The University of the State of New York

The State Education Department
State Review Officer
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No. 18-085

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Teri Horowitz, Esq., and Linda A. Goldman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Mary H. Park, 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 a 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 entire 2016-17 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

A full recitation of the student's educational history is unnecessary due to the disposition of this appeal. Briefly, the student has a history of "developmental lags" in the acquisition of reading skills, along with anxiety regarding his academic capabilities (Parent Ex. E at pp. 1-2). In October 2014 (fourth grade), his parents referred him for a neuropsychological evaluation that yielded diagnoses of: specific learning disability in reading (decoding, fluency, comprehension); specific learning disability in math (calculations); specific learning disability in written expression (rapid retrieval, sentence formulation); and generalized anxiety disorder (id. at pp. 1, 15). The

parents shared the results of the evaluation with the district, and the district developed an accommodation plan for the student pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (see Tr. pp. 143-45, 156).

In May 2015, the parents requested that the district perform an initial evaluation of the student to determine his eligibility for special education services (Parent Ex. C at p. 1). Although the CSE conducted a social history in June 2015 (Tr. p. 147; Dist. Ex. 7 at p. 1), it did not further evaluate the student or convene for an initial eligibility determination during the 2015-16 school year (fifth grade) (Tr. pp. 10, 147-48). The parents unilaterally placed the student at a private religious school for students with disabilities for the 2015-16 school year (Dist. Ex. 7 at p. 2).[1]

On March 8, 2016, the parents signed an enrollment contract with Windward for the student's attendance for the 2016-17 school year (sixth grade) (Parent Ex. G). By letter dated August 22, 2016, the parents advised the district of their intention to seek funding for a unilateral placement for the 2016-17 school year if the district did not develop an appropriate IEP and offer an appropriate placement to the student (Parent Ex. B at pp. 1-2).[2] The district did not contact the parents to schedule a CSE meeting prior to the start of the school year (Tr. p. 150). The parents unilaterally placed the student at Windward for the 2016-17 school year (see Parent Ex. K).

The district subsequently conducted a classroom observation of the student in November 2016, and a social history and educational evaluation in December 2016 (see Dist. Exs. 6-8). Additionally, the parents obtained a private educational evaluation of the student that took place in December 2016/January 2017 (see Parent Ex. F).

[1] According to representations by counsel for the parties during the impartial hearing, a dispute concerning the student's 2015-16 school year was settled via a stipulation dated November 10, 2016 (Tr. pp. 18-20). During the impartial hearing, the parents sought to have the November 2016 stipulation admitted into evidence for the purpose of proving that the facts agreed to in the stipulation established the student as being eligible for special education as a student with a disability (Tr. pp. 17-20). Although the IHO sustained the district's objection to the admission of the November 2016 stipulation, the document remained on the IHO's exhibit list and is physically a part of the record on appeal submitted by the district to the Office of State Review (Tr. pp. 19-20; IHO Decision at p. 14). The undersigned requested that the parties state their positions regarding the proper disposition and consideration of the November 2016 stipulation for the purpose of this appeal. The parties agree that the IHO did not intend to admit the document into evidence. As the parents do not appeal the IHO's evidentiary determination, that finding shall not be reviewed. However, another possible route for consideration of the document on appeal was to receive it as additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if the evidence is necessary in order to render a decision (see 34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). I have considered the parties' submissions and conclude that, given the IHO's final and binding determinations as discussed below, the stipulation is not necessary in order to render a decision. Accordingly, the stipulation will not be further considered.

[2] The parents' notice indicated that they intended to continue the student's unilateral placement at the private religious school that he attended during the 2015-16 school year (Parent Ex. B at pp. 1-2). However, as noted above, the parent signed a contract with Windward for the 2016-17 school year in March 2016, and paid the balance of the tuition by April 2016 suggesting that their notice to the district identified the private religious school, instead of Windward, in error (see Parents Exs. A at p. 1; B at p. 1; G; H).

On January 31, 2017, the CSE convened and determined that the student was ineligible for special education; however, the CSE developed a document that identified the student's present levels of performance (Dist. Exs. 1; 2 at pp. 1-3). The document indicated that the student was "recommended for a general education class setting with . . . suggested instructional strategies" including additional practice in reading from word lists and graphic organizers for written assignments (Dist. Ex. 2 at pp. 1-4).

The student remained at Windward for the entirety of his sixth-grade year (see Parent Exs. J ; K; L).

A. Due Process Complaint Notice

By due process complaint notice, dated August 3, 2017, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (Parent Ex. A at pp. 1-3). Specifically, the parents asserted that the district failed to fulfill its obligation under the IDEA's "child find" provisions beginning in the 2015-16 school year when it became aware of the student's serious academic needs yet failed to recommend additional services or convene a CSE to develop a program for the student (id. at pp. 2-3). The parents also asserted that the district failed to comply with State and federal regulations governing initial referrals for evaluation and placement when it failed to convene a CSE meeting after the parent's written referral dated May 11, 2015 (id. at p. 3). The parents alleged that the failure to evaluate the student and convene a CSE to develop a program for the student prior to the 2016-17 school year denied the student a FAPE for that school year, and further contended that the fact that the CSE eventually met in January 2017 was not relevant to the proceeding (id.). Alternatively, the parents asserted that the January 2017 CSE's failure to classify the student as a student with a disability, despite his documented delays in reading and writing and a diagnosed learning disability, also denied the student a FAPE (id.).

The parents next asserted that their unilateral placement of the student at Windward during the 2016-17 school year was appropriate, and that equitable considerations weighed in favor of an award of tuition reimbursement (Parent Ex. A at pp. 3-4). For relief, the parents requested tuition reimbursement for the cost of the student's attendance at Windward during the 2016-17 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 18, 2017, and concluded on January 29, 2018, after two days of proceedings (Tr. pp. 1-159). During the impartial hearing, the district "concede[d] that" the CSE "meeting was held outside the time lines" (Tr. p. 10).

In a decision dated June 19, 2018, the IHO found that the district failed to offer the student a FAPE for the first half of the 2016-17 school year because there was a CSE referral outstanding from the previous school year and a CSE did not convene until January 2017 (IHO Decision at pp. 8, 12). The IHO noted that "it was the [d]istrict's delay that resulted in the unilateral placement, at least up to the point that the [d]istrict actually conducted the CSE meeting" (id. at p. 8).

Addressing the result of the January 2017 CSE meeting, the IHO found that the CSE correctly determined the student was ineligible under the IDEA as a student with a learning

disability because, although the student was diagnosed with a learning disability, the hearing record did not demonstrate that there was an adverse effect on the student's educational performance (IHO Decision at pp. 8-12).

Next, the IHO found that Windward was an appropriate unilateral placement for the student for the first half of the 2016-17 school year, and that equitable considerations weighed in favor of reimbursement (IHO Decision at p. 11-12). The IHO ordered the district to provide reimbursement for the cost of tuition at Windward from September 2016 through January 31, 2017 (id. at p. 12).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in limiting the tuition reimbursement award for the 2016-17 school year at Windward to the period of September 2016 through January 31, 2017. Specifically, the parents assert that the district's failure to comply with its child find obligations—independent and apart from the parents' referral of the student to the CSE—constituted an independent FAPE violation for all of the 2016-17 school year. Moreover, the parents assert that the IHO also erred in finding that the district failed to offer a FAPE for only the first half of the 2016-17 school year because the failure of the district to timely evaluate the student and convene the CSE before the start of the 2016-17 school year caused a denial of FAPE for the entire year. The parents contend that, having made a finding that the inaction of the district caused the parents to unilaterally place the student at Windward, the IHO should have determined that the student was denied a FAPE for the entire 2016-17 school year. The parents further contend that the January 2017 CSE's ineligibility determination could not be used retrospectively to deprive the student of reimbursement rights that arose at the beginning of the 2016-17 school year and cite case law for the proposition that "mid-year amendments" to a student's program in a tuition reimbursement case should not be considered.

With this in mind, the parents also contend that the IHO should not have considered any testimony regarding the CSE meeting conducted on January 31, 2017, or the CSE's ineligibility determination, and erred in failing to uphold the parents' objections to the testimony.

In the event that the SRO decides to consider evidence with respect to the CSE's ineligibility determination, the parents assert that the IHO erred in finding that the January 2017 CSE properly considered the student to be ineligible for special education and argues that the student should have been found eligible as a student with a learning disability.

For relief, the parents request that the IHO's decision be modified and that the district be required to reimburse them for the costs of the student's tuition at Windward for the entire 2016-17 school year.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety. The district asserts four arguments in response to the parents' appeal. First, the district alleges that the IHO correctly affirmed the CSE's determination that the student was not eligible for special education as a student with a disability. Second, the district asserts that, because the student was ineligible for special education, he was not entitled to a FAPE. Third, the district alleges that, because the student was not entitled to a FAPE, any procedural violation did not deprive the student of educational benefits. Fourth, the district alleges that it

committed no child find violation in that it did not overlook clear signs of a disability or negligently fail to order testing prior to the parents' request for an initial evaluation; however, the district again concedes that it did not evaluate the student within the mandated time period. The district has not cross-appealed any of the IHO's findings and has explicitly declined to challenge the partial tuition reimbursement award to the parents (see Answer ¶ 22, n.5).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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).

[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 ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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. Tuition Reimbursement

The heart of the parents' appeal is their request for an order providing tuition reimbursement for the entire 2016-17 school year, as opposed to the IHO's order that only provided reimbursement for a portion of the school year, beginning September 2016 and ending January 31, 2017, the date of the CSE's ineligibility determination. As neither party has cross-appealed the IHO's findings that the district denied the student a FAPE, that Windward constituted an appropriate unilateral placement for the student, and that the parents cooperated with the district and equitable considerations favored reimbursement, these determinations have become final and binding on both parties (IHO Decision at pp. 8, 11-12; 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]).[4, 5] In particular, with respect to the denial of a FAPE, the IHO found that the district failed to conduct timely evaluations of the student and convene a CSE despite the parents' outstanding referral of the student from May 2015 (IHO Decision at p. 8, 12).[6, 7]

[4] While the district acknowledges in a footnote in its answer that it did not cross-appeal the IHO's decision and, therefore, that the IHO's determination is final and binding, the district also states its "position" that the procedural violation did not amount to a denial of a FAPE and, therefore, the parents were not entitled to any tuition reimbursement; nevertheless, the district indicates its "belie[f] that" the IHO's award of tuition reimbursement up to the date of the CSE meeting on January 31, 2017 "is appropriate and equitable relief, since the CSE meeting was held after the start of the school year" (Answer ¶ 22, n.5). That the district chooses to view the IHO's award as a form of equitable relief, rather than a remedy for a denial of a FAPE as the IHO explicitly determined, is insufficient to put the IHO's FAPE determination at issue on appeal. As a party aggrieved by a determination of the IHO, it was incumbent upon the district, if it wished to seek review of "all or a portion" of the IHO's decision, to assert a cross-appeal in the answer (8 NYCRR 279.4[f]). Moreover, as this argument is raised only in a footnote, it must be considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [arguments raised only in footnotes are insufficient to preserve an argument for review on appeal], citing United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]).

[5] Although the IHO indicated that her determination as to the appropriateness of Windward applied only to that portion of the school year through the date of the January 2017 CSE meeting (see IHO Decision at p. 12), it appears that this limitation mirrored her finding that the January 2017 CSE meeting cut off the parents' right to tuition reimbursement, rather than relating to any evidence about a change in the appropriateness of the unilateral placement.

[6] With respect to the parents' alternative argument that the district failed to comply with its independent child find obligation, it is unnecessary to reach this issue because, as described herein, the evidence shows that the parents are entitled to their requested relief based on the IHO's finding that the student was denied a FAPE on other grounds.

[7] During the impartial hearing and in the instant appeal, the district concedes that it failed to comply with the time frames set forth in federal and State regulations (Tr. p. 10; Answer ¶ 3). Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a

Under the circumstances of this case, the IHO's final and binding determinations that the district failed to offer the student a FAPE at the outset of the 2016-17 school year, that the unilateral placement was appropriate, and that equitable considerations supported an award of tuition reimbursement, entitle the parents to an award of tuition reimbursement for the entire school year regardless of the subsequent occurrence of the January 2017 CSE meeting (Novak v. Ennis Ind. Sch. Dist., 2012 WL 13026966, at *9 [N.D. Tex. Sept. 11, 2012] [finding that, as no FAPE was offered until November 2009, "equitable considerations militate[d] toward awarding reimbursement for the entire 2009-2010 school year"]; see Greenwich Bd. of Educ. v. G.M., 2016 WL 3512120, at *20 [D. Conn. June 22, 2016] [reimbursement for entire school year was appropriate notwithstanding that the IHO's order directing reimbursement was issued in the middle of the school year]; but see S.L. v. Weast, 2012 WL 983789, at *5-*6 [D. Md. Mar. 21, 2012] [noting that a rule that midyear transfers from a unilateral placement to a district school upon midyear development of an appropriate IEP "are invariably inequitable . . . could discourage school officials from reassessing children's needs and recommending necessary transfers lest their guardians contend that such transfers are overly disruptive"]). Under circumstances where a denial of a FAPE is premised on a violation arising out of an annual CSE meeting or a resultant IEP document for a student previously determined eligible for special education, the time frame for a tuition reimbursement remedy may fall more comfortably in the framework of a full school year (cf. A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 216 [S.D.N.Y. 2010] [finding that summer months not covered by the challenged IEP were not reimbursable in that proceeding]). This is due in part to the district's obligations to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), as well as its obligation to convene a CSE on an annual basis to review the student's program and revise it as necessary (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[f]). Here, however, where the student's eligibility for special education had not yet been reviewed by the CSE but the district delayed the process of making that determination for over one year, the parents made a reasonable choice to place the student at Windward for the full school year and the broad authority to fashion equitable relief allows for reimbursement of that tuition.

Further, as the parents argue, an award of full tuition reimbursement for the denial of a FAPE premised on the district's delay in evaluating the student and convening a CSE also generally aligns with the Second Circuit's decision in R.E. v. New York City Department of Education (694 F.3d 167). R.E. involved three cases challenging the students' IEPs, rather than the district's obligations to evaluate or the students' eligibility, but the Court did not explicitly limit its holding regarding prospective analysis to only those students who have previously been determined to be eligible (694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral

description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]). Here, the parents referred the student to the CSE in writing on May 11, 2015 (Parent Ex. C). It was not until November and December 2016 that the district began to conduct evaluations of the student (see Dist. Exs. 6 at p. 1; 7 at p. 1; 8 at p. 1). The CSE did not meet until January 31, 2017 (see Dist Exs. 1; 3; 4).

placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]; see Application of the Bd. of Educ., Appeal No. 18-001; Application of a Student Suspected of Having a Disability, Appeal No. 16-011). Since R.E., the Second Circuit has continued to emphasize the importance of limiting a FAPE analysis to include a review only of the information "reasonably known to the parties at the time of the [parents'] placement decision" (R.E., 694 F.3d at 187; see J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 220 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F3d 68, 81 [2d Cir. 2014]). The Second Circuit's reasoning is generally applicable in this context, where the district failed to evaluate the student in a timely manner. As the parents were compelled to unilaterally place the student for the school year when confronted with the district's failure to evaluate the student—a failure that the IHO found amounted to a denial of a FAPE—allowing the district to defeat the parents' reimbursement claim by belatedly determining that the student was ineligible would be inequitable.

B. IDEA Eligibility

It is unnecessary to reach the parties' positions with respect to the issue of the student's eligibility because, as described herein, the evidence shows that the parents are entitled to their requested relief due to the IHO's final and binding determination that the district denied the student a FAPE on other grounds. Moreover, the passage of time and a preference for a properly composed CSE to develop a student's program—or consider the question of eligibility—weighs against making findings on the topic when it is not necessary to grant the parents' requested relief. In particular, it has been close to two years, including one full school year, since the CSE last met to consider the student's eligibility under the IDEA in January 2017. Further, the hearing record does not reflect how the student performed over the course of the 2017-18 school year or how the student is currently functioning.

Nonetheless, some discussion of IDEA eligibility is warranted in this matter, in part because there is testimony in the hearing record suggesting that the CSE may not have fully grappled with information required by State and federal regulations concerning the student's potential eligibility for special education as a student with a learning disability (see Tr. pp. 35-36, 83-84, 123-27).

A learning disability, according to State and federal regulations, means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10]). A learning disability "includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][i]). A learning disability "does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of an intellectual disability, of emotional disturbance, or of environmental, cultural or economic disadvantage" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][ii]).

While many of the eligibility classifications require a determination that a student's condition "adversely affects [the student's] educational performance" (34 CFR 300.8[c][1][i]; [3],

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

In addition to drawing on a variety of sources including "aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]), federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).[8] Finally, when determining eligibility for a student suspected of having a learning disability, the CSE shall prepare a written report containing specific documentation and certification(s) in writing as to whether the report reflects each member's conclusion or, if not, a separate statement presenting the member's conclusion (8 NYCRR 200.4[j][5]; see 34 CFR 300.311).

Accordingly, in the event a CSE considers the student's eligibility in the future, the CSE is reminded that, when considering the eligibility of a student for the educational classification of a student with a learning disability, the definition and procedures summarized above should be considered.

VII. Conclusion

Based on the foregoing, the IHO's determinations that the district failed to offer the student a FAPE for the 2016-17 school year, that placement of the student at Windward was reasonably calculated to meet his educational needs, and that equitable considerations warrant reimbursement

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

for the costs of the student's tuition at Windward for the 2016-17 school year are final and binding on the parties. However, the IHO's determination limiting the award of tuition reimbursement to cover the period of time starting in September 2016 and ending January 31, 2017 is modified. The parents are entitled to reimbursement for the costs of the student's tuition at Windward for the entire 2016-17 school year.

I have considered the parties' remaining contentions and find that I need not reach them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 19, 2018 is modified to require the district to reimburse the parents for the full cost of the student's attendance at Windward during the 2016-17 school year.

Dated: **Albany, New York**
September 17, 2018

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SARAH L. HARRINGTON
STATE REVIEW OFFICER