



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-095

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 Cold Spring Harbor Central School District

Appearances:

Law Office of Vincent Bianco, Esq., attorney for petitioners, by Vincent Bianco, Esq.

Frazer & Feldman, LLP, attorneys for respondent, by Timothy M. Mahoney, 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 denied their request to be reimbursed for their son's tuition costs at the Windward School (Windward) for the 2015-16 and 2016-17 school years. 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 attended a parochial school in a neighboring school district for kindergarten through second grade (Dist. Exs. 4 at pp. 3-4; 9 at p. 2). At the end of first grade, the student's classroom teacher referred the student for an evaluation due to concerns regarding his academic performance; however, the evaluation was not conducted (Dist. Ex. 4 at pp. 3-4). In second grade, the student was evaluated by the school district in which the parochial school was located and found eligible for special education as a student with a learning disability (id. at p. 4). For the 2012-13 school year (second grade) he received one 40-minute session of resource room services daily, along with several testing accommodations (id.).

For third grade (2013-14) the student transferred to the school district that is the subject of this appeal (Dist. Ex. 4 at p. 4).¹ The student received resource room and consultant teacher services; however, he continued to experience ongoing academic difficulties and was referred to the CSE for a multidisciplinary evaluation (Dist. Exs. 1 at p. 1; 4 at p. 5).

On March 31, 2014, a CSE convened to review the student's 2013-14 school year program (third grade) as well as to develop the student's IEP for the 2014-15 school year (fourth grade) (Dist. Ex. 1 at pp. 1). The resultant IEP highlighted the student's difficulties with decoding and spelling, fluency of basic math facts, visual tracking and visual perception, as well as his tendency to become frustrated and overwhelmed when faced with academic difficulties (*id.* at pp. 2, 6). Finding that the student remained eligible for special education as a student with a learning disability, the CSE recommended additional testing accommodations for the remainder of the 2013-14 school year (*id.* at pp. 1, 11). In addition, for the 2014-15 school year, the CSE recommended that the student receive the following on a weekly basis: five 40-minute sessions of resource room services, four 40-minute sessions of direct consultant teacher services to address mathematics and writing, one 40-minute session of indirect consultant teacher services, one 30-minute session of group occupational therapy (OT), and one 30-minute session of individual psychological counseling (*id.* at pp. 1, 2, 9). The CSE also recommended the student for 12-month services consisting of direct consultant teacher services for reading, five times weekly for 60 minutes at home or in the community (*id.* at p. 10). In addition, the CSE recommended that the student be afforded numerous program modifications and multiple testing accommodations (Dist. Ex. 1 at pp. 9-11).

Following the CSE meeting, the parents requested a speech-language evaluation due to their concerns regarding the student's auditory attending skills (Dist. Ex. 2 at p. 1). In May and June 2014, a district speech-language pathologist conducted a clinical observation of the student and administered numerous standardized tests to assess the student's hearing status, oral peripheral mechanism, voice/fluency, articulation, formal language, formal vocabulary, and phonological processing (*id.*). The evaluator noted that the student had difficulty with the manipulation of sounds and/or syllables in the beginning, middle and end portions in words, recalling phonological information from memory, and visual tracking (*id.* at p. 9). The evaluator concluded that the student's speech and language profile was consistent with a diagnosis of a reading disability, specifically dyslexia (*id.*). However, the evaluator advised that the results of her speech-language evaluation "should be considered in the overall functioning of [the student's] profile" and stated that in her clinical opinion speech-language services were not warranted at that time (*id.*).

The student received 30 hours of 1:1 Orton-Gillingham reading instruction during summer 2014 (Parent Ex. 23 at pp. 4-5). In an end of summer report, the consultant teacher who provided the student's reading services described the student's ongoing struggles with decoding and her need to adjust instruction in response to his struggles (*id.* at p. 1). The consultant teacher stated that it was "critically important" that the student continue to receive one hour a day of individual Orton-

¹ According to the hearing record, the student's family moved into the district and decided to transfer the student from the parochial school to the public school due to their dissatisfaction with the services the student was receiving at the parochial school (Dist. Ex. 4 at pp. 4-5).

Gillingham instruction during the school year in order to continue to develop his literacy skills (id. at p. 5).

In fall 2014 the parents sought a private speech-language-literacy evaluation due to their concerns regarding the student's literacy skills and their impact on his overall academic performance (Dist. Ex. 4 at p. 1). The speech-language pathologists who evaluated the student assessed his abilities in writing, reading, listening, and speaking (id. at p. 56). With respect to writing, the evaluators reported that the student demonstrated significant weaknesses in spelling skills, use of writing mechanics/conventions, and written language skills related to the use of syntax, grammar, and cohesion (id.). In reading, the evaluators identified weaknesses in the student's decoding/word attack skills, phonological awareness and knowledge of grapheme-phoneme relationships, rapid naming skills and working memory, reading comprehension, and oral reading skills (Dist. Ex. 4 at pp. 56-57). Overall, the evaluators found that the student's listening skills and oral expression were relative strengths for the student (id. at p. 58). Based on their assessment, the evaluators concluded that the student's significant reading and writing difficulties could be attributed to a specific learning disorder with impairment in reading (dyslexia) and an impairment in written expression (id. at p. 58). The evaluators recommended that the student continue to receive intensive remedial reading services using Orton-Gillingham to further develop his literacy skills and speech-language therapy to address the student's written language and reading weaknesses (id. at pp. 59-60).

On October 30, 2014 a CSE convened for a review of the student's program (Dist. Ex. 5 at p. 1). Committee members reviewed the June 2014 speech-language evaluation conducted by the district, as well as the parents' private speech-language-literacy evaluation (id. at p. 2). In addition, the CSE received updates on the student's participation in resource room, occupational therapy, and counseling (id. at pp. 1-2). Upon consideration of the information presented, the October 2014 CSE increased the student's resource room services from 40 to 80 minutes per day (id. at pp. 1, 9).

Over the course of the 2014-15 school year, the parents notified the district of numerous concerns regarding the student's social/emotional needs, homework, provider access to the student's IEP, accommodations, and implementation of the student's IEP (Parent Ex. 22 at pp. 8, 10, 15, 17, 19, 20, 23, 25, 31, 33; Dist. Exs. 19; 21).

On May 20, 2015, the CSE convened for the student's annual review and to develop the student's IEP for the 2015-16 school year (fifth grade) (Dist. Ex. 6 at p. 1). While district staff reported that the student's confidence and peer relations had increased, and that he articulated his emotions more clearly, the parents presented audio tapes that highlighted the student's emotional response to his feelings and his perceptions of what others thought of him (id.). The CSE meeting comments indicated that the student's emotional stress was an issue that appeared to gradually worsen (id. at p. 2). The May 2015 CSE found that the student remained eligible for special education and related services as a student with a learning disability, and recommended that he receive five 80-minute sessions of resource room services per week and direct and indirect consultant teacher services for five 40-minute sessions per week to address mathematics and writing (id. at pp. 1, 9). The CSE also recommended individual counseling daily for 10 minutes, consisting of a check of the student during resource room to assess his emotional state and individual parent counseling one time per week for 30 minutes per session (id. at p. 9). The May 2015 CSE also recommended six 60-minute sessions of individual behavioral intervention services

during the month of September 2015, followed by two 60-minute sessions of individual behavioral intervention services for the remainder of the school year (id. at pp. 1, 9). The CSE also recommended that the student receive 12-month services in the form of direct consultant teacher services for reading five times per week for one hour per session (id. at pp. 10-11).

For summer 2015, the parents enrolled the student in two courses at Windward (Parent Ex. 22 at p. 39; see Tr. p. 1157). The student also received individual Orton-Gillingham instruction from the district (Parent Ex. 23 at p. 6; Dist. Exs. 6 at pp. 10-11; see Tr. pp. 348-49). On August 18, 2015 Windward conducted an initial educational screening with the student (Parent Ex. 24).

By letter dated August 28, 2015, counsel for the parents notified the district of their rejection of the "program and placement" recommended by the May 2015 CSE for the student's 2015-16 school year (Parent Ex. 38). The letter also indicated the parents' intent to unilaterally place the student at Windward "no sooner than 10 days from the date of [the] letter" for the 2015-16 school year and further expressed their intent to seek public funding for the costs of the student's tuition at, and transportation to, Windward (id.).

By letter dated September 2, 2015, a licensed social worker sent the district a request for home instruction for the student based on an August 30, 2015 evaluation for depression and anxiety (Parent Ex. 20 at p. 1). The social worker stated that, based on parent and student report, the student was "suffering from severe panic attacks and depression" in anticipation of his return to the district's school (id.). The social worker diagnosed the student as having an adjustment disorder with mixed depression and anxiety and a panic disorder, and opined that it would be detrimental to the student's mental health to return to the district school at that time (id.). Noting that the student would be attending a new school shortly, the evaluator indicated that the student required home instruction from the date of the letter until the start date of the new school (id. at pp. 1-2).

After receiving notice of the parents' intent to unilaterally place the student at Windward, the CSE reconvened on September 10, 2015 to review the program recommendation for the 2015-16 school year (Dist. Ex. 8 at p. 1). At the September 2015 CSE meeting, the parents expressed their intent to proceed with unilaterally placing the student at Windward (id. at p. 1). The September 2015 CSE did not make any changes to the original program recommendation contained in the May 2015 IEP (id.).

Following the student's enrollment in Windward, the parents sought a neuropsychological evaluation of the student from a different private provider (Dist. Ex. 9). Based on his fall 2015 assessment, the evaluator offered the following Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition (DSM-5) diagnostic impressions: specific learning disorder (dyslexia); specific learning disorder (dysgraphia); specific learning disorder (dyscalculia); attention deficit/hyperactivity disorder (ADHD), predominately inattentive presentation; and developmental coordination disorder (id. at p. 17). The evaluator's recommendations for the student included placement in a specialized school for students with language-based learning disabilities to minimize the student's exposure to negative peer role modeling, one-to-one or small group evidence based, multi-sensory, Orton-Gillingham-based reading instruction daily on a 12-month basis, and access to assistive technology (id. at p. 18). The evaluator opined that the student's reading, decoding, and spelling deficits were largely due to a visual memory impairment and secondarily, to a generalized deficit in working memory (id. at p. 19). He further stated that the

student had intact phonological processing but an impairment in visual memory (id.). In an April 2016 update, the same evaluator reported that, while the student made gains in reading, writing, and mathematics, significant weaknesses persisted in all academic areas; he maintained the same diagnostic impressions as presented in his October 2015 neuropsychological assessment with similar recommendations (compare Dist. Ex. 9 at p. 17-21, with Dist. Ex. 10 at pp. 4-9). Based on his assessment, the evaluator opined that the student had made meaningful progress at Windward and strongly recommended that the student continue his placement there (Dist. Ex. 10 at p. 8).

On May 13, 2016, the CSE convened for the student's annual review and to develop an IEP for the 2016-17 school year (sixth grade) (Dist. Ex. 12 at p. 1). The CSE continued to find the student eligible for special education and related services as a student with a learning disability (id.). To address the student's academic needs, the May 2016 CSE recommended that the student receive the following services daily: one 40-minute session of resource room services, one 40-minute session of consultant teacher services, and a 60-minute special class for reading in a group of five (Dist. Ex. 12 at p. 11). The May 2016 further recommended that the student receive two 30-minute sessions of OT weekly (id. at p. 11). The May 2016 CSE continued the student's modifications and accommodations from the May and September 2015 IEPs as well as individual consultant teacher services for reading during the summer of 2016 for five 60-minute sessions per week (id. at pp. 11-13). The IEP indicated that the student was not presenting with anxiety at the time of May 2016 CSE meeting and although the IEP included one social/emotional goal, no direct parent counseling or behavioral intervention services were recommended (Dist. Ex. 12 at p. 2; see Dist. Ex. 12 at pp. 11-13).

By letter dated August 12, 2016, counsel for the parents notified the district of their rejection of the "program and placement" recommended by the May 2016 CSE for the student's 2016-17 school year (Parent Ex. 39). The letter also indicated the parents' intent to unilaterally place the student at Windward "no sooner than 10 days from the date of [the] letter" for the 2016-17 school year and further expressed their intent to seek public funding for the costs of the student's tuition at, and transportation to, Windward (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 14, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) (see Parent Ex. 40). The due process complaint notice contains allegations spanning from the 2012-13 school year through the 2016-17 school year, listed chronologically, with factual assertions intermixed with allegations of misconduct on the part of the district or district staff (see id. at pp. 4-46). Repeated assertions regarding the 2012-13 through 2014-15 school years included, among other things, allegations that the district failed to offer the student a specific reading program or appropriate methodology, failed to provide assistive technology, and failed to address needs related to executive functioning; that district staff were not adequately trained and did not implement the student's IEP; and that the student did not make progress in light of his abilities (id. at pp. 6, 8, 10, 12-13, 15, 17-19, 22-23, 2-26, 30, 34-35). The parents also alleged that during the 2014-15 school year, the student began experiencing social emotional difficulties at school and was subjected to bullying (id. at pp. 28-31, 34).

With respect to the 2015-16 school year, the parents argued that the May 2015 IEP failed to include a diagnosis of executive functioning disorder or inattention, as identified in a private October 2015 evaluation (Parent Ex. 40 at p. 41). The parents further argued that the IEP incorrectly identified phonological awareness and processing as impacting the student's reading development (id. at p. 43). Additionally, the parents asserted that the IEP incorrectly indicated the student was responding well to Orton-Gillingham and leveled literacy reading programs because there was no indication in the prior IEP that the student received a reading program (id.). Additionally, the parents alleged that the May 2015 CSE continued to recommend the same "special education program and placement," despite the student's severe academic and social problems during the 2014-15 school year (id. at pp. 35-36).

The parents further argued that once the parents unilaterally placed the student at Windward, the district refused to provide publicly funded transportation which denied the student's rights under Education Law § 4402[4][d] and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) ("section 504") (Parent Ex. 40 at p. 39). Furthermore, the parents argued that they had to drive the student to Windward approximately 49 miles each way, which resulted in severe economic damages (id. at pp. 39-40).

With respect to the 2016-17 school year, the parents argued that they never received the student's May 2016 IEP (Parent Ex. 40 at p. 46). Turning to the unilateral placement, the parents argued that the student made appropriate progress at Windward during the 2015-16 and 2016-17 school years (id.).

As relief, the parents requested funding of the student's placement at Windward for the 2015-16 and 2016-17 school years as well as for summer 2015 (Parent Ex. 40 at pp. 46-47). The parents also requested the costs of the student's transportation for the 2015-16 school year (id. at p. 47). The parents further requested \$100,00.00 in lost income as a result of driving the student to Windward and not being able to work (id.). Additionally, for alleged violations of section 504, the parents requested reimbursement of the cost of privately-obtained evaluations and therapy (id.).

B. Impartial Hearing Officer Decision

After prehearing conferences on December 20, 2016 and January 23, 2017, an impartial hearing convened on January 31, 2017 and concluded on July 11, 2017 after nine days of proceedings (Tr. pp. 1-1342).² In a decision dated September 18, 2017, the IHO found that the district met its burden of proving that it offered the student a FAPE and denied the parents' request for tuition reimbursement at Windward (IHO Decision at p. 19, 22).

Initially, the IHO made findings with respect to the parents' section 504 claims (IHO Decision at pp. 15-18). First, the IHO found that although there was an allegation of bullying, there was no evidence of bullying and that the district took reasonable steps to detect and remedy

² Although the hearing record contains the transcript for the second prehearing conference held on January 23, 2017 (Tr. pp. 1-26) and the parties indicated they had previously met for an initial prehearing conference on December 20, 2016 (Tr. pp. 11-12), the hearing record does not contain a transcript or written summary of the initial prehearing conference held on December 20, 2016 as required by State regulation (see 8 NYCRR 200.5[j][3][xi]).

bullying in the event they found evidence of it (id.). The IHO also found that the parents failed to present any evidence that the student was discriminated against or excluded from any programs because of his disability (id. at p. 17). In addition, the IHO found that there was no evidence that the school or district staff intimidated, coerced, or discriminated against the parents or student (id. at p. 18).

Next, the IHO found that the district offered the student a FAPE because the IEPs developed for the student accurately reflected the student's needs, present levels of educational performance, and annual goals and contained program recommendations with modifications and testing accommodations to address the student's goals (id. at p. 19). The IHO noted the parents' argument that the student's reading program was not included in the student's IEP; however, she found that specific reading programs are not a required part of an IEP (id.).

The IHO further found that even if the district failed to provide the student with a FAPE, equitable considerations would limit the parents' request for tuition reimbursement (Parent Ex. 40 at pp. 19-21). First, the IHO noted that the parents' ten-day notice letters for the 2015-16 and 2016-17 school years failed to include "even a cursory description of their concerns" (id. at p. 20). Next, the IHO noted that the parents did not cooperate with the district because they did not make the student available for his scheduled triennial evaluation (id. at pp. 20-21). The IHO further noted that the parents did not provide any witnesses from Windward during the impartial hearing and that Windward "was not a better placement for the student" (id. at p. 21). Lastly, the IHO noted that the student's mother treated the teachers and administration "like . . . incompetent subordinates" (id.).

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 appeal from the IHO's denial of their requests for testing protocols and district records. They assert that failing to provide the testing protocols prevented the parents from obtaining information to allow them to properly cross-examine the district's witness. Next, the parents argue that the IHO improperly denied the parents' request to adjourn the impartial hearing due to the inability to schedule a witness. The parents contend that the IHO improperly faulted the parents for delays in the hearing and that prior to the parents' notification that a witness from Windward would not be available, all other cancellations were at the request of the district and IHO. The parents further allege that the IHO erred in misstating certain facts in her decision; in particular, the parents assert that the IHO "missed the coercive nature" of a May 2014 meeting between district staff and the parents. The parents also appeal the IHO's favorable credibility determinations regarding district witnesses and her finding that the parent's testimony was "duplicious and inconsistent." In addition, the parents contend that the IHO erred in not considering privately obtained evaluation reports, which the parents assert show a contrast between the student's lack of progress in the district and his progress at Windward. The parents further appeal from the IHO's determination that the two-year statute of limitations applied in this matter.

The parents also argue that the student's program recommendation was not appropriate and that the IHO ignored evidence that the student did not make progress in the district placement but

made progress while attending Windward. The parents further contend that placement in a general education classroom was not only inappropriate educationally, but also socially, because the student's inability to perform at grade level exposed him to ridicule from his peers.

With respect to the student's transportation, the parents argue that the student was entitled to publicly funded transportation to Windward and that the IHO's finding that the parents claim for transportation should have been appealed to the Commissioner of Education was incorrect (see Educ. Law § 310).

As relief, the parents request reimbursement for the cost of the student's tuition at Windward for the 2015-16 and 2016-17 school years. The parents also request reimbursement for transportation costs for the 2015-16 school year. Next, the parents request a determination with respect to their section 504 claims and specifically request a finding that they and their son were discriminated against on the basis of his disability. The parents also request that, if they are denied the above relief, this matter be remanded to a new IHO to allow them to put on a witness from Windward.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.

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]).³

³ 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

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

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

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing

The parents raise several allegations on appeal with respect to the IHO's conduct. Initially, the parents argue that the IHO denied the parents' requests for testing protocols and a teacher's file during the impartial hearing.

The Family Educational Rights and Privacy Act (FERPA) and the IDEA grant parents the right to review and inspect their child's education records (34 CFR 99.10[a]; 300.613[a]). Educational records are defined as records that are directly related to a student that are collected, maintained, or used by the district (34 CFR 99.3; 300.613[a]). Districts must comply with a parental inspection request within 45 days (34 CFR 99.10[b]; 300.613[a]). When in-person review is not feasible, districts must provide the parents with a copy of the requested records or make other arrangements for review (34 CFR 99.10[d]; 300.613[b][2]). Parents are also entitled to have the educational records explained or interpreted upon request (34 CFR 300.613[b][1]). However, the right to inspect does not include records kept in the sole possession of the maker which are used only as a memory aid and are not shared with others (see Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 435-36 [2002]; Bd. of Educ. v. Horen, 2010 WL 3522373, at *25-*27 [N.D. Ohio Sept. 8, 2010], aff'd 113 LRP 45713 [6th Cir. May 26, 2011]).

OSEP has stated that test protocols which include personally identifiable information are educational records within the meaning of the IDEA and FERPA, and therefore parents have the right to inspect and review them and that copyright concerns are not implicated by the right of inspection and review, but may restrict the right to have a copy provided (Letter to Price, 57 IDELR 50 [OSEP 2010]). Initially, during the impartial hearing, the parents made a request for the test

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).

protocols for the Fountas and Pinnell assessments that the district coordinator of AIS testified might have been included in the student's resource room teacher's folder (Tr. p. 574-75). First, I have no basis for determining on the record before me whether the test protocols which the parents sought to examine had personally identifiable information on them and accordingly whether they are part of the student's educational records. Additionally, although the parents assert that not having the test protocols impacted their ability to properly cross-examine a district witness, the parents did not identify what the test protocols would be used for other than the parents' counsel's statement during the hearing that he "would like to verify the accuracy [of the information provided by the student's teacher]" (Tr. pp. 577-78). In addition, outside of the hearing process, the parents have the right to "inspect and review" their child's educational records (34 CFR 300.613; 8 NYCRR 200.5[d][6]), and the hearing record contains no indication that the parent requested to inspect or review the student's educational records. Similarly, the parents requested a file during the impartial hearing which was maintained by the student's fourth grade teacher (Tr. pp. 514-15). However, the student's fourth grade teacher testified that she may not have the file (Tr. p. 515). Again, the parents do not allege any specific harm caused by the failure to obtain the folder or provide any explanation as to why it was necessary, and, additionally, there is no indication that the parents made any attempt to exercise their right to review or inspect the file outside of the proceeding. Under these circumstances, the parents have not asserted sufficient prejudice so as to warrant reversal on the basis that the IHO abused her discretion.

Next, the parents argue that the IHO improperly denied the parents' request to adjourn the impartial hearing in order to obtain a witness from Windward. During the impartial hearing, the IHO was initially hesitant to grant the parents an adjournment to obtain a witness due to the length of the impartial hearing (Tr. p. 1013). Notwithstanding, the IHO gave the parents a final opportunity to produce a witness from Windward (Tr. p. 1027). However, the parents were still unable to obtain a witness by the last day of the impartial hearing and the IHO refused to grant the parents an adjournment for more time to obtain a witness (Tr. pp. 1304-05). A review of the hearing record also reveals that the IHO granted both parties several adjournments throughout the impartial hearing (IHO Exs. 3-7). Accordingly, the IHO was reasonable in denying the parents' request for an adjournment to produce a witness.

The parents also argue on appeal that the IHO improperly refused to permit them the opportunity to cross-examine the district representative on matters which she testified to on direct examination. During cross-examination, counsel for the parent questioned the district representative about evaluations that were considered during the March 2014 CSE meeting (Tr. pp. 295-96). More specifically, counsel for the parent asked the district representative about the Wechsler Individual Achievement Test-Third Edition (WIAT-III) which was conducted on September 7, 2012 (Tr. pp. 296-97; Dist. Ex. 1 at p. 4). The district representative responded and testified that she was not able to interpret the 2012 WIAT-III scores because it was not in front of her (Tr. p. 297). The district representative further testified that she "personally never administered the WIAT" and that the March 2014 CSE did not "specifically" go over the 2012 WIAT-III results (Tr. pp. 297, 299). Accordingly, in barring further questioning related to the 2012 WIAT-III scores, the IHO appeared to be appropriately exercising her authority to exclude irrelevant testimony (see 8 NYCRR 200.5[j][3][xi][c]).

In addition, the parents contend that the IHO was biased against them and "had decided the case already," as evidenced by the IHO's language in her decision.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064).

While the IHO at times took a sharp tone with the parents in her decision, an independent review of the hearing record does not ultimately support a finding that the IHO acted with bias or abused her discretion in the conduct of the hearing. While I understand that the parents may not have appreciated some of the phrasing used by the IHO in the decision and, further, have disagreed with her in a number of respects, that alone does not provide a basis for finding actual or apparent bias by the IHO. However, even if the IHO was biased or conducted the hearing in an improper manner, I am required to conduct an impartial review of the hearing record and render an independent decision thereon (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]), and for the reasons discussed below have modified, in part, the IHO's determinations.

2. Scope of Impartial Hearing

Before reaching the merits, a determination must be made regarding what claims are properly preserved on appeal. First, the IHO found that equitable considerations did not favor the parents and that tuition reimbursement should be limited because of the following: (1) the parents' ten-day notice letters for the 2015-16 and 2016-17 school years failed to include "even a cursory description of their concerns"; (2) the parents did not cooperate with the district because they did not make the student available for his scheduled triennial evaluation; (3) the parents did not provide any witnesses from Windward during the impartial hearing and Windward "was not a better placement for the student"; and (4) the student's mother treated the teachers and administration inappropriately. As neither party has challenged the IHO's findings on equitable considerations, these determinations have become final and binding on the parties and will not be reviewed on appeal, except to the extent that these issues are related to awarding relief to the parents as discussed further below (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Next, the scope of the parents' request for review is focused on allegations that the student did not make progress in the district when compared to his progress at Windward and, accordingly, a number of issues which were previously asserted in the parents' due process complaint notice have not been raised on appeal. These issues include claims that the May 2015 IEP did not include a diagnosis of an executive functioning disorder or inattention, did not appropriately describe the student's reading abilities, and did not identify a reading program, and that the parents never received the student's May 2016 IEP. To the extent the parents do not raise arguments on appeal regarding claims which were alleged in the due process complaint notice and were not reached by the IHO, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

Additionally, although the parents raise allegations in their request for review related to the appropriateness of the program recommendation for the student's 2016-17 school year, this issue

was not raised in the parents' due process complaint notice (see Parent Ex. 40). In general, a party may not raise issues at the impartial hearing that were not raised in his or her due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]).

In the instant case, the district agreed to the expansion of this issue during the impartial hearing. During the impartial hearing, counsel for the district asserted in his opening statement that the CSE made an "appropriate recommendation" for the student's 2016-17 school year and that the district was prepared to show that the IEP for the 2016-17 school year was appropriate for the student (Tr. pp. 62, 64). The district then solicited testimony from the district representative and the district school psychologist regarding the appropriateness of the program recommendation for the 2016-17 school year (Tr. pp. 281-82, 664-65). Furthermore, the district briefed this issue to the IHO at the conclusion of the hearing (Dist. Post-Hr'g Br. at pp. 1, 17).

Lastly, the parents raise claims outside the scope of the IDEA and the Education Law. Specifically, on appeal, the parents claim the district violated section 504 by discriminating against them and the student on the basis of his disability. State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see 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"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims or the IHO's findings regarding section 504 and discrimination (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Accordingly, the parents' claims related to section 504 and disability discrimination shall not be reviewed on appeal.

3. Statute of Limitations

Turning next to the parties' dispute over the applicability of the IDEA's statute of limitations, the parents assert that the IHO erred in determining that the two-year statute of limitations period for requesting a hearing applied in this matter.

Initially, while the parents' due process complaint notice included allegations going back to the 2012-13 school year (Parent Ex. 40 at p. 4), during a prehearing conference the IHO limited the hearing to "as far back" as the 2014-15 school year, noting that the parents were making claims for the 2015-16 and 2016-17 school years (Tr. pp. 9-10). The parents' attorney objected to the IHO raising statute of limitations without a request from the district (Tr. pp. 10-11). On appeal, rather than asserting that the statute of limitations was not properly raised as a defense, the parents contend that an exception to the statute of limitations should apply because the district withheld

information from them which would have made the parents aware of their rights.⁴ However, the parents do not raise any claims on appeal related to the 2012-13, 2013-14, or 2014-15 school years. Furthermore, as relief, the parents are only requesting tuition reimbursement for the cost of Windward for the 2015-16 and 2016-17 school years. Accordingly, the matters raised on appeal are limited to determinations regarding those school years.

B. 2015-16 School Year—Appropriateness of Program Recommendation

The parents argue that the May 2015 CSE's recommendation was not appropriate for the student and that the IHO erred in finding that the district offered the student a FAPE for the 2015-16 school year.⁵ The parents further argue that the IHO ignored the student's lack of progress while in the district school program.

1. Progress During the 2014-15 School Year

Turning to the parents' contention that the program recommendation for the 2015-16 school year was not appropriate because the student did not make progress during the 2014-15 school year, a student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

The hearing record presents a complex picture of the student's academic performance during the 2014-15 school year (fourth grade). Progress monitoring using the Fountas and Pinnell

⁴ A party may waive the statute of limitations by failing to raise it during the hearing (M.G. v. New York City Bd. of Educ., 15 F. Supp. 3d 296, 306 [S.D.N.Y. 2014] [holding that "[b]ecause the [district] did not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [holding that a statute of limitations defense need not be raised in the district's response to the due process complaint notice but noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level"]; Vultaggio v. Bd. of Educ., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

⁵ On September 10, 2015, the CSE reconvened to review the program recommendation for the 2015-16 school year after the student was unilaterally placed at Windward; however, the September 2015 CSE did not make any changes to the original program recommendation from the May 2015 IEP (Dist. Ex. 8). Accordingly, when discussing the appropriateness of the 2015-16 program recommendation, we will refer to the May 2015 IEP (Dist. Ex. 6).

benchmark assessment and running records showed that the student made progress in both reading accuracy and comprehension (Dist. Ex. 29 at p. 1).⁶ In addition, the results of the Explode the Code assessment reflected improvements in the student's reading and spelling (*id.* at p. 3).⁷ In math, the student scored between the 43rd and 50th percentiles on the STAR math assessment administered three times during the 2014-15 school year (*id.* at pp. 2-3).⁸ In addition, the student achieved 9 of his 14 IEP goals including 2 out of 3 reading goals and 2 out of 2 math goals (Dist. Ex. 7 at pp. 1-2).⁹ Moreover, the student's fourth grade report card indicated that he made progress toward meeting grade level expectations in many of his work study habits and some of his writing, listening/speaking, and math skills, as well as in social studies, health, and science (Parent Ex. 33).¹⁰ However, the student scored at a Level 1 on the New York State Testing Program for reading and math and his reading skills, as measured by the STAR reading assessment, remained

⁶ The hearing record shows that, based on Fountas and Pinnell, the student began the 2014-15 school year at an E or F instructional reading level which met the instructional level expectations for the beginning or first interval of first grade (Dist. Exs. 27; 29 at p. 1). The student finished the 2014-15 school year at a K instructional reading level which met the instructional level expectations for the beginning or first interval of second grade (Dist. Exs. 6 at p. 5; 27; 29 at p.1).

⁷ The Explode the Code assessment results (books 1-4) show that the student went from a reading score of 47 percent and a spelling score 58 percent in September 2014 to a reading score of 89 percent and a spelling score of 77 percent in June 2015 (Tr. p. 560; Dist. Ex. 29 at p. 3).

⁸ The September 17, 2014 STAR math report indicated the student's 586 scaled score was at or above the benchmark, the student was in the 50th percentile rank and performance was at a grade equivalent of 3.8 (third grade after the eight month) (Dist. Ex. 26 at p. 10). The report also noted that the student was not yet meeting grade level expectations for algebra readiness (*id.*) In May 2015 the student scored at the 49th percentile on the STAR math assessment, which equated to a grade equivalent of 4.7 (Dist. Ex. 29 at pp. 2-3).

⁹ The student achieved IEP goals related to decoding at his instructional level using phonics, word analysis, and contextual cues; answering questions related to story elements; editing for correct capitalization and punctuation; solving math calculations with values to 100; solving fourth grade word problems; demonstrating concepts of laterality and directionality; visual tracking; copying from a near point source; and discriminating differences among three similar forms (Dist. Ex. 7).

¹⁰ The results of the spring 2015 New York State Testing Program for science indicated that the student performed at level four (Parent Ex. 34 at p. 11).

at the first percentile for the duration of the 2014-15 school year (Dist. Ex.29 at pp. 2-3).^{11, 12} In addition, the student's report card grades for reading remained stagnant and he continued to require support to meet grade level expectations in many ELA skills (Parent Ex. 33). The student achieved only 1 of 3 writing goals on his IEP and neither of his social emotional goals (Dist. Ex. 7 at pp. 1-2, 3).

As noted above, the district monitored the student's reading progress during the 2014-15 year using, among other things, the Fountas and Pinnell benchmark assessment and leveled literacy intervention (LLI) running records (Dist. Ex. 29 at p. 1). The AIS Coordinator testified that LLI is more of a running record where the emphasis is on word accuracy and is administered using a book the student has read before, whereas the benchmark assessment is a "cold read" and the comprehension is more comprehensive (Tr. p. 557; see Tr. pp. 550-52).¹³ The AIS coordinator indicated that benchmark assessment and running records provide two different types of information about how a student is performing under different circumstances, using certain leveled readers (Tr. p. 557). The AIS Coordinator explained that a student's independent reading level was the level at which the student had one or two miscues and excellent comprehension (Tr. p.

¹¹ The 2014-15 New York State ELA testing conducted in the spring of the student's fourth grade school year indicated the student was performing at level one with a percentile rank of 2, demonstrating limited gain toward proficiency of the expected common core standards for the fourth grade (Dist. Ex. 34 at p. 7). The student's scores were consistent with those attained during the 2013-14 school year (compare Dist. Ex. 34 at p. 1 with Dist. Ex. 34 at p. 7). As described in the New York State Testing Program report, students who perform at level one are well below proficient in standards for their grade; they demonstrate limited knowledge, skills, and practices embodied by the New York State P-12 Common Core learning standards for ELA; and level one skills are considered insufficient for the expectations at the student's grade (Parent Ex. 34 at p. 1). The 2014-15 New York State testing for mathematics, administered in the spring of the students fourth grade year, indicated that the student performed at level one but showed an increase from the previous year from the 11th to the 26th percentile; however, even with the progress noted, the student did not meet the expected common core standards in mathematics for the student's grade level (Parent Ex. 34 at pp. 4, 9). Conversely, the student's 2014-15 district report card indicated that, with respect to mathematics, the student met grade level expectations in understanding concepts and showing effort, and progressed from "needing support" to "meeting expectations" in mastery of number facts and performing calculations with accuracy (Parent Ex. 33 at p. 1). Regarding applying appropriate problem-solving strategies and communicating mathematical reasoning effectively, the student demonstrated no significant change over the year and continued to need support to meet grade level expectations (id.).

¹² The January 29, 2015 STAR reading report indicated that the student achieved a scaled score of 84, a percentile rank of one, and grade equivalent of 1.3 indicating that the student's reading skills were comparable to that of an average first grade student after the third month of school (Dist. Ex. 26 at p. 6). The report further indicated that the student could read 23 words per minute correctly on grade level appropriate text and noted that the student would be best served by instructional material prepared at the pre-kindergarten level with a continued recommendation of urgent intervention (id.). As indicated on a June 2, 2015 STAR reading report the student's reading performance declined with a scaled score of 65, percentile rank of one, and grade equivalent of 1.0 noting that the student's performance was comparable to that of an average student at the start of the first grade (id. at p. 7). The June 2015 STAR report continued to recommend that the student would be best served by instructional materials prepared at the pre-kindergarten level and noted that, at that time, the student could likely read only 8 words per minute correctly on grade level appropriate text suggesting a significant decline from the previous STAR report (id. at p. 7; compare Dist. Ex. 26 at p. 7 with Dist. Ex. 26 at p. 6).

¹³ The AIS coordinator testified that a "cold read" is when a student sees a text for the very first time as opposed to having read it before (Tr. p. 595).

558). She indicated that a student's instructional level was the level at which the student's accuracy was between 90 and 95 percent and their comprehension was satisfactory (Tr. p. 559).

The student's private psychologist testified that he was familiar with Fountas and Pinnell in that he had read information about it and attended professional conferences where reading programs were discussed (Tr. p. 796). He described Fountas and Pinnell as a reading intervention program for struggling readers that emphasized working at a fast pace to improve reading skills (Tr. p. 797). He opined that Fountas and Pinnell would not work for the student because, according to its creators, it was not designed for students with dyslexia (Tr. p. 797).

With respect to the student's progress during the 2014-15 school year, the AIS coordinator testified that she did not think that students' scores on state tests were an adequate measure of how they were doing in relation to their IEP (Tr. p. 571). She explained that the state scores are used as measures of how a student is meeting the standards of that particular grade level and that assessments measuring a child's individual educational goals would not be targeted on a state test (*id.*). The AIS coordinator testified that an assessment of a student's progress using Fountas and Pinnell was more closely correlated to a student's current level of functioning and was more closely aligned with the interventions and levels at which the student was functioning (*id.*). She further testified that looking at the student's Fountas and Pinnell benchmark scores in September 2014 as compared to June 2015 the student had made "significant progress within that time frame" (Tr. pp. 571-72).¹⁴ According to the AIS coordinator, there was a correlation between the services that the district provided during the 2014-15 school year and the student's IEP (Tr. p. 572). More specifically the AIS coordinator reported that the student's reading teacher had worked on syllabication and decoding (Tr. pp. 572-73).

The AIS coordinator explained that the STAR assessment was an online computer adaptive test of reading skills (Tr. p. 561). She indicated that students take the tests in a group setting and that if a student answers a question wrong the test adapts to the student and the questions get easier (Tr. p. 589). If a student answers correctly, the questions get harder and the student's standard scores go up (*id.*). The AIS coordinator testified that when looking at the student's STAR scores, the first thing that stood out to her was the amount of time the student took to complete the assessment, which she stated was significantly below the time that was allotted for the student (Tr. p. 565). She noted that the student would have had time and a half to complete the test and that he had used only 20-25 percent of the available time (Tr. pp. 565-66; *see* Tr. pp. 596-97). The AIS coordinator testified that it was hard to correlate the time the student spent on the test with him "really" interacting with the test and getting a valid score (Tr. p. 566). She indicated that for her, the time the student spent completing the STAR reading test made the results less reliable and less valid (Tr. p. 566; *see* Tr. pp. 590-91). She noted that the student took much more time completing the STAR math assessment and that his scores on that test were much higher (Tr. p. 567). On cross-examination, the AIS coordinator confirmed that the student tended to be stronger in math than in reading and that reading and spelling tended to be the student's weakest academic areas

¹⁴ The AIS coordinator testified that she did not know the student and had not provided him with direct or indirect services (Tr. p. 553). In addition, she had not spoken to the student's resource room teacher about the student (Tr. p. 553). The hearing record shows that the student's resource room teacher passed away prior to the impartial hearing and that the AIS coordinator testified based on notes/data found in the file kept by the student's teacher (Tr. pp. 109-110; 554-55).

(Tr. pp. 579-80). She also acknowledged that she had not read anything in the administrative and instructional materials for the test that tied the amount of time a student spent taking the test with test results (Tr. pp. 582-84).

With respect to the student's social/emotional progress, the school psychologist testified the student made progress towards his social/emotional goals during the 2014-15 school year and the correlating progress report indicated that the student was progressing satisfactorily toward recognizing feelings of frustration and their triggers as related to academic demands, but progressed inconsistently with respect to the ability to apply coping strategies when faced with academically challenging situations (Dist. Ex. 7 at p. 3; see Tr. p. 701). The district representative testified that during the 2014-15 school year the parents had concerns with the student at home, where he was exhibiting resistance to homework, self-esteem issues, and behavioral issues (Tr. p. 231). The district representative testified that in early spring of the student's fourth-grade year the student began to demonstrate resistance during the resource room, which was not reported to occur in the general education classroom (Tr. pp. 231-32).

The student's mother disagreed with the district's claims of progress. The parent testified that during the student's fourth-grade year (2014-15) she had concerns regarding his reading and that she discussed her concerns with the student's resource room teacher (Tr. pp. 944-45). Specifically, the parent stated that she conveyed her concern that the student was not performing at the level that the district was reporting (Tr. p. 945). In addition, the parent wanted to know if the student was memorizing the books used for testing reading because when he brought the books home "we started reading them and the cover was closed" (*id.*). The parent explained that the books were very easy and repetitive (*id.*). She reported that the student would bring the books home to practice and would memorize them; she stated that the student "compensated very well for his disability" (Tr. pp. 945-46). The parent explained that the student referred to the books as "baby books" and "used to cry about it, because his friends were not reading baby books."¹⁵ The parent reported that her overall concern was that the student was not getting what he needed and was falling through the cracks (Tr. p. 945).

The parent testified that throughout fourth grade she met with the student's team every four to six weeks to discuss any concerns she had, as well as the student's progress (Tr. p. 952). She explained that the team "would go over benchmarking, what they saw in class, his performance in class that they observed, and his report card; anything that had a grade on it" (Tr. p. 951). According to the parent, school personnel indicated that the student was progressing nicely, he was a great boy, they did not see stress in the classroom, he didn't avoid, he was moving right along and doing reading and math (Tr. p. 952). However, the parent reported that by the end of fourth grade she did not notice any progress in the student's reading or math (*id.*). She noted that the student would get upset and overwhelmed, and that he would bring home multi-step math worksheets that would not have tick marks on them but would have the right answer (Tr. pp. 952-53). The parent recalled that the student would bring home reading passages, sometimes in his handwriting, but sometimes not in his handwriting or that of the scribe (Tr. p. 953). She reported that she brought her concerns to the team and frequently told the team that she was "not seeing the progress" (Tr. p. 953). She noted that the student brought home spelling tests with great grades on

¹⁵ The parent testified the books were at the kindergarten to second grade level (Tr. 946-47).

them but the student could not spell the words (Tr. pp. 954-57). The parent questioned the validity of a writing sample, reportedly completed by the student and shared with her at a CSE meeting (Tr. p. 958). She opined that the district initially misrepresented the amount of time it took the student to complete the writing sample (Tr. p. 958-59). The parent testified that she had to probe and ask questions to find out that the writing sample represented months of work with revisions and help from a scribe (Tr. p. 958).

The parent explained that when she expressed her concerns regarding the student's progress she was told he was doing fine academically, he was making progress but that the progress wasn't as fast as they might want to see or that she wanted to see (Tr. p. 965). She reported that district staff responded defensively to her concerns and ignored her suggested solutions (Tr. p. 966).

The parent testified that at an April 2, 2015 team meeting she became aware that the student's general education teacher was unsure how to grade the student because he was not a typical fourth grade student (Tr. p. 1101-02). She observed that the district representative advised the teacher to grade the student "based off his own ability" (Tr. pp. 1101-02). The parent concluded that the student was not being graded on a fourth-grade level, confirming to her that he was not performing at grade level which she opined was the intention of his IEP accommodations (Tr. pp. 1101-1104).

The parent testified that during the transition meeting between the student's fourth grade teachers and would-be fifth grade teachers she discovered the student was not necessarily reading social studies as previously reported, he did not work well in groups, and there was a "complete" shut down in fourth grade (Tr. pp. 1119; see Parent Ex. 56 at pp. 4, 21-22).

2. Student's Needs

In order to assess the appropriateness of the May 2015 CSE's placement recommendation, a discussion of the student's present levels of performance, as described in the May 2015 IEP, is necessary. In developing the student's IEP for the 2015-16 school year, the district representative testified that the May 2015 CSE considered an OT review, IEP progress reports, and teacher reports (Tr. p. 225; Dist. Ex. 6 at p. 3). The district representative further testified that the student's fourth grade general education teacher provided information regarding the student (Tr. p. 226).

With respect to reading, the May 2015 IEP indicated that the student had a significant weakness in decoding and that phonological awareness and processing were impacting the student's reading development (Dist. Ex. 6 at p. 5). The IEP noted that the student was responding well to a combination of the Orton-Gillingham approach and LLI program, which provided the student with a structured word analysis program along with texts in which he could combine word analysis and contextual systems as he read (id.). At the time the May 2015 IEP was developed, the student's reading was at a beginning second grade level (id.). The IEP indicated that the student needed to develop decoding skills and increase reading fluency via a multisensory presentation using structured analysis and context (id.).

With respect to writing, the May 2015 IEP noted that the student was able to write from dictation using sound patterns he had mastered and was beginning to include unfamiliar patterns (Dist. Ex. 6 at p. 5). The IEP indicated that the student comprehended writing lessons presented

in the classroom and was able to draft his ideas with the help of a graphic organizer and scribe; his ideas were organized and expressed well (id.). According to the IEP, the student did not consistently capitalize or punctuate when writing (id.). The IEP stated that the student was developing the ability to keyboard and noted the student's tendency to resist writing (id.). The IEP stated that the student needed to strengthen spelling skills and develop the ability to write multi-paragraph compositions with appropriate punctuation (id.).

As for mathematics, the May 2015 IEP indicated that the student demonstrated solid problem solving, number sense, and mathematical reasoning skills (Dist. Ex. 6 at p. 5). However, the IEP also indicated that it was difficult for the student to memorize addition and subtraction facts and that he counted mentally or on his fingers for facts that he had not memorized (id.). The IEP indicated that the student needed to develop competence with grade level algorithms and procedures (id.). Further, the IEP indicated the student required pre-teaching and re-teaching to ensure understanding of the concepts presented in the curriculum (id.).

Notably, with respect to the student's social/emotional development, the May 2015 IEP described the student as friendly and affable and indicated that he had established positive peer relationships and got along well with both adults and peers (Dist. Ex. 6 at p. 5). However, the IEP also indicated that when faced with reading difficulties the student at times became frustrated and overwhelmed, which impacted his ability to complete academic tasks (id. at p. 6). The IEP stated that the student expressed emotions at home that he did not display at school, more specifically that he "demonstrated meltdowns" (id.). According to the IEP, the student was insightful and attempted to verbalize his emotions during counseling (id.). The IEP specified that the student needed to recognize feelings of frustration, their related triggers, and develop appropriate coping strategies (id.).

Initially, a comparison between the October 2014 IEP, which was developed for the student's 2014-15 school year, and the May 2015 IEP, reveals that the IEPs contain substantially similar academic programs. For example, the October 2014 IEP and the May 2015 IEP recommended the same level of resource room services for the student (compare Dist. Ex. 5 at p. 9, with Dist. Ex. 6 at p. 9). Although the direct and indirect consultant teacher services were not delineated separately on the May 2015 IEP, the total frequency remained five times per week for 40 minutes per session, the same as recommended in the October 2014 IEP (compare Dist. Ex. 5 at p. 9, with Dist. Ex. 6 at p. 9). By way of contrast, a notable difference between the October 2014 IEP and the May 2015 IEP appears in the number of recommended counseling services. The October 2014 IEP and the May 2015 IEP recommended one thirty-minute session per week of individual counseling; however, the May 2015 CSE also recommended ten-minute daily counseling sessions to assess the student's emotional state (compare Dist. Ex. 5 at p. 9, with Dist. Ex. 6 at p. 9). Additionally, as discussed more fully below, the May 2015 CSE recommended individual parent counseling and training and individual behavior intervention services to assist the parent with the behavioral concerns, meltdowns, and frustrations that were occurring in the home (Tr. pp. 350, 642; Dist. Ex. 6 at p. 9).

To address the student's academic needs, the May 2015 CSE recommended that the student receive five 80-minute sessions of resource room services per week in a group of five students and five 40-minute sessions per week of direct and indirect consultant teacher services (Dist. Ex. 6 at p. 9). The CSE developed six annual goals designed to address the student's reading deficits, four

of which targeted the student's deficits in decoding and two of which targeted the student's weaknesses in reading comprehension (*id.* at pp. 7-8). More specifically, the decoding goals targeted the student's ability to decode syllable division patterns, prefixes and suffixes, r-controlled syllables, and vowel digraph and diphthong syllables (*id.* at p. 7). Additional goals targeted the student's ability to decode text using contextual cues, phonics, and word analysis cues (*id.*). With respect to reading comprehension, the May 2015 CSE developed goals related to identifying the main idea, supporting details, sequence, and cause/effect in a non-fiction text and answering questions about story elements such as setting and characters in a fictional text (*id.*).

The May 2015 CSE also detailed the extent to which environmental and human or material resources were needed to address the student's management needs and indicated that the student required pre-teaching of new concepts and the use of a multisensory approach to accelerate the student's reading and decoding skills (Dist. Ex. 6 at p. 6). The May 2015 CSE recommended that the student's assignments, homework, and spelling curriculum be modified and that the student be provided with a co-reader or co-writer (*id.* at pp. 9-10).¹⁶ Additional program modifications and accommodations included preferential seating, access to graph paper, refocusing and redirection, copy of class notes, checks for understanding, and reteaching of materials (*id.* at p. 10). To further address the student's academic needs, the May 2015 CSE recommended that the student receive testing accommodations including extended time (1.5x); directions, test passages, questions, items, and multiple-choice responses read; flexible location; text-to-speech software; and use of a tracking tool (*id.* at p. 11). Additional testing accommodations included the use of a computer or word processor to record responses, breaks as needed, and a scantron check for accuracy (*id.* at p. 11). The May 2015 CSE also recommended that the student have access to a laptop/iPad as needed in the classroom (*id.* at p. 10).¹⁷

With respect to writing, the May 2015 CSE developed four writing goals, two specific to spelling, one related to composing a paragraph, and one related to editing written material (Dist. Ex. 6 at p. 8). Specifically, the spelling goals addressed the student's need to correctly spell words with vowel digraph and vowel diphthong syllables, syllable patterns, prefixes, and suffixes (*id.*). With respect to paragraph composition, the recommended goal targeted the student's ability to write a single paragraph on a given topic with a topic sentence, three supporting details and a concluding sentence (*id.*). The editing goal targeted the student's ability to edit for correct capitalization, punctuation, and spelling (*id.*). The May 2015 CSE recommended that the student's spelling curriculum be modified, the student have access to a computer as needed, a scribe, and use of text-to-speech software (*id.* at pp. 10-11). The school psychologist testified that the daily consultant teacher services, both direct and indirect, were recommended to support the student in writing (as well as mathematics) (Tr. p. 641). The district representative testified that writing was one of the cornerstones of the student's disability, "yet, he could express himself quite nicely" (Tr.

¹⁶ The district representative testified that the student's primary disability was in reading and writing, therefore, when reading and writing impacted other areas, modifications would be implemented (Tr. p. 248).

¹⁷ A technology evaluation was completed by the district in June of 2015 and recommended that the student have a "typing tutor;" continued access to Read & Write Gold, continued access to an iPad with Read & Write keyboard application, continued access to Bookshare with the addition of Vice Dream Reader application; membership to Learning Ally, slow introduction to speech-to-text software; and four hours of consultation in the use and implementation of the suggested technology (Dist. Ex. 20 at pp. 2-4).

p. 259). She explained, "when you want to assess a child's ability to show and display knowledge on a subject, it is not always fair to him to let that writing piece interrupt that flow" (Tr. pp. 259-60). The district representative noted that the student could be offered a scribe for anything that exceeded a couple of sentences and he could talk through his understanding of something and someone would be able to write that information down for the student (Tr. pp. 259-60).

The May 2015 CSE also developed two goals to address the student's mathematics needs: solving math problems using presented algorithms and solving word problems (Dist. Ex. 6 at p. 8). The May 2015 IEP included management strategies to provide pre-teaching of new concepts and the reading of word problems so that reading skills did not interfere with the student's mathematical skills (Tr. p. 248; Dist. Ex. 6 at p. 6). Additionally, the May 2015 CSE recommended that the student have access to graph paper to support proper alignment for mathematics problems, modified homework and assignments, and re-teaching of materials (Dist. Ex. 6 at pp. 9-10). The district representative testified that the modification of homework assignments was specifically included to reduce [the number of] math word problems assigned to the student (Tr. p. 255; Dist. Ex. 6 at pp. 9-10).

To address the student's social emotional needs, the May 2015 CSE recommended four social/emotional/behavioral goals that targeted the student's ability to accurately articulate emotions during counseling, use coping strategies when faced with academic challenges rather than withdrawing, recognize and verbalize feelings of frustration when they arose, and verbally identify triggers for frustrating situations as they arose or after they had occurred (Dist. Ex. 6 at p. 8). To support the student in meeting the social emotional goals, the May 2015 CSE recommended individual counseling services for one 30-minute session per week, individual counseling daily for 10 minutes to assist the student in articulating emotions and utilizing coping strategies during resource room, and individual parent counseling and training for one 30-minute session per week (Tr. p. 246, Dist. Ex. 6 at p. 9).¹⁸ Additionally, to address the student's social/emotional concerns at home, the May 2015 CSE recommended individual behavioral intervention services six sessions a month for the month of September 2015 to establish a program and rapport with the student, followed by two sessions per month for the remainder of the 2015-16 school year (Tr. p. 245, 350; Dist. Ex. 6 at p. 9). The school psychologist testified that the purpose of the behavioral consultation was to address the student's "meltdowns" and frustrations at home and to support the student and family within the home to overcome or work through those frustrations (Tr. p. 642). The district representative testified that because the behavioral intervention services were offered to support the student at home, rather than at school, no functional behavioral assessment or behavioral intervention plan was completed (Tr. pp. 349-50). The district representative also stated that, for the same reason, the behavioral intervention services were for the home, not school-based, therefore no goals were developed (Tr. p. 350).

¹⁸ The district representative indicated that, in response to the CSE's discussions regarding strategies to address the student's frustration, the 10-minute check ins were for the counselor to "touch base" with the student on how his homework went, reinforce where he was in terms of his perception of what the day would look like, and debrief on what had happened the previous day (Tr. pp. 245-246). The district representative testified that parent counseling and training was recommended in response to the parents' report that they were having challenging afternoons with the student regarding completion of homework and self-esteem issues (Tr. p. 235).

The district representative testified that the parent and student were invited to join the school psychologist for a group counseling session multiple times which the parent declined (Tr. pp. 236-239). Therefore, the CSE recommended sending a district behaviorist to the home to try to see if she could mitigate some of the behaviors that were occurring in that setting and provide support to the family (Tr. pp. 236-239). The district representative indicated that the behavioral intervention services were "front loaded" to help the parents get systems set with homework routines, expectations of behavior, develop a possible reinforcement plan, set the tone, and establish the rules with the family and student (Tr. p. 239). She explained that once the systems were up and running the services could be decreased as the provider would be only working on maintaining and tweaking the systems (Tr. p. 240). The district representative testified that the behavioral intervention services were offered to the parents to address the significant difficulty they were having at home and were a separate service from parent counseling and training built in as a school-based service for the purpose of carryover (Tr. pp. 230-240, 1324-25).

Finally, the May 2015 CSE recommended that the student receive 12-month services in the form of five 60-minute sessions per week of direct consultant teacher services for summer 2015 (Dist. Ex. 6 at pp. 10-11). The district representative testified that although the student did not demonstrate regression and the district did not have the burden of closing the gap during the summer, she recognized that the student was dyslexic with a significant reading issue and felt that the more the district could do with the student the better chance it would have to close the gap (Tr. pp. 1329-1330).

Overall, while the hearing record indicates that the student exhibited progress in some areas leading up to the May 2015 CSE meeting, the student continued to have significant delays in reading and writing relative to grade and age level expectations —testing at an early second grade level in reading at the end of the fourth grade (see Dist. Exs. 6 at p. 5; 27; 29 at p.1). Additionally, while the May 2015 CSE addressed many of the student's needs through a combination of resource room and direct and indirect consultant teacher services, those programs did not sufficiently address the student's primary and overarching need to develop literacy skills.¹⁹

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6 [b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). However, a

¹⁹ While the May 2015 IEP increased the student's counseling services, such services were intended to address the student's increasing social/emotional needs, and were not directed at improving the student's academic skills, particularly in reading, writing and math. Although there may be a possible relationship between the student's academic deficits, and his increasing behaviors, the evidence in the hearing record did not substantiate this connection in a manner sufficient to conclude that an increase in counseling services would have resulted in the student making gains in academics absent more support.

resource room is not intended to provide primary instruction and is defined as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]).

Further, while the May 2015 IEP indicated that the consultant teacher services were directed at addressing the student's needs in the areas of writing and mathematics, the May 2015 IEP did not identify any specific areas for the resource room teacher to focus on (see Dist. Ex. 6 at p. 9) and it is unlikely that the entire recommended 80 minutes of resource room would have been directed at developing the student's literacy skills. Pertinently, for the 2014-25 school year (fourth grade), the student's teacher testified that the student was pulled out of her general education classroom for the math and ELA blocks to go to resource room (Tr. 423, 525-26; see Dist. Ex. 19).²⁰ She also testified that the student's time during resource room was split between reading and math (Tr. pp. 423, 438). The parent testified that in his resource room the student worked on reading, writing, and math, and any class or homework that was not completed (Tr. pp. 968-69). Additionally, as the student was pulled from the ELA block of his general education classroom, there is no indication on the IEP, or elsewhere, that the student would have received reading instruction outside of the resource room for the 2015-16 school year.²¹

Based on the above, and with particular concern regarding the severity of the student's needs with respect to learning literacy skills, the program recommended by the district was not reasonably calculated to result in progress in line with the student's abilities without additional supports to address the persistent gap between the student's functional reading abilities and his current grade level.

C. 2016-17 School Year—Appropriateness of Program Recommendation

The parents argue that the IHO erred in finding that the district offered the student a FAPE for the 2016-17 school year.

1. Progress During the 2015-16 School Year

The parents argue that the program recommendation for the 2016-17 school year should be viewed in light of the progress the student made at Windward, which highlighted the student's lack of progress in the district's recommended program. Initially, while progress the student made in his new program is not relevant to whether the district's IEP was appropriate for the 2015-16 school year (J.R. v. New York City Dep't of Educ., 2017 WL 3446783, at *22 [E.D.N.Y. Aug. 10, 2017]); it may have some relevance to whether the student was receiving educational benefit in the prior program in the district (see Konkel v. Elmbrook Sch. Dist., 348 F. Supp. 2d 1018, 1024 [E.D. Wis.

²⁰ The teacher testified that the student was pulled out for 120 minutes in the morning for resource room; however, the 120 minutes would have included the recommendations for both the 80 minutes of daily resource room and 40 minutes of daily consultant teacher services (Tr. pp. 526; see Dist. Exs. 6 at p.9; 19).

²¹ The student's class schedule for the 2014-15 school year indicated that in addition to the morning ELA block that the student was pulled out of for resource room, the student's general education class also had time in the afternoon set aside for instruction in spelling and vocabulary (Dist. Exs. 19; 28); however, the hearing record does not indicate what the student's schedule would have looked like for the 2015-16 school year.

2004]), and thus whether a continuation of that or a similar recommendation for the 2016-17 school year is appropriate. However, while the student continued to make progress at Windward, the hearing record does not indicate that the extent of the progress was out of line with the progress the student had made in the district during the prior school year.

The student attended Windward for the 2015-16 school year. Windward is a private school that specializes in educating students with learning disabilities "where the focus is on reading support in a small class setting using an Orton-Gillingham based program" (Tr. p. 264; Dist. Ex. 12 at p. 2). The student's classes included three periods of language arts in a group—reading/writing/Orton-Gillingham skills (1:1), with mathematics, science, and social studies occurring in a group (Dist. Ex. 12 at p. 2). At Windward the student's primary reading instruction was done one-to-one in a daily skills class, using the multisensory Preventing Academic Failure (PAF) program (*id.* at pp. 2, 6).

On September 9, 2015, when the student first entered Windward, the school assessed the student's reading using the Stanford 10, which yielded a percentile rank of 2 for vocabulary and 8 for comprehension in the standard time format (Parent Ex. 28 at p. 1). In addition, an August 2015 administration of the Gates-MacGinitie Reading Test yielded a percentile score of 2 for comprehension in the timed format (*id.*). In September 2016, after the student's first year at Windward, the student attained a percentile rank of 32 for vocabulary in the timed format, a percentile rank of 21 for comprehension in the timed format and 44 in the untimed format (*id.*). The Windward coding test for reading showed that the student made progress in 11 of the 14 elements assessed from August 2015 to May 2016 and the Windward coding test for spelling showed progress in 10 of the 13 elements assessed between September 2015 and May 2016 (Parent Exs. 27; 28 at p. 1).

The student's 2015-16 Windward progress report indicated that by spring 2016 the student's word attack skills improved significantly such that the student began to self-correct and read with greater accuracy (Parent Ex. 29 at p. 4). The student's spring progress report showed that, in decoding and spelling, he progressed from "infrequently" to "occasionally" reading fluently and reading accurately in connected text (*id.* at p. 1). Consistent with the winter progress report, the student continued to "occasionally" apply decoding strategies and spelling strategies during dictation (*id.*).²² In reading comprehension the student demonstrated progress in five of the 13 benchmarks progressing from "occasionally" identifying the main idea, sequencing information, identifying story components, recognizing cause-effect relationships, and making reasonable predictions to doing so "frequently" (*id.*). By the spring marking period, the student's science teacher noted that the student's decoding and fluency improved, although still a challenge, and the student volunteered to read aloud in class (*id.* at p. 10). In mathematics the student progressed from "occasionally" to "frequently" reading and writing decimals, solving basic word problems, showing mathematical steps, and applying new concepts and procedures independently after teacher modeling (*id.* at p. 7). However, the spring progress report also showed a decline in the student's ability to meet classroom expectations such as following class routines, maintaining attention, and self-monitoring behavior (*id.* at p. 7). The teacher noted the student "made solid

²² This progress is reflective of the period from the 2015 winter report to the spring 2016 report (Parent Ex. 29 at p. 1).

progress" and although he struggled with word problems at times, he readily used strategies to overcome obstacles (id. at p. 8). The student's social studies and science teachers both commented that the student's background knowledge supported his understanding of content area concepts (id. at pp. 6, 10).

The Windward report card for the 2015-16 school year (fifth grade) reflected the student's performance with respect to language arts, mathematics, social studies, science, art, computer, and physical education (Parent Ex. 30 at p. 1). The report card showed gradual progress throughout the year in reading, mathematics, science, and social studies with the most significant progress noted in vocabulary growth and reading comprehension (id.). In language arts the report card tracked the student's performance on a combination of 12 academic and work skills (id.). Most notably, over the course of the school year the student's vocabulary and reading comprehension skills improved from satisfactory to good and the student's participation in class discussions and ability to behave appropriately improved from satisfactory plus to good plus (id.). In mathematics, the Windward 2015-16 report card indicated the student's performance was in the good minus to good range at the end of the first marking period and remained the same or improved slightly by the fourth marking period, specifically in relation to his ability to understand mathematical concepts and solve word problems (id.). In relation to social studies, science, and computer skills the report card again reflected gradual progress throughout the year with particular growth noted in following science lab procedures independently, using keyboarding skills accurately, and using word processing skills effectively (id.).

In addition to the Windward reports, the student's private psychologist conducted updated educational testing in April 2016 and concluded that the student made progress in some key areas of reading (Dist. Ex. 10 at pp. 4-5). The private psychologist reported that during the 2015-16 school year, the student demonstrated marked progress in his sight word vocabulary, which he explained was related to the student's deficits in visual memory, and one of the most important areas in need of development in terms of the student's reading skills (Dist. Ex. 10 at p. 4; see Tr. pp. 760-61). The evaluator further reported that with the increase in sight word vocabulary the student's reading comprehension improved (Tr. p. 761; Dist. Ex. 10 at p. 5). The evaluator reported that although the student's phonics knowledge did not increase, the speed with which the student applied phonics knowledge increased from the previous assessment in October 2015 (Tr. pp. 760-61; Dist. Ex. 10 at p. 5). In addition, the private psychologist noted that the student was more effectively utilizing working memory to decode, an area which was weak in the prior evaluation (Dist. Ex. 10 at pp. 4-5). The psychologist indicated that although the student was not closing the gap with regard to reading fluency, the student's reading comprehension, while still below average at the sixth percentile, had significantly improved from the previous assessment and indicated the student was "beginning to close the gap" (id. at p. 5).

The private psychologist opined that, with regard to spelling and written expression, the student made progress at a consistent rate but did not significantly close the gap relative to same aged peers (Tr. p. 761; Dist. Ex. 10 at pp. 5-6). The psychologist indicated that the student showed the greatest overall improvement in mathematics, noting that the student's calculation skills fell "only mildly below average" but also noting that the student's ability to perform calculations was constrained by his attention regulation deficit, which resulted in careless errors on items that were within the student's area of mastery (Dist. Ex. 10 at p. 7). The evaluator reported that the student's mathematical fluency was markedly below average (first percentile) but the student's performance

was significantly better than the examiner's October 2015 evaluation, where the student's mathematical fluency fell below the .1 percentile rank (Dist. Exs. 9 at p. 29; 10 at p. 7).

A comparison of the standard scores obtained as a part of the October 2015 neuropsychological assessment report with scores obtained as part of the April 2016 educational update shows an increase in scores in the reading (from 58 to 72), math (from 82 to 88) and decoding (from 65 to 71) composites of the Kaufman Test of Educational Achievement, Third edition (KTEA-3) (compare Dist. Ex. 9 at p. 29, with Dist. Ex. 10 at p. 10). The most notable progress in reading was with respect to the student's standard scores in letter and word recognition (from 55 to 69), decoding fluency (from 55 to 62), and reading comprehension (from 67 to 77) (compare Dist. Ex. 9 at pp. 29, with Dist. Ex. 10 at p. 10). In mathematics, the student demonstrated improvement in standard scores relative to computation (from 78 to 82), fluency (from 46 to 62), and concepts and application (from 88 to 96) (compare Dist. Ex. 9 at p. 29, with Dist. Ex. 10 at p. 10). According to the October 2015 and April 2016 psychological testing reports the student's standard score performance remained the same or decreased with respect to word recognition fluency (from 61 to 55), silent reading fluency (from 60 to 60), spelling (from 68 to 67), and written expression (from 55 to 47) (compare Dist. Ex. 9 at p. 29, with Dist. Ex. 10 at p. 10).

The district school psychologist, who attended the May 2016 CSE meeting, testified that she reviewed the reports from the private psychologist and noted that there were some little increases and decreases, but for the most part the student remained consistent (Tr. p. 649). She also explained that as the tests are normed to age standards, maintaining the same score over a six-month period is an indication the student was continuing to grow (Tr. pp. 649-50).

2. Student's Needs

Again, although the present levels of performance are not directly in dispute, a brief discussion of the student's present levels of performance, as described in the May 2016 IEP, is necessary to frame the discussion below. In developing the student's IEP for the 2016-17 school year, the district representative testified that the May 2016 CSE considered report cards and progress reports from Windward (Tr. p. 275; Ex. 12 at p. 4). Additionally, the school psychologist testified that she reviewed both the private October 2015 neuropsychological assessment report and a private April 5, 2016 educational testing update report both conducted by the student's private psychologist (Tr. pp. 646-50; Dist. Ex. 12 at p. 4).

With respect to the academic and functional needs of the student, the May 2016 IEP indicated that the student required supports and structure as part of his educational program (Dist. Ex. 12 at p. 7). More specifically, the IEP stated that a highly structured multisensory approach to reading was necessary for the student and that he needed to develop skills relative to decoding, encoding, reading comprehension, written expression and the mechanics of writing, as well as mathematic problem-solving skills related to multi-step sequences and word problems (id.). The May 2016 IEP indicated that the student struggled to regulate attention throughout testing (id.). The IEP further indicated that working memory was an area of weakness for the student and that he struggled with manipulating and sequencing information (id.). The IEP noted a delay in the student's visual memory skills and weaknesses in spatial orientation and visual motor integration,

as well as motor planning (id.). According to the May 2016 IEP, the student's phonological processing skills were in the average range (id.).

With respect to reading, the May 2016 IEP indicated that the student continued to demonstrate a significant delay and that his reading comprehension was hampered by weak decoding skills that resulted from deficits in working and visual memory skills (Dist. Ex. 12 at p. 6). The May 2016 IEP indicated the student presented with significant difficulty with decoding and noted that the student struggled with retention of skills and rules taught, lacked stamina, and read at a slow pace (id.). The May 2016 IEP indicated that the student's reading comprehension was limited due to decoding but noted he was able to answer literal and inferential questions with scaffolding (id.). At the time the IEP was developed, the student's primary reading instruction was provided in a one-to-one setting using the PAF program (id. at p. 7).

With respect to writing, the May 2016 IEP indicated that the student required support to write at the sentence and paragraph level, required teaching and re-teaching to apply skills, and struggled with syntax, tense agreement, spelling, and punctuation (Dist. Ex. 12 at p. 6). The IEP indicated that the student was working on expanding basic sentence structure using question words, conjunctions, and transition words and at the paragraph level the student was able to organize information using an outline (id.).

As for mathematics, which was a relative strength for the student, the May 2016 IEP indicated that the student was working on grade level content in "the middle level math group," a group of nine students (Dist. Ex. 12 at p. 7). The IEP stated that the student needed step-by-step instruction and teacher support with multi-step concepts (id.). Additionally, the May 2016 IEP noted that the student continued to have difficulty with word problems, showed a weakness in overall problem-solving skills, and struggled to work through problems to solve them accurately (id.).

To support the student's academic subject areas, the May 2016 CSE recommended that the student receive resource room services daily, in a 5:1 group for 40 minutes per session and consultant teacher services, both direct and indirect, five sessions per week for 40 minutes per session (Dist. Ex. 12 at p. 11). According to the service delivery recommendations included in the IEP, the purpose of the consultant teacher services was to support performance and skill application, provide consults to teachers, and provide modifications and accommodations in the content area subjects (id.). In addition to consultant teacher and resource room services, the May 2016 CSE also recommended that the student receive a 5:1 special class for reading for one-hour daily to support skill development (id.). To further support the student's reading development the May 2016 IEP recommended 12-month services in the form of direct consultant teacher services for five sessions per week for one hour per session during summer 2016 (id. at p. 13).

The May 2016 CSE recommended six reading goals to address the student's weaknesses in decoding and reading comprehension (Dist. Ex. 12 at p. 9). With respect to decoding, the May 2016 IEP included goals that targeted the student's ability to correctly decode words containing targeted phonics patterns, phonetically regular multisyllabic words using word analysis skills and knowledge of syllable rules, unknown words in instructional level text using phonics and word analysis cues and use contextual cues to aide in decoding (id.). The recommended reading

comprehension goals targeted the student's ability to answer questions with respect to a given reading selection (id.).

The May 2016 CSE recommended management strategies to support the student's reading needs including providing a multisensory approach to accelerate the student's reading and decoding skills (Dist. Ex. 12 at p. 8). Additionally, the May 2016 CSE recommended modifications and accommodations including modification of assignments, homework, and spelling curriculum; provision of a co-reader or co-writer; visual supports; and provision of examples/models to support visual memory when decoding unfamiliar text (id. at pp. 11-12). The May 2016 CSE also recommended that the student receive testing accommodations including extended time (1.5x); directions, test passages, questions, items, and multiple-choice responses read; flexible location; text-to-speech software; a check of scantron for accuracy and use of a tracking tool (id. at p. 13).

The school psychologist opined that the May 2016 IEP addressed the student's decoding concerns and supported him in "areas of challenge" (Tr. p. 666). She explained that to address concerns regarding the student's memory and difficulty retrieving information on demand, as identified by the private psychologist, the May 2016 IEP recommended pre-teaching, repetition, reteaching, and providing a reader to support the student when he encountered difficulty sounding out a word or recalling an item (Tr. pp. 667-68; see Dist. Ex. 12 at p. 12).

With respect to the student's writing weaknesses, the May 2016 CSE recommended six goals to address the student's needs in written expression: two goals to address spelling words with targeted phonics patterns and targeted syllable patterns; one goal to address paragraph composition and another to address the development of a multi-paragraph essay; one goal to address editing for punctuation and capitalization; and one goal for drafting complete sentences in response to a targeted prompt (Dist. Ex. 12 at pp. 9-10). The May 2016 IEP recommended that the student's spelling curriculum be modified, the student have access to a computer (laptop/iPad) to be utilized when a task required one or more paragraphs to be developed, provision of a scribe, use of text-to-speech software, and no penalization for spelling errors on tests (id. at pp. 11-13).

The May 2016 CSE also recommended two mathematics goals: one, targeting the student's ability to correctly solve five mathematics procedures or algorithms presented in the sixth-grade curriculum and two, to correctly solve five verbally presented word problems that corresponded to concepts taught in the sixth-grade curriculum (Dist. Ex. 12 at p. 10). To further support the student in math, the May 2106 IEP continued to recommend that he have word problems read so that reading skills did not interfere with mathematics, access to graph paper, modified homework assignments, checks for understanding, reteaching of materials, and pre-teaching (id. at pp. 8, 11-13). With regard to the student's social emotional development, the May 2016 IEP reflected that the student developed positive peer relationships, was respectful and well-liked, communicated well with adults, was hard-working, and inquisitive (id. at p. 7). The May 2016 IEP noted that the student got frustrated when making mistakes and in response to academic challenges and needed strategies to deal with academic frustrations (id.). The May 2016 CSE recommended a goal to address the student's ability to use coping strategies to increase frustration tolerance related to academic difficulties (id. at p. 10).

The district representative testified that the May 2016 IEP no longer included counseling services or behavioral intervention services because the family reported drastic improvement in the home and that all the behaviors that had presented issues for the student in the past had been eliminated (Tr. pp. 279-80).²³ According to the district representative, with respect to school, the student was described similar to the way the district had seen him—well-liked by peers and happy in the school environment (Tr. p. 280). A summary of the student's performance at Windward, reflected in the May 2016 IEP meeting comments, indicated that the student was not presenting with anxiety at that point in time, came home from school "in a good emotional place," and was more open to taking risks in the school setting (Dist. Ex. 12 at p. 3).

Although there were no specific physical needs documented in the student's IEP, the May 2016 IEP included a copying goal and the CSE recommended that the student receive OT services for two 30-minute sessions per week to support visual motor integration and increase technological compensatory strategies as suggested by the representative from Windward (Tr. pp. 278-79; Dist. Ex. 12 at pp. 1, 11). The district representative testified that the Windward liaison discussed concerns related to the student's digit isolation and handwriting and indicated that the student would benefit from OT, therefore the district recommended that the student receive it (Tr. pp. 278-279). The district representative also noted that the student had a history of going "back and forth" regarding the provision of OT so it was not completely new information and the district itself would have gone "back and forth" with recommending OT over the years (Tr. p. 279).

With respect to assistive technology, the school psychologist testified that the May 2016 CSE discussed the use of assistive technology at Windward and that the Windward liaison indicated the student was not using technology at the school (Tr. p. 663). According to the school psychologist, the liaison explained that when a student had writing difficulties the primary goal was to teach the student to write and not "jump[] in" and provide assistive technology, which would limit further support of their writing needs (Tr. p. 663). Further, Windward did not want to relinquish the direct support of the act of writing prematurely, which the school psychologist indicated was consistent with the district's approach (Tr. pp. 663-64). As noted above, the IEP included a recommendation for access to a laptop or iPad for writing tasks (Dist. Ex. 12 at p. 12).

Regarding the 2016-17 program modifications the district representative testified that the CSE reviewed the student's then current modifications and determined which ones the student continued to need (Tr. p. 280). She opined that the recommendations for the 2016-17 school year were "pretty similar" to those in the 2015-16 IEP (Tr. pp. 280-81). The district representative testified that the 2016-17 IEP was appropriate because the cornerstone of the student's issues were reading and writing and "there was a healthy amount of time being recommended to address those areas of weakness with modifications and accommodations to be able to modify the mainstream curriculum to mitigate the reading piece" (Tr. p. 282). Further, the district representative opined that the student's high-functioning social, emotional, and cognitive profile should allow him to have access to the mainstream curriculum and peers as frequently as possible, while still addressing the skill deficits that were identified (Tr. pp. 282-83). Additionally, the district representative expressed that being in a homogeneous environment was a disservice to children with such a

²³ Likewise, the school psychologist testified that when she raised the question at the May 2016 CSE meeting as to why student was not receiving counseling she was told the student did not need counseling at Windward (Tr. p. 677-78).

profile (Tr. pp. 282-83). The district representative also opined that the student should have access to his peers in the school that was "in his backyard," where he could foster friendships that he may maintain in the community and not be so far away from home (Tr. pp. 283-84).

As described above, the recommendations contained in the May 2016 IEP addressed the student's primary need areas in reading, writing, and mathematics. Additionally, the recommendations included in the May 2016 IEP differed in two key regards from the May 2015 IEP. First, the May 2016 IEP recommended a 5:1 special class for reading for one-hour daily to support skill development (Dist. Ex. 12 at p. 11). This recommendation ensured that the student would receive his primary reading instruction in a small group setting. Further, in contrast with the May 2015 CSE's recommendation for resource room, which as discussed above did not identify a specific amount of reading instruction during each day, the May 2016 IEP's special class recommendation ensured the student would have received at least one hour per day of primary reading instruction, his greatest area of need. Second, the May 2016 IEP indicated that the recommended consultant teacher services would have been used to provide the student's modifications and accommodations in his content area subjects, which included preteaching and reteaching of materials throughout the school day (Dist. Ex. 12 at p. 11-12). As indicated in the private psychologist's recommendations, small group reading instruction and incorporating the student's accommodations, including preteaching, reteaching, and multisensory instruction throughout the school day were important components to developing a successful program for the student (see Tr. pp. 747-48; Dist. Ex. 4 at p. 18). Accordingly, considering the changes from the May 2015 IEP made by the CSE to address specifically the student's primary needs related to literacy, and to utilize consultant teacher services to provide supportive modifications and accommodations in his content subject areas, the May 2016 IEP was reasonably calculated to enable the student to receive an educational benefit and the district offered the student a FAPE for the 2016-17 school year.

D. Appropriateness of Unilateral Placement—Windward

Having determined that the district did not offer the student a FAPE for the 2015-16 school year, the next issue to determine is whether the parents' unilateral placement of the student at Windward was appropriate.

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

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to

maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["[e]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]).

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

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

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

As presented in detail above, the hearing record shows that the student demonstrated academic needs with regard to reading, writing, and mathematics (Dist. Exs. 1 at pp. 1-2, 5-6; 5 at pp. 1-2, 5; 6 at pp. 1-2, 5-6; 8 at pp. 1, 4; 12 at pp. 1-3, 6-7). Additionally, the student exhibited social/emotional concerns related to frustration and being overwhelmed (Dist. Exs. 5 at pp. 2, 5-6; 6 at pp. 1-2, 5-6; 8 at pp. 4-5; 12 at p. 7).

As discussed previously, Windward is a private school that specializes in educating students with language-based learning disabilities where the focus is on reading support in a small class setting using an Orton-Gillingham based program (Tr. p. 264; Dist. Ex. 12 at p. 2). Staff from Windward were unavailable to provide testimony at the impartial hearing. However, the private psychologist who conducted the neuropsychological assessment and updated educational testing of the student testified that he was told by Windward staff that class sizes at the school generally ranged between eight to ten students, with two teachers in the room (Tr. pp. 770-71). He further reported that the school typically had three periods dedicated to language arts instruction; two periods for reading and one period for writing (Tr. pp. 770-72). The May 2016 IEP indicated

that Windward provided the student with three periods of language arts in homogeneous groups—reading/writing/Orton-Gillingham skills (1:1), with science, and social studies occurring in heterogeneous groupings (Dist. Ex. 12 at p. 2). In addition, at Windward, the student's primary reading instruction was done in a skills class daily one-on-one, using the multisensory Preventing Academic Failure (PAF) program (*id.* at p. 6). According to the private psychologist, Windward integrated multisensory instruction throughout the curriculum and used PAF, an Orton-Gillingham based, evidence-based multisensory reading program, for reading instruction (Tr. pp. 770-71).²⁴

As described in the May 2016 IEP and by the private psychologist, the program provided at Windward during the 2015-16 school year was consistent with the private psychologist's recommendation that the student be educated in a school that specialized in educating students with language-based learning disabilities that provided small class size, and integrated multisensory instruction throughout the curriculum (*compare* Dist. Ex. 9 at p. 18, *with* Dist. Ex. 12 at pp. 2, 6). Windward provided the student with a program that focused on reading support using an Orton-Gillingham based program and daily one-on-one reading instruction consistent with the October 2015 and April 2016 private psychologists' recommendations (*compare* Dist. Ex. 12, *with* Dist. Ex. 9 at p. 18 and Dist. Ex. 10 at p. 8).

With respect to the student's progress at Windward, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D.-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).²⁵ However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

While not dispositive, as discussed above, a review of the hearing record reveals that the student made progress while attending Windward. Overall, the Windward fifth grade report card for the 2015-16 school year reported the student made progress during that year with respect to language arts, mathematics, social studies, science, art, computer, and physical education (Parent Ex. 30 at p. 1).

²⁴ For example, the psychologist testified that when he observed the program at Windward the reading teacher used social studies facts and curriculum to work on spelling words, highlighting the school's language-based integration of instruction (Tr. pp. 772-773).

²⁵ The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]).

With respect to objective assessments, as discussed above, the hearing record indicates that during the 2015-16 school year the student demonstrated progress relative to vocabulary, reading comprehension, and spelling as judged by the Gates-MacGinitie, and the Windward coding tests for spelling and reading (Parent Ex. 28 at p. 1). By comparison of the standard scores from the October 2015 neuropsychological report and the April 2016 educational update report noted an increase in performance regarding the composite standard scores on the KTEA-3 in reading (58 to 72), mathematics (82-88), and decoding (65-71) (compare Dist. Ex. 9 at p. 29, with Dist. Ex. 10 at p. 10). The most notable progress in reading was with respect to letter and word recognition with standard scores progressing from 55 to 69, decoding fluency 55 to 62, and reading comprehension 67 to 77 (id.). In mathematics, the student demonstrated improvement in standard scores relative to computation skills (78-82), fluency (46-62), and concepts and application (88-96) (id.). Additionally, as discussed in greater detail above, the April 2016 educational testing update report indicated that, since attending Woodward, the student demonstrated progress regarding sight vocabulary and improved reading comprehension, as well as an increase in the speed with which the student applied phonics knowledge (Tr. pp. 760-61; Dist. Ex. 10 at pp. 4-5). Additionally, regarding mathematics, the April 2016 educational testing update indicated improvement demonstrating skills (Dist. Ex. 10 at p. 7).

In summary, the lack of more detailed information in the hearing record regarding Windward, and the parents' failure to demonstrate with particularity, as opposed to relying on information establishing the general educational milieu of the school, that the placement provided educational instruction specially designed to meet the student's unique needs, is certainly concerning. However, courts have recently deemed evidence of the general educational milieu of a unilateral placement sufficient for purposes of tuition reimbursement (see, e.g., T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *26-*36 [S.D.N.Y. Nov. 23, 2016]), in an apparent retreat from the standard, articulated in Gagliardo, that the unilateral placement must provide instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).²⁶ Here, the evidence in the hearing record identified that Windward provided a language based program, including the incorporation of multisensory methods integrated throughout the curriculum, which, at least to some extent, addressed the student's reading deficits. Furthermore, the private psychologist noted that the school was providing instruction in line with his recommendations. Thus, despite my concerns regarding the sufficiency of the evidence presented, based on the above standard increasingly applied by courts considering the appropriateness of unilateral placements, the hearing record is sufficient to conclude that Windward met the student's needs.

E. Equitable Considerations

Having determined that Windward constituted an appropriate unilateral placement for the student, the final criterion for a reimbursement award is that the parents' claim be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226

²⁶ Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

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

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

As noted above, the IHO found that equitable considerations did not favor the parents and that tuition reimbursement should be limited because of the following: (1) the parents' ten-day notice letters for the 2015-16 and 2016-17 school years failed to include "even a cursory description of their concerns"; (2) the parents did not cooperate with the district because they did not make the student available for his scheduled triennial evaluation; (3) that the parents did not provide any witnesses from Windward during the impartial hearing and that Windward "was not a better placement for the student"; and (4) the student's mother treated the teachers and administration inappropriately. As the parents do not appeal from this portion of the IHO's decision, which was adverse to them, the IHO's finding on equitable considerations has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, while I do not necessarily agree that all of the IHO's findings are relevant to a determination on equitable considerations (such as the production of witnesses and the parents' treatment of school staff), the remaining findings regarding the provision of timely 10-day notices

and parents' cooperation with the district warrant a reduction of tuition reimbursement based on equitable considerations. However, in determining how much tuition reimbursement should be reduced, I exercise my discretion by reducing the award by 10 percent.

F. Transportation

The parents requested reimbursement for the cost of transporting the student to Windward for the 2015-16 school year. By letter dated August 28, 2015, the parents notified the district of their intention to place the student at Windward and seek the costs of such placement from the district, including the cost of transportation (Parent Ex. 38). The parents testified that the district decided not to provide transportation for the student and that she transported the student to school (Tr. pp. 1161-62, 1165). The parents' request for the cost of transportation of the student to Windward for the 2015-16 school year is supported by the evidence in the hearing record as it was associated with the parents' unilateral placement of the student at Windward and the parents are awarded reimbursement for mileage and tolls to and from Windward for the 2015-16 school year. The parents' separate claim for transportation pursuant to Education Law Section 4402(4)(d) need not be addressed under these circumstances.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2015-16 school year, that placement of the student at Windward was reasonably calculated to meet his educational needs, and that equitable considerations warrant a 10 percent reduction for the total tuition costs at Windward for the 2015-16 school year. For the 2016-17 school year, the hearing record supports finding that the program recommended by the May 2016 CSE offered the student a FAPE. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision, dated September 18, 2017, is reversed to the extent that it found the district offered the student a FAPE for the 2015-16 school year and denied the parents' request for reimbursement of the cost of the student's tuition at Windward for the 2015-16 school year, along with the cost of transportation; and

IT IS FURTHER ORDERED that, upon proof of payment, the district shall reimburse the parents for the cost of the student's tuition at Windward for the 2015-16 school year and transportation for the 2015-16 school year, but reduced by 10 percent.

Dated: Albany, New York
February 16, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER