



The University of the State of New York

The State Education Department
State Review Officer
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No. 23-026

Application of a STUDENT SUSPECTED OF HAVING 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 West Genesee Central School District

Appearances:

Alvy Law, PLLC, attorneys for petitioners, by Vida M. Alvy, Esq., and Norma Francullo, Esq., of counsel

Ferrara Fiorenza PC, attorneys for respondent, by Susan T. Johns, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their requests for reimbursement for the cost of their daughter's private reading instruction and compensatory educational services, and further determined that the district correctly found the student ineligible for special education during the 2020-21 school year. Respondent (the district) cross-appeals from the IHO's determinations that it violated its child find obligations during the 2019-20 and 2020-21 school years and predetermined the eligibility determination and from the IHO's order that it reimburse the parents for a private evaluation and reevaluate the student. The appeal must be sustained in part. The cross-appeal must be dismissed.

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 was found eligible for special education as a preschool student with a disability but was declassified in November 2014 when she met all of her annual goals (Parent Ex. A ¶¶ 12, 13). According to the parents, they provided the student "with an extra year in [p]reschool since

they felt that she would not be prepared for kindergarten since she did not know her letters and sounds" (id. ¶ 14).

During the 2017-18, 2018-19, and 2019-20 school years the student received support in reading as part of the district's multi-tiered Response to Intervention (RtI) program (see Parent Ex. N at pp. 1-3; Dist. Exs. 4 at p. 1; 5 at pp. 1-2). On December 10, 2019, a privately obtained psychoeducational evaluation of the student was conducted by a private psychologist (Parent Ex. D).¹

On or about May 22, 2020, the parents received the December 2019 private psychoeducational evaluation report from the private psychologist (Parent Ex. A ¶ 25).²

By email dated September 3, 2020 (2020-21 school year-fourth grade) the parents provided a copy of the December 2019 private psychoeducational evaluation report to the district assistant director of special education and requested a CSE meeting (Parent Ex. G at p. 1). By email dated September 16, 2020, the parents provided a copy of the December 2019 private psychoeducational evaluation report to the district school psychologist (Dist. Ex. 9 at p. 1). A handwritten note on the bottom of the email indicated that on September 30, 2020, the school psychologist spoke with the student's mother, who advised that she wanted to proceed with a referral to the CSE (id.). By prior written notice dated October 1, 2020, the district requested consent to "conduct an evaluation to determine initial eligibility for special education services" (Parent Ex. H at p. 1). The district sought parental consent for an educational evaluation, record review, classroom observation and a social history (id. at pp. 1-2). The student's mother signed the consent form on October 2, 2020 and provided a copy to the district by email dated October 2, 2020 (id. at p. 3).

On October 14, 2020, the student was evaluated by a district special education teacher, who administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) and the Qualitative Reading Inventory-5 (QRI-5) (Parent Ex. I at pp. 4-5, 7-22; Dist. Ex. 14; see Dist. Ex. 12).

By notice dated October 23, 2020, the parents were invited to a CSE meeting to be conducted via telephone conference on November 6, 2020 (Dist. Ex. 13 at p. 1). The purpose of the meeting was an initial eligibility determination and the attendees listed were the assistant director of special education, the school psychologist, a special education teacher, and the student's remote regular education teacher (id.).

¹ The hearing record contains duplicate exhibits and duplicate pages in multiple exhibits. For purposes of this decision, only one version of a document will be cited in instances where two or more exhibits are identical in content.

² According to the amended due process complaint notice, the parents did not receive the private psychoeducational evaluation report until approximately May 22, 2020 (Parent Ex. A ¶ 25). Receipt in May 2020 is supported by other information in the hearing record; however, it appears that the parents' private psychologist was still communicating with district staff in preparation of her evaluation report as late as May 27, 2020 (Dist. Exs. 6 at p. 1; 7 at p. 1). However, the only date listed in the private psychoeducational evaluation report was the date the student was evaluated, therefore the document will be referred to as the December 2019 private psychoeducational evaluation in this decision (Parent Ex. D at p. 1).

On October 26, 2020, the student was observed in her remote fourth grade classroom for 40 minutes by the school psychologist (Parent Ex. I at p. 22; Dist. Ex. 15 at p. 1). On October 26, 2020, the parent was invited to a videoconference by the school psychologist to be held later that day (Parent Ex. R at p. 1). The meeting invitation also included the special education teacher who had evaluated the student on October 14, 2020 (id.). By email dated October 27, 2020, the parent thanked the school psychologist for meeting with her the day before and requested the student's "testing data" (id. at p. 2).

In an email dated October 30, 2020, the school psychologist indicated that she would provide the data requested by the student's mother and stated "[she] kn[ew] [thei]r recommendations were contrary to [the private psychologist]'s" (Parent Ex. U at p. 1). By email dated October 31, 2020, the special education teacher provided the parents with a copy of her report, a draft IEP, and thanked the parent for meeting with her and the school psychologist prior to the CSE meeting (Parent Ex. V at p. 1; see Parent Ex. I at pp. 7-10; see also Dist. Ex. 21).

By email dated November 2, 2020, the student's mother wrote to the private psychologist stating that she had learned the district would not be recommending special education services for the student (Parent Ex. V at p. 1). The student's mother further wrote that she was "really disappointed and want[ed] to continue to advocate at the meeting" (id.). The student's mother commented that "the data" she received from the district "ma[d]e[] her wonder how they c[ould] say [the student] d[id]n't need support with an IEP" (id.). In closing, the student's mother informed the private psychologist that the meeting would be held via telephone conference rather than videoconference (id.).

A CSE convened on November 6, 2020, which was video recorded by the district and audio recorded by the parents (Parent Ex. UU; Dist. Ex. 27). According to written minutes of the meeting, attendees included the parents, the private psychologist, the district assistant director of special education, the district school psychologist, the district special education teacher, and the student's fourth grade remote regular education teacher (Dist. Ex. 20 at p. 1). By prior written notice dated November 6, 2020, the district summarized the CSE's recommendation that the student was not eligible to receive special education services (Parent Ex. I).

In a letter dated June 23, 2021, the parents notified the district that, as a result of the district's "failure to classify [the student] and offer an appropriate program for her . . . for the past two school years," they were obtaining five weekly sessions of private Wilson reading instruction for the student and would see reimbursement of the costs thereof from the district (Parent Ex. C)

A. Due Process Complaint Notice

By amended due process complaint notice dated April 14, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (Parent Ex. A at p. 10).³

³ The parents filed an initial due process complaint notice on February 2, 2022 and the district responded to the parents' initial due process complaint notice on February 15, 2022 (see Parent Ex. B; Dist. Ex. 2).

The parents contended that the district violated its child find obligations by failing to identify, locate, and evaluate the student as early as first grade, the 2017-18 school year, which resulted in a denial of a FAPE to the student (Parent Ex. A at pp. 13-14). According to the parents, they voiced concerns regarding the student's lack of progress throughout her time in the district public schools (id. at p. 13). The parents further alleged that, due to the district's denial of a FAPE to the student, they were required to obtain private reading instruction for the student beginning September 20, 2021 (id. at p. 14).

Turning to the November 2020 CSE process, the parents raised a number of allegations related to the district's evaluations of the student (Parent Ex. A at pp. 10-12). The parents asserted that they gave the district a copy of the May 2020 psychoeducational evaluation report in September 2020 (id. at p. 10). According to the parents, the district failed to offer any objective data that contradicted the private evaluation, yet the CSE failed to follow the recommendations included in the evaluation report (id. at p. 11). The parents alleged that the district failed to evaluate the student in all areas of suspected disability, only assessing the student in the area of reading, failing to evaluate the student in written expression or language, and failing to conduct a social history evaluation, a physical examination, an observation, or a speech-language evaluation (id. at pp. 11-12). The parents asserted that these violations contributed to the CSE's eligibility determination and impeded the parents' opportunity to participate in the decision-making process (id. at p. 12). The parents further asserted that the November 2020 CSE predetermined its findings and results and committed multiple procedural violations of the IDEA, which rose to the level of a denial of a FAPE (id. at pp. 11, 12). According to the parents, the CSE improperly failed to find the student eligible for special education as a student with a learning disability and failed to provide appropriate special education supports and services to address the student's needs from 2019 onward (id. at pp. 10, 12-13).

As relief, the parents sought a declaration that the student had been denied a FAPE and an order directing the district's CSE to reconvene "to develop and implement an IEP that meets [the student]'s needs as identified in [the May 2020 psychoeducational evaluation report]," which included "1:1 direct reading instruction in a multi-sensory, structured[,] language-based program for reading for at least 60 minutes per day" by a teacher certified in the program (id. at p. 15). The parents further requested "compensatory 1:1 direct reading instruction in a multi-sensory, structured, language-based program, such as Wilson Reading Program or Orton-Gillingham" delivered by a teacher certified in the program (id.). The parents also requested reimbursement for the May 2020 psychoeducational evaluation as a matter of equity and for the privately obtained 1:1 reading instruction (id.). Lastly, the parents requested an independent educational evaluation (IEE) to be conducted by their chosen provider (id.).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on March 16, 2022 (Mar. 16, 2022 Tr. pp. 1-20).⁴ The impartial hearing began on May 9, 2022 and concluded on August 29, 2022 after

⁴ The pages of the transcripts are not paginated consecutively. For the purpose of clarity, the transcripts will be cited to in this decision by the hearing date and corresponding page number.

six days of proceedings (May 9, 2022 Tr. pp. 1-177, May 18, 2022 Tr. pp. 1-136, June 3, 2022 Tr. pp. 1-84, June 10, 2022 Tr. pp. 1-114, July 11, 2022 Tr. pp. 1-229, Aug. 29, 2022 Tr. pp. 1-28).

By decision dated January 10, 2023, the IHO rejected the parents' argument that their claims accrued in May 2020 when they received the May 2020 psychoeducational evaluation report and further determined that any of the parents' claims that accrued before February 2, 2020 were barred by the statute of limitations (IHO Decision at pp. 20-21). Turning to the parents' child find claim, the IHO found that the district violated child find from February 2, 2020 through November 6, 2020, when the CSE convened to determine the student's eligibility for special education (*id.* at p. 23). In particular, the IHO faulted the district for failing to submit progress monitoring records to show the student's progress while receiving RtI (*id.* at pp. 23-24). With regard to the November 2020 CSE's determination that the student was ineligible, the IHO noted that a "pre-meeting" was held on October 26, 2020 for the purpose of reviewing the results of the academic testing completed by the district (*id.* at p. 24). According to the IHO's decision, the district school psychologist informed the parents during the "pre-meeting" that the student was not eligible for special education and then sent an email to the parents reiterating the student's ineligibility before the CSE convened on November 6, 2020 (*id.*). The IHO also indicated that the parents advised their private evaluator before the November 6, 2020 CSE meeting that the student would not be found eligible at the meeting and that the meeting would be conducted via teleconference (*id.* at pp. 24-25). The IHO further noted that the meeting notice for the November 2020 CSE meeting indicated that it would be conducted via teleconference; however, at the November 2020 CSE meeting the district employees appeared by videoconference and the parents, as well as their private evaluator, appeared by telephone (*id.* at pp. 26-27). The IHO found that, in not allowing the parents to appear with the district attendees by videoconference, the parents were not on "equal footing" during the November 2020 CSE meeting (*id.* at p. 27). Additionally, the IHO found that the outcome of the November 2020 CSE meeting had been predetermined and that the parents were denied the opportunity to participate in the decision-making process for the student's eligibility (*id.*). The IHO noted that the November 2020 CSE did not follow the statutory guidelines for determining if a student is eligible for special education as a student with a learning disability as the district did not provide a certification of each of the CSE member's conclusions (*id.*). The IHO further found that the November 2020 CSE failed to evaluate the student in all areas of suspected disability, noting that the district did not evaluate the student's needs related to anxiety or conduct a speech-language evaluation, and instead relied primarily on the parents' privately obtained evaluation (*id.* at pp. 27-28). After finding that the district violated child find, failed to evaluate the student in all areas of suspected disability, and that the district had predetermined its eligibility determination, the IHO noted that eligibility and child find are separate considerations and "remanded [the matter] back to the CSE for evaluations in all areas of suspected disability and to consider [the student] for eligibility for special education services" (*id.* at p. 28).

