The University of the State of New York

The State Education Department
State Review Officer
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No. 15-079

Application of the BOARD OF EDUCATION OF THE IROQUOIS 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 Allison A. Bosworth, Esq., of counsel

Carolyn Nugent Gorczynski, Esq., attorney for respondents

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Gow School (Gow) for the 2013-14 and 2014-15 school years. The parents cross-appeal from the IHO's adverse determinations of claims related to alleged bullying and improper functional grouping of the student while he attended the district. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior administrative appeal related to the 2012-13 school year, and as a result, the parties' familiarity with the student's educational history and the prior due process proceedings is assumed and they will only be repeated herein to the extent relevant to this matter (see Application of the Bd. of Educ., Appeal No. 13-214).[1] Pertinently, the decision in the prior appeal determined that an IEP developed in January 2013 for the 2012-13 school year provided the student with a free appropriate public education (FAPE) (id.).

[1] Additionally, because the parties stipulated to use the hearing record created with respect to the impartial hearing underlying Appeal No. 13-214, this decision does not distinguish between citations to the record developed in that case and the additional materials entered into the hearing record in connection with this matter (IHO Decision at pp. 1, 18; see Tr. pp. 1220, 1225-26; IHO Ex. 1).

The January 2013 CSE found that the student continued to be eligible for special education programs and services as a student with a learning disability and recommended a 12:1+1 special class placement with the related services of speech-language therapy and counseling for the remainder of the 2012-13 school year (Dist. Ex. 7 at pp. 1, 11).[2] The CSE also recommended a specialized reading program consisting of 1:1 instruction utilizing an explicit, systematic, multisensory approach for a minimum of three sessions per six-day cycle for 50 minutes and 1:1 instruction utilizing a "program that addresses Rate of Information Retrieval, Automaticity, Vocabulary, [and] Orthography" for two sessions per six-day cycle for 50 minutes (id. at p. 11).[3]

As relevant to the instant appeal, a CSE convened on July 3, 2013, to conduct the student's annual review and develop his IEP for the 2013-14 school year (Dist. Ex. 73 at p. 1).[4] At the time of the July 2013 CSE meeting, the student was attending Gow, having been unilaterally placed there by the parents in February 2013 (Tr. pp. 1032, 1291).[5] Participants at the July 2013 CSE meeting included the student's mother, the director of Gow (by telephone), and the CSE chairperson, who was also the district director of instruction, student services, and assessment (Tr. pp. 1306-07; Dist. Exs. 73 at p. 1; 74 at p. 4). Additional district staff members who participated in the CSE meeting included a school psychologist, the middle school principal, a regular education teacher, a special education teacher, and a speech-language therapist (Tr. pp. 1308-09; Dist. Exs. 73 at p. 1; 74 at p. 4).

The July 2013 CSE found the student continued to be eligible for special education programs and services as a student with a learning disability and recommended a 12:1+1 special class placement for English language arts (ELA), math, science, and social studies (Dist. Ex. 73 at

[2] It appears that many of the exhibits contained in the hearing record include notations made by an unidentified individual(s), most likely the IHO in many instances. While I can appreciate that an IHO may have a need to make notes on an extra copy of the materials, I remind the IHO that it is necessary to avoid annotating the copy that is maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or the even to the party offering the exhibit. In most cases, it falls within an IHO's discretionary authority to order the parties provide the IHO with an additional courtesy copy of the exhibits if necessary to assist the IHO in conducting the proceeding in an effective and efficient manner and then prepare a decision within the stringent deadline imposed on the IHO by the IDEA.

[3] The hearing record reflects that although the CSE did not reference the specific reading programs in the IEP by name, 1:1 instruction utilizing an explicit, systematic, multisensory approach refers to the Sonday system (Sonday) and 1:1 instruction utilizing a program that addresses rate of information retrieval, automaticity, vocabulary, and orthography refers to the RAVE-O program (RAVE-O) (Tr. pp. 86-87, 115-16, 770-71; Dist. Ex. 7 at p. 11).

[4] The hearing record reflects the CSE convened on June 21, 2013, but the parent did not attend (Tr. pp. 1302-03; Dist. Ex. 71). However, the hearing record shows the school psychologist who was in attendance at the June 2013 meeting reviewed the most recent psychological report during the meeting and the director of Gow provided updated information regarding the student's performance at Gow (Dist. Ex. 71 at p. 2; see Tr. p. 1303). The CSE chairperson testified that the CSE did not generate an IEP at the June 2013 meeting, but did so at the July 3, 2013 CSE meeting, with the parents in attendance (Tr. pp. 1305-07, 1309).

[5] Gow has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (Tr. pp. 489, 1560; see 8 NYCCR 200.1[d]; 200.7).

pp. 1, 13, 18).[6] The CSE also recommended two 30-minute sessions of individual speech-language therapy per six-day cycle and one 60-minute session of individual counseling per month to be delivered at the student's home by an outside counselor (id. at p. 13). In addition, the July 2013 CSE added one 30-minute session of "explicit social skills instruction" per six-day cycle to the student's IEP (id.).[7]

The July 2013 CSE continued the recommendation from the January 2013 IEP for 1:1 instruction in two specialized reading programs, offering RAVE-O for two 60-minute sessions per six-day cycle and Sonday for four 50-minute sessions per six-day cycle (Tr. pp. 1334-35; Dist. Ex. 73 at p. 14). The July 2013 IEP also carried over the program modifications and accommodations from the January 2013 IEP, including allowing the use of a calculator for computation, no penalty for misspelling, assignments read to the student, and scheduled communication with the parents (compare Dist. Ex. 7 at pp. 11-12, with Dist. Ex. 73 at pp. 13-14). The July 2013 IEP also included a recommendation for three 30-minute sessions of 1:1 instruction in foundational math skills (Dist. Ex. 73 at p. 14). In addition, the CSE added a recommendation for 12-month special education services in math, reading instruction, and counseling (id. at pp. 14, 16).

The student attended Gow for the 2013-14 school year (Parent Ex. GG at pp. 1-31). A CSE convened on May 28, 2014, to conduct the student's annual review and develop his IEP for the 2014-15 school year (Dist. Ex. 80). Participants at the May 2014 CSE meeting included the student's mother and district staff including the CSE chairperson, a school psychologist, a school counselor, a regular education teacher, a special education teacher, and a speech-language therapist (Dist. Exs. 79 at p. 3; 80 at p. 1). Further, the director of Gow and the student's ELA and reconstructive language teachers from Gow participated by telephone (Tr. pp. 1351-52; Dist. Exs. 79 at p. 3; 80 at p. 1).

The May 2014 CSE found the student continued to be eligible for special education programs and services as a student with a learning disability and recommended placement in a 12:1+1 special class (Dist. Ex. 80 at p. 13).[8] The May 2014 CSE increased the recommended frequency of counseling services from one 60-minute session per month to one 30-minute session

[6] There is considerable discussion in the hearing record regarding "double-deficit dyslexia" in relation to the student's needs (Tr. pp. 271-72, 488, 565-66, 645-47, 816, 1023-24, 1096, 1100-01, 1112-14, 1486, 1518, 1534-37, 1584, 1604; Dist. Ex. 73 at p. 9). An educational diagnostician who evaluated the student in May 2012 and February 2013 and Gow's director of research and assessment referred to the "double-deficit hypothesis of dyslexia," characterized by weaknesses in rapid naming and phonological processing, as "a more severe learning disability than that characterized by either weakness alone" (Parent Ex. F at p. 3; see Parent Ex. E at p. 1).

[7] The CSE chairperson explained that a school social worker would have provided the social skills instruction (Tr. p. 1350).

[8] The actual amount of time the student was recommended to receive instruction in a 12:1+1 special class is unclear. The CSE chairperson testified that "330 minutes" was "not an accurate depiction" as "330 [minutes] is a full school day," and the student would spend parts of the school day (i.e., art, music, gym, and lunch) with nondisabled peers (Tr. pp. 1458-60). In addition, while the CSE chairperson indicated the amount of time spent in the 12:1+1 special class would not have increased, the July 2013 IEP indicated that the student would have been in a 12:1+1 class for one hour in "4 days / 6 Day cycle" for each of English, math, science, and social studies, rather than "6 times / 6 Day Cycle" for 330 minutes without limitation by class as was recommended in the May 2014 IEP (Tr. pp. 1368, 1458-1460; Dist. Exs. 73 at p. 13; 80 at p. 13). However, the May 2014 IEP also indicated that the student would be removed from the general educational environment for instruction in math, science, social studies, ELA, and reading, and to receive his related services, implying that he would be in the general educational environment for other portions of the school day (Dist. Ex. 80 at p. 17).

per six-day cycle (compare Dist. Ex. 73 at p. 13, with Dist. Ex. 80 at p. 13). The May 2014 CSE continued the recommendation for two 30-minute speech-language therapy sessions per six-day cycle (Dist. Exs. 79 at p. 2; 80 at p. 13). The CSE did not continue the recommendation for 1:1 instruction in foundational math skills from the July 2013 IEP (compare Dist. Ex. 73 at p. 14, with Dist. Ex. 80 at pp. 13-14). The CSE continued to recommend 1:1 instruction in two reading programs, continuing instruction in Sonday for four 60-minute sessions per six-day cycle and increasing instruction in RAVE-O from two 50-minute sessions per six-day cycle to two 60-minute sessions per week (Tr. pp. 1371-72; Dist. Exs. 73 at p. 14; 80 at pp. 13-14).[9] The May 2014 CSE also continued to recommend 12-month special education services consisting of five hours per week of 1:1 reading instruction and five 30-minute sessions per week of math instruction (Dist. Ex. 80 at p. 15).

A. Due Process Complaint Notice

The parents requested a due process hearing pursuant to a due process complaint notice dated November 13, 2014 (Dist. Ex. 67). The parents assert that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, that Gow was an appropriate placement for the student for both school years, and that equitable considerations weigh in the parents favor (id.). The parents assert that both the July 2013 and May 2014 IEPs recommended placement in an inappropriate 12:1+1 special class, failed to address the student's social/emotional needs, failed to address the student's needs in the areas of reading and math, and failed to recommend assistive technology training (id. at pp. 3-9).

With respect to educational placement, the parents asserted that a 12:1+1 special class setting was not appropriate for the student because the student would have been placed with students who had dissimilar academic and social/emotional needs (Dist. Ex. 67 at pp. 5-6). The parents alleged that when the student previously attended a 12:1+1 special class in the district, the other students exhibited disruptive behaviors and did not require the same intensive supports for reading, writing, and math (id.). In addition, the parents alleged that placement of the student in the district 12:1+1 special class caused the student to exhibit anxiety and school phobic behaviors and believed that such behaviors would return if the student returned to public school (id. at pp. 6-7). The parents asserted that the recommendations for counseling in the July 2013 and May 2014 IEPs would have been insufficient to address the student's anxiety and school phobic behaviors (id. at pp. 7-8). In addition, the parents alleged that the student was subjected to bullying while in the district and that neither the July 2013 IEP nor the May 2014 IEP addressed what steps the district would take to ensure that the student would not be subjected to bullying if he returned to the district (id. at p. 9).

With respect to the literacy program recommended by the district, the parents alleged that the services recommended for the student were not appropriate because the student had failed to make progress utilizing the instructional approach recommended by the CSE and because the parents' private evaluator advised against using the two instructional approaches recommended by the district together (Dist. Ex. 67 at pp. 3-4). The parents further asserted that the math services recommended by the CSE were not sufficient (id. at p. 4). The parents acknowledged that the July 2013 CSE recommended the addition of 1:1 instruction in math; however, they alleged that the

[9] While it is unclear why the previous RAVE-O sessions had been recommended for 50-minute sessions, the CSE chairperson indicated that in the May 2014 IEP, the sessions were 60 minutes due to the district's schedule being based on 60-minute periods (Tr. p. 1459; see Dist. Exs. 7 at p. 11; 73 at p. 14; 80 at pp. 13-14).

May 2014 CSE's decision not to recommend 1:1 math instruction was inappropriate (id.). Regarding assistive technology, the parents alleged that the district failed to adequately train the student and district staff in its use while the student was in the district and failed to recommend such training in either the July 2013 or May 2014 IEPs (id. at p. 5).

The parents alleged that Gow was an appropriate placement for the student, addressing his reading, math, assistive technology, and social/emotional needs, and sought reimbursement for the cost of the student's tuition at Gow for the 2013-14 and 2014-15 school years (Dist. Ex. 67 at pp. 10-12).

B. Impartial Hearing Officer Decision

After a prehearing conference held on December 16, 2014, an impartial hearing convened on January 20, 2015 and concluded on January 23, 2015 after four consecutive hearing dates (Tr. pp. 1216-2002; IHO Ex. 1). In a decision dated March 2, 2015, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years and that Gow was an appropriate placement for both years (IHO Decision at pp. 3, 33-34).[10] The IHO awarded the parents reimbursement for the cost of the student's tuition at Gow for the 2013-14 and 2014-15 school years (id. at p. 3).

Before addressing the substance of the parties' arguments about the student's educational programming, the IHO determined that the parents were not precluded from raising issues in the present proceeding that were previously litigated and decided in Appeal No. 13-214 and the underlying hearing therein, reasoning that neither res judicata nor collateral estoppel applied because the parents appealed from the SRO decision to United States District Court and, therefore, the SRO decision was not "final" (IHO Decision at pp. 34-36). The IHO also determined that the parents were not precluded from raising claims that the July 2013 and May 2014 CSEs should have addressed the student's needs related to bullying that occurred while the student was enrolled in the district (id. at pp. 36-38). The IHO then reviewed the student's progress in the district during the 2012-13 school year and determined that while the student attended the district he did not make progress with regard to the areas of reading, writing, math, technology, or social/emotional anxiety (id. at pp. 39-46). The IHO held that because the student did not make progress in the district, and because the district recommended similar programs in the July 2013 and May 2014 IEPs to the programs that were previously implemented in the district, those IEPs were not reasonably calculated to provide the student with an educational benefit (id. at pp. 46-48). In particular, the IHO found that the district failed to recommend appropriate services to address the student's needs in reading and math (id.).

Although the IHO identified "placing [the student] with students whose needs are dissimilar," and "failing to meaningfully address ongoing instances of bullying" as reasons for finding that the district did not develop appropriate programs for the 2013-14 and 2014-15 school years (IHO Decision at pp. 33-34, 38), in analyzing the parents' claims related to grouping and bullying, the IHO found that there was no merit to either claim (id. at pp. 48-50). The IHO determined that the parents' grouping argument was speculative as the district did not create a class profile of the student's projected 12:1+1 class prior to the parents' filing of the due process complaint notice (id. at pp. 48-49). With respect to bullying, the IHO found that the student was

[10] The IHO noted that the district did not contest the parents' position that equitable considerations warranted relief in favor of the parents (IHO Decision at p. 34; see Dist. Ex. 69 at p. 2).

subjected to teasing and social rejection and that the student experienced anxiety which disrupted the student's learning environment; however, the IHO also determined that "[t]he record does not establish that bullying resulted in a FAPE denial" (id. at pp. 49-50).

The IHO next addressed the appropriateness of Gow to meet the student's needs for the 2013-14 and 2014-15 school years and determined that it was appropriate (IHO Decision at pp. 50-54). The IHO found that the student did not require counseling at Gow because Gow addressed the student's anxiety "by the very nature of its program" (id. at pp. 50-51). The IHO found that the student did not suffer from anxiety at Gow and that Gow prepared him for participation in the community (id. at p. 51). The IHO also determined that the reconstructive language program and the constructive writing program used at Gow appropriately addressed the student's reading and writing needs and that the student made progress in reading, writing, math, and in the use of assistive technology (id. at pp. 51-53). Finally, the IHO rejected the district's argument that Gow was too restrictive for the student (id. at pp. 53-54).

IV. Appeal for State-Level Review

The district appeals from the IHO's determinations that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years and that Gow was an appropriate placement for the student.

The district addresses the IHO's contradictory findings regarding grouping and bullying and requests that the IHO's determinations that the parents' grouping claim is speculative and that bullying did not result in a denial of FAPE be upheld. The district also contends that the IHO should not have addressed the parents' claims related to bullying because the parents waived these claims in the prior proceeding. Additionally, the district contends that both the July 2013 CSE and May 2014 CSE addressed the student's social/emotional needs through counseling, accommodations, and annual goals.

The district asserts that the IHO's determination that the July 2013 IEP and the May 2014 IEP failed to address the student's needs in reading, math, written expression, and assistive technology is faulty because it is based on the premise that the student failed to make progress while he attended public school during the 2012-13 school year. The district contends that the student's progress in the district was already litigated during the prior proceeding and that the IHO erred in finding that the parents were not estopped from relitigating issues related to the student's progress in the district during the 2012-13 school year. The district also argues that the IHO erred in finding that the student had failed to make progress and points towards the student's grades, successful completion of annual goals, completion of parts of the Sonday reading program, and increase in his reading level as indicators of academic progress, along with the student's improved management of his emotions as an indicator of social/emotional progress. The district contends that the July 2013 IEP and the May 2014 IEP appropriately addressed the student's needs with respect to reading, math, writing, and the use of assistive technology.

The district further contends that Gow was not an appropriate placement for the student because it did not offer counseling or otherwise address the student's anxiety and was not in the least restrictive environment for the student. Additionally, the district asserts that the IHO erred in finding that the student made progress at Gow. The district points to the decrease in the student's scores on the reading comprehension subtest of the Gray Oral Reading Tests – Fifth Edition while

he attended Gow and asserts that the gap between the student's performance and grade levels has widened.

The parents answer, responding to the allegations in the petition, and cross-appeal from the IHO's contradictory findings regarding grouping and bullying. Regarding bullying, the parents allege that the district's failure to include plans in the July 2013 IEP and the May 2014 IEP to investigate and respond to instances of bullying resulted in the denial of a FAPE. Regarding grouping, the parents assert that the class profiles submitted by the district for both school years indicated that the student would not have been appropriately functionally grouped. The parents contend that the class profiles were not retrospective evidence and that the district waived its argument that the class profiles were retrospective by submitting them into evidence. The district answers the cross-appeal, denying the substance of the allegations therein.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Collateral Estoppel

The parents contend and the IHO agreed that collateral estoppel does not apply to the matters addressed in Appeal No. 13-214 because the parents appealed the SRO's decision and the matter is currently pending in United States District Court, and, therefore the matter was not a "final." Although the matter is currently undergoing judicial review pursuant to the statutory scheme put in place by Congress, direct appeal in no way renders an administrative due process decision "non-final," such the parties are free to once again start the proceeding anew and relitigate all of the issues again in front of an IHO.[11] The parties in an impartial hearing brought under the IDEA are limited by the doctrine of collateral estoppel, which "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006] [internal quotations omitted]). Additionally, in New York the pendency of an appeal does not divest a decision on the merits of the requisite finality for collateral estoppel purposes (DiSorbo v. Hoy, 343 F.3d 172, 183 [2d Cir. 2003]). Accordingly, the IHO erred in addressing issues that had already been decided in the prior due process proceeding, notwithstanding the fact that the parties may continue to seek judicial review of that matter.[12]

To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]).

[11] By analogy, a trial court in New York, such as the United States District Court, would not sit in review of a matter already decided by the Second Circuit Court of Appeals simply because one of the parties elected to further petition the United States Supreme Court for certiorari. Instead, the Second Circuit decision would stand as the controlling decision in the matter unless and until the appellate decision was overturned by the United States Supreme Court.

[12] In addition, the authority relied upon by the IHO was inapposite, as it dealt with the preclusive effects of judicially unreviewed quasi-judicial determinations of administrative bodies on federal courts, rather than subsequent administrative decision makers (JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1567-69 [11th Cir. 1991]; N.T. v. Espanola Pub. Schs., 2005 WL 6168483, at *5-*7[D.N.M. June 21, 2005]; Drinker v. Colonial Sch. Dist., 888 F. Supp. 2d 674, 680 [E.D. Pa. 1995], aff'd, 78 F.3d 859 [3d Cir. 1996]; see IHO Decision at pp. 35-36).

As noted above, the parents brought an impartial hearing challenging the district's provision of a FAPE for the 2012-13 school year (Application of the Bd. of Educ., Appeal No. 13-214). As part of the hearing, the parents challenged the January 2013 IEP based on an allegation that the student had not made progress in the district during and prior to the 2012-13 school year (id.). After reviewing the evidence in the hearing record, I determined that although "the student's rate of progress was clearly less than ideal," the student made progress in the district during the 2012-13 school year (id.). Additionally, I determined that the January 2013 CSE made modifications to the student's program in order to offer the student a FAPE for the remainder of the 2012-13 school year (id.). To the extent that the parents are challenging the student's progress in the district during the 2012-13 school year or the appropriateness of the program offered in the January 2013 IEP, those issues were already litigated and decided and the doctrine of collateral estoppel bars consideration of those claims as the parent had a full and fair opportunity to litigate them and the resolution of the issues was necessary to support the final judgment on the merits. Thus, for purposes of the present proceedings, those matters were final and binding on the parties and will continue in that status unless and until they are overturned by a court of competent jurisdiction. Therefore, the IHO in this instance was not free to disregard the SRO decision at the time her decision was rendered. Assuming there was good reason, even I, siting as the SRO in both proceedings, lack the statutory authority to undo my previous decision in Application of the Bd. of Educ., Appeal No. 13-214 due to the finality provisions governing administrative due process decisions under the IDEA. To hold otherwise would wreak havoc in the orderly and timely resolution of disputes between parties and subject them to endless, repeated litigation.

In terms of the evidentiary record that was developed in this matter, it should also be noted that the IHO did not hear new evidence regarding the student's progress in the district or the appropriateness of the programs and services offered in the January 2013 IEP, and her decision on those matters was based almost entirely on the record from the prior proceeding (see IHO Decision at pp. 41-46). To the extent that the IHO relied on the hearing record from the prior impartial hearing, even if collateral estoppel did not apply, there is no new evidence to consider and thus no basis to depart from my determinations in Appeal No. 13-214.

In summary, the IHO's determinations that are contrary to my prior determinations in Appeal No. 13-214 and were based on evidence that was considered in the appeal of the IHO's decision in the prior impartial hearing are reversed. These include the IHO's findings that the student's performance on standardized tests indicated that he did not make progress in the district, that the student's achievement of annual goals during the 2012-13 school year did not indicate progress, and that the combination of RAVE-O and Sonday would not be appropriate for the student (compare IHO Decision at pp. 41-45, 47, with Dist. Exs. 12-16; 19-20).

2. Bullying

As indicated by the IHO, the parents' allegations that the student was bullied during the 2012-13 school district were not part of their allegations in the prior proceeding that the student was denied a FAPE for the 2012-13 school year, but were allegations that the July 2013 and May 2014 CSEs did not take appropriate steps to ensure the student would not be the subject of bullying if he returned to the district. Accordingly, these claims are not barred by either collateral estoppel or res judicata and may be addressed as new claims related to the sufficiency of the July 2013 IEP and the May 2014 IEP, neither of which was the subject of the prior proceedings.

B. July 2013 IEP

1. Literacy Instruction

The parents contend the district failed to provide the student with "appropriate reading programming/interventions" to address the student's specific learning disability (Dist. Ex. 67 at p. 3). Specifically, the parents allege that recommending instruction using the Sonday system was inappropriate because the student failed to make progress utilizing Sonday while he attended public school in the district and the student responded positively to the reading interventions used at Gow, which the parents allege were significantly different from Sonday.

As noted in the prior appeal, the hearing record reflects that throughout his time in public school, the student had varying degrees of success in Sonday, with some progress and some regression observed (Application of the Bd. of Educ., Appeal No. 13-214; see Dist. Exs. 12 at p. 3; 15 at pp. 2-3; 17 at pp. 2-3; 18 at p. 4; 19 at p. 4; 21 at p. 3; 37; Parent Ex. G). In finding that the January 2013 IEP offered the student a FAPE, I previously determined that the student had made progress utilizing Sonday during the 2012-13 school year and that the January 2013 CSE's decision to modify the student's literacy program by adding RAVE-O was reasonable (Application of the Bd. of Educ., Appeal No. 13-214).[13] A review of the additional information available to the July 2013 CSE in this proceeding does not reveal any new evidentiary or legal basis upon which I can permissibly reach a different conclusion that the student's reading skills did not advanced during the 2012-13 school year while he was enrolled in the district.

During the February 2013 assessment, the student exhibited overall reading comprehension "at a third to fourth grade level," whereas during the May 2012 session, the student's reading comprehension achievement was at an "early third grade level" (compare Dist. Ex. 44 at p. 6, with Parent Ex. E at p. 4). Although a precise estimate of the student's reading comprehension skills appears elusive, a comparison of the May 2012 and February 2013 reports provide evidence of a qualitative change in the student's ability to garner meaning from text, despite his ongoing decoding challenges (compare Dist. Ex. 44 at p. 6, with Parent Ex. E at p. 3). For example, the May 2012 report stated the student was "not yet capable of compensating for his word learning problems when reading connected text" (Dist. Ex. 44 at p. 6). In contrast, the February 2013 report reflects that despite the student's ongoing challenges with "decoding or naming words, reading fluently, and reading accurately[,] . . . [i]mprovements were evident in his ability to read and interpret connected text during passage comprehension tests" (Parent Ex. E at p. 3).

The July 2013 CSE recommended a similar program as in the January 2013 IEP to address the student's literacy needs (compare Dist. Ex. 73, with Dist. Ex. 7). Similar to the January 2013

[13] Contrary to the IHO's determination that the hearing record did not explain what deficits instruction using the RAVE-O program was designed to address, the hearing record supports a finding that the addition of RAVE-O was intended to address the student's specific skill deficits in reading with rapid retrieval (Tr. pp. 115-16; Dist. Ex. 23 at p. 2). Skill deficiencies that were identified as particularly noteworthy in the February 2013 educational evaluation, including automaticity/fluency and comprehension, would have been addressed by RAVE-O (Tr. pp. 274-76, 443; Parent Ex. E at pp. 3-4). In addition, the hearing record does not support the IHO's finding that the student would be confused by instruction using both Sonday and RAVE-O, as the district reading consultant who recommended the use of RAVE-O testified that combining the programs "certainly is not going to hurt" the student (Tr. p. 276; see Tr. pp. 1476-79). The district reading consultant further explained that both programs are based on the same "instructional design model" and that they are both "multi-sensory structured language programs" (Tr. pp. 275-76; Dist. Ex. 7 at p. 11).

CSE, the July 2013 CSE recommended a 12:1+1 special class for ELA, math, science, and social studies (compare Dist. Ex. 73 at p. 13, with Dist. Ex. 7 at p. 11; see Tr. pp. 1331-32). In addition, the July 2013 CSE recommended supplementary services, including 1:1 instruction in two specialized reading programs (Dist. Ex. 73 at p. 14). More specifically, the IEP included a recommendation for two 60-minute sessions per six-day cycle using a multisensory program that addressed retrieval, automaticity, vocabulary, and orthography (RAVE-O) and four 50-minute sessions per six-day cycle using an intervention program described as an explicit, systematic, multisensory reading program (Sonday) (Dist. Ex. 73 at p. 14; see Tr. pp. 1294, 1334). The only change in the reading programs from the January 2013 to July 2013 IEPs was that the recommendation for Sonday was modified from "a minimum 3/6 days per 6 day cycle" to "4/6 days" (Tr. pp. 1334-35; compare Dist. Ex. 7 at p. 11, with Dist. Ex. 73 at p. 14).[14]

As the student had made progress in the district during the 2012-13 school year, the addition of RAVE-O to the January 2013 IEP was reasonably calculated to allow the student to obtain an educational benefit, and given that the district recommended a similar program in July 2013, the hearing record supports finding that the literacy program recommended in the July 2013 IEP was appropriate (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 67 [2d Cir. June 24, 2013] [it is reasonable for the CSE to recommend a similar program to a previous IEP that was reasonably calculated to provide student with an educational benefit]).

The parents also assert that the student's response to and progress with the reading interventions used at Gow required the CSE to change the instructional methods used in the student's reading program in order for the student to receive a FAPE. According to progress reports generated by Gow, the student achieved some success in adjusting to Gow and in learning the basics of the reconstructive language program used there (see Parent Exs. N; O at pp. 1, 4; FF at pp. 9, 13). The student's grade equivalent scores on the Gray Oral Reading Tests increased marginally from January to May 2013, although his standard scores and percentile rank remained level (Parent Ex. Y). The July 2013 CSE meeting minutes indicate the parents felt the student's "use of [the] reconstructive language program at Gow" had been the biggest change for the student, and that he was "learning and memorizing cards and sounds" (Dist. Ex. 74 at p. 2). However, the minutes also reflect that the CSE chairperson proposed working with the district reading consultant to align the implementation of the district's reconstructive language program—Sonday—with Gow's reconstructive language program (id.). In the hearing record, both the district's reading program and Gow's program are identified as multisensory, structured language programs, heavily reliant upon the student's memorization of phonogram cards (Tr. pp. 274-76, 434, 443, 1294-96, 1511-14, 1593-95; Dist. Ex. 74 at p. 2; Parent Ex. P at p. 1). One of the district reading instructors explained that Sonday is an Orton-Gillingham based program and that the developer of the program "worked hand-in-hand with the Gow School setting it up" (Tr. pp. 434-35; see Tr. p. 463). Gow's director of research and assessment further testified that the Gow reconstructive language program was also developed in conjunction with Orton-Gillingham (Tr. p. 1512). In addition, the student's seventh grade reconstructive language teacher at Gow reported that he required the student to employ material that he had learned while receiving instruction in the Sonday System (Parent Ex. FF at p. 13). Considering the similarities between the two programs, the hearing record does not support finding that the district was required to provide the student with the precise

[14] The CSE also recommended that the student receive 12-month services and added three 50-minute sessions of 1:1 reading instruction during July and August 2013 (Dist. Ex. 73 at pp. 14-15).

teaching methodology employed at Gow to receive appropriate instruction in literacy.[15] Although the student may have made some progress at Gow during the period between the January 2013 and July 2013 CSE meetings, it does not overcome the findings that the student made some progress in the district's programs and that there is insufficient information to indicate that the instructional methodologies at Gow were fundamentally different from those employed in the school district or that the student's rate of progress substantially increased after he attended Gow such that the district was required to realign its instructional methodologies with Gow's in order for the student to receive an educational benefit (see Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010] [greater progress in private reading program is not relevant to determining appropriateness of district program]; A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 174 [D. Conn. 2006] [evidence that a student made progress using a specific methodology is not evidence that the district's chosen methodology was inappropriate]).

2. Math Instruction

Based in part upon her agreement with the parents that the student failed to make progress in math while in the district, the IHO also concluded that the July 2013 CSE failed to address the student's needs in math because the CSE did not change the methodology used to teach the student's math class (IHO Decision at pp. 47-48). Specifically, the IHO found that the student needed a multisensory approach, small group instruction, and reinforcement of skills in a 1:1 setting (id. at p. 48). In this instance, as methodology is not generally a required part of an IEP and the evidence does not support finding that the student required a specific instructional methodology for math, the IHO erred in concluding on that basis that the services recommended in the July 2013 IEP to address the student's math needs were inappropriate.[16]

To the contrary, the evidence shows that the district took appropriate steps to address the student's deficits in the area of math. Consistent with the March 2013 evaluation report, the July 2013 IEP acknowledged the student's struggles in math, indicating that the student lacked a foundation in basic operations (i.e. addition, subtraction, multiplication, and division), that the student's reading problems made "applied, word problems very challenging," and that the student required "extensive repetition" to learn new skills (Dist. Ex. 73 at pp. 1, 9; Parent Ex. D at p. 2). This is also consistent with the testimony of the student's math teacher at Gow, who testified that during the 2013-14 school year the student needed help with multiplying and dividing, which the teacher addressed through repetition (Tr. pp. 1625-26). Additionally, April and June 2013 Gow reports indicated that the student "would benefit from studying his multiplication facts daily"

[15] Gow's director of research and assessment indicated that the student needed to have a reading program that was integrated throughout the school day (Tr. pp. 1535-39). The July 2013 CSE took steps to ensure that the strategies employed by the student's reading instructors could be implemented throughout the school day by recommending an outside reading consultant to "discuss application of strategies across content and settings" with the student's special education teacher and reading teacher (Dist. Ex. 73 at pp. 15-16). Gow's director of research and assessment testified that this was not "the same thing as what [she] meant" but that the recommendation was consistent with it (Tr. pp. 1575-76).

[16] The IHO's determination that the district's program was inappropriate because it lacked a multisensory approach, small group instruction, and reinforcement of skills in a 1:1 setting, is also contrary to the information contained in the hearing record. The IHO does not appear to have considered testimony by district staff that indicated the district employed an instructional approach in math that included multisensory techniques along with 1:1 instruction (Tr. pp. 363-64, 1336-37; Dist. Ex. 73 at p. 14).

(Parent Ex. N at p. 1) and should practice multiplication and division over the summer to prepare him for the next school year (Parent Ex. FF at p. 8).

While the parents' disappointment at their son's lack of progress in the district's math program is understandable, the July 2013 CSE attempted to address the student's math deficits by adding 1:1 instruction in math (Dist. Ex. 73 at p. 14). The CSE recommended three 30-minute sessions per six-day cycle of "1:1 instruction in foundational math application and computation skills," in addition to the 12:1+1 special class in math, starting in September 2013 (Dist. Ex. 73 at pp. 13-14; Tr. pp. 1335-37). The CSE also recommended three 30-minute sessions per week of 1:1 instruction in foundational math for July and August 2013 (Dist. Ex. 73 at p. 14). The CSE chairperson reported the individualized math lessons would have focused on "the basic foundational skills . . . [a]ddition, subtraction, multiplication and division and very basic application of those skills" (Tr. pp. 1336-37). The addition of 1:1 instruction addressed a specific area of need in targeting the student's foundational math skills. Under these circumstances, the district acknowledged the student's deficits and lack of progress in math and took appropriate steps to address and target those areas deficit.

3. Special Factors—Assistive Technology Services

The parents contend that although the district recommended that the student receive assistive technology, the district failed to provide appropriate training and support services in conjunction with the recommendation for assistive technology devices, and as such, the recommended assistive technology was "inaccessible and inappropriate" (Dist. Ex. 67 at p. 5).

One of the special factors that a CSE must consider in developing a student's IEP is "whether the student requires assistive technology devices and services" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. §1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Assistive technology services means "any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device," including training or technical assistance for the student or service providers in the use of an assistive technology device (8 NYCRR 200.1[f][5], [6]).

The hearing record reflects that the July 2013 CSE repeated the same recommendation for assistive technology as were included in the January 2013 IEP, including access to a laptop, text-to-speech software, audio versions of textbooks, and speech-to-text software (compare Dist. Ex. 7 at p. 13, with Dist. Ex. 73 at p. 15).[17] The student required assistive technology in order to be able to understand text above his instructional reading level allowing him to stay at the same level as his other classmates (Tr. p. 1201; Dist. Ex. 73 at p. 15). However, despite indications that the student did not know how to fully use the recommended assistive technology devices, the July 2013 CSE did not recommend training in the use of the devices (Tr. pp. 1200, 1438-40, 1913-14; Dist. Exs. 41 at p. 1; 73).

The chairperson of the July 2013 CSE testified that the district provided support for the student to use the assistive technology in the form of counseling to address the student's resistance to using a laptop in school (Tr. pp. 1439-41). The CSE chairperson believed the reason the student

[17] While the January 2013 IEP only recommended access to one laptop, the district had previously offered the student access to two laptops (one for home and one for school), and the July 2013 IEP included a recommendation for two laptops (Dist. Exs. 7 at p. 13; 61; 73 at p. 15).

did not use the laptop was because "he didn't like to look different" (Tr. p. 1439). The CSE chairperson opined that reducing the student's anxiety about being different would make the student more likely to use the assistive technology in class (id.). The student's mother testified that there were two reasons the student did not use the laptop in the district: because he did not like to use it and because he did not know how to use it (Tr. pp. 1913-14). Under these circumstances, although the recommended counseling services may have addressed the student's reluctance to use the laptop, it would not have addressed a need for training in the use of the assistive technology. However, while this is likely the largest weakness in the IEP proposed by the district, it does not appear to be a fatal flaw that amounted to a denial of FAPE under the Rowley standard, as the student's performance on assessments completed on or around the time he was unilaterally placed at Gow reflected the student was able to access his educational program in the district public schools during the 2012-13 school year without the use of assistive technology devices or the provision of assistive technology services (Parent Exs. D-F; see Application of the Bd. of Educ., Appeal No. 13-214; see, e.g., Application of a Student with a Disability, Appeal No. 11-121 [the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program]).

4. Social/Emotional Needs

a. Counseling and Social Skills Instruction

The parents allege that the July 2013 IEP failed to adequately address the student's social/emotional needs. In particular, the parents assert that despite the provision of counseling during the 2012-13 school year, the student developed anxiety and school-phobic behaviors and that the July 2013 IEP would not have addressed the student's anxiety or school phobia.

Prior to the student's unilateral placement at Gow, the hearing record indicates the student felt "self-conscious" about his placement in the 12:1+1 special class program and experienced anxiety as a result of the change in placement (Dist. Ex. 7 at p. 8; Tr. pp. 1420-22). The district school counselor noted that the student often reported that "things were fine," but his parents would report the student "expressed some worries" (Tr. p. 1956). When queried regarding specific concerns the student may have shared, the school counselor recounted the student's worries about changes in his relationship with former classmates, some of which the student attributed to the change in his educational placement (Tr. pp. 1958-60). When the student shared these concerns with the school counselor, the ensuing conversation focused on problem solving and determining the contributing factors in situations that contributed to the student's anxiety (Tr. pp. 1959-60). In addition to the counseling provided by the district school counselor, during the 2012-13 school year the student received services from an outside counselor paid for by the parents (Tr. p. 917).

As noted in the present levels of performance, while the parent agreed the student would require counseling if he returned to his former district placement in a 12:1+1 special class, she believed the student would be resistant to working with a district counselor (Dist. Ex. 73 at p. 10).[18] In order to address this concern, the July 2013 CSE recommended one 60-minute session of individual counseling per month to be delivered at the student's home (id. at p. 13). The July

[18] The parent confirmed this during her testimony, explaining that the student did not want attention drawn to himself in front of the other students and would therefore be reticent to being pulled out of class for counseling and would refuse to attend counseling sessions in the district public school (Tr. pp. 1908-09).

2013 CSE also identified the student's private counselor from the 2012-13 school year as the person who would deliver the service (id.). According to the CSE chairperson, the district wanted to continue the service with the outside counselor because the student had previously worked with and was comfortable with her (Tr. pp. 1337-38). In addition, the minutes from the July 2013 CSE meeting indicated that the student "had difficulty opening up to [the] psychologist and counselor at school" (Dist. Ex. 74 at p. 2). In a March 2013 letter, the private counselor reported that she worked on establishing rapport with the student, developing coping strategies, and peer relationships (Parent Ex. K). She further indicated that the student reported improvement in the management of his emotions and in his view of self (id.).

The parents also alleged that the recommendation for counseling and social skills instruction were inappropriate because they were based on an inaccurate description of the student (Dist. Ex. 67 at p. 8). Specifically, the parents asserted that after being placed at Gow, the student was "very well adjusted socially and emotionally" and therefore statements in the present levels of performance that the student had no friends were not correct (id.). However, the student's mother agreed that the student would have needed counseling if he returned to the district, offering her opinion that the student needed "every bit of help that he could possibly get" (Tr. pp. 1908-09). Although the statements in the present levels of performance may not have reflected the student's social and emotional status at Gow,[19] they did reflect the student's social and emotional difficulties in the district, noting the student's lack of friends and his need to develop social skills (Dist. Ex. 73 at p. 10). Notably, the mother testified that during the 2012-13 school year the student lacked friends in the district, did not feel like he fit in with the students in his class, and "[h]e knew what kids said about kids in that classroom" (Tr. pp. 1851-52).

The July 2013 CSE added one session per six day cycle of social skills instruction because the student struggled with making or retaining friends in the district (Tr. pp. 1340-41; Dist. Ex. 73 at p. 13). The parent testified that the July 2013 CSE explained social skills instruction as something to help the student "socially by trying to rise above" the name calling he experienced in school (Tr. pp. 1905-06). The parent did not believe that the student needed social skills instruction (Tr. p. 1906). However, the parent also explained that when the student was in the district, if someone called the student a name, the student would "take it to heart" and it would "level him" (Tr. p. 1900). The parent stated that Gow taught the student coping skills, so that if he were called a name "he would rise above it because he now has a different perception of how he looks at himself" (Tr. pp. 1903-04). Based on the above, the student exhibited a need to learn coping skills that could have been addressed through social skills instruction. Accordingly, although the description of the student in the present levels of performance may not have been an accurate representation of the student's social/emotional performance at Gow, the student exhibited a need for both counseling and social skills instruction while he attended the district and the district's recommendations for both services was appropriate.

b. Response to Bullying or Harassment

As a corollary to the parents' claims related to the student's anxiety and social/emotional needs, the parents contend that because the student was the subject of bullying while he attended

[19] The July 2013 IEP did reflect the Gow director's opinion that the student was "doing well socially at the Gow school and is an active participant in Gow activities" (Dist. Ex. 73 at p. 10).

school in the district, the July 2013 CSE should have identified how it would address any instances of bullying or harassment if the student returned to the district.

The parent did not remember raising concerns related to bullying or harassment at the July 2013 CSE meeting, but testified that she brought up the student's difficulties in the district during the 2012-13 school year with the student's principal (Tr. pp. 1855, 1943). In a February 2012 letter to the district superintendent, the parents reported that the student was bullied by his general education classmates when he was moved from a general education classroom into a special education classroom (Parent Ex. L at p. 3). The student's mother testified that she spoke to the superintendent thereafter, and was informed that the matter would be addressed but that the student continued to be mistreated (Tr. p. 1861). The student's mother testified that the student's group of friends "disappeared" after he was moved into the special class and that his former friends called the student names (Tr. pp. 1853-55). The parent further testified that the student did not have social difficulties or exhibit anxiety prior to moving into the 12:1+1 special class during the 2011-12 school year (Tr. p. 1857). The principal of the district school the student attended during the 2011-12 and 2012-13 school years remembered being made aware of a single incident on the school bus involving the student and name calling (Tr. pp. 1964-65; see Tr. p. 922). While the principal was unable to recall the specifics of the incident, he indicated that district administrators were on hand to address the situation (Tr. pp. 1965-66). The principal also recalled speaking with both students and their parents regarding the incident and testified that he did not recall "any other situations" that were brought to his attention regarding the student and name calling (Tr. p. 1966). While the parents' desire for the district to ensure that the student will not be subjected to harassment or bullying if he returns to public school is understandable, the hearing record does not support a finding that the district failed to address any specific instances of bullying or harassment in the past, and it would be speculative to assume that the district would fail to address any instances of bullying in the future. Additionally, to the extent that the parents are seeking a plan from the district as to how it would address instances of bullying or harassment in the event the student returns to the district, pursuant to the Dignity for All Students Act, the district is required to have "policies and procedures intended to create a school environment that is free from harassment, bullying and discrimination," and a written or electronic copy of such policies must be distributed to all school employees, students, and parents (Educ. Law § 13[1]; see 8 NYCRR 100.2[*l*][2][ii][b]).[20]

C. May 2014 IEP

The hearing record reflects that in addition to the evaluative information presented in the July 2013 IEP, the May 2014 CSE considered new assessment data provided by Gow (Tr. pp. 1354-56; Dist. Exs. 79 at p. 1; 80 at p. 2; 84 at pp. 25-27). Specifically, the May 2014 IEP incorporated the updated results regarding the student's performance during a March 13, 2014 administration of the Gray Oral Reading Tests, as well as his performance during a March 8, 2014

[20] This decision should not be taken as an endorsement of the district's response to the parents' concerns that their son was being mistreated at school on the basis of his disability. Rather, because I determine that the district adequately addressed the student's social/emotional needs in the July 2013 IEP, the district's failure to take additional actions does not rise to the level of a denial of a FAPE in this instance. I also note that while a district has very clear obligations to address instances of bullying, the IEP is the place set aside to identify and address a student's special education needs that have arisen as a result of the student being bullied; however, the IEP is not the place to set forth a district's plan for addressing the conduct of other student(s) whose conduct meets the definitions of bullying.

group administration of the Stanford Achievement Test Tenth Edition (Tr. pp. 1354-55, 1515; Dist. Exs. 80 at p. 2; 84 at pp. 25, 29). The IEP also reflected consideration of progress reports prepared by the student's Gow teachers (Tr. pp. 1358-59; Dist. Exs. 80 at p. 9; 84 at pp. 1-23). Whereas the July 2013 IEP contained limited input from Gow, the May 2014 IEP included reports from specific Gow teachers who worked with the student (Dist. Ex. 80 at pp. 9-10). For example, the student's reconstructive language teacher described the student as "pleasant and driven," adding the student was "working hard toward mastering the phonic card deck" (id. at p. 9). The student's language arts teacher reported the student volunteered to read aloud in class and that the student wrote "creative journal entries in which [the student] used specific details to develop conflict in his writing" (id.). Input from the student's math teacher indicated that while the student "did well converting fractions, decimals and percents," if he "did not practice multiplication and division facts daily he forgot them" (id.). The May 2014 IEP also reflected that the student's Gow teachers noted improvements in class participation and attendance at tutorial sessions (id.).

1. Literacy Instruction

The parents' arguments regarding the district's literacy program recommended in the May 2014 IEP for the 2014-15 school year mirror their arguments regarding the program recommended in the July 2013 IEP. Based on the additional evaluative information available to the May 2014 CSE, the student's needs relating to literacy did not change significantly from his needs at the time of the July 2013 CSE meeting.

A review of the student's performance on the March 2014 administration of the Gray Oral Reading Tests indicates the student's reading rate earned a grade equivalent score of 2.7 (5th percentile), the student's accuracy decoding words yielded a grade equivalent score of 3.7 (9th percentile), and his fluency earned a grade equivalent score of 3.2 (9th percentile) (Dist. Exs. 80 at p. 2; 84 at p. 25). When compared with the student's performance on the same test during the Gow admissions assessment completed approximately 14 months earlier, the student's grade equivalent score for rate increased from 2 to 2.7, which Gow's director of research and assessment opined was a reasonable rate of progress for a student with the student's learning difficulties (Tr. pp. 1584-86; Dist. Exs. 80 at p. 2; 84 at p. 25). The student's accuracy and fluency scores also showed improvement in March 2014 when compared with those achieved in January 2013; the reading accuracy grade equivalent score went from 1.2 to 3.7, and the fluency grade equivalent score went from 1.7 to 3.2 (Dist. Exs. 80 at p. 2; 84 at p. 25).[21]

The student's performance on the Stanford Achievement Test, as reported in the May 2014 IEP, indicated that the student's reading skills ranged from a grade equivalent score of 2.8 (2nd percentile) on comprehension to a grade equivalent score of 4.6 (9th percentile) on reading vocabulary, with a total reading grade equivalent of 3.4 (4th percentile) (Dist. Exs. 80 at p. 2; 84 at pp. 29).

The May 2014 CSE continued to recommend that the student be placed in a 12:1+1 special class for all academic subjects (Tr. pp. 1458-60; Dist. Ex. 80 at p. 13). The CSE also continued to recommend 1:1 instruction in two specific reading programs, continuing instruction in Sonday for four 60-minute sessions per six-day cycle and increasing instruction in RAVE-O from two 50-

[21] Although a comprehension score had been rendered for the student's March 2014 performance on the Gray Oral Reading Tests, it was not reported to the CSE at the time of the May 2014 meeting (Tr. p. 1986; Dist. Ex. 84 at p. 25; 87 at p. 2).

minute sessions per six-day cycle to two 60-minute sessions per week (Dist. Ex. 80 at pp. 13-14).[22] As with the student's prior IEPs, the May 2014 IEP included a management need targeting the student's need for explicit, systematic reading instruction; however, the May 2014 IEP also indicated that such a program should also be "research based," which is consistent with State regulations (Dist. 80 at p. 10; see 8 NYCRR 200.4[d][2][v][b]). Considering that the student's needs regarding a literacy program had not changed significantly, the May 2014 CSE's continuation of a similar reading program from the July 2013 IEP was reasonable (see H.C., 528 Fed. App'x at 67), and I find that the district has complied with the Act. However, I do believe that the district would be open to exploring other options and therefore, in the spirit of assisting the parties as much as possible, I noted that there are indications in the hearing record that the Sonday System may not have been an ideal match for the student's learning needs. For example, the chairperson of the Gow department of reconstructive language opined that Sonday is "an elementary level curriculum most effective for that level of learner . . . [with] limitations as students get older" (Tr. pp. 538-40). While that does not lead me to conclude that the district's program was inappropriate, I will encourage the CSE, if it has not already done so, to explore the efficacy of literacy programs based upon peer-reviewed research and designed for older students, and at least consider recommending a different program going forward, especially now that the student has been away from the district for some time.

2. Math Instruction

The parent contends that the district failed to address the student's math needs, especially as related to the May 2014 CSE's decision not to continue 1:1 instruction in foundational math skills from the July 2013 IEP (Dist. Exs. 73 at p. 14; 80 at pp. 13-14).

According to the hearing record, the CSE determined that 1:1 instruction in foundational math was no longer necessary because of the student's substantial growth in math skills evidenced by his performance on the Stanford Achievement Test math tasks (Tr. pp. 1372-73; Dist. Exs. 80 at p. 2; 84 at p. 29). The student's math scores reflected a significant increase in his math skills, as his total mathematics grade equivalent score of 6.7 placed him in the 40th percentile (Dist. Ex. 84 at p. 29). However, the hearing record is unclear regarding the student's possible use of a calculator during testing. The student's math teacher at Gow testified that he did not know if the student had used a calculator when taking the math portion of the Stanford Achievement Test, but added "[w]ithout a calculator he would probably not do very well at all" (Tr. pp. 1692, 1700-01). The teacher indicated that the student continued to have difficulties with basic multiplication skills because he did not work on those skills regularly (Tr. pp. 1683-85). While the student's math

[22] While the May 2014 IEP continued to recommend that school staff be provided with an "[o]verview of student's unique needs and strategies to address those needs," it did not indicate an outside consultant as the provider of this support as had been recommended in previous IEPs or continue the recommendation to "discuss application of strategies across content and settings" (Dist. Ex. 80 at p. 15; see Dist. Exs. 7 at p. 13; 73 at pp. 15-16). The CSE chairperson explained that although the IEP did not specify the use of the outside consultant, it was the CSE's intention to do so (Tr. p. 1463). The fact that the May 2014 IEP did not specify the personnel who would deliver the service is not relevant, as the IEP included the service and the district is required to implement the IEP (see 8 NYCRR 200.4[e][7]). Additionally, even if the parents challenged the qualifications of the person who would have delivered the service, "'[t]he proper inquiry is whether the staff is able to implement the IEP'" (see Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted by 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012], quoting S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8, 2011]; see also 8 NYCRR 200.6[b]), and there is no indication in the hearing record that it could not.

teacher reported in December 2013 that the student excelled at basic math facts, by March 2014 the teacher reported that the student needed to work on his multiplication and division facts daily (compare Dist. Ex. 84 at p. 10, with Dist. Ex. 84 at p. 21).

Although the student made significant progress in math, the student's math teacher at Gow continued to believe that the student required a lot of support (Tr. pp. 1696-97). The teacher believed that the student needed 1:1 support in math in order to catch his mistakes as they happened, so that the student would not repeat an incorrect process (Tr. pp. 1659, 1670-71).

The CSE chairperson testified the student's Gow teacher informed the CSE that it was important for the student to be able to "focus on the concepts and skills" (Tr. p. 1363). The CSE chairperson explained that the student understood the concepts behind addition, subtraction, multiplication, and division and the use of a calculator as an accommodation enabled the student could move past memorization and apply those concepts (Tr. pp. 1364-67).[23] The minutes from the May 2014 CSE meeting indicated agreement that "since [the student] understands the concepts of multiplication and division, rather than have him memorize facts, it makes more sense for him to use a calculator and work on problem solving skills" (Dist. Ex. 79 at p. 1). The IEP included math goals consistent with these observations, which focused on enhancing the student's facility with problem solving requiring the proper sequencing of the orders of operation (Dist. Exs. 79 at p. 1; 80 at p. 12). Finally, as highlighted by the CSE chairperson, in high school students "are working more on concepts and application," and as a pre-algebra student, "a calculator was likely to be used" (Tr. p. 1364).

Overall, considering the student's math skills at the time of the May 2014 CSE meeting and the use of a calculator for computation, the May 2014 CSE's recommendation for math in a 12:1+1 class would have been sufficient to provide the student with an educational benefit.

3. Special Factors—Assistive Technology Services

Similar to the parents' claims regarding the July 2013 IEP, the parents allege that the May 2014 IEP did not include training in the use of the recommended assistive technology devices. Although the May 2014 CSE continued to recommend the use of assistive technology, including access to two laptops, audio versions of textbooks, speech-to-text software, and text-to-speech software, the CSE did not recommend assistive technology services, such as training, to support the student's use of the assistive technology (Dist. Ex. 80 at p. 14). However, at the time of the May 2014 CSE meeting, the student had improved his computer skills, both in general usage by participating in a computer class (Dist. Ex. 84 at p. 9) and in his use of text-to-speech software to improve his reading comprehension (id. at p. 12). As the district recommended assistive technology devices, and the student's ability to use those devices had increased, the failure to recommend training in assistive technology did not amount to a denial of a FAPE in this instance. However, it does indicate that a current assessment of the student's assistive technology needs should be performed to assist the CSE in determining the student's continuing need for assistive

[23] The May 2014 IEP provided for use of a calculator for computation on all assignments that required computation (Dist. Ex. 80 at p. 14), while the student's prior IEP provided for use of a calculator for computation only when computation was not the primary skill being assessed (Dist. Ex. 73 at p. 13). The CSE chairperson explained that the recommendations were essentially the same because it would be unlikely for the student to participate in an assessment where computation was the primary skill being assessed (Tr. pp. 1376-78).

technology devices and services during the next annual review held to develop an IEP for the student, and the district will be ordered to conduct such an assessment.

4. Counseling and Social/Emotional Needs

The parents contend that the May 2014 CSE inappropriately removed the recommendation for outside counseling.[24]

The description of the student's social functioning in the May 2014 IEP was markedly more positive than had been presented in the July 2013 IEP (compare Dist. Exs. 73 at p. 10, with Dist. Ex. 80 at p. 10). While the parent agreed with Gow staff that the student "did not show anxiety in their smaller classes," the parent asserted the student would experience anxiety should he return to the public school (Dist. Exs. 79 at p. 1; 80 at p. 10).

The May 2014 CSE increased the recommended frequency of counseling services from one 60-minute session per month to one 30-minute session per six-day cycle (compare Dist. Ex. 73 at p. 13, with Dist. Ex. 80 at p. 13). However, the May 2014 CSE did not recommend that the service be delivered at home by the student's outside counselor and instead recommended that it be delivered in school in the counselor's office (Dist. Ex. 80 at p. 13). When asked why the IEP no longer stipulated the provision of these services by an outside counselor, the CSE chairperson explained the student would be moving into a new district school and would have a different counselor than he had worked with in the past (Tr. pp. 1379-80). As mentioned above, the July 2013 CSE's decision to recommend that counseling be delivered by an outside counselor was based in part on the student's difficulty opening up to the psychologist and counselor in the school he attended for the 2011-12 and 2012-13 school years (Dist. Ex. 74 at p. 2). Under these circumstances, the May 2014 CSE's decision to recommend counseling services to be provided in school was reasonable as the student would have received services from a different provider.

D. Functional Grouping

As noted by the Second Circuit, the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013] [noting that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]). However, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-

[24] The parents also allege that the May 2014 IEP failed to address how the district would prevent the student from being bullied or harassed if he returned to the school district. The analysis for this claim is the same as for the July 2013 IEP, set forth above, and therefore it is not repeated other than to reiterate that it did not result in a denial of FAPE.

[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]).

In the instant matter, the student has been enrolled at Gow since February 2013 (Tr. p. 1291; Parent Ex. R at p. 1). The parents rejected the proposed IEPs for the 2013-14 and 2014-15 school years (Dist. Exs. 76; 82); however, the student's mother testified that she did not know what the composition of the student's 12:1+1 class would have been like (Tr. pp. 1920-21). During the hearing, the district produced class profiles for the 2013-14 and 2014-15 school years (Dist. Exs. 85; 86).[25] The CSE chairperson testified that both class profiles were generated on the first day of the hearing (Tr. p. 1970).

As determined by the IHO, issues related to the functional grouping of the student within the public school are generally speculative and the circumstances of this case do not present a reason to depart from this rationale (see M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K., 961 F. Supp. 2d at 590; see also J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). There is nothing in the hearing record indicating that the parents ever asked to visit the student's proposed class or requested a class profile for the proposed class prior to the times they determined to withdraw the student from the district and enroll him in Gow for the 2013-14 and 2014-15 school years (Tr. pp. 1402-03). Additionally, to the extent that the parents argue that the 12:1+1 special classes in the district were the same as the class the student was in for the 2012-13 school year, the parent conceded that she did not know what the class was going to be like (Tr. pp. 1920-21) and the class profile for the 2012-13 school year is not the same as the class profiles for either the 2013-14 or 2014-15 school years (compare Dist. Ex. 62, with Dist. Ex. 85, and Dist. Ex. 86). Nevertheless, in an abundance of caution, I address the parents' claims related to whether the student would have been grouped appropriately with the other students listed on the class profiles for the 2013-14 and 2014-15 school years.

1. 2013-14 Class Profile

The hearing record includes a class profile for the proposed special class program for the 2013-14 school year (Dist. Ex. 85). Although the profile describes the class as a 12:1+1 classroom, the profile lists seven students, not including the student (Tr. pp. 1387-88; Dist. Ex. 85). The class profile identifies each student's disability classification, full scale IQ, and reading fluency and comprehension scores as measured by the district's progress monitoring system (Tr. pp. 1391, 1970; Dist. Ex. 85). The disability classifications of the students in the class included learning disabled, autism, multiply disabled, and hearing impaired, with full scale IQs ranging from 52 to

[25] To the extent that the parents assert the district waived any objections to the class profiles being speculative by submitting them into evidence, the class profiles for the 2013-14 and 2014-15 school years were created by the district and submitted into evidence at the request of the IHO after the district objected to the issue of functional grouping as being speculative (Tr. pp. 1267-68, 1280, 1387-88, 1969-71).

84 (Dist. Ex. 85). Student performance on the reading fluency assessments spanned from the well below average to average range, although some scores lacked a qualitative description (id.). Student performance on the comprehension tasks indicated that two students earned below average scores (id.). However, the qualitative descriptor was not reported on the scores for the other students (id.). Gow's director of research and assessment opined that she thought the class profile for the 2013-14 classroom would have been an inappropriate grouping for the student because she believed the needs of the lower functioning students in that class would have made it difficult for the teachers to address the student's needs (Tr. p. 1558). However, based on the student's general cognitive abilities and reading skills, there would have been other students within the class who had sufficiently similar levels of academic or educational achievement as the student and the hearing record supports a finding that the functional grouping of the student would not be inappropriate based on academic skills alone (see W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 290-292 [S.D.N.Y. 2010] [holding that a district did not fail to offer a FAPE because the student could have been functionally grouped with other similarly-aged students within the class who had sufficiently similar instructional needs and abilities in both reading and math]). Because there is insufficient evidence in the hearing record regarding the levels of social development, levels of physical development, and management needs of the students in the classroom, to the extent the parents intended to challenge the ability of the district to functionally group the student with students of similar needs in these areas in accordance with State regulations, their challenge must be rejected as speculative.[26]

2. 2014-15 Class Profile

The hearing record includes a class profile for the proposed 12:1+1 special class for the 2014-15 school year (Dist. Ex. 86). Although the profile indicates that it was for a 12:1+1 program, the profile lists five students, not including the student (id.; Tr. pp. 1387-88). The class profile, unlike the ones submitted for the 2012-13 and 2013-14 school years, did not provide reading fluency and comprehension scores, indicating only the students' disability classifications (speech or language impairment, other-health impairment, autism, and learning disability) and full scale IQs, which ranged from 73 to 96 (compare Dist. Ex. 86, with Dist. Ex. 62 and Dist. Ex. 85). Gow's director of research and assessment opined that the class profile for the 2014-15 school year did not include sufficient information regarding the needs of the students in the classroom in order to determine if it would have been an appropriate grouping for the student (Tr. p. 1559). While the student fits within the range of the other students' full scale IQs, there is no other information provided regarding the other students' needs related to reading, math, communication and language skills, or social skills (Dist. Ex. 86; Parent Ex. H at p. 4). Because there is insufficient evidence in the hearing record regarding the similarity of the student's academic achievement and learning characteristics, levels of social development, levels of physical development, and management needs to those of the students in the classroom, this challenge must be rejected as speculative.[27]

[26] The parents raise no specific arguments in support of their cross-appeal, asserting only that the students in the proposed class had needs dissimilar from the student. The CSE chairperson testified that, based on her knowledge of the children in the classroom, the student's needs were similar to those of the seven students in the classroom for the 2013-14 school year (Tr. p. 1973).

[27] As with respect to their cross-appeal on this issue related to the 2013-14 school year, the parents do not raise specific arguments in support of their cross-appeal regarding grouping for the 2014-15 school year, and the CSE chairperson testified that the student's needs were similar to those of the students in the classroom for the 2014-15 school year (Tr. p. 1974).

VII. Conclusion

I have reviewed the evidence in this case carefully, just as I did in Application of the Bd. of Educ., Appeal No. 13-214. I have watched the student's struggle to make gains and to his credit he has in fact made some progress in both the public and private school programs, and I commend him for his rugged determination in the face of adversity. At the same time, the rate of progress has been less than what I am sure he, all of his teachers and his parents would ideally hope for. Speaking in terms of ideals, I of course desire nothing less for him than a perfect key that will enable him to suddenly make progress in his literacy skills in leaps and bounds. However, a specific solution that leads to that result appears to have remained elusive to all who have worked with the student thus far (both public and private) despite consistently earnest efforts on their parts, but above all I hope they will follow the student's example by working cooperatively together to continue to try innovative solutions that will yield optimal results for him – an endeavor which would likely require more than the basic floor of opportunity called for by the IDEA.

In the end, my primary function is to determine whether the allegations of noncompliance with the IDEA and State regulations have merit, and, upon my independent review in this matter, I have found no violations on the part of the district that resulted in a denial of a FAPE to the student. Thus, having determined that the district offered the student a FAPE for the 2013-14 and 2014-15 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Gow was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated March 2, 2015 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years and directed the district to pay for the student's tuition related to his attendance at Gow during the 2013-14 and 2014-15 school years; and

IT IS FURTHER ORDERED that the district shall conduct an evaluation of the student's need for assistive technology devices and services, the results of which shall be considered no later than the next annual review held by the CSE to develop an IEP for the student.

Dated: **Albany, New York**
September 30, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER