The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-066

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Mamaroneck Union Free School District

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Gow School (Gow) for the 2010-11 and 2011-12 school years. The 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 school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

A. General Background and History

In this case, the student has received diagnoses of a reading disorder, an attention deficit hyperactivity disorder (ADHD), a developmental coordination disorder, a disorder of written expression, and a learning disorder – not otherwise specified (NOS) (Dist. Ex. 19 at p. 13).[1] During sixth grade (2005-06) while attending the district's middle school, the CSE determined that the student was eligible for special education programs and services as a student with a learning disability (Dist. Ex. 3 at pp. 1, 3).[2] In September 2008 at the commencement of the student's ninth

[1] I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (Tr. p. 91; see 34 CFR 300.8 [c][10]; 8 NYCRR 200.1[zz][6]).

grade year, the parent unilaterally placed the student at Gow and he has remained there since that time (Dist. Ex. 1 at pp. 1-2; see Tr. pp. 559-60, 584-85).[3, 4]

On June 7, 2010, a subcommittee of the CSE convened to conduct the student's annual review and to develop an IEP for the 2010-11 school year (eleventh grade) (Dist. Ex. 9). The CSE subcommittee recommended that the student receive two 50-minute sessions of direct consultant teacher services in his general education English, math, social studies, and science classes per week; four 50-minute sessions per week of special class reading instruction in a group of no more than five students; and four 50-minute sessions per week of special class skills instruction in a 15:1 student-to-teacher ratio (id. at p. 1). The June 2010 IEP recommended that the student also receive one individual session per week of counseling and a variety of program modifications, testing accommodations, and assistive technology services (id. at pp. 1-2). The student's mother rejected the June 2010 CSE subcommittee's recommendation at the meeting and indicated that the student would attend Gow for the 2010-11 school year (Tr. pp. 180-81, 984-88; Dist. Ex. 9 at p. 6).

The student attended Gow during the 2010-11 school year, and over two dates in January 2011, the director of research and assessment at Gow conducted a psychoeducational evaluation of the student (Dist. Exs. 21; 24).

On June 6, 2011, the CSE subcommittee convened to conduct the student's annual review and to develop the IEP for the 2011-12 school year (Dist. Ex. 10). The CSE subcommittee recommended that during the 2011-12 school year, the student receive direct consultant teacher services in his general education science and math classes; indirect consultant teacher services in his general education English and social studies classes; four 50-minute sessions of special class skills instruction in a 12:1 student-to-teacher ratio; and twice weekly 50-minute sessions of special class reading instruction in a group of no more than eight students (id. at pp. 1, 7-8). The CSE subcommittee also recommended various program modifications, testing accommodations, and assistive technology services (id. at pp. 8-9). According to the resultant IEP, at the June 2011 meeting the parent informed the district that the student would remain at Gow for the 2011-12 school year (id. at p. 1; see Tr. pp. 1000, 1003-08).

By letter dated July 6, 2011, the parent notified the district that she was rejecting the 2011-12 school year IEP and continuing the student's unilateral placement at Gow (Dist. Ex. 47). In the letter, the parent stated her belief that the June 2011 IEP was not reasonably calculated to provide her son with a free appropriate public education (FAPE) and notified the district of her intention to seek reimbursement for the student's tuition at Gow for the 2011-12 school year (id.). The parent also asserted in her July 2011 letter that at the June 2010 CSE meeting, she had informed the CSE that the 2010-11 IEP was not reasonably calculated to "provide meaningful progress and an appropriate education" for the student and that she would be seeking reimbursement for Gow

[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 NYCRR 200.1[d], 200.7).

[4] The student has been the subject of a previous appeal (Application of a Student with a Disability, Appeal No. 10-020). The parties subsequently sought judicial review of that proceeding and the matter is currently pending in the U.S. District Court (see Dist. Exs. 1 at pp. 1-2; 2 at pp. 4-23). Contrary to the parent's request, the IHO did not, and I now decline to review that proceeding as it relates to the prior appeal insofar as such review would impermissibly allow the parties to re-litigate issues that were or should have been determined in the prior appeal or otherwise improperly sit in review of determinations made by a prior SRO.

(id.). Despite this, the parent contended that as of the date of the July 2011 letter, she had not received the "final IEP" for the 2010-11 school year; therefore, she reiterated her intent to seek tuition reimbursement at Gow for the 2010-11 school year (id.).

B. Due Process Complaint Notice

In a due process complaint notice dated July 29, 2011, the parent alleged that the district failed to offer the student a FAPE for the 2010-11 and the 2011-12 school years, and requested tuition reimbursement at Gow for both school years (Dist. Ex. 1 at pp. 2, 10). The parent alleged that the district did not provide her with a "final IEP" for the 2010-11 school year, and therefore the complaint was "filed under the assumption that the [2010-11] IEP would be similar to the IEP for the school year 2011-12" (id. at pp. 2, 7). For both the 2010-11 and 2011-12 school years, the parent asserted that the IEPs failed to provide the student with: (1) a specific, appropriate reading program; (2) a fully integrated program consisting of teachers qualified in general education and specially trained to instruct students with severe reading disorders; (3) extended school day services including daily 1:1 tutoring and extensive study hall periods with specialists trained in teaching students with dyslexia; (4) general education classes with no more than 10 students; and (5) technological assistance and software (id. at pp. 7-8). The parent also asserted that teachers in the skills class and resource room at the public school were not "highly qualified" or specially trained to instruct students with dyslexia (id. at pp. 8).

The parent also asserted that Gow was appropriate for the student because it offered an extended school day, multiple tutoring and study hall sessions with "highly qualified teachers," an integrated reading program, Reconstructive Language provided by teachers trained in that method and how to instruct students with severe reading disorders, extensive technology supports and devices with appropriate software, and ongoing professional testing to monitor the student's progress (Dist. Ex. 1 at p. 9).

The district responded to the parents' due process complaint notice, denying the allegations contained in the notice (Dist. Ex. 2). Among other things, the district asserted that the parents were given a copy of the 2010-11 school year IEP in a timely manner and that the district offered the student a FAPE, and would have provided the student with any needed assistive technology devices (id. at pp. 2-3).

C. Impartial Hearing Officer Decision

An impartial hearing convened on November 2, 2011 and concluded on January 10, 2012, after five nonconsecutive days of hearing (Tr. pp. 1, 344, 554, 896, 1228). In a decision dated February 24, 2012, the IHO determined that the district offered the student a FAPE for both the 2010-11 and 2011-12 school years (IHO Decision at p. 24). The IHO noted that although the parent had argued during the impartial hearing that both IEPs were flawed because none of the district's CSE participants had any firsthand knowledge of the student or the programs he was then-attending, the parent had not raised these allegations in the due process complaint notice, and therefore the IHO would not consider them (id. at p. 22). The IHO further noted that both the 2010-11 and 2011-12 IEPs were created with the participation of Gow staff (id.).

The IHO determined that for the 2010-11 school year, the hearing record did not demonstrate that the student required all of the supports and services the parent wanted (e.g., a fully integrated program with teachers qualified in general education and specially trained to teach

students with dyslexia, 1:1 tutoring, general education classes of no more than 10 students, and extensive study halls with specialists in dyslexia and core subjects) (IHO Decision at pp. 18-19, 21). Rather, she found that the hearing record showed the student's needs could be addressed in the recommended general education classes by the consultant teachers, the skills teacher, and the services provided in the reading classes in addition to assistive technology and counseling (id.). With respect to the parent's concerns that the district's program would not allow the student to make meaningful progress in reading due to his "'double deficit dyslexia,'" the IHO found that the recommended reading program was tailored to the student's needs and addressed his reading difficulties by providing remediation and the development of compensatory strategies in both the special class reading and skills instruction classes, the use of consultant teachers, the use of computer programs including Kurzweil, and a "host" of testing accommodations and in-class supports (id. at pp. 21-22). The IHO also noted that the student was of average ability in reading comprehension and was able to compensate for his deficits in decoding by deriving meaning from the text (id. at p. 18). With respect to the provision of assistive technology, the IHO determined that it would have been available to the student at the district, and furthermore, the hearing record demonstrated that the student did not take advantage of all the assistive technology offered to him at Gow, noting that he will only use it if he wishes to (id. at pp. 20-21).

The IHO also determined that Gow, among other things, does not individualize its programs for students and was therefore an inappropriate unilateral placement for the student (IHO Decision at pp. 24-25). Additionally, with regard to equitable considerations, the IHO found that the parents provided notice of their intent to place the student at Gow in June 2010, but did not fully cooperate with the district (id. at p. 27).

IV. Appeal for State-Level Review

The parent was granted leave to submit an amended petition appealing the IHO's decision and therein asserts that the IHO improperly found that the district offered the student a FAPE for the 2010-11 and 2011-12 school years, and that Gow was not an appropriate placement for the student.[5] The parent also asserts that the IHO was biased based on several grounds. More specifically, the parent alleges, among other things, that the district did not offer an appropriate reading program five days per week to the student, contending in particular that the Wilson reading program had not worked with the student in the past; that the student required teachers trained in teaching students with dyslexia; that the hearing record did not show the district could have provided the assistive technology; and that placement of the student in a skills class and the use of consultant teacher services would not provide appropriate support for the student.

The district answers, asserting that the IHO properly found that the district offered the student a FAPE for both the 2010-11 and 2011-12 school years and that Gow was not an appropriate unilateral placement. The district also asserts several defenses, discussed more fully below, among which are that the instant appeal is time barred, and the amended petition was not properly served upon the district and lacked a verification page.

[5] The parent's original petition was challenged by the district as failing to: (1) contain the required notice with petition; (2) clearly indicate the reasons for challenging the IHO's decisions and orders, and what relief the SRO was expected to grant; and (3) comport with the requirement for numbered paragraphs (see 8 NYCRR 279.3, 4[a], 8[a][3]).

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 v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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; 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. Dep't 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 enabling 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]). 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; 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 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. Scope of Review

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's determination that the parent did not raise the issue of whether the district's CSE participants had firsthand knowledge of the student or the programs he was then-attending in her due process complaint notice (see IHO Decision at p. 22). Accordingly, this determination has 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]).[6]

B. Procedural Defenses

In its answer, the district asserts that the parent's appeal is "time barred" and that there was no request made in the petition for additional time in which to initiate the appeal or good cause asserted for the untimeliness; therefore, the petition should be dismissed as untimely in violation of State regulations. The district also asserts that the amended petition was not properly served upon the district.

The district's assertions concerning service and timeliness of the appeal are not convincing. The parent personally served a verified petition in a timely manner that was accepted for filing and thereby properly initiated this appeal (8 NYCRR 279.2, 279.4). While the amended petition was not personally served, State regulations provide that all subsequent pleadings may be served by United States mail, by private express delivery service or by personal service (8 NYCRR 275.8[b], 279.1; cf. Application of a Student with a Disability, Appeal No. 12-042 [noting that an appeal had not been successfully initiated due to rejection of a petition that violated the length prescribed in State regulation and a second petition that was dismissed again for procedural defects and untimeliness]). With regard to the parent's failure to verify the amended petition, the district is correct that the parent has violated the practice regulations regarding verification (8 NYCRR 279.6); however, in this instance and as more fully described below, the parent would not have prevailed even if she had properly verified the amended petition. Since the district will suffer no prejudice as a result, I decline in this particular instance to exercise my discretion to dismiss the amended petition due to the lack of verification (8 NYCRR 279.13). However, the parent is cautioned to carefully review and comply with State regulations governing appeals before an SRO in the event she has need to file another proceeding with the Office of State Review in the future.

C. IHO Bias

Turning first to the contentions that the IHO evinced bias against the parent at the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard

[6] I also note that although the parent asserted in her due process complaint notice that the district failed to provide her with a final IEP for the 2010-11 school year, the IHO did not address this allegation in her decision (see Dist. Ex. 1 at 2). Since the parent does not appeal the IHO's failure to rule on any claims, whether or not the district failed to provide to the parent a "final" IEP for the 2010-11 school year, is not at issue on appeal and I will not address this allegation in this decision.

(Application of a Student with a Disability, Appeal No. 12-064; Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

The parent asserts that the IHO demonstrated bias by allowing the district's response to the due process complaint notice to be entered as evidence even though it was provided more than 10 days after receiving the due process complaint notice (see 34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]). The parent also asserts that the IHO demonstrated her bias by not holding the district to the rules of evidence when it submitted its evidence to the parent one day late in violation of State regulations (8 NYCRR 200.5[j][3][xii]), and in allowing rebuttal testimony that was cumulative, inappropriate, and irrelevant. Finally, the parent asserts that the IHO demonstrated her bias by ignoring the parent's evidence, and failing to give at least equal weight to the testimony of the parent's expert witnesses.

With respect to the parent's assertion that the IHO demonstrated her bias toward the district by admitting the district's response to the due process complaint notice into evidence although it was submitted late in violation of federal and State regulations, the hearing record shows that the district admitted it did not send the response within the required 10 days after receipt of the due process complaint notice, and that the IHO provided both parties with opportunity to be heard on the issue before deciding to accept the district's response into evidence (Tr. pp. 32-42; see 34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Dist. Ex. 2). Based on the hearing record, I find that the IHO's decision to accept the district's response did not demonstrate bias on her part, especially when, in this instance, she provided both parties the opportunity to weigh in on the matter. Courts have explained that a default ruling is not specified as a penalty for a district's failure to comply with the requirements of filing a response to a due process complaint notice in accordance with the IDEA and have emphasized the avoidance of subverting the intended administrative process (Jalloh v. District of Columbia, 535 F. Supp. 2d 13, 20-21 [D.D.C. 2008]; Sykes v. District of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]). Additionally, if the district failed to comply with the procedural requirement of providing a response to a due process complaint notice, nothing would preclude an IHO from ordering a district's compliance with a hearing procedure such as filing a response required by the IDEA (34 CFR 300.513[a][3]). Accordingly there is no basis in this case for concluding that the IHO acted with bias by allowing the admission of the district's response when it rectified noncompliance with the IDEA.

Upon careful review of the hearing record, I also find no basis to support the parent's allegations that the IHO displayed bias against her through the IHO's conduct, statements, admonitions, or rulings. Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 2011 WL 2321461, at *4 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008]); Pachl v. School Bd. of Independent Sch. Dist. No. 11, 2005 WL 428587, at *18 [D.Minn. Feb. 23, 2005]; Letter to Steinke, [OSEP 1992]; see also Dell v. Board of Educ. Tp. High School Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]). With respect to the parent's assertion in

this case that the district did not disclose to the parent its evidence to be used at the impartial hearing at least five business days prior to the hearing and the IHO "did not feel it was necessary to hold the district to the rules," the hearing record shows that the parties and the IHO discussed this issue on the record (Tr. pp. 30-31, 57-63; see 8 NYCRR 200.5[j][3][xii]). The hearing record also shows that the parent was not asserting that she did not have time to review the documents, the IHO offered to delay the proceeding for one day in order to allow the parent additional time to review the documents, and the parent was upset that the documents were received via e-mail rather than the customary overnight mail (id.). I find that based on the above, the IHO's determination to allow the admission of evidence provided after the five-day disclosure deadline was permissible and did not demonstrate any bias on the part of the IHO, especially where the IHO attempted to mitigate the effect of any surprise by offering the parent a brief continuance to review the evidence.

With respect to the parent's assertion that the IHO demonstrated bias by allowing district witnesses to testify when their testimony was cumulative, inappropriate, and irrelevant, and by failing to give at least equal weight to the testimony of the parent's expert witnesses, upon careful review of the hearing record, I find no basis in the hearing record to support the parent's general and conclusory allegations that the IHO displayed bias against the parent through her conduct, her statements, her admonitions, or her rulings. Notably, the parent does not specify or assert with any particularity that the IHO's alleged bias with respect to her rulings, statements, admonishments, or conduct affected either the parent's opportunity to present evidence or her opportunity to otherwise exercise rights under due process (see 8 NYCRR 200.5[j], [k]). In fact, the parent states in her petition that "none of these procedural errors could be construed to be fatal to the [parent's] [c]ase . . . " (Pet. ¶ 10). While the parent may disagree with the conclusions reached by the IHO, that disagreement, alone, does not provide a sufficient basis for finding actual or apparent bias by the IHO (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 12-017; Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). An independent review of the hearing record in this matter demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]; see e.g., Tr. pp. 30-31, 32-42, 57-63, 65-66, 75-79, 216-217, 219-220).

Having determined these initial procedural matters, I now turn to the substantive claims concerning both the 2010-11 and 2011-12 school years. For purposes of the tuition reimbursement analysis, each school year is treated separately, therefore, I will start first with the 2010-11 school year (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of the Dep't of Educ., Appeal No. 11-124). I note however, that several issues identified in the petition are not clearly allocated to a particular school year. Therefore, I will address those issues after matters clearly related to a specific school year have been separately addressed.

D. 2010-11 IEP

Turning first to the parent's allegations that the recommendations in the June 2010 IEP were inappropriate for the student, the hearing record reflects that prior to the June 2010 CSE meeting, the student had undergone extensive evaluations that revealed his overall cognitive skills were within the average range, with identified weaknesses in word retrieval and auditory processing skills, ability to learn and retain verbal and visual information, and attention, reading decoding, spelling, math fact retrieval, and mathematical procedure skills (see e.g., Dist. Exs. 11; 12; 14; 15; 17; 18; 19; 25; 27; 29). The district's secondary director of special education, who acted as the CSE subcommittee chairperson at the June 2010 CSE subcommittee meeting testified that the CSE subcommittee had obtained and reviewed many assessments from which it compiled information about the nature of the student's disability (Tr. pp. 120, 125-26, 146-47, 159-60; Dist. Ex. 9 at pp. 6-7; see Tr. pp. 425-26).[7] Additionally, the CSE subcommittee reviewed written information prepared by Gow staff, as well as verbal information presented by the representative from Gow and the student who participated in the meeting (Tr. pp. 146-54; Dist. Ex. 9 at pp. 6-7; see Dist. Ex. 23).

The resultant present levels of performance contained in the June 2010 IEP indicated that the student's cognitive functioning was in the low average to average range of ability, with strengths in verbal comprehension and vocabulary skills (Dist. Ex. 9 at p. 4). The student's verbal reasoning skills were age appropriate and his working, visual, and verbal memory skills were within the average range (id.). According to the IEP, the student's performance improved when information was presented within a larger context rather than in rote format (id.). The student's perceptual reasoning skills were adequate, but more variable and an area of relative weakness (id.). The IEP indicated that the student exhibited slow processing speed, and his attention weaknesses caused variability and inconsistency in his motivation and ability to complete work (id.). The student's performance on academic assessments showed spelling scores in the low range; decoding scores in the low/very low range; significant difficulty with reading fluency; and mathematical calculation, writing, and reading comprehension scores in the average range of academic ability (id. at pp. 3-4). The June 2010 IEP indicated that the student's significant delays in reading decoding, spelling, and math calculation skills, along with organizational difficulties, affected his progress in the general education curriculum, and that he needed to improve his reading decoding, spelling and math calculation skills, and also his ability to organize his school papers, binders, and homework assignments (id.). The present levels of performance also included information derived from the February 4, 2010 Gow advisor report about the student's classroom behavior, ability to complete homework, and prepare for tests (compare Dist. Ex. 9 at p. 3, with Dist. Ex. 23 at p. 16). The IEP indicated that the student's note and test taking skills and organizational awareness had progressed; however, the student needed to continue to initiate those skills independently (Dist. Ex. 9 at p. 4).

1. Consultant Teacher Services and Special Class Skills Instruction

The parent asserts that the June 2010 CSE subcommittee's recommendations that the student receive consultant teacher services and special class skills instruction did not provide

[7] The hearing record shows that the district unsuccessfully attempted to obtain the parent's consent to reevaluate the student prior to the development of the 2010-11 IEP (Tr. pp. 126-35, 145-46, 900-07; Dist. Exs. 9 at p. 3; 31; 40; see Dist. Exs. 39; 40).

individualization or sufficient support to the student.[8] The parent also asserts that the June 2010 CSE subcommittee chairperson described consultant teacher services as consisting of a special education teacher who "spends time working with students directly in the core academic content areas," and whose involvement in those settings is "individualized to each student" who receives consultant teacher services (Tr. pp. 162-63).[9] The special education teacher is available to provide modifications of the instruction provided by the regular education teacher, redirection, on-task management strategies, and clarification of the regular education teacher's instruction (Tr. p. 163). The CSE subcommittee chairperson stated that classes at the high school convened four days per week, and according to the student's IEP, he would receive CTS in all of his academic classes two days per week (Tr. pp. 163, 246-47; Dist. Ex. 9 at p. 1). Although the student-to-teacher ratio for consultant teacher services is capped at 12:1, the CSE subcommittee chairperson testified that in the high school there were rarely in excess of six students receiving that service within a general education class (Tr. pp. 247-48).

The CSE subcommittee chairperson testified that the recommended skills instruction occurred in a special class setting provided to the student four days per week (Tr. p. 164). She indicated that "typically," the same special education teacher provided both a student's consultant teacher services and special class skills instruction (Tr. pp. 164-65). Within the skills special class, the special education teacher provided individual remediation and interventions related to a student's IEP goals, skill deficits, and need for pre-teaching or re-teaching of content area

[8] To the extent that the parent also asserts for the first time on appeal that "there was no way of knowing what the number or profile of students sharing these support services would be," the parent did not assert this allegation in her due process complaint notice and the IHO did not address this issue in her decision (see IHO Decision; Dist. Ex. 1). 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[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues 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 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 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. South 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., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft 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 a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Nor can it be said that the district opened the door to such claims by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H. v. New York City Dep't of Educ., 2012 WL 2477649, at *28-*29 [2d Cir. June 29, 2012]). Therefore, I will not review this issue raised for the first time on appeal.

[9] State regulations define direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]).

information (Tr. p. 164). The CSE subcommittee chairperson also testified that because the special education teacher had knowledge of what was occurring in the general education classes, the skills special class provided the opportunity for a structured period to individually reinforce content area material (id.). The special education teacher who attended the June 2010 CSE subcommittee meeting testified that she had experience as, among other things, both a consultant teacher and skills special class teacher (Tr. p. 425; see Dist. Ex. 9 at p. 6). She indicated that skills special classes are usually composed of no more than six students (Tr. pp. 432-33). Another district special education teacher with experience as both a skills and reading special class teacher testified that students with reading disabilities in the skills special class are provided with differentiated materials and assignment modifications such as simpler text, books on tape, technological supports, and graphic organizers (Tr. pp. 349, 352, 383-85).

The special education teacher testified that she believed consultant teacher services and special class skills instruction were appropriate recommendations for the student due to his average cognitive skills, need for someone in the classroom to focus him and provide prompting due to his attending weaknesses, and to provide him with support in the skills class (Tr. p. 428). The special education teacher explained that two special education teachers usually provide consultant teacher services, one in English and social studies classes, and one in math and science classes (Tr. pp. 430-31). Both of the consultant teachers provide support to students in the skills special class (id.). The special education teacher testified that the rationale for having the consultant teachers provide instruction in the skills special class is so that the teachers can address individual deficits through content area material (Tr. pp. 431-32). Skills targeted included summarizing content area material, note taking, preparing outlines, and improving study skills (id.). The CSE subcommittee chairperson testified at length about the rationale the CSE subcommittee used in recommending each program modification in the June 2010 IEP including copy of class notes, refocusing and redirection, access to word processor, check for understanding, preferential seating, and use of digital books (Tr. pp. 173-74, 177-78; Dist. Ex. 9 at p. 2). She also provided the reasons the CSE subcommittee recommended the use of extended time; tests read; alternative forms of recording; and directions read, repeated, and explained as testing accommodations for the student (Tr. pp. 178-80; Dist. Ex. 9 at p. 2).

The CSE subcommittee chairperson testified about her understanding of the student's educational strengths and needs, in that he had average cognitive skills, and exhibited strengths in reading and language comprehension, and "clear weaknesses" in decoding, fluency, spelling, and math calculation skills (Tr. p. 126). She testified that students recommended for consultant teacher services and special class skills instruction exhibit specific learning needs due to learning disabilities and attention difficulties, and perform in the low average to low range academically, but have low average to average cognitive ability (Tr. pp. 171-72). Both the CSE subcommittee chairperson and the special education teacher testified that students with educational strengths and needs similar to the student's had been successful in the consultant teacher and skills special class programs (Tr. pp. 183-84, 428-29, 435, 458). The CSE subcommittee chairperson stated her belief that the placement the June 2010 CSE subcommittee recommended was appropriate in part because the student's ongoing contact with the special education teacher throughout the school day and in the skills special class would provide continuity, in conjunction with the supports provided by the program modifications, testing accommodations, and other services recommended in the June 2010 IEP (Tr. pp. 183-84).

Based on the foregoing evidence, I find that the consultant teacher services and special class skills instruction that the district offered was designed to address the student's unique needs and provide sufficient support to the student, and was reasonably calculated to enable the student to receive educational benefits (Mrs. B., 103 F.3d at 1120; see Rowley, 458 U.S. at 192).

2. Special Class Reading Instruction and Methodology

The parent asserts that the IEP was inappropriate because student could not progress with the Wilson Reading System (Wilson) methodology, and that the special class reading instruction recommended in the June 2010 IEP was inappropriate for the student.

At the outset, 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.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. Department of Educ. of the City of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

In this case, the district was not required to specify in the June 2010 IEP a particular methodology that would be used with the student in the recommended reading special class. The June 2010 CSE subcommittee recommended that the student receive four sessions per week of special class reading instruction in a group of no more than five students (Dist. Ex. 9 at p. 1). The CSE subcommittee chairperson testified that the reading instruction would be "highly individualized" based upon the student's goals and needs, and would have focused primarily on decoding and fluency, and also vocabulary and comprehension (Tr. pp. 165-66, 209-10). The special education teacher who would have provided the student's reading instruction during the 2010-11 school year (reading teacher) testified that she has certification to teach reading and special education (Tr. pp. 349-50, 380). She further testified that she has received training in reading methodologies such as Wilson and Orton-Gillingham (Tr. pp. 352-53, 361-62; see Dist. Ex. 50). The reading teacher indicated that during the 2010-11 school year, she would have worked on improving the student's reading decoding and fluency skills, and also provided instruction in reading comprehension (Tr. pp. 380-81). To address the student's decoding needs, the reading teacher indicated that she used Wilson, which she described as "direct, explicit instruction" of letters and their associated sounds to improve decoding skills (Tr. pp. 353, 365, 380-81). According to the reading teacher, Wilson is a program designed for students with reading disabilities, providing phonics-based "over-practice" and drill work (Tr. pp. 353-54). Within the 12-step Wilson program, vocabulary is controlled and provided in a systematic, structured and

sequential format using six syllable types (Tr. pp. 354-58; Dist. Ex. 50). According to the reading teacher, Wilson is multisensory in that students print the words, say the sounds of the words, create words on tile boards and "magic slates," and use air writing to obtain auditory, visual and kinesthetic input (Tr. pp. 359-61).

The reading teacher stated that Wilson is designed for students with average cognitive abilities who exhibit severe reading disabilities and have tried many other programs, but continue to exhibit difficulty with decoding (Tr. pp. 369-70). The reading teacher opined that Wilson is an appropriate reading methodology for students with difficulties in reading and in other areas such as auditory processing, processing speed, and short-term memory (Tr. pp. 395-96). She further testified that students who are determined to be candidates for special class reading instruction often exhibit standard scores below 80 on two of the three following subtests of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III): letter-word identification, passage comprehension, and reading fluency (Tr. pp. 370-72). Upon review of the results of the February 2008 and May 2009 administrations of the WJ-III reading subtests to the student, the reading teacher indicated that the student's reading decoding and fluency skills were low, but his comprehension skills were considerably higher (Tr. pp. 372-77). She stated that the student's decoding and fluency scores were commensurate with the scores of other students in her reading special class during the 2010-11 school year, and that his comprehension scores were higher than the other students in the class (id.).

According to the CSE subcommittee chairperson, the reading instruction provided to students in the reading special class is individualized, and the intervention provided to the student in this case would be developed in response to his fluency and decoding needs (Tr. pp. 209-10). While Wilson may have been an instructional approach used within the reading special class, reading programs are "customized" for each student, and there is not a "one size fits all" methodology (id.) Before progressing to the next step in Wilson, students must master 80 percent comprehension, and the reading teacher stated that other components would be added to the student's reading program if a student's progress with Wilson was very slow (Tr. pp. 358-59, 397-99). She also described activities to improve fluency skills such as the teacher reading material in phrases to the student and having him repeat it, and having the student practice reading lower level instructional material aloud (Tr. pp. 381-82). To address the student's reading comprehension, the reading teacher testified that she incorporated other strategies into her sessions such as using high interest articles to target vocabulary; and Reading Plus, an internet-based program to improve reading comprehension using silent reading, guided reading, and vocabulary instruction (Tr. pp. 363-69). Based on the above, the hearing record shows, contrary to the parent's claim, that the district used multiple methods, including Wilson, to address students' reading needs.

The hearing record also shows that both the Wilson methodology described by the district and the Reconstructive Language methodology preferred by the parent and used with the student at Gow are derived from an Orton-Gillingham foundation and emphasize explicit instruction in the structure of language and sound-symbol relationships, and use rote memorization as a learning technique (Tr. pp. 353-54, 578-81). Although there are some differences between the two methodologies, as stated above there are basic similarities and while I can understand that the parent may have preferred a district placement with a reading methodology more similar to the Reconstructive Language program available at Gow, the evidence above does not support the conclusion that had the student attended the district's placement, the district should have been

compelled to provide the reading methodology that the private school provided, or that the district was incapable of addressing the student's reading needs as envisioned on the IEP.

The evidence above shows that the special class reading instruction the district offered in the June 2010 IEP was reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

E. 2011-12 IEP

Turning to the parent's assertions regarding the June 2011 IEP, the hearing record reflects that the CSE subcommittee reviewed information about the student including a January 2011 Gow psychoeducational evaluation report and Gow progress reports for the 2010-11 school year up through March 14, 2011 (Tr. pp. 486, 494-96; Dist. Exs. 10 at p. 2; 21; 24). According to the results of cognitive assessments conducted during the January 2011 Gow evaluation, the student's verbal comprehension and perceptual reasoning skills were in the average range, and his working memory and processing speed skills were in the low average range of cognitive functioning (Dist. Ex. 21 at p. 4). The evaluator indicated that weaknesses in working memory and processing speed could cause difficulty on tasks such as learning specific fact information, completing complex mental manipulations, and performing tasks within specific time limits (id. at pp. 6-7). According to the evaluator, results of assessments of the student's academic achievement skills indicated severe deficits in reading, math, and written expression consistent with learning disorders commonly associated with his previously diagnosed ADHD (id. at pp. 11-14). The evaluation report provided recommendations for program modifications and testing accommodations including extended time, a word processor for writing assignments, a calculator, preferential seating, access as needed to assistive technology and software, use of multisensory instructional methods and memory strategies, and class notes (id. at pp. 14-17). The CSE subcommittee also reviewed written and verbal Gow reports pertaining to the student's performance during the first through third marking periods of the 2010-11 school year, including information about his classroom participation, homework completion, study skills, and grades (Tr. pp. 491-94; Dist. Ex. 24). The district's school psychologist, who acted as the CSE subcommittee chairperson at the June 2011 meeting, testified that the special education teacher present at the meeting reviewed the information Gow submitted and prepared draft IEP present levels of performance for the meeting (Tr. pp. 483-84, 486-91). From her review of the student's information, the school psychologist stated the student's educational profile continued to show strengths in verbal comprehension and weaknesses in processing speed, working memory, reading decoding, and math skills (Tr. pp. 486-88, 494-95). The student's classroom and homework performance was variable throughout the school year and on average, he was achieving grades in the "C" range (Tr. pp. 492-94).

Resultant present levels of academic performance contained in the June 2011 IEP reflected the results of the January 2011 psychoeducational evaluation, noting that the student's writing sample and passage comprehension scores were in the average range (Dist. Ex. 10 at pp. 2-4). The IEP indicated that the student struggled with math, spelling, letter word identification, and writing fluency with scores in the very low to low range, and reading fluency, math fluency and applied math skills in the low average range; information commensurate with the results of the January 2011 psychoeducational evaluation (compare Dist. Ex. 10 at p. 4, with Dist. Ex. 21 at p. 8). The present levels of performance also included specific information derived from the Gow third quarter teacher reports prepared by each of the student's academic teachers (compare Dist. Ex. 10 at p. 4, with Dist. Ex. 24 at pp. 13-17). The IEP indicated that the student needed to improve his

reading decoding, spelling and math calculation skills, and also his ability to complete homework assignments (Dist. Ex. 10 at p. 4).

1. Consultant Teacher Services and Special Class Skills Instruction

The parent asserts that the June 2011 CSE subcommittee's recommendations that the student receive consultant teacher services and special class skills instruction did not provide individualization or sufficient support to the student. The school psychologist testified she considered the student's identified strengths in verbal comprehension when developing recommendations for the 2011-12 school year (Tr. pp. 494-96). According to the school psychologist, students with verbal comprehension skills in the upper end of the average range, such as the student in this case, have "better resources to fall upon and can develop stronger compensatory abilities, they have a far better ability to understand at least on a reasoning level the material that's being taught" (Tr. pp. 495-96, 503). The school psychologist added that students with average verbal comprehension skills can understand the concepts and curriculum presented in the classroom (Tr. p. 496). The school psychologist testified that the student's cognitive assessment scores suggested to her that the student was likely to function well in the district's general education classes with supports to address areas of weakness, but that on a whole, he had the capability of understanding what was being taught (id.). Upon review of the student's achievement test results, the school psychologist indicated that he continued to exhibit weaknesses in decoding, spelling and math, while he showed strengths in passage comprehension (Tr. pp. 487-98).

For the 2011-12 school year, the CSE subcommittee recommended that the student receive twice weekly direct consultant teacher services in general education science and math classes, twice weekly indirect consultant teacher services in general education English and social studies classes, and four sessions per week of special class skills instruction (Tr. p. 504; Dist. Ex. 10 at pp. 7-8). According to the school psychologist, the student, who attended the meeting, expressed his belief that he did not require direct consultant teacher services in English and social studies classes, to which the CSE subcommittee agreed because those were subject areas additionally supported by the skills special class (Tr. p. 504). Within the skills special class, the student was recommended to receive direct support for his English and social studies classes, provided by the special education teacher who also provided the consultant teacher services to those classes (Tr. pp. 505-06). According to the school psychologist, at the CSE subcommittee meeting the student expressed his need for special class skills instruction (Tr. pp. 506-07). The special education teacher of the skills special class was also available to support the student's math and science classes, classes in which the student was recommended to receive direct consultant teacher services as well (Tr. p. 505).

In conjunction with the direct and indirect consultant teacher services, the June 2011 CSE subcommittee recommended that the student receive program modifications including access to a computer and spelling device, a copy of class notes, preferential seating, and additional time to complete assignments (Dist. Ex. 10 at p. 8). The school psychologist testified the recommended program modifications would help the student function more independently and address his weaknesses to allow him to function within the general education environment (Tr. pp. 509-10). The CSE subcommittee recommended that the student receive testing accommodations of flexible scheduling and timing, extended time, use of a graphing calculator, access to SOLO software, frequent breaks, separate location, tests administered in small groups or individually, alternate

forms of recording responses, and spelling waived (Dist. Ex. 10 at p. 9). The school psychologist did not recall that any program modifications or testing accommodations suggested by CSE members were not included in the June 2011 IEP (Tr. pp. 510, 512-13). I note that many program modifications and testing accommodations the CSE subcommittee recommended were also recommendations included in the January 2011 Gow psychoeducational evaluation report (compare Dist. Ex. 10 at pp. 8-9, with Dist. Ex. 21 at pp. 14-17).

Based on the foregoing, I find that the consultant teacher services and special class skills instruction that the district offered for the 2011-12 school year was designed to address the student's unique needs and provide individualization and sufficient support to the student, and was reasonably calculated to enable the student to receive educational benefits.

2. Special Class Reading Instruction

The parent asserts that the instruction that would have been provided in the recommended reading special class, and the reduction of reading instruction the CSE subcommittee recommended for the 2011-12 school year was inappropriate. The June 2011 IEP provided the student with two weekly 50-minute sessions of special class reading instruction in a group no larger than eight students (Dist. Ex. 10 at p. 8). The school psychologist explained that the frequency of services was reduced from four sessions during the 2010-11 school year (eleventh grade) to two sessions during 2011-12 (twelfth grade) because the student was already receiving "a lot" of consultant teacher services and the goal for senior students was increased independence (Tr. p. 507). The school psychologist testified that the CSE subcommittee recommended the student receive two sessions per week of special class reading instruction because high school staff had not worked with the student and the CSE subcommittee believed he needed the individual and small group reading instruction that the special class would provide (Tr. pp. 507-08).[10] The school psychologist also testified that another factor in the reduction of the number of sessions per week between eleventh and twelfth grade was the student's solidly average January 2011 WJ-III passage comprehension score, which in conjunction with the recommended program accommodations, would have lessened the student's need for the support of a reading teacher (Tr. p. 508).

Upon reviewing the results of the January 2011 Gow psychoeducational evaluation, the district's reading teacher stated that she did not believe that twice weekly special class reading instruction was inappropriate because the student had exhibited progress in reading comprehension (Tr. pp. 420-21). She further testified that although the frequency of sessions was reduced from four times per week in eleventh grade to twice per week in twelfth grade, the CSE subcommittee continued the recommendation that the student receive special class skills instruction, which would have addressed some of his reading difficulties, and that the student could use the Reading Plus program independently after school, thus his needs would be sufficiently met (Tr. p. 421). The school psychologist testified that the district had worked with many other students with significant needs, and expressed her belief that it had "done a very good job in helping them to be successful," stating her opinion that the student would have done "equally well" with the supports the district could have provided (Tr. pp. 514-15).

[10] I note that the school psychologist testified there were typically four or less students in the reading special class during the 2011-12 school year (Tr. pp. 508-09).

Based on the foregoing, I find that the evidence shows that the level of special class reading instruction the district offered was reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 64-65).

3. Special Factors and Assistive Technology

Turning to the parent's claim in her complaint that the IEPs failed to offer "any technological assistance," under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP, including whether the student requires assistive technology devices and services, and may be required to provide school-purchased assistive technology devices in the student's home or in other settings if the CSE determines that the student needs access to those devices in order to receive a FAPE (20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.105, 300.324[a][2][v]; 8 NYCRR 200.4[d][2][v][a][6], [3][v]-[vi]; see Letter to Anonymous, 24 IDELR 854 [OSEP 1996]; Letter to Naon, 22 IDELR 888 [OSEP 1995]). State policy guidance in New York explains that the CSE

> must consider each student's need for assistive technology devices and/or services. If a student needs such devices and/or services, the appropriate sections of the IEP must specify the:
>
> - nature of the assistive technology to be provided;
> - services the student needs to use the assistive technology device;
> - frequency, duration of such services;
> - location where the assistive technology devices and/or services will be provided; and
> - whether such device is required to be used in the student's home or another setting in order for the student to receive a free appropriate public education

("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 24, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/ publications/ iepguidance/IEPguideDec2010.pdf; see also Letter to Anonymous,18 IDELR 627 [OSEP 1991] [explaining that an IEP should contain a specific statement of the assistive technology services when a student requires them]).

In this case, the parent asserts that the district failed to offer assistive technology on the 2010-11 and the 2011-12 IEPs such as Kurzweil and "numerous other programs" (Dist. Ex. 1 at p. 8). However, the evidence does not support the parent's claim. Both the June 2010 and June 2011 IEPs contained specific notations that the student should be provided with access to a word processor/computer installed with Kurzweil and speech recognition software such as Dragon Speak, and books on tape/digital books via Bookshare (Dist. Exs. 9 at p. 2; 10 at p. 8). The computer provided for in the June 2011 IEP also included Inspiration and Structured Writing software, access to Rosetta Stone for Spanish, and a spelling device for in-class assignments and tests (Dist. Ex. 10 at p. 8). I find that the evidence shows that in both IEPs the district specifically offered assistive technology services with several software packages that were tailored to address

the student's unique needs. Any deficiency in the IEPs with respect to assistive technology and meeting the criteria above did not rise to the level of a denial of a FAPE to the student.[11]

In summary upon review of the hearing record, I find that the evidence demonstrates that the student's IEPs for the 2010-11 and 2011-12 school years were appropriately based on the information before the CSEs and the IEPs contained appropriate recommendations to address the student's needs. Consequently, I decline to reverse the IHO's determination that the district offered the student a FAPE based upon deficiencies in the student's IEPs.

F. Failure to Implement IEPs

The parent asserts that the district would not have been able to properly implement the student's IEPs for both years based in part on the qualifications, certifications, and/or abilities of the district's teachers and staff, as well as the district's ability to provide the appropriate assistive technology. In this case, however, a meaningful analysis of the parent's claims would require me to determine what might have happened had the district been required to actually implement the student's IEPs—events that did not occur in this case because the parent unilaterally removed the student from the public school before the IEPs were to be implemented. Parents are not required to "try out" the school district's proposed program (Forest Grove, 129 S. Ct. at 2496). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir.2009]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]).

The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

[11] On appeal, the parent shifted tack away from her claim in her due process complaint notice regarding the inadequacy of the student's IEPs and toward a claim that the implementation of assistive technology services under the IEPs was "unworkable" and district would not have provided the services in a large public high school (Pet. ¶ 28). I address the parent's assistive technology implementation claim below.

In this case, the parent rejected both of the proposed IEPs for the 2010-11 and 2011-12 school years and enrolled the student at Gow prior to the time that the district became obligated to implement either IEP (Tr. pp. 180-81, 984-88; Dist. Exs. 1, at pp. 2, 7-8; 9 at p. 6; 47). Thus, while the district was required to establish that the IEPs were appropriate during the impartial hearing, the district was not required to establish that IEPs were actually implemented in accordance with State and Federal law in the proposed classrooms.[12] Even assuming for the sake of argument that the student had attended the district's recommended programs, as further discussed below, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEPs in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at *3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. Teacher Qualifications

The parent alleges that the student required instruction provided by teachers who were trained in instructing students with dyslexia.[13] I note that a State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K., 2011 WL 127063, at *11), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Carter, 510 U.S. at 14 [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1201 n.3

[12] In New York State, policy guidance offers an explanation of the steps that must be taken to ensure the implementation of an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 60-61, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/ iepguidance/IEPguideDec2010.pdf).

[13] To the extent that the parent attempts to revisit a prior SRO decision with regard to teacher qualifications and prior testimony, once again I note that the matter is currently pending in U.S. District Court, and I decline to otherwise review the previous SRO's decisions concerning this student and prior school years, including the credibility of witnesses (see Application of a Student with a Disability, Appeal No. 10-020).

[S.D.Cal. 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]]).

In this case, the hearing record shows that the teaching staff at the district's high school was certified in their respective content areas and capable of implementing the IEPs (Tr. pp. 184-85, 349-50, 380, 424, 429-30). The special education teacher from the public school testified that she received a master's degree in corrective reading, a second master's degree in special education, and holds certifications to teach reading in all grades (Tr. pp. 349-50). She also testified that as part of her corrective reading graduate course, she received graduate credits for such areas as reading difficulties, diagnosis, testing, interpretation, and interventions (Tr. p. 350). The district's special education reading teacher opined that regular education teachers in the district's school did not necessarily need to be trained in specific reading programs because they are trained to differentiate instruction and accommodate students' needs (Tr. pp. 416-17). As described above, in the recommended placement, the student would have received the support of a certified special education teacher in all of his content area classes and in the skills special class (Tr. pp. 163-64, 246-47; Dist. Ex. 9 at p. 1). The level of special education teacher support in the general education environment, coupled with the student's average reading comprehension abilities, his ability to "perform most effectively when learning through auditory means and while listening to lectures and discussions," and program modifications provided in the June 2010 and June 2011 IEPs, do not support a finding that the student required the teachers of his content area classes to have received specialized training in working with students with dyslexia in order to implement his IEP (Tr. pp. 374-75, 379-80; Dist. Exs. 8 at p. 3; 9 at pp. 1-2; 10 at pp. 7-8; 19 at pp. 2, 20; 21 at p. 8). Based on the aforementioned evidence, I find that the parent's assertion is without merit and that the district's staff was sufficiently qualified to implement the student's 2010-11 and 2011-12 school year IEPs in the event that the student had attended the public school (S.H., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]).

2. Assistive Technology Implementation

Turning next to the parent's claim that the district would fail to implement the assistive technology services required under the IEPs, once again, the sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10) and, in view of the evidence described below, there is no basis to conclude that the district intended to deviate from the IEPs in a material way if the parent had elected to enroll the student in the public school.[14]

Assuming for the sake of argument that the student had attended the district's program during the 2010-11 and 2011-12 school years, the hearing record contained some evidence describing the various assistive technology devices and software programs the June 2010 and June 2011 CSE subcommittees recommended (Tr. pp. 174-78, 1261-69). According to the district's assistive technology specialist, during both the 2010-11 and 2011-12 school years, the high school operated an "AT library" that made available a variety of assistive technology, including the devices and software the CSE subcommittees recommended for the student (Tr. pp. 1258-62; Dist. Exs. 9 at p. 2; 10 at p. 8).

[14] Assuming the parent can raise an assistive technology implementation claim in the context of this case, I am not convinced she actually raised such a claim in her due process complaint notice (see Dist. Ex. 1).

The district's K-12 assistive technology specialist testified that it is his responsibility to ensure that assistive technology is implemented according to student IEPs (Tr. p. 1238). To that end, he testified extensively about the steps he takes to ensure that assistive technology recommendations are implemented, and described at length the approach that the district would have taken regarding the implementation of the student's assistive technology recommendations in the 2010-11 and 2011-12 IEPs, including installing software on devices the student would use, making sure the AT library had adequate numbers of devices and corresponding licenses, and ensuring materials were scanned into devices for the student's use (Tr. pp. 1272-86). The district's high school chairperson of the special education department testified regarding how assistive technology was implemented at the high school, with specific references to the type of assistive technology recommended for the student (Tr. pp. 1376, 1381-85). To ensure a student's assistive technology recommendations were met, the high school chairperson of the special education department testified that she would meet with the assistive technology specialist to make sure she understood the student's needs, and that the high school had the available the specific assistive technology required (Tr. pp. 1387-88). Additionally, in conjunction with the assistive technology provided in the student's IEPs, the hearing record shows that the district provided all students with a variety of instructional technology, described as "any technology that enables students to access the curriculum, to learn more effectively than they would be able without it" (Tr. pp. 1239-41).

Based on the foregoing, the evidence supports the conclusion that the district was prepared to implement the student's IEPs with respect to the recommended assistive technology devices for the 2010-11 and 2011-12 school year and, had the student enrolled in the public school, would not have deviated from his IEPs in a material way.

VII. Conclusion

In summary, I find that after a thorough review of the hearing record and due consideration, there is no reason to disturb the finding of the IHO that the hearing record shows that the district offered the student a FAPE for the 2010-11 and 2011-12 school years. Having determined that the district offered the student a FAPE for those school years, it is not necessary to reach the issue of whether Gow was an appropriate placement for the student or whether equitable considerations support the parent's claim for tuition reimbursement and the necessary inquiry is at an end (Voluntown., 226 F.3d at 66; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038). I have considered the parties' remaining contentions and find that they need not be addressed in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 9, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER