



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-093

Application of the BOARD OF EDUCATION OF THE ALLEGANY-LIMESTONE CENTRAL SCHOOL DISTRICT 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., and Anne M. McGinnis, Esq.

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, H. Jeffrey Marcus, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Gow School (Gow) for the 2016-17 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has a history of academic difficulties, which began in kindergarten (Parent Ex. H at p. 2).¹ In first grade, she received academic intervention services (AIS) once per week for 40 minutes each in reading and math, along with speech-language therapy (Dist. Ex. 52 at p. 1). Her parents referred her "to special education" and she was evaluated by the school psychologist who

¹ The student has a family history of dyslexia (Parent Ex. H at p. 1).

reported that based on diagnostic measures of reading performance and measures of phonological processing, the student "appeare[d]" at risk for developing a reading disability and required more intense reading intervention to address her phonological deficits (id. at p. 7). In fourth grade (2011-12 school year), a CSE found the student eligible to receive special education and related services as a student with a learning disability² (Dist. Exs. 4 at pp. 1, 8-10). The student was subsequently diagnosed as having a specific reading disability in decoding and spelling (phonological dyslexia) in 2012 by a private educational diagnostician (Dist. Exs. 54 at pp. 3, 12). Between fourth and seventh grades, the student received a variety of special education services to address her academic deficits including resource room services, consultant teacher services and a special class for reading instruction (Parent Ex. F at p. 8; Dist. Exs. 8 at p.10; 10 at p. 9; 12 at p. 10; 14 at p. 10; 16 at p. 10; 19 at p. 8; 22 at p. 9). The student also received private tutoring services from the department chair of reconstructive language at Gow (Parent Ex. H at p. 1; see Tr. p. 681). The student attended general education classes for eighth grade (2015-16 school year) and received direct consultant teacher services five times weekly for 40 minutes in both ELA and math (Dist. Ex 19 at p. 8). In December 2015, a CSE convened for the student's annual review and noted that, per the parents, course content was becoming overwhelming for the student, she was struggling with homework every night, and math and reading were the "main concern" for her struggle (Dist. Ex. 26 at p. 5). The CSE recommended that in addition to receiving direct consultant teacher services for ELA and math, the student also receive direct consultant teacher services for science, social studies and Spanish five times weekly for 40 minutes each for the remainder of eighth grade (Dist. Exs. 24 at p. 6; 26 at p. 5; see Tr. pp. 110-11).

The CSE met again on May 18, 2016 to conduct a review of the student's program, as part of the district's traditional practice of "solidify[ing] services" for students transitioning from eighth to ninth grade (Dist. Exs. 27 at pp. 1, 6; 28 at p. 1;29 at p. 4; see Tr. pp. 106-07). Minutes from the May 2016 CSE meeting indicated that the student was struggling with math and that Spanish was becoming overwhelming for her (Dist. Ex. 29 at p. 4). The May 2016 CSE continued the student's classification as a student with a learning disability and recommended that for the 2016-17 school year (ninth grade) she receive integrated co-teaching services (ICT) in both ELA and math for 40 minutes per day in a regular education classroom and direct consultant teacher services daily for 40 minutes, in both science and social studies (Dist. Ex. 27 at p. 1). In addition, the IEP reflected that the student would be provided with a modified curriculum consisting of a multisensory based reading program daily, for 30 minutes (Dist. Exs. 27 at p. 6; 29 at p. 3).

Following the CSE meeting the parents sought a private evaluation of the student and in late May 2016 the student was evaluated by a reading specialist (Parent Ex. H). Based on the results of numerous assessments, the evaluator concluded that the student was dyslexic (id.at p. 1). The evaluator opined that the student was "struggling tremendously in her reading, and need[ed] much more intensive intervention, using the approved Orton-Gillingham based methodologies appropriate for a Dyslexic, modified according to the descriptions" in her report (Parent Ex. H at p. 18). With regard to math, the evaluator found that the student's abilities were within the average range and commensurate with her intelligence, but that the student lacked automaticity of basic math facts (id.at pp. 19-20). Among other things, the evaluator recommended that the student's

² 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]).

instructional program include a full-day Orton-Gillingham-based curriculum, such as the program at Gow (id. at p. 27). The evaluator opined that the extensive intervention that the student required could not be provided in a public school (id. at p. 27).

By letter dated August 18, 2016, the parents notified the district that they would be enrolling the student at Gow³ and seeking tuition reimbursement because the district's "proposed placement and program for [the student] [wa]s not designed to meaningfully address her very serious and deep rooted learning problems" (Parent Ex. Q at p. 1). The parents characterized the district's failure to address the student's needs as "longstanding," noting that it was evidenced by the student's continued inability to read at a level that would allow her to be successful (id.). In addition, the parents stated that although the student's most recent IEP recommended a reading program for the student, the "details and nature" of the program were "completely unclear" to the parents at the May 2016 CSE meeting and the district indicated that it had not yet secured a provider to deliver reading services to the student (id.). Along with the letter dated August 18, 2016, the parents indicated that they were enclosing a copy of the May 2016 private evaluation (id.).

The CSE reconvened on August 30, 2016 to review the private evaluation provided by the parents (Dist. Ex. 30 at p. 1; see Parent Ex. H). As a result of its review, the August 2016 CSE revised the student's IEP to include evaluative information and recommendations offered by the private evaluator (compare Dist. Ex.30 at pp. 1-4 with Parent Ex. H at pp. 4,6-7, 8-9, 19-20, 26-27). In response to the increased level of need reflected in the private reading evaluation, the August 2016 CSE continued to recommend daily ICT services in ELA and math, direct consultant teacher services in science and social studies, and a multisensory based reading program (Dist. Exs. 27 at pp. 1, 6; 30 at pp. 1, 8). However, the CSE intensified its recommendation for the student's multisensory based reading instruction to be specially designed and delivered in a 1:1 setting for 42 minutes each day, and provided by a special education or reading teacher (Dist. Ex. 30 at p. 8).⁴

A. Due Process Complaint Notice

By due process complaint notice, dated December 15, 2016, the parents alleged that the district failed to provide the student with a free appropriate public education (FAPE) (Parent Ex. A at pp. 3-6). The parents asserted that the district's CSE failed to recommend specialized programs in reading and writing and failed to offer "a full day Orton-Gillingham based curriculum" (id. at pp. 3-4). The parents alleged that as result of the district's ongoing and long-term failure to provide appropriate specialized instruction in reading and writing, the student failed to make meaningful academic progress. The parents also claimed that the student's IEP for the 2016-17 school year did not accurately reflect the student's current needs, present levels of educational performance, or appropriate goals (id. at p. 5). The parents also challenged the adequacy of the

³ Gow has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCCR 200.1[d], 200.7).

⁴ The final IEP dated August 30, 2016 reflects implementation dates from September 2016 to January 2017, however, the hearing record reflects that the parties agreed, for purposes of this proceeding, to extend the implementation date to the end of the 2016-17 school year (Tr. pp. 19-21; Dist. Ex. 30 at p. 1).

student's annual goals arguing that they were vague, not measurable and did not provide sufficient guidance to be implemented (*id.*). Specifically, the parents' contended that the annual goals failed to address the student's needs in vocabulary, consonant/vowel confusion, oral reading, reading rate/accuracy/fluency/comprehension, decoding, automaticity, written expression, spelling, grammar, sentence structure, rapid naming, vowel digraphs/diphthongs, advanced concepts (decoding/encoding), reading efficiency, and memory/retrieval deficits (*id.*). The parents further alleged that the district failed to conduct an assistive technology evaluation and failed to recommend appropriate assistive technology services (*id.*). With regard to the student's transition plan, the parents contended that the district failed to develop a meaningful plan that included an adequate statement of student's needs, and provided specific details (*id.*). The parents also claimed that the IEP did not include non-district evaluations or recommendations (*id.*).

The parents also alleged that Gow was an appropriate placement for the student and that equitable considerations weighed in favor of granting the parents' request for public funding or reimbursement for the cost of the student's attendance at Gow for the 2016-17 school year (Parent Ex. A at pp. 5-6). As additional relief, the parents' requested an unspecified amount of compensatory educational services.

B. Impartial Hearing Officer Decision

On May 5, 2017, an impartial hearing was convened and after five days of proceedings, concluded on June 27, 2017 (Tr. pp. 1-737). In a decision dated September 20, 2017, the IHO set forth a listing of issues to be decided in the proceeding and set forth his responses on some of the issues (IHO Decision at pp. 3-4). The IHO noted that the parents withdrew their claim for compensatory educational services during the hearing (*id.* at p. 2). The IHO concluded that the district failed to meet its burden of proof that a May 2016 IEP and an August 2016 IEP offered the student a FAPE for the 2016-17 school year (IHO Decision at pp. 2, 3, 25-26).⁵ Aside from the fact that the IHO found a denial of a FAPE for the 2016-17 school year, the reasons for the IHO's decision are unclear. For example, the IHO concluded that the student failed to make progress "[u]nder the IEP's (*id.* at p. 3), but does not identify the IEP's to which he is referring. The IHO also concluded that that the student was denied a FAPE in the 2016-17 school year because the student did not demonstrate progress in State assessments in prior school years or toward annual goals in prior school years (*id.* at pp. 3-4). With regard to progress, the IHO concluded that student would not show progress under the May or August 2016 IEPs because the student did not receive services in accordance with the proposed IEPs because the student was unilaterally placed at Gow by the parents (*id.* at p. 17). The IHO attributed a statement to the private evaluator to the effect of "the other program is not working since she had only progressed 1/3 per year" (*id.* at p. 14) and that, under the New York State assessments, the student was progressing below acceptable range with the exception of the final year which is of limited comparison value (*id.* at p. 16). The IHO observed that the student's progress for 2015-16 was identified on the 8th grade report card and that she had an 86.6 grade point average (*id.* at p. 17). With regard to goals for the district's proposed program, the IHO does not appear to have squarely addressed the issue, noting only that the May 2016 IEP "did not contain any fluency decoding, or spelling goals making it difficult to

⁵ The IHO's decision incorrectly references the August 30, 2016 IEP as being developed on August 30, 2017 in several places and references the May 18, 2016 IEP as being developed on May 18, 2017 in one place (*see* IHO Decision at pp. 3, 9, 25, 26).

measure the Student's progress in her greatest areas of deficit. The student's strong work ethic will mask her fluency and decoding deficits when only comprehension is the sole reading goal" (*id.* at p. 9). However, the IHO did not appear to make any findings regarding the goals as modified in the August 2016 IEP, which was the finalized IEP that was proposed for the student the 2016-17 school year. In a separate section of his decision entitled "Conclusions of Law," the IHO also found that the district's unspecified reading program did not offer the student a FAPE and did not meet legal standards (*id.* at p. 26).