The IHO agreed with the district's assertion that the parents had not alleged "a specific act or failure to act subsequent to the" November 6, 2020 CSE meeting and that the student was not entitled to a FAPE as she had not been found eligible for special education (IHO Decision at pp. 29-30). The IHO determined that the district violated child find from February 2, 2020 through June 30, 2020 and from "September, 2020 (the beginning of the school year)" through November 6, 2020; however, the IHO determined that there was no denial of FAPE because the district was not obligated to provide a FAPE to a student who was not classified (*id.* at pp. 28-29, 31). The

IHO then denied the parents' requests for reimbursement for privately obtained reading instruction and for compensatory educational services on the ground that the student was not entitled to a FAPE (*id.* at pp. 30, 31). Finally, the IHO granted the parents' request for reimbursement of the privately obtained evaluation "as a matter of equity" (*id.* at pp. 30, 32).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred by remanding the matter to the CSE for further evaluation and by failing to find the student eligible for special education and related services; by failing to find the CSE's determination that the student was ineligible was a continuing denial of a FAPE through the 2020-21 and 2021-22 school years; by finding that the district met its burden as the district relied on the RtI process but failed to include data to support its contentions; by failing to award compensatory educational services based on a denial of FAPE from the 2019-20 through 2021-22 school years; by failing to award the parents reimbursement for privately obtained reading instruction; and by denying the parents' request to include the student's fifth grade ELA exam results in evidence after the hearing but before the record close date. As relief, the parents request that the student's fifth grade ELA exam results be accepted into evidence, that the IHO decision be modified to direct the CSE to find the student eligible for special education as a student with a learning disability, that the student be awarded 500 hours of compensatory education, and that the parents be awarded reimbursement for reading instruction.

In an answer and cross-appeal, the district argues that the IHO properly did not determine that the student should have been found eligible for special education as a student with a learning disability in that the evidence did not support the student's need for special education. Additionally, the district asserts that it has recently evaluated the student and, on February 2, 2023, found her ineligible for special education; the district attaches additional evidence in support of these assertions. Further, the district argues that the IHO's order remanding the matter to the CSE to evaluate the student and consider the student's eligibility was now moot. The district alleges that the parents' request for compensatory education is inequitable as the parents did not show a need for it and that the request for reimbursement for tutoring should be precluded as the parents did not show it was an appropriate service.

Next, the district cross-appeals the IHO's determination that it violated child find from February 2, 2020 through November 6, 2020. The district argues that there was no reason prior to the receipt of the parents' private psychoeducational evaluation to suspect that the student might have a disability and been in need of special education services. The district asserts that the student was able to make meaningful educational progress with general education instruction and supports. The district further contends that the IHO was without jurisdiction over general education supports and services and the district was not required to "show the [s]tudent's response to academic interventions."

The district also cross-appeals the IHO's finding that the outcome of the November 2020 CSE meeting was predetermined. The district argues that the parents and their private evaluator participated in the meeting and that the outcome was not predetermined. The district further cross-appeals the IHO's order to reimburse the parents for the cost of the private psychoeducational evaluation. The district alleges that the IHO did not state any equitable rationale for reimbursement and the evaluation did not meet the criteria for district funding as an IEE. The district further

cross-appeals the IHO's order directing the district's CSE to evaluate the student's needs in the areas of speech-language and anxiety.

In a reply and answer to the district's cross-appeal, the parents assert that the IHO's remand of the matter to the district's CSE is not moot, denies the district's allegations, and argues that the district's cross-appeal should be dismissed. The parents also assert that the district's answer did not include all of the information in front of the February 2023 CSE and requests that, if the district's additional evidence is accepted, the documents annexed to the parents' reply and answer to the cross-appeal also be accepted.

V. Applicable Standards

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁵

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

⁵ 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).

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 Matter—Additional Evidence

Both parties have submitted additional documents with their pleadings and request that they be considered as additional evidence. The parent has submitted the results of the student's performance on the fifth grade State ELA exam, along with correspondence with the IHO requesting that the IHO accept the exam results into evidence (see Req. for Rev. Ex. 1). The district has offered documents related to evaluations completed after the issuance of the IHO's decision in this matter and a February 2, 2023 CSE determination that the student was not eligible for special education (see Answer & Cross-Appeal Exs. A-C). Finally, in response to the district's additional evidence, the parents submit additional documents that they assert are required to complete the information considered by the February 2023 CSE (Answer to Cross-Appeal Exs. A-H).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, the parents' initial proposed exhibit includes the student's results on the fifth grade ELA exam and an email dated November 9, 2022, wherein the parents requested that the IHO admit the student's results on the exam as evidence, which was sent after the impartial hearing had ended but prior to the record closing date of December 29, 2022 (Req. for Rev Ex. 1 at p. 1; see IHO Decision at p. 1). By email dated November 11, 2022, the IHO declined to enter the additional evidence into the hearing record (Req. for Rev. Ex. 1 at p. 1). Therefore, the parents did offer the document at the time of the impartial hearing. Further, I find that the parents' proposed exhibit is relevant to fashioning relief for the district's denial of a FAPE, as discussed below, and is therefore necessary in rendering a decision in this matter. Accordingly, I will exercise my discretion and accept the parents' proposed exhibit. On the other hand, the district's proposed additional evidence, and the parent's further additional evidence in response, is not necessary to render a decision in this matter as it all pertains to a CSE meeting that took place after the conclusion of this proceeding and which may be the subject of a subsequent due process complaint notice if the parents disagree with the February 2023 CSE's determination. Therefore, I decline to accept the district's proposed additional evidence or the parents' additional evidence submitted in response.

B. Child Find

The district cross-appeals from the IHO's determination that it violated child find from February 2, 2020 through November 6, 2020.⁶

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696

⁶ Under the circumstances of this case, it is unnecessary to consider the district's cross-appeal of the IHO's findings that the district engaged in impermissible predetermination and failed to evaluate the student in all areas of suspected disability, and in turn determine whether or not they were procedural violations of the IDEA that rose to the level of a denial of a FAPE (see R.E., 694 F.3d at 190), as the hearing record supports finding that the student should have been found eligible for special education as a student with a learning disability by the time of the November 2022 CSE meeting; accordingly, the district's failure to identify and classify the student resulted in a substantive failure to offer the student a FAPE for the 2020-21 and 2021-22 school years.

F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent in failing to order testing, or have no rational justification for deciding not to evaluate the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]).

Additionally, as particularly relevant in this case, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

1. Scope of Review and Jurisdiction

The IHO's selection of February 2, 2020 as the starting date for the district's child-find violation was based on her determination that the parents' claims accrued two years before the date of the initial due process complaint notice, dated February 2, 2022.⁷ Neither party has appealed from the IHO's finding that any claims that accrued prior to February 2, 2020 are barred by the statute of limitations; as such, the IHO's determination has become final and binding on the parties

⁷ The IDEA and State law provide that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]). Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]).

and will not be further considered (34 CFR 300.514; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

With regard to the district's claim that RtI services are general education supports that are outside the jurisdiction of the IHO and, by extension, an SRO, under the IDEA and State law a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). Additionally, an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]).

Under review in this matter is the process the district used to identify students with disabilities within the district, falling squarely within the jurisdiction of the impartial hearing system (see 20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). Additionally, while the district's RtI program is a general education program, one of the minimum requirements for a district's process to determine if a student responds to scientific, research-based instruction is that it include "the application of information about the student's response to intervention to make educational decisions about changes in goals, instruction and/or services and the decision to make a referral for special education programs and/or services" (8 NYCRR 100.2[ii][1][v]). Additionally, after the student was referred for an initial evaluation and eligibility determination, the November 2020 CSE determined that the student did not have a learning disability and did not qualify for special education services based on its conclusion that the student made "sufficient progress to meet age or State-approved grade-level standards" in reading "when using a process based on the student's response to scientific, research-based intervention pursuant to" an RtI program (8 NYCRR 100.2[ii]; 200.4[j][3][i][a]). Therefore, the student's participation in the district's RtI process is central to determining whether the district met its child find obligations (see 8 NYCRR 200.4[a]), as well as relevant to the below discussion of the student's eligibility for special education as a student with a learning disability (see 34 CFR 300.309[a][2][i]; 8 NYCRR 200.4[j][3][i][a]).

As discussed in greater detail below, the inevitable result of the district's position that the RtI services provided to the student were not subject to review is that the district failed to meet its burden in this proceeding (Educ. Law § 4404[1][c]). Review of the hearing record shows that the district's legally flawed position informed the district's litigation strategy and impacted the development of the hearing record (see, e.g., May 9, 2022 Tr. p. 85).

2. District's Response to Intervention Policy

State regulation provides that a school district's process to determine if a student responds to scientific, research-based instruction shall include "the application of information about the student's response to intervention to make educational decisions about changes in [the student's] goals, instruction and/or services and the decision to make a referral for special education programs and/or services" (8 NYCRR 100.2[ii][1][v]). State regulation further mandates that school districts shall select and define the specific structure and components of its RtI program, including, but not

limited to, the criteria for determining the levels and types of intervention to be provided to students, the amount and nature of student performance data to be collected, and the manner and frequency for progress monitoring, and set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[i][2], see 8 NYCRR 200.2[b][7]).

According to the district's written policy, a "Multi-Tiered System of Support (MTSS) framework takes the RtI framework to the next level by providing multiple levels of support for all learners" (Parent Ex. AAA at p. 1). The policy indicates that in academic instruction "[a] critical component of this framework is the use of multiple tiers of instruction and intervention" (id.). According to the policy, having multiple levels of instructional support meant "ensuring all students have access to grade-level core instruction as well as additional targeted support necessary to learn at high levels (referred to as core and more)" (id.). Core instruction was described as providing "high quality, research-based instruction to all students in the general education class provided by qualified teachers," including "a literacy block and a math block with differentiated instruction to meet the range of student needs" (id.). The policy further indicated that there would be a review of student data "for all students and subgroups of students across the essential standard(s) to evaluate progress"; for kindergarten through fifth grade (the student was in fifth grade for the 2021-22 school year), an additional block of time was designated where all students were given targeted instruction in both math and reading based on their needs (id. at p. 2). The targeted academic instruction section further stated that students "will be supported in an intervention, instruction, practice, or extension group based on performance on the evaluated essential standard(s)" (id.).

The district's written policy next addressed intensive academic intervention and stated that the focus was developing "specific skills and concepts to address areas of identified weakness building on students' strengths" (Parent Ex. AAA at p. 2). Additionally, the policy indicated that "[i]nterventions will focus on the areas of student need or weaknesses that have been identified" and "will be supported by research and vary by curriculum focus, group size, frequency, location, and duration" (id.). According to the policy, "[i]ntervention services at this level are delivered to students who have significant achievement gaps based on assessment results" (id.). The policy stated that "[t]hese services are supplemental to core instruction delivered in the classroom setting but differ in frequency, intensity, and duration from services at the targeted level" (id.). According to the policy, the progress of students receiving intensive intervention services would be monitored regularly and students not responding to intensive academic interventions would be brought to the "Data Inquiry Team" to "analyze and evaluate relevant information and plan and implement strategies that support student outcomes. The problem-solving process will encompass defining the problem, analyzing the problem, brainstorming an intervention plan, and discussing ways to evaluate the intervention" (id.). The policy reflected that the "Data Inquiry Team may discuss the potential referral of the student to the Committee for Special Education" (id.). The written policy then indicated that the "[r]ate of progress over time is used to make important educational decisions. Interventions must be targeted to a student's academic needs using research-based practices. The instruction and interventions encompassing the MTSS model may involve many different levels of intensity and individualization" (id.).

With regard to assessments, the district's written policy stated that all students in kindergarten through ninth grade would "participate in universal screening which is an assessment procedure characterized by efficient, repeatable testing of age-appropriate academic skills or

behaviors" (Parent Ex. AAA at p. 3). In addition, the policy noted that "[v]alid and reliable universal screenings are conducted at multiple key points of the year for the purposes of monitoring students' academic progress more closely" (id.). The policy further indicated "students with low test scores be monitored periodically through screenings and ongoing assessments of the students' reading and mathematics abilities and skills" (id.).

According to the district's policy universal screening results would be used in conjunction with other measures to determine student growth through the use of core literacy and math instruction and assessments (Parent Ex. AAA at p. 3). The district's process to determine if a student responded to scientific, research-based instruction included "(a) instruction matched to student need with increasingly intensive levels of targeted intervention and, (b) instruction for students who do not make satisfactory progress in their levels of performance and/or in their rate of learning to meet age or grade-level standards" (id.). Next, the written policy reflected that "grade-level performance indicators would be assessed using an ongoing formative assessment process: and that student data would be reviewed "for all students across the essential standards to evaluate progress and determine individual interventions" (id.). The district's written policy also included sections related to parent or guardian notification, professional development, and behavior instruction (id. at pp. 3, 4-5).

State regulation provides that a school district's process to determine if a student responds to scientific, research-based instruction shall include screenings applied to all students in the class to identify those students who are not making academic progress at expected rates (8 NYCRR 100.2[ii][1][ii]). State guidance notes that "the school district determines the level of typical, at risk, and seriously at risk performance and that "[t]his information is used by teachers to determine which students need to be closely monitored for learning difficulties, including further individualized assessment to determine the need for supplemental instruction" recommends that school districts implementing a progress monitoring model "initially identify a student as at-risk based on results from a screening process and continue to progress monitor those students on a weekly basis for five or six weeks to confirm or disprove initial risk status" ("Response to Intervention, Guidance for New York State School Districts," at p. 9, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). Additionally, schools that employ a progress monitoring model will typically also differentiate instruction for those students identified as at-risk during core instruction while additional progress monitoring data are obtained (id.). Among the suggested procedures during screening with progress monitoring, State guidance recommends confirming students' risk status on school-wide screening by conducting at least five weeks of weekly monitoring of the student's response to the core instructional program and considering evidence of poor rates of improvement after receiving appropriate instruction over five to eight weeks in core instruction as confirming the need for supplemental intervention (id.).

State regulation further requires that a school district's process to determine if a student responds to scientific, research-based instruction shall include instruction matched to student need with increasingly intensive levels of targeted intervention and instruction for students who do not make satisfactory progress in their levels of performance and/or in their rate of learning to meet age or grade level standards (8 NYCRR 100.2[ii][1][iii]).

The district's written policy does not identify specific supports available at different tiers, instead, refers to core instruction, targeted academic instruction, and intensive academic instruction, as described above (Parent Ex. AAA). While specific tiers are not identified in the district's written policy, in a multi-tier service delivery model, State guidance describes Tier 1 as the core instructional program provided to all students by the regular education teacher in the general education classroom utilizing research-based instruction, positive behavior intervention, and supports ("Response to Intervention, Guidance for New York State School Districts," at p. 12). According to State guidance, Tier 1 should also minimally include core curriculum aligned to the State learning standards; appropriate instruction and research-based instructional interventions that meet the needs of at least 80 percent of all learners; universal screening administered to all students in the general education classroom three times per year; weekly progress monitoring of students initially identified as at-risk for five or six weeks; differentiated instruction based on the abilities and needs of all students in the core program; and a daily uninterrupted 90 minute block of instruction in reading.

State guidance indicates that Tier 2 intervention is typically small group (3-5) supplemental instruction, which is provided in addition to, and not in place of, the core instruction provided in Tier 1 ("Response to Intervention, Guidance for New York State School Districts," at p. 13). Tier 2 interventions focus on the areas of student need or weakness that are identified in the screening, assessment, or progress monitoring reports from Tier 1, and in Tier 2, direct, systematic instruction provides more teacher-directed instruction, carefully structured and sequenced to an individual student, than was provided in Tier 1 (*id.*). Notably, "[t]he determination of a student's achievement [should be] well defined and mastery is achieved before moving on to the next step in the sequence" (*id.*). Progress monitoring occurs more frequently in Tier 2 and may vary from once every two weeks to once a week using a Curriculum-Based Measurement (CBM) that measures targeted skills (*id.* at pp. 13-14). Periodic checks to ensure that the delivery of instruction was provided in the way it was intended (fidelity checks) should be conducted for the purposes of determining how closely the intervention or instruction was implemented to the way it was designed (*id.* at p. 14).

The district's written policy does not include a recommended length of time that a student is supposed to spend receiving intensive academic interventions; however, according to State guidance, the recommended length of time a student spends in the second tier of intervention could vary from approximately 9 to 30 weeks, depending on such factors as the skill set to be learned, the rate of the student's progress, whether the student was making adequate progress according to the standard protocol established prior to initiation of the intervention, and the student's age and/or developmental level ("Response to Intervention, Guidance for New York State School Districts," at p. 14). According to State guidance, when progress monitoring of a Tier 2 intervention indicates lack of adequate response, schools should consider adjusting the intervention in terms of intensity (*id.*).

State regulation also requires that a school district's process to determine if a student responds to scientific, research-based instruction shall include repeated assessments of student achievement which should include curriculum-based measures to determine if interventions are resulting in student progress toward age or grade level standards (8 NYCRR 100.2[ii][1][iv]).

According to State guidance, "[t]he primary purpose of progress monitoring in Tier 2 and beyond involves determining whether the intervention is successful in helping the student catch up to grade level expectations" ("Response to Intervention, Guidance for New York State School Districts," at p. 19). Data from progress monitoring in Tiers 2 and 3 inform decision-making regarding individual students' responsiveness or lack of responsiveness in two ways: "Learning rate, or student's growth in achievement or behavior competencies over time, compared to prior levels of performance and peer growth rates; and 'Level of performance, or the student's relative standing on some dimension of achievement/performance, compared to expected performance (either criterion- or norm-referenced)'" (*id.* at pp. 19-20). In addition, data from progress monitoring should be used to inform student movement through tiers (*id.* at p. 20). State guidance further recommends that progress monitoring data obtained during the course of Tier 2 intervention should be analyzed for level of performance and growth status (*id.*). If student data reflect performance at or above benchmark, the student may return to Tier 1, if the student is performing below benchmark, but making sufficient growth progress, the decision to continue Tier 2 intervention can be made; however, if the student is performing below benchmark and demonstrates poor growth (i.e. under-responding), a change in the Tier 2 intervention or movement to a Tier 3 intervention may be considered (*id.*).

Additionally, in reading, an appropriate progress monitoring tool would target the specific essential element(s) of reading with which an individual student is having difficulty, such as phonemic awareness, phonics, fluency, vocabulary and/or comprehension ("Response to Intervention, Guidance for New York State School Districts," at p. 20). State guidance further recommends a combination of CBMs and informal, ongoing assessments (checklists, reading inventories, running records) completed by teachers to monitor progress, so that use of CBM is not the sole index of progress, which could lead to unintended consequences such as children being fast and accurate in word reading, but inattentive to the meaning of what is read (*id.*).

The district's RtI process was described in more detail in testimony during the impartial hearing. The district's literacy lead teacher testified that the district's core instructional program for kindergarten through fifth grade was called Core Knowledge Language Arts (CKLA) and it had assessments embedded within it and would be considered Tier 1 (May 18, 2022 Tr. pp. 23, 25-27).⁸ According to the teacher, students were universally screened three times per year in oral reading fluency, in the fall, January, and June (May 18, 2022 Tr. pp. 26-27). The district's literacy lead teacher testified that universal screenings were conducted using the FastBridge platform, and that reading screenings beginning with first grade measured oral reading fluency (May 18, 2022 Tr. p. 26). The students read three passages that were each timed for one minute and the median score was recorded to establish the student's oral reading fluency proficiency (*id.*). The district's literacy lead teacher testified that students were assessed in oral reading fluency from second grade through high school (*id.*). She further testified that, in addition to universal screening and the

⁸ The district's school psychologist testified that CKLA was the "comprehensive of language arts" but she could not remember what the K stood for and further testified that CKLA was a "curriculum-based measure[] for words read correct" (May 9, 2022 Tr. p. 106-07). The district's attorney later prompted her in a question asking if CKLA stood for "curriculum knowledge in language arts" and she answered affirmatively (May 9, 2020 Tr. pp. 112-13). The district's lead literacy teacher testified that CKLA stood for Core Knowledge Language Arts, which was the core instructional program and would be considered Tier 1 in kindergarten through fifth grade (May 18, 2022 Tr. pp. 23, 25).

CKLA assessments, diagnostic assessments were also available if more information was needed about a student (May 18, 2022 Tr. p. 28). The diagnostic assessments were identified as the Phonemic Awareness Screening Test (PAST) and the Quick Phonics Screener (QPS) (*id.*).

The literacy teacher testified that Tier 2 was provided by an instructional support specialist outside of the classroom and Tier 3 was intensive support in the area of reading and math provided by an instructional support specialist (May 18, 2022 Tr. pp. 23, 25). She testified that progress monitoring for students receiving Tier 2 and Tier 3 supports consisted of weekly or bi-weekly monitoring using a platform called FastBridge, for oral reading fluency (May 18, 2022 Tr. p. 36).

In testifying regarding her participation as a part of a data inquiry team that referred students for special education, the literacy teacher explained that the criteria for referral was based on the weekly progress monitoring and a lack of progress (May 18, 2022 Tr. p. 32). According to the teacher, progress monitoring utilized FastBridge, which plotted a "trajectory of how students are performing based on . . . their goal"; she testified that progress is based on whether a student's trajectory is going in the right direction and if a student was not making growth the team could consider changing or increasing the intervention (May 18, 2022 Tr. p. 32). She then clarified that a referral for special education was only made if a student was receiving the highest level of support and the student was either stagnating or the trajectory was going the wrong way (May 18, 2022 Tr. pp. 32-33).

3. Delivery of Response to Intervention Services to the Student

According to a timeline of the student's participation in the district's RtI program compiled by the district school psychologist, the student received Tier 1 support in an 8:1 "TEAM" group in first grade after the administration of the September 2017 universal screening (May 9, 2022 Tr. pp. 109, 111-13; Parent Ex. N at p. 1).^{9, 10} The district school psychologist testified that the September assessment was a criterion-based assessment that identified the student's scores compared to benchmarks (May 9, 2022 Tr. pp. 111-12). The student's score on a September 2017 "FAST CBM" placed her below the benchmark and within the "[s]ome [r]isk" range (Parent Ex. N at p. 1). The district school psychologist testified that FAST CBM was a curriculum-based measure that was used "to look at words read per minute" and that "Team Time" was smaller group intervention provided in Tier 1 (May 9, 2022 Tr. p. 112).¹¹

Notes associated with a January 2018 FAST assessment—wherein the student read 24 words per minute with 83 percent accuracy—indicated that intervention should "Target Code" and address sentences and passages in a "TEAM (8:1)" (Parent Ex. N at p. 1). Notes associated with a February 2018 CKLA Unit 3 assessment—wherein the student read 28 words per minute with

⁹ The district school psychologist testified that she compiled the timeline at the request of the student's mother and in preparation for the November 6, 2020 CSE meeting (May 9, 2022 Tr. pp. 103, 105-06, 109, 117).

¹⁰ There was a discrepancy in the district witnesses' testimony as to whether "Team Time" was a Tier 1 or Tier 2 level support (compare May 9, 2022 Tr. p. 112, and May 18, 2022 Tr. p. 118, with May 18, 2022 Tr. p. 107).

¹¹ The district's school psychologist also testified that FAST was a screener used to measure fluency and decoding (May 9, 2022 Tr. p. 107).

96 percent accuracy—indicated that the student began Tier 2 IS on March 8, 2018 in a group (4:1) to work on "Code and build[ing] automaticity" (*id.*). The district school psychologist testified that the student started Tier 2 at this point "because that wasn't adequate progress" (May 9, 2022 Tr. p. 113). In April 2018, an unidentified assessment was administered wherein the student read 33 words per minute with 93 percent accuracy and an unidentified CBM was also administered which indicated the student read 43 words per minute (Parent Ex. N at p. 1). Notes associated with the April 2018 entries state that the student would continue Tier 2 IS in a group (4:1) to "Code Gaps and build automaticity" (*id.*). According to a CKLA Unit 4 assessment, the student's word reading score was 58 out of 60 with 97 percent accuracy, the student's comprehension score was seven out of nine, and the student's FAST assessment indicated the student read 60 words per minute (*id.*). Notes associated with the CKLA Unit 4 entry reflect that the student was dismissed from Tier 2 IS on May 10, 2018, and further indicate that the student would receive "Team Time [to] apply code and develop fluency, sentences and phrases (11:1)" (*id.*).

The student's final report card for first grade (2017-18 school year) reflected that she was working toward State and district standards in the ELA foundational skill of "[r]ead[ing] with accuracy and fluency to support comprehension of grade-level text" (Dist. Ex. 17 at p. 1). The student was meeting State and district standards in all other graded skills (*id.*).

In an unidentified September 2018 assessment, when the student was in second grade, the student's word reading score was 103 out of 120, and her comprehension scores were eight out of eight, seven out of seven, eight out of eight, and five out of eight (Parent Ex. N at p. 2). Notes associated with this entry indicated that fluency would be targeted in a group (9:1) during "TEAM time" (*id.*). On an October 18, 2018 CKLA assessment, the student's word reading score was 34 out of 40, and her comprehension score was five out of five (*id.*). Notes associated with the October 18, 2018 CKLA assessment indicated that the student would "Target code in TEAM time" in a group (13:1) (*id.*). An unidentified November assessment indicated that the student would continue to "Target code in Team time" in a group (10:1) after scoring 13 out of 16 in word assessment (*id.*). On a December CKLA assessment, the student scored 18 out of 18 in word identification, seven out of eight in comprehension, and read 56 words per minute, which placed her below the benchmark of 61 words per minute (*id.*). Notes associated with the December entry indicated that the student would "Target code in TEAM time" in a group (12:1) (*id.*).

On January 17, 2019, the student was assessed using FAST CBM and CKLA (Parent Ex. N at p. 2). On the FAST CBM, the student scored 64 [words per minute], which placed her below the benchmark of 87, with 96 percent accuracy, the student scored 31 out of 32 in decodable words (*id.*). Notes indicated that the student would "[c]ontinue code in TEAM time" in a group (11:1) (*id.*). On a January 31, 2019 CKLA Unit 3 assessment, the student scored 19 out of 20 on a midpoint assessment, 45 out of 56 on word identification with 80 percent accuracy, and a three out of nine on reading comprehension (*id.*). Notes associated with this entry reflected that the student began Tier 2 IS in a group (6:1) on February 14, 2019 to target code and fluency (*id.*).

On a March 21, 2019 CKLA Unit 4 assessment, the student scored 37 out of 40 in word reading, nine out of ten in vowel matching, six out of six in literal questions, four out of four in inferential questions, and ten out of ten in total reading comprehension (Parent Ex. N at p. 3). The student read 69 words per minute with 96 percent accuracy (*id.*). Notes indicated that the student

was improving and would continue to receive Tier 2 IS in reading code and fluency in a group(4:1) (id.).

According to a document entitled "UDS: RTI Historical Overview," the student began receiving Tier 2 IS on March 25, 2019, which consisted of five 30-minute sessions per week of "small group fluency intervention" (Dist. Ex. 4 at p. 1). In May 2019, the student moved back to a classroom Tier 2 group to work on fluency and "CODE" (id.). According to the progress monitoring from March 25, 2019 through June 30, 2019, the student exhibited weak oral reading fluency (Dist. Ex. 5 at pp. 1- 2). The progress monitoring document further indicated that the student would "[a]pply the skills and strategies learned to gain accuracy in reading text, develop awareness of the fundamentals of fluent reading and comprehension abilities" (id. at p. 2). The Tier 2 intervention was further described as an intervention that would "assist the student in identifying words accurately and automatically; allowing them to focus most of their attention on making connections among the ideas in the text and their background knowledge" (id.). The document further indicated that small group reading time consisted of fluency instruction, vocabulary instruction and comprehension skills and strategies (id.). Fluency included teacher modeling, explicit instruction on the fundamentals of fluent reading and practice with fluency cards and repeated readings (id.). In addition, phonics instruction was incorporated into the lessons to help with reading larger, more difficult words (id.). Vocabulary instruction included multiple exposures to key vocabulary related to the text and each component of the small group reading intervention was designed to accelerate acquisition of skills to improve reading ability (id.). The progress monitoring explanation section of the document indicated that reading progress would be monitored and assessed weekly either using FAST second grade CBM and/or formative assessments that were part of the CKLA program (id.). The document also included scores from a March 29, 2019 assessment using the PAST Form-B (id.).

In a May 2019 CKLA Unit 5 assessment, the student scored 19 out of 20 in decoding, 67 out of 75 in individual decoding with 89 percent accuracy, seven out of 11 in reading comprehension, which placed her below the benchmark of 8 or more, 46 out of 46 high frequency words, and on a FAST CBM, the student read 97 words per minute, which was below the benchmark of 106 words per minute (Parent Ex. N at p. 3). According to the notes associated with these entries, the student was dismissed from Tier 2 IS on May 9, 2019 and would begin "Team time" for fluency in a group (13:1) (id.).¹²

The student's report card for second grade (2018-19 school year) indicated that the student was working toward State and district standards for each marking period in the ELA foundational skill of "[r]ead[ing] with accuracy and fluency to support comprehension of grade-level text" and the ELA writing skill of "[u]s[ing] conventions and grammar when revising and editing written work" (Dist. Ex. 18 at p. 1). In the ELA reading section of the report card, the student met State and district standards for the first two marking periods in "[a]sk[ing] and answer[ing] questions using evidence to demonstrate understanding of the text" and in "[i]dentify[ing] a main topic or central idea and retell[ing] key details in a text; summariz[ing] portions of a text" (id.). For the

¹² The student also scored below the benchmark for the first time in math on the May 2019 assessment (Parent Ex. N at p. 3).

final marking period of second grade, the student was reportedly no longer meeting State and district standards in the two ELA reading skills and was working toward them (id.).

According to a second grade CKLA end-of-year summary, the student appeared to have poor preparation for third grade in reading comprehension (Parent Ex. K at p. 1). The summary rubric indicated that the 50th percentile in fluency was "on grade level"; however, the student was noted to be below the 50th percentile (id.). In word reading in isolation, the student's score, according to the rubric, indicated that she had outstanding preparation for third grade (id.). The "[r]ecommended [p]lacement for [n]ext [y]ear" portion of the form was marked "Below level" and handwritten notes at the bottom of the page indicated that the student "typically does ok" and "[s]ome confusion [at] times and her pacing is always slow. Very easy to work with" (id. at p. 1). The district school psychologist testified that the entries in the student's timeline indicated that during second grade the student "respond[ed] to Team Time. When she didn't respond to Team Time, she was put in a smaller group of [T]ier 2 and shortly afterwards, her score in that area that was being target[ed] improved" (May 9, 2022 Tr. p. 115).

In third grade (2019-20 school year), the student began receiving Tier 2 IS support on either September 22 or 23, 2019 after scoring below the benchmark of 87 words per minute on a FAST CBM, wherein she read 76 words per minute with 89 percent accuracy (Parent Ex. N at p. 3; Dist. Exs. 4 at p. 1; 5 at p. 1).¹³ The progress monitoring document further indicated the student concerns were phonological processing, phonics, and fluency (Dist. Ex. 5 at p. 1). The Tier 2 intervention was described in the progress monitoring document as Road to Reading with CKLA, which focused on developing accuracy and fluency in decoding (id.). The document stated that the student reviewed letter sounds, made words with sound boards, read both phonetically regular and high-frequency word cards, used word attack strategies to read in context, and applied knowledge of word patterns in writing (id.). In addition to Road to Reading, "components of the research-based skills strand program" would be "infused into daily lessons" (id.). The document indicated the student would receive explicit instruction on the components of fluent reading with consistent practice opportunities (id.). The Tier 2 instructional support was provided five times per week in 30-minute sessions (id.). The progress monitoring document reflected that the student's progress would be measured using FAST CBM, PAST assessments, and CKLA formative assessments (id.).

On an October 27, 2019 Grade 3 CKLA Unit 2 assessment, the student earned a total of 12 out of 13 points (Parent Exs. M at p. 1; CC at p. 4; Dist. Ex. 25 at p. 5). The student was dismissed from Tier 2 after an October 30, 2019 FAST CBM wherein she read 82 words per minute (Parent Ex. N at p. 3). Notes associated with the October 30, 2019 entry indicated that the student would target fluency during "TEAM time" (id.). On a November 22, 2019 Grade 3 CKLA Unit 3 assessment, the student earned 11 out of 12 points (Parent Exs. M at p. 2; CC at p. 4; Dist. Ex. 25 at p. 5).

An undated "Winter" FAST CBM assessment indicated that the student read 112 words per minute, exceeding the benchmark of 110 words per minute (Parent Ex. N at p. 3). The district

¹³ According to an email sent May 27, 2020, in response to the parents' private psychologist's request for teacher input, this assessment was a "Fall FAST Universal Screening" (Dist. Ex. 7 at p. 1).

school psychologist testified that the winter FAST CBM would have been administered in January 2020 (May 9, 2022 Tr. p. 116).

On a March 4, 2020 Grade 3 CKLA mid-year assessment, the student earned 11 out of 20 points (Parent Exs. M at p. 3; CC at p. 4; Dist. Ex. 25 at p. 5).¹⁴ Across the three CKLA assessments for which details are included in the hearing record, the student had difficulty answering questions related to "[d]evelop[ing] and answer[ing] questions to locate relevant and specific details in a text to support an answer or inference," with the student getting four out of eight of those questions incorrect on the March 4, 2020 assessment (Parent Ex. M at pp. 1-3). On a March 11, 2020 unidentified CBM, the student read 126 words per minute with 99 percent accuracy, which was below the "Spring/June 3rd grade" benchmark of 131 words per minute (Parent Ex. N at p. 3).

On May 20, 2020, the student's third grade classroom teacher completed a teacher input form requested by the parents' private psychologist as part of her psychoeducational evaluation (Dist. Ex. 6 at p. 1). The third grade classroom teacher described the student as a quiet, friendly student who was well-liked by her peers (*id.*). She further described the student as a good listener, who offered great content to class discussions (*id.*). The student reportedly organized herself and her materials, followed directions, and used her time wisely (*id.*). The student was learning to check over her work carefully before turning it in more consistently (*id.*). The teacher noted that the student turned "in quality work, work she is proud of" (*id.*). The classroom teacher indicated that the student's greatest strengths were that she was a hard worker, who strove to do her best (*id.*). The student asked for clarification if she did not understand something, and when she learned a strategy, she then used it (*id.*). As an example, the teacher reported that the student had learned the "RAP" strategy of restate, answer, proof for writing responses and had been using that strategy (*id.*). When asked what the student's greatest challenges were, the classroom teacher responded that the student "takes everything in. She knows exactly what is happening with everyone in the classroom. Very aware" (*id.*). With regard to specific concerns the classroom teacher had, she responded, "[n]ot necessarily a concern, but she works on these skills. During our WINN Time (What I Need Now), [she] practices fluency building strategies. She also practices multi-syllable strategies. [Her] fluency and word reading assessments are all on grade level. Our district uses FAST and CKLA references" (*id.* at pp. 1-2). When asked what factors influenced the student's learning in her classroom, the classroom teacher responded that she had implemented specific strategies for all of her students and that the student benefitted from them (*id.* at p. 2). The classroom teacher noted that she believed that the student could have some anxiety in her class if she had not implemented the strategies (*id.*).

¹⁴ Although the district's documentation states that this assessment was a "Grade 3 CKLA Mid Year Assessment," the district literacy lead teacher testified that "[t]he CKLA mid-year assessment was taken from a State assessment passage. It's not part of our CKLA program" (*compare* Parent Exs. M at p. 3; CC at p. 4, *with* May 18, 2022 Tr. p. 110). With regard to the March 4, 2020 assessment using a passage from a State assessment, the district literacy lead teacher further testified that "we call it our comprehension. . . . like that one and the reading comprehension one, are the -- are the assessments that are given and the passages are either taken from CKLA or they're taken from a New York State passage. It's not a unit assessment, so yes, it was a comprehensive" (May 18, 2022 Tr. p. 111).

The student's report card for third grade (2019-20 school year) indicated that the student met State and district standards for each marking period in all skills measured in ELA (Dist. Ex. 19 at p. 1). The comments for the first marking period indicated that the student was making good progress in all academic areas, was writing more and "starting [to] organize her sentences into paragraphs with more details" and was "successfully using many strategies to increase her fluency and reading comprehension" (*id.* at p. 3). The comments for the second marking period indicated that the student continued to make progress in all areas and in ELA the student "practiced writing detailed literature responses" and was "learning to restate the question and add details from the text to support her answers" (*id.*). In reading, the teacher noted that the student's "increased fluency and ability to connect to and question text, help[ed] her achieve comprehension" (*id.*). For the third marking period, the teacher noted that the all learning for that period was completed virtually and rather than commenting on the student's skills, the teacher described the what the class was working on in ELA, math, and writing (*id.*).

The district school psychologist's timeline ends with the March 11, 2020 entry (Parent Ex. N at p. 3). The hearing record indicates that the student did not receive Tier 1 Team Time support or Tier 2 IS after March 11, 2020, and the district literacy lead teacher testified that the district did not provide RtI "at the level of what we were able to provide in-house" during the COVID-19 school closure (May 18, 2022 Tr. p. 36). The hearing record further indicates that on the fall 2020-21 school year universal oral reading fluency screening, the student's score was 88, which placed her within the "some risk" range and was a decline from the student's prior score of 112 in the winter of the 2019-20 school year, which was within the "low risk" range (Parent Ex. P at p. 1).¹⁵ Notably the student's score of 88 in fall of the 2020-21 school year was only four points above placing her within the "high risk" range (*id.*). The student's remote fourth grade teacher testified that she provided approximately 20 minutes of small group instruction and "worked with [the student's] small group and listened to her read" (June 3, 2022 Tr. p. 30). However, there is no documentary evidence that RtI data was collected during the 2020-21 school year prior to the November 6, 2020 CSE meeting (*see* Parent Ex. J; Dist. Exs. 12, 14-15, 20, 22). The remote fourth grade teacher further testified that she began working with the student 1:1 in November 2020 (June 3, 2020 Tr. p. 33).

As indicated above, the district literacy lead teacher testified that progress monitoring used six data points and was reported via the FastBridge platform which plotted a trajectory of how students were performing (May 18, 2022 Tr. pp. 32, 106). However, no documentary evidence was linked to this testimony and the literacy lead teacher never identified the six data points. The only objective documentary evidence of progress monitoring of the student's participation in the district's RtI program—that is also explained by testimony—consists of a single graph which plots the student's performance on curriculum-based, universal screenings measuring oral reading fluency using FastBridge (Parent Ex. P at p. 1; May 18, 2022 Tr. pp. 25, 26-27; *see also* Parent Ex. R at p. 9, 10-12; CC at p. 2; Dist. Exs. 25 at p. 2; 26 at p. 1). This documentation consistently demonstrated that, despite receiving Tier 1 and Tier 2 level support beginning in 2017, leading up to the November 6, 2020 CSE meeting, the student scored within the "some risk" range on every

¹⁵ As noted above, the hearing record indicates that the student read 126 words per minute on a CBM assessment which was conducted on March 11, 2020; however, the results of that assessment were not charted in the individual benchmark report (*see* Parent Exs. N at p. 3; P at pp. 1, 3; R at pp. 8, 10-11).

assessment, with the exception of one administration in winter 2020, when her score was in the "low risk" range (Parent Ex. P at p. 1; see May 18, 2022 Tr. pp. 26, 27). The student's scores on the test ranged from being just over the "high risk" range, by one point in winter of the 2017-18 school year, three points in winter of the 2018-19 school year, and four points in fall of the 2019-2020 school year, to being solidly within the "some-risk" range in spring of the 2017-18 school year, spring of the 2018-19 school year, and fall of the 2019-20 school year, up to one score in the "low risk" range in winter of the 2019-20 school year (id.).

The hearing record also includes a graph entitled "CBMreading English Progress Monitoring Report" which plots the student's scores from four unidentified assessments administered in third grade dated October 4, 2019, October 11, 2019, October 23, 2019 and March 11, 2020 (Parent Ex. P at pp. 2-3; R at pp. 10-11). According to emails from the district school psychologist to the parent, this graph was provided to show the student's progress, noting the March 11, 2020 data point for words per minute that was not included in the individual benchmark report (Parent Ex. R at pp. 8, 10). However, the October 2020 dates do not correspond to dates listed on any other test results included in the hearing record (see Parent Exs. M; N; P; R). Accordingly, the total trend line noted on this report showing that the student's progress was above the goal trend line (Parent Exs. P at p. 2; R at p. 11) does not bear any weight in reviewing the student's progress.

The district lead literacy teacher testified on cross-examination that RtI was available to support all students with whatever they may need and that tiered support was "fluid" (May 18, 2022 Tr. pp. 108, 109). In addition, she testified that "[s]ometimes, we have students that stay in Tier 2 and that's sufficient for them. Sometimes, they make progress and they're only needing Tier [1]" (id.). She then concluded "[s]ometimes, they don't progress, and they go to Tier 3 support. It's only when they're at a Tier 3 support that they're not making progress that we may refer [to the CSE] based on a Data Inquiry Team discussion" (id.).

As applied to the student in this instance, the evidence shows that the district's implementation of its written RtI policy did not comply with State regulations or State guidance. In particular, as noted above, the district did not present much evidence of progress monitoring beyond the charting of a single measure of oral reading fluency; the district did not demonstrate how the student's progress was monitored on an ongoing basis and how decisions were made to either continue or discontinue specific interventions and intervention tiers. In addition, the student's teacher appeared to paint an optimistic view of the student's abilities in class, her report cards stated that she was predominantly meeting State and district level standards, and the district's witnesses testified that her scores on RtI assessments were on grade level; however, the data included in the hearing record does not correlate the student's rubric grades or assessment scores to grade-level equivalents. The only objective assessment included in the hearing record that could correlate to grade level standards was the March 4, 2020 midyear assessment using a State assessment reading passage, on which the student earned 11 out of 20 points for a test score of 55 percent (Parent Exs. M at p. 3; CC at p. 4). The witness testimony and the timeline created by the district school psychologist demonstrate that, contrary to State guidance, the student was repeatedly dismissed from Tier 2, without ever establishing well-defined achievement or that she had mastered the targeted skills. In addition, the district failed to demonstrate that it relied on a combination of CBMs and informal, ongoing assessments (checklists, reading inventories, running

records) completed by teachers to monitor progress, so that use of CBM was not the sole index of progress.

As cautioned against in State guidance, and as discussed more fully below, the district's reliance on a single, curriculum-based measure of oral reading fluency led to unintended consequences such as the student "being fast and accurate in word reading, but inattentive to the meaning of what is read" ("Response to Intervention, Guidance for New York State School Districts," at p. 20).¹⁶

Based on the foregoing, I agree with the IHO that the district's failure to present evidence of the data collected as part of its RtI process resulted in a lack of evidence regarding the student's progress for the extended period of time that she was receiving tiered support outside of core instruction; and, thus, the district violated its child-find obligations and failed to establish that the student should not have been referred for special education as of February 2020.

C. Eligibility

Turning to the November 2020 CSE meeting, the parents assert that the IHO erred in finding that "there was a reasonable disagreement about whether the student should be classified as a student with a disability" and in remanding the matter to the CSE for further evaluation and review of the student's eligibility for special education (IHO Decision at pp. 28, 31). The district alleges that the IHO correctly declined to determine the student's eligibility and further argues that the IHO's order of remand is now moot, given that the CSE reconvened on February 2, 2023 and again found the student ineligible for special education and related services.¹⁷

1. Learning Disability

As noted above, the parents had a private psychoeducational evaluation of the student conducted in December 2019, the report was completed in May 2020 after the student's teacher completed a teacher input form, and the report was delivered to the district in September 2020 (see Parent Exs. D; G; Dist. Exs. 6; 7). As part of the report, the private psychologist who conducted the evaluation offered a diagnosis of specific learning disability in reading (decoding) (Parent Ex. D at pp. 22-23). After the district completed its own evaluation of the student (see Parent Ex. I; Dist. Exs. 11; 14-15), the CSE convened in November 2020 and considered the student's eligibility for special education, finding that the student did not meet the criteria required to be determined eligible as a student with a learning disability (Dist. Exs. 20; 22).

¹⁶ For example, the student achieved a standard score of 86 (18th percentile, low/below average) on both the December 2019 administration of the WIAT-III reading comprehension subtest and the October 2020 administration of the KTEA-3 reading comprehension subtest, and a standard score of 84 (below average) on the December 2019 administration of the silent reading comprehension subtest of the Feifer Assessment of Reading (Parent Exs. D at pp. 9, 12-13; I at p. 7).

¹⁷ As noted above, the February 2023 CSE meeting is not relevant to this proceeding, rather, a determination must be made as to whether the student was eligible for special education during the time period relevant to this proceeding based on the evaluative information available.

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

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

In addition to drawing on a variety of sources including "aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]), federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).¹⁸

¹⁸ More specifically, the CSE must consider data that demonstrates that the student was provided appropriate

With respect to the relationship between RtI and the learning disability category of eligibility, State guidance describes that RtI is the practice of providing high-quality instruction or intervention matched to student needs and using learning rate over time and level of performance to make important educational decisions about an individual student ("Response to Intervention, Guidance for New York State School Districts," at p. 1). The guidance describes RtI as an important educational strategy that has been shown to lead to more appropriate identification of and interventions with students with learning disabilities (id.). The guidance provides that identifying whether a student has a learning disability must be based on extensive and accurate information that leads to the determination that the student's learning difficulties are not the result of the instructional program or approach (id.).

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

Here, review of the hearing record indicates that the district failed to conduct a complete initial evaluation; however, review of the evaluative material available to the November 2020 CSE

instruction by qualified personnel in a "regular education setting," and data-based documentation of "repeated assessments of achievement at reasonable intervals, reflecting formal assessments of student progress during instruction" (8 NYCRR 200.4[j][1][ii][a]-[b]).

¹⁹ In addition, each CSE member must certify whether the written report accurately reflects that member's conclusion; where it does not reflect the member's conclusion, that CSE member must also submit a statement identifying their own conclusions (8 NYCRR 200.4[j][5][ii]). State guidance provides a form for CSEs to use in ensuring that a proper written record is maintained (see "Response to Intervention: Guidance for New York State School Districts," Appendix B). As determined by the IHO, the November 2020 CSE did not follow this process (IHO Decision at p. 27).

reveals that there was sufficient evaluative data to determine the student met the criteria for eligibility as a student with a learning disability.

The November 2020 CSE considered the December 2019 private psychoeducational evaluation report, a June 26, 2020 report card, an October 14, 2020 reading evaluation that included administration of the KTEA-3 and QRI-5, an October 19, 2020 record review, and an October 26, 2020 classroom observation (Parent Exs. D at pp. 1-25; I at pp. 4, 7-22; Dist. Exs. 14-15; 19 at pp. 1-6).²⁰

The December 2019 private psychoeducational evaluation was conducted in the student's third grade year; the report noted that the parents requested the evaluation due to concerns about the student's reading development and that despite receiving academic support services since kindergarten, the student struggled with decoding and fluency, misread words and was challenged to comprehend what she read, demonstrated trouble finding the right words when she spoke or understanding a question that was asked of her, and that her parents hoped to gain insight as to how best to support the student's progress in reading (Parent Ex. D at p. 1).

The report provided a medical and social history as well as an academic and intervention history (Parent Ex. D at pp. 1-3). The report noted that the student received speech-language therapy twice weekly as a preschooler with a disability to address articulation issues, was subsequently declassified while still in preschool due to the progress she made, and that this evaluation was the student's first formal school-age evaluation (*id.* at pp. 2-3). The report indicated that, according to the parents, the student had always struggled with reading, had difficulty learning her letter sounds in kindergarten despite spending an additional year in pre-K, and that the student was frustrated by her learning difficulties and commented that she was not smart and wished she could do better (*id.* at p. 2). The report noted that in first grade the student had difficulty learning sight words, and over the years the student's teachers recommended working with her on decoding or practicing reading for fluency by doing repeated readings at home (*id.* at pp. 2-3). In addition, her teachers often commented that the student needed to have directions repeated or re-explained, she had "been in and out of AIS reading support every year," and "[h]er teachers noted difficulties, but ha[d] not recommended testing" (*id.* at p. 3).

The December 2019 report indicated that evaluation procedures included a review of records, clinical interview with parent and child, written teacher consultation, and administration of the Feifer Assessment of Reading (FAR), Test of Word Reading Efficiency, Second Edition (TOWRE-2), Phonological Awareness Screening Test (Form A) (PAST-A), Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), and Wechsler Individual Achievement Test, Third Edition (WIAT-III) (Parent Ex. D at p. 3). The student's third grade teacher reported that the student was a role model to her classmates who listened appropriately in class, was a good contributor to class discussions, followed directions, used her time wisely, and organized her materials (*id.*). The report noted that the student was more consistent in checking her work before turning it in, was a hard worker who asked questions when she did not understand something, and used strategies that were taught to her (*id.*). The student was noted to be socially attuned and tended to know everything that was happening with everyone else in the classroom, which was

²⁰ The October 19, 2020 record review is not a part of the hearing record.

sometimes distracting (id.). Additionally, the teacher reported that during "WINN" (what I need now) time the student was working on fluency building strategies and multi-syllable strategies, and that the student's assessments "(FAST, CKLA) indicate[d] that her fluency and word reading [we]re 'on grade level'" (id.).

Throughout the evaluation, the private psychologist indicated that the student demonstrated a solid work ethic, a desire to please, persistence to task, was hardworking, and she concluded that the results were an appropriate estimate of the student's functioning at the time (Parent Ex. D at pp. 4, 21). According to the private psychologist, the student's cognitive assessment yielded overall scores in the average range with particular strengths in verbal comprehension and working memory, her vocabulary and verbal reasoning skills were particularly strong, and another "significant strength" was observed on a task of visual memory (id. at p. 21). The student demonstrated relative weaknesses on a task of rapid visual searching and decision making as well as on naming speed, which was a weakness that was also observed on reading assessment (id.).

The report stated that the assessment of academic achievement was somewhat more variable, and the student demonstrated strong vocabulary knowledge as well as high average listening comprehension skills (Parent Ex. D at p. 21). Notably, the report indicated that together with the student's cognitive strengths, these scores suggested that the student possessed the language processes necessary to comprehend grade level texts; however, her reading comprehension and word reading skills fell in the low average range on a wide range assessment of reading (WIAT-III) and below average on a more comprehensive targeted assessment of reading (FAR) (id.). The student's math problem solving and computation skills both fell within the average range and the student demonstrated grade appropriate skills overall in math (id.). With respect to writing skills, the student's performance was more variable with an overall average score on essay composition skills despite weaknesses in grammar and mechanics and, on an isolated task of spelling, her score fell within the low average range (id.).

Specifically, to evaluate the student's reading skills, several additional specialized reading tests were administered (Parent Ex. D at p. 21). Assessment of fundamental and complex reading skills indicated that despite some solid compensatory skills, the student "demonstrate[d] pervasive and significant deficits in the underlying reading processes necessary for continued development in reading" (id.). The report noted that "[f]irst, and critically, although [the student] demonstrated mastery of lower-level phonological awareness, she lack[ed] automaticity even at some of the most basic levels" (id.). According to the private psychologist, the student's lack of phonemic proficiency impaired the development of decoding and orthographic mapping skills, and although the student recognized some words on sight, she did not do so efficiently (lacked fluency) or consistently (id.). As such, the private psychologist indicated that the student was prone to frequent word substitution errors and, further, when presented with unknown words to decode (nonsense words), the student was inconsistent in her application of decoding strategies, which earned her scores "below the average range despite years of academic intervention support and systematic Tier 1 phonics instruction at school" (id.). According to the private psychologist, despite strong vocabulary and oral comprehension skills, and an average reading rate, the student's comprehension was impaired by her frequent word level errors (id.). The private psychologist concluded that even when the student's errors were minimal, much of her cognitive energy was spent lifting the words off the page leaving little reserve left for comprehension (id.). The report noted that an analysis of the student's performance across several measures suggested an

overreliance on a less efficient top-down processing style for reading with many orthographically based substitution errors, and further noted that it was critical that reading instruction de-emphasize guessing strategies (i.e., use of context, picture cues, etc.) while systematically instructing phonetic rules (id. at p. 22).

The private psychologist reported that, although the student received evidence-based Tier 1 instruction and Tier 2 academic support, her profile suggested that she required intensive, explicit, systematic, and phonologically based reading instruction that was of sufficient intensity and individualized to her needs as outlined in the report (Parent Ex. D at p. 22). The private psychologist went on to advise that the reading instruction should not focus on fluency, but rather on accuracy as the student tended to focus on reading quickly, often guessing the words on the page rather than taking the time required at that stage in her development to accurately decode (id.). The report stated that, although the student read with grade-appropriate fluency, her comprehension was impaired by greater than expected errors, particularly orthographically based substitution errors (id.). According to the private psychologist, it was critical that reading instruction across all environments deemphasize word solving strategies based on cueing or guessing, as the student's overreliance on such inefficient strategies seemed to have impacted her consistent application of decoding skills (id.). In addition, even though the student displayed many personal, academic, and cognitive strengths, the private psychologist noted that the student was showing signs of anxiety about her reading skills, which was concerning and indicated the need for "intensification of systematic reading intervention" (id.). The private psychologist suggested the need for a balanced approach to accommodation and remediation because too much emphasis on remediation could stifle the student's curiosity and effort while over reliance on accommodation would not allow her to acquire the skills that she needed to continue to grow and learn (id.).

In the report recommendations, it was noted that the student met the "diagnostic criteria" for dyslexia (language-based reading disability), and that she met the IDEA "classification criteria as a student with a Specific Learning Disability in Reading (Decoding)" (Parent Ex. D at pp. 22-23). The private psychologist recommended that the student receive an IEP with related supports, services, and accommodations at school including but not limited to: directions and questions read to her, extended time (1.5) for tests and assignments, alternate location for testing, access to recorded texts, and access to teacher or guided notes (id. at p. 23). The recommendations also included that the student required systematic, explicit, intensive, and individualized reading intervention and that the intervention be delivered by a skilled reading teacher who was not only trained in the program of choice but was also knowledgeable about the syllable patterns in the English language and how to explicitly and systematically teach them (id.). In addition, the private psychologist recommended that the student's reading intervention include phonemic awareness exercises, that her spelling program be aligned with her reading intervention, and that the student's parents consider having the student evaluated for a central auditory processing disorder (id. at pp. 23-24). Further recommendations included additional reading-specific interventions such as word level interventions, phonics instruction, as well as advanced word study with attention to the student's morphological awareness (id. at p. 24). Recommendations for classroom-specific interventions included active learning along with repetition and practice, that teachers provide information in multiple ways, for teachers to encourage the student to write her first draft without concern for punctuation and grammar, allowing the student to focus on content alone (id.). The report included recommendations for applications and games for reading and spelling practice as well as for building fluency, and provided a reading list for parents and teachers (id. at p. 25).

As part of the district's academic achievement evaluation of the student, on October 14, 2020, the student was administered all reading subtests of the KTEA-3 as well as the QRI-5 by a special education teacher (Parent Ex. I at pp. 4, 7-21). According to KTEA-3 results, the student performed in the average range on the following subtests: letter and word recognition, nonsense word decoding, silent reading fluency, and reading vocabulary, with an overall reading composite also in the average range (id. at pp. 7-9). The student performed in the below average range on KTEA-3 subtests measuring phonological processing, word recognition fluency, decoding fluency, and reading comprehension (id.). With respect to phonological processing, the student was most successful with tasks that required blending and sound matching, and the majority of her errors were made when she was tasked with deleting and segmenting sounds (id. at p. 8). The report noted that with respect to letter and word recognition the student had difficulty with some multisyllabic words and during the subtest the student relied on the decoding strategy known as "chunking" by locating familiar patterns/sounds when reading the word lists (id.). With respect to nonsense word decoding, the student's decoding errors were mostly related to vowel sounds, as she had trouble deciphering what vowel sound to use with a given word (id.). The report indicated that, with respect to silent reading fluency, the student took a very cautious approach during this subtest, seeking out confirmation of a correct answer on three separate occasions, and, although she accurately read aloud 21 sentence prompts and made zero errors within the two-minute time limit, the special education teacher opined that had she worked confidently, her score would have been higher (id.). With respect to word recognition fluency, the student was able to accurately decode 27 total words within the 30-second time frame given to her, resulting in a subtest score that "fell just below the [a]verage range" (id. at p. 9). The report noted that, with respect to decoding fluency, the student was able to accurately decode 12 total words within the 30 second time frame given to her, and she appeared to be somewhat hesitant in her responses during that subtest (id.). The student demonstrated a notable strength on the reading vocabulary subtest and located synonyms for several words while struggling to find synonyms for other words (id.).

With respect to the reading comprehension subtest on the KTEA-3, the student read some passages to herself and some aloud, and she demonstrated greater accuracy answering literal comprehension questions (Parent Ex. I at p. 9). Further, as the reading level became more challenging, the student demonstrated difficulty accurately answering inferential comprehension questions particularly with narrative text (id.). The special education teacher stated that "[i]t [wa]s worth noting that [the student's] reading comprehension [wa]s significantly enhanced by her background knowledge, as she was able to answer some questions based on previously learned information," and that her score on the reading comprehension subtest fell in the below average range because "it was adversely impacted by her limited background knowledge on one particular passage" (id.). The QRI-5 was an additional test that was administered and upon completion of the test, the student achieved a score at an "Instructional Level 4," which was considered to be grade level (id. at pp. 9-10, 19-21).

On October 26, 2020, the district school psychologist conducted a 30 to 40-minute classroom observation of the student during remote instruction via videoconference (May 9, 2022 Tr. pp. 117-18; Parent Ex. I at p. 22). The school psychologist indicated in a checklist form that the student attempted assigned tasks, attended to tasks independently, was able to work with normal classroom distractions, followed directions, attended during group activities, contributed/worked well in group activities, shifted easily when activities changed, demonstrated an activity level that was appropriate for the situation, and did not demonstrate a short attention

span and was not impulsive (Parent Ex. I at p. 22). In addition, the school psychologist commented that the student easily transitioned between tasks, sat very still in her seat, maintained eye contact throughout the observation within the remote classroom, and that she participated, volunteered, and was on task with correct responses, engaged, prepared, and ready (*id.*).²¹

By prior written notice dated November 6, 2020, the district summarized the recommendations of the November 2020 CSE and provided the parents with a CSE ineligibility document (ineligibility document) (Parent Ex. I). With respect to the October 19, 2020 records review indicated on the November 2020 CSE ineligibility document, the district assistant director of special education testified that, although she did not know specifically what the district school psychologist included in her October 19, 2020 record review, a record review typically consisted of a review of the private psychoeducational evaluation, the student's current academics, how she was performing, and "those types of records" (May 9, 2022 Tr. pp. 5, 83-84). The school psychologist testified that for the October 19, 2020 record review she reviewed the student's report card, and "requested information of all her curriculum-based measures" so that she could see what her performance was, consulted with the student's last instructional specialist who worked with her at the beginning of third grade to get information on the time the student spent in instruction in Tier 2 intervention, and spoke with the student's third grade teacher (*id.* at pp. 101, 105-06). The school psychologist stated that the curriculum-based measures included "any screenings that were done school-wide three times a year" and that, they were the "CKLA, the FAST screenings, curriculum-based measures for words read correct, the fluency" (*id.* at p. 106). It is unclear what the school psychologist specifically reviewed, and although there are documents in the hearing record that contain CKLA and FAST screenings as well as those with curriculum-based measures, the school psychologist provided no details (*i.e.*, dates of any documents) as to which documents within the hearing record she reviewed.

When determining the eligibility of a student suspected of having a learning disability, where the student has participated in a process that assesses the students' response to scientific, research-based intervention, such as RtI, the CSE is required to prepare a written report containing, among other things, the instructional strategies used and the student-centered data collected (8 NYCRR 200.4[j][5][i][g][1]). In addition, specific to the consideration of the student's eligibility for special education as a student with a learning disability, the CSE was also required to consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the student's progress during instruction, and this assessment should have been provided to the student's parents (8 NYCRR 200.4[j][1][ii][b]).

As detailed above, the district failed to offer sufficient evidence of the student's RtI performance data consistent with State regulation and further failed to establish that referral of the student was not required during the 2019-20 school year. Additionally, as discussed above, the

²¹ Although not included in the district's prior written notice as an evaluation/report that the CSE considered, during the CSE meeting, the district school psychologist referenced an audio recording of the student reading a passage that the parents provided, along with the text version of Owl Moon, and the district school psychologist noted that she and the special education teacher had listened to the recording (Parent Exs. TT; SS; Dist. Exs. 20 at p. 2; 27 at 45:45). The district school psychologist went on to say that the student "does not read like that in school," "not even on the first cold read," and that she could imagine what the parents were seeing at home after hearing the recording (Dist. Ex. 27 at 45:42, 46:03).

private psychologist who conducted the December 2019 psychoeducational evaluation noted that the student met the criteria for a specific learning disability in reading (decoding) (Parent Ex. D at pp. 22-23). While the November 2020 CSE was not required to agree with the private psychologist, when presented with this information, the district was required to present the data gathered as part of its RtI process and use that data in determining whether the student was making sufficient progress towards grade level standards (34 CFR 300.309[a][2]; 8 NYCRR 100.2[i][1][iv], 200.4[j][3][i]). The district has failed to meet this burden. Therefore, the next inquiry as part of the eligibility determination is whether the student required special education services.

2. Need for Special Education

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

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

services" to students in the general education setting (see Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]).

Given the broad definition of special education within New York's Education Law and State regulations and given the length of time the student had consistently received interventions under RtI, her minimal progress within RtI, and her regression when RtI services were decreased, the evidence in the hearing record supports the conclusion that the student required special education to make sufficient progress in reading to access the general education curriculum. As noted in detail above, the student demonstrated weaknesses in reading, specifically with decoding, fluency, and comprehension, and she began receiving RtI services, including small group instruction in reading separate from core instruction, in first grade that has continued each year since (see Parent Exs. N; XX; ZZ; Dist. Exs. 4; 5; 26).

The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to general education students. Nevertheless, the continuous provision of RtI services to the student beginning with the 2017-18 school year and the district's inability to demonstrate through consistent progress monitoring that the student made progress toward grade-level standards as detailed above, supports a finding that the student required special education and the district denied the student a FAPE as a result of the November 2020 CSE's failure to find the student eligible for special education for the 2020-21 school year, continuing through the 2021-22 school year as the parents alleged.

D. Relief

Having found the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, I will next address the parents' requested relief.

1. Reimbursement for Unilateral Services

a. Reading Instruction

Turning to the parents' request for reimbursement of the student's private reading instruction, the issue is whether the student's reading instruction constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

Here, to adequately address the student's underlying reading deficits, the private psychologist determined that the student required systematic, explicit, intensive, and individualized reading interventions, such as Orton-Gillingham, Road to Reading, the Wilson Reading Program, etc., indicating that the intervention should be delivered by a skilled reading teacher who was not only trained in the program of choice, but was knowledgeable about the syllable patterns in the English language and how to explicitly and systematically teach them (Parent Ex. D at p. 23). In addition, the private psychologist found that phonemic awareness exercises as part of the student's reading intervention were "crucial," and that her spelling program should be aligned with her reading intervention (*id.* at pp. 23-24). Further recommendations included additional reading-specific interventions such as word level interventions, good phonics instruction, as well as advanced word study with attention to morphological awareness (*id.* at p. 24).

The parents hired a private tutor (tutor) who possessed a Wilson Reading Certification, level one; the tutor testified that she was "certified to instruct students who ha[d] been labeled with reading disabilities, specifically dyslexia, . . . how to decode and encode words" (July 11, 2022 Tr. pp. 15-16; Parent Ex. GG at p. 1). The tutor testified that she started working with the student in September 2021 when the student was in fifth grade and noted that the parents reached out to her because the student was having trouble with reading and they wanted her to get support specifically in the Wilson Reading Program (July 11, 2022 Tr. p. 16). The student received between one hour and one hour and 15 minutes per week of the Wilson reading program in a small group with her sister (July 11, 2022 Tr. pp. 61-62).

The tutor stated that she assessed the student's reading ability by using the Wilson Assessment of Decoding and Encoding (WADE) and explained that "it takes a look at a child's ability to decode," which meant to break down the sounds within a word using both real words and nonsense words (July 11, 2022 Tr. p. 17). She further explained that the WADE tests sight words and looks at a child's "encoding piece," which includes spelling and putting the sounds back together, and more specifically, the tutor noted that the WADE breaks down each section for the child into basic consonants, vowels, additional sounds, diagraphs/trigraphs, welded sounds, and high frequency words (July 11, 2022 Tr. pp. 18-20; Parent Ex. HH at pp. 1-2). The tutor stated that the student scored fairly well with basic consonants, struggled with vowels and words having additional sounds, which indicated that she did not have a good foundation of reading to actually identify that sound in isolation (July 11, 2022 Tr. pp. 19-20; Parent Ex. HH at p.1). According to the tutor, in her initial assessment for sounds, the student started to make a lot of errors with welded words with the closed exception, which is a single syllable sound or word that makes the long vowel sound, and that the student struggled with and could not distinguish between the short and the long vowel (July 11, 2022 Tr. pp. 20-21). With respect to reading high frequency words, which are sight words, the tutor stated that the student did very well, reading 53 out of 60 words (July 11, 2022 Tr. p. 21; Parent Ex. HH at p. 2). The tutor explained that in the next part of the test the student was asked to use the sound symbol relationships to decode real words; that the student did well on the very first substep consisting of basic single syllable words, then demonstrated more difficulty with lists two and three at which point she started to make errors such as dropping letters in the middle of the word and struggling significantly with double letters in the middle of the word (July 11, 2022 Tr. pp. 21-22; Parent Ex. HH at pp. 3-4). As the words increased in complexity, the student continued to make the same kinds of errors, left letters out and confused some, scrambled a couple of letters, and dropped endings (July 11, 2022 Tr. p. 22; Parent Ex. HH at pp.

3-4). The tutor testified that the WADE summary of scores reflects that the student achieved 65 percent for total sounds and 80 percent for total reading, and she explained that although the student's total reading was at 80 percent, the key indicator was that she scored significantly lower with nonsense words at 68 percent (July 11, 2022 Tr. pp. 22-24; Parent Ex. HH at p. 5). She further explained that 68 percent for pseudo (nonsense) words was important because that assessment category forced children to use their knowledge of what sounds represent, did not allow for guessing or many strategies, and required that the sounds be pulled apart and put back together quickly, which proved increasingly difficult for the student (July 11, 2022 Tr. p. 24; Parent Ex. HH at p. 5).

The tutor testified that with respect to the December 2019 private psychoeducational evaluation, the errors that the student made during the evaluation were very similar to the errors that the tutor saw the student making (July 11, 2022 Tr. pp. 48-49; see Parent Ex. D). According to the tutor, the student was "definitely behind her peers" in her ability to decode and encode words and she continued to struggle with reading comprehension (July 11, 2022 Tr. pp. 45-46). In addition, the tutor testified that the student "definitely" required a very structured program that was going to focus on the decoding and encoding to help her learn to do words in isolation, put them in sentences, and read the sentences for meaning in order to be able to participate in the grade level curriculum (July 11, 2022 Tr. pp. 49-50).

To address the student's identified reading needs, the tutor used the Wilson program, which she explained was appropriate because it addressed the behaviors and strategies that students with dyslexia implemented "that [we]re not always very good" (July 11, 2022 Tr. p. 46). According to the tutor, Wilson focused on getting the student to use the right sounds and put words together so she could read a sentence and understand what she was reading (July 11, 2022 Tr. pp. 46-47). The tutor started the Wilson reading method with the student in book one, at level 1.3 because the student did not need the review of consonants sounds (found in levels 1.1 and 1.2) (July 11, 2022 Tr. pp. 25-26). The tutor explained that creating the Wilson lesson plan was probably the most important part of planning a lesson for the student, as it guided everything that was done for the student, the instructor wrote on it, made notes about what errors the student made, and it helped to drive the instruction of the next lesson (July 11, 2022 Tr. pp. 26-27; Parent Ex. JJ at pp. 1-34).²² For example, the tutor stated that if a child was making certain errors, she actually included those words more often in the next lesson so that those targeted sounds would be "hit" again, and she expected mastery of the skill in each substep before moving on (July 11, 2022 Tr. p. 27). The tutor noted that by using the lesson plans, she learned that the student left out a lot of sounds in the middle of words and at the ends of words, that the errors she made were so subtle that it was hard to know she was guessing, but when reading nonsense words, the tutor could tell the student was guessing at some of the words and she continued to struggle with spelling (July 11, 2022 Tr. pp. 27-28). The student continued to read extremely quickly, which often skewed the meaning for her, and she required reminders from the tutor to slow down (July 11, 2022 Tr. p. 28).

The tutor testified that in Wilson book 2, the student started working on welded sounds, closed exemption sounds, letter blends, two letter blends, and three letter blends and that the

²² The tutor noted that the other name that appeared on the Wilson lesson plans was the student's sister who received Wilson small group instruction at the same time, and that the tutor differentiated each of the sisters' errors by using their name on the plan (Jul. 11, 2022 Tr. p. 29; Parent Ex. JJ at pp. 1-34).

student was demonstrating many errors consistently (July 11, 2022 Tr. pp. 32-33). Specifically, the tutor indicated that the student really struggled with the closed exception as well as two letter blends, and had spent numerous weeks on those substeps, but had recently completed substep 2.4 which were two letter blends (July 11, 2022 Tr. p. 33). According to the tutor, the student did not always hear all of the sounds so that during the encoding phase when she had to spell things back to the tutor, the student dropped letters in both the beginnings and at the ends of the words (July 11, 2022 Tr. pp. 33-34). The tutor testified that she had not started the next level subset due to the transition between the school year and summer and that she slowed down the pace for the student as she had struggled to grasp how to implement the sounds without guessing (July 11, 2022 Tr. p. 34). With the Wilson reading program, the tutor explained, the front half of the lesson plan was decoding and the back half of the lesson plan was encoding, with part of the lesson plan providing a dictation book wherein the student was required to "write it down on paper" (July 11, 2022 Tr. pp. 34-35). The tutor stated that encoding was very taxing for the student, that she tried to spell as fast as she could, and that the tutor would not move the student on until she knew that the student could complete each substep (July 11, 2022 Tr. pp. 34-35). The tutor noted that because the student's high frequency word reading was so high, she actually had to take a step back because the student's spelling of those words was below grade level, for example, she did not know which form of "there" to use (there, their, or they're) (July 11, 2022 Tr. p. 35). Further, the tutor commented that the student did not have working knowledge of the spelling rules for high frequency words and dropped letters (id.).

As to progress in the Wilson program, the tutor testified that the student mastered book one and had moved on to book two (July 11, 2022 Tr. p. 28). The tutor stated that the student "did very well in book 1, which was consistent with her WADE testing" and the tutor noted that for mastery, the Wilson program required 15 out of 15 for "real words" with zero errors, and with "nonsense words," 13 out of 15 was considered mastery (July 11, 2022 Tr. p. 30). The student's progress was charted for each substep and the tutor noted that Wilson dictated that self-corrections not be held against the student, meaning that if a student self-corrected an error, it would be not counted as an error (July 11, 2022 Tr. p. 31; Parent Ex. LL). The tutor explained that if errors were made, the errors drove her instruction, so the words or sounds that the student had difficulty with would be included in every substep going forward until the student was able to complete that book without those errors (July 11, 2022 Tr. pp. 31-32). The tutor commented that the student was "doing really well with" the Wilson reading program, that she was engaged, and that the student should continue with the program (July 11, 2022 Tr. p. 42).

Given the above description of the private reading instruction the tutor provided to the student, including her selection of the Wilson program to assess and address the student's specific decoding needs and the progress the student made, the evidence in the hearing record supports a finding that the private reading services constituted specially designed instruction that met her unique needs.

b. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary

equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]).

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

By letter dated June 23, 2021, the parents provided the district with ten-day written notice that as a result of the district's failure to classify the student and offer an appropriate IEP at the November 2020 CSE meeting, the parents intended to obtain private reading instruction and seek reimbursement from the district for the cost of the instruction (Parent Ex. C at p. 1). In review of the hearing record, there is no reason to find that equitable considerations do not favor reimbursement. The hearing record demonstrates that the parents referred the student to the CSE in writing, provided consent for the district to evaluate the student, provided the district with privately obtained evaluative information, cooperated with the district evaluations, timely provided ten-day notice of their intent to obtain private reading instruction at district expense, and participated in the November 2020 CSE meeting. According there is no equitable basis for a reduction or denial of an award of reimbursement for the costs of the reading instruction.

2. Reimbursement for Psychoeducational Evaluation

The district cross-appeals the IHO's equitable award of reimbursement to the parents for the costs of the privately obtained psychoeducational evaluation. In its answer and cross-appeal, the district has conflated the procedure for obtaining an IEE at public expense with a request for reimbursement of a privately obtained evaluation as equitable relief for the district's alleged failure to evaluate the student in all areas of suspected disability (compare 8 NYCRR 200.5[g][1][iv]; with 8 NYCRR 200.4[b][4]). The parents have not alleged that they requested reimbursement for the cost of the private psychoeducational evaluation as an IEE, nor did the IHO analyze it as such. Review of the hearing record supports the IHO's award of reimbursement to the parents for the evaluation as equitable relief.

Pursuant to federal and State procedures for determining a student's eligibility and educational needs, a "[CSE] and other qualified individuals must draw upon information from a

variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]; see 34 CFR 300.306[c][i]). To accomplish this task, a district is required, in part, to conduct an initial evaluation of the student referred to the CSE (see 20 U.S.C. § 1414[a][1][B]-[C]; 34 CFR 300.301, 300.306; 8 NYCRR 200.4[a]-[b]).

Under federal and State regulation, a school district is responsible to conduct a "full and individual initial evaluation" before the initial provision of special education and related services to a student with a disability (34 CFR 300.301[a]; see 8 NYCRR 200.5[b][1]). Under federal regulation, an evaluation must assess the student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4] [emphasis added]). Under State regulation, an initial evaluation must include at least:

- (i) a physical examination . . . ;
- (ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student . . . that further evaluation is unnecessary;
- (iii) a social history;
- (iv) an observation of the student in the student's learning environment (including the regular classroom setting). . . ; and
- (v) other appropriate assessments or evaluations, including an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4[b][1]).²³ A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Federal and State evaluation procedures require that any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii] 8 NYCRR 200.4[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or

²³ Federal requirements do not prescribe specific types of assessments that must be conducted as part of an initial evaluation except that a classroom observation is a federal requirement for students with specific learning disabilities. The terms psychological evaluation, social history, and FBA are not defined in federal law or regulation.

developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

By email dated September 3, 2020, the parents provided a copy of the December 2019 private psychoeducational evaluation to the district assistant director of special education and requested a CSE meeting (Parent Ex. G at p. 1). By email dated September 16, 2020, the parents provided a copy of the December 2019 private psychoeducational evaluation to the district school psychologist (Dist. Ex. 9 at p. 1). A handwritten note on the bottom of the email indicated that the school psychologist spoke with the student's mother on September 30, 2020 and the parent wanted to proceed with a referral to the CSE (*id.*). By prior written notice dated October 1, 2020, the district requested consent to "conduct an evaluation to determine initial eligibility for special education services" (Parent Ex. H at p. 1). The district sought parental consent for an educational evaluation, record review, classroom observation and a social history (*id.* at pp. 1-2). The student's mother signed the consent form on October 2, 2020 and provided a copy to the district by email dated October 2, 2020 (*id.* at p. 3).

Initially, as determined above, the district was found to have violated its child-find obligations. Accordingly, although the December 2019 private psychoeducational evaluation of the student was conducted prior to the district's evaluation of the student, due to the child-find violation, the district should have conducted an evaluation of the student prior to its receipt of the private psychoeducational evaluation report. Additionally, as described above in detail, the district's ineligibility document indicates that the November 2020 CSE relied on a classroom observation, record review, and student report cards; however, all other evaluative information listed in the ineligibility document was taken from the December 2019 private psychoeducational evaluation (compare Parent Ex. I at pp. 4, 7-22, with Parent Ex. D).

The district assistant director of special education testified that the district completed "some academic testing" and did not do its own cognitive or psychological assessment "because it had been done by [the private psychologist]" (May 9, 2022 Tr. p. 65). The district did not conduct a social history and the assistant director of special education testified that "[the private psychologist] had really covered that pretty significantly in her report, and we typically would send a document home for the parent to fill out, but we didn't get that back" (May 9, 2022 Tr. p. 66). In response to why the district did not follow up with the parents to obtain the social history, the assistant director of special education testified that "we did see that there was social history there, so we were able to consider[] that portion of the information in [the private psychologist's] report in lieu of receiving back the document directly from the parent" (May 9, 2022 Tr. pp. 79, 80). Further, on cross-examination, the assistant director of special education conceded that the district did not obtain and consider a physical examination of the student, stating that "[the private psychologist] referred to [the student's] medical history in her report. We do send that home, and if we don't receive it back . . . there's not a lot we can do" (May 9, 2022 Tr. p. 78).

The district school psychologist testified that she did not complete any testing herself because "[i]t was not necessary. The cognitive testing was done and we were going to be completing updated achievement testing" (May 9, 2022 Tr. p. 105). On cross-examination, the district school psychologist agreed that the November 2020 CSE adopted the cognitive and psychological testing conducted by the private psychologist (May 9, 2022 Tr. pp. 142, 143). The district school psychologist further confirmed that the CSE relied on the December 2019 private psychoeducational evaluation for the student's social history (May 9, 2022 Tr. p. 143).

The hearing record demonstrates that, even after the parents' referral of the student, a referral for which the parents relied on the December 2019 private psychoeducational evaluation, the district failed to conduct a complete initial evaluation and also relied extensively on the private psychoeducational evaluation. Under these circumstances, I find no basis to disturb the IHO's award of equitable relief and the district must reimburse the parents for the cost of the December 2019 psychoeducational evaluation.

3. Compensatory Education

Finally, as relief, the parents request one hour per day of compensatory "direct reading instruction in a multi-sensory, structured, language-based program, such as Wilson delivered by a teacher certified in such program" to remedy "the deprivation of FAPE from 2020-2022" totaling "approximately 500 hours (180 hours per school year)" (Req. for Rev. ¶ 4). In their memorandum of law, the parents request compensatory services to remedy a deprivation of FAPE from February 2, 2020 through June 30, 2022 (Parent Mem. of Law at p. 28). The district asserts that the parents are "double-dipping" by seeking both reimbursement for private reading instruction and compensatory education for the same time period (Answer & Cross-Appeal ¶ 4). Based on the findings above and for the reasons that follow, the student is entitled to compensatory educational services for the 2020-21 and 2021-22 school years. The district is directed to fund 360 hours of direct reading instruction in a multisensory, structured, language-based program to be provided by a certified teacher of the parents' choosing.

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]). Compensatory education relief 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]). The purpose of an award of compensatory education 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 & n.12 [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 Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; 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]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems

with the IEP"]; 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. of Fayette County 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"]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; 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). 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"]).

As discussed in detail above, the student received a variety of services and supports through the district's RtI process. The support occurred separate from the student's core instructional program in groups as large as 13:1 and as small as 4:1 (Parent Ex. N at pp. 1-3). The student also received services within a 1:1 setting (Parent Ex. XX at p. 2). While it is not clear from the hearing record how frequently each of these groups met, there is evidence that the student sometimes received interventions for 30 minutes per day (Dist. Ex. 5 at p. 1), 40 minutes per day (Parent Exs. WW at p. 1; ZZ at p. 2), or "an additional 15 minutes" (Parent Ex. XX at p. 2). The student's remote fourth grade teacher testified that, starting around the time of the November 2020 CSE

meeting she began working individually with the student once per week and then in March or April of 2021 she met individually with the student twice per week. The purpose of the individual meetings was to work on reading strategies including word recognition, fluency, and comprehension (June 3, 2022 Tr. pp. 21, 36-38).

A review of the hearing record showed the student required extra time to process information, modeling, and paraphrasing of directions (June 3, 2022 Tr. p. 30; Dist. Ex. 17 at p. 3), as well as repetition for comprehension (Parent Ex. Z at p. 2; Dist. Exs. 12 at p. 3; 18 at p. 3). On April 8, 2021, the teacher wrote to the parent that there were "tools that [she had] observed working for [the student]" and she encouraged using them at home; these tools included color filters as well as text to speech and speech to text software (Parent Ex. Z at p. 3). The teacher testified she offered text to speech and speech to text software for support because the student was in a remote setting and the parent expressed concerns (June 3, 2022 Tr. pp. 43-44). She testified that the color strip filters were a reading strategy to support keeping track of their location on the page (June 3, 2022 Tr. pp. 44-45). The student benefitted from the use of organizational tools for written expression (Parent Ex. J at p. 4; Dist. Ex. I at p. 5), reminders to check her spelling and grammar (June 3, 2022 Tr. p. 29; July 11, 2022 Tr. pp. 27-28; Parent Exs. J at p. 4; I at p. 5), and the ability to type information and access to word processing applications (Dist. Ex. 28 at p. 3). The student was also described as needing reminders to slow down her reading in order to increase her comprehension (July 11, 2022 Tr. pp. 27-28, 35).

During the November 2020 CSE meeting, the classroom teacher stated that the district literacy teacher had recommended that she begin using the Rewards program with the student. When she described it to the parent, the classroom teacher said that it teaches word attack strategies, increases fluency, and vocabulary instruction (Parent Ex. UU at 11:48; Dist. Ex. 27 at 16:06). Another member of the November 2020 CSE, the special education teacher, stated that it seemed as though the student would benefit from the vocabulary component of Rewards and that the program would address the student's fluency and comprehension issues. She went on to say that if she were to work with the student as her special education teacher it "would be the exact place where [she] would start" (Parent Ex. UU at 13:15; Dist. Ex. 27 at 17:38). The Rewards program was still in use as included in the minutes of the April 7, 2021 Data Inquiry Team Form when a Tier 3 level of support was implemented with the student (Dist. Ex. 24 at p. 1).

The private psychologist who conducted the December 2019 psychoeducational evaluation also completed a reading update in March 2022. The results of three evaluations included the following recommendations: directions, questions, and tests read to the student; extended time to complete assignments and tests; an alternate location to take tests; access to recorded texts, use of a word processor and/or voice-to-text software; and access to teacher or guided notes (Parent Exs. D at p. 23; E at p. 19). The psychologist recommended a "systematic, intensive and individualized multi-sensory reading intervention" with "continued phonemic awareness exercises," "word-level interventions," and "advanced word study with attention to morphological awareness" (Parent Ex. E at p. 19). The psychologist noted that, as of December 2019, the student had interventions but she did not master the skills, as they were not retained (Parent Ex. D at p. 19). In her updated evaluation, the psychologist wrote that "while [the student] [had] made some gain, her rate of growth ha[d] not been sufficient to begin to close the gap between herself and same-grade peers" (Parent Ex. E at p. 15). In a Data Inquiry Team Form, the school team reported that "it is clear

that [the student] regresse[d] when she d[id] not have reading interventions" (Parent Ex. XX at p. 1).

The student's private Wilson reading tutor testified that she began providing instruction in September 2021 (July 11, 2022 Tr. p 16). According to the graph of the student's performance on universal screenings of oral reading fluency, the student's score of 117 on the fall 2021 administration placed her within the "some risk" range and 17 points above the "high risk range" (Parent Ex. CC at p. 2). On the winter 2022 universal screening, the student's score of 118 placed her within the "some risk" range and four points above the "high risk" range (*id.*). In the spring 2022, the New York State Grades 3-8 ELA exams were administered between March 29, 2022-April 5, 2022 (SRO Ex. 1 at p. 3; see "2021-22 Elementary- and Intermediate-level Testing Schedule" at p. 1, Office of State Assessment [Apr. 2022], available at <http://www.nysed.gov/memo/state-assessment/2021-22-elementary-and-intermediate-level-testing-schedule>). The parents received the results of the student's performance on the Grade 5 ELA exam on October 27, 2022 (Req. for Rev. Ex. 1 at p. 1). The student received a score of 601, placing her within the level 2 range, which was below the State standard and indicated that the student was partially proficient in standards for her grade (*id.* at p. 3). Specifically in reading, the student scored 18 out of 28 and in writing from sources, the student scored eight out of 16 (*id.* at p. 4).

Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5-7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]; I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with Doe v. E. Lyme, 790 F.3d 440, 456-57 [2d Cir. 2015] [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]).

Unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related

services are required in order for the placement to provide the student with a FAPE (see V.W., 2022 WL 3448096, at *5–7).

Notwithstanding the above, one court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period, in a footnote, the court distinguished a compensatory award in the form of an additional year of tuition at a nonpublic school, noting that an award of tuition reimbursement and compensatory education in the form of an additional year of tuition could be viewed as duplicative remedies (V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5 n.3; see J.M. v. Kingston City Sch. Dist., 2015 WL 7432374, at *13 [N.D.N.Y. Nov. 23, 2015] ["Where the parent has not unilaterally enrolled a child in a private school, and thus does not seek retroactive reimbursement, the child may be entitled to compensatory education"]). Based on this view, it would appear that an award of reimbursement for unilaterally obtained services and an award of compensatory reading instruction based on the same denial of FAPE for the same school years, under the circumstances presented in this matter would not be duplicative.

Based on the totality of the evidence in the hearing record, the parents' unilaterally obtained reading instruction delivered during the 2021-22 school year, while appropriate, was insufficient to remedy a denial of a FAPE beginning in February 2020 and continuing through the 2021-22 school year. In other words, had the student been found eligible for special education by the district during the 2019-20 school year and offered a FAPE, she could have received in excess of one hour per week of specialized reading instruction. Taking into account the amount of reading instruction that could have been provided to the student if she were found and referred for special education by February 2020 and the amount of support that the student did receive through the district's RtI process, a reasonable award of compensatory education is 360 hours of direct reading instruction. Notably, with this award, the district is responsible for what the district "would have borne in the first instance" had it offered the student a FAPE and does not constitute 'double-dipping' (see Burlington, 471 U.S. at 370-71; 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district failed to fulfill its child find obligation and denied the student a FAPE by failing to find the student eligible for special education when the CSE convened on November 6, 2020. The evidence also supports the IHO's determination that the district must reimburse the parents for the cost of a December 2019 psychoeducational evaluation. I further find that the IHO erred in finding that the student was not entitled to a FAPE because she was not eligible for special education, in remanding the matter to the CSE, and in denying the parents' requests for reimbursement of private reading instruction and compensatory educational services.

I have reviewed the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 10, 2023, is modified by reversing those parts which found the student was not eligible for special education as a student

with a learning disability and not entitled to a FAPE, and which found the parents were not entitled to reimbursement for unilaterally obtained reading instruction and compensatory educational services; and

IT IS FURTHER ORDERED that upon proof of delivery of services and payment, the district shall reimburse the parents for unilaterally obtained private reading instruction delivered to the student during the 2021-22 school year in the amount of \$50.00 per hour; and

IT IS FURTHER ORDERED that the parents are entitled to 360 hours of compensatory reading instruction to be provided by a certified instructor of the parents' choosing.

Dated: **Albany, New York**
 March 23, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER