



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-101

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

Appearances:

Gina DeCrescenzo, PC, attorneys for petitioners, by Gina M. DeCrescenzo, Esq.

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, 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 determined that the educational programs respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2015-16, 2016-17, and 2017-18 school years were appropriate. 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 has received diagnoses of attention deficit hyperactivity disorder (ADHD), specific learning disorder with impairment in reading, moderate severity, and major depressive disorder, single episode, moderate, with anxious distress (Dist. Exs. 10 at p. 1; 4 at p. 1; 19 at p. 5).

By letter to the district dated January 19, 2014, during the 2013-14 school year (first grade), the parents referred the student to the CSE and requested that she be evaluated for a possible "language and/or learning disability" (Dist. Ex. 22). On February 24, 2014, the student began

receiving response to intervention (RtI) reading services (Dist. Ex. 3 at p. 1).¹ In response, the district obtained consent to evaluate the student and between February and April 2014 conducted a social history, a speech-language evaluation, a psychological evaluation including a classroom observation, an academic evaluation, and a reading assessment (Dist. Exs. 11-14; 16; 23-25; 27-28).

A CSE convened on April 29, 2014, and determined the student was not eligible for special education services because her "overall cognitive ability" was in the average range, academic testing resulted in scores between the high average and low average ranges, her speech-language abilities were in the average range, and she was "responding to" the AIS reading services (Dist. Ex. 3 at p. 1). The CSE agreed to reconvene in approximately six weeks to "revisit" the matter (id.).

A continuation of the initial eligibility determination meeting was scheduled for June 6, 2014 (Dist. Ex. 32).² On that date, the CSE reconvened and reviewed a letter from the student's developmental pediatrician indicating a medical diagnosis of ADHD (Dist. Exs. 4 at p. 1; 10 at p. 1; 34 at p. 1). The June 2014 CSE determined that the student was eligible for special education services as a student with an other health impairment and recommended that the student receive 10 hours of integrated co-teaching (ICT) services (Dist. Ex. 4 at pp. 1-2, 7).

In October 2014, the student was referred for an occupational therapy (OT) evaluation, which was conducted on January 5, 2015 (Dist. Exs. 5; 17; 36-41). On February 25, 2015, the CSE reconvened to review the OT evaluation, which identified weaknesses in visual motor and visual spatial skills as well as sensory processing deficits (Dist. Ex. 6 at pp. 1, 3, 6; see Dist. Ex. 17).³ The CSE recommended the addition of one 30-minute session of OT per week in a small group (2:1) for the remainder of the 2014-15 school year (id. at pp. 1, 8). On the same date, the CSE conducted an annual review to develop the student's IEP for the 2015-16 school year (third grade) (Dist. Ex. 7). In addition to the evaluative information considered by the April 2014 CSE, the February 2015 CSE considered the January OT evaluation and a February 2015 teacher report

¹ The parties refer to the services received by the student interchangeably as RtI or academic intervention services (AIS). As defined in State regulation, AIS consists of additional, supplementary instruction or support services designed to assist students in meeting State learning standards, and must be made available to students with disabilities, "provided that such services shall not include . . . special education services and programs" (8 NYCRR 100.1[g]). RtI is defined in State regulation as a multi-level educational approach to targeted academic intervention—adjusted and modified as the student's needs require—to provide systematic and appropriately intensive assistance to students who are not making academic progress at expected rates (8 NYCRR 100.2[ii][1]; see Response to Intervention – Guidance for New York State School Districts, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). State regulation further provides that a district may provide an RtI program in lieu of AIS (8 NYCRR 100.2[ee][7]). For purposes of consistency, this decision refers to the services received by the student as AIS.

² The hearing record reflects that the parents privately obtained a speech-language assessment in April 2014, which the student's mother testified she provided to the CSE at a June 2014 CSE meeting; the June 2014 IEP does not reflect that the evaluation was considered (Dist. Ex. 15; see Tr. pp. 1002-09; Dist. Exs. 4 at p. 2; 61 at p. 3).

³ Each of the IEPs for the school years at issue were developed by Subcommittees on Special Education; because the parents raise no claims in this regard, for purposes of this decision they are referred to as CSEs (see 8 NYCRR 200.3[a][1]; [c]).

(compare Dist. Ex. 7 at p. 3, with Dist. Ex. 4 at p. 2; see Dist. Exs. 17-18). The February 2015 CSE recommended one hour of daily ICT services in math and English language arts (ELA) and one 30-minute session of OT per week in a small group (Dist. Ex. 7 at pp. 1-2, 8). The February 2015 CSE also recommended a 12:1 teaching assistant for two hours daily to support the student in the classroom when the special education teacher was not in the classroom (id. at p. 8).

In November 2015, the parents obtained a private "Comprehensive Assessment Report" ("November 2015 assessment") due to concerns regarding the student's academic functioning (Dist. Ex. 19 at p. 1). The parents provided the report to the district in April 2016 (id.; see Tr. pp. 70-71, 1079-80).

On June 8, 2016, a CSE convened to develop the student's IEP for the 2016-17 school year (fourth grade) (Dist. Ex. 8). In addition to the evaluative information considered by the February 2015 CSE, the June 2016 CSE considered the November 2015 assessment, an April 2016 annual review of the student's academic progress, and an April 2016 OT annual review summary (id. at p. 3; see Dist. Exs. 20; 70). The June 2016 CSE determined that the student was eligible for special education services as a student with a learning disability and recommended that the student receive ICT services in math for one hour daily, science every other day for 45-minutes and social studies every other day for 45-minutes, a 12:1+1 special class in ELA for 1 hour and 30 minutes daily and 30-minute sessions of a resource room program in ELA (5:1) daily (Dist. Ex. 8 at pp. 1, 3, 14).⁴ The CSE also recommended one 30-minute session of OT per week in a small group (id. at p. 14). The IEP meeting summary indicated that the district "agreed to the completion of an assistive technology evaluation" (id. at p. 2).

The CSE reconvened on November 10, 2016 for a "requested review" (Dist. Ex. 9).⁵ The November 2016 CSE changed the recommendation for a 12:1+1 special class from ELA for 90-minutes daily to reading for 45-minutes daily, added a recommendation for ICT services in ELA for 45-minutes daily, and modified the resource room program from ELA to math for 30-minutes daily (id.). The IEP indicated that the student's special class reading instruction consisted of "individualized assistance from a special education teacher for most of" the 45-minute period, and group reading instruction "for part of" the period (id. at pp. 14-15).

Between February 2017 and March 2017, the district conducted an OT reevaluation, a classroom observation, a psychoeducational evaluation, and an educational evaluation as part of the student's three-year re-evaluation, and an assistive technology evaluation (Dist. Exs. 71-74, 78; see Dist. Exs. 53-55).

On June 7, 2017, the CSE convened to develop the student's IEP for the 2017-18 school year (fifth grade) (Dist. Ex. 63). The June 2017 CSE recommended that the student receive ICT

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

⁵ The hearing record reflects that in October 2016, the district requested the parents' permission to amend the student's IEP without a CSE meeting to reflect the parents' request at the June 2016 CSE meeting that the student receive a resource room program for math (Dist. Exs. 56-57). The district also sought to reflect a reduction in the amount of time the student spent in her ELA special class "due to [the student] only needing special class for reading instruction," indicating that she should receive writing instruction "in the general education classroom" (Dist. Exs. 56-57).

services in math for one hour daily, science every other day for 45 minutes, and social studies every other day for 45 minutes (*id.* at p. 10). The CSE also recommended ICT services in ELA for 45 minutes daily and a 5:1 special class in reading for 45 minutes daily (*id.*). The CSE also recommended a resource room program in math (5:1) for 30 minutes daily (*id.*). The CSE determined that OT should be discontinued but recommended 10 30-minute OT consultations in the classroom as a support for school personnel on behalf of the student (*id.* at pp. 1-2, 11-12). The CSE also added a number of supplementary aids and services, program modifications, and accommodations, assistive technology, and three hour-long assistive technology consultations "to support teachers and student" (*id.* at pp. 11-12).

A. Due Process Complaint Notice

By due process complaint notice dated July 19, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17 and 2017-18 school years (Dist. Ex. 1). With regard to the 2015-16 school year, the parents asserted that the present levels of academic performance in the February 2015 IEP failed to reflect the student's decoding skills (*id.* at p. 5). The parents further asserted that the annual goals contained in the February 2015 IEP did not adequately address the student's needs, specifically contending that the IEP did not contain any "meaningful goals" to address the student's decoding deficits (*id.*). Regarding the 2016-17 school year, the parents alleged that the June 2016 IEP failed to address the student's decoding needs (*id.* at p. 7). Next, the parents argued that the June 2016 CSE disregarded the November 2015 assessment recommendations for reading instruction, a math intervention program, metacognitive skills training, and assistive technology (*id.*). The parents also argued that the CSE failed to recommend a multi-sensory, systematic sustained, research-based reading intervention (*id.*). Furthermore, the parents asserted that while not recommended at the CSE meeting, the principal of the student's school informed the parents that the student would receive instruction using the Wilson method in her special class for reading; however, the student did not receive any instruction using the Wilson method until October 2016 (*id.* at pp. 7-8). In addition, the parents contended that the district "failed to provide Wilson with fidelity," leading to the student making "virtually no measurable progress" (*id.* at p. 8). The parents further asserted that the student did not receive 1 hour and 30 minutes of instruction in the 12:1+1 special class, instead attending the special class for 45 minutes and receiving writing instruction for 45 minutes "in an ICT session" (*id.*).

Relative to both the 2015-16 and 2016-17 school years, the parents argued that the district failed to provide "an appropriate program and placement" to address the student's needs (Dist. Ex. 1 at p. 11). Specifically, the parents argued that the district failed to provide the student with appropriate reading services and that the district did not "provide Wilson with fidelity" (*id.*). Additionally, the parents argued that the district failed to provide appropriate writing services for the student (*id.*). Next, the parents contended that the district failed to conduct an assistive technology evaluation (*id.*). The parents further contended that the district failed to provide metacognitive skills training and accommodations to address the student's executive functioning deficits (*id.*). Next, the parents alleged that the district failed to provide "appropriate annual goals" for the student, in that the district "abandoned" goals the student had not met, and did not recommend "specific" decoding goals that would "measure [the student's] progress at a fine grain level" (*id.*).

Turning to the 2017-18 school year, the parents alleged that the May 24, 2017 educational evaluation was "defective" and that the district failed to "thoroughly and meaningfully" assess the student's academic abilities and deficits (Dist. Ex. 1 at p. 12). The parents further alleged that the June 2017 CSE disregarded the November 2015 assessment and failed to adopt its recommendations for reading and math intervention programs and metacognitive skills training for the student (id. at pp. 9, 12). The parents also argued that at the time of the CSE meeting, the student "still had not received instruction from a Wilson certified teacher and was still without any multi-sensory, systematic, sustained, research-based, intensive reading intervention" as recommended in the November 2015 assessment (id. at p. 9). The parents also argued that the June 2017 IEP lacked a scientifically-based intervention to address the student's executive functioning deficits (id.). Next, the parents argued that despite evidence of the student's lack of meaningful academic progress, the CSE "kept largely the same program in place," "except for the addition of a 5:1 special class in reading" (id. at pp. 9, 12). The parents also argued that the 5:1 reading class had "no peer-reviewed scientific theory supporting its approach" (id. at p. 10). The parents further contended that the "program and supports" recommended by the June 2017 CSE were "not founded on peer-reviewed research" (id. at p. 12). With respect to the annual goals, the parents asserted that many of them "demonstrate[d] a complete lack of understanding regarding Orton-Gillingham, Wilson, and dyslexia" (id. at p. 10).

For relief, the parents requested provision of an appropriate IEP (Dist. Ex. 1 at p. 13). In addition, the parents requested reimbursement for privately obtained tutoring services and other "out of pocket expenses" (id.). The parents also requested reimbursement for the costs of the November 2015 assessment (id.). Additionally, the parents requested 1:1 explicit reading instruction through a multi-sensory, systematic, sustained, research-based, intensive reading intervention program for a minimum of 45 minutes per day (id.). Lastly, the parents requested a formal scientific research-based intervention program in math, metacognitive skills training, and keyboard training (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 6, 2017, which concluded on May 21, 2018 after six hearing days (see Tr. pp. 1-1316).⁶ In a decision dated August 2, 2018, the IHO concluded that the district offered the student a FAPE for the 2015-16, 2016-17, and 2017-18 school years (IHO Decision at pp. 2, 29-36).

Initially, the IHO noted the parents' argument that any post-IEP evidence could not be considered retroactively to support an IEP (IHO Decision at p. 29). The IHO stated that his determinations were made based on the information available to the CSE at the time the IEPs were created and not on retroactive evidence (id.). The IHO further noted that the precedent cited by the parents was not directly applicable to the instant case (id.). The IHO found that all post-IEP evidence in this case "either appropriately demonstrated what progress was made during a given school year or served as a predicate for future IEPs" (id.).