Regarding the unilateral placement of the student at Gow, the IHO found that the placement was appropriate for the student and, in a somewhat lengthier but no less confusing discussion that identified the struggle with tracking the student's progress, noted that the student showed progress on certain assessments but also showed regression in certain tasks (IHO Decision at pp. 4, 18-21, 26). The IHO also found that equitable considerations favored the parents' request for tuition reimbursement (*id.*).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred by finding that the district failed to offer the student a FAPE for the 2016-17 school year. The district contends that the IHO erred in finding that the student failed to make progress under prior IEP's developed by the district. The district contends that the IHO simply stated legal standards, but did not engage in any analysis of how the August 2016 IEP fared under the legal standard other than to note that "there can be no disputing that 1:1 reading instruction is intensive instruction." The district argues that it recommended appropriate 1:1 reading instruction using a multisensory reading program and that the IHO erred in failing to acknowledge that the student did not require a specific reading methodology or reading program stated on the IEP to derive educational benefit. The district further contends that upon receipt of the parents' private reading evaluation, a CSE reconvened to amend the IEP. According to the district, the IHO erred in finding that the private evaluator was qualified to conduct cognitive testing and provide a diagnosis of dyslexia. Notwithstanding her lack of qualifications, the district nevertheless avers that many of the private evaluator's suggestions were reviewed by the CSE. With regard to the August 2016 IEP, the district states that new goals were added to the IEP and that daily reading instruction was increased from 30 minutes per day to 42 minutes per day. The district also notes that the IEP included a transition plan and access to assistive technology. In addition, the district asserts that the IHO erred in finding that the unilateral placement at Gow was appropriate because the student did not make sufficient progress and did not receive 1:1 reading instruction, and Gow was overly restrictive.

In an answer, the parents generally deny the district's allegations and assert that the IHO correctly determined that the district failed to offer the student a FAPE for the 2016-17 school year and correctly ordered full tuition reimbursement. Additionally, the parents argue that the district misconstrued their claims regarding a specific reading methodology. The parents argue that they were not seeking a particular methodology on the student's IEP and contend that the district's CSE

should have reviewed reading methodologies used with the student in the past that were unsuccessful, prior to developing the May 2016 IEP.⁶

V. Applicable Standards

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

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

⁶ In their answer the parents also allege that:

The district failed to meet its burden of proving it offered [the student] a FAPE for the 2016-2017 school year, because (a) she did not make appropriate progress despite [the student] being provided with a variety of special education settings, services, modifications and accommodations, (b) the District's proposed ninth grade program was inappropriate in light of [the student's] educational history and failure to progress; (c) the May and August 2016 IEPs lack appropriate goals and (d) the May and August IEPs lack an appropriate transition plan.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Scope of Review

There are several preliminary matters to address prior to reaching the merits. First, the IHO did not address in his decision the parents' claims regarding the present levels of performance, the claims that the district failed to 1) recommend a specialized writing program; 2) recommend a full day of Orton-Gillingham based curriculum; 3) include non-district evaluations or recommendations; 4) develop goals to address the student's specific needs; 5) develop a meaningful transition plan; and 6) conduct an assistive technology evaluation and provide appropriate assistive technology services. Neither party has advanced arguments in an appeal or cross-appeal that IHO erred by failing to make any specific findings relative to these claims. Notably, the parents did not file a cross-appeal challenging any aspect of the IHO's decision and simply mention, as reasons to affirm the IHO's award of tuition reimbursement, their allegations regarding the student's prior failures to progress, the May and August 2016 IEPs lack of appropriate goals and the IEPs lack of an appropriate transition plan. The regulations governing practice before the Office of State Review are explicit, and require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4 [f] [emphasis added]). Furthermore the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4] [emphasis added]). If a respondent wishes an SRO to address one or more claims that went unaddressed by an IHO, the practice regulations require the respondent to serve and file a cross appeal with respect to such claims that references to the evidentiary record supporting such claims, to which the petitioner is entitled to file an answer to such a respondent's cross-appeal (8 NYCRR 279.5[b]) or the SRO is to deem them abandoned. As no cross appeal challenging any portion of the IHO's decision was filed by the respondent

parents in this matter, the claims above are deemed abandoned notwithstanding their listing of several of the topics above in their answer.

2. Scope of Impartial Hearing

Also in their answer, the parents now allege that the district has misconstrued their claims regarding a specific reading methodology. The parents contend that the district's CSE should have reviewed reading methodologies used with the student in the past that were unsuccessful, prior to developing the May 2016 IEP. The hearing record does not support the parents' version of events. Supporting the district's view that the parents' claim focused on the lack of a specific methodology on the student's IEP, in their due process complaint notice, the parents specifically alleged that "the August 30, 2016 IEP fails to recommend the 'full day Orton-Gillingham based curriculum' which the student so desperately needs" (Dist. Ex 1 at p.4). The due process complaint notice does not include any claim regarding the lack of a fact-based analysis of past methodologies that the parents now argue for the first time on appeal that the CSE should have conducted during the May 2016 CSE meeting. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue, and did not include this issue in their due process complaint notice, I decline to review this issue for the first time on appeal. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions that limit the issues meaningless (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that an issue was not properly preserved for review because it was not raised in the party's due process complaint notice]). Nor did the district open the door to this claim by raising evidence relating to it as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-51).

In its appeal, the district argues that the IHO erred by making findings relative to the practice of psychology and by relying on the parents' private reading evaluation. Although the IHO's findings were not relevant to the determination of whether or not the student was offered a FAPE, the district's arguments do not merit further consideration given that the August 2016 CSE incorporated much of the parents' private reading evaluation into the August 2016 IEP.

B. 2016-17 School Year

The district challenges the IHO's finding that an unspecified reading program recommended in the May 2016 and August 2016 IEPs did not offer the student a FAPE for the 2016-17 school year. The district contends that its recommended program and placement offered the student a FAPE. In their answer, the parents allege that the district's recommended program was not appropriate in light of the student's educational history and failure to progress. As noted above, in their answer the parents now explicitly state on appeal that "the Parents are not arguing that the IEP required a particular methodology (Answer ¶ 28, Sub ¶ 5.) As described below, the hearing record supports the district's position.

1. May 2016 CSE Meeting

The May 2016 prior written notice reflects generally, that the CSE used teacher reports, classroom tests, parent report, and student progress reports in making its recommendation for the student's ninth grade program for the 2016-17 school year; however, it does not specifically name or describe any documents with identifying dates, titles, or authors that could be linked to evidence in the hearing record (Dist. Ex. 28 at p. 1).

However, at the time of the May 2016 CSE meeting the student was described in the IEP as being in an eighth grade, general education classroom and receiving direct consultant teacher support in her core classes, including ELA, mathematics, science, and social studies, as well as in Spanish; she was not receiving special reading instruction (Dist. Exs. 26 at pp. 2, 5; 27 at pp. 3, 4; see Tr. p. 121). The present levels of performance section of the May 2016 IEP shows that although the student participated well in classes, was very organized, completed all of her assignments and was a hard worker, she struggled with the writing process due to difficulty with spelling, grammar and usage, needed help organizing her thoughts into sentences that made sense and required assistance with editing and revising her work (Dist. Ex. 27 at p. 3). She also required support and practice solving multi-step math problems and although she seemed to understand during class, had difficulty when working independently (id. at p. 3).⁸

In addition, at the time of the May 2016 meeting the parents communicated to the CSE that they were very concerned that the student was "struggling overall" (Dist. Ex. 29 at p. 4; see Tr. pp. 568-69). The student, who attended the meeting, also indicated that the work was getting more difficult for her, with math and math homework being the most difficult, and that she would like to have a study hall every day (Dist. Ex. 29 at p. 4).

Testimony by the district's director of special education, who functioned as the CSE chairperson, indicated that the parents' concerns were related to content and workload (Tr. p. 125).

⁸ In addition, the May 2016 CSE had before it the results from a December 2014 administration of the Woodcock-Johnson Tests of Achievement – Third Edition (Dist. Ex. 27 at p. 2). According to the May 2016 IEP, the student obtained the following subtest standard scores (SS) letter word identification 83 (13th percentile), math calculation 107 (67th percentile), math fluency 87 (20th percentile), reading fluency 95 (37th percentile), spelling 95 (37th percentile), and writing samples 108 (71st percentile) (Dist. Ex. 27 at p. 2; see Dist. Ex. 56 at pp. 3-4). In addition, the CSE had before it the results of a December 2014 administration of the Woodcock-Johnson Tests of Cognitive Abilities-Third Edition which yielded a brief intellectual ability standard score of 103 (Dist. Ex. 27 at p. 2; see Dist. Ex. 56 at p. 3).

The CSE chairperson reported that the May 2016 CSE discussed the student's performance on her eighth grade "i-Ready" reading assessments, noting that the student had "made progress and then regressed" during the school year (Tr. pp. 115-16; see Tr. pp. 34-38). Specifically, the student's performance went from "Needs Improvement" in September 2015, to "Approaching Level 8" in February 2016; however, by May 2016 the student's score was again in the "Needs Improvement" range, and lower than it had been at the start of the eighth-grade school year (Tr. pp. 115-16; see Parent Ex. M). Although the CSE chairperson did not specifically recall the conclusions the CSE reached based on this information, she did indicate that the CSE was surprised by the regression in the student's scores (Tr. p. 116).

The May 2016 CSE considered the information at hand and responded by recommending that the student receive direct consultant teacher services in social studies and science and integrated co-teaching services in ELA and math (Dist. Exs. 29 at p. 2; 27 at p. 6). In addition, the program modifications/accommodations section of the IEP reflected the CSE's recommendation that the student receive a modified curriculum and a multisensory-based reading program for 30 minutes per day (Dist. Ex. 27 at p. 6).⁹ The CSE also added a new goal to the student's IEP that addressed reading comprehension (Dist. Ex. 27 at p. 5). The May 2016 CSE further recommended that the student receive supplementary aids and services, assistive technology, and testing accommodations (id.). The CSE chairperson testified that a multisensory-based reading program was recommended for the student given the disability classification of learning disability, specifically dyslexia, and "knowing that multisensory-based approaches tend to be most effective with students with dyslexia, [the CSE] felt that it would support the student the best"(Tr. p. 112).

In addition to the recommendations reflected on the student's IEP, the May 2016 meeting minutes indicate that the CSE also responded to input from the parents and the student regarding the student's needs, by recommending that chorus be removed from the student's schedule, so she could "get more help from [the math] teacher" (Dist. Ex. 29 at p. 4). The meeting minutes also reflect that because Spanish was becoming overwhelming to the student, she would discontinue Spanish for the next school year (2016-17), which would allow room in her schedule for a study hall and an activity period (Dist. Ex. 29 at p. 4).

2. August 2016 CSE Meeting

In response to the parents' August 18, 2016 letter described above, the CSE reconvened on August 30, 2016 to review the parents' privately obtained reading evaluation. According to the May 2016 private reading evaluation report, the student's reading and spelling test results showed that the student did not think in terms of phonetic patterns and that she had difficulty seeing, hearing and representing the sound structure of words (Parent Ex. H at p. 14). However, the student was consistently described as a hard worker (Parent Exs. F at p. 4; H at p. 2, 3; Dist. Exs. 24 at p. 3; 30 at p. 4; 56 at p. 4). She historically achieved strong grades throughout her school experience, despite her reading difficulties (Dist. Ex. 35-37; 56 at p. 2); however, in contrast to her classroom grades, she had consistently scored below the proficiency level on State ELA and mathematics tests from fourth through eighth grades (Dist. Exs. 40-51). The hearing record also reflects that despite not receiving special reading instruction during eighth grade, the student

⁹ The IEP did not identify a group size for the multisensory reading program (Dist. Ex. 27 at p. 6).

achieved a score approaching grade level on the district's "i-Ready" assessment in February of that year (2015-16) (Parent Ex. M). However, by May 2016 her score had declined to the "Needs Improvement" level (id.).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The August 2016 IEP included the student's present levels of academic achievement, functional performance and learning characteristics as described in the May 2016 IEP and added details from the private evaluation assessment results describing the student's functioning in reading, writing, and math (compare Dist. Ex. 27 at p. 3 with Dist. Ex. 30 at p. 4).¹⁰ Specifically, the August 2016 IEP indicated that while the student was generally able to identify one-syllable words, she decoded most words so slowly that it caused extreme impairment to her reading fluency; she decoded words inaccurately by substituting words of similar meaning and did not discern word structures or recognize common syllable patterns; she was better able to read words in context than in isolation; was more able to spell real words than to read real words accurately; that she struggled with analyzing and spelling vowel patterns, had difficulty recognizing and producing rhyming patterns; demonstrated an average vocabulary although her short term memory span was poor; was able to express herself in writing but struggled with spelling and editing her written work; and demonstrated average problem solving ability but poor math fact fluency (id.).

With regard to the academic, developmental and functional needs of the student, including those that were of concern to the parent, in addition to her need for reinforcement of new math concepts in small groups, assistance with proofreading and editing due to spelling difficulties and her need for guidance on writing extended responses that were reflected in the May 2016 IEP, the August 2016 IEP also included the use of graphic aids for organizing ideas for extended writing

¹⁰ With respect to the student's writing ability, the CSE chairperson testified that according to the student's fourth quarter progress report on goals, she was still struggling with getting ideas "from her brain onto the paper," and spelling and usage continued to be a concern (Tr. p. 118). The CSE chairperson concluded that while the student was making progress, "she's still not where she needs to be at [that] point" (Tr. p. 118; see Dist. Ex. 34). With respect to the student's performance in math, the CSE chairperson testified that based on the progress report, the student understood basic math facts, but continued to have difficulty identifying the procedures and operations that needed to be used in solving multistep math problems (Tr. p. 118; see Dist. Ex. 34). Testimony by the CSE chairperson also indicated that the student's grade 8 New York State ELA scores placed her at level 2, and she confirmed that the student scored closer to level 3 than level 1, and that she believed that all of the student's previous test results that the CSE looked at were at a level 1 (Tr. p. 119; see Dist. Ex. 50 at p. 1).¹⁰ Regarding the student's overall academic performance, the student's end of the year report card for the eighth-grade year indicated that although the student earned a year end GPA of 86.8, her grades had significantly declined from the third to the fourth quarter, in English (95 to 83), health (84 to 72), math (88 to 69), social studies (80 to 70), and more significantly in Spanish (86 to 67) (Dist. Ex. 37). Testimony by the CSE chair indicates that the student's decline in grades was consistent with the decline in her i-Ready scores and that the CSE took both of these factors into account in making the decision to add reading instruction to the student's IEP (Tr. pp. 122-23, 127-28).

responses; the student's need to review all spelling patterns, beginning with the simplest CVC patterns; and her need for the provision of notes and/or guided notes/outlines to assist with lecture materials (compare Dist. Ex. 27 at p. 3 with Dist. Ex. 30 at p. 5 and with Parent Ex. H at pp. 27, 28).

The August 2016 CSE also updated the management needs reflected in the May 2016 IEP. In addition to her need for consultant teacher support in core classes, guidance and visual support for written responses, assistance editing her work due to difficulty with spelling, reinforcement and reteaching of new math concepts in a small group, and use of an agenda to record assignments, the new IEP also indicated that the student needed 1:1 reading instruction to assist her with developing basic reading skills (Dist. Exs. 27 at p. 4; 30 at p. 5). The August 2016 IEP also included program modifications/accommodations and assistive technology supports that were a result of the private reading evaluation (Dist. Ex. 30 at p. 8). In addition to the provision of additional time ("2 times") to complete written assignments, a modified curriculum for reading - a multisensory based reading program daily for 30 minutes-, and the electronic access to reading materials (electronic textbooks) reflected in the May 2016 IEP, the August 2016 IEP added the provision of a copy of class notes (noting that this could be "guided notes with lines to be filled in") and the provision of electronic access to written materials through reader software, as well as access to speech recognition software to assist the student in writing without her disability hindering her (compare Parent Ex. H at p. 28 with Dist. Ex. 30 at p. 8).

3. Reading Methodology and the August 2016 IEP

With regard to the issue of methodology, the district asserts that its obligation under the IDEA was to develop an IEP that appropriately met the student's reading needs, and the IHO erred by failing to acknowledge that the district was not required to identify a specific reading program methodology on the IEP. In their due process complaint notice, the parents alleged that the district failed to recommend a "full day Orton-Gillingham-based curriculum" (Parent Ex. A at p. 4). Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]). The parents point to a recent Second Circuit case in which the Court ruled in favor of a parent who challenged lack of methodology in an IEP. The Court stated in that case that "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, and the CSE did not sufficiently explain why the recommended program would be appropriate absent the designation of that methodology on the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017]).

Even putting aside the fact that the parents now allege on appeal that they were not seeking a particular reading methodology on the IEP, the district is correct that the IHO's conclusion that the IEP's failure to specify a particular reading program resulted in a denial of a FAPE to the student was in error because the IHO's decision is not adequately reasoned or sufficiently supported by evidence in the hearing record. In this regard, the hearing record does not indicate that the student required a specific methodology in order to make meaningful progress, nor was there a clear consensus yielded at either the May 2016 CSE meeting or the August 2016 CSE meeting. The private evaluator recommended the student be instructed using an "Orton-Gillingham-based curriculum, such as [that] found at Gow School" ("O-G Reconstructive Language"), but did not conclude that reconstructive language was the only program that the student could benefit from (Parent Ex. H at p. 27). The hearing record reflects that consistent with the private evaluator's recommendation for an Orton-Gillingham-based program, prior to the August 2016 CSE meeting, the district opted to use a more general term on the IEP, "multisensory" with the intensive 1:1 reading instruction.¹¹

As noted above, the hearing record reflects that the August 2016 CSE increased the student's reading services from 30 minutes per day to 42 minutes per day and from instruction provided in a group setting, to instruction in a 1:1 setting, increasing both the duration of the daily service as well as the intensity of her reading instruction (compare Dist. Ex. 27 at p. 5 with Dist. Ex. 30 at p. 8). While it is clear that the student would not receive 1:1 multisensory based reading instruction all day, the hearing record reflects that the August 2016 IEP continued to provide the student with special education support during all of her academic classes via ICT services in ELA and math and direct consultant teacher services during science and social studies (*id.*)¹² Therefore, given that the hearing record does not support a finding that a specific methodology was necessary for the student to progress in her academic program or that a consensus existed, I find that the August 2016 IEP was reasonably calculated to provide the student with educational benefits and

¹¹ With respect to implementing the IEP, the district anticipated and was in the process of obtaining a multisensory reading program that was Orton-Gillingham based (Tr. pp. 109, 169). This evidence would be impermissibly retrospective if used to argue that the district would have provided student with Orton-Gillingham specifically. It only tends to show how Orton-Gillingham would be among the programs that could satisfy the mandate of the IEP as drafted because it is a multisensory reading program. For example, testimony by the director of special education indicated that "it had become apparent that we had a pocket of students in the district in need of a multisensory-based reading program, an Orton-Gillingham-based approach" and the district was "looking at what [it] [was] going to do for that particular program" (Tr. pp. 106-09, 169). She further testified that at the May 2016 CSE meeting it was "deemed that [the student] would benefit from that particular program which focuse[d] on phonics development" (Tr. p. 109).

¹² I note that despite the private evaluator's recommendation for a full day of Orton-Gillingham-based instruction, testimony by the director of Reconstructive Language at Gow indicated that based on a survey she conducted five years ago, teachers of Gow's core academic classes such as English, math, and social studies, "generally did some supportive work with Reconstructive Language (RL) weekly in their classes" (Tr. pp. 695-96). She indicated that many of them do oral reading or assist the students and that every teacher needs to learn and memorize the RL card deck (Tr. p. 696). She further indicated that according to the survey, most Gow teachers referred to RL materials in their classrooms or reinforced RL weekly, and that this could be once per week for a few minutes (Tr. pp. 695, 722-24, 724-25). In addition, the student received reading instruction at Gow in a group setting of four to six students for 45 minutes five days per week, although Gow has provided 1:1 services to students who needed it (Tr. pp. 532, 561, 683-84, 686-87).

comported with the "broad discretion" afforded to the district "to adopt programs that, in its educational judgment, are most pedagogically effective" (M.H., 685 F.3d at 257).

4. 2016-17 IEP Goals

As noted above, the IHO made what may be characterized as observations about the content of the goals in the May 2016 IEP, but made no specific conclusions regarding the IEP goals and how they contributed to or undermined the provision of a FAPE to the student. Even assuming, for the sake of argument, that the IHO intended that the May 2016 proposed IEP goals to support his conclusion that the district denied the student a FAPE, the IHO failed to analyze that the IEP goals were thereafter modified in the finalized August 2016 IEP. In addition to the three goals carried over from the May 2016 IEP (one each addressing reading comprehension, writing, and mathematics), the August 30, 2016 IEP also included two new reading goals based on recommendations reflected in the private reading evaluation—one that required the student to demonstrate phonemic awareness by identifying and manipulating letter sounds, beginning with CVC pattern words, and another that required the student to identify consonant blends by their two or three constituent sounds, for example, the "str" blend (compare Parent Ex. H at p. 27 with Dist. Ex. 27 at p. 5 and with Dist. Ex. 30 at p. 7). The hearing record reflects that both of these goals address skills that were specifically identified as needs in the private reading evaluation and were recommended to be part of the student's instructional program (Parent Ex. H at p. 27). In addition, the reading evaluation further indicated that the student should "not work with other patterns until the CVC pattern was mastered for reading and spelling (with real and nonsense words), using both single and multi-syllable CVC words" (id.). Based on the above, there is no reliable basis for upholding the IHO decision that the district failed to offer the student a FAPE due to the content of the goals as finalized in the August 2016 IEP which addressed the student's needs in phonemic awareness, reading comprehension, consonant blends, written expression, vocabulary, and mathematics and adequately align with the areas of need identified by the private reading evaluation and the student's August 2016 IEP.

5. Progress Under Prior IEPs

The district also argues that the IHO erred in finding that the student did not make appropriate progress under previous IEPs developed by the district or that this contributed to the IHO's finding that the district failed to offer the student a FAPE for the 2016-17 school year. First, as the IHO noted, the parents withdrew their claims for compensatory education, leaving their tuition reimbursement claim for Gow for the 2016-17 school year, which in turn relates to the adequacy of the August 2016 IEP as finalized. There is nothing in the IHO's decision that indicates that his FAPE determination was specifically premised upon a deficiency in the design or implementation of an IEP from 2015 or earlier.

With regard to the August 2016 IEP, 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]). 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]).

Here, the IHO found that the student's scores for state assessments from the 2010-11 school year through the 2015-16 school year "consistently showed the [st]udent progressing below acceptable range" (IHO Decision at p. 16). The IHO does not explain what he meant by the term "acceptable range," and I question, for instance whether he intended to find that anything less than a score in the range of 3, that is "Students performing at this level are proficient in standards for their grade level achievement on the assessment", would fail to be acceptable for purposes of a FAPE determination (see, e.g. Dist. Ex. 50 at p. 1). However, the State assessments, among other things, compare skills for all students taking the exams whether disabled or not, and there is no evidence suggesting that the student, with the significant learning deficits she is faced with, is guaranteed to achieve a specific level of benefit such as scoring in the 3 range (or better). The IHO did not analyze what specific skills were addressed on each year of the State ELA assessment and how those curriculum skills related to the student's areas of deficit. The IHO's generalized statement is contrary to logic, the district noted, the student's scores on state assessments, when viewed in a larger context, suggest that she was improving on assessment in the ELA curriculum for the 2015-16 school year. The IHO also cites to the student's inconsistent progress toward IEP goals from September 1, 2013 through August 31, 2015 and inconsistent school testing results, as reflected in "I-reading" reports, administered during the 2012-15 and 2015 -16 school years (id. at pp. 16-17).¹³ There is no evidence in the hearing record, however, that the student's academic program, or IEPs, in place from the 2010-2011 through 2015-16 school years were based on the same or similar evaluative information or were similar or the same in what supports they offered to the student. Although the IHO notes the student's variable progress under a random assortment of measures over the course of several years, the IHO does not link those details to specific IEPs. Moreover, there is no evidence in the hearing record that the student's academic programs, or IEPs, in place from the 2010-2011 through 2015-16 school years were based on the same or similar evaluative information or were similar in what supports they offered to the student. Most

¹³ The IHO also notes that there was no progress reported pursuant to the August IEP from September 6, 2016 to January 5, 2017 "because the Student was unilaterally parentally placed at G[ow] School" during that time period (IHO Decision at p.17). The IHO's "findings" in his decision must in large part be a recounting of the evidence that was entered into in the hearing record versus actual weighing of disputed evidence because it is unclear, how lack of progress under an IEP that was never implemented due to the student's unilateral placement could be used to support his conclusion that the IEP in question did not offer the student a FAPE.

importantly, the IHO did not find that the student had failed to progress under a prior IEP that was similar to the only IEP at issue in this proceeding, the IEP that was finalized in August 2016. Rather, the hearing record demonstrates that the May 2016 CSE responded to the student's struggles during the 2015-16 school year by recommending more intensive services and supports.

When the parties began developing an IEP for the 2016-17 school year at the time of the May 2016 CSE meeting, the student was described in the IEP as being in an eighth grade general education classroom and receiving direct consultant teacher support in her core classes, including ELA, mathematics, science, and social studies, as well as in Spanish, and was not receiving special reading instruction (Dist. Exs. 26 at pp. 2, 5; 27 at pp. 3, 4; see Tr. p. 121). The present levels of performance section of the May 2016 IEP reflects that during eighth grade, she struggled with the writing process due to difficulty with spelling, grammar and usage, needed help organizing her thoughts into sentences that made sense and required assistance with editing and revising her work (Dist. Ex. 27 at p. 3). She also required support and practice solving multi-step math problems and although she seemed to understand during class, had difficulty when working independently (Dist. Ex. 27 at p. 3).

In addition, at the time of this meeting the parents communicated to the May 18, 2016 CSE that they were very concerned that the student was "struggling overall" (Dist. Ex. 29 at p. 4; see Tr. pp. 568-69). The student, who attended the meeting, also indicated that the work was getting more difficult for her, with math and math homework being the most difficult, and that she would like to have a study hall every day (Dist. Ex. 29 at p. 4). Testimony by the CSE chair indicated that the parents' concerns were related to content and workload (Tr. p. 125).

Testimony by the district's director of special education who functioned as the CSE chairperson (Tr. pp. 34, 38), indicated that the May 2016 CSE discussed the student's performance on her eighth grade i-Ready reading assessments, noting that the student had "made progress and then regressed" during the school year (Tr. pp. 115-16). Specifically, the student's performance went from "Needs Improvement" in September, to "Approaching Level 8" in February, however, by May the student's score was again in the "Needs Improvement" range, and lower than it had been at the start of the eighth grade school year (Tr. pp. 115-16; see Parent Ex. M).

Accordingly, the May 2016 CSE reviewed to the evaluative information and responded by recommending that the student receive direct consultant teacher services in social studies and science and integrated co-teaching services in ELA and math (Dist. Ex. 29 at p. 2). In addition, the program modifications/accommodations section of the IEP reflected the CSE's recommendation that the student receive a modified curriculum and a multisensory based reading program for 30 minutes per day (Dist. Ex. 27 at p. 6). The CSE also added a new goal to the student's IEP that addressed comprehension (Dist. Ex. 27 at p. 5).

Furthermore, before the school year began, the August 2016 CSE modified the IEP and further intensified the student's reading program after the parent provided it with the private reading evaluation. The CSE reconvened on August 30, 2016 to review the private reading evaluation provided by the parent, that was conducted in May 2016, shortly after the May 18, 2016 CSE meeting took place (see Tr. pp. 571-73, 592; Dist. Ex. 30 at p. 1; see Parent Ex. H). As previously discussed, a review of the August 2016 IEP reveals that the CSE responded by including in the new IEP much of the information provided in the private reading evaluation regarding the

student's needs and increased the student's services by recommending that the student's multisensory based reading instruction was to be specially designed and delivered in a 1:1 setting for 42 minutes each day, and provided by a special education or reading teacher (Dist. Ex. 30 at p. 8). As a result, the IEP services were more intense and less similar to prior IEPs. Accordingly, to the extent the IHO relied on the student's alleged lack of progress under prior IEPs to support his finding of a FAPE denial for the 2016-17 school year, that determination is not sufficiently supported by the evidence in the hearing record must be reversed.

VII. Conclusion

Based on the foregoing, the conclusion of the IHO that the district failed to offer an appropriate IEP for the 2016-17 school year was inadequately reasoned and the finalized August 30, 2016 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 recommended the student's program based upon the CSEs consideration of all current available evaluative material, input from the student's parents and the parents' private reading evaluation (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 2016-17 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 parents' 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.

IT IS ORDERED that the IHO's decision dated September 20, 2017 is modified, by reversing those portions which concluded that the district failed to offer the student a FAPE for the 2016-17 school year and which ordered the district to reimburse the parents for the costs of the student's tuition at Gow for the 2016-17 school year.

Dated: Albany, New York
December 18, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER