



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-214

### Application of the XXXXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

#### Appearances:

Harris Beach PLLC, attorneys for petitioner, Jeffrey J. Weiss, Esq., of counsel

Colligan Law, LLP, attorneys for respondents, Carolyn Nugent Gorczynski, Esq. and William J. Casey, Esq., of counsel

## 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents) son and ordered the district to reimburse the parents for the cost of the student's tuition at the Gow School (Gow) for the 2012-13 school year. The parents cross-appeal from the IHO's decision to the extent that it did not address all of the claims raised by the parents in their due process complaint notice. The appeal must be sustained. 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**

According to the hearing record, the student presents with an extensive history of learning challenges, and more recently, social/emotional concerns (Tr. pp. 642-643; Dist. Exs. 7 at p. 8; 22 at p. 2; 42 at p. 2; 44 at p. 2-3; 45 at p. 2; Parent Exs. A; B). The hearing record contains documentation of the student's educational history dating back to the student's initial referral during the 2006-07 school year, and the completion of a privately-obtained neuropsychological evaluation in February 2007 (Tr. p. 962-63; Dist. Ex. 47; Parent Ex. B at p. 1). Among other things, the student's early educational history was notable for difficulties with short-term memory and delays in the development of articulation, expressive language, auditory processing, fine motor, and early literacy skills (Parent Exs. A at pp. 3-4; B at pp. 2-3).<sup>1</sup> In

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<sup>1</sup> Although the hearing record refers to the student's "reading" challenges, those references to "reading" challenges include documentation of his difficulties with other aspects of written language/literacy (Tr. pp. 136, 517-18, 666-67; Dist. Exs. 37 at p. 1; 40 at pp. 2-3; 42 at pp. 3, 6, 8; 44 at pp. 4, 8, 11; 45 at pp. 9-10).

November 2006, the student was found eligible for special education and related services as a student with a speech or language impairment and was provided the related service of speech-language therapy (Parent Ex. B at pp. 1-2).<sup>2</sup> During the 2007-08 and 2008-09 school years, the student was placed in a 12:1+1 special class with related services of speech-language therapy and occupational therapy (OT) (Dist. Ex. 20 at p. 2; Parent Ex. A at p. 1). For the student's 2009-10 school year, the CSE changed the student's category of special education eligibility to a student with a learning disability and transitioned the student back to a general education setting with the support of an aide in a 2:1 ratio while in that setting (Dist. Ex. 19 at p. 1). In addition, the CSE recommended the student's placement in a 12:1+1 special class for math, a general education class providing integrated co-teaching (ICT) services for English language arts (ELA), speech-language consultation services one time per month for thirty minutes, and a reading lab in a 12:1 ratio for three forty-minute sessions in a six-day cycle (*id.*).<sup>3</sup> The record indicates that for the 2010-11 school year, the CSE removed the student's 2:1 aide due to his lack of need for the support provided by the aide, but continued to provide the student with the special class, ICT services, and reading lab programs (Dist. Exs. 17 at p. 6; 18 at pp. 1, 4). For the 2011-12 school year, the CSE adjusted the student's program, switching the student's math class to a general education class with ICT services, continuing to provide the student with ICT services in ELA, and providing the student with a 15:1 special class setting for "ISP" three hours per six-day cycle, and adding counseling as a related service for one thirty-minute session per month (Dist. Exs. 13 at p. 6; 15 at p. 6; 17 at p. 6).<sup>4</sup> As the student continued to struggle in a general education setting, the CSE met in November 2011 and modified the student's program again, recommending that the student move into a 12:1+1 special class on a full-time basis in January 2012 (Tr. pp. 67-68, 983-990; Dist. Ex. 12 at p. 6).

During the 2012-13 school year, the CSE met three times: on August 20, 2012, November 20, 2012, and January 25, 2013, in an effort to develop an appropriate program for the student (Tr. pp. 80, 84, 94; Dist. Exs. 7; 8; 9).<sup>5</sup> The August 2012 IEP recommended placement in a 12:1+1 special class with two individual 30-minute speech-language therapy sessions per six-day cycle as a related service (Dist. Ex. 9 at p. 7). The August 2012 IEP also included a recommendation for a "1:1 [e]xplicit, systematic, multisensory reading program[]" for four 50-

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<sup>2</sup> Prior to the district's determination that the student was eligible to receive special education and related services, the student had received "Reading Recovery" and academic intervention services (AIS) (Parents Ex. B at p. 2).

<sup>3</sup> Although the term "CTIS" was used in the hearing record to describe the services provided to the student in the general education classroom setting, for consistency with State regulations this decision refers to these services as ICT (*see, e.g.*, Tr. pp. 66, 203-04; Dist. Exs. 17; 18; 19). ICT services are defined in State regulation as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to a classroom providing ICT services "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a guidance document which further describes ICT services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). I also remind the district that according to State guidance, ICT services are required to be designated as such on an IEP (*id.* at p. 13).

<sup>4</sup> "ISP" is not defined in the hearing record, nor was any explanation given of the services provided thereby.

<sup>5</sup> In addition, an IEP was created on June 4, 2012 without a CSE meeting pursuant to a consent decree entered into between the parents and the district in order to add individual counseling for one 30-minute session weekly as a related service (Dist. Exs. 6; 10; 11).

minute sessions per six-day cycle as well as monthly communication with the parent regarding the student's progress toward his IEP goals, copies of class notes provided to the student, and an array of program modifications, accommodations, and assistive technology (id. at pp. 7-9). The IEP also recommended consultation between a reading specialist and the student's special education teacher at least one time per month (id. at p. 9).

On November 20, 2012, the CSE reconvened to review the student's program recommendation (Tr. p. 94; Dist. Ex. 8 at p. 1). The November 2012 IEP continued to recommend placement in a 12:1+1 special class and the related service of speech-language therapy (Dist. Ex. 8 at p. 7). The CSE added the related service of counseling for two individual thirty-minute sessions per month (id.).<sup>6</sup> The November 2012 IEP identified supplementary aids and services, program modifications, and accommodations including 1:1 reading instruction utilizing an explicit, systematic, multisensory approach for four fifty-minute sessions per week and similar 1:1 reading instruction for a minimum of three sessions per six-day cycle, as well as scheduled monthly face-to-face communication and bi-weekly email updates between the parents and special education teacher (id. at pp. 7-9). The November IEP also recommended continued use of assistive technology and consultation between an outside reading specialist and the special education teacher with the focus of the consultation to be on the "application of strategies across the content area and settings" (id. at pp. 9-10).

On January 15, 2013, the parents sent a letter to the district notifying the district that they were rejecting the program recommended in the student's November 2012 IEP because it did not meet the student's needs in the areas of reading, spelling, and language development (Dist. Ex. 1). The parents also notified the district of their intention to place the student at Gow and to seek reimbursement from the district for the cost of the student's tuition and expenses there (id.).

In response to the parents' notice, the district reconvened the CSE on January 25, 2013 (Tr. p. 109; Dist. Ex. 7). The January 2013 CSE found that the student continued to be eligible for special education programs and services as a student with a learning disability and continued to recommend placement in a 12:1+1 special class with the related services of speech-language therapy and counseling (Dist. Ex. 7 at pp. 1, 11).<sup>7</sup> The CSE modified the student's specialized reading program to 1:1 reading instruction utilizing an explicit, systematic, multisensory approach for a minimum of three times per six-day cycle for fifty minutes and added 1:1 instruction utilizing a "program that addresses Rate of Information Retrieval, Automaticity, Vocabulary,[ and] Orthography" for two sessions per six-day cycle for fifty minutes (id. at p. 11).<sup>8</sup>

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<sup>6</sup> The district representative testified that the student received counseling services in September and October 2012 and the failure to include it in the August 2012 IEP "may have been an oversight" (Tr. pp. 94-96; compare Dist. Ex. 8 at p. 7, with Dist. Ex. 9).

<sup>7</sup> The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

<sup>8</sup> Testimony provided by district staff at the impartial hearing indicated that although the district did not rely on trade names for the student's specific reading programs in the IEP, the 1:1 reading instruction utilizing an explicit, systematic, multi-sensory approach was referred to during the impartial hearing as the Sunday system (Sunday) and the recommendation for 1:1 instruction utilizing a program that addressed rate of information retrieval, automaticity, vocabulary, and orthography was referred to as the RAVE-O program (RAVE-O) (Tr. pp. 86-87, 115-16, 770-71; Dist. Ex. 7 at p. 11). Additionally, RAVE-O is sometimes referred to as RAV-O in the hearing record; however, for the purposes of consistency it is referred to herein by its complete acronym, which stands for retrieval, automaticity, vocabulary, engagement with language, and orthography (Tr. p. 443;

At the time of the January 25, 2013 CSE meeting, the parents had entered into contract for the student's enrollment at the Gow, and on February 1, 2013, the student began attending Gow (Tr. pp. 112, 1032; Dist. Ex. 7; Parent Ex. R).<sup>9</sup>

### **A. Due Process Complaint Notice**

By due process complaint notice dated March 29, 2013, the parents requested an impartial hearing (Dist. Ex. 2). The parents alleged that despite the interventions contained in the August 2012 IEP, the student continued to struggle in reading, spelling, and math during the 2012-13 school year while attending the district's program (*id.* at pp. 4-5). Regarding the January 2013 CSE, the parents alleged that CSE improperly included forward-looking statements in the present levels of performance that did not describe the student, that the CSE failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP), and that the annual goals were developed outside the CSE meeting without input from the parents (*id.* at pp. 6-7).<sup>10</sup> The parents also asserted that the CSE impeded their ability to participate in the development of the student's IEP by providing that certain reading services would be provided a minimum of three times per six-day cycle, implying that an individual could determine that the student would receive additional services without consultation with the parents (*id.* at p. 6). Regarding the January 2013 IEP, the parents alleged that it was not reasonably calculated to provide the student with an educational benefit because despite the student's lack of progress, the district decreased the amount of reading support available for the student, failed to appropriately address the student's needs in spelling or math, failed to address the student's anxiety issues, and failed to address the student's social/emotional needs stemming from his placement with students with dissimilar needs (*id.* at pp. 5-7). The parents asserted that they were justified in removing the student from the district's program due to a lack of progress and further asserted that their placement of the student at Gow was reasonable because it addressed his need for alternative instructional approaches, as evidenced by the progress he made there (*id.* at pp. 7-8). The parents requested reimbursement for the cost of the student's tuition and related expenses at Gow and prospective payment for future tuition and expenses at Gow (*id.* at p. 8).

### **B. Impartial Hearing Officer Decision**

On June 4, 2013, an impartial hearing was convened and, following five days of testimony, concluded on June 19, 2013 (Tr. pp. 1-1212). In a decision dated October 17, 2013, the IHO determined that the district did not offer the student a FAPE for the 2012-13 school year, that the parent's unilateral placement of the student at Gow was appropriate, and that

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see Tr. pp. 97-101, 115-16, 129, 273-75, 327-28, 370, 442-44, 540-41, 769-74, 811, 816).

<sup>9</sup> Gow has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 489; see 8 NYCRR 200.1[d], 200.7).

<sup>10</sup> The IHO did not address the parents' claims regarding the present levels of performance, the district's failure to conduct an FBA or develop a BIP, or the development of the annual goals; furthermore, neither the parents nor the district raised these issues on appeal and the parents have effectively abandoned these claims by failing to identify them or make any legal or factual arguments as to how they might rise to the level of a denial of a FAPE. Therefore, the parents' claims regarding the present levels of performance, an FBA, a BIP, or the annual goals will not be further considered (34 CFR 300.514[a]; 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]).

equitable considerations weighed in favor of granting the parent's request for relief (IHO Decision).

Prior to finding that the district did not offer the student a FAPE for the 2012-13 school year, the IHO made a number of findings related to her determination that the student did not make "meaningful" progress in the district's program from September 2012 through January 2013 (IHO Decision at pp. 13-19). The IHO rejected the district's progress monitoring data, finding it unreliable because it reflected a high level of variability in the student's performance (id. at pp. 13-16). The IHO also rejected a report prepared by a district consultant in January 2013 because it was based on the progress monitoring data and was prepared after the parents notified the district of their intention to enroll the student at Gow (id. at pp. 13-14). Regarding the student's reading instruction using the Sonday system, the IHO determined that the hearing record was unclear as to whether the student made progress from September 2012 through January 2013 because the student relearned some previously taught material and there was no indication of how much progress the student made between July and October 2012 (id. at pp. 17-18). With respect to multiplication and division, the IHO determined that it was unclear if the district's progress monitoring data showed "meaningful progress" and later found the student's progress in multiplication and division to be "trivial at best" (id. at pp. 15-17). The IHO also rejected the district's assertion that the student's report card grades were indicators of progress because they were based on both homework and classwork and were part of a highly modified curriculum (id. at p. 19).

Because the January 2013 IEP was the offered program at the time the parents placed the student at GOW, the IHO analyzed the district's program based on whether the January 2013 IEP would have enabled the student to make educational progress (IHO Decision at p. 13).<sup>11</sup> The IHO found the January 2013 IEP to be similar to the August 2012 and November 2012 IEPs, except for a modification of the Sonday reading program from four times per week to three out of six days per six-day cycle and the addition of RAVE-O for two days out of a six-day cycle (id. at p. 19). The IHO found that due to the student's lack of progress in Sonday, the reduction in Sonday services was not likely to produce progress and that the addition of RAVE-O was not sufficient to allow the student to make meaningful progress (id. at pp. 19-21). In addition, the IHO found that having two separate reading programs would likely confuse the student, and that the literacy program utilized by the student's 12:1+1 special class would have created further confusion (id. at pp. 20-21). Regarding math, the IHO found that the January 2013 IEP did not add any services or additional supports to address the student's needs in math (id. at pp. 22-23). The IHO determined that although the present levels of performance in the January 2013 IEP noted that the student received AIS services targeting foundational math, those services were not listed as part of the student's special education program and services in the IEP (id. at pp. 22-23).

Although the IHO declined to address the parents' challenges to the IEP regarding the student's social/emotional needs and assistive technology needs, the IHO addressed and found a denial of FAPE based on the academic and social grouping within the student's 12:1+1 classroom (IHO Decision at pp. 24-25). Academically, the IHO determined that the student was below the other student's functional levels in math (id. at p. 25). Regarding social grouping, the IHO determined that the other students exhibited disruptive, impulsive, or oppositional behaviors, which distracted the student and made it difficult for him to concentrate (id.).

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<sup>11</sup> Neither party challenges the IHO's determination that the January 2013 IEP was the operative and challenged IEP at the time the parents removed the student from public school and unilaterally placed him at Gow.

In finding Gow to be an appropriate placement for the student, the IHO found that Gow's language programs were effective for the student and that the student made progress while attending Gow (IHO Decision at pp. 26-31). The IHO found that the Gow program offered a substantial level of highly structured multisensory instruction in reading and appropriate assistive technology and training to use the technology (*id.* at p. 30). The IHO also found that Gow provided the student with 1:1 instruction in a developmental math class to address his deficits in math (*id.* at p. 29). The IHO rejected the district's arguments that Gow was not the least restrictive environment for the student and that Gow did not offer counseling services, and instead found that the student benefited from being in a school where all the students had similar needs and that the student did not require counseling because he did not have the same anxiety issues at Gow that he experienced in the district (*id.* at pp. 30-31). The IHO also rejected as irrelevant the district's argument that the student's IQ was lower than students typically accepted into Gow (*id.* at p. 31).

Regarding equitable considerations, the IHO did not find any grounds to preclude reimbursement (IHO Decision at pp. 31-35). The IHO determined that although the parents intended to place the student at Gow as of the January 2013 CSE meeting, the parents had already sent out a ten-day notice at that time and had previously cooperated with the CSE in good faith, signed all requests for consent, shared evaluations, and participated in CSE meetings (*id.* at pp. 31-33). The IHO also determined that although the parents did not share privately obtained February 2013 and March 2013 evaluation reports with the district, the decision not to share the reports was not a bar to reimbursement because at the time of the evaluations the parents had already placed the student at Gow (*id.* at pp. 33-35). Based on her findings, the IHO directed the district to reimburse the parents for the cost of the student's tuition at Gow upon submission of a signed contract and proof of payment (*id.* at pp. 35-36).

#### **IV. Appeal for State-Level Review**

The district appeals, asserting that the IHO erred in finding the program recommended in the January 2013 IEP to be inappropriate and in finding the parents' unilateral placement of the student at Gow to be appropriate.<sup>12</sup> The district alleges a number of specific errors made by the IHO in her decision.

Regarding the IHO's factual determinations, the district asserts that the IHO mischaracterized the district's objections to the parents' privately obtained February 2013 and March 2013 evaluation reports, incorrectly discredited the January 2013 report by a district consultant as being solely prepared to defend a tuition reimbursement claim, and improperly credited the testimony of the parents' witnesses over the district's witnesses.

The district further objects to the legal standard used by the IHO in assessing the progress the student made in the district's program, pointing to references by the IHO to "meaningful" progress as being unsupported by any legal authority. The district also asserts that the IHO failed to consider the extent of the student's disability in determining progress. Regarding the

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<sup>12</sup> Although the district asserts that it appeals the IHO's decision in its entirety, the district does not allege any errors on the part of the IHO relating to the IHO's finding that equitable considerations weigh in favor of the parents' request for relief. Accordingly, the IHO's findings with respect to equitable considerations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

student's progress in the district's program, the district alleges that the student exhibited progress and asserts that the IHO incorrectly interpreted the district's progress monitoring data, mischaracterized the student's scores in math drills, ignored progress shown in scores from multiplication and division drills, improperly discounted progress in Sunday, failed to consider the student's achievement of four out of the seven goals on his August 2012 IEP, and improperly discredited the student's grades on his report cards.

Regarding the district's program offered in the January 2013 IEP, the district asserts that the IHO erred in finding that combining RAVE-O and Sunday would have confused the student, in finding that the literacy program utilized in the 12:1+1 special class would have been more confusing, and in discrediting testimony that RAVE-O would have addressed the student's retrieval fluency. The district also asserts that the IHO erred in determining that AIS services for math were not included in the IEP and in failing to acknowledge that the CSE changed the student's math services from group to individualized instruction on the prior written notice sent to the parents after the January 2013 CSE meeting.

Regarding grouping, the district asserts that the IHO erred in making findings relating to academic levels as the parent only challenged social/emotional grouping in their due process complaint notice. Additionally, the district alleges that the IHO mischaracterized the teacher's testimony regarding the behaviors of other students in the classroom and in finding that the presence of such students rendered the program inappropriate. The district also objects to the IHO's use of the class profile to the extent that the IHO made adverse findings against the district with respect to information that was not included in the class profile and failed to take into consideration the information included in the class profile showing that the student's IQ was within range of the other students in the class.

The district also challenges the IHO's finding that Gow was appropriate, asserting that the IHO improperly found that the student made progress in math at Gow and improperly discounted tests showing the student regressed in spelling and reading while attending Gow. The district also asserts that the Gow program was inappropriate because the math program provided instruction by videotape and computer programs and was focused on memorization rather than math concepts and because Gow failed to provide the student with counseling services.<sup>13</sup>

The parents answer and cross-appeal, denying the district's allegations to the extent they assert the IHO finding was in error. The parents assert that the IHO correctly found that the student did not make progress in the district's program, that the addition of RAVE-O in the January 2013 IEP was not reasonably calculated to provide the student with educational benefits, that the January 2013 IEP did not appropriately address the student's math or spelling needs, that the student was not appropriately grouped academically or socially in the district's 12:1+1 classroom, that placement of the student at Gow was appropriate to address the student's needs, and that equitable considerations favor the parents. In addition, the parents cross-appeal the IHO's failure to address the parents' claims that the January 2013 IEP did not appropriately address the student's anxiety and that the January 2013 did not recommend appropriate assistive technology services or recommend accommodations or services to address the student's reluctance to utilize assistive technology. The parents also cross-appeal the IHO's decision not to

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<sup>13</sup> The district also asserts that the IHO erred in rejecting the district's assertion that the student's IQ is lower than students typically accepted into Gow; however, the district does not identify how that would result in Gow being an inappropriate placement for the student.

consider a March 2013 evaluation report as evidence that the student did not make progress while attending the district public school program.

The district answers the cross-appeal, denying the allegations contained in the cross-appeal and asserting that the parents do not have the right to cross-appeal because they were not an aggrieved party.<sup>14</sup>

## 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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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<sup>14</sup> Regarding the district's claim that the parents do not have the right to cross-appeal because they were not an aggrieved party, State regulations explicitly provide that "in an appeal to [an SRO] from a final determination of an [IHO], a party may seek review of any interim ruling, decision or refusal to decide an issue" (8 NYCRR 279.10[d]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an

available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matters**

I first address the IHO's consideration of evidence not before the CSE at the time of the January 2013 CSE meeting. The district appeals the IHO's consideration of a February 2013 evaluation report as probative of the student's progress within the district, while the parents cross-appeal the IHO's exclusion of a March 2013 evaluation report (IHO Decision at p. 15; Parent Exs. D; E). The Second Circuit has held that "with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created" R.E. v. New York City Dep't of Educ., 694 F.3d 167, 188 [2d Cir. Sept. 20, 2012]). Consequently, courts have declined to accept evidence that was not available to the CSE at the time of the CSE meeting as a basis for determining whether that IEP was appropriate (J.M. v New York City Dep't of Educ., 2013 WL 5951436, at \*18-\*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 2013 WL 5495493, at \*8 [S.D.N.Y. Oct. 2, 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

I understand the IHO's reasoning—in that because the evaluation was conducted within three school days after the student started Gow, it is likely that there was not yet sufficient time to ascertain whether the student was exhibiting progress or regression in his new program;<sup>15</sup> however, it does not appear that the IHO considered that in accepting the February 2013 evaluation report as evidence of the student's performance in the district, the IHO relied on information that was not available to the January 2013 CSE (IHO Decision at p. 15; Dist. Ex. 7 at p. 1; Parent Ex. E at p. 1). Therefore, to the extent that the IHO considered and relied upon the February 6, 2013 evaluation report in determining that the January 2013 IEP was not reasonably calculated to enable the student to receive educational benefits, such an analysis was not consistent with controlling legal authority requiring a prospective analysis only (R.E., 694 F.3d at 186-88; J.M., 2013 WL 5951436, at \*18-\*19; F.O., 2013 WL 5495493, at \*8). "In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available to the January 2013

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<sup>15</sup> Notwithstanding the IHO's determination, there is testimony in the hearing record indicating that a change in placement could have had a positive or negative impact on the student's test scores (Tr. pp. 899-900).

CSE at the time the January 2013 IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [an IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE]; D.A.B. v New York City Dept. of Educ., 2013 WL 5178267, at \*12 [S.D.N.Y. Sept. 16, 2013] [same]).

At the time of the January 2013 CSE meeting, the evaluative data available to the CSE included an August 2012 auditory processing evaluation (Dist. Ex. 40), a May 2012 reading evaluation (Dist. Ex. 44), a January 2012 psychological assessment (Dist. Ex. 45), a March 2011 psychoeducational reevaluation (Dist. Ex. 46), a November 2009 neuropsychological evaluation (Parent Ex. H), and an April 2007 neuropsychological evaluation (Dist. Ex. 47). In addition, the January 2013 CSE had the results of curriculum-based progress monitoring assessments that the student participated in during the 2011-12 and 2012-13 school years, a January 2013 evaluation report based on the progress monitoring data, and the results of State testing (Dist. 7 at pp. 2-6; Exs. 31; 33; 36, Parent Exs. I; J). Accordingly, and as the parents do not contend that the CSE had insufficient evaluative information available to it to develop the January 2013 IEP, analysis of the student's progress while in the district public schools and the adequacy of the IEP, for purposes of this decision, does not take into account either the February or March 2013 evaluation reports.

## **B. Progress in the District**

The district next challenges the IHO's finding that the student did not make progress in the district's program during the 2012-13 school year. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67; 2013 WL 3155869, at \*2 [2d Cir. June 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ., 2007 WL 2681207, at \*3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

In an effort to better understand the student's challenges, the student participated in a variety of assessments, most of which were completed within two years prior to the January 2013

CSE meeting (Dist. Exs. 37; 40; 41; 42; 43; 44; 45; 46; 47; Parent Ex. H). Of particular note, the student received psychoeducational, psychological, and neuropsychological evaluations, a speech-language evaluation, an educational evaluation, an auditory processing evaluation, and an assistive technology assessment (Dist. Exs. 40; 41; 42; 44; 45; 46; 47; Parent Ex. H).<sup>16</sup> In addition to documenting the student's progress, the evaluative reports offered suggestions regarding a range of strategies by which to enhance the student's learning, including the use of assistive technology, participation in specialized therapy, alternative instructional strategies and programs, and provision of a 12-month school year program (Exs. 41 at p. 7; 42 at p. 8; 44 at p. 13; 45 at p.12).

The hearing record shows that as the background and perspective of each evaluator varied, so did their observations and descriptions of the student's performance (Dist. Exs. 40; 42; 43; 44; 45; Parent Ex. H). A careful review of these reports yields a number of consistent patterns of functioning amid a field of conflicting data and/or differing interpretations of the data (Dist. Exs. 40 at p. 2; 45 at pp. 4-5). As one evaluator noted, the student is "diagnostically complex" (Parent Ex. H at p. 9).

The complexity of the student's needs is evidenced in measures related to his ability to use auditory information (Dist. Exs. 40; 42; 45; Parent Ex. H). For example, in an August 2012 evaluation, an audiologist reported the student exhibited a type of auditory processing disorder that she opined might cause him to "have difficulty in understanding what is asked of him, [and t]his problem could cause him to miss important verbal information" (Dist. Ex. 40 at p. 4). In contrast, the student's auditory processing skills and listening comprehension as assessed in a January 2012 psychological assessment appeared within the "average range" (Dist. Ex. 45 at pp. 5, 10). Indeed, the author of the latter evaluation report suggested that based upon the student's skill in the area of listening comprehension, "oral presentation of information is an effective way to provide [his] instruction" (*id.* at p. 10). In yet another report, a speech-language pathologist noted the student's use of self-rehearsal to enhance his performance on an auditory task (Dist. Ex. 42 at p. 3).

In addition to performing with differing levels of competence on measures of similar skills, the student also showed marked variation within a single evaluation (Dist. Exs. 42 at pp. 3, 6; 45 at p. 6). For example, the January 2012 psychological evaluation described the student's "broad reading, basic reading skills, and math calculation skills" as being "significantly lower than would be predicted by his oral language ability" (Dist. Ex. 45 at p. 6). Another evaluation described the student's overall language skills as "severely delayed" but later reported he used "simple and complex, complete sentence structures" and was able "to greet, question, comment, negate, and protest appropriately" (Dist. Ex. 42 at pp. 3, 6). The evaluator also noted that the student "initiated topics of conversation, took turns appropriately, and maintained a topic of conversation over several turns" (*id.* at p. 6).

The student's daily academic functioning also reflects some degree of instability and variability, as evidenced by a pattern of regression when instruction in one skill shifted to

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<sup>16</sup> As mentioned above, the CSE also considered curriculum based progress monitoring tools, including a teacher-made chart to track math skill development (Dist. Exs. 31; 33; 43; 63; 64). While these tools can provide the student's teachers with information useful in guiding daily instruction, because there was an abundance of standardized evaluative data available to the CSE, this decision focuses on standardized testing measures as the more reliable assessments of student performance and progress (Dist. Exs. 37; 40; 41; 42; 43; 44; 45; 46; 47; Parent Ex. H).

another, "higher level" skill (Tr. pp. 172-73, 377-378; Dist. Ex. 33; Parent Ex. A at p. 3). As early as first grade, it was noted that the student would fail to recognize previously learned words when instruction "move[d] on to new words even with review of the old ones" (Parent Ex. A at p. 3). During the 2012-13 school year, the student's teacher charted his performance on brief math assessments across a period of four months, revealing a pattern in which the student's facility with addition and subtraction appeared to level off and at times decrease, while he demonstrated a concomitant increase in his proficiency with multiplication and division (Tr. pp. 167-174, 377-378; Dist. Ex. 33). As the district representative testified, due to the student's memory challenges, "[i]f things are not continually refreshed he loses them" (Tr. p. 173).<sup>17</sup>

Although the hearing record reveals a history of inconsistent performance within and between assessments, the student's performance on four standardized measures of reading comprehension completed during January, May, and August 2012, provides evidence of improvement across time and task (Dist. Exs. 42 at p. 5; 44 at p. 6; 45 at pp. 5, 9). During the January 2012 evaluation, the student's reading comprehension appeared "almost 2 standard deviations lower than his oral comprehension," which was determined to be in the "average range" (Dist. Ex. 45 at pp. 9, 11). During the May 2012 evaluation, the student's comprehension score increased to the 11th percentile, and during the August 2012 evaluation, the student's score was "within normal limits" at the 25th percentile (Dist. Exs. 42 at p. 5; 44 at p. 6). In addition, the May and August evaluation reports described the student's use of multiple strategies to understand what he read, despite ongoing "word decoding problems" and "severely delayed oral reading fluency" (Dist. Exs. 42 at p. 5; 44 at p. 6; 45 at p. 11). For example, the May 2012 educational evaluation report provides that the student acquired the reported score "by rereading, by relying on anticipated language, and by adjusting several mispronunciations for meaning" (Dist. Ex. 44 at p. 6). In addition, the author of the May 2012 educational evaluation report testified that the student seemed to rely heavily on context to figure out a test sentence (Tr. p. 652). The author of the January 2012 evaluation report also testified that the student showed progress in passage comprehension from January 2012 to May 2012, and explained that context helps individuals "understand a question and arrive at an answer" even when they may not know the meaning of all the words (Tr. p. 862). He further explained that when an individual doesn't know the meaning of all the words, "they can use sentences . . . or words included in sentences that they do know and often make very educated guesses, and that is the comprehension" (Tr. pp. 862-63). The January 2012 evaluator did not discount the importance of recognizing words on sight or the need for sounding out words, but he did testify that comprehension represented a relative strength for the student and the student had demonstrated growth in this area between the January 2012 and May 2012 evaluations (Tr. pp. 861-64).

Throughout the hearing record, there are multiple references to the student's difficulty with decoding and spelling words, with considerable discussion of the related skills of phonological awareness, blending and segmenting speech sounds to make words/non-words, and the student's ability to apply these skills with fluency and accuracy during oral reading and writing (Dist. Exs. 18 at p. 4; 42 at pp. 3-5; 44 at p. 3-5, 7; Parent Ex. A at p. 3). Again, the diagnostic complexity of the student was revealed during the August 2012 speech-language evaluation (Dist. Ex. 42 at p. 4). For example, the evaluator reported that students who have "the ability to identify syllables, blend words, and manipulate words through sound substitution have an advantage learning to read the printed forms of language" because the sound structure of

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<sup>17</sup> The January 2013 IEP's inclusion of two goals to address telling time and making monetary change reflect the district's awareness of the student's tendency to regress and require reteaching of previously mastered skills (Tr. at pp. 177-178; Dist. Ex. 7 at p. 10).

language is represented in print (id.). Although the student performed within normal limits on tests of manipulating the sounds of words by syllable, sound substitutions, as well as blending and segmenting words and non-words, the student was unable to apply these skills consistently when reading words and non-words (Dist. Exs. 42 at pp. 4-5; 45 at p. 9). Despite the student's challenge applying his knowledge of letter-sound associations when decoding (reading), according to the January 2012 psychological evaluation the student demonstrated the use of this information by spelling phonetically (Dist. Ex. 45 at p. 3). While not demonstrating mastery of conventional spelling rules, the student's efforts to spell dictated words do reveal his efforts to analyze speech sounds and map them onto print, as when he spelled "next" as "neckst," birthday as "berthday," and circle as "sercle" (Dist. Ex. 44 at p. 7). While other errors do not exhibit the same level of phonetic analysis, some of his approximations might be considered "conventional" as when he omitted silent letters (id.).

As with documentation of the student's literacy development, the evaluative information regarding the student's math skills included conflicting evidence of progress (Dist. Exs. 26; 31; 33; 43; 45; 46). Overall, the hearing record includes limited evidence regarding the student's development in math, aside from grades based upon a "modified" curriculum and progress monitoring scores detailing his acquisition of basic computation/operation skills (Tr. pp. 415, 429; Dist. Exs. 26; 31 at p. 1; 33; 43 at p. 1; 45 at pp. 4-5, 9; 46 at p. 2). As previously noted, during the 2011-12 school year, the special education teacher charted the student's acquisition of multiplication and division skills and what appeared to be a concurrent standstill or regression in his addition and subtractions skills (Tr. pp. 377-78; Dist. Ex. 33).

Some progress is also reflected in the modification of the student's annual goals during the January 2013 CSE meeting to reflect adjustments to his special education program as he mastered certain goals (compare Dist. Ex. 7 at p. 10, with Dist. Exs. 8 at pp. 6-7; 9 at p. 6; 22 at p. 2).<sup>18</sup> For example, the January 2013 IEP did not carry over four goals that the student had mastered during the 2012-13 school year (Tr. p. 131-33; Dist. Exs. 7 at p. 10; 9 at p. 6; 32 at pp. 3, 14-15). The hearing record indicates that during the 2012-13 school year the student mastered goals related to spelling words with specific patterns (i.e., consonant-vowel-consonant), reading accuracy in decoding "18/20 of the words containing short vowel sounds," syllabication of third grade level words with a vowel-consonant-consonant-vowel spelling pattern, and increasing his reading fluency rate (Tr. pp. 131-33; Dist. Exs. 9 at p. 6; 32 at p. 3, 14-15). The student's special education teacher also testified that although the student had not yet met certain goals related to auditory memory, math skills, and writing complex sentences, he did make some progress toward achieving those goals (Tr. pp. 380-84). In order to address the student's changing needs the January 2013 CSE added a goal to address the student's anxiety and another goal to improve the student's reading comprehension (Dist. Ex. 7 at p. 10). The January 2013 CSE also restructured the math goal contained in the November 2012 IEP to target operational processes and provide opportunities to reinforce previously taught skills, such as telling time and making change (Tr. p. 139; Dist. Exs. 7 at p. 10; 8 at p. 6). I also note that the CSE shifted the focus of the writing goal from authoring complex sentences in earlier IEPs to analyzing whether written language samples were "complete or incomplete," as staff had noted the student did not always "understand why a sentence is complete or incomplete, and we were able to hone in on that" (Tr. p. 138; compare Dist. Ex. 7 at p. 10, with Dist. Ex. 9 at p. 6). According to the district representative, the student's goals were modified based upon the student's mastery of four goals,

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<sup>18</sup> The student's annual goals were not reviewed during the November 2012 CSE meeting and were carried over almost verbatim from the August 2012 IEP (compare Dist. Exs. 8 at pp. 6-7, with Dist. Ex. 9 at p. 6, and Dist. Ex. 23 at p. 2).

the addition of a new goal to address the student's anxiety, and modification/continuation of others, in keeping with the CSE's ongoing efforts to provide the student with an effective instructional program (Tr. pp. 132, 138-141; Dist. Exs. 7 at p. 10; 22 at p. 2).

The student's progress in the district's program must also be viewed in light of the limitations imposed by his disability (H.C., 528 Fed. Appx. at 67; Mrs. B., 103 F.3d at 1121). The chairperson of the reconstructive language program at Gow acknowledged that the student's disability was "severe" and that she would not be surprised if his progress were slower due to his "double-deficit" dyslexia (Tr. pp. 565-66).<sup>19</sup> The student's mother also testified that the district's reading consultant explained to her that although the student had the capacity for learning, the student's progress would be "slow and methodical" (Tr. pp. 1135-36). In contrast, while acknowledging the student made progress, one evaluator testified he would have expected more progress from the student during the period from 2007 to 2013 (Tr. pp. 899, 910). While the hearing record shows the student's overall academic achievement in literacy and math continued to lag behind expected levels for a student his age, it also documented progress, consistent with his identification as a student with a disability, albeit somewhat less than what might have been expected in light of his other strengths (Dist. Exs. 44 at p. 4; 45 at p. 6; 46 at p. 2). On balance, the evidence does not support the conclusion that the student failed to progress, even though it supports the conclusion that the student's rate of progress was clearly less than ideal. As further described below the district continued to make modifications to the student's IEP in an attempt to increase his rate of progress.

### **C. January 2013 IEP**

Notwithstanding my finding that the student made progress while attending a public school placement in the district, the hearing record also supports a finding that the January 2013 IEP independently addressed the student's needs as known to the CSE and that the district appropriately reconvened the CSE to address parental concerns that the student was making inadequate progress.

Initially, although the present levels of performance and individual needs section of the January 2013 IEP is not at issue in this instance, it is helpful briefly review the contents thereof to provide context for the discussion of the issues to be resolved in this appeal—that is, whether the literacy and math instruction, assistive technology, and counseling services recommended in the IEP were appropriate to meet the student's needs. The January 2013 IEP detailed the student's evaluative history, including his performance on a combination of individually and group-administered assessments, dating from 2007 through January 2013 (Dist. Ex. 7 at pp. 2-6).<sup>20</sup> The present levels of performance included recent progress monitoring data in both reading and math (id. at pp. 2-3). In addition, the January 2013 IEP set forth the student's academic achievement, functional performance, and learning characteristics, reporting his then-current educational program, his need for "explicit, systematic instruction" to build reading skills, and his need to improve basic math skills (id. at p. 7). It also included excerpts from a May 2012 evaluation report that identified the student's "skill deficiencies" in "single word pronunciations,

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<sup>19</sup> Although there is considerable discussion in the hearing record indicating the student had received a diagnosis of "double-deficit dyslexia," there is no record of the source of that diagnosis (Tr. pp. 33, 271, 272, 276, 488, 565, 612, 619, 646-47, 816, 1033, 1100-01, 1114).

<sup>20</sup> The January 2013 IEP lists an assessment from September 10, 2013; however, as the CSE meeting was held in January 2013, this appears to have been an error (Dist. Ex. 7 at p. 2).

his knowledge and use of the phonological code and alphabetic orthography, in his spelling skills, and in his reading fluency and passage reading skills" (id.).<sup>21</sup> The present levels of performance provided information regarding the student's interest in science, especially hands-on activities, and his age-appropriate peer interactions (id.). The January 2013 IEP included a brief explanation of the impact of the student's decoding difficulties on his "ability to independently complete reading assignments above a fourth grade level, both quickly and accurately" (id. at p. 8). Additionally, the IEP denoted that the student required assistive technology to be used at home and school (id. at p. 9).

Regarding the student's social development, the present levels of performance documented the parents' concern that the student "was upset about being in special class" and the district's efforts to help the student feel less self-conscious (Dist. Ex. 7 at p. 8). Strategies in place to ameliorate the student's distress included allowing the student to leave school to attend a reading class in a discreet location, providing text-to-speech and speech-to-text software, and counseling support twice monthly as well as on an as-needed basis (id.). The IEP reported that the student needed instruction to develop coping skills to "address/prevent anxiety" (id.). In contrast to the student's academic and social/emotional weaknesses, the student's physical development and fine motor skills were described as being "normal" and it was noted the student exhibited skill in sports-related and other physical activities (id.).

The student's parents contend that the January 2013 IEP failed to offer the student sufficient support to address their son's literacy challenges, failed to appropriately address the student's anxiety, failed to offer the student appropriate assistive technology and failed to address the student's math and spelling needs. However, as discussed above, the student demonstrated progress in similar programs leading up to the January 2013 IEP and the January 2013 CSE further modified the recommended program to address the student's needs (Dist. Exs. 7 at pp. 2-8, 11-14; 8 at p. 7; 9 at p. 6; 17 at p. 2; 22 at p. 2; 32 at p. 14). The district's continued efforts to enhance the efficacy of the student's educational program inclusive of the CSE's development of the January 2013 IEP, is further reflected in the hearing record (Dist. Exs. 7 at pp. 11-12; 9 at p. 7; 12 at p. 6).

The January 2013 IEP continued to recommend a 12:1+1 special class placement for ELA, reading, math, science, and social studies with two 30-minute speech-language therapy sessions per 6-day cycle, and counseling for two 30-minute sessions per month (Tr. pp. 112-113; Dist. Ex. 7 at p. 11). In addition, the January 2013 IEP continued to recommend individual instruction in Soudy, at a decreased frequency of a minimum of three 50-minute sessions per six-day cycle, rather than four 50-minute sessions per week, and added individual instruction in RAVE-O (compare Dist. Ex. 7 at p. 11, with Dist. Ex. 8 at p. 7, and Dist. Ex. 9 at p. 7).

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<sup>21</sup> The present levels of performance also recited portions of a January 2013 report projecting a rate of improvement based upon a limited sampling of the student's progress monitoring scores on a measure of his oral reading fluency (Dist. Ex. 7 at p. 7). Although the parents raised the inclusion of future projections in the present levels of performance as an issue in their due process complaint notice, they have not raised this issue on appeal and it is unclear how the inclusion of future projections in the student's IEP would have led to a denial of FAPE. However, projections of future performance are not the type of information that is typically included in the present levels of performance section of an IEP and in the future the district is encouraged to review State guidance describing the information that should be included in the present levels of performance section of an IEP ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at pp. 18-25, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

The January 2013 CSE also recommended program modifications and accommodations, such as allowing text "above a fourth grade level" to be read utilizing technology, using a calculator for computation, no penalty for misspelling, and providing the student with copies of class notes and advance notice of testing (Dist. Ex. 7 at pp. 12-13). The January 2013 IEP also included recommendations for assistive technology, such as the use of text-to-speech and speech-to-text software, audio versions of textbooks, and access to a laptop computer (*id.* at p. 13). The January 2013 IEP carried over the recommendation in the November 2012 IEP for monthly consultation between an "outside reading consultant" and the student's special education teacher, maintaining the focus of these consultations on "strategies [the student] is learning and to discuss application across content and settings" (*id.* at p. 13; Dist. Ex. 8 at p. 10).

## 1. Literacy Instruction

In this instance, although the district did not identify the student's specialized reading programs on the January 2013 IEP by name, during the impartial hearing the district referred to the two programs in the IEP as Sonday and RAVE-O. Sonday was described as an Orton-Gillingham based reading intervention and RAVE-O was described as a "continuation of what Sonday does, just in a more interactive, multi-sensory way" (Tr. pp. 86-87, 115-16, 443, 770-71; Dist. Ex. 7 at p. 11).<sup>22</sup> The student began receiving instruction in Sonday during the 2007-08 school year (Tr. pp. 184-85; Dist. Ex. 21 at p. 3). The hearing record indicates that throughout his time in public school, the student has had varying degrees of success in Sonday, with some progress and some regression (Dist. Exs. 12 at p. 3; 15 at pp. 2-3; 17 at pp. 2-3; 18 at p. 4; 19 at p. 4; 21 at p. 3; 37; Parent Ex. G). The May 2012 evaluator suggested that the continued use of the Sonday program should be examined in light of the student's slow rate of response to that program (Dist. Ex. 44 at p. 11).<sup>23</sup> The same evaluator testified that one option was to stay with the Sonday program with a more experienced instructor to see if the student responded (Tr. pp. 672-74).

In July 2013, the district hired a reading consultant to instruct the student in Sonday and, according to testimony by the student's mother, the student felt as if he was learning when he received instruction from the reading consultant (Tr. p. 1136; Dist. Ex. 37; Parent Ex. P at p. 1).<sup>24</sup> Similarly, the reading consultant noted that the student made progress in completing nine levels in Sonday between July 2012 and January 2013 (Dist. Ex. 37). While the district cannot guarantee that the student would continue to receive instruction from the same reading

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<sup>22</sup> I note that although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (*Rowley*, 458 U.S. at 204; *M.H.*, 685 F.3d at 257; *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1102 [11th Cir. 2006]; *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 [7th Cir. 1988]; *A.S. v New York City Dep't of Educ.*, 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; *L.K. v. Dep't of Educ.*, 2011 WL 127063, at \*11 [E.D.N.Y. Jan. 13, 2011]).

<sup>23</sup> The psychologist who conducted the 2007 and 2009 neuropsychological evaluations recommended as early as March 2011 that the district should consider an alternative reading program other than Sonday (Parent Ex. G).

<sup>24</sup> Conversely, both the student and his mother testified that the student did not feel like he was learning while being instructed in the same reading program by another district special education teacher (Tr. pp. 1145-47, 1196-97). According to the January 2013 CSE minutes, the student's mother expressed concerns that the student believed he could only be successful with the reading consultant (Dist. Ex. 23 at p. 2).

consultant,<sup>25</sup> the student's ability to make some progress in Sonday in this instance is an indication that continuance of Sonday services for the remainder of the school year was reasonably calculated to allow the student to receive educational benefits (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*12-\*13 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012]; S.H., 2011 WL 6108523, at \*10)

Notwithstanding the continuance of the Sonday program, the CSE went further and considered modifying the student's program to add RAVE-O as early as November 2012 (Tr. pp. 115-16; Dist. Ex. 23 at p. 2).<sup>26</sup> While the IHO found that the hearing record did not explain what deficits instruction using the RAVE-O program was designed to address, the hearing record supports a finding that the addition of RAVE-O was intended to address the student's specific skill deficits in reading with rapid retrieval (Tr. pp. 115-16; Dist. Ex. 23 at p. 2). An independent consultant with special training in learning disabilities, who was present at the November 2012 CSE meeting, recommended the addition of RAVE-O to address the student's weaknesses in retrieval fluency (Tr. pp. 273-277; Dist. Ex. 23 at p. 2). The minutes from the November 2012 CSE meeting, indicated that the CSE considered RAVE-O as an additional reading program to improve "automaticity/rate of information retrieval" because the student was struggling with "rapid retrieval of visual information" (Dist. Ex. 23 at p. 2).<sup>27</sup>

The IHO erred in finding the student would have become "confused" by instruction using both Sonday and RAVE-O together. In making this determination, the IHO relied solely on testimony by the author of the May 2012 evaluation, who indicated that the student "would probably get confused" if RAVE-O was used to compliment Sonday (Tr. p. 722).<sup>28</sup> However, the IHO marginalized the testimony of a consultant who was present at the November 2012 CSE meeting, recommended the introduction of the RAVE-O program, and later testified that, even though the Sonday program was helping to address some of the student's needs, "I think everyone wanted to bolster the student's achievements . . . to address a need that was currently unaddressed" (Tr. p. 276). In addition, the consultant testified that both programs were based on the same "instructional design model" and that they are both "multi-sensory structured language programs" (Tr. pp. 275-76; Dist. Ex. 7 at p. 11). The consultant also testified that combining the programs "certainly is not going to hurt" the student (Tr. p. 276). Considering the testimony of the evaluators, as well as the similarities between the two programs as discussed above, the

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<sup>25</sup> Even though the student was receiving instruction from a specific teacher at the time of the January 2013 CSE meeting, the district "cannot guarantee that a particular teacher or aide will not quit or become otherwise unavailable for the upcoming school year" (R.E., 694 F. 3d at 187).

<sup>26</sup> Instruction in RAVE-O was not included in the November 2012 IEP because the district had not yet purchased the program, but was a part of the January 2013 IEP, which specified instruction in RAVE-O beginning on February 1, 2013 (Tr. p. 100, 115-16; Dist. Ex. 7 at p. 11). Additionally, the prior written notice relating to the November 2012 IEP indicates that the CSE recommended that the student receive "reading support [to] explicitly target Retrieval, Automaticity, Vocabulary and Orthography" (Dist. Ex. 52 at p. 1).

<sup>27</sup> While the parents claim, and the IHO found, that the January 2013 IEP did not address the student's spelling needs, the hearing record does not support such a finding as both interventions and the special class literacy program included spelling instruction as a component (Tr. pp. 128-29, 443).

<sup>28</sup> In addition, there is no evidence in the hearing record to support the IHO's finding that the reading instruction provided in the student's ELA class would have created further confusion for the student. In fact, although the student had been receiving reading instruction in both his ELA class and Sonday at the time of the January 2013 CSE meeting, there is no indication in the hearing record that he was ever confused by the use of the two different instructional programs (Dist. Ex. 7 at p. 7).

evidence in the hearing record does not support the IHO's determination that the student would have been confused.

## **2. Math Instruction**

The parents assert (and the IHO agreed) that despite the student's struggles in math, the January 2013 CSE did not add any additional services to address his deficits. However, upon review of the hearing record, the January 2013 CSE adequately considered the student's math needs in developing the January 2013 IEP and made appropriate adjustments to the IEP (Dist. Exs. 7 at pp. 7, 11; 50 at p. 1). The January 2013 IEP described the student as struggling with math computation and problem solving skills and indicated the student received AIS targeting foundational math skills for two to three 30-minute sessions per six-day cycle. (Dist. Ex. 7 at p. 7). The district representative testified that the CSE reviewed the student's annual goals for math, his scores on math assessments, and discussed the student's needs in math during the January 2013 CSE meeting (Tr. pp. 751, 753, 755). The student's mother testified that the CSE discussed fitting 1:1 math instruction into the student's schedule during the January 2013 CSE meeting (Tr. pp. 1169-70). The parent's testimony is confirmed by prior written notice from the district dated February 21, 2013, which lists the CSE's recommendation for AIS targeting math to be provided in a 1:1 ratio (Dist. Ex. 50 at p. 1).<sup>29</sup> In response to the student's struggles the CSE also added goals to shore up fundamental skills and strategies (such as the use of manipulative objects) the student lacked (Tr. pp. 177-78, 743-44; Dist. Ex. 7 at p. 10).

## **3. Special Factors—Assistive Technology**

The parents assert that the district failed to offer the student appropriate assistive technology services or to address the student's reluctance to use assistive technology; however, the parents do not point to any particular device or service that is missing from the student's January 2013 IEP. One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. §1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of a Student with a Disability, Appeal No. 11-121).

The district conducted an assistive technology assessment of the student in December 2012, which recommended the continued use of a laptop in his classes and at home (Dist Ex. 41 at p. 1). The January 2013 IEP provided for multiple assistive technology services for the student, including: daily access to a laptop, speech-to-text software for writing assignments, and text-to-speech software and audio versions of textbooks for reading text above the student's grade level (Dist. Ex. 7 at p. 13). The district also offered the student two laptops, one for use at home and one for use at school, so that he would not have to bring a laptop back and forth (Tr. pp. 82, 387; Dist. Ex. 61). The student's teacher and his mother both indicated in their testimony

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<sup>29</sup> The IHO declined to consider the February 21, 2013 prior written notice as being "retrospective" evidence under the holding in R.E.; however, it does not appear that the IHO considered the portion of the decision in R.E. that allows a district to remedy an omission in the IEP during the thirty-day resolution period without penalty (R.E., 694 F. 3d at 187-88).

that the student was reluctant to use the laptop because it made him stand out from the rest of the students in the school (Tr. pp. 418-19, 1180). The student testified that in the district he did not use the computer as much as he should have and he did not know how to use the computer properly (Tr. p. 1200). While the assistive technology assessment indicated the student had computer skills, it also recommended training in the recommended software prior to the start of the next school year (Dist. Ex. 41 at pp. 1, 3). Although the student was reluctant to use the laptop provided to him by the school because of his concern that it made him stand out, the hearing record indicates that the district was aware of this discomfort and that the student would be "encouraged to use [his assistive technology devices] according to his comfort level" (Dist. Ex. 23 at p. 2). Furthermore, the student's teacher indicated that although the student did not like to use his laptop, for materials above his reading level the student would either use audio versions of textbooks or have the material read to him; "[h]e was never expected to read something that was above his reading level" (Tr. pp. 418-19). Based on the foregoing, the hearing record does not support a conclusion that the district's failure to force the student to use assistive technology devices available to him restricted the student's access to his educational program.

#### **4. Counseling**

The parents also argue that the January 2013 CSE did not appropriately address the student's social/emotional needs, as the student experienced anxiety regarding his placement in a special education classroom, teasing from peers, and difficulty coping with his disability.<sup>30</sup> The hearing record shows that the student was provided with counseling support as early as March 2011, when the student expressed frustration due to his reading difficulties (Parent Ex. S at p. 1). Counseling support continued on subsequent IEPs, inclusive of the January 2013 IEP, although the frequency and service delivery model (i.e., group versus individual sessions) were adjusted based upon CSE meeting discussions, including parental input (Dist. Exs. 7 at p. 11; 9 at p. 7; 10 at p. 6; 12 at p. 6; 13 at p. 6; 15 at p. 6).<sup>31</sup>

According to the parent and the student's private counselor, when his special education placement was changed to a 12:1+1 special class in January 2012, the student became increasingly unhappy and he began to engage in resistance to school attendance (Tr. pp. 920, 993). In response, the CSE increased the frequency of his counseling sessions and the student worked with the school counselor to develop "strategies to address and/or prevent anxiety" (Tr. 120-121; Dist. Ex. 7 at p. 8). When the student did not find the meetings with the school counselor sufficient to meet his needs, he was referred to a private counselor, with whom he met several times between February 2012 and January 2013 (Tr. p. 917). Despite the parents' claim to the contrary, the private counselor testified that the student reported that he was making progress in the "social-emotional area," including "how he was handling stress" (Tr. p. 940). In addition, the January 2013 IEP described efforts to address the student's anxiety about his special education program and his concerns about the behavior of his classmates (Tr. pp. 120-121, 384-85, 390-94; Dist. Ex. 7 at p. 8). The January 2013 IEP recommended continuation of two

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<sup>30</sup> Although the parents raise the student's interactions with his peers as something that had an effect on the student's emotional well-being, during the hearing the parents' attorney explicitly waived any claims regarding bullying or failure to intervene on the part of the district (Tr. pp. 49-56).

<sup>31</sup> As noted above, testimony by the district representative indicates that the omission of counseling from the August 2012 IEP was an error and the student continued to receive counseling as a related service while the August 2012 IEP was being implemented (Tr. pp. 94-96; Dist. Exs. 8 at p. 7; 9 at p. 7).

individual 30-minute counseling sessions per month as well as additional accommodations that included attending an off-campus reading class "in an inconspicuous location" as well as text-to-speech and speech-to-text software (Dist. Ex. 7 at p. 8). The IEP also included a goal that the student would implement strategies learned in counseling to prevent and/or decrease his anxiety (Dist. Ex. 7 at p. 10). Although I can sympathize with the parents' concerns that their sons' social/emotional needs were not being met, and note the seriousness of the impact of the student's social/emotional difficulties on his well-being, the hearing record supports a conclusion that the district made reasonable attempts to address the student's anxieties relating to his placement in a special class and his embarrassment at being different from his peers, by seeking to provide the student with additional coping strategies to deal with his social/emotional issues.

For all the foregoing reasons, I find that the district developed and modified an appropriate program to meet the student's needs arising from his disability. Accordingly, the IHO's determination that the January 2013 IEP failed to offer the student a FAPE must be reversed.

#### **D. Grouping**

I next address the IHO's determination that the student was not appropriately grouped with students with similar individual needs relating to academics, social, and behavioral management needs.<sup>32</sup> State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]).

During the first half of the 2012-13 school year, the student was enrolled in a 12:1+1 special class placement for students in grades six through eight (Tr. p. 353; Dist. Ex. 7 at p. 11). According to the student's teacher, all students in the class were identified as having a learning disability, were in the class for academic reasons, and the student "fit in as far as his academic levels" (Tr. pp. 356-57). An undated class profile listed each student's full scale IQ, and their performance on the Winter Benchmark assessment for reading fluency and comprehension (Dist. Ex. 62). The range of IQs reported for 10 of the 12 students ranged from 77 to 108, with this

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<sup>32</sup> I note that the parents' due process complaint notice does not make a clear allegation relating to the grouping of the student in the 12:1+1 classroom but asserted that the IEP did not "redress the [s]tudent's inappropriate placement with students of dissimilar needs"; however, in an abundance of caution this decision addresses the IHO's findings relating to the appropriateness of the student's grouping in his 12:1+1 classroom (Dist. Ex. 2 at p. 7).

information incomplete for two classmates (*id.*).<sup>33</sup> The class profile for performance on the benchmark assessments were classified as "AVG" for average, "BA" for below average, and "WBA" for well below average (*id.*). In the category of reading fluency, five students earned scores in the below average range, and seven, including the student, earned scores in the well below average range (*id.*). Within the category of reading comprehension, one student earned an average score, two earned below average scores, and nine, including the student, earned well below average scores (*id.*). Upon questioning, the student's special education teacher testified that, academically, "he was in the middle," but later added that the student had greater needs in reading and was afforded additional individualized attention to address those needs (Tr. pp. 357, 361-62).<sup>34</sup>

The student testified about how placement in the district's 12:1+1 special class affected him (Tr. pp. 1190-93). Specifically, the student testified that placement in the 12:1+1 classroom created upheaval in his social life at school, as the friends he had in school prior to his placement in the 12:1+1 classroom "just stopped talking to me" (Tr. p. 1190). Nonetheless, the student was able to form a friendship with one member of the class (Tr. pp. 1190-91). The student shared his concerns with his teacher—who listened—and the school counselor, with whom he talked about ways to change what he didn't like, but he concluded that these conversations only helped "a little" because what he really wanted was to "get out" (Tr. pp. 1192-93).

According to the hearing record, the student's mother made frequent contact with school staff regarding the student's adjustment to the change in placement to the 12:1+1 special class, often citing the student's anxiety and his reluctance to attend school (Tr. pp. 120, 136-37, 395-98, 400-01, 452-53; 988-90; 1191-92; Dist. Ex. 7 at p. 8). In contrast, the student's special education teacher reported that she had observed limited occasions of when the student was anxious, such as when leaving one class for another; for instance, the student wanted to "leave for speech when there wasn't a change in lunch period" (Tr. p. 385). As an accommodation, the teacher "would let him go before the kids were in the hallway" (*id.*). The student's special education teacher also noted that she did not see an "adverse impact on him academically" due to his feelings of anxiety (Tr. p. 386).

The student testified that he experienced discomfort with the behaviors of some of his classmates (such as "yelling out"), which made it difficult for him "to think" (Tr. p. 1190). When asked about the behavior of the students in her class, the special education teacher expressed reluctance to compare the student's behavior with that of his classmates, but nonetheless acknowledged that the students in her class presented with a variety of behaviors, ranging from talking to impulsivity and opposition (Tr. p. 390). The student's special education teacher also testified that within her class, some students were disruptive more frequently than others and some had individual "behavior management plans" to address these behaviors in addition to the whole class behavior management plan (Tr. pp. 390-94). The teacher also indicated, "[w]e do what is appropriate to place a child where they need to go" and conceded that students had been removed from her class in the past school years due to excessive behavioral needs (Tr. p. 395). The student's mother also testified as to a specific occasion when she complained to the district

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<sup>33</sup> The score for one student was presented as a broad range (57-94) and missing for another, who was a new transfer to the class (Dist. Ex. 62).

<sup>34</sup> To the extent that the IHO found the teacher's testimony indicative of the student being the lowest functioning student in her classroom in terms of math skills, the IHO did not cite to any evidence in the hearing record. Additionally, when asked about how much attention the student required in math, the teacher indicated the student received an equal amount of attention to the other students (Tr. p. 375).

about another student's disruptive behavior, indicating that the school addressed the problem shortly after her call (Tr. pp. 1120-21). While I can sympathize with the student's feelings of being excluded from his former peer group, the hearing record indicates that the district took steps to address his feelings by providing counseling and making certain accommodations to permit the student to attempt to avoid contact with his former friends. On this basis, the hearing record does not support a finding that the district denied the student a FAPE by placing him in a classroom with students with such dissimilar needs that he could not receive educational benefits therefrom.

## **VII. Conclusion**

While I understand the parents' concerns and acknowledge that the student's progress in the district may have been described as slow and methodical at times, the hearing record indicates—both through standardized testing and in the completion of four out of his seven annual goals—that the student was making progress in the district's program. In addition, the January 2013 IEP was reasonably calculated to enable the student to make progress in the district as this was not a situation where the district merely offered the student the same program from year to year, but rather continued to amend and modify the recommended program throughout the 2012-13 school year in order to improve it (H.C., 528 Fed. App'x 64, 66-67; 2013 WL 3155869, at \*2). Having determined that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Gow was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12).

I have considered the parties remaining contentions; however, in light of the above determinations, it is unnecessary to address them.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated October 17, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and which ordered the district to reimburse the parents for the costs of the student's tuition at Gow for the 2012-13 school year.

**Dated:** Albany, New York  
January 15, 2014

  
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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**