the parents obtained a private psychoeducational evaluation, described in greater detail below, which identified the student's diagnoses as "specific learning disability with impairments in reading rate, accuracy," and "rule out attention-deficit/hyperactivity disorder – primarily inattentive type," and made a series of recommendations for the student's educational programming (Dist. Ex. 2 at pp. 1, 13-15). In September 2014 the parents provided the student's teacher and the then-current principal of the district elementary school the student attended with a copy of the March 2014 private psychoeducational evaluation report (Tr. pp. 319-325; Parent Ex. Q at p. 1).

During the 2014-15 school year while in third grade, the student received both "Tier 1" and "Tier 2" level RtI services (Tr. pp. 19-20, 196). During summer 2015 the student was privately tutored, and the student began the 2015-16 school year in fourth grade at the district elementary school (Tr. pp. 197, 323-26; Parent Ex. R at p. 1). Because of the student's score on the State-wide English language arts (ELA) exam during third grade, the student was placed in RtI Tier 2 in fourth grade (Tr. pp. 192, 197, 324). Near the beginning of the 2015-16 school year, the student's mother sought out and met with the student's fourth grade teacher and the new building principal to discuss the student's needs and challenges (Tr. pp. 197, 324-27). At the meeting, which occurred in early October 2015, the new principal explained the differences between a plan developed pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) ("section 504") and an IEP prepared by a CSE, and the parents referred the student to the CSE for evaluation shortly thereafter in October 2015 (Tr. pp. 199-200, 326-27, 369; Dist. Ex. 17).

In December 2015, the parents obtained a private psychological evaluation and the district conducted a classroom observation, prepared a social history, and conducted initial education, occupational therapy (OT), and speech-language evaluations of the student (see Dist. Exs. 3-8).

On January 14, 2016 the CSE convened for an initial eligibility meeting at the parents' request and found the student eligible for special education and related services as a student with a learning disability (Dist. Ex. 9 at p. 1). The CSE recommended four 45-minute sessions of a resource room program per week, one monthly OT consult, seven annual goals designed to address study skills, reading, writing, and mathematics, and various program modifications and accommodations (*id.* at pp. 7-10). After the January 2016 CSE meeting the student began receiving resource room services (Tr. pp. 344-47).

By letter dated February 11, 2016, the parents informed the district they were rejecting the IEP, indicating that they did not consider the recommendation to be appropriate, and that they were placing the student at Winston effective March 7, 2016 and "reserve[d] the right to seek tuition reimbursement and transportation at public expense" (Dist. Ex. 11). The parents indicated that they were also rejecting the IEP as a result of bullying the student had experienced in the district

elementary school, which they asserted made placement in any district school inappropriate (*id.* at p. 2). In an email to the parents dated February 15, 2016, the school principal indicated that he was responding to their concerns over two physical altercations in which the student was involved (Parent Ex. E. at pp. 3-5). The principal indicated that he had investigated both incidents and determined that, while "inappropriate and inexcusable," neither constituted bullying of the student but, rather, came about as a result of "mutual disagreements" (*id.*). In a response to the principal dated February 16, 2016, the parents related their concerns that the other student involved in one of the physical altercations had previously threatened the student, and expressed concern at the principal's "one-sided characterization" of the incidents so as to place blame on the student (Parent Ex. E at pp. 1-2; *see* Tr. pp. 348-49). The parents unilaterally placed the student at Winston in March 2016 (Tr. p. 262).

On July 18, 2016, the CSE convened for the student's annual review and to develop an IEP for the 2016-17 school year (Parent Ex. B; Dist. Ex. 13 at p. 1). According to the hearing record, the CSE had before it and considered the previously conducted district evaluations from December 2015 and the December 2015 private psychological evaluation report, as well as information provided by the student's then-current teachers at Winston (Dist. Ex. 13 at pp. 1-5). The CSE continued to recommend a general education setting with resource room services, specifically, five 45-minute sessions of a resource room program per week, one monthly OT consult (two for September 2016), one monthly counseling consultation, 10 annual goals designed to address study skills, reading, writing, and mathematics, and various program modifications and accommodations (*id.* at pp. 1, 7-11). The parents rejected the IEP at the conclusion of the CSE meeting and indicated they were reserving the right to unilaterally place the student at district expense (*id.* at p. 1; Parent Ex. B).

By letter dated August 22, 2016, the parents informed the district of their intention to unilaterally place the student at Winston for the 2016-17 school year (Dist. Ex. 14). By letter dated September 21, 2016, the parents informed the district of their reasons for rejecting the July 2016 IEP, that the student would continue his unilateral placement at Winston for the 2016-17 school year, and that they "reserve the right to seek tuition reimbursement and transportation at public expense" (Dist. Ex. 15).

A diagnostic learning evaluation was conducted in summer 2016 and the CSE reconvened to consider the new information on October 13, 2016 (Tr. pp. 358-61; Parent Ex. D; Dist. Ex. 16). The CSE made some changes and updates to the IEP, and added an annual reading goal, but continued to recommend a resource room program; the parents maintained the unilateral placement of the student at Winston (Tr. pp. 359-61; Parent Ex. C; Dist. Ex. 16 at pp. 1, 8-13).

A. Due Process Complaint Notice

In a due process complaint notice dated December 23, 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 (Dist. Ex. 1). Initially, the parents asserted that the district failed to identify, locate, and evaluate the student as part of the district's child find obligations during the 2015-16 school year and "years prior" (*id.* at pp. 7, 13, *see* Dist. Ex. 1 at pp. 8-11).

For the 2015-16 school year, the parents alleged that the district failed to offer the student a FAPE for a variety of procedural and substantive reasons, including that the district failed to sufficiently evaluate the student, failed to follow the recommendations of private evaluators, failed to respond to parental concerns, failed to apply "education modalities related to emotional disturbances," failed to locate and recommend an out-of-district placement, failed to provide appropriate academic instruction and counseling, and failed to address instances of bullying (Dist. Ex. 1 at pp. 6-8). Additionally, the parents asserted that the recommendation for the student to attend a resource room program for four 45-minute sessions per week was insufficient (*id.* at p. 13).

For the 2016-17 school year, the parents asserted that although the CSE met in July 2016, the parents were not provided with a copy of the IEP until the day before school began, and as a result they had already given the district 10-day notice of their intention to unilaterally place the student at Winston because, "it was a certainty to the parents that the district would not have an IEP in place on the first day of school" (Dist. Ex. 1 at pp. 15-16). Further, the parents asserted that the district failed to offer the student a FAPE for many of the same reasons as for the 2015-16 school year, including that the CSE failed to follow the recommendations of private evaluators, failed to respond to parent concerns, failed to apply "education modalities related to emotional disturbances," failed to locate and recommend an out-of-district placement, and failed to provide appropriate academic instruction and counseling (*id.* at pp. 6-8).

The parents also asserted that Winston was an appropriate unilateral placement for the student for the 2015-16 and 2016-17 school years, and that the student made progress at Winston (Dist. Ex. 1 at pp. 14-16). With respect to equitable considerations, the parents asserted that they cooperated with the CSE process and provided the required notice of their intention to unilaterally place the student at Winston at district expense (Dist. Ex. 1 at pp. 16-17). The parents further alleged that the district acted inequitably because it failed to cooperate with reasonable parent requests, and that equitable considerations favored reimbursement for the cost of the student's attendance at Winston (*id.*).

Lastly, the parents requested relief in the form of reimbursement for the cost of transportation and the student's tuition at Winston during the 2015-16 and 2016-17 school years (Dist. Ex. 1 at pp. 17-18).¹

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 30, 2017, and concluded on June 9, 2017 after five days of proceedings (Tr. pp. 1-539). By decision dated August 31, 2017, the IHO found that the district offered the student a FAPE during the 2015-16 and 2016-17 school years and denied the parents' request for tuition reimbursement at Winston (IHO Decision). Initially, with respect to the parents' claim that the district violated its child find obligations, the IHO determined that the statute of limitations precluded the parents from raising claims that accrued prior to December 2014; therefore, the IHO found that the permissible time period for the parents' child find claim

¹ The parents asserted that their claims were raised pursuant to a number of statutes other than the IDEA, including section 504, but did not assert any specific claims under those statutes in their due process complaint notice (Dist. Ex. 1 at p. 5).

was limited to December 2014 through October 2015 (*id.* at pp. 19-20). The IHO found that prior to the parents' referral of the student to the CSE in October 2015 the district did not violate its child find obligations because the district had been implementing its RtI program with the student and the student did not meet the district's criteria for referral to the CSE (*id.* at pp. 20-21).

With respect to the parents' claims relating to the January 2016 IEP, the IHO found that the district evaluated the student in all areas of suspected disability and the IEP accurately identified the student's needs, contained adequate annual goals, modifications, and accommodations, and that the provision of resource room services for four 45-minute sessions per week was appropriate to address the student's needs (IHO Decision at pp. 21-23). The IHO further determined that the parents' claim of a denial of FAPE for "social issues" was without merit, the parents' testimony that the student was bullied was not credible, and the incidents alleged by the parents did not adversely affect the student's ability to learn (*id.* at pp. 23-24).

With respect to the July and October 2016 IEPs and the 2016-17 school year, the IHO found that the IEPs were appropriate and offered the student a FAPE (IHO Decision at pp. 24-25). In particular, the IHO determined that the present levels of performance described the student's strengths and needs, as well as parent concerns (*id.* at p. 24). In addition, the IHO found that the recommendation for a resource room program was appropriate to address the student's needs in the least restrictive environment (LRE) (*id.*). The IHO further held that the recommendations for counseling and OT consultations would have addressed the student's difficulty with peers and visual motor deficits, and that the testing accommodations would have addressed the student's attentional issues (*id.* at pp. 24-25).

Despite having found that the district offered the student a FAPE for the 2015-16 and 2016-17 school years, the IHO expressed concern with the unilateral placement of the student at Winston in terms of LRE considerations, lack of progress, and the lack of individualization in the program (IHO Decision at p. 25). The IHO also expressed concern that the parents never intended to allow the district to provide special education to the student and determined it would be "very difficult" to find equitable considerations favored reimbursement (*id.* at pp. 25-26).

Lastly, the IHO denied the parents' section 504 claim, finding no evidence in the hearing record of discrimination, gross negligence, or reckless indifference (IHO Decision at pp. 26-27).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding that the district offered the student a FAPE and denying their request for tuition reimbursement.

Initially, the parents assert that the IHO erred in finding that the district satisfied its child find obligation. In particular, the parents contend that they provided an evaluation to the district in 2014 that recommended an IEP be considered for the student, and the district never provided the parents with a copy of the procedural safeguards notice or informed the parents of their right to initiate a CSE meeting. The parents contend that the private evaluation report shared with the district in 2014 was consistent with the December 2015 evaluations, such that the district should have convened a CSE meeting and developed an IEP for the student by no later than fall 2014.

Further, the parents assert that the district failed to establish that the "tiered building services" (i.e., RtI) were effective because the evidence showed that the student did not make progress under RtI.

The parents also assert that the IHO erred in finding that the district offered the student a FAPE during the 2015-16 school year because the resource room services recommended were insufficient to meet the student's needs and the evidence also showed that the student should not have been placed in a class with 20 or more students. The parents contend that the IHO erred in relying on certain academic test results, because witnesses at the impartial hearing called the validity of the results into question. The parents assert that the student did not make progress while receiving RtI or resource room services at the district. The parents also assert that the IHO erred in finding that the incidents of bullying did not impact the student.

With respect to the 2016-17 school year, the parents assert that the IHO erred in ignoring that the July 2016 IEP was not provided to them until after the beginning of the school year and that no "finalized" IEP was in place until October 2016. Further, the parents contend that the IHO erred in finding that the IEPs offered the student a FAPE for the same reasons that they assert the January 2016 IEP was insufficient. In addition, the parents assert that the July 2016 CSE had evidence that the smaller classes and 1:1 instruction provided to the student at Winston had been effective and enabled him to make progress.

The parents next allege that the IHO erred in his analysis of the unilateral placement at Winston. The parents also allege that IHO erred in his analysis of equitable considerations and assert that they cooperated with the district. Lastly, the parents allege that IHO erred in dismissing their section 504 claim. As relief, the parents request reimbursement for the costs of the student's tuition at Winston during the 2015-16 and 2016-17 school years.

In an answer the district admits and denies the allegations contained in the request for review and argues that the IHO's decision should be upheld. With respect to the parents' claim that the district violated its child find obligations, the district contends that the IHO correctly determined that the district satisfied its child find obligations because there was no reason to suspect the student had a disability until fall 2015. The district further asserts that its RtI program was appropriate at the time it was implemented and although the evaluation the parents obtained was provided to the district prior to the parents' referral to the CSE, it did not contain any information mandating the district to refer the student to a CSE.

Next, the district contends that the IHO correctly determined that all of the IEPs at issue offered the student a FAPE. The district contends that the evaluations available to the January, July, and October 2016 CSEs showed that the student could be educated in a general education setting supported by a resource room program with modifications and accommodations. The district contends that the evaluations accurately identified the student's needs. The district further contends that the annual goals developed for the student could have been appropriately addressed in the resource room program, and together with the accommodations and modifications in the IEP, as well as the recommendation for OT and counseling consultations, addressed the student's academic, visual-motor, fine motor, and social/emotional needs.

The district additionally argues that the parents' unilateral placement of the student at Winston was not appropriate. With respect to equitable considerations, the district contends that

the IHO was correct in finding that the parents' actions demonstrated that they never seriously considered accepting a program developed by the CSE. Lastly, the district denies the parents' assertions regarding bullying and claims made under section 504, and requests that the IHO's decision be upheld in full.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that

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

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

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).

² The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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

Preliminarily, the parents assert that the IHO's decision should not be entitled to "deference" because the IHO's decision contains unsupported factual findings and relied upon data that was demonstrated to be false by district witnesses in making key findings on the student's progress in the district's program. However, as set forth above it is an SRO's duty to conduct an impartial review of the IHO's findings, conclusions, and decision and 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 solely upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

Additionally, a State Review Officer lacks jurisdiction to consider the parents' challenge to the IHO's denial of their section 504 claim. 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 (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"]; see 34 CFR 104.36). As courts have recognized, the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see 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"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504 and, to the extent such claims are asserted in this proceeding, they shall not be further addressed in this decision.

A. 2014-15 and 2015-16 School Years—Child Find

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" (Educ. Law § 4402[1][a]). As part of this obligation, districts are required to initiate a referral to a CSE to determine if a student requires special education services if a student has not made adequate progress when provided with instruction pursuant to an RtI program; 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]; 8 NYCRR 200.4[a]). Accordingly, a district's child find obligation is distinct from its obligation to offer a FAPE to a student with a disability.

The IHO found that prior to the parents' referral of the student to the CSE in October 2015, the district did not violate its child find obligations because the district had implemented its RtI process with the student and the student did not meet the criteria for referral to the CSE (IHO

Decision at pp. 19-20). The parents assert that the district failed to prove that the student made progress in the district's RtI program, which should have resulted in the district referring the student to the CSE.

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]; 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; see 20 U.S.C. § 1412[a][10][A][ii]; 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]; 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 Dept 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]).

To ensure that a school district has complied with its child find obligations, State regulation requires that "[t]he school district must initiate a referral and promptly request parental consent to evaluate the 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]). State regulation provides that "[a] school district's process to determine if a student responds to scientific, research-based instruction shall include," among other things, "the application of

information about the student's response to intervention to make educational decisions about changes in goals, instruction and/or services and the decision to make a referral for special education programs and/or services" (8 NYCRR 100.2[ii][1][v]).

State regulation further mandates that a school district may 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 must set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[ii][2]; 200.2[b][7]). While the district may determine the nature of data to be collected and the manner in which progress monitoring will be conducted, the district's RtI process must include "repeated assessments of student achievement . . . to determine if interventions are resulting in student progress toward age or grade level standards" (8 NYCRR 100.2[ii][1][iv]).

The district's director of pupil personnel services and special education (director) described the three-tiered RtI system used by the district as follows: Tier 1 takes place in the general education classroom and consists of the teacher meeting with the RtI team (the school principal, a school psychologist, the educational consultant teacher, a learning specialist, and a regular education teacher) to develop strategies to address a student's needs and to take data on the student's response; if the data suggested that Tier 1 interventions were not successful after six to eight weeks, the RtI team would have assigned a person to work with the student in a smaller group for a "more finite" period of time using specific interventions (Tier 2); if that was not sufficient, Tier 3 intervention would have been put in to place, which included "one-to-one or one-to-two" instruction "for a more intense amount of time" with continued data collection (Tr. pp. 19-21). The director also testified that during the RtI process, either the parents or the RtI team could have referred the student to the CSE if there was any concern that the interventions were not resulting in progress, and that at the end of the Tier 3 "finite amount of time," the effectiveness of the interventions would have been assessed and, if there was "evidence of a disability," the RtI team would have referred the student to the CSE (Tr. pp. 21-22).

The hearing record does not contain detail with respect to how the student responded to RtI; for example, the district did not submit into evidence its written RtI policy or any progress monitoring data specific to the student's progress in the district's RtI program. Testimony from the school principal indicated his second-hand knowledge that the student received RtI Tier 1 services consisting of "small group support for fluency" beginning in second grade during the 2013-14 school year, that during the 2014-15 school year the student received RtI Tier 2 services until, "with progress monitoring, he then surpassed the benchmark" and was returned to RtI Tier 1 services, consisting of "fluency interventions in the classroom" (Tr. pp. 196-97). Email correspondence between the district and the student's mother from January and April 2015 described the student as "making strides in literacy," provided some information on regarding the student's reading comprehension, and noted parent and teacher concerns with the student's reading stamina (Parent Ex. Q at pp. 5-7). At the start of the 2015-16 school year (fourth grade), the student received RtI Tier 2 services—consisting of twice weekly small group reading instruction—due to his score on the third grade New York State ELA exam, which continued until the January 2016 IEP was implemented (Tr. pp. 197-200).

It is difficult to determine if the district was required to initiate a referral due to a lack of adequate progress after an appropriate period of time when the student was provided instruction in the district's RtI program, based on information in the hearing record suggesting he fluctuated between Tier 1 and Tier 2 interventions. According to State Education Department guidance, a district's use of Tier 2 interventions includes "direct, systematic instruction [which] provides more teacher-directed instruction, carefully structured and sequenced to an individual student, than was provided in Tier 1" (see "Response to Intervention, Guidance for New York State School Districts," at p. 13, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). The hearing record is lacking in terms of evidence of student performance data the district was required to collect while the student was receiving RtI.³ Such evidence is critical in a child find dispute of this nature insofar as such data is supposed to form the basis for: the district's review and decision making in the RtI process, determinations regarding entering and exiting intervention tiers as defined by district policy, and deciding whether and when the student should be referred for evaluation for eligibility for special education services under the IDEA. The lack of such evidence in the hearing record, as well as the lack of specific information regarding the district's RtI policy, results in the district's failure to establish that the student made adequate progress pursuant to its RtI policy such that referral to the CSE was not necessary. Furthermore, the district failed to comply with its child find obligations on the basis that the March 2014 private psychoeducational evaluation report forwarded to the district by the parents was sufficient to provide reason to suspect a disability as set forth below.

Although the parents obtained the private psychoeducational evaluation in March 2014, the report was not provided to the district until the beginning of the student's third grade year in fall 2014 (Tr. p. 325; Parent Exs. P. at pp. 1-4; Q. at p. 1; Dist. Ex. 2). The contents of the March 2014 psychoeducational evaluation report provided reason to suspect that the student had a disability and that special education may have been needed to address that disability.

Specifically, the March 2014 psychoeducational evaluation identified deficits in the student's processing speed; visual processing and automaticity related to letters, digits, and symbols; executive functioning; reading rate, accuracy, and fluency—possibly affecting comprehension; and fine motor dexterity and visual motor integration (Dist. Ex. 2 at pp. 4-13, 16-18). The report provided a diagnosis of specific learning disability with impairments in reading, and indicated the possibility of an attention deficit hyperactivity disorder, primarily inattentive type (id. at p. 13). The report recommended a wide variety of modifications to the student's education program to address these needs, including extended time on tests, "intensive reading intervention services" provided by a reading specialist, consultation with an occupational therapist, preferential seating, daily reading, partner reading, strategies to support reading accuracy and fluency, and other strategies to address visual processing, organization, and cognitive flexibility (id. at pp. 13-15). The report specifically recommended to the parents that they share the report with the CSE to determine if the student should be classified as a student with a learning disability

³ While the district asserts the presence of evaluative data conducted between June 2015 and January 2016 (Dist. Exs. 21-24) shows that it complied with its monitoring obligations, State guidance indicates that "[p]rogress monitoring occurs more frequently in Tier 2 and may vary from once every two weeks to once a week" ("Response to Intervention, Guidance for New York State School Districts," supra, at pp. 13-14). The hearing record does not reflect that the district undertook monitoring at this frequency during the time period the student received RtI Tier 2 services (the 2013-14 school year and the first half of the 2015-16).

(*id.* at p. 13). Accordingly, the report provided a basis to suspect the student might have a disability and require special education services to address it, and the district was in violation of its child find obligations from the time it received a copy of the report until the parents referred the student to the CSE for evaluation in October 2015 (Tr. pp. 199-200, 326-27, 369; Dist. Ex. 17). At the very least, the receipt of the psychoeducational evaluation report should have caused the district to ensure that it was monitoring the student's progress while receiving services pursuant to its RtI program.

Although the district violated its child find obligation by failing to refer the student to the CSE for evaluation during the 2014-15 school year, the parent has not requested any relief with respect to that school year in the form of, for example, compensatory education. With respect to the 2015-16 school year, the child find violation remained until the parents referred the student to the CSE in October 2015 and the CSE determined that the student was eligible for special education in January 2016. The only relief the parents request for the 2015-16 school year is tuition reimbursement for the student's attendance at Winston beginning in March 2016, after the student was found eligible and the child find violation had ended. In light of the above, although the district violated its child find obligation, no relief relevant to this violation has been requested (see Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). Additionally, the district's failure to comply with its child find obligation does not impact the appropriateness of the program recommended by the January 2016 CSE, and it is to that question that I next turn.

B. 2015-16 School Year

1. January 2016 IEP

With respect to the January 2016 IEP, the parents contend that the IHO erred in finding that the district offered a FAPE because resource room services were insufficient to meet the student's needs and the evidence showed that the student should not be placed in a general education class with 20 or more students. The parents further contend that the IHO erred in relying on certain academic test results, because witnesses at the impartial hearing called the validity of the results into question. Also, the parents assert that the student did not make progress commensurate with his abilities while receiving resource room services or tiered intervention services, and that none of the student's teachers testified about the student's progress at the district. Despite these assertions, review of the hearing record supports the IHO's finding that the January 2016 IEP offered the student a FAPE (IHO Decision at p. 23).

While the sufficiency of the evaluative information is not challenged by the parents in their request for review, a brief review of the evaluative information available to the January 2016 CSE and the student's needs is instructive for purposes of determining whether the recommendation for resource room services was appropriate. According to the hearing record, the January 2016 CSE had before it and considered a December 2015 private psychological evaluation report; a December 2015 speech-language evaluation report; a December 2015 OT evaluation report; a December 2015 social history; a December 2015 classroom observation; and a December 2015 educational evaluation report (Tr. pp. 340-42; Parent Ex. A; Dist. Ex. 9 at pp. 1-6). Review of the information in the hearing record regarding the student's academic achievement, functional

performance and learning characteristics, visual perceptual, visual motor integration, fine motor, speech-language, and social/emotional skills and needs shows that the present levels of performance contained in the January 2016 IEP is generally consistent with the evaluative information available to the January 2016 CSE (compare Dist. Ex. 9 at pp. 3-7, with Dist. Exs. 3-8).

The January 2016 IEP contained information regarding the student's learning rate, consistent with results from the administration of the WISC-V as indicated in the December 2015 private psychological evaluation report, specifying that the student had a very high score on the visual spatial index (96th percentile), high average index scores in verbal comprehension (77th percentile) and working memory (79th percentile), an average index score in fluid reasoning (66th percentile), and a low average index score in processing speed (9th percentile) (compare Dist. Ex. 8 at pp. 5, 17-18, with Dist. Ex. 9 at pp. 3, 5). The IEP also indicated that there was a significant discrepancy between the student's processing speed and all other index scores (Dist. Ex. 9 at p. 5).

With respect to academics, the January 2016 CSE reviewed the results from a December 2015 private psychological evaluation and a December 2015 educational evaluation (Dist. Exs. 7; 8 at pp. 21-23; 9 at pp. 1-5). Both evaluation reports contained results from administrations of the Wechsler Individual Achievement Test – Third Edition (WIAT-III) completed in December 2015; however, comparison of the results indicated similar scores (Tr. pp. 341, 470-71; compare Dist. Ex. 7 at pp. 1-6, with Dist. Ex. 8 at pp. 1, 12-16, 22). The January 2015 IEP present levels of performance in reading, writing, and mathematics contained the results from the district's December 2015 administration of the WIAT-III reported in the educational evaluation (compare Dist. Ex. 9 at p. 5, with Dist. Ex. 7 at pp. 2-6).

With regard to the student's reading skills, the January 2016 IEP, consistent with the December 2015 educational evaluation, indicated that the student achieved scores in the average range for total reading, decoding, fluency, and comprehension (compare Dist. Ex. 7 at p. 3, with Dist. Ex. 9 at p. 5). According to the IEP, the classroom teacher reported that the student was able to sequentially retell a story in verbal and written form, accurately read sight words and decode real and nonsense words, and comprehend at a literal level (Dist. Ex. 9 at p. 5). The teacher further reported that the student had difficulty reading connected text aloud with accuracy and fluency, difficulty with inferential comprehension, and that his responses were often vague and lacked organization, evidence, and support (id.).

According to the December 2015 private psychological evaluation report the student achieved scores at the 18th percentile on subtests for both oral reading rate and accuracy (Dist. Ex. 8 at pp. 13, 22). The evaluator indicated that the ability to perform rapid naming tasks is related to oral fluency and is "highly correlated" to reading speed and fluency, and that oral reading rate is the speed at which a child can automatically decode or read words in context (id. at p. 22). The evaluator indicated that both oral reading rate and accuracy contribute to the "establishment of reading fluency" (id.). On the reading comprehension subtest, the student's score was at the 32nd percentile (id.). The evaluator reported that the student could not use contextual cues, recognize stated cause and effect, order events, draw conclusions, and predict outcomes (id.). Although not specifically listed in the January 2016 IEP, the CSE discussed the student's diagnosis of dyslexia provided in the December 2015 psychological evaluation report (Tr. p. 342; Parent Ex. A; Dist. Ex. 8 at p. 26).

With regard to writing, the January 2016 IEP reflected results from the December 2015 educational evaluation that indicated the student achieved scores in the average range for written expression (standard score 109), and specifically provided the following subtest scores: spelling (106), sentence building (117), sentence combining (114), and essay composition (99) (compare Dist. Ex. 7 at p. 4, with Dist. Ex. 9 at p. 5). The January 2015 IEP contained information provided by the student's then-current teacher, which indicated that the student was developing his writing abilities in all areas including grammar, capitalization, punctuation, organizing ideas logically and appropriately for the task, editing, and revising (Dist. Ex. 9 at p. 5). The IEP further reflected reports from the classroom teacher that the student's ability to develop writing ideas using supporting details, examples, and precise descriptive language was in the "early stages" (id.).

According to the December 2015 private psychological evaluation report, in written expression, the student's standard score of 87 was in the average range; however, he demonstrated difficulty with sentence combining and sentence generation; specifically, that he consistently forgot the period, often misspelled words he was copying, randomly used capitals, and many of the sentences he wrote were fragments (Dist. Ex. 8 at pp. 14, 22). Furthermore, the student scored at the 13th percentile (standard score 83) in sentence composition, his essay was comprised of only 35 words, and he did not follow the directions or provide enough information (id.).⁴

In mathematics, consistent with the December 2015 educational evaluation report, the January 2016 IEP indicated that the student's standard score of 124 in broad math was in the above average range, specifying that his scores were in the average range for fact fluency across addition (100), subtraction (103), and multiplication (109), and in the high average range for numerical operations (116) and math problem solving (128) (compare Dist. Ex. 7 at p. 6, with Dist. Ex. 9 at p. 5).⁵ The IEP reflected information from the student's classroom teacher that the student demonstrated perseverance with problem solving, and that his ability to interpret word problems and solve problems using appropriate strategies, use estimation strategies to assess reasonableness of answers, and demonstrate fact fluency across all operations and computations was at grade level (Dist. Ex. 9 at p. 5). Additionally, the January 2016 IEP indicated that the student had difficulty explaining and justifying mathematical thinking using appropriate organization, details, and representations (id.).

The December 2015 educational evaluation report summarized the student's academic ability, indicating that overall his academic achievement levels were within the average range; and specified that math problem solving, numerical operations, sentence repetition, sentence building, and receptive vocabulary were areas of academic strength (Dist. Ex. 7 at p. 7). Moreover, the evaluation report indicated that oral reading fluency was an area of relative weakness, and oral discourse comprehension was also an area of academic weakness (id.).

⁴ Furthermore, although the evaluator did not provide a diagnosis of dysgraphia, she did reference the definition as "a learning disability that affects writing abilities manifesting itself as difficulties with spelling, poor handwriting, and trouble putting thoughts on paper," and stated that "dysgraphia seldom exists in isolation without other symptoms of learning deficits" (Dist. Ex. 8 at p. 23).

⁵ According to the December 2015 private psychological evaluation report, the student's math reasoning score was at the 90th percentile and his numerical operation skills were above average (Dist. Ex. 8 at p. 23).

The December 2015 private psychological evaluation report provided diagnoses of specific learning disorder with impairment in reading (dyslexia) with deficits noted in reading accuracy, reading rate, and fluency; specific learning disorder with impairment in written expression including spelling accuracy, grammar and punctuation, accuracy, and organization of written expression; and ADD (Dist. Ex. 8 at p. 26).

With regard to speech-language skills, the January 2016 IEP references a December 2015 speech-language evaluation report, which indicated that the student's core language score was in the above average range on the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5) (compare Dist. Ex. 3 at pp. 2-3, with Dist. Ex. 9 at p. 5). Additionally, the IEP reflected that the student was able to respond to questions in the classroom given some wait time, and his conversational skills were age appropriate (Dist. Ex. 9 at p. 5). Furthermore, the December 2015 speech-language evaluation report described the student's conversation, articulation, and pragmatic language skills as age appropriate (Dist. Ex. 3 at p. 3).

The student's fine motor, sensory processing, and visual motor skills were assessed in the December 2015 OT evaluation, and the evaluation and scores were discussed at the January 2016 CSE meeting (Parent Ex. A; Dist. Ex. 4). The evaluation was briefly summarized in the January 2016 IEP (compare Dist. Ex. 4, with Dist. Ex. 9 at p. 6). The IEP indicated, consistent with the December 2015 OT evaluation report, that the student's fine motor precision, upper-limb coordination, visual perception, and motor coordination skills were within the average range (compare Dist. Ex. 4 at pp. 2-4, with Dist. Ex. 9 at p. 6). Additionally, the IEP reflected evaluation results that showed the student's ability to perform tasks that required fine motor integration, manual dexterity, and visual motor integration was in the below average range (compare Dist. Ex. 4 at pp. 2-4, with Dist. Ex. 9 at p. 6). The occupational therapist who completed the evaluation attended the January 2016 CSE meeting and related that the student had good fine motor skills and visual motor skills when these were evaluated separately; however, she explained that the student achieved lower scores on assessments which required him to integrate fine motor and visual motor skills (Parent Ex. A).

The hearing record shows that the January 2016 CSE also discussed a December 2015 classroom observation (Tr. pp. 332, 340; Dist. Exs. 5; 9 at p. 3). The observation reported that the student was attentive when engaged in subjects of high interest that matched his ability level; however, he became "internally distracted" during less preferred or academically challenging activities (Dist. Ex. 5 at p. 2). The classroom observation report further described that the student was socially appropriate, collaborated well with peers, appropriately followed directives, was able to work independently, and was responsive to prompting (id.).

The January 2016 CSE determined that, regarding management needs, the student required the additional support of special education services to be successful in the regular education classroom (Dist. Ex. 9 at p. 6). The IEP also included a statement regarding the effect of the student's needs on his involvement and progress in the general education curriculum that indicated the student exhibited slow processing speed and delays in reading fluency, written expression, and mechanics that impacted his progress in the general education setting (id. at p. 7).

With respect to the annual goals developed during the January 2016 CSE meeting, the January 2016 IEP contains seven annual goals, each of which included criteria by which to

determine the student's progress, and provided a method to measure progress toward goal attainment as well as a schedule by which progress would be measured (Dist. Ex. 9 at pp. 7-8; see Parent Ex. A). Review of the annual goals indicates that they were designed to address the student's study, reading, writing, and mathematics skills; and that they were commensurate with the student's present levels of performance contained in the January 2016 IEP (id. at pp. 5-8).⁶

In order to address the student's identified needs, the January 2016 CSE recommended the student receive four 45-minute sessions of resource room services per week in a group of five (Dist. Ex. 9 at p. 8). The January 2016 IEP included accommodations and program modifications for the student, including access to a word processor; additional time to complete assignments; classroom breaks; additional wait time for responses; checks for understanding; prioritized classroom assignments; support for organizational skills; refocusing and redirection; and modified homework assignments (id. at pp. 8-9). Testing accommodations included in the IEP were flexible seating, breaks for tests lasting longer than 30 minutes, alternate forms of recording, and extended time for all tests requiring reading and writing (id. at p. 10). Comparison of the accommodations and modifications in the IEP with the December 2015 private psychological evaluation report indicates that—contrary to the parents' assertion—many of the psychologist's recommendations were included in the January 2016 IEP (compare Dist. Ex. 8 at pp. 26-28, with Dist. Ex. 9 at pp. 8-10). The January 2016 CSE also specified that homework would be modified to 50 percent of the assigned tasks in reading and writing, and that the student use an online program for reading homework assignments, to address his reading needs as well as his tracking difficulties (Parent Ex. A; Dist. Ex. 9 at p. 9). Additionally, the January 2016 IEP recommended the provision of one monthly OT consult as a support for school personnel on behalf of the student (Dist. Ex. 9 at p. 10).

The parents argue on appeal that the IHO erred in determining that the recommendation for a general education classroom placement with resource room services was appropriate because the resource room program would not have provided sufficient support. State regulations provide that a resource room program "means 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]). A resource room program "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

According to the district coordinator for elementary special education, once the January 2016 CSE determined the student's eligibility for special education as a student with a learning disability, it developed annual goals based on the student's needs; specifying that the goals were developed prior to determining the level of service needed to implement those goals (Tr. pp. 446, 449). Thereafter, based on the goals, the CSE determined that four 45-minute sessions of resource room services per week was the most appropriate program (Tr. p 449). The district coordinator further testified that based on the information presented at the CSE meeting, resource room services were appropriate (Tr. pp. 456-57). During the January 2016 CSE meeting, the parents

⁶ Although the student's visual motor integration, tracking, and fine motor integration skills were identified as areas of weakness, annual goals were not developed to address these skills (see Dist. Ex. 9 at pp. 3, 6-8; Parent Exs. A; B; C).

expressed their concern about resource room services based on the student not making progress while he received three sessions of tiered instruction per week (Parent Ex. A). According to the recording of the January 2016 CSE meeting, tiered instruction was provided in a group of 15 students by a tiered support teacher; however, resource room services would be provided by a learning specialist special education teacher in a group no larger than five, which would provide more opportunity for the teacher to focus on the student's identified needs (id.; see Tr. p. 450).

The parents further assert the IHO ignored the private evaluator's testimony that a class of 20 or more students would have been problematic for the student.⁷ Review of the hearing record does not indicate that the student required a classroom setting with fewer than 20 students to receive a FAPE. Initially, the private psychological evaluation report did not reflect a specific recommendation for classroom size, but indicated that the student required "intensive remedial intervention in an individual or small group setting" (Dist. Ex. 8 at p. 26). In addition, the private evaluator did not testify that a classroom containing 20 students would be "problematic and cause issues with [the student's] learning," as asserted by the parents, but rather that she "would be concerned" about such a classroom placement "because of his slow processing speed, his attention deficits, and the difficulty that he had in reading fluency, and in terms of his written language" (Tr. pp. 516-17). Furthermore, the classroom observation indicated that the student demonstrated appropriate attention to the lesson and worked appropriately with an assigned partner (Dist. Ex. 5 at p. 1). According to the December 2015 social history, the student was a "happy outgoing child who ha[d] no issues interacting with other children and making friends," and exhibited frustration only when he felt he was being treated unfairly or could not complete homework (Dist. Ex. 6 at p. 1). Additionally, the social history reported that the student was a "happy, socially appropriate boy with good frustration tolerance" (id. at p. 2).⁸

The parents further contend that the IHO erred in relying on certain academic test results, because witnesses at the impartial hearing called the validity of the results into question. With regard to the parents' contention that the IHO based his decision on the district's WIAT-III test results and that those test results were not valid; a review of the hearing record indicates that the two administrations of the WIAT-III in December 2015 provided scores that were generally consistent with each other. There was confusion during the January 2016 CSE meeting as to which administration occurred first; with the parents stating during the meeting the December 2015 private psychological evaluation occurred first (Parent Ex. A). Furthermore, the evaluator who conducted the December 2015 private psychological evaluation testified that she thought she tested the student before the district's December 22, 2015 testing date (Tr. p. 512).

⁷ The private evaluator did not attend the January 2016 CSE meeting, nor do the parents assert large class size as a reason to reject the January 2016 IEP in their February 2016 letter to the district (see Dist. Exs. 9 at p. 1; 11).

⁸ Also, the December 2015 initial educational evaluation report described the student as cooperative and noted that he "appeared comfortable with the examiner" (Dist. Ex. 7 at p. 1). Furthermore, the evaluator described that the student's conversational proficiency was typical for his grade level and he "responded slowly and carefully to test questions, generally persisting with difficult tasks" (id.). The December 2015 private psychological evaluation report described the student as "a very good sport about testing" who "was a gentleman at all times," and indicated that he was "intrinsically motivated to do well" and impressed the evaluator as kind and caring (Dist. Ex. 8 at p. 3). The private evaluation report also indicated that the student had difficulty maintaining attention and focus, but was responsive to redirection (id.).

According to the December 2015 private psychological evaluation report, the assessments were administered to the student on December 9, 15, and 28, 2015; however, it does not specify which of the approximately 20 assessment procedures were administered on what dates (Dist. Ex. 8 at pp. 1, 3-16). The December 2015 educational evaluation report indicated that the assessment was completed on December 22, 2015 (Dist. Ex. 7 at p. 1). Additionally, the private psychologist testified that the weakest scores the student obtained were in oral reading fluency and oral reading accuracy and rate, and these "seem[ed] to be identical" when asked to compare her findings with the district's evaluation (Tr. p. 511). She further testified that the scores were consistent (within a few points of each other) with respect to reading comprehension, basic reading, word reading, and pseudo-word decoding; however, she noted a difference in the scores for written expression with the district's scores being "much higher" (Tr. p. 512). The private psychologist also testified that the findings in her December 2015 evaluation were consistent with results of a March 2014 private psychoeducational evaluation, and that even though two different assessments were used, there was a lot of statistical compatibility between "the WIAT and the Woodcock Johnson," the trend in the scores seemed to be very similar, and her test data indicated consistency with the prior findings (Tr. pp. 509, 514). According to the district coordinator of elementary special education, the January 2016 CSE discussed the possibility of the WIAT-III scores being invalid due to the timing of the two administrations; however, comparison of the evaluation results showed consistent scores (Tr. pp. 476-77; Parent A).⁹ Further comparison of the two administrations showed that the composite scores were consistent with each other, with the exception of the written expression composite; however, both of those scores fell in the average range (compare Dist. Ex. 7 at p. 2 with Dist. Ex. 8 at p. 14). Therefore, the parents' argument that the IHO improperly relied on the scores contained in the district's administration of the WIAT-III is without merit as the two administrations were consistent with each other and provided sufficient information to aid the January 2016 CSE in determining the student's academic needs and to design an appropriate program by which to address those needs.

Finally, the parents further argue that resource room was not appropriate because the student did not make progress during the time he attended the program, and none of the student's teachers from the district testified during the hearing. However, this aspect of the parents' claim cannot be addressed as the result of a lack of evidence in the hearing record, primarily because the student only received resource room services for a short time before being unilaterally placed at Winston. The limited information included in the hearing record showed that the student began receiving resource room services beginning on or around January 26, 2016, was removed on or around February 3, 2016, and then began receiving resource room services again around February 7, 2016; notably the student attended resource room for approximately six weeks, during which the parent testified that she received a "glowing report" from the student's then current classroom and resource room teachers (Tr. pp. 345-46; Parent I at p. 1). The parent further testified that the student was not doing as well at home or with his private tutors during this time (Tr. pp. 346-47). The hearing record shows that the student was removed from the public school and began attending Winston on March 7, 2016 (Dist. Ex. 11 at p. 2).

⁹ During the January 2016 CSE meeting recording, the parents acknowledged that the test scores are consistent (Parent A).

Based on the above, the hearing record supports the IHO's determination that the general education setting with resource room services, together with accommodations and modifications addressing the student's deficits, was appropriate to meet the student's needs (IHO Decision at p. 23).

2. Social/Emotional Needs—Bullying

The parents contend that while in the district school, the student experienced several instances of bullying, which the CSE did not sufficiently address, and that these events were not appropriately considered by the IHO.

Under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter: Bullying of Students with Disabilities, 61 IDELR 263 [OSERS 2013] [stating that bullying that results in a student with a disability not receiving meaningful educational benefit constitutes a denial of a FAPE and that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs]; see M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650-51 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199-201 [3d Cir. 2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter: Harassment and Bullying, 55 IDELR 174 [OCR 2010] [stating that "a school is responsible for addressing harassment incidents about which it knows or reasonably should have known"]; Dear Colleague Letter: Prohibited Disability Harassment, 111 LRP 45106 [OCR/OSERS 2000]).¹⁰ In determining whether allegations related to bullying rise to the level of a denial of FAPE, the United States Department of Education has clarified that:

A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.

¹⁰ At least one district court in New York has found that bullying may lead to the denial of a FAPE if "it is likely to affect the opportunity of the student for an appropriate education" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 316-18 [E.D.N.Y. 2011]; see T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417-22 [E.D.N.Y. 2014]). The Second Circuit did not decide whether the failure to address bullying in a student's IEP could rise to the level of a denial of a FAPE, nor did it adopt the district court's four-part test for determining when bullying results in a denial of a FAPE (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 876-77 & n.3 [2d Cir. 2016]). Accordingly, this decision relies more heavily on the interpretation letters issued by the United States Department of Education.

(Dear Colleague Letter, 61 IDELR 263).

After review of the information concerning these incidents in the hearing record, including their timing, context, and the response of the district's staff, I decline to overturn the IHO's finding that bullying and/or unaddressed social/emotional needs did not result in a denial of a FAPE. The hearing record does not show that the student developed any needs that could be addressed through special education as a result of the identified events, and the parents do not identify any specific needs that might have arisen as a result of the alleged bullying.

Specifically, the hearing record contains evidence of events that led to physical altercations on the bus in January 2016 and during recess in February 2016, and refers to another student threatening the student with a BB gun during a prior school year (Tr. pp. 201-06, 213-15, 348-49; Parent Ex. E). The principal of the district school the student attended testified that he investigated the two physical altercations that occurred in January and February 2016, which he determined were "difficult peer interactions" and attributed the incidents to students "making . . . mistakes getting along with one another" (Tr. pp. 201-06). In email communication between the principal and the student's mother contemporaneous with the latter incident, the principal explained that his investigation revealed that although inappropriate behavior had occurred by all the students involved, evidence of bullying or the student being targeted because of his learning disability was not found; rather, the principal determined that the incidents were cases of mutual disagreements between the student and classmates that led to physical conflict (Parent Ex. E. at pp. 3-5). He testified that while the conduct was inappropriate, he would not define these events as bullying, which he described as "ongoing . . . persistent conflicts between peers where there is not a friendship" (Tr. p. 209). The director further testified that he recalled the parents mentioned bullying during a CSE meeting; however, review of the recordings from the CSE meetings at issue in this proceeding reveals that the parents did not raise bullying as a concern during any of them (Tr. p. 56; Parent Exs. A; B; C). Moreover, the hearing record contains no indication, and the parents do not allege on appeal, that these incidents of alleged bullying interfered with the student's ability to receive educational benefits, substantially restricted the student's learning opportunities, or prevented him from making progress. Accordingly, the hearing record does not support a finding that the student was denied a FAPE as a result of the alleged instances of bullying (see N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 470-72 [E.D. Pa. 2014] [holding that where a district responded to all allegations of bullying brought to its attention, the district did not deny the student a FAPE despite not convening a CSE to address bullying by modifying the student's IEP]).

Furthermore, the parents do not identify, nor does the hearing record show, that the student exhibited social/emotional needs related to any of the alleged incidents of bullying at the time of the January 2016 CSE meeting. The January 2016 IEP present levels of social development—that are not in dispute on appeal—indicate that the student "has appropriate relationships with peers and adults, is a well-adjusted, happy boy and has age-appropriate interests" (Dist. Ex. 9 at p. 6). The IEP also indicates that the student demonstrated a high frustration tolerance, was a hard worker despite his difficulties, and did not have social or emotional needs that should be addressed through special education at that time (*id.*). Although not specifically related to any alleged bullying incident, review of the hearing record shows that at the time of the January 2016 CSE meeting the student was experiencing frustration and anxiety related to his struggles with homework (Tr. pp. 330-31; Parent Ex. A). The January 2016 CSE recommended homework modifications including

the use of an online reading program to fulfill reading homework assignments (Parent Ex. A; Dist. Ex. 9 at p. 9). Additionally, the January 2016 IEP also recommended homework assignments for reading and writing be reduced by 50 percent, and contained annual goals designed to improve the student's reading and writing skills (Dist. Ex. 9 at pp. 7-9). In conclusion, the January 2016 IEP was adequately designed to meet the student's social/emotional needs at the time it was developed.

Based on the hearing record, the parents raised concerns regarding the student's social/emotional needs related to incidents of bullying in communications to district staff in February and September 2016 (Parent Ex. E; Dist. Exs. 11; 15); however, when asked to clarify their position regarding the student's social/emotional needs during the October 2016 CSE meeting, the parents expressed their concern that the district had not sufficiently addressed the student's anxiety related to his difficulties completing school work during the time he attended the district public schools (Parent Ex. C; see Dist. Ex. 15). Additionally, as discussed below, the July and October 2016 IEPs continued the recommendations contained in the January 2016 IEP for modification of classwork and homework assignments, as well as additional time and supports on assignments, (compare Dist. Ex. 13 at pp. 8-9, and Dist. Ex. 16 at pp. 10-11, with Dist. Ex. 9 at pp. 8-9).

C. 2016-17 School Year

1. Timing of the July 2016 IEP

The parents assert that an IEP for the 2016-17 school year was not "completed" by the beginning of the school year, asserting that they did not receive the July 2016 IEP prior to the beginning of the school year and that the IEP was not finalized until the October 2016 CSE meeting.

Initially, the parents' argument that an IEP was not completed until the October 2016 IEP was developed is not supported by the hearing record. During the July 2016 CSE meeting, the parents and district discussed the district's request to obtain additional testing of the student (Parent Ex. B; Dist. Ex. 13 at p. 1). Counsel for the parents asked if the IEP would be finalized after the CSE reconvened to consider the updated testing, to which the district replied that the IEP developed at the July 2016 CSE meeting would be final because it might not be possible to complete the testing and reconvene the CSE prior to the beginning of the school year (Parent Ex. B).

Turning to the parents' assertions regarding the timing of the transmittal of the July 2016 IEP, the district is required to have an IEP in effect for each student with a disability at the beginning of the school year and provide a copy of the IEP to the parents (34 CFR 300.322[f]; 300.323[a]; 8 NYCRR 200.4[e][1][ii], [e][3][iv]; Cerra, 427 F.3d at 193-94 [holding that a district "fulfill[s] its legal obligations by providing the IEP before the first day of school"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE if the violation (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]; see G.B. v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 246 [S.D.N.Y. 2015] [finding the failure to provide the IEP before the first day of school was a procedural violation that did not significantly impede the parents' participation in the CSE process]; K.M. v. New York City Dep't of Educ., 2015 WL 1442415, at *1 [S.D.N.Y. Mar. 30, 2015] [same]; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 225-27 [S.D.N.Y. 2014] [finding the failure to provide a copy of the IEP before the beginning of the school year impeded the provision of a FAPE to the student]).

There is no dispute that the CSE met in July 2016 and discussed the contents of the student's IEP for the upcoming 2016-17 school year (Tr. pp. 34, 74, 162, 357-59, 453; Parent Ex. B; Dist. Ex. 13 at p. 1). There is also no dispute that the district sent the parents a copy of the completed July 2016 IEP in a letter dated August 30, 2016 (Tr. pp. 50-52, 359). In their due process complaint notice the parents asserted that they received the IEP "the day before school started" (Dist. Ex. 1 at pp. 15-16). Both the due process complaint notice and the July 2016 IEP indicated that the first day of the 2016-17 school year was September 1, 2016 (id. at p. 16; Dist. Ex. 13 at pp. 1, 2, 8-9). However, the hearing record includes a September 21, 2016 letter from the parents to the district stating that the July 2016 IEP was received on September 3, 2016 (Dist. Ex. 15; see Tr. p. 359).

Even if the parents did not receive a copy of the July 2016 IEP until September 3, 2016, it is not clear that this would constitute a procedural violation, as the parents concede that the district mailed the IEP to them on August 30, 2016, and caselaw is unclear whether the date of mailing or date of receipt controls for purposes of determining when the district "provides" the IEP to the parents (Tr. pp. 50, 359; see Cerra, 427 F.3d at 190, 194 [finding no procedural violation where the IEP was mailed to the parents on August 29, before the first day of school]; K.M., 2015 WL 1442415, at *1 [indicating that the relevant date is date of mailing]; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d at 225-27 [finding a procedural violation where the IEP was not received prior to the first day of school]). In any event, even if the district's delivery of a copy of the July 2016 IEP to the parents was a procedural error, it would not constitute a denial of a FAPE for the 2016-17 school year because the parents were aware of the program recommended by the July 2016 CSE and had already decided to reject it and unilaterally place the student at Winston, prior to the time the district was required to implement the IEP.

The hearing record establishes that the parents were aware of the contents of the program recommended by the July 2016 CSE because the parents participated in the July 2016 CSE meeting and rejected the recommended IEP at the end of the meeting; the parents also notified the district by letter dated August 22, 2016 of their intention to unilaterally place the student at Winston for the 2016-17 school year (Tr. pp. 360-61; Parent Ex. B; Dist. Exs. 13 at p. 1; 14). Accordingly, the hearing record does not indicate that any procedural violation in the transmittal of the July 2016 IEP impeded the parents' ability to participate in the development of the student's educational program to an extent that it rose to the level of a denial of a FAPE. In addition, the parents do not assert that they were in any way unaware of the program recommended for their son, or that their participation in the development of his program was impeded as a result of the allegedly untimely transmittal of the IEP (see L.L. v. New York City Dep't of Educ., 2016 WL 4535037, at *6 [S.D.N.Y. Aug. 30, 2016] [noting that "[i]t would be a closer case were a [parent] to allege specific facts about how the delayed IEP . . . prevented her from accessing information necessary to evaluate the placement through all potentially available channels"]).

2. July and October 2016 IEPs

Turning to the substantive adequacy of the programs recommended for the student for the 2016-17 school year, the December 2015 district evaluations and the December 2015 private psychological evaluation report considered by the July 2016 CSE are discussed in detail above and will not be repeated at length here.

The July 2016 CSE updated the student's present levels of academic performance based on information provided by the student's teacher from Winston, indicating that he made growth in reading comprehension and reading fluency, and was using strategies such as highlighting and margin notes to support his comprehension development (Dist. Ex. 13 at p. 4; see Parent Ex. B). In writing, the July 2016 IEP indicated that the Winston teacher reported the student was able to identify and correct grammatical errors in his work with increasing independence and he was using strategies such as brainstorming, outlining, and using editing checklists to improve the overall organization and length of his written sentences (Dist. Ex. 13 at p. 4). In mathematics, the July 2016 IEP reflected information from the Winston teacher that the student made notable gains in math; in particular, he developed foundational skills including multi-digit multiplication, long division, fractions, decimals, and percent in isolation and in word problems; and new concepts were presented in a systematic step-by-step manner emphasizing a structured approach (id.).

With regard to the student's social development, the July 2016 IEP reflected the Winston teacher's report that the student's self-esteem and self-confidence had improved; he had positive peer relations and had made friends; and he related well and interacted nicely with others (Dist. Ex. 13 at p. 5; see Parent Ex. B). Furthermore, the July 2016 CSE determined that there were no social or emotional needs that needed to be addressed through special education at the time of the CSE meeting; however, the CSE recommended a monthly counseling consult to ensure positive social interactions and social skills were developing in a general education setting (Dist. Ex. 13 at pp. 5-6, 9; see Parent Ex. B).

With regard to the student's physical development, the July 2016 IEP continued the recommendation to monitor via OT consult, further development of his visual motor integration abilities as related to school-related tasks, and to provide sensory strategies for use in the classroom (Dist. Ex. 13 at pp. 6, 9; see Parent Ex. B). Finally, the "effect of student needs on involvement and progress in the general education curriculum" indicated, as did the January 2016 IEP, that the student exhibited slow processing speed and delays in reading fluency, written expression, and mechanics that impacted his progress in the general education setting (compare Dist. Ex. 9 at p. 7, with Dist. Ex. 13 at p. 6).

The July 2016 CSE recommended additional academic testing due to the WIAT-III having been administered multiple times within a six-month period; specifying that even though the scores were consistent with each administration, the CSE wanted to administer different assessments in order to gain additional information about the student's academic skills (Tr. p. 454; Parent Ex. B). According to the learning specialist who completed the additional testing in July and August 2016, further testing was necessary because repeating a test within a year can alter the validity of the test (Tr. p. 81).

On October 13, 2016, the CSE reconvened to review the updated testing completed in August 2016 (Tr. p. 167; Parent Exs. C; D; Dist. Ex. 16 at p. 1). The October 2016 IEP is largely similar to the July 2016 IEP, with the exception of summaries regarding the August 2016 assessments results and the addition of one reading goal and one new accommodation based on the assessment results (Tr. p. 90; compare Dist. Ex. 13 at pp. 3-8, with Dist. Ex. 16 at pp. 2-11; see Parent Exs. B; C; D). The annual goal added to the October 2016 IEP was designed to address the student's ability to answer text-based questions to demonstrate an understanding of text while explicitly citing text details and examples as the basis for the answers, and the accommodation was the use of a graphic organizer (Tr. p. 90; Dist. Ex. 16 at pp. 9, 11).

Consistent with the August 2016 diagnostic learning evaluation report, the October 2016 IEP reflected that the student achieved scores in the average range on the broad reading cluster of the Woodcock Johnson III Tests of Achievement (WJ III ACH) (standard score 93); specifying that the student's standard scores on the letter word identification (100) and passage comprehension (93) subtests were in the average range; however, his standard score on the reading fluency subtest was in the low range (78) (Tr. pp. 82-83; compare Dist. Ex. 16 at p. 6, with Parent Ex. D at p. 1). In writing, the October 2016 IEP reflected results from the August 2016 diagnostic learning evaluation that showed the student's standard scores in the broad written language cluster and on both subtests in the average range (spelling 100 and writing samples 108) (Tr. pp. 82-83; compare Dist. Ex. 16 at p. 6, with Parent Ex. D at p. 2). Notably, the August 2016 diagnostic learning evaluation reported the student achieved a score in the low average range on the writing fluency subtest (84) (Tr. pp. 85-86; Parent Ex. D at p. 2). According to the October 2016 IEP, the student achieved standard scores in the average range on the broad math cluster (102), calculation subtest (91), and quantitative concepts subtest (105); scores in the above average range on the applied problems (117) and math reasoning (114) subtests; and in the low range on the math fluency (76) subtest (Tr. pp. 87-88; compare Dist. Ex. 16 at p. 6, with Parent Ex. D at p. 3).

The August 2016 diagnostic learning evaluation report indicated that the student's oral language skills were in the average range, and his academic skills and ability to apply those skills were at grade level (Parent Ex. D at p. 4). Additionally, the evaluator indicated that the student's level of academic knowledge was within the low average range, and his fluency with academic tasks was within the low range (id.). Furthermore, the evaluator reported that the reading composite score on the WJ-III demonstrated average skills; however, isolated skills assessed using the Test of Reading Comprehension – 4 (TORC-4) showed difficulty in relational vocabulary, sentence completion, and text comprehension (id.). The evaluator testified that the student's performance on the TORC-4 was not commensurate with his performance on the other tests, and opined that the visual aspect of reading was "a daunting task for him" (Tr. p. 84).

The parents argue that the IHO erred in his determination that the July 2016 and October 2016 IEPs were appropriate; however, based on the new evaluative information discussed at the July 2016 and October 2016 CSE meetings, the hearing record does not show that the student's needs changed significantly after the January 2016 CSE meeting. Furthermore, the information provided by the student's "Focus" teacher from Winston indicated that the student had made progress in the few months he had attended (Tr. pp. 275-76; Parent Exs. B; C; G at pp. 68-69; Dist. Ex. 13 at pp. 1, 4). According to the student's mother, the reports from Winston were good during the few months he had attended, and he was coping with and handling homework better (Tr. p. 354). According to the Winston 2016 final report, the student had made progress in his self-

advocacy skills, and had developed emerging skills as a reader and in writing "that will help him continue to develop in these areas" (Tr. p. 275; Parent Ex. G at p. 68; see Parent Ex. B).

With respect to the annual goals developed by the July 2016 CSE, the July 2016 IEP contains 10 annual goals, each of which included criteria by which to determine the student's progress (Dist. Ex. 13 at pp. 7-8). Further review of the annual goals indicates that they were designed to address the student's study, reading, writing, and mathematics skills, and that they were commensurate with the student's present levels of performance contained in the July 2016 IEP (id. at pp. 4-8). The district elementary learning specialist testified that each goal was designed based in part on anecdotal information provided by Winston and upon the results of the diagnostic learning evaluation testing (Tr. pp. 76-79). While keeping the annual goals developed in July 2016, the October 2016 CSE also added one goal to address additional reading needs identified in the August 2016 diagnostic learning evaluation (compare Dist. Ex. 13 at pp. 7-8, with Dist. Ex. 16 at p. 9; Parent Exs. C; D).

Furthermore, the July 2016 and October 2016 IEPs recommended testing accommodations and program modifications as discussed in more detail above (Dist. Exs. 13 at pp. 8-10; 16 at pp. 10-11). Additionally, the October 2016 CSE added the use of a graphic organizer to the student's IEP (Tr. p. 75; Dist. Ex. 16 at p. 10). The district elementary learning specialist testified that the accommodations "would level the playing field . . . and provide him with opportunities to access his learning" (Tr. pp. 79-80). Also, the July 2016 and October 2016 IEPs provided testing accommodations similar to those in the January 2016 IEP (compare Dist. Ex. 9 at p. 10, with Dist. Ex. 13 at p. 10, and Dist. Ex. 16 at p. 12; see Parent Ex. B). Finally, under supports for school personnel on behalf of the student, the July 2016 and the October 2016 CSEs recommended a monthly counseling consultation and a monthly OT consultation (for the month of September the CSE recommended two OT consultations) for the student, the purpose of which was to provide sensory strategies and assistance to the team for any visual motor needs (Dist. Exs. 13 at p. 9; 16 at p. 11; see Parent Ex. B).

The July 2016 CSE recommended an increase in the amount of resource room from four 45-minute sessions per week to five 45-minute sessions per week; the addition of a monthly consult for counseling to monitor development of the student's social/emotional skills; and continuation of the monthly OT consults (with two recommended for the month of September) (compare Dist. Ex. 9 at pp. 9-10, with Dist. Ex. 13 at pp. 5-6, 8-9; see Parent Ex. B). According to the July 2016 CSE chairperson, the increase in resource room services was based on the student's present levels being reported by Winston (Tr. pp. 455-56; Parent Ex. B). The hearing record indicates that the student's Focus teacher from Winston reported during the July 2016 CSE meeting that the student continued to struggle with oral reading fluency, accuracy, and encoding (Parent Ex. B). The October 2016 CSE maintained the resource room program recommendation (Dist. Ex. 16 at p. 10). The district elementary learning specialist, who attended both the July and October 2016 CSE meetings, testified that resource room services were appropriate for the student based on the standardized testing, and because he could "perform tasks that were representative of classroom tasks at a rate of average" (Tr. pp. 80-81; Dist. Exs. 13 at p. 1; 16 at p. 1).

Based on the above, review of the hearing record indicates that the student's identified needs had not changed significantly between the January 2016 CSE meeting and the time the student's IEPs for the 2016-17 school year were developed, and shows some improvement in the

student's skills; therefore, it supports IHO's determination that a general education classroom with resource room services, along with the additional support of the recommended accommodations and modifications, as well as counseling and OT consultations, were appropriate to meet the student's identified needs. In light of the above, I decline to disturb the IHO's finding that the district offered the student a FAPE for the 2016-17 school year.

VII. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein. Having found that the IHO correctly determined that the district offered the student a FAPE for the relevant portion of the 2015-16 school year and the 2016-17 school year, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated August 31, 2017, is modified, by reversing so much thereof as determined that the district complied with its child find obligations during the 2014-15 school year and a portion of the 2015-16 school year, as set forth above.

Dated: **Albany, New York**
 December 8, 2017

STEVEN KROLAK
STATE REVIEW OFFICER