⁶ According to the IHO's decision, a prehearing conference took place on September 12, 2017 (IHO Decision at p. 1); however, no transcript or written summary of the prehearing conference was included in the hearing record, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

Turning to the 2015-16 school year, the IHO found that "[i]n light of the testing results and teacher perspectives available to the [February 2015] CSE," the absence of a decoding goal in the February 2015 IEP was not a "disqualifying defect" that would, by itself, amount to a denial of a FAPE (IHO Decision at p. 30). The IHO noted that testimony indicated that the student made progress in reading during the 2014-15 school year while receiving ICT services and AIS similar to those recommended by the February 2015 CSE (id. at pp. 30-31). The IHO also found that although the student's weaknesses in math and writing were not the focus of the parents' claims, these areas of concern were adequately addressed in the IEP (id. at p. 31). The IHO also noted that although the student had difficulty during the 2015-16 school year, subsequent circumstances did not alter his finding that the IEP was appropriate (id.). The IHO also found that the student's teachers' efforts during the 2015-16 school year to "mold teaching methods to fit the student's changing learning circumstances," specifically changing the emphasis of the student's reading instruction to phonics, to be appropriate (id. at p. 32). The IHO found that because specific teaching methods do not need to be specified on an IEP, the fact that the IEP was not modified was not a "FAPE denying defect" (id.).

In regard to the 2016-17 school year, the IHO noted the changes made to the student's program and found that based on the information available to the CSE, the June 2016 IEP was designed to address the student's needs and enable her to make progress in light of her disability (IHO Decision at p. 32). Next, the IHO found that based on testimony during the impartial hearing, the student made progress during the 2016-17 school year (id. at pp. 32-33). The IHO also found that although the CSE did not adopt all of the recommendations from the November 2015 assessment, the hearing record established "that attention was paid to decoding and that a suitable eclectic, multi-sensory approach was used" (id. at p. 33). The IHO further noted that "there is no requirement that any specific teaching methodology be contained in an IEP," and that "due deference" should be given to school staff's determination not to adopt all of the recommendations made by the private evaluator (id. at p. 34). In particular, the IHO found the testimony of the parents' expert witness to be unpersuasive with respect to their contention that the student required a specific methodological approach to make progress in reading, and noted that her views were not made known to the CSE (id.).

With respect to the June 2017-18 school year, the IHO found that the district offered the student a FAPE (IHO Decision at p. 35). Initially, the IHO noted the progress made by the student during the prior school year and found that based on the information available to the June 2017 CSE, including the November 2015 assessment, the June 2017 IEP provided a "suitably challenging education plan for [the student] that would permit the student to progress" (id. at p. 34). The IHO further found that with respect to the parents' assertion the student did not make progress, and despite the student performing below grade level in reading, math, and writing, the student made "appropriate progress during the 2017-18 school year given her learning disability" (id. at pp. 34-35). The IHO also found the student's special education teacher's approach to teaching reading—including using two systematic multi-sensory approaches rather than using one approach exclusively—was "appropriate and entitled to deference and need not be displaced by the recommendation of an outside expert—even a qualified one—who maintains that a specific reading program must be exclusively taught" (id. at p. 35).

In conclusion, the IHO found that while the parents were concerned with the methodological approach used to instruct their daughter, the hearing record did not reflect that the approaches preferred by the parents "would produce better results than the methods employed by

the District" (IHO Decision at p. 35). The IHO noted the use of "elements of acknowledged peer-reviewed methods," including research-based programs, "extensively employed by [the student's] teachers," and found that "[t]he teachers' use of elements from various methods—including the mentioned peer-reviewed programs—is within their sphere of educational expertise and is acceptable" (*id.*). Even if such a program would have led to better results, the IHO found that the district responded to the parents' concerns, conducted appropriate tests and evaluations, acted properly on the information available to it at each CSE meeting, was providing training for staff in specific reading methodologies, and that district staff was "diligent in its attempts to address [the student's] changing needs" (*id.* at pp. 35-36).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in finding that the district offered the student a FAPE for the 2015-16, 2016-17 and 2018 school years. Initially, the parents argue that the IHO erred in disregarding Second Circuit precedent and "suggesting its rule against retrospective evidence only applies to . . . tuition reimbursement cases."

With respect to the 2015-16 school year, the parents assert that the IHO erred in relying on "subjective testimony" from the student's teachers to find that the student made progress in reading prior to the February 2015 CSE meeting and that the February 2015 IEP contained adequate decoding interventions, despite offering less decoding support than the student's IEP from the previous year. With respect to the program developed by the February 2015 IEP, the parents argue that the goals in the IEP were inadequate, vague and insufficiently ambitious, and that the student could achieve the goals but still not make "sufficient progress" that was "appropriate in light of her circumstances." Next, the parents assert that the IHO incorrectly found that the recommended program contained appropriate specially designed instruction that was based on peer-reviewed research to the extent practicable. The parents assert that the IHO improperly relied on evidence of the student's receipt of AIS, which was not recommended on the IEP, in assessing the appropriateness of the February 2015 IEP. In addition, the parents argue that the IHO relied on testimony regarding changes to the student's AIS programming and special education program during the course of the school year which occurred without the parents' participation. Finally, the parents argue that the IHO "failed to support his conclusion" that the student made "meaningful progress" in decoding during the 2015-16 school year from receiving "ad hoc" forms of reading instruction.

In regard to the 2016-17 school year, the parents argue that the IHO "disregarded clear evidence" that the student struggled in decoding at the end of the 2015-16 school year. The parents further argue that the IHO erred in finding that the June 2016 IEP contained "appropriate programming" and decoding goals for the 2016-17 school year. Next, the parents argue that the IHO ignored "clear data and specific evidence" of the student's lack of progress and instead relied on subjective testimony from the student's teachers regarding "unsupported assessments of [the student's] overall success." In addition, the parents argue that the IHO "erred in crediting [the student's] teachers' . . . use of 'multi-sensory' programs for teaching [the student] decoding," despite evidence that the use of these programs were not implemented with fidelity, and were not consistent with each other. Similarly, the parents assert that the IHO erred in finding that the approach taken by the district constituted a "'suitably eclectic' multi-sensory approach," absent evidence that such an approach was "permissible or effective." The parents assert that the IHO erred in disregarding the testimony of their expert by mistakenly inferring that her testimony

regarding the student's lack of progress with the use of a specific methodology (Orton-Gillingham) meant that the student did not need such programming. The parents argue that their Orton-Gillingham expert explained that the student's lack of progress was due to the student receiving "too little" Orton-Gillingham instruction using the methodology. The parents also argue that the IHO erred in finding that the June 2016 CSE was not made aware of the student's need for instruction using Orton-Gillingham. The parents assert that the IHO "lacked basic knowledge of special education required to render a determination" and erred in "explicitly deferring to [the student's] teachers in their sphere of educational expertise."

Turning to the 2017-18 school year, the parents argue that the IHO erred in finding that the district offered the student a FAPE "for the reasons stated above." The parents further argue that the IHO improperly deferred to the student's teachers, rather than apply his own knowledge and expertise. As relief, the parents request that the student be provided with "evidence-based, 1:1, systematic, multi-sensory decoding instruction" and reimbursement for the cost of providing the student with reading tutoring.

In an answer, the district generally admits and denies the parents' allegations and argues that the IHO's decision should be upheld in its entirety. The district also affirmatively asserts that the parents' request for review should be dismissed because it does not comply with the form and content requirements set forth in State regulations. Next, the district argues that any claims on appeal that were not raised in the parents' due process complaint notice should be dismissed. With respect to the 2015-16 school year, the district argues that the parents' only challenge with respect to annual goals related to the absence of a decoding goal and that decoding was addressed in the IEP. Additionally, the district argues that the IHO's finding that the absence of a decoding goal, did not by itself, amount to a denial of a FAPE, should be binding on the parties because the parents have not appealed this finding. Finally, the district asserts that the hearing record does not establish that the privately obtained tutoring services were necessary or appropriate, such that the parents' request for reimbursement was properly denied by the IHO.

In a reply, the parents respond to the district's procedural defenses and argue that their request for review complied with the form and content requirements set forth in State regulations, and that the issues raised on appeal were set forth in their due process complaint notice, which identified all of the issues litigated during the impartial hearing and ruled on by the IHO.

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., 137 S. Ct. at 999). 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]).⁷

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. Compliance with Practice Regulations

The district asserts that the request for review should be dismissed for failing to comply with the regulatory requirements governing practice before the Office of State Review (see 8 NYCRR 279.4[a]; 279.8[c][2], [3]). More specifically, the district asserts that the parents' request for review does not contain a clear and concise statement of the issues presented and reasons for challenging the IHO's decision, and did not include proper citations to the hearing record.

State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request

⁷ 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).

for review "must conform to the form requirements in section 279.8 of this Part" (*id.*). Section 279.8 requires, in relevant part, that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or in the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; *see T.W. v. Spencerport Cent. Sch. Dist.*, 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (*J.E. v. Chappaqua Cent. Sch. Dist.*, 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting *Foman v. Davis*, 371 U.S. 178, 181-82 [1962]).

The district is correct that the parents' request for review does not set forth a clear and concise statement of the issues presented for review. In addition, the request for review lacks citations to the hearing record to support many of the parents' allegations that the IHO erred. While the issues for review were more detailed in the parents' memorandum of law, as the parents point out in their reply, it has long been held that a memorandum of law is not a substitute for a request for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3], [d]; *see, e.g., Application of a Student with a Disability*, Appeal No. 15-070).

In this instance, however, there is no indication that the deficiencies in the request for review prevented the district from being able to formulate an answer to the issues raised on appeal or that the district suffered any prejudice as a result (*see Application of a Student with a Disability*, Appeal No. 18-028; *Application of a Student with a Disability*, Appeal No. 18-012; *Application of a Student with a Disability*, Appeal No. 15-069; *Application of a Student with a Disability*, Appeal No. 15-058). Accordingly, I decline under these circumstances to exercise my discretion to dismiss the request for review. Although the parents' failure to comply with the practice regulations will not ultimately result in a dismissal of their appeal, the parents—and their counsel—are cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; *see Application of a Student with a Disability*, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice

requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). In light of the foregoing, the district's arguments regarding the form of the parents' request for review are dismissed.

2. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, the parents asserted a number of issues in their due process complaint notice which are not raised in their request for review. The following claims related to the 2015-16 and 2016-17 school years were not raised on appeal: (1) the district failed to provide appropriate writing services; (2) the district failed to conduct an AT evaluation with accompanying keyboard services; and (3) the district failed to provide metacognitive skills training and accommodations. In addition, the parents have not reasserted on appeal their claim that the present levels of academic performance in the February 2015 IEP failed to reflect the student's decoding skills. Additionally, the parents have not raised the following claims for the 2017-18 school year on appeal: (1) that the March 2017 educational evaluation was not appropriate; (2) that the 5:1 reading class had no peer-reviewed scientific theory supporting its approach; (3) that the district failed to recommend a scientific research-based intervention program in math; and (4) that the June 2017 IEP annual goals demonstrated a lack of understanding regarding Orton-Gillingham, Wilson, and dyslexia. To the extent the parents do not raise arguments on appeal regarding those claims which were alleged in the due process complaint notice and were not addressed by the IHO, those claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).⁸

3. IHO Qualifications

On appeal, the parents argue that the IHO erred in deferring to testimony from the student's teachers instead of applying his own knowledge and expertise to the issues raised at the impartial hearing. The parents further argue that the IHO erred in applying Second Circuit precedent regarding the permissibility of retrospective evidence.

Initially, the parents argue that the IHO improperly deferred to the testimony of the student's teachers and failed to exhibit the necessary knowledge and expertise with respect to the evidence presented at the impartial hearing.

An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and federal and State

⁸ While the district asserts that the parents' claims "should be dismissed to the extent that they were not raised in the due process complaint" notice, the district does not identify any claims, either in its answer or memorandum of law, that are raised by the parents on appeal that were not raised before the IHO. Absent any identified issues, it is unclear to which claims the district is referring. However, to the extent the parents raised claims in their memorandum of law that were not raised in any manner in their request for review—specifically, claims relating to the adequacy of the math goals contained on the June 2016 IEP and the student's progress toward these goals—I decline to address them further (see Application of a Student with a Disability, Appeal No. 17-108).

regulations, and legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). A review of the IHO's decision reflects that, although the IHO may have used less than optimal language in indicating that he deferred to the judgment of district witnesses, this language reflected the IHO's determination to weigh the testimony of district witnesses more heavily than that of the private evaluator (see IHO Decision at pp. 33-36).

Accordingly, to the extent the parents disagree with the conclusions reached by the IHO—or with the weight afforded to testimonial evidence presented at the impartial hearing—such disagreement does not provide a basis for finding that the IHO lacked the required knowledge or expertise. Overall, an independent review of the hearing record demonstrates that the parents had the opportunity to present their case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-295). In any event, I have conducted an impartial review of the entire hearing record and rendered an independent decision thereon (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

In addition, the parents' assert that in considering testimony by the student's teachers related to teaching methods used with the student which were not identified in the student's IEP, the IHO improperly considered retrospective evidence. The parents argue that under Second Circuit precedent, testimony may explain or justify what is written in the IEP but a district may not introduce testimony related to a different teaching method, not mentioned in the IEP, which would have been used with the student (R.E., 694 F.3d at 186-88). The parents argue that this testimony is retrospective and that the IHO impermissibly deferred to this retrospective testimony in finding that the district offered the student a FAPE for the 2015-16, 2016-17 and 2017-18 school years. Contrary to the parents' contention, the IHO explicitly noted that the adequacy of an IEP is to be judged on the information available to the CSE (IHO Decision at p. 29). For each school year at issue, the IHO determined that the IEP was reasonably calculated to enable the student to make appropriate progress based on the information available to the CSE (id. at pp. 31-34). To the extent the IHO also addressed the progress made by the student during these school years while receiving instruction incorporating methodologies not referenced on the IEPs (id. at pp. 31-35), in their post-hearing brief the parents explicitly asserted a lack of progress for each school year as a basis for their contention that the district did not offer the student appropriate special education programs (Parent Post-Hr'g Br. at pp. 17-20, 25-26, 28). Thus, the parents' argument that the IHO impermissibly relied on retrospective testimony to find the district offered the student a FAPE is without merit.

B. 2015-16 School Year

Turning to the merits of the parents' appeal, the parents allege that the IHO erred in finding that that student made progress with respect to reading during the 2014-15 school year and that the district offered the student a FAPE for the 2015-16 school year. The parents further allege that the program developed by the February 2015 CSE for the 2015-16 school year was inappropriate because it did not address the student's reading needs and it failed to provide appropriate annual goals targeting the student's decoding deficits.

1. Evaluative Information Considered for the 2015-16 School Year

Although not at issue, a discussion of the student's program recommendation for the 2014-15 school year and the progress the student made within that program is relevant in determining the appropriateness of the student's IEP for the 2015-16 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 June 2014 CSE recommended that the student receive ICT services along with supplementary aids and services, program modifications, and accommodations, as well as testing accommodations (Dist. Ex. 4 at pp. 7-8).⁹ The CSE reviewed the student's evaluations, teacher reports, classroom functioning, and background/parent information (*id.* at p. 1).

More specifically, the June 6, 2014 CSE "re-reviewed" information considered by the April 2014 CSE including a February 12, 2014 classroom observation report, a February 19, 2014 social history, a March 10, 2014 speech-language evaluation report, a March 11, 2014 initial academic evaluation report, and a March 10, 2014 psychological evaluation report (Dist. Exs. 3 at p. 2; 4 at 1-2; 11-14).¹⁰

The February 2014 classroom observation was conducted by a district school psychologist and took place in the student's first grade classroom during morning meeting (Dist. Ex. 13 at pp. 1-2). The school psychologist reported that when she entered the classroom the student was sitting on a rug near a rocking chair, holding herself up on the chair and flopping her body over (*id.* at p. 2). The class was engaged in an activity presented on the smart board (*id.*). According to the school psychologist, during the lesson, the student raised her hand to answer questions, sometimes self-corrected her answers, and made funny faces at a girl sitting next to her (*id.*). When the teacher asked the class questions during a math lesson, the student guessed answers, often incorrectly, or quietly mouthed the answers with her lips (*id.*). The school psychologist noted that at the end of the activity the student transitioned well back to her seat (*id.*). During a class discussion about character traits, the school psychologist observed the student doodling with a pencil and noted she

⁹ The CSE reconvened on February 25, 2015 and recommended that the student continue to receive ICT services for the remainder of the 2014-15 school year along with the addition of one 30-minute session of OT per week in a small group (2:1) (Dist. Ex. 6 at pp. 1, 8).

¹⁰ The initial academic evaluation report was dated March 11, 2014, although the academic testing took place earlier (Dist. Ex. 14 at p. 1). Additionally, although the report indicates testing took place on March 5th and 6th 2014, the report also indicates that testing was conducted over a three-day period (*id.* at pp. 1, 3).

was fidgety in her chair and played with her headband, eyelashes, and multiple pencils (id.). However, the school psychologist indicated that the student followed along with the lesson and colored in the appropriate answers (id.).

Next, the February 2014 social history form, completed by a district interviewer with the student's mother serving as informant, indicated that the student would likely need glasses as she got older, was sensitive to loud noises, and tended to get nervous before any type of change. (Dist. Ex. 11). The social history form detailed the student's early school problems including vision and hearing concerns in kindergarten due to misinterpretations of language and difficulty copying from the board, sound symbol concerns, and slow progress with sight words in first grade (id. at p. 3). At the time of the social history, the parent reported that the student had a "mixed" attitude toward school as she felt it was getting harder and she did not like to participate because she did not get the answers right (id.). Academic difficulties were noted in reading (decoding) and math (reversing numbers, subtraction) (id.). The social history form noted the student had recently begun receiving extra help at school for reading, notably that she received daily support from the special education teacher and classroom teaching assistant (id.).

According to the March 10, 2014 speech-language evaluation report, formal administration of the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) and the Peabody Picture Vocabulary Test – Fourth Edition - Form 4A, the student demonstrated average ability in listening, oral expression, and vocabulary knowledge at the one-word level (Dist. Ex. 12). Academic support and/or special education support in the area of language was not recommended (id.).

With respect to the March 11, 2014 initial academic evaluation, testing was conducted by a district educational specialist in a 1:1 setting (Dist. Ex. 14 at p. 3). According to the educational specialist, during testing, the student needed constant redirection to stay on task (id.). When starting a new subtest, the student required the directions repeated several times (id.). In addition, the student needed reminders to stay seated and to complete the task at hand (id.). Occasionally, when the student heard a noise from the building, she initiated off task conversation (id.). As a result of these distractions, both verbal and nonverbal redirections were given (id.). Based on the student's performance on the reading, mathematics, and writing composites of the Woodcock Johnson III Tests of Achievement (WJ-III), the educational specialist reported that the student's academic skills and ability to apply those skills were within the average range (id. at pp. 1-2). However, she also noted that the student's fluency with academic tasks was low average (id. at p. 2). According to the educational specialist, the student's score on the reading fluency subtest was voided as the student skipped numerous questions (id.). The educational specialist indicated that on this subtest when the student read a sentence and came across a difficult word, she did not try to use reading strategies to figure out the word (id.). Instead, she chose to skip the question (id.). Due to this discrepancy, the student's score on the reading fluency subtest was not represented in her overall performance (id.). The educational specialist reported that the student scored the highest on the calculation and writing samples subtests of the WJ-III (id. at p. 3). The initial items on the calculation subtest required the student to write numbers that were presented verbally (id.). The next items required the student to follow basic addition and subtraction problems, presented both horizontally and vertically (id.). The educational specialist noted that during this subtest the student relied mostly on her fingers to help solve the problems (id.). On the writing subtest, the initial items required the student to fill in the sentence with an appropriate missing word, which according to the educational specialist was something that the student completed with ease (id.).

The next items required the student to look at a picture and write a complete sentence telling about the picture (*id.*). The educational specialist noted that although the student scored in the high average range for writing samples, she scored in the low average range on the writing fluency subtest, which was the student's lowest score of all the subtests (*id.*). The educational specialist indicated that the writing fluency subtest was timed and provided the student with three words that she needed to use in a sentence (*id.*). During administration of the subtest, although the student read all three words and then began writing her sentence, her sentences did not contain the provided words (*id.*). Furthermore, when the words were attempted she did not spell them correctly (*id.*).

According to the March 10, 2014 psychological evaluation report, completed by the district school psychologist, the student was referred for an initial evaluation by her parents as they "suspect[ed] that she ha[d] a language and/or learning disability" (Dist. Ex. 13 at p. 1).¹¹ The student's mother was particularly concerned about letter-sound relationships, and language-based math (*id.*). According to the school psychologist, the student's first grade teacher shared the parents' concerns (*id.*). The teacher reported that the student's number sense was very weak, and spelling and formulation of sentences were also areas of struggle (*id.*). The teacher further reported the student had difficulty focusing in class and rarely volunteered to participate (*id.*). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded a full scale IQ of 90, which the school psychologist reported was in the average range of cognitive functioning (*id.* at p. 3). According to the school psychologist, the student's overall perceptual reasoning abilities fell within the average range (standard score [SS] 94), while her scores on tasks of verbal reasoning fell in the low average range (SS 81) (*id.* at p. 5). The student demonstrated an area of strength related to her ability to process visual information quickly and efficiently (SS 115) (*id.* at p. 6). Her working memory skills were assessed to be in the low average range (SS 88) (*id.* at pp. 5-6). The school psychologist noted that during test administration, the student had a difficult time sitting still; she continuously tilted her head upward, turned her body around in her chair, pulled upward on the seat of her chair, stood up periodically, knelt on her chair, played with the test booklet and her pigtails, and put her chin inside her turtleneck (*id.* at p. 3). The school psychologist indicated that although the student was fidgety and appeared distracted during much of the test administration, results of the evaluation provided a valid estimate of the student's then current levels of cognitive functioning (*id.*).

In addition to the aforementioned assessments, the June 6, 2014 CSE considered the results of the Woodcock Reading Mastery Tests - Revised (WRMT-III) administered to the student on April 22, 2014 by the same educational specialist who conducted the March 11, 2014 initial academic evaluation (Dist. Exs. 14; 16). The educational specialist indicated that she administered the following subtests to the student: phonological awareness, rapid automatic naming, word attack, passage comprehension, and oral reading fluency (Dist. Ex. 16). According to the educational specialist, during testing, the student remained cooperative and eager to answer all of the questions presented; however, she required processing time and constant redirection (*id.*). In addition, the student displayed some off-task behaviors such as playing with her necklace/headband and was "constantly moving in her seat" (*id.*). The educational specialist

¹¹ The school psychologist who conducted the psychological evaluation testified that at the time of the evaluation, the student participated in services within the classroom such as computer-based programs to assess reading, and in February 2014, began participating in AIS for reading (Tr. pp. 24, 29, 35-36).

reported that although the student displayed some difficulties during presentation of subtests, she scored within the average range on all subtests that were administered (*id.*)¹² The educational specialist provided additional details about the student's subtest performance (*id.*). She noted that with regard to the phonological awareness subtest, the student performed well in the area of rhyme production and blending, yet she struggled with last-sound matching, and deletion (i.e., say pancake without the cake, say card without the d) (*id.*). During the deletion task, the student needed the questions repeated (*id.*). According to the educational specialist, the student attempted the questions several times, realizing that she was giving the wrong answer but could not provide the correct answer (*id.*). On the word attack subtest, the student was required to read nonsense words of increasing difficulty (*id.*). Here, the student made most of her errors at the end of the word (*id.*). She tended to add onto the word, pronouncing "ded" for the word "dee," and she changed the end sounds of the word, pronouncing "plim" for "plip" (*id.*).

In a private speech-language assessment, also conducted on April 22, 2014, the student was administered the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) (Dist. Ex. 15). The student scored in the average range in phonological memory (SS 101) and rapid symbolic naming (SS 95) and in the below-average range on phonological awareness (SS 88) (*id.* at pp 2-3). The student also scored in the average range on subtests measuring blending words, phoneme isolation, memory for digits, non-word repetition, rapid digit naming, and rapid letter naming (*id.* at pp. 3-4). The student scored in the below average range on a subtest which "measures the extent to which an individual can remove phonological segments from spoken words to create another word" (*id.* at p. 4). The evaluator noted that the student was consistent in deleting symbols but was inconsistent in deleting initial sounds and blends and final sounds in words (*id.*). The evaluator opined that the student exhibited a specific deficit in phonological awareness and working memory and recommended explicit phonological awareness and phonics instruction (*id.* at pp. 5-6).

2. Progress During the 2014-15 School Year

Turning to the progress the student made during the 2014-15 school year, with a focus on the student's reading and literacy skills, the hearing record contains several district measures of progress with respect to the first half of the 2014-15 school year.

The student's report card for the first marking period of the 2014-15 school year indicated that the student's performance on foundational reading skills and literature/informational text skills (comprehension) was below grade-level standards and expectations (Dist. Ex. 77 at pp. 1-2). The student's teacher also reported that the student's reading was below grade level (*id.* at pp. 1, 3). Her comments indicated that the student was working on decoding skills and applying decoding skills to text (*id.* at p. 3). The teacher commented that the student was good at retelling a story sequence, but that she needed to "take it a step further with inference and predicting " (*id.* at p. 3). The student's writing skills were also assessed to be below grade-level standards and expectations, as were her math skills (*id.* at pp. 2, 4).

¹² The WRMT-III report indicated that the student attained a standard score (SS) of 98 (45th percentile) on the rapid automatic naming (RAN) subtest, an SS of 90 (25th percentile) on phonological awareness subtest, an SS of 89 (23rd percentile) on the word attack subtest, an SS of 86 (18th percentile) on the passage comprehension subtest, and an SS of 87 (19th percentile) on the oral reading fluency subtest (Dist. Ex. 16).

The student's progress toward her IEP goals was assessed in December 2014 (Dist. Ex. 65). With respect to reading, the progress report indicated that the student was making less than anticipated progress toward a word attack goal that targeted vowel digraphs (*id.* at p. 1). However, the student was making satisfactory progress toward a goal that targeted increasing her reading decoding skills from a middle of first grade to a middle of second grade level (*id.*). The progress report indicated that the student was reading at an independent level G, which was approximately at the mid-first grade level (*id.*).¹³ The student was also progressing satisfactorily toward a reading comprehension goal, although the progress report noted that the student needed to be prompted to use comprehension strategies that had been taught and that staff was looking for her to be more independent in doing so (*id.* at p. 2). The progress report further indicated that the student was able to retell a story but had difficulty going beyond what was specifically stated in the text (*id.*).

A chart that tracked the student's guided reading levels showed that the student advanced from a level F in fall of the 2014-15 school year to a level G in winter of the 2014-15 school year (Dist. Ex. 80 at p. 1). A second guided reading chart showed the student moved from an independent reading level of E in October 2014 to an independent reading level of H at the end of January 2015 (Dist. Ex. 82 at p. 2; *see* Tr. p. 462).¹⁴ A February 2015 mid-trimester report showed that with respect to the behavioral aspects of learning, such as focus, participation, and following directions, the student was performing satisfactorily in her reading support class (Dist. Ex. 81 at p. 5; *see* Tr. p. 532). The report also stated that the student was continuing to work toward reading texts accurately and on improving her reading level (Dist. Ex. 82 at p. 5). According to the report, in phonics, the support class had been "focusing on consonant blends and word parts" and that familiarity with these led to "quick recognition and more accurate decoding when reading text" (*id.*). The report concluded that the student had made improvements toward her reading goals (*id.*). A language arts intervention progress report showed that for the first marking period the student was progressing satisfactorily toward a goal that targeted her ability to read CVC-e words (Tr. pp. 515-16; Dist. Ex. 82 at p. 6).

With respect to the student's progress during the 2014-15 school year, the student's second grade ICT special education teacher from September 2014 through March 2015 testified that the student "generally had a good year" and progressed satisfactorily on her goals (Tr. pp. 167-68, 170, 173-74). The student received daily reading instruction from the special education teacher for one hour, mainly in a small group (Tr. pp. 178-80). At the beginning of second grade, the special education teacher testified that in addition to other comprehension, decoding, phonics, whole-word reading, and fluency strategies, she used the Fountas & Pinnell guided reading system to assess students by levels (Tr. pp. 173-74, 177, 179-82). The special education teacher testified that guided reading is a reading program that assesses students' accuracy, decoding skills, fluency, and comprehension; moving up levels according to their ability to meet criteria for each level (Tr. pp. 174-75). According to the special education teacher, the student began the year at a guided reading level F, and achieved a level I by February 2015, which was approximately a one-year

¹³ The hearing record reflect that levels refers to the Fountas & Pinnell leveled literacy intervention program (*see* Tr. pp. 177, 444).

¹⁴ The first chart was completed by the student's classroom teachers (Tr. p. 492), while the second chart was completed by the student's reading teacher (Tr. pp. 451-52). The reading specialist testified that because running records are a snapshot, they can vary from day to day based on such things as a student's distractibility or background knowledge (Tr. pp. 510-11).

gain (Tr. pp. 174, 177). An academic summary prepared by the special education teacher reflected that the student's decoding was improving, and that she was "working on reading through the whole word and stopping to self-correct" (Dist. Ex. 18 at p. 1). The special education teacher testified that she also assessed the student's skills using "running records" to analyze errors and provide the student with direction regarding her decoding skills and assess comprehension skills (Tr. pp. 182-83).

According to the student's second grade ICT special education teacher, the student's progress was "inconsistent" in that she would progress then reach a plateau; repeating that pattern (Tr. pp. 183-84). Staff tried to assess why the student did not independently apply skills she was known to have, and whether it was due to her attending difficulties (Tr. p. 184). However, the special education teacher testified that based on her direct observation of the student's reading performance, the student made gains consistent with her progression from Fountas & Pinnell level F to I; specifically, that she accurately read more complex texts (Tr. pp. 184-85).

A district reading teacher testified that she began working with the student at the beginning of her second-grade year and provided the student with AIS for four days per week for 30 minutes in a small group using the leveled literacy intervention program (Fountas & Pinnell) (Tr. p. 447, 450-51, 475).¹⁵ She stated that the student was responsive to the leveled literacy program as evidenced by progress in her independent reading level (Tr. pp. 451-52; Dist. Ex. 82 at p. 2). The AIS reading teacher used running records to assess the student's progress during the 2014-15 school year (Tr. pp. 451-52; Dist. Ex. 82 at p. 2). The AIS reading teacher described running records as a "snapshot" of a student's strengths and weaknesses and explained that it provides "multiple pieces of information regarding a child's literacy progress" (Tr. p. 453-54). With respect to phonics, she testified that running records can provide a teacher with information regarding how a student is attempting to decode words (if they are using meaning, text or visual information), and if they are self-correcting their errors (Tr. p. 453). She also testified that running records provide information on text comprehension and a student's ability to combine that with their own background knowledge to develop inferences (Tr. pp. 453-54).

The AIS reading teacher reported that for each lesson she would work on phonics skills as determined by the lesson sequence for the leveled literacy intervention program (Tr. p. 472). She testified that she also worked on comprehension for every lesson and sometimes fluency (Tr. pp. 472-73). The group read a new text every day, therefore part of the lesson included previewing the new text and then reading the text with teacher support (Tr. p. 473). She recalled that the student participated well with her peers although at times she got distracted and some days she required more redirection than others (Tr. pp. 473-74).

The AIS reading teacher testified that during the student's second grade year she worked with her primarily on phonics and accuracy and noted that typically her accuracy did not interfere with comprehension (Tr. p. 498). Phonics instruction included working with word cards, building words, sorting words, and writing words using the alphabet linking chart and consonant digraph

¹⁵ By letter dated September 24, 2014, the district advised the parents that "based on multiple measures of student academic growth" that the student would be receiving additional academic support during the 2014-15 school year (Dist. Ex. 82 at p. 1). The letter informed the parents that the New York State Education Department required districts to provide academic intervention services to students who were struggling to meet grade level standards in reading (*id.*).

linking chart (charts used to associate key sounds with key words) (Tr. pp. 498-99). She recalled that she addressed CVC-e words with the student (Tr. pp. 501-02). The AIS reading teacher testified that in second grade the student made growth in the area of phonics (Tr. p. 503). She indicated that as of January 2015 the student had advanced to an independent reading level G (Tr. pp. 519-20).

The student's guided reading levels, as measured by both her classroom teachers and reading teacher, coupled with the testimony of the teachers who provided reading instruction to the student, show that with the support of ICT services, as well as four sessions per week of AIS in reading, the student was making progress (albeit inconsistently) in reading at the time the CSE convened in February 2015 (see Dist. Exs. 80, 82 at p. 2).

3. February 2015 IEP

In order to assess the appropriateness of the February 2015 CSE's program recommendation, a discussion of the student's needs as described in the February 2015 IEP, is necessary. In addition to the evaluations reviewed by the June 2014 CSE, the February 2015 CSE had an annual review—academic summary completed by the student's special education teacher available for review (Dist. Ex. 7 at pp. 3; see Dist. Ex. 18).¹⁶

The February 25, 2015 IEP developed for the 2015-16 school year, indicated that the student was reading at a guided reading level I and that her word decoding was improving (Dist. Ex. 7 at p. 5). According to the IEP, the student was working on reading "through the whole word and stopping to self-correct if the error did not make sense" (id.). The IEP stated that the student was encouraged to use comprehension strategies (and re-reading, looking back in the story, etc.) to assist her understanding of the stories she read (id.). The IEP described the student as having become more active in participating in small group reading activities (id.). The IEP also noted, under the reading section, that the student was receiving Tier 2 AIS reading support (id.). With regard to writing, the IEP indicated that it proved to be more difficult for the student as she lacked confidence in this area and would often go back to basic repetitive sentences and used only words that she knew how to spell (i.e., I like school. I like to read. I like to play) (id.). The IEP noted that the student often needed help organizing her thoughts in a logical, coherent manner (id.).

To address the student's academic weaknesses, the February 2015 CSE recommended that for the 2015-16 school year (third grade) the student receive one 60-minute session of ICT services daily for both ELA and math and one 30-minute session per week of OT in a small group (Dist. Ex. 7 at p. 8). The February 2015 CSE also added a recommendation for a 12:1 teaching assistant for two hours daily to support the student in the classroom when the special education teacher was not present (id. at p. 8). Goals developed by the February 2015 CSE targeted the student's ability to answer "wh" questions related to a mid-second grade level text; recount stories after reading a mid-second grade level text; spell words from content area subjects correctly; use appropriate grammar when writing; identify which operation to use to solve math word problems; add and subtract within 20 without using objects, drawings, or equations; organize written work on a page; and increase attending (id. at pp. 8-9). Recommended program modifications and

¹⁶ The student's special education teacher who completed the academic summary also attended the February 2015 CSE meeting (see Dist. Exs. 7 at p. 1; 18).

accommodations included checks for understanding, refocusing and redirection, breaking down directions into smaller units, and special seating arrangements away from distractions (id. at p. 8). The CSE also recommended the following testing accommodations: extended time and redirection and a flexible setting on lengthy tests (id. at p. 9). With respect to the services recommended in the February 2015 IEP, the district school psychologist opined that the program recommended for the student for the 2015-16 school year was appropriate (Tr. p. 68). She explained that the student had needs in the areas of reading, math, and writing and that the student was receiving ICT services in ELA and math to address the goals for those areas (id.). With respect to the student's decoding needs, the school psychologist testified that they were being addressed through AIS and that the focus of the reading support recommended by the February 2015 CSE was on comprehension, as recommended by her special education teacher (Tr. p. 64).

The district school psychologist confirmed that the 12:1 teaching assistant was added to the student's IEP to provide her with support in the classroom for times when the special education teacher was not present (Tr. p. 66). According to the school psychologist, the role of the teaching assistant was to provide the student with refocusing if needed and to keep the student on task and make sure that she understood what she needed to do (id.). The school psychologist opined that this was an appropriate service for the student (id.). She explained that the student did not need the teaching assistant in second grade because she was making progress, but that in third grade the expectations were much greater and there was more reading and writing as students moved into content areas (Tr. p. 135).

The student's second grade ICT special education teacher testified that she helped develop the academic goals for the student's February 2015 IEP, which are consistent with the annual goals included in the academic summary produced by the special education teacher (Tr. pp. 190-91; compare Dist. Ex. 7 at pp. 7-8, with Dist. Ex. 18). She indicated that the reading goals were moving toward the mid-second grade level based on the expectation that students should make a year's worth of progress (or three levels) and she wanted the student to read at a mid-second grade level (Tr. p. 191). In her academic summary of the student, the special education teacher indicated that the student continued to need special education support to address reading comprehension skills and the reading goals included on the IEP appear to address the student's comprehension of various texts (see Dist. Exs. 7 at pp. 7-8; 18).

A review of the student's reading goals included in the February 2015 IEP for the 2015-16 school year revealed there was no goal dedicated to decoding specific sounds or sound combinations (see Dist. Ex. 7 at p. 7). The special education teacher testified that there were no decoding goals on the student's February 2015 IEP for the 2015-16 school year because the student received instruction for her "weakness" with decoding during AIS and the team felt the student's difficulty with comprehension was preventing her from making progress (Tr. pp. 270-72, 275). She also testified that the student was receiving her special education in conjunction with AIS and that the student's mother wanted to maintain the AIS reading support (Tr. p. 192). Consistent with this explanation, the comments section of the IEP indicated that the student's reading support was working on decoding and special education support was working on comprehension (Dist. Ex. 7 at p. 1).

AIS is available to students with disabilities on the same basis as nondisabled students, provided such services are provided to the extent consistent with the student's IEP; however, according to the guidance, AIS does not include special education services and programs (see

"Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). Additionally, while certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), according to the State Education Department, such services should not be listed on a student's IEP (see id.). On the other hand, subsequent guidance by the United States Department of Education indicates that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]).

In this instance, the delivery of a reading program in a small group setting four days per week for 30 minutes per day appears to meet the definition of "specially designed instruction" (34 CFR 300.39[b][3]), and thus align with the guidance from United States Department of Education that it should have been included as a part of the student's IEP. However, in this instance, AIS was identified on the February 2015 IEP and the IEP also indicated that the AIS was working on decoding skills (Dist. Ex. 7 at pp. 1, 5). Additionally, the special education teacher's testimony explained that the CSE planned to address the student's reading needs in conjunction with AIS, which is in line with State guidance that the CSE review the student's program to coordinate additional reading instruction provided under AIS (see "Academic Intervention Services: Questions and Answers," at p. 20, supra). Still, the decision not to include a decoding goal on the February 2015 IEP was in error, as it is the CSE's responsibility to determine the supports needed to address the student's unique needs and the CSE should not have abdicated that responsibility by assuming AIS would address a specific need area. Under these circumstances, identifying AIS on the IEP, rather than including it as a recommended special education service, and failing to identify a goal targeting the student's needs in decoding, amount to procedural violations, and as there is no indication that they (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, I do not find a denial of FAPE on this basis.

C. 2016-17 School Year

With respect to the 2016-17 school year, the parents argue that the IHO erred in finding that the student made progress during the 2015-16 school year. The parents also argue that the IHO erred in finding that the decoding goal on the June 2016 IEP was appropriate. The parents assert the IHO further erred in finding that the reading instruction provided to the student was appropriate and that she did not require a specific reading program, and that to the extent the district provided the student with instruction using a specific reading program, it was not implemented with fidelity.

1. Progress During the 2015-16 School Year

With respect to the student's progress during the 2015-16 school year, the student's report card indicated that she remained below grade-level standards and expectations for foundational

reading skills, literature/informational text skills (comprehension), and writing (Dist. Ex. 77 at pp. 5-6). Teacher comments for the first marking period indicated that at that time, the student had shown solid comprehension within her reading level (id. at p. 7). However, her decoding was weak, and she did not consistently apply the strategies she learned (id.). The student often made visual errors (id.). The student showed various compensation strategies to demonstrate an understanding of a text (id.). Teacher comments for the second marking period indicated that a number of interventions were put in place to address the student's areas of need in reading and writing (id.). The student was still working on decoding and vowel strategies to improve fluency and then her comprehension (id.). The report card noted that the student was encouraged to generalize skills, something very challenging for her (id.). Teacher comments for the third marking period indicated that during the school year the student gained valuable reading strategies that she could build upon in fourth grade (id.). She read books among various genres and wrote narratives, nonfiction reports, and opinion pieces (id.). However, the student's reading level remained well below grade level and she required significant teacher prompts and intervention, as she was not applying taught strategies independently (id.). For marking periods one and two, teacher comments indicated that the student's weakness with reading was often reflected in math in that "problem solving and critical thinking type questions [were] much more challenging for her" (id. at p. 8).

A review of an April 27, 2016 annual review academic summary report, completed by the student's ICT special education teacher for the 2015-16 school year, indicated the student read at a guided reading level L, with 97 percent accuracy and 85 percent comprehension (Dist. Ex. 20). The summary indicated that during the 2015-16 school year, the student worked on phonics instruction, especially on vowel sounds (vowel pairs, spelling patterns, and discriminating short and long vowel sounds) (id.). The student was learning to self-correct errors that did not make sense rather than just continuing to read (id.). According to the report the student's skills improved "greatly," bringing up her overall accuracy percentage (id.). Other strategies the student learned but sometimes needed encouragement to use were reading through the whole word and comprehension strategies like going back into the story and re-reading (id.). The student was shy about reading in front of the whole class but felt more comfortable in small reading group (id.). The student contributed to group discussions and often made connections to the stories to assist in understanding (id.).

Next, review of a December 2015 AIS progress report indicated that during the first marking period of the 2015-16 school year, the student demonstrated some growth as a reader (Parent Ex. E). The report indicated that although the student's efforts were inconsistent, she demonstrated progress (id.). At the time of the December 2015 progress report, the student was reading below grade level expectations (id.). In learning about words, the student worked on recognizing words with consonant blends and silent letters (id.). When reading text, she struggled with accuracy in her oral reading (id.). When reading independently, the student did not consistently go back to correct errors but would do so when prompted and supported (id.). The student had been given a tracker to help guide her attention on the text, but she often chose not to use the tool unless specifically asked to do so (id.). When asked to retell what she had read, the student was able to give an accurate retelling and was able to add details to the retelling when prompted to look back and re-read if needed (id.). In addition, the student was able to discuss a character's feelings and motivation but benefited from teacher prompts to provide text details to support her thinking and to explain her thoughts more fully (id.).

Although it is unclear from the hearing record whether the December 2015 AIS progress report was available to or considered by the June 2016 CSE, the student's ICT special education teacher for the 2014-15 and 2015-16 school years (second and third grade), who attended the June 2016 CSE meeting, testified that the student received AIS in reading from a reading specialist during the 2015-16 school year (third grade) (Tr. pp. 213-214). The special education teacher further testified that at the start of the school year, assessments revealed that the student had regressed over the summer and she was at a level H (Tr. pp. 210-11). The special education teacher provided the student with 60-minutes of reading instruction per day in "reading groups" consisting of students with similar needs and strengths (Tr. pp. 211-12). She further testified that she continued to use the guided reading program and by the end of third grade, the student was at guided reading level K, one percent below achieving reading level L, which reflected approximately one year of growth (Tr. pp. 212-13). However, the special education teacher acknowledged that although the student "had moved up a level . . . she wasn't performing consistently . . . [s]he wasn't applying her skills independently" (Tr. p. 310). According to the special education teacher, in addition to the guided reading program, the student received "different reading strategies," including support from the AIS reading teacher (Tr. pp. 213-14).

The special education teacher further testified that during the 2015-16 school year, staff noticed that the student exhibited "more areas of weakness in decoding," and that she was not making consistent progress with respect to decoding (Tr. pp. 272, 285). The special education teacher testified that around January 2016, staff "adjusted" their instruction when they realized the student was not making the expected progress: she began pulling the student out of the classroom four times per week with one other student to provide instruction focusing on phonics and decoding; and the reading teacher provided the student with one session per week of "intensive decoding" instruction (Tr. pp. 275-77, 285-86, 315, 318-21, 335-36). In addition, the special education teacher testified that she used a specific reading program (Stevenson) with the student at the parents' request (Tr. p. 286). The special education teacher testified that overall during the 2015-16 school year the student made progress according to the Fountas & Pinnell leveled system that was the equivalent of the amount of progress a nondisabled student would be expected to make in the course of one year (Tr. pp. 327, 330-32). However, she characterized the student's progress over the course of the school year as "inconsistent," noting that the student "wasn't using her strategies consistently," which is why the district adjusted its instruction "to kind of fill in those gaps that she knew she was missing and those skills specifically" (Tr. pp. 324-25, 331).

The reading teacher who provided intervention services to the student during the 2014-15 school year testified that at the beginning of the 2015-16 school year, another reading teacher provided support to the student using the same Fountas & Pinnell leveled literacy intervention program (Tr. p. 474). Based on that teacher's report, the student did not respond as well to the instruction as she had in second grade (Tr. pp. 477-78). In the winter, the two reading teachers determined that the student was not making "adequate progress" and "met together with her classroom teachers in order to determine next steps" and "discuss other options to help [the student] to improve as a reader (Tr. pp. 479-80, 484-85). Taking into consideration the parents' request for phonics instruction, it was determined that the ICT special education teacher would provide "individualized phonics instruction" to the student four days per week using a specific reading program requested by the parents, and the reading teacher would provide reading instruction to the student one day a week on a 1:1 basis, using a "multi-sensory phonics teaching approach" (Tr. pp.

485-86, 527).¹⁷ Although the two teachers used different approaches, the reading teacher testified that the multi-sensory approach she used "mirrored" the instruction provided by the ICT special education teacher, in that the skills she was working on "were similar skills or skills that played off of the skills" the special education teacher was working on with the student (Tr. pp. 534-36). The reading teacher testified that as opposed to previous reading instruction, at this point she began focusing "solely on phonics" (Tr. p. 526). The reading teacher worked on a phonics skill until the student had achieved mastery of that skill, with each skill building on the ones before and "allowing for some spiraling back to review the skills that were taught previously" (Tr. pp. 487-88). Among the phonics skills addressed were "CVC words," "welded sounds," and "consonant digraphs" (Tr. pp. 487-88). Between January and May 2016, the student mastered several phonics skills (Tr. pp. 488-90; see Dist. Ex. 83 at pp. 7-9). The reading teacher acknowledged that the student "struggle[ed] to make progress in her third grade year" (Tr. p. 523). While the reading teacher hesitated to say that 1:1 instruction was necessary, she opined that "at that point in time it was phonics that was necessary" for the student (Tr. p. 528).

2. Evaluative Information Considered for the 2016-17 School Year

Before turning to the recommendations made by the June 2016 CSE, it is necessary to briefly consider the evaluative information available to the CSE. As noted previously, in addition to the information considered by the February 2015 CSE, the June 2016 CSE considered the November 2015 assessment, an April 2016 annual review of the student's academic progress (discussed above), and an April 2016 OT annual review summary, as well as teacher reports, classroom functioning, and parent input (Dist. Ex. 8 at pp. 1, 3; see Dist. Exs. 19; 20; 70).

A review of the November 2015 assessment report shows that the student was referred for evaluation by her parents and that, according to the student's mother, the student had longstanding difficulties with reading, spelling, and writing, as well as difficulties with math concepts and math fluency, despite multiple interventions (Dist. Ex. 19 at p. 1). The evaluator indicated the student's cognitive ability, as assessed by the Kaufman Assessment Battery for Children – Second Edition (KABC-II) was in the average range with no specific weaknesses noted (id. at pp. 4, 11). In addition, based on the student's performance on the Children's Communication Checklist, Second Edition (CCC-2) and parent reports the student's language skills were age and grade appropriate or better; she demonstrated adequate oral expression and language comprehension, and fast retrieval of information from memory (id. at pp. 4, 10, 19-20). The evaluator administered several achievement tests and concluded that the student's written expression, spelling, and math computation were all grade appropriate, and her understanding of math concepts was just slightly below the average range due to error-prone performance particularly on word problems read aloud and time/money problems (id.). The student's academic knowledge base for science, social studies, and humanities were all grade appropriate (id.).

However, the evaluator indicated, "[t]he one academic area in which [the student] demonstrate[d] clear difficulty even under optimal testing conditions such as [a] 1:1 situation [wa]s reading" (Dist. Ex. 19 at p. 4). The evaluator stated that the student's reading fluency was not an area of particular concern but further stated, that the student "ha[d] virtually no decoding skills"

¹⁷ The reading teacher's recollection was that the student's ICT special education teacher "called the parents to let them know about the changes in her program" (Tr. p. 527).

(id.). The evaluation report showed that the student attained including a standard score of 2 (very low) on the nonsense word decoding subtest of the Kaufman Test of Academic Achievement, Third Edition (KTEA-III) (id. at pp. , 20-21). According to the evaluator, the student sounded out one pseudoword and was extremely error-prone when attempting to sound out unknown words; she typically guessed a different word based on a few letters (id. at p. 4). The evaluator opined that the student's reading level was low enough that it negatively affected her reading vocabulary and reading comprehension (id.).

Specifically, with respect to reading instruction, the evaluator who conducted the November 2015 assessment recommended that the student be provided with explicit reading instruction, which she described as "systematic, sustained, research-based, intensive reading intervention at all levels of word analysis, with particular focus on orthography-to-phonology (letter-to-sound) connections" (Dist. Ex. 19 at p. 5). The evaluator indicated that "[g]ood reading programs teach explicit decoding rules in a series of steps that build upon one another" (id.). She recommended daily progress monitoring to ensure the student was learning the skills being taught, and stated that any efforts in and out of school needed to be streamlined so that the student was working on the same skills steps in both places simultaneously (id.). The opined that any program should be used systematically and slowly, with mastery of one lesson occurring before continuing to the next (id.). In addition, the evaluator recommended carrying out on-going progress monitoring covering the scope of the student's learning objectives to ensure she did not lose old letter patterns while learning new ones (id.). The evaluator opined that given the pervasiveness of the student's difficulties, she needed 1:1 instruction every day for at least one class period (id.). Further, evaluator indicated that the specific reading skills being taught to the student should be reinforced across the curriculum (i.e., using science words that have the same pattern as she is being taught in her 1:1 instruction) (id. at pp. 5-6). According to the evaluator, any intervention program chosen should be administered by a teacher whose training was in reading acquisition and who was trained with a specific intervention package (id. at p. 6). Several scientific, research-based intervention packages were listed as possible programs to use (id.). Additionally, the evaluator indicated that the student's IEP should be augmented to include multiple specific objectives for each of multiple reading goals, such that her progress could be monitored at a fine-grained level (id.). The evaluator recommended that the objectives be quantifiable and heavily loaded toward decoding rather than sight-word acquisition or fluency (id.).

3. June and November 2016 IEPs

The district school psychologist testified that the June 2016 CSE's review of the student's performance during third grade and consideration of the November 2015 assessment, led to "some further services being put in place" for the 2016-17 school year (Tr. pp. 73-76). The June 2016 CSE recommended a daily 12:1+1 ELA special class, a daily resource room program in ELA, and ICT services in math, social studies, and science (Dist. Ex. 8 at p. 14). According to the school psychologist, the CSE recognized the student's continued "struggle with areas of reading," and therefore recommended "a more intensive level of support" through the change in recommendation from ICT services in ELA to a 12:1+1 ELA special class (Tr. p. 76). The school psychologist further testified that the special class allowed for "more direct instruction in the areas that [the student] needed and a smaller teacher to student ratio" (id.). She also stated that the reading instruction provided in the special class used a "multi-sensory approach," which included "hands-on learning, auditory learning," that used "different aspects from a variety of educational areas to supplement instruction" (Tr. pp. 81, 143-44). Additionally, the CSE recommended the student

receive daily, small group (5:1) resource room services in ELA (Tr. p. 78). The June 2016 IEP noted that the parents disagreed with the recommendations of additional resource room and special class in the area of ELA (Dist. Ex. 8 at p.11).

The district school psychologist testified that at the November 2016 CSE meeting, reports indicated that the student had been participating in the special class for reading, and that she was primarily receiving that instruction individually (Tr. pp. 84, 145). According to reports, the student was responding to the approaches the special education teacher used (Tr. p. 84). She further testified that the special education teacher used "some aspects of the multi-sensory program" with the student to measure progress, and throughout the year conducted literacy assessments (Tr. p. 86). The November 2016 IEP was modified to reflect that the student would receive 45 minutes per day of ICT services for writing instruction, and 45 minutes per day in the 12:1+1 special class specifically to receive reading instruction (Dist. Ex. 9 at pp. 1-2, 14-15). The November 2016 IEP also changed the recommendation for resource room from ELA to math (id.).

Notwithstanding the recommendation on the June 2016 IEP for a 12:1+1 special class for one hour and 30 minutes daily, the special education teacher who provided the student's special class instruction during the 2016-17 school year testified that at the beginning of the school year, the student received support in the 12:1+1 class for "about 45 minutes or so, sometimes [up to] an hour"; she did not spend one hour and 30 minutes in the special class (Tr. pp. 789-90). The special class teacher testified that prior to the beginning of the 2016-17 school year, she met with the parents and the fourth grade general education teacher to discuss the instruction she would be providing to the student (Tr. pp. 798-99). The general education teacher testified that in the beginning of the year, "we" decided that the student would receive writing instruction in the ICT classroom and reading instruction focusing on decoding in the special class (Tr. pp. 559-60, 570-71). Accordingly, the analysis of the appropriateness of the recommendation will consider the level of reading instruction recommended on the November 2016 IEP, which reflects the program actually provided to the student at the beginning of the 2016-17 school year.¹⁸ Based on a conversation with the school principal, the parents believed that the student would receive 1:1 instruction within the context of the recommended special class (Tr. p. 1049). Although the CSE reconvened in November 2016 and created an IEP to reflect ICT for ELA for 45 minutes per day and special class reading instruction for 45 minutes per day, instead of the 1.5 hours of special class instruction recommended in the June 2016 IEP, the student's IEP did not reflect 1:1 reading instruction (see Dist. Ex. 9 at p. 1; Tr. p. 1049).

With respect to the parents' concerns that the decoding goal was not appropriate, the IEP included reading goals that required the student to apply phonics skills and word analysis skills to correctly decode words when presented with "reading narratives or specific information text from [the student's] content area subjects on the beginning of the 3rd grade level" with 95% success, fluently read fourth grade "level literature text and/or specific informational text" from content

¹⁸ The November 2016 IEP indicates that the student's "math and science teacher shared her impressions that [the] student is responding well to Resource Room support aimed at assisting her progress in these subjects" (Dist. Ex. 9 at p. 1). The student's general education teacher for the 2016-17 school year testified that the resource room program "was for math purposes" (Tr. p. 562). It is unclear whether this evidence reflects that the district was implementing the resource room program in a manner other than that indicated on the June 2016 IEP; however, this further supports the determination to consider the adequacy of the reading supports for the 2016-17 school year based on the recommendations contained in the November 2016 IEP.

area subjects with 85% success, and ask and answer questions demonstrating an understanding of text when "presented with narrative and/or informational text" from "content area subjects on the middle of the 3rd grade level" with 90% success (Dist. Ex. 8 at pp. 13-14).

Based on the above, and with particular concern with respect to the student's fluctuating reading scores and the continued gap between the student's independent reading ability, especially with respect to decoding, and her current grade level, the program recommended by the CSE was not reasonably calculated to result in progress in line with the student's abilities without additional supports. In particular, despite the progress made during the 2015-16 school year, the record reflects, as discussed above, that the student was receiving individual reading instruction one day per week and reading instruction in a group of two four days per week. Accordingly, while the district's assertion, that the recommendation for a 12:1+1 special class increased the intensity of academic supports, is true in reference to the program described on the February 2015 IEP, it does not reflect the program the student actually received during the second half of the 2015-16 school year.¹⁹ As the district relies on the progress achieved by the student to support the appropriateness of its recommendations for the 2016-17 school year, and the student only made what was described as inconsistent progress while receiving a more intensive level of instruction, the hearing record does not support a finding that the CSE's recommendation for a 12:1+1 special class, was reasonably calculated to enable the student to make progress in reading consistent with her abilities (see, e.g., C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014] [finding that the failure to consider 1:1 instruction when the hearing record established that it was necessary constituted a denial of a FAPE]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 140 [2d Cir. May 21, 2013]).

4. Methodology

The parents argue that the IHO misinterpreted the testimony of the student's private reading tutor and contend that the district failed to recommend a program based on peer-reviewed research including Orton-Gillingham based approaches. The parent further argues that the district failed to implement the Wilson reading program "with fidelity" and that the district did not present any evidence that its multi-sensory programs were based on peer-reviewed research.

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be

¹⁹ It does not necessarily reflect an increase from the amount of support the student received in the first half of the 2015-16 school year either, as the student was receiving four sessions per week of AIS in a small group prior to the change in January 2016 (Dist. Ex. 83 at p. 5).

responsive to a different methodology"). Although the Second Circuit recently recentered in favor of a parent who challenged lack of methodology in an IEP, the Court specifically noted that in that case "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, the CSE needed to sufficiently explain why the recommended program would be appropriate absent the designation of that methodology on the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017]).

The November 2015 assessment recommended that the student be taught with explicit reading instruction, which the evaluator described as "systematic, sustained, research-based, intensive reading intervention at all levels of word analysis, with particular focus on orthography-to-phonology (letter-to-sound) connections" (Dist. Ex. 19 at p. 5). The November 2015 assessment further indicated "[g]ood reading programs teach explicit decoding rules in a series of steps that build upon one another" (*id.*). The report identified several research-based intervention packages as being "good," including Wilson and Stevenson (*id.* at p. 6). In addition, the November 2015 assessment noted that given the pervasiveness of the student's difficulties, she needed 1:1 instruction every day for at least one class period (*id.*). Similarly, the private evaluator who conducted the November 2015 assessment testified the student needed "a good scientific research-based system focusing on phonics" and explained that as long as the student was making progress it could be provided in a small group setting (Tr. p. 1216). When asked about research related to Orton-Gillingham and the duration and frequency the student should receive in order to yield positive results, the evaluator responded, "Specifically for Orton-Gillingham, I don't know" (Tr. pp. 1298-1299). The evaluator further testified that she did not know the duration, frequency and intensity of instruction that the student received through the student's private reading tutor (Tr. p. 1299).

Testimony by a private tutor described Orton-Gillingham as the "gold standard" for teaching dyslexic students (Tr. p. 874). She described Orton-Gillingham as a "multi-sensory approach which means that children are seeing things, hearing things, feeling things all at the same time" (Tr. pp. 864-868, 875). The tutor indicated she had gone through extensive training in Orton-Gillingham methods (Tr. p. 867).

The private tutor initially evaluated the student in May 2015 toward the end of the student's second grade year and before her third grade year (Tr. pp. 883, 885).²⁰ She began tutoring the

²⁰ The hearing record reflects that the student began receiving private tutoring services using the specific Orton-Gillingham methodology desired by the parents in or around May 2015 and continued to receive them through the 2017-18 school year (Tr. pp. 883-85, 900-01, 904-05, 910, 912-13, 929-30, 1014-15). However, it is unclear the extent to which the district was aware that the student received these services during the school years at issue. Testimony from the student's special education teacher during the 2014-15 and 2015-16 school years indicated that at some point during the 2014-15 school year, the parent told her in a "brief conversation" that the parent was obtaining a private tutor to work with the student over the summer, but that while she was aware the student had received instruction using the methodology desired by the parents, she did not know the details of the tutoring or whether it continued into the 2015-16 school year (Tr. pp. 312-14). The special education teacher also indicated that she did not base her program on outside tutoring because the frequency of the tutoring could fluctuate; rather, she provided instruction based on her own assessments and her everyday instruction with the student (Tr. pp. 314-15). The student's general education teacher for the 2016-17 school year testified that the parents "provided us with E-mails to [the student's] tutors" but did not elaborate (Tr. p. 568). The private tutor indicated that she had "previous communications with some of [the student's] teachers"; however, she testified that while she had received permission from the parents to communicate with the student's teachers, she had no recollection of

student one time per week in spring 2015 using Orton-Gillingham (Tr. pp. 883, 899). During summer 2015 the student attended a summer camp run by the private tutor and received, among other things, 1:1 Orton-Gillingham reading instruction for 45 minutes per day (Tr. pp. 883-85). Since that time, the tutor continued to see the student for approximately one hour per week, using the Orton-Gillingham methodology (Tr. pp. 898, 910-12). The tutor opined that based on the student's profile and the use of Orton-Gillingham instruction, the student required Orton-Gillingham instruction more frequently than she was receiving it (Tr. pp. 915-16). The tutor acknowledged that the student was making less progress than expected but noted that the student had made gains and attributed her failure to make greater progress to an insufficiently intensive level of Orton-Gillingham instruction (Tr. pp. 898-904, 957-58). In addition, the tutor opined that the instruction should be provided during the school day rather than as tutoring after the school day when the student was already tired (Tr. p. 916). With respect to the reading instruction that the student was receiving in the classroom, the school psychologist testified that the reading instruction provided in the special class used a "multi-sensory approach," which included "hands-on learning, auditory learning," that used "different aspects from a variety of educational areas to supplement instruction" (Tr. pp. 81, 143-44). In addition, the student's third grade special education teacher indicated that because the student's progress was inconsistent—by January 2016, her instruction was changed to where the student "was receiving the Stevenson's sic four times a week and Wilson one time a week" (Tr. pp. 319-20). The teacher further noted that at the time she taught the student she was not trained in either the Wilson or Stevenson reading programs, but she used resources from Stevenson, while the AIS reading teacher used resources from Wilson (Tr. p. 292, 295). The special education teacher further conceded that she did not do specific formal measurements of progress related to her use of the Stevenson resources (Tr. pp. 327). Instead, she monitored the student informally and through her use of running records (Tr. 331-32). With regard to the student requiring an Orton-Gillingham based program, the hearing record does not support the parents' argument that the student required this particular methodology to the exclusion of other reading programs in order to improve her decoding skills. While the parents' complaints regarding the instruction provided to the student focus mostly on the lack of explicit systematic instruction in phonics, and the student's weakness in decoding skills, the district was required to address literacy, including reading, writing, listening and speaking skills within "a comprehensive and integrated literacy curriculum" aimed at ensuring that the student would acquire skills necessary to progress in the general education curriculum ("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>). Generally, while the CSE should consider what prior instructional methods and strategies had been utilized with the student to avoid reinstituting programs that would likely be ineffective based upon past experience, reading methodology is not listed on an IEP and reading teachers are expected to be "knowledgeable about developmentally appropriate and well-balanced instructional methodologies in reading" (*id.*). Neither the November 2015 assessment nor the private reading tutor's testimony limit the available options to one specific methodology, nor does the student's past experiences show that any particular methodology should have been avoided. Under these circumstances, it was appropriate for the district to leave the selection of an appropriate reading methodology to the teachers providing the student's reading instruction.

providing the district with her test results (Tr. pp. 901, 950-52).

Next, with respect to the parents' argument that Wilson was not implemented with fidelity, State and federal regulations require, in part, that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (34 CFR 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). According to the Official Analysis of Comments to the federal regulations, the IDEA

requires special education and related services, and supplementary aids and services, to be based on peer-reviewed research to the extent practicable. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.

(Statement of Special Education and Related Services, 71 Fed. Reg. 46664-65 [Aug. 14, 2006]; see 20 U.S.C. § 1414[d][1][A][i][IV]).

While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that the Wilson Reading System must be used "with fidelity" or exclusively in order to provide a FAPE and finding that the incorporation of aspects of Wilson instruction as part of a balanced literacy program was permissible]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not appropriate because it provided for an eclectic program and holding that the district's offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]).

With respect to the 2016-17 school year, based on a conversation with the school principal, the parents believed that the student would receive reading instruction from the special class reading teacher utilizing the Wilson reading program (Tr. pp. 1046-47). The parent testified that she was looking for a sequential, research-based program to teach the student how to read (Tr. p. 1050).

Testimony by the student's fourth grade reading teacher in the 12:1+1 special class indicated that she worked with the student individually instead of in a whole class group because she did not have any other students who could be appropriately grouped with the student (Tr. p.

775). At the time she worked with the student, the teacher was being trained in Wilson instruction and she had materials from the program (Tr. p. 775). The teacher testified that she began using the Wilson reading program for the student at the "end of September, very beginning of October" 2016 (Tr. p. 801). The teacher indicated she worked with the student using sound/symbol cards, reading passages specific to the work on decoding and comprehension, drills and review as necessary (Tr. p. 775). Furthermore, the special class teacher testified that she used the Wilson materials as specified by Wilson at the recommended frequency and duration (Tr. p. 835). By deciding to use components of Wilson, the reading teacher did not adopt the parents' position that the student should have only been taught using Wilson, and the reading teacher's use of components of Wilson is not a failure to implement the IEP (see A.G., 2017 WL 1200906, at *9-10).

D. 2017-18 School Year

Although not explicitly stated in the parents' request for review, the parents' allegations with respect to the 2017-18 school year focus overall on whether the student made progress during the 2016-17 school year and whether the program recommendation for the student's 2017-18 school year was appropriate. The parents also allege that the student's reading program was not implemented appropriately.

1. Progress During the 2016-17 School Year

With regard to the student's progress during the 2016-17 school year, the district assessed the student's progress toward her IEP goals three times during the 2016-17 school year, in December, March, and June (Dist. Ex. 67). The June progress report showed that the student was "progressing satisfactorily" on reading goals related to her ability to apply phonics skills and word analysis skills to correctly decode words; read fourth-grade literature and/or content area informational text fluently with accuracy at an appropriate rate; and explicitly refer to text at a mid-third grade level to answer questions in content area subjects (id. at p. 1). Teacher comments indicated that the student had grown confident in using the strategies she had learned to decode passages but also noted that the student rushed through reading and at times missed or replaced words (id.). The June 2017 progress report indicated that the student was making less than expected progress on writing goals related to spelling and grammar (id. at p. 2).

The student's report card for the 2016-17 school year indicated that the student's foundational reading skills and literature/informational text skills (comprehension) were progressing and that the student was "approaching proficiency toward grade-level standards and expectations" (Dist. Ex. 77 at pp. 9-10). This was in contrast with the previous two years in which the student's reading skills were characterized as below grade level standards and expectations (compare Dist. Ex. 77 at p. 10, with Dist. Ex. 77 at pp. 2, 6). For the June 2017 marking period, the report card indicated that the student's performance was consistent on ELA standards related to knowing and applying word analysis skills, asking and answering questions using details and text evidence, identifying a theme or main idea using text evidence, citing evidence to identify the authors purpose and theme, and exhibiting effort and focus on learning in reading (Dist. Ex. 77 at p. 10). The student's performance was inconsistent on standards related to reading grade-level text accurately and fluently to support comprehension, making inferences based on text evidence, and applying spelling, grammar, and punctuation conventions (id.).

The student's 12:1+1 special class reading teacher testified that during the 2016-17 school year she provided the student's special class ELA instruction individually on a daily basis for approximately 45-60 minutes (Tr. pp. 774, 781, 789, 798). Specifically, the special class reading teacher indicated that she addressed the student's difficulty with decoding and primarily used the Wilson program with her (Tr. pp. 775, 833-35).²¹ She further testified that she selected the Wilson program to use with the student in part at the parents' request, and also based on her prior experience with the student having the same type of instruction (Tr. p. 804). The special class reading teacher testified that the Wilson program "goes back to the basics" of reading skills, including learning the sounds that correlate to each letter, reading single sentences in isolation, and writing to dictation to assess the student's confidence and accuracy (Tr. pp. 782-83). During the course of the school year, the student was required to read longer passages to the special class reading teacher, who then asked the student questions to assess her knowledge of vocabulary and comprehension (Tr. pp. 783-84). According to the special class reading teacher, she used Wilson materials with the student such as a notebook, sound/symbol cards, and reading passages specific to the program to work on the student's decoding and comprehension (Tr. pp. 778-79, 830-31). She further testified that "each day" the student completed drills, and if necessary, reviewed "anything" the student needed extra help with before "moving on" (Tr. p. 779).

The student's reading instruction was provided individually, because there were no other students in the class with whom the student would be appropriately grouped (Tr. p. 775).²² She testified that she did not ask the CSE to modify the student's IEP to reflect the provision of 1:1 Wilson instruction, because the service was still being delivered in the 12:1+1 special class (see Tr. pp. 808-14).

To assess the student's progress, formally on three occasions during the 2016-17 school year, the special class reading teacher administered "running records," which she described as individual assessments of a student's reading level (Tr. p. 780). According to the special class reading teacher, the student progressed from a level J to a level M over the course of the year, indicating growth in her ability to read more in-depth text, decode, and answer comprehension questions independently (Tr. pp. 780-81). The special class reading teacher also observed that the student's confidence grew, she knew the "routine," and went through the passages, cards, and writing with less errors (Tr. pp. 782, 791-92). Additionally, the special class reading teacher testified that the student "move[d] up in steps in the Wilson program as we went through the year" (Tr. pp. 782, 818-19, 828). The ability to move up steps in the Wilson program indicated to the special class reading teacher that the student was recalling the skills that were necessary for her to be a more successful reader (Tr. p. 782).²³ With respect to the student's progress with the Wilson

²¹ The special class reading teacher stated that she had other resources in her class that she used when providing reading instruction, such as different passages, and cards that were "similar to Wilson" (Tr. pp. 824, 830-31).

²² The special class reading teacher testified that the other students in the 12:1+1 special class read approximately two to three grade levels below the student (Tr. pp. 776-77). Accordingly, the student received 1:1 instruction "[m]ost of the time" for the entire period (Tr. pp. 812-13). Furthermore, the student never received instruction in a group of 12 and was only grouped with other students four or five times over the entire school year (Tr. pp. 810, 815-16).

²³ The AIS reading teacher testified that using the Wilson program, a skill would be worked on until mastery of that skill was achieved, mastery being defined as the student being able to read 15/15 real and nonsense words

program specifically, the special class reading teacher testified that the student "was getting quicker with it, she was moving through steps" even through some steps—which focused on different skills—took more time to complete (Tr. p. 784). Overall, the special class reading teacher observed that the student's reading skills progressed, and she did not see "any regression by any means" (Tr. pp. 784-85, 792).

The special class reading teacher testified that the student's reading needs could have been appropriately met in "her ICT classroom" during the 2016-17 school year, because the student requested to do work in a group, and asked to go back to the ICT class or work with another student (Tr. pp. 785-87, 792, 795-96).

A district special education teacher who provided the student's ICT services and resource room program during the 2016-17 school year beginning in January 2017 also testified regarding the student's progress (Tr. pp. 351-55).²⁴ The ICT/resource room teacher opined that the student had a "very successful year" in that she was "well adapted," exhibited "really nice peer interactions," and was "very motivated," despite her struggles retaining information, and her need to have instruction repeated or presented in a different way (Tr. p. 359).

At the June 2017 CSE meeting, the ICT/resource room teacher reported that the student was "having a pretty successful year" with the accommodations provided, and that she had "a lot of success" (Tr. p. 374; see Dist. Ex. 63 at p. 1). She testified she felt the parents were concerned with how much progress the student was making in math and reading and that her test scores were consistently low in comparison to her general education peers (Tr. pp. 374-75). However, the ICT/resource room teacher testified that she presented Fountas & Pinnell data to the CSE, which showed the student was "making steady gains" in relation to the gains her peers were making, although she was not yet reading on grade level (Tr. pp. 375-76, 380-81; see Dist. Ex. 80). Specifically, according to a graph charting the student's overall achievement for reading, the student progressed from a Fountas & Pinnell level J to level M during the 2016-17 school year, which the ICT/resource room teacher testified was "expected growth" and reflected improvement from a beginning second grade level to a mid-third grade level (Tr. pp. 377-80; see Dist. Exs. 80; 81).²⁵ Therefore, based on the amount of progress the student had achieved, the special education teacher opined that the reading instruction provided to the student during the 2016-17 school year had been "successful" (Tr. p. 381).²⁶

correctly that required the use of that skill (Tr. pp. 487-89).

²⁴ The ICT/resource room teacher testified that she provided the student with ICT services in ELA for writing only, and that a different special education teacher provided the student's reading instruction in a special class setting (Tr. pp. 355-56).

²⁵ Review of the hearing record reveals that according to the district's "Independent Level Expectations for Reading," level "J" was within a second grade reading level and "M" was within a third grade reading level (see Dist. Ex. 81).

²⁶ The hearing record does not contain documentation of the progress for the 2016-17 school year similar to that developed for the 2015-16 school year (see Dist. Ex. 83 at pp. 7-9). Although the district is not required to maintain records of progress in any particular fashion, under the circumstances of this case where the fourth grade special class reading teacher identified that she primarily used the Wilson reading program with the student, it

According to the ICT/resource room teacher, during the 2016-17 school year the student received reading instruction in a self-contained classroom, which was "actually 1:1 reading instruction by another special education teacher," that was "more phonetic-based" (Tr. pp. 384-86). So, while she was not the only student in the classroom, she was "the only student working at that time with the teacher for direct instruction" because she was the only student who required it at that time (Tr. pp. 385-86).

During cross-examination the ICT/resource room teacher testified that according to Fountas & Pinnell monitoring, it was possible for a student to stay at a particular level or decrease in a skill area, such as decoding, while still showing overall advancement, if the deficit did not interfere with comprehension (Tr. pp. 402-04).

Testimony by the student's fourth grade ICT general education classroom teacher indicated that throughout the school year, the student read texts progressing in reading level and that "she was better able to make meaning from her text even if the words weren't 100 percent correct by the end the year" (Tr. pp. 565-66). Furthermore, the classroom teacher testified to the student's overall success and ability to keep pace with her nondisabled peers during the 2016-17 school year, and that the student gained confidence in academics over the course of the school year (Tr. pp. 577-79, 597, 600). However, she also testified that the student would not be able to independently read grade-level texts for social studies and math for fifth grade (Tr. pp. 577-79, 597, 614). The teacher also stated, "Decoding is the gap for sure, but I noticed that throughout the year she was making progress with that and also that her weakness in the area of decoding wasn't always affecting her ability to make meaning from the text and to understand what she (was) reading" (Tr. p. 614).

2. Evaluative Information Considered for the 2017-18 School Year

When developing the student's IEP for the 2017-18 school year (fifth grade) the June 2017 CSE reviewed updated assessments, teacher reports and input from the student's parents (Dist. Ex. 63 at p. 1). The updated assessments included an October 2016 social history, a February 24, 2017 classroom observation, a March 17, 2017 assistive technology evaluation, a March 24, 2017 educational evaluation, a March 27, 2017 psychological evaluation, and a May 19, 2017 occupational therapy reevaluation (Dist. Ex. 63 at pp. 1-3).

The February 24, 2017 classroom observation consisted of a checklist completed by the student's then fourth-grade ICT/resource room teacher (Dist. Ex. 72). The checklist included categories related to the student's classroom interaction with the teacher, work behavior, participation in classroom discussion, classroom interaction with peers, and general classroom function (*id.*). The form prompted the observer to check "yes," "no," or "not observed" for each task and included a space for comments (*id.*). Based on her observation of the student in a math class of 16-20 students, the ICT/resource room teacher responded "yes" for tasks related to classroom interaction with the teacher including "demands teacher attention," "cooperative with teacher," and "needs individual attention," adding the comment "for accuracy" (*id.* at p. 1). With respect to work behavior, the ICT/resource room teacher indicated that the student "beg[an] tasks promptly," "appear[ed] prepared and organized for activity," "follow[ed] oral instruction," and

would have been helpful for the district to maintain records of the student's progress in that program.

"works effectively in a small group, large group, and independently" wherein she followed directions well and sought help if needed (*id.*). In addition, the ICT/resource room teacher rated as "yes" tasks related to the student's participation in class including "tries hard," and "works at a reasonable pace," and for classroom interactions with peers including "interacts with peers appropriately," and "initiates social interactions" (*id.* at p. 2). With respect to general classroom function, the ICT/resource room teacher indicated that the student displayed an "appropriate" level of classroom activity and a "happy" temperament (*id.*). The teacher rated the following statements as "no": "excessive concern with achievement," "requires firm discipline," "refuses to follow instruction," "short attention span," "easily distracted," "works slowly," "gives up easily," "careless in work," and "disturbs others frequently" (*id.* at p. 1). The teacher commented that the student checked in appropriately as needed to ensure she was correct/on task and appeared focused and was working hard on the class activity (*id.*). However, she noted that the student consistently used a protractor upside down/backwards (*id.*).

In addition to the classroom observation, the CSE reviewed the results of the March 24, 2017 educational evaluation, which was also conducted by the student's ICT/resource room teacher (Dist. Ex. 74 at p. 1). Administration of the Wechsler Individual Achievement Test - Third Edition (WIAT-III) yielded the following composite standard scores (SS): basic reading 84, written expression 91, and mathematics 89 (*id.* at p. 2). With respect to basic reading, the student's ICT/resource room teacher reported that the student scored in the average range on the reading comprehension (SS 85) and pseudoword decoding (SS 90) subtests, but in the below average range on the word reading subtest (SS 78) (*id.*). For written expression the student scored in the average range on spelling (SS 87) and essay composition (SS 112) subtests and the below average range on the sentence composition (SS 80) subtest (*id.*). The ICT/resource room teacher reported that in mathematics, the student scored in the average range on the numerical operations (SS 85), math fluency addition (SS 101), and math fluency multiplication (SS 115) subtests, and in the below average range on the math problem solving (SS 81) and math fluency subtraction subtests (SS 84) (*id.*). On supplemental subtests the student received a standard score of 75 for oral reading accuracy and 76 for oral reading rate (*id.* at p. 6). Based on her assessment, the ICT/resource room teacher concluded that the student demonstrated average ability in the academic areas of oral language, written expression, and mathematical operations and fluency (*id.* at pp. 2, 4, 7). However, the ICT/resource room teacher noted that the student exhibited the greatest amount of difficulty in the areas of reading comprehension and fluency and overall reading skills (*id.*).²⁷

The CSE also reviewed the results of the March 27, 2017 psychological re-evaluation conducted by the district's school psychologist (Dist. Ex. 78). Administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) yielded a full-scale IQ of 92, which the school psychologist reported was in the average range of cognitive functioning (Dist. Ex. 78 at pp. 2-3). The school psychologist indicated that the student demonstrated overall average abilities with regard to verbal reasoning and processing speed (*id.*). The student's visual spatial skills, fluid reasoning abilities, and working memory skills were assessed to be in the low average range (*id.*).

²⁷ The special education teacher's summary included recommendations for a student with a different name; however, the teacher testified that the error did not affect the test scores that the student obtained or her recommendations for the student (Tr. pp. 367-68; Dist. Ex. 74 at p. 4).

3. June 2017 IEP

Turning to the June 2017 IEP, the CSE recommended that the student receive ICT services in math for one hour daily, science every other day for 45 minutes, and social studies every other day for 45 minutes (Dist. Ex. 63 at p. 10). The CSE recommended ICT services in ELA for 45 minutes daily and a 5:1 special class in reading for 45 minutes daily (id.). The CSE also recommended a resource room program in math (5:1) for 30 minutes daily (id.). The most notable difference in the program recommendation from the June 2017 IEP and November 2016 IEP is that the June 2017 CSE changed the student's special class in reading from a 12:1+1 special class to a 5:1 special class (compare Dist. Ex. 63 at p. 10, with Dist. Ex. 9 at p. 14).

The student's ICT/resource room teacher, who participated in the June 2017 CSE meeting, testified that the June 2017 CSE's recommendation "was a strong program going forward to fifth grade" (Tr. p. 391). After considering the evaluative information available to the CSE, her knowledge of the student and the parents' concerns, the ICT/resource room teacher testified that the recommended program for the 2017-18 school year would enable the student to continue to make the type of gains in reading she had exhibited during the 2016-17 school year (Tr. p. 392). The ICT/resource room teacher testified that she administered, scored, and reported the results of her administration of the WIAT-III to the student at the June 2017 CSE meeting (Tr. pp. 360-68; Dist. Exs. 63; 74). Specifically, the student achieved reading comprehension and decoding subtest scores in the average range, and a word reading subtest score in the below average range (Dist. Ex. 74 at p. 2). With respect to the 12:1+1 special class in reading during the 2015-16 school year (fourth grade), the ICT/resource room teacher testified that the student actually received 1:1 reading instruction because she was the only student receiving reading instruction at that time (Tr. pp. 385-386). The ICT/resource room teacher further opined that she disagreed with the CSE's recommendation to change the student's reading instruction from a 12:1+1 to a 5:1 special class because she believed that "the less restrictive environment could meet [the student's] needs" (Tr. p. 406). The ICT/resource room teacher opined that the CSE did not believe a more "restrictive" setting was necessary for the student but made the recommendation based on the parents' desire for smaller group instruction (Tr. pp. 404-08, 415-16).

The special education teacher testified that the change from a 12:1+1 special class in reading to a 5:1 special class in reading was made because of a discussion with the student's parents (Tr. pp. 794-795).

Similarly, the 12:1+1 special class reading teacher participated in the June 2017 CSE meeting by telephone and reported to the committee that the student was making gains, growing in confidence, becoming a stronger reader, and that her comprehension was "always good" (Tr. pp. 793-94). While she opined that the student could have received her reading instruction in an ICT setting, the special class reading teacher testified that the CSE's recommendation that the student receive reading instruction in a 5:1 special class was based on the parents' request for a smaller group setting (Tr. pp. 794-96). The special class reading teacher testified that she provided the student 1:1 reading instruction during the 2016-17 school year because she did not have any students who could be "appropriately grouped" with the student (Tr. pp. 773, 775). The teacher explained that the parents wanted to continue "with a more restrictive 1:1 type setting. So instead of a 12:1 we kind of brought it down to a smaller group" (Tr. p. 795).

Next, the parents assert that the annual goals in the June 2017 IEP were insufficient as they did not address the student's decoding deficits. A review of the reading goals included in the June 2017 IEP reveals that one goal targeted decoding words in reading narratives or specific informational text from the student's content area subjects on her instructional level with 85% success over 10 months (Dist. Ex. 63 at p. 9). The second reading goal addressed recognition/reading of high frequency words (id.). A third reading goal addressed reading fluency, and a fourth reading goal addressed the student's ability to identify main theme idea, provide five supporting details, and summarize course content text (id.).

Based on the above, and with particular concern regarding the severity of the student's needs with respect to decoding, the program recommended by the district was not reasonably calculated to result in progress in line with the student's abilities without additional supports and appropriate annual goals to address the student's decoding deficits. Similar to the 2016-17 school year, despite the recommendation for a 12:1+1 special class for reading, the record reflects, as discussed above, that the student was receiving individual reading instruction on a daily basis. Accordingly, while the district asserts the recommendation for a 5:1 special class was reasonably calculated to enable the student to make appropriate progress, and while the hearing record reflects overall progress in reading, similarly as with the 2016-17 school year, the hearing record does not contain sufficient evidence of progress to support the recommendation for a less supportive instructional environment in reading. As the district relies on the progress achieved by the student while receiving largely 1:1 instruction in reading, without more, the hearing record does not support a finding that the CSE's recommendation for a 5:1 special class was reasonably calculated to enable the student to receive educational benefits and make progress consistent with her ability.

4. Methodology

The parents argue that the district failed to offer an Orton-Gillingham based program that would have addressed the student's decoding issues for the 2017-18 school year. The parents further argue that the district failed to implement Wilson with fidelity and that the district did not present any evidence that its multi-sensory programs were based on peer-reviewed research.

Similarly as to the 2016-17 school year, the parents rely on the testimony of the private evaluator who conducted the November 2015 assessment and the student's private tutor; however, as discussed above, neither identified that the student required a specific program for reading instruction. Additionally, the student's special class reading teacher testified that she did not recommend that Wilson be specified on the student's June 2017 IEP because she "didn't feel that was the only way" the student could make progress, despite her use of elements of the Wilson program (Tr. pp. 821, 824, 830-31). Accordingly, a review of the hearing record does not support the parents' contentions that the student required an Orton-Gillingham based methodology in order to improve her decoding skills for the 2017-18 school year.

Next, with respect to the parents' argument that Wilson was not implemented with fidelity, the hearing record reveals that the student was taught using various reading methodologies during the 2017-18 school year. Testimony from the student's fifth grade special education teacher, who was also the student's reading teacher in the student's 1:1 pull-out reading class, indicated she attended numerous conferences related to reading instruction including workshops for multi-sensory based reading (Tr. pp. 665, 692-93). The teacher had training in the Orton-Gillingham method but had not been certified by the Orton-Gillingham Academy (Tr. pp. 665-66). The teacher

indicated she was being trained in the Wilson Reading program at the time she worked with the student and used "elements" of that program and elements from an approach called Preventing Academic Failure (PAF) (Tr. pp. 682, 698, 704-05). The special education teacher also testified that despite her knowledge that the trainers of the Wilson program did not recommend using other programs in conjunction with Wilson, she went against that advice and used elements of other reading programs because she was with the student every day and wanted to do "what's best" for the student, indicating that if she saw something from a different multi-sensory approach that worked with a student, she used it (Tr. pp. 703-04). Thus, based on the legal standards stated above, any lack of peer-reviewed research supporting the teacher's approach used in the implementation of the student's reading program is not a sufficient basis for finding a violation of the IDEA or attendant State regulations. Consequently, the parents' argument must be dismissed.

E. Relief

On appeal, the parents' request that the district be required to provide the student with "evidence-based, 1:1, systematic, multi-sensory decoding instruction" and that the district "compensate Parents for the expenses of providing [the student] with reading tutoring."

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]), and may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a

Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Relevant to calculating an award of compensatory additional services to place the student in the same position she would have occupied, the district's failures in this matter relate to an insufficient recommendation for reading instruction for the 2016-17 and 2017-18 school years. As discussed in greater detail above, although the recommendations included in the student's IEPs for the 2016-17 and 2017-18 school years did not recommend sufficient supports for reading, the student actually received more reading instruction than what was included in the IEPs (see Tr. pp. 385-386, 773, 775, 808-14, 1049). Additionally, the student made progress with those additional supports, advancing from a guided reading level J to a guided reading level M during the course of the 2016-17 school year (see Dist. Ex. 80 at p. 1). However, as of Spring 2016, the student's reading level remained two full grades below her grade level (see Dist. Exs. 80; 81). This indicates compensatory reading instruction may be warranted, especially as the private reading tutor testified

that based on the student's testing, she believed the student should be able to learn to decode and read fluently with proper instruction (Tr. pp. 887-89).

Initially, the district objects to the parents' request for reimbursement for the cost of private tutoring, asserting that the hearing record does not support that this service was necessary or appropriate. For one, the district points out that the testing conducted by the private tutor indicated that the student did not make progress. The student's percentile scores either decreased or remained consistent on the Woodcock Reading Mastery and Gray Oral Reading Test – 5th Edition, from July 2015 to January 2018 (Parent Ex. F at p. 1). The private tutor testified that these scores indicated that the student was making gains with respect to her grade equivalent, but that the gap between the student and her same-age peers was widening (Tr. pp. 902, 957-58); however, as noted above, the reading tutor testified that based on the student's testing, she believed the student should be able to learn to decode and read fluently with proper instruction (Tr. pp. 887-89). She also testified that she expects her students to gain at least two grade levels per year (Tr. pp. 903-04). Additionally, although the private tutor testified that she provided the student with reading instruction approximately one time per week for 60 minutes, she also testified that students should receive a minimum of two 40- to 60-minute sessions per week of Orton-Gillingham instruction on non-consecutive days (Tr. pp. 898, 947). Based on the above, although the student may have benefited from the private tutoring, the hearing record does not support an award of reimbursement. Nevertheless, the hearing record does support an award of compensatory reading services.

In their post-hearing brief, the parents requested 360 hours of compensatory 1:1 Orton-Gillingham tutoring, equivalent to one hour of tutoring per day during the past two school years (Parent Post-Hr'g Br. at p. 30). Considering the student did receive a benefit from the district's reading program, although not the benefit expected by the parents or the private reading tutor, and considering the student's current abilities and the expectations of the private reading tutor, the district is directed to fund the cost of two hours per week of reading instruction for the extent of one school year (equivalent to 72 hours of instruction) to be provided by the private reading instructor selected by the parent or, if the instructor is not available, another reading instructor mutually agreeable to the parties. The compensatory services are required separate and apart from any IEP services that the student may otherwise receive, and, therefore, the district and parents are free to schedule the compensatory services in a flexible manner, and may, by agreement, utilize school vacations and the summer months for delivery of the services.

VII. Conclusion

In summary, the evidence in the hearing record supports finding that the district offered the student a FAPE for the 2015-16 school year, but because of the student's inconsistent progress in reading with more reading supports in place than those recommended for the 2016-17 and 2017-18 school years, the district did not offer the student a FAPE for the 2016-17 and 2017-18 school years and the parents are awarded compensatory education for those school years.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated August 2, 2018, is modified, by reversing so much thereof as found that the district offered the student a FAPE for the 2016-17 and 2017-18 school years, and

IT IS FURTHER ORDERED that the district shall fund the cost of 72 hours of compensatory reading instruction for the student as described in the body of this decision.

Dated: **Albany, New York**
 October 13, 2018

STEVEN KROLAK
STATE REVIEW OFFICER