The University of the State of New York

The State Education Department
State Review Officer
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No. 18-009

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, by Jeffrey J. Weiss, Esq.

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, by Kyle M. Costello, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for a portion of their daughter's tuition costs at the Gow School (Gow) for the 2015-16 and 2016-17 school years. The parents cross-appeal from that portion of the IHO's decision which denied their request for full tuition reimbursement and compensatory educational services. 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

As a young child, the student exhibited severe delays in speech production and phonology, moderately severe dysfluencies, and mildly delayed expressive language skills (Parent Ex. G at p. 2). Although the student's cognitive abilities were in the average range, her school readiness skills were in the low end of the expected range (id. at p. 2). The student was found eligible for related services as a preschool student with a disability and began receiving speech-language therapy around the age of four (Parent Exs. G at p. 2; H at p. 1). However, the student experienced

increasing difficulties with early academic skills and academic intervention services (AIS) in reading and mathematics were initiated in kindergarten (Parent Ex. G at p. 2). Based on the results of a private neuropsychological evaluation, the student was referred for participation in the Reading Recovery program at the beginning of first grade, which consisted of remediation with the Sonday System reading program three times per week (Parent Ex. G at p. 2; see Parent Ex. H). Due to significant improvement in the student's analysis and fluency skills, the student graduated from Reading Recovery in February of first grade and was declassified by the CSE at the end of first grade (Parent Ex. G at pp. 2-3). The student continued to receive AIS in reading and math (id. at p. 3). In third grade the student was found eligible for an accommodation plan under section 504 of the Rehabilitation Act of 1973 (504 plan) based on the results of her neuropsychological evaluation and parent and teacher observations (id.).

In July 2012 (end of sixth grade), the student participated in a private psychological evaluation, conducted by Gow, that included intelligence and achievement testing, as well as an assessment of the student's reading and phonological processing skills (Parent Ex. G at pp. 4-11). The evaluator concluded that the student's "history and pattern of testing scores were characteristic of intellectually gifted children with dyslexia" and reported that the student met the criteria for diagnoses of a reading disorder, a mathematics disorder, and a disorder of written expression (dysgraphia) (id. at pp. 11, 15). The evaluator opined that, among other things, the student was in need of intensive reading instruction that encompassed the principles of a multisensory structured language education, as well as individualized instruction in math and written expression (id. at pp. 15-17).

On August 20, 2012, a CSE convened and determined that the student was eligible for special education as a student with a learning disability (Dist. Ex. 9 at p. 1). For the start of the 2012-13 school year (seventh grade) the CSE recommended that the student receive resource room services three times per six-day cycle for 60 minutes (id. at p. 5). In September 2012, "service delivery recommendations" were added to the student's IEP, which explained that the recommended resource room program would include explicit, systematic reading instruction (Dist. Ex. 12 at p. 5). In addition, numerous supplementary aids and services and program modifications/accommodations were added to the student's IEP (id. at pp. 4-5).

At the student's annual review meeting in March 2013, the CSE continued to recommend resource room support to provide the student with explicit, systematic reading instruction for the 2012-13 school year (see Parent Ex. E at p. 7). In addition, the CSE modified the student's program modifications and accommodations effective April 2013 and recommended assistive technology devices and services, specifically that the student be provided with speech-to-text software and access to a laptop (compare Dist. Ex. 12 at pp. 5-6, with Parent Ex. E at pp. 8-9).

For the 2013-14 school year (eighth grade) the March 2013 CSE recommended that the student receive direct consultant teacher services in mathematics two times per six-day cycle for 30 minutes, in addition to the explicit, systematic reading instruction provided through the student's resource room program three times per six-day cycle for 60 minutes (Parent Ex. E at p. 7). At the student's annual review meeting in January 2014 the CSE recommended continuing the student's then-current program for the remainder of the 2013-14 school year (Dist. Exs. 18 at p. 8; 20 at p. 1).

The January 2014 CSE also recommended that, beginning in September 2014 (ninth grade), the student attend a 15:1 special class for study hall and co-taught 12:1 special classes for English and mathematics (Dist. Exs. 18 at p. 8; 20 at p. 1).[1] The January 2014 CSE further recommended the addition of a specialized reading program, three times per six-day cycle for 30 minutes (Dist. Ex. 18 at p. 9); however, on September 4, 2014, with the parents' agreement, the student's IEP was amended to remove this service (Dist. Exs. 32-35).[2]

The September 2014 CSE continued to recommend that the student attend a 15:1 special class study hall and 12:1 co-taught special classes for English and mathematics, four times per six-day cycle for the 2014-15 school year (Dist. Ex. 31 at p. 8). At the student's annual review meeting in December 2014, the CSE recommended a continuation of the student's then-current program for the remainder of the school year and proposed conducting a program review in May/June of 2015 to consider the student's need for services and possibly a 504 plan (Dist. Exs. 42; 43 at p. 1).[3]

A subcommittee of the CSE convened on May 22, 2015 and with parent agreement determined that the student should be declassified from special education services (Dist. Exs. 45; 46). The student was then referred to the district's 504 committee (Dist. Ex. 45). The 504 committee subsequently determined that the student met the "criterion for qualification as a handicapped individual under Section 504 of the Rehabilitation Act of 1973" and developed a 504 plan for the student to be implemented beginning on June 11, 2015 (Dist. Ex. 44 at p. 1). The 504 plan was recommended for the 2015-16 school year as well (Dist. Exs. 44 at p. 2; 45).

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[1] The IEP indicates that the location for the co-taught 12:1 special class is the general education classroom (Dist. Ex. 18 at p. 8). Based on the director of student services' description of the co-taught classroom and the indication it is in a general education classroom, the class appears to fit the description of integrated co-teaching services, which according to State regulation means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students," with instruction provided by, at a minimum, a special education and a general education teacher (see Tr. p. 116; 8 NYCRR 200.6[g]).

[2] The supplementary aids and services section of the January 2014 IEP reflects a start date of February 13, 2014 for the specialized reading program included in this section (Dist. Ex. 18 at p. 9). The district's director of instruction explained that the student's reading instruction was changed to a specialized reading program under supplemental supports because the student was only recommended for three 30-minute sessions of reading per six-day cycle and resource room services are mandated for three hours (Tr. pp. 202-03). "Each student with a disability requiring a resource room program shall receive not less than three hours of instruction per week in such program…" (8 NYCRR 200.6[f][1]). However, specialized reading instruction does not have to be provided in a resource room. State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html).

[3] Although the December 2014 CSE proposed holding a program review at the end of the 2014-15 school year to determine the student's continued need for services, it also made recommendations for the beginning of the 2015-16 school year, including placement in a 15:1 special class study hall and a 12:1 co-taught ELA class (Dist. Exs. 41 at p. 8; 42 at p. 1).

The student began the 2014-15 school year as a general education student in the district's high school (Dist. Ex. 71 at p. 1). In mid to late September 2014, the district conducted a psychoeducational evaluation of the student to assess her levels of cognitive and academic functioning (id.). The results of the evaluation indicated that the student's full scale IQ was in the average range; however, her score on the verbal comprehension index was in the high average range, while her score on the working memory index was in the borderline range (id. at pp. 2-3). With respect to academic achievement, the district's evaluation showed that the student attained scores in the average to low average range (id. at pp. 2-5).[4] The evaluator concluded that due to the student's significant weakness in working memory and below average scores in reading and math fluency, the student should continue to be supported by a 504 plan (id. at p. 5).

In late October and early November 2015, the parent sent a series of emails to the district superintendent alleging that a teacher had commented on the student's possible attendance at Gow in front of other students and she also expressed concerns about implementation of the student's 504 plan (Parent Ex. CC). On November 19, 2015, a 504 committee convened for a program review and revised the student's plan, to allow additional accommodations including taking a break to meet with a trusted adult, having the counselor meet with the student's teachers to review the student's 504 plan, and providing bimonthly check-ins with the counselor (Dist. Exs. 47 at p. 2; 48). The parents advised the district that they were looking into Gow to see if it would be a good fit for the student (Dist. Ex. 48 at p. 1).

On December 1, 2015, Gow conducted an admissions assessment of the student (Dist. Ex. 6). The school's director of research and assessment administered a variety of tests and subtests to the student and determined that she was in need of multisensory instruction in vocabulary and morphology and intensive, phonetically-based remediation in decoding and fluency, with application to comprehension strategies (Dist. Ex. 6 at pp. 2-3).

On December 17, 2015 the parents notified the district in writing that they were sending the student to Gow for the remainder of the 2015-16 school year and they would be making a claim for reimbursement for all expenses associated with the placement (Parent Ex. V).

On December 23, 2015 the district responded to the parents' letter and denied the parents' request for tuition reimbursement, noting that the district believed that general education with the accommodations provided in the 504 plan was appropriate for the student and the student was no longer eligible for classification as a student with a disability (Parent Ex. X).

The student began attending Gow in January 2016 (Tr. p. 797; see Parent Ex. U). Her final GPA for the 2015-16 school year was 3.69 (Parent Ex. U).

On August 18, 2016 the parents notified the district in writing that they had decided to send the student to Gow for the 2016-17 school year and they would be making a claim for reimbursement for all expenses associated with the placement (Parent Ex. W).

[4] The parent testified that the purpose of the September 2015 evaluation was to enable the student to have accommodations for Scholastic Aptitude Test (SAT) (Tr. pp. 744-46).

On August 20, 2016 the district responded to the parents' letter and denied the parents' request for tuition reimbursement (Parent Ex. Y).

A. Due Process Complaint Notice

By due process complaint notice dated November 18, 2016, the parents alleged that the student was improperly found ineligible for special education and related services on May 22, 2015. The parents contended that the district did not base its recommendation on any formal evaluative data and that the district failed to address the student's needs in reading (Parent Ex. A at pp. 3-4). The parents also argued that the district denied the student a FAPE by failing to provide any declassification support services (id. at p. 3). The parents further alleged that the student required a specialized reading program in order to receive a FAPE; because of the district's alleged failures to address the student's reading needs and improper declassification of the student, the parents argued that they had no choice but to unilaterally place the student at Gow (id. at p. 4). The parents asserted that the rigorous curriculum and environment provided by Gow, including use of an adapted Orton-Gillingham methodology and specialized intensive writing program, allowed the student to make progress and receive an educational benefit (id. at p. 5). The parents also claimed that they fully cooperated with the CSE and that equitable considerations weighed in favor of awarding them full reimbursement for the student's cost of attendance at Gow (id.). As relief, the parents requested findings that the student was denied a FAPE and the district's procedural violations significantly impeded the parents' opportunity to participate in the decision-making progress and caused a deprivation of educational benefits. The parents also requested reimbursement and/or direct payment of the costs and expenses associated with the student's attendance at Gow for the 2015-16 and 2016-17 school years (id.). The parents further sought compensatory or additional educational services in an unspecified amount (id.).

B. Impartial Hearing Officer Decision

Following several prehearing conferences, the hearing began on June 21, 2017 and concluded on September 27, 2017 after four days of proceedings (Tr. pp. 1-810). By decision dated December 28, 2017, the IHO determined that removal of a corrective reading program from the September 2014 IEP "compromised the student's access to FAPE" (IHO Decision at p. 35). Regarding the May 2015 CSE's decision to declassify the student, the IHO determined that the declassification of the student was inappropriate because the student continued to need reading support and the subsequent transition plan should have, but failed to, incorporate a corrective reading program to monitor and support the student (id. at pp. 36-38). The IHO also noted that a district is required to evaluate a student prior to declassification and that, in this case, the district failed to conduct any testing of the student prior to declassification even though the student was due for a triennial evaluation (id. at pp. 35-36).

Next the IHO indicated that the 504 plan was not implemented consistently and that it was difficult to ascertain the impact of the district's failure to provide a corrective reading program (IHO Decision at p. 38). The IHO found that the student was struggling as of October 2015 with the support of a 504 plan and the student's classroom teacher should have known that the student was struggling as of October 2015 (id. at p. 39). The IHO then determined that the student's 504 plan should have included a reading program (id. at p. 40). The IHO further found that Gow was

an appropriate placement and that the parents cooperated with the CSE until preparation for the 2016-17 school year began (id. at pp. 42-44). The IHO determined that the parents did not allow the district the opportunity to revisit the student's 504 plan for the 2016-17 school year and that equitable considerations warranted a reduction in the relief awarded (id. at p. 44).

With regard to compensatory educational services, the IHO found that the student was entitled to compensatory relief based on the district's failure to include a reading program on either the "2015-16 IEP or the subsequent 504 accommodation plan" (IHO Decision at p. 45). Notwithstanding that finding, the IHO reasoned that the student's program at Gow included a corrective reading program and as such, there was no need to award additional services (id.). In conclusion, the IHO found for the parents on their claims relative to the 2014-15, 2015-16, and 2016-17 school years, and awarded tuition reimbursement for the 2015-16 and 2016-17 school years, reduced by 20 percent, upon proof of payment (id. at p. 46).

IV. Appeal for State-Level Review

The district appeals and requests that the IHO's decision be reversed in its entirety. The district first argues that the relevant time period for an award of compensatory educational services is November 18, 2014 through December 2015, when the student began attending Gow. The district alleges that the IHO erred by finding that it failed to offer the student a FAPE by not including a reading program on the student's 2014-15 IEP. The district further argues that the IHO erred by finding the student was not properly declassified because its declassification of the student was procedurally and substantively appropriate and no further testing of the student was required prior to declassification. Specifically, the district contends that the IHO erred by determining that the student continued to need corrective reading services due to her reading fluency issues, and asserts that the student did not require reading services to access and excel in the general education curriculum and to make sufficient progress to meet age or State-approved grade level standards. Next, the district alleges that the IHO did not have jurisdiction to review the adequacy of the student's 504 plan or the district's implementation of the plan. The district contends that the record does not support any of the IHO's reasons for finding that the student has a processing disorder and anxiety. The district also alleges that the hearing record does not support a finding that Gow is an appropriate placement, and that the IHO ignored that Gow was not necessary for the student because the student was able to access and excel in the general education curriculum without special education support. The district also appeals the IHO's determination that the student was entitled to compensatory relief and tuition reimbursement. As relief, the district requests that the IHO's decision be reversed.

In an answer with cross-appeal, the parents allege that the IHO erred by finding that the student's 504 plan should have included a reading program. The parents further contend the IHO erred in failing to address compensatory education for the lack of a specialized reading program for the period from November 2014 through December 2015. The parents also cross-appeal the IHO's determination that they did not fully cooperate with the CSE. The parents allege that they are entitled to full reimbursement of the student's cost of attendance at Gow for the 2015-16 and 2016-17 school years. The parents request that the IHO's decision be upheld in all other respects.

In an answer to the cross-appeal, the district denies specific allegations set forth in the parents' answer with cross-appeal.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132,

quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 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).

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

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

VI. Discussion

A. Scope of Review

In their due process complaint notice, the parents alleged that the district failed to provide declassification support services to the student.[6] The IHO indicated that a 504 plan served as declassification support services for the student and that the student's declassification was effective as of the start of the 2015-16 school year (IHO Decision at p. 36). In its appeal, the district asserts that the student was transitioned to a 504 plan as declassification support services. The parents' answer with cross-appeal does not challenge the IHO's finding that the student's 504 plan served as declassification support services.[7] Since neither party has challenged that portion of the IHO's decision, it is final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, this determination will not be reviewed on appeal.

Concerning the student's 504 plan, the student's chronological educational history is relevant and included in the facts of this case, nevertheless it is important to note that an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504. School districts are required to have policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review

[6] State law provides that once a CSE determines that a student no longer requires special education services, the CSE is required to "identify and recommend the appropriate declassification support services" for the student (Educ. Law § 3602[1][i][2]; [5-a][d][1]; 8 NYCRR 200.4[d][1][iii][a]). Declassification support services are defined as "services for teachers and pupils in the first year that a pupil moves from a special education program to a full-time regular education program"; services for students "shall be provided on a regular basis and may include, but not be limited to psychological, social work, speech and language services and noncareer counseling services"; and services for teachers "may include the assistance of teacher aides or consultation with appropriate personnel" (Educ. Law § 3602[5-a][d][1]; see Educ. Law § 3602[1][i][2]; 8 NYCRR 200.1[ooo]). The purpose of declassification support services is "to aid in [the] student's transition from special education to full-time regular education" (8 NYCRR 200.1[ooo]). State Regulations provide that a recommendation for declassification support services must "indicate the projected date of initiation of such services, the frequency of provision of such services, and the duration of such services, provided that such services shall not continue for more than one year after the student enters the full-time regular education program" (8 NYCRR 200.4[d][1][iii][b]).

[7] The regulations governing practice before the Office of State Review are explicit and require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]).

procedure, and districts may elect to satisfy the section 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36). However, in New York, the review procedure under section 504 does not include State-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Application of a Student Suspected of Having a Disability, Appeal No. 15-104; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). As the courts have recognized, the New York Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 hearings (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504 (see A.M., 840 F. Supp. 2d at 672). While the factual allegations underlying the parents' claims arising under the IDEA may involve information set forth in the student's 504 plans, I make no findings relative to section 504.

Likewise, those aspects of the district's appeal that allege the IHO exceeded her jurisdiction by addressing the implementation and adequacy of the student's 504 plan are not reviewable by an SRO.

B. January 14, 2014 Annual Review

The 2013-14 school year is not at issue in this appeal; however, the student's programming and progress in the year prior to declassification is relevant to the appropriateness of the CSE's recommended programming changes and its decision to later declassify the student.

According to the hearing record, the January 2014 CSE relied on AIMSweb progress monitoring data, State assessments in ELA and mathematics, and input from the student's parent, teacher, and counselor to determine the student's educational program for the remainder of the 2013-14 school year and the beginning of the 2014-15 school year (Dist. Exs. 18 at pp. 4-6, 8; 19 at p. 1; 20 at p. 1). Minutes from the January 2014 CSE meeting included parent and teacher comments that reflected the student was doing well (Dist. Ex. 19 at p. 1). According to the January 2014 IEP, the student was showing improvement in a corrective reading program (Dist. Ex. 18 at p. 4). Based on information included in the January 2014 IEP, the student's reading skills ranged from average to below average (id. at pp. 4-5). Results of the Group Reading Assessment and Diagnostic Evaluation (GRADE) were in the average range in all areas (id. at p. 5). Based on AIMSweb results from the fall of 2013, and when compared to peers in her middle school, the student's fluency score was below average and her comprehension score was in the average range (Dist. Exs. 18 at p. 5; 56). The student's report card reflected grades ranging from 92-100 in all classes for the first two marking periods of the 2013-14 school year (Dist. Ex. 63).

However, some inconsistencies in the student's reading abilities were noted within the January 2014 IEP. For example, according to the present levels of performance section of the

January 2014 IEP, the student was reading between the 25th and 50th percentile at the 6th grade level; however, minutes from the CSE meeting indicated the student was reading at the 50th percentile at the 7th grade level and AIMSweb progress monitoring from 2013-14 was at the seventh grade level (compare Dist. Ex 18 at p. 4, with Dist. Exs. 19; 55).[8] The January 2014 IEP indicated that literal and inferential comprehension were areas of strength; however, drawing conclusions/making inferences and summarizing were also noted to be areas where the student struggled the most (Dist. Ex. 18 at p. 5).

After reviewing the evaluative information, the January 2014 CSE decided that the student needed to improve her reading fluency and recommended continuing the student's current program (resource room for reading instruction and consultant teacher services for math) for the remainder of the 2013-14 school year (Dist. Exs. 18 at p. 8; 19 at p. 1; 20 at p. 1). To address the student's reading needs, the January 2014 IEP included explicit, systematic, intensive reading instruction (three times in a six-day cycle for 60 minutes) in resource room, a goal that addressed reading fluency, and a specialized reading program (three times in a six-day cycle for 30 minutes) in the supplementary aids and services section, beginning in February 2014 (Dist. Ex. 18 at pp. 7-9).[9] The January 2014 IEP was not entirely clear with respect to how the specialized reading program would be delivered in the recommended program beginning in September 2014, which included a special class study hall and co-teaching for English and math, although the IEP included a specialized reading program (three times in a six-day cycle for 30 minutes) under supplementary aids and services (Dist. Ex. 18 at pp. 5, 8-9). As noted above, the director of student services testified that resource room was discontinued for the 2014-15 school year because resource room was mandated to be three hours and the specialized reading program that was recommended was for three times 30 minutes (Tr. pp. 202-03).

In February 2014 and March 2014, amendments were made to the student's January IEP to correct clerical errors (e.g. "fluency goal should state 7th grade, not 6th grade"; in the program modification section "wait time" should say "wait time to process information," later changed to "allow 10 seconds of wait time to process prior to giving verbal response") (Dist. Exs. 22, 23, 27, 28).[10] However, changes were not made to the present levels of performance section, which still reflected that the student was having progress monitored at the 6th grade level (Tr. pp. 466-67; Dist. Exs. 18 at p. 4; 21 at p. 4; 26 at p. 4; 31 at p. 5; 36 at p. 5).

[8] The reading goal on the January 2014 IEP was amended in February 2014 to reflect 7th grade instead of 6th grade (compare Dist. Ex. 18 at p. 7, with Dist. Exs. 21 at p. 7; 22; 23).

[9] It is unclear from the hearing record if the student was receiving a 60-minute session and a 30-minute session of reading from February through June 2014.

[10] Amendments were made to the January 2014 IEP in February, March, September, and October 2014 with parent permission, but without CSE meetings (Dist. Exs. 21; 22; 23; 24, 25; 26; 27; 28; 29, 30).

C. September 2014 IEP - Specialized Reading Instruction

In its appeal, the district challenges the IHO's determination that the failure to include a corrective reading program on the student's last IEP resulted in a denial of a FAPE for the 2014-15 school year.

The student's IEP for the beginning of the 2014-15 school year was originally developed at an annual review meeting held on January 14, 2014 and included recommendations for a special class study hall, co-taught classes for English and mathematics and a specialized reading program as a supplemental support (Dist. Ex. 18 at pp. 8-9). After an amendment on September 4, 2014, the student's IEP for the 2014-15 school year removed the specialized reading program, and included recommendations that the student be placed in co-taught 12:1 special classes for English and mathematics, each for four times per six-day cycle for 60 minutes (Dist. Ex. 31 at p. 8; see Dist. Ex. 32). In addition, the CSE recommended that the student attend a 15:1 special class study hall four times per six-day cycle for 60 minutes (Dist. Ex. 31 at p. 8). The September 2014 IEP also included CSE recommendations for numerous supplementary aids and services/program modifications/accommodations for the student including: prompting the student to record homework assignments with sufficient detail, providing the student with a copy of class notes, clarifying directions if necessary, providing the student with an audio version of texts, preferential seating, providing the student with due dates for each part of a long-term assignment, allowing the student wait time to process information, and not penalizing the student for spelling errors on class assignments (id. at p. 9). The student's September 2014 IEP called for the student to be provided with text reader software, access to a word processor for lengthy writing assignments, and access to a laptop (id.). With respect to supports for school personnel on behalf of the student, the IEP indicated that a special education teacher would provide ongoing communication with general education teacher(s) to address strategies to apply within the classroom (id. at p. 10). The September 2014 IEP also afforded the student testing accommodations including advance notification of tests, extended time, location with minimal distractions, and spelling requirements waived (with the exception of spelling evaluations) (id. at pp. 10-11). The September 2014 IEP included one annual goal, the student's fluency goal from the previous school year (Dist. Exs. 31 at p. 8; 37-40).

The student's IEP was amended again in October 2014 to remove a reading fluency goal, which was tied to the supplemental reading instruction (Dist. Exs. 31-33; 35-40). Both the September 2014 and October 2014 amendments were agreed to in writing without a CSE meeting (Dist. Exs. 32; 37). With respect to academic needs, the September and October 2014 IEPs indicated that the student needed to improve her fluency, required advance notice for tests, and needed long-term assignments broken into manageable chunks (Dist. Exs. 31 at p. 6; 36 at p. 6). The student's present levels of performance were essentially unchanged from the January 2014 IEP (compare Dist. Ex. 26 at pp. 4-6, with Dist. Exs. 31 at pp. 5-6; 36 at pp. 5-6).

The director of student services testified that the student's service model was changed between eighth and ninth grades because co-teaching was not provided at the middle school, but it was at the high school, and because the student had needs in the areas of ELA and math (Tr. pp. 116-17, 199-200). The director of student services further testified that the parent asked to have reading services removed from the student's IEP because she did not feel that the student required

direct reading instruction anymore (Tr. p. 136; see Tr. pp. 138-39). The parent was not asked during the impartial hearing if she initiated the removal of reading services from the student's IEP and, if she did, why she may have done so (see Tr. pp. 737-794). Regardless, the director of student services stated that she discussed the request with the school psychologist who had been working closely with the family, and "all indications were that [the student] had mastered her reading goal" and was ready to move into the 8th grade level with reading for progress monitoring goals (Tr. p. 137). The director of student services noted that given the parents' request and the fact that the student had been doing so well, the district amended the student's IEP to remove the reading service (Tr. p. 137).[11] The prior written notice indicated that the reason for the removal of the reading program was that the student was on the honor roll throughout middle school and had achieved her reading goal (Dist. Ex. 35 at p. 1).

Although the district submitted evidence that it monitored the student's reading progress during the 2013-14 school year, the information presented is confusing and inconsistent. The student's 2013-14 IEPs included a reading fluency goal that targeted her ability to read 150 words per minute at the 7th grade level with no more than seven errors (Dist. Exs. 18 at p. 7; 21 at p. 7; 26 at p. 7).[12] The method for measuring the student's progress was listed as "progress monitoring" (Dist. Exs. 18 at p. 7; 21 at p. 7; 26 at p. 7). According to the director of student services, the district used a program called AIMSweb to conduct reading fluency checks and monitor progress (Tr. p. 63).

The hearing record contains an AIMSweb progress monitoring improvement report for the student covering her performance from October 2013 to February 2014, an AIMSweb reading improvement report for the 2013-14 school year, and a narrative report of the student's progress toward her IEP fluency goal as measured in April and June 2014 (Dist. Exs. 55; 56; 59). The director of student services testified that for the AIMSweb progress monitoring improvement report (progress report) the student's progress was being monitored at the seventh-grade level (Tr. p. 124). The progress report included 12 data points (Dist. Ex. 55). A review of the report shows that the student first read 150 or more words correct with less than seven errors on November 26, 2013 and continued to meet this target for 4 of the next 6 data points (id. at p. 2). The report also shows that the student's expected rate of improvement was .65 words read correct per week, while her actual rate of improvement was 1.18 words read correct per week (Dist. Ex. 55). Based on

[11] The director of student services testified that, if a parent asked to discontinue reading services, and she had concerns about the student's ongoing need for reading instruction the CSE would hold a meeting and look at all the evidence and then make a determination as a committee (Tr. p. 139). She further indicated that in order for her to amend an IEP without a meeting she would have to be very certain that it was in the best interest of the student (Tr. p. 139). The director stated that with regard to the student she "had no concerns at all" (Tr. p. 140; see Tr. p. 210).

[12] The initial IEP for the 2013-14 school year is missing the page that included annual goals (see Dist. Ex. 15). The January 2014 IEP included an annual goal targeting the student's ability to read 150 words at a 6th grade level; however, the grade level was changed by hand to the 7th grade level (Dist. Ex. 18 at p. 7). In addition, the January 2014 IEP stated that on AIMSweb fluency testing, conducted in fall 2013, the student scored below average, reading 108 words per minute at the 8th grade level (Dist. Ex. 18 at p. 5; see also Dist. Ex. 31 at p. 5).

these scores, the director of student services opined that the student made "excellent progress" and noted that the student had almost doubled the expected rate of progress (Tr. pp. 124-25).

The narrative report of the student's progress shows that the student was assigned a goal of reading 150 words per minute on a 6th grade fluency passage with no more than seven errors on January 23, 2014; however, there were no entries tracking progress of the goal and it was withdrawn on March 12, 2014 (Dist. Ex. 59). On March 13, 2014 a new goal was assigned that targeted the student's ability to read 150 words per minute on a 7th grade fluency passage with no more than seven errors (id.). An April 2014 update shows that the student had not reached the target; however, she read the following words per minute/errors on three opportunities: 130/2, 121/5, and 102/6 (id.). A June 2014 update shows that the student met the target of 150 words per minute on one occasion, but missed the target on four other attempts (id.). The student's teacher commented on the report that the student "has proved that she can reach 150 words read per minute" (id.). Based on the numbers reported, the director of student services acknowledged that as of June 2014 the student was not consistently reading 150 words correct per minute at a 7th grade reading level (Tr. pp. 204-05).

Lastly, on the AIMSweb reading improvement report for the 2013-14 school year, which the director of student services testified measured fluency, the student attained scores of 108 (fall), 105 (winter), and 135 (spring) (Tr. pp. 125-26; Dist. Ex. 56 at p. 1).[13] The student's performance was compared to "[m]iddle [s]chool" and her level of skill was characterized as "[w]ell [b]elow [a]verage" (Dist. Ex. 56 at p. 1). The director of student services testified that the student's skill level was compared to other students in the district's middle school, rather than national norms, which tended to result in lower scores (Tr. pp. 126-27). However, the director of student services characterized the student's change in scores from a 109 to 135 as "excellent progress" (Tr. p. 128). In addition, she noted that the student's comprehension was in the average range when compared to other students in the middle school (Tr. pp. 128-129; Dist. Ex. 56 at p. 2).

In addition to AIMSweb monitoring, the hearing record includes the student's report card for the 2013-14 school year which indicated that the student received a final average of 95.92 and notably a final average of 95 in ELA (Dist. Ex. 63). According to the director of student services, there was no indication in the student's IEP that the curriculum was modified for her in any way, the student was receiving the same curriculum as her non-disabled peers, and she mastered the curriculum with "[s]traight As" (Tr. pp. 134-35; Dist. Ex. 63). The student did not take the New York State assessments for ELA or math for the 2013-14 school year (see Dist. Ex. 31 at p. 4).

Understandably, much of the parents' and the IHO's focus during the impartial hearing was on the student's performance with respect to reading fluency. However, the student's strength in reading comprehension and her excellent record of achievement in her general education curriculum should not be overlooked. "For most students with disabilities, the IEP goals and objectives associated with reading are linked to the standards by ensuring a student has the precursor skills and strategies in reading necessary to access and progress in the general education

[13] The student's September 2014 IEP stated that on AIMSweb testing for reading fluency in fall 2013, the student scored below average, reading 108 words per minute at the 8th grade level (Dist. Ex. 31 at p. 5; see also Dist. Ex. 18 at p. 5).

curriculum" ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About "Lack of Instruction" in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html).

Thus, while it is unclear if the student met her IEP goal of reading 150 words correct at the 7th grade level or what reading level test was being used to measure the student's reading fluency, the student performed well in the general education curriculum throughout the 2013-14 school year. Additionally, although the student's reading fluency continued to be below average as compared to other students in the middle school, the student's reading comprehension was in the average range (Tr. pp. 128-129; Dist. Ex. 56 at p. 2). Accordingly, at the time the parents and district agreed to remove the student's reading program in September 2014, such decision was reasonable in light of the information available at the time as it is clear that the student had skills and strategies in reading necessary to access and progress in the general education curriculum.[14]

D. May 2015 CSE - Declassification

1. Sufficiency of Evaluative Information

The district argues that its declassification of the student was procedurally appropriate and that there was no need for updated testing of the student prior to declassification because it had sufficient information to declassify her in May 2015. Citing to federal and State regulations, the IHO noted that a CSE is required to evaluate a student prior to declassification, the May 2015 CSE did not conduct any additional testing although the student was also due for a triennial evaluation, and instead deferred evaluating the student pending the parents' request for Gow to perform psychoeducational testing of the student during summer 2015 (IHO Decision at pp. 35-36).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A reevaluation in all areas related to the student's suspected disability is required prior to declassifying a student (8 NYCRR §§200.2[b][8][ii], 200.4[c][3], 200.4[b][6][vii]).

On December 8, 2014 a CSE convened for the student's annual review (Dist. Exs. 41; 42). According to CSE meeting minutes, the team discussed the student's performance since the beginning of the school year, her then-current grades, and the potential for reevaluation (Dist. Ex. 42 at p. 1). At that time, the student's grades were all in the 90s and she reportedly exhibited "very good study skills," was prepared for class, and used extra study guides (id.). The December 2014

[14] The IHO relied in part on testimony describing the results of a December 2015 Gow admissions test, which was conducted approximately 16 months after the September 2014 IEP removed the corrective reading program. As the Gow assessment was not available to the September 2014 CSE, the IHO's reliance on this testimony was an improper use of retrospective evidence to evaluate the appropriateness of the program change made in September 2014.

IEP did not recommend any changes to the student's program for the remainder of the school year (compare Dist. Ex. 31 at p. 8, with Dist. Ex. 41 at p. 8; see Dist. Ex. 42 at p. 1). The prior written notice for the December 2014 CSE meeting indicated that a program review would take place at the end of the school year to "review the need for services next year and consider a 504 Accommodation Plan" (Dist. Ex. 43 at p. 1). Testimony by the director of student services indicated that changing from an IEP to a 504 plan would require the student to be declassified (Tr. p. 148).

The hearing record reflects that a CSE subcommittee convened on May 22, 2015 and agreed to declassify the student (Dist. Exs. 45; 46). The student was then referred to the section 504 committee, which developed a 504 plan to address the student's needs (Dist. Exs. 44; 45; 46).[15]

Prior written notice indicated that the May 2015 CSE considered a parent report, teacher report, student report, and counselor report (Dist. Ex. 46 at p. 1). The school psychologist testified that the May 2015 CSE considered the student's grades, credits, and parent and teacher reports, and determined that they had sufficient information to recommend declassification without conducting additional evaluations (Tr. pp. 381, 384-85; 436). The parent testified that she reiterated her desire to have the student evaluated at Gow in order to get accommodations for the SAT (Tr. pp. 744-45). Based on the foregoing and with the agreement of the parents, the May 2015 CSE determined that the student should be declassified (Dist. Ex. 46 at p. 1). The hearing record reflects that following the CSE meeting, a meeting to develop a 504 plan for the student was convened and accommodations were created with an effective date of June 11, 2015 (Dist. Ex. 44 at p. 1).

Although the May 2015 CSE failed to evaluate the student prior to finding her ineligible for special education, in this instance it is a procedural violation that does not rise to the level of a denial of a FAPE. This is not a case where declassification was briefly discussed and accompanied by a flurry of procedural violations that significantly impeded the parents' ability to participate in the decision-making process (see Application of a Student with a Disability, Appeal No. 15-099); rather, the student's potential declassification was a focus of the December 2014 CSE meeting and the issue was revisited and determined at the May 2015 CSE meeting where declassification of the student officially occurred. There is no dispute that the student had a classifiable disability and, as discussed in further detail below, the May 2015 CSE had sufficient information to identify the student's needs, whether or not commonly linked to the student's disability category, and determine that the student did not require special education to access the general education curriculum or derive educational benefit. Additionally, as discussed in greater detail below, the subsequent evaluations of the student did not produce information that would have made the May 2015 CSEs decision to declassify the student inappropriate.

2. Need for Special Education

With respect to the substantive decision by the district to declassify the student, the district alleges that the IHO erred by determining that declassification was inappropriate because the

[15] After declassification, the student's 504 plan provided her with all of the accommodations she received under her most recent IEP (compare Dist. Ex. 41 at pp. 9-11, with Dist. Ex. 44 at pp. 1-2).

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

Whether a student's condition adversely affects his or her educational performance, such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F. 3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist. v. L.S., 307 F. Supp. 2d, 394, 399 [N.D.N.Y. 2004). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 CFR 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibly for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546). Moreover, as noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not

based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clarke, 48 IDELR 77).

Moreover, the availability and utilization of appropriate academic or social-emotional interventions to meet a student's educational needs also may influence a court's determination as to whether a student qualifies for special education under the relevant criteria (see Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic progress and social success and, therefore, did not need special education]; M.P. v. Aransas Pass Ind. Sch. Dist., 2016 WL 632032, at *5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need services under the IDEA]; L.J. v Pittsburg Unified Sch. Dist., 2014 WL 1947115, at *15 [N.D. Cal. May 14, 2014] [finding that a student made academic and behavioral progress after receiving general education interventions and, therefore was not a "child with a disability" under the IDEA]; Ashli C. v State of Hawaii, 2007 WL 247761 at *10-*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]). As an added complication, a 504 plan might provide for services or supports that meet the definition of special education under the IDEA and, more specifically, State law and regulation.

The First Circuit recently addressed, in Doe, the two-step inquiry utilized in making eligibility determinations and the need to distinguish between the existence of eligibility criteria for a disability category from the actual need for special education (Doe, 832 F.3d at 77-81, 85-86). Given that the IHO relied, in part, on Doe in reaching her determination that the district denied the student a FAPE by inappropriately declassifying her, it is useful to revisit the holding of the case and whether it applies to this proceeding.

In applying the facts and analysis from the case in front of the First Circuit (Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69 [1st Cir. 2016]) to this matter, the IHO determined that the student's below average testing with respect to reading fluency, combined with delays in processing speed, indicated the student needed special education, or, at the very least, "a transition plan which incorporated a corrective reading program" (IHO Decision at pp. 36-38). The IHO also stated that "[u]nlike the student in Doe, reading fluency was not probed or monitored following declassification and that it was unclear if the student's fluency skills remained stable or declined once reading instruction was terminated" (id. at p. 38; see Doe, 832 F. 3d at 79-80).

Factually, the student in this matter is similar to the student in Doe in that both students excelled academically and had deficiencies in reading fluency. However, the First Circuit only addressed what it termed the "first prong of the eligibility inquiry"; whether the student had a specific learning disability (Doe, 832 F.3d at 77-81). The First Circuit determined that the district court "erred in relying on [the student's] overall academic achievements without assessing the relevance of such achievements to her reading fluency skills" and remanded the case for a determination as to "whether [the student's] generalized academic measures, such as school grades . . . may serve as fair proxies of her reading fluency ability" (id. at p. 81).

In this matter, the parties do not dispute that the student has a qualifying disability. The sole issue is whether the student continued to need special education at the time the district declassified her in May 2015.

In Doe, the First Circuit did not reach "the second prong of the eligibility inquiry"; whether the student needed special education (id. at pp. 85-86). However, the Court did opine that "a child who needs only accommodations or services that are not part of special education to fulfill the objective of the need inquiry does not 'need' special education" (Doe, 832 F.3d at 85). Considering the First Circuit's decision, and in the absence of a controlling "bright line" rule governing the determination of whether a disabled student needs special education under the IDEA, and utilizing the "case-by-case approach" favored by New York courts, I find that, under the particular circumstances of this matter, the district appropriately declassified the student in May 2015.

At the time of the May 2015 subcommittee of the CSE meeting, the student's last IEP was formulated in December 2014 (Dist. Ex. 41). The December 2014 CSE recommended a continuation of the student's then-current program (placement in a 15:1 special class study hall and 12:1 co-taught special classes for English and mathematics, four times per six-day cycle) for the remainder of the school year and proposed conducting a program review in May/June of 2015 to consider the student's need for special education services and possibly a 504 plan (Dist. Exs. 41 at p. 8; 42; 43 at p. 1). The December 2014 CSE did not continue the recommendation for assistive technology devices and services from the October 2014 IEP (compare Dist. Ex. 36 at p. 9, with Dist. Ex. 41 at p. 9).

As noted by the IHO, the effective date of the May 2015 CSE's decision to declassify the student was June 11, 2015 and the development of a 504 plan was to serve as declassification support services (IHO Decision at p. 36; see Dist. Exs. 44; 46 at p. 2). According to meeting minutes, the 504 plan continued all test accommodations and program modifications from the student's IEP (Dist. Ex. 45). Consistent with the accommodations included in the December 2014 IEP, the May 2015 504 plan included preferential seating, wait time for the student to process information, clarification of directions including checks for understanding, copies of class notes, due dates for each chunk of large assignments, no penalties for missed spelling, as well as testing accommodations, such as advance notification of tests, location with minimal distractions, extended time, and waiver of spelling requirements (compare Dist. Ex. 41 at p. 9, with Dist. Ex. 44). A consistent theme of these accommodations is that they are intended to assist with the student's attending and to provide the student with extra time to process information (see Tr. p. 377).

As noted above, "specially-designed instruction," means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). Overall, I do not find that the accommodations provided in the 504 plan, which are designed to provide the student with extra time and help with focusing her attention rather than an adaptation of the content, methodology or delivery of instruction, meet the definition of specially designed instruction (see Ashli C. v State of Hawaii, 2007 WL 247761 at *10-*11 [D.

Haw. Jan. 23, 2007] [identifying additional time highlighting and taking tests, being moved closer to the teacher, and having test directions read aloud as not being special education]).

The remaining question is whether the student required supports outside of those recommended in the 504 plan which may have been identified as special education. In this respect, the IHO determined that the student needed a corrective reading program (IHO Decision at pp. 36-38). As noted above, the parents and district agreed to discontinue the recommendation for supplemental reading instruction in September 2014 (Dist. Exs. 31-35), so at the time of the May 2015 CSE the student had almost completed the 9th grade without specialized reading support (Tr. pp. 307-08).

The district's school psychologist testified that reports from the teacher and special education teacher who attended the May 2015 CSE meeting indicated that the student performed very well, with no skill development needs at that time, and the student's parents were also pleased with her performance (Tr. p. 381). The student's ninth grade special education teacher agreed with the declassification decision due to the student's ability to advocate for herself, her strong work ethic, and good grades in all classes (Tr. pp. 312-13). The student's ninth grade special education teacher testified that the student did not receive reading support during the 2014-15 school year, nor did she observe anything that indicated the student needed more reading support (Tr. pp. 307-08). The special education teacher stated that the student was able to read and answer questions based on the readings without extra help or explanations, and she had a final grade of 97 in her general education English class, with co-taught services (Tr. pp. 308-09). The special education teacher reported that the student worked independently and very rarely asked for help in the small group study hall (Tr. pp. 310-11). The student passed all ninth-grade classes, with final grades ranging from 91-100 (Dist. Ex. 64).

Based on the information available to the May 2015 CSE, as described above, the student was performing exceptionally well academically (see Dist. Ex. 64), even after reading instruction had been removed from her IEP (see Tr. pp. 308-09). Accordingly, the May 2015 CSE's decision to declassify the student, because she was not in need of special education, is supported by the hearing record. Additionally, to the extent that the IHO determined the student was experiencing anxiety related to school, the student's mother's testimony regarding anxiety and the amount of work the student was putting in at night in order to maintain her grades were both in response to questions regarding the 2015-16 school year—after the student had been declassified and the district was implementing, or according to the parents, failing to implement a 504 plan (see Tr. pp. 752-53, 755-57). Accordingly, use of this evidence to contradict the May 2015 CSE's decision to declassify the student was an improper retrospective analysis.

Finally, while evidence of how the student performed during the 2015-16 school year is not relevant to whether the May 2015 CSE's decision to declassify the student was appropriate, because the district failed to evaluate the student prior to declassification, the subsequent September 2015 and December 2015 evaluations of the student are reviewed to determine if they would have impacted the May 2015 CSE's decision.

The school psychologist stated that she offered to conduct a psychological evaluation in September 2015 because an evaluation at Gow had not been completed and the deadline for

submitting information to the college board for SAT accommodations was approaching (Tr. pp. 389-90, 745-47). The September 2015 psychoeducational evaluation included a review of the student's record; behavioral observations; parent, teacher, and student interviews; a social/developmental history; and standardized assessment of cognitive and academic functioning for the purpose of making program decisions regarding the student's accommodations and educational needs (Dist. Ex. 71 at pp. 1, 2, 5).

Results of the September 2015 psychoeducational evaluation indicated that the student had average cognitive abilities, with a weakness in working memory (Dist. Ex. 71 at pp. 2, 3, 5). The student scored in the average range on measures of academic achievement, including letter-word identification, passage comprehension, spelling, word attack, calculation, and applied problems (id. at pp. 3-5). The student scored in the low average range in reading and math fluency (subtests that involved time constraints) on the Woodcock Johnson Tests of Achievement-III, while her scores on the Gray Oral Reading Tests-5 (GORT-5) were in the average range for fluency and comprehension (id. at pp. 4-5). The school psychologist who conducted the evaluation testified that the student's achievement in the classroom and her achievement on untimed subtests were in the average to high average range, and "her disability did not show when she was given more time. She was able to achieve like an average student" (Tr. pp. 424-25). The evaluator concluded that, consistent with current and previous observations, evaluation reports, and parent and teacher reports, the student needed additional time to process information and a 504 plan was recommended to continue to support her needs (Dist. Ex 71 at p. 5). The school psychologist also testified that there was nothing in her psychoeducational evaluation report that identified a need for special instruction (Tr. pp. 373-74). She also testified that the results of the September 2015 psychoeducational evaluation confirmed her opinion that the student's recent declassification was appropriate (Tr. pp. 372-74).

The parent testified that she made a decision to enroll the student at Gow based on the results of a December 2015 Gow School admissions assessment (Tr. pp. 753-54).[16] The Gow School evaluator described the admissions assessment as a screening of language based measures, which was one piece used to identify whether the student would be a good match for Gow (Tr. pp. 615-16). The Gow assessment included standardized measures, as well as tests in the public domain that were interpreted qualitatively, and curriculum-based measures from Gow (Tr. pp. 616-22). According to results from standardized measures on the Gow admissions assessment, the student achieved a standard score of 82 on the Slosson Oral Reading Test-Revised (SORT-R), and an oral reading quotient of 86 on the GORT-5, and a standard score of 117 on the Test of Written Language-4 (Dist. Ex. 6 at pp. 2-4).[17] The evaluator stated that the student tended to sacrifice decoding accuracy for speed in her oral reading, and she opined that the student needed intensive,

[16] The director of student services testified that when a 504 committee met in November 2015 to discuss parent concerns and review the student's 504 plan, the parents did not request that the student be referred back to the CSE; instead, the parents had concerns about the implementation of the 504 plan (Tr. pp. 167-72; see Dist. Exs. 47; 48).

[17] The student performed lower on the GORT-5 in December 2015 (oral reading quotient 86) than she did in September 2015 (oral reading quotient 94) (compare Dist. Ex. 6 at p. 3, with Dist. Ex. 71 at p. 4).

phonetically-based remediation in decoding and fluency with application to comprehension strategies (id. at p. 2). The evaluator reported that the student's many repetitions and self-corrections interfered with fluency and her difficulties understanding text primarily were due to weak decoding and fluency (id.). With respect to the student's verbal ability, the evaluator indicated that the student responded to questions in complete sentences and used age-appropriate vocabulary (id. at p. 1). However, according to the evaluator when asked to define a sample of words from the SORT-R the student provided an accurate definition for only 20 percent of the words, leading the evaluator to conclude that the student was in need of multisensory instruction in vocabulary and morphology (id.).[18] According to the Gow admissions assessment report, a ceiling was not obtained on the SORT-R, yet no explanation was provided for the failure to obtain a ceiling level or how the lack of a ceiling level factored into the student's performance or the reported scores on this assessment (id. at p. 1). The evaluator testified that she administered the IOTA Word Test, a test in the public domain, because she was qualitatively interested in determining if the student knew words by sight and could easily recognize them; however, she stated that a limitation of the test was that the highest grade equivalent score on the test is 5.5 (Tr. pp. 616-17). The student made two errors on the IOTA word test, resulting in a grade equivalent score of 5.3 (Dist. Ex. 6 at p. 1). The evaluator also administered the Gow non-word test which she described as a curriculum-based measure that was created at Gow and was scored by percent of words read correctly (Tr. at pp. 617-18; Dist. Ex. 6 at p. 1). The student read 57 percent of the words correctly; however, the student was not participating in the curriculum at the time and no frame of reference for interpreting the score was provided (Dist. Ex. 6 at p. 1).

The Gow School evaluator testified that, based on the overall 2015 admissions assessment, the student still had the weaknesses characteristic of dyslexia and was in need of intervention; however, the evaluator did not offer any additional explanation and the assessment report did not include a summary of test results (Tr. p. 621-23; see Dist. Ex. 6). Additionally, although the student's scores on the Gow admissions assessment, specifically with respect to the GORT-V, were lower than the student's scores on the September 2015 psychoeducational evaluation (compare Dist. Ex. 6 at p. 3, with Dist. Ex. 71 at p. 4), the district school psychologist testified that the testing was "fairly consistent" and that there could have been multiple reasons to explain the discrepancy (Tr. p. 369-72). Further, the September 2015 psychoeducational evaluation included a review of the student's records and parent and teacher interviews as part of the overall evaluation (Dist. Ex. 71 at p. 2). The evaluator explained that testing is just one piece of data and that the student's testing taken together with the student's performance in school shows that although she needed more time, her needs can be addressed through accommodations rather than through special education (Tr. pp. 373-74).

The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students. Nevertheless, this student has never needed modified curriculum even when receiving services pursuant to an IEP and has consistently performed in an exceptional manner academically. Although the district should have evaluated

[18] However, the evaluator did not provide any frame of reference to interpret the student's ability to define vocabulary words, or any explanation of the contrast between the student's ability to define words and her use of age-appropriate vocabulary.

the student prior to declassification, because the hearing record (including the subsequent September 2015 and December 2015) supports finding that the student did not require special education, the May 2015 CSE's decision to declassify the student was appropriate.

VII. Conclusion

In summary, a review of the hearing record supports a finding that removing a corrective reading program from the student's 2014-15 IEP did not result in a denial of a FAPE to the student. The district properly declassified the student for the 2015-16 school year. The student was not eligible for special education during the 2016-17 school year. The IHO erred by finding that the district denied the student a FAPE for the 2014-15, 2015-16, 2016-17 school years, and by finding the student was entitled to compensatory relief, and by awarding partial tuition reimbursement.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated December 28, 2017 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE, the student was not properly declassified, the student was entitled to compensatory relief, and awarded partial tuition reimbursement.

Dated: **Albany, New York**
April 11, 2018

STEVEN KROLAK
STATE REVIEW OFFICER