



The University of the State of New York

The State Education Department

State Review Officer

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Nos. 10-120 & 10-121

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District

Appearances:

Law Offices of Neal H. Rosenberg, attorneys for petitioners, Neal H. Rosenberg, Esq., of counsel

Kehl, Katzive & Simon, LLP, attorneys for respondent, Andrea Green, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a portion of a decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2008-09 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2009-10 school year and awarded tuition reimbursement to the parents for their placement of their son at Eagle Hill for that year.¹ The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was 12 years old and attending Eagle Hill (Tr. pp. 16, 573-74). Eagle Hill has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education and related services for

¹ Although the parents duly and timely served the district with a notice of intention to seek review, the parties nevertheless created a procedural irregularity by initiating separate appeals from the same impartial hearing decision. State regulations governing the procedures for review of the decision of an impartial hearing officer provide for an appeal and a cross-appeal (8 NYCRR 279.4). Upon notice and an opportunity for the parties to be heard, and as a matter of discretion, the two appeals were consolidated by a State Review Officer. Since the parents served a notice of their intention to seek review first, for purposes of this decision, their request for review will be treated as the initiating appeal and the district's request for review shall be deemed a cross-appeal. I encourage counsel for the parties to avoid such unnecessary irregularities in the future.

students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record reflects that the student demonstrates difficulties with math, reading comprehension, anxiety, attention, impulsivity, perceptual reasoning ability, social skills, and motor skills as well as receptive, expressive, and pragmatic language (Tr. pp. 35-37, 233, 509, 617; Dist. Exs. 50; 63). The student has received a diagnosis of a generalized anxiety disorder (Tr. p. 506; Dist. Ex. 50 at p. 23). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R § 300.8[c][10]; 8 NYCRR 200.1 [zz][6]).

The hearing record indicates that the student began receiving speech-language therapy services when he attended nursery school (Dist. Ex. 50 at p. 2). The student attended a district kindergarten inclusion class and received special class instruction for both language arts and math (id.). During his kindergarten year, he received occupational therapy (OT), speech-language therapy, and a psychological consultation (id.). For first grade through third grade, the student attended a private special education school (id.). The student began to attend Eagle Hill in September 2007 and he continued to attend Eagle Hill through the 2009-10 school year (Tr. p. 16; Dist. Ex. 50 at p. 2).

An August 2007 physical examination record was completed by a physician (Dist. Ex. 50 at pp. 22-24). According to the physician, the student had received diagnoses of an oppositional defiant disorder and an anxiety disorder (id. at p. 23).

An Eagle Hill speech-language report dated December 2007 described the student's progress in speech-language therapy and his speech-language goals (Dist. Ex. 50 at pp. 43-44). The student's long-term goals were to improve his receptive, expressive, and pragmatic language skills (id. at p. 43). To address the student's long-term goals, he received one weekly individual and two weekly small group (2:1) speech-language therapy sessions (id.). The speech-language pathologist indicated that the student had appropriately completed activities and was highly responsive to verbal direction and prompting during his individual therapy sessions (id.). However, the student had difficulty with peer interactions during group sessions including interrupting and dominating the conversation (id.). Specifically, the speech-language pathologist reported that the student was "less responsive to redirection and also present[ed] as highly sensitive to peer reactions and behaviors. His reaction to his peers [wa]s not always accurate and he require[d] intervention from the therapist to solve problems and to diffuse conflicts that often escalate[d] to an inappropriate tone and volume of voice." (id.). The speech-language pathologist used role-playing with the student to improve his social skills (id. at p. 44). According to the speech-language pathologist, the student's "ability to self-regulate and interrupt appropriately during sessions [wa]s emerging" (id.). The speech-language pathologist further reported that the student made progress in several areas, including gaining a better understanding of cause and effect relationships and abstract information (id. at p. 43). The speech-language pathologist recommended that the student's therapy sessions continue in order to improve his overall language skills (id. at p. 44).

In a letter to the parents dated February 8, 2008, the Eagle Hill headmaster recommended that the student continue at Eagle Hill for the 2008-09 school year (Parent Ex. G). According to the headmaster, the student had made academic and social progress but continued to require further remediation (id.). In a separate letter to the parents also dated February 8, 2008, the

headmaster enclosed an enrollment contract for the 2008-09 school year (Parent Ex. L). In February 2008, the parents executed an enrollment contract for the student to attend Eagle Hill for the 2008-09 school year (Parent Ex. H at pp. 1-2).

In April 2008, the student was assessed using the Stanford Diagnostic Reading Test, Fourth Edition (SDRT) and the Stanford Diagnostic Mathematics Test, Fourth Edition (SDMT) (Dist. Ex. 50 at pp. 50-51). The SDRT results included percentile ranks of 63 in vocabulary, 18 in comprehension, 17 in scanning, and 22 for the SDRT total (*id.* at p. 50). The skill areas in which the student met the testing criteria at or above the "Progress Indicator cutoff score" included synonyms, classification, word parts, content area words, functional reading, initial understanding, critical analysis, and process strategies (*id.*). The skill areas in which the student did not meet the testing criteria and were below the "Progress Indicator cutoff score" were recreational reading, textual reading, and interpretation (*id.*). The SDMT results included percentile ranks of 1 in concepts/applications, 2 in computation, and 1 for the SDMT total (*id.* at p. 51). The skill areas at or above the "Progress Indicator cutoff score" were graphs/tables, statistics/probability, addition of whole numbers, and multiplication facts (*id.*). The skill areas below the "Progress Indicator cutoff score" were number systems/numeration, whole numbers, rational numbers, problems solving, geometry/measurement, subtraction of whole numbers, multiplication of whole numbers, multiplication operations, and division of whole numbers (*id.*).

In a letter to the district's director of special services dated April 2, 2008, the parents requested that the Committee on Special Education (CSE) meet to develop an individualized education program (IEP) for their son (Dist. Ex. 37). By letter dated April 10, 2008, the director of special services indicated to the parents that a CSE meeting had not been scheduled because the student attended a private school located within another school district (Dist. Ex. 38). In an April 15, 2008 letter, the parents again requested a CSE meeting and indicated that they were willing to consider recommendations made by the CSE regarding an educational program and services for their son (Dist. Ex. 39).

The district sent the parents a letter dated May 8, 2008, entitled "Committee on Special Education Consent for Reevaluation" advising them of an upcoming reevaluation of the student and enclosed a reevaluation consent form (Dist. Ex. 40). On May 13, 2008, the parents signed the reevaluation consent form (Dist. Ex. 41).

On May 14, 2008, the parents completed a social history update of the student as part of the triennial review (Dist. Ex. 50 at pp. 20-21). The parents indicated that the student had a history of language and gross motor delays (*id.* at p. 21). The parents also indicated that the student had made progress at Eagle Hill, including progress in the area of social skills (*id.*).

On May 28, 2008, the district's speech-language pathologist conducted a speech-language evaluation of the student as part of the triennial review (Dist. Ex. 50 at pp. 2-5). Administration of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) yielded a core language standard score (percentile rank) of 82 (12), a receptive language standard score of 70 (2), an expressive language standard score of 96 (39), a language content standard score of 96 (39), and a language memory standard score of 80 (9) (*id.* at p. 3). The student's CELF-4 standard scores "reveal[ed] some scatter in abilities" (*id.* at pp. 3-4). The student exhibited weaknesses in the areas of language processing, including short-term memory deficits and

difficulty with processing complex directions (id. at p. 3). The student demonstrated "good" core vocabulary and the ability to follow rules regarding linguistic structure (id.). Although the student was able to formulate intact sentences, the sentences constructed by the student were restricted and lacked creativity (id.). The student performed in the overall average range in the areas of "semantic development, including vocabulary, concept and category development, comprehension of associations and relationships among words, interpretation of factual and inferential information presented orally, and the ability to create meaningful semantically and syntactically correct sentences" (id. at pp. 3-4). Regarding the student's performance on individual subtests, he demonstrated strength in the areas of formulating sentences, explaining word classes, and understanding spoken paragraphs (id. at p. 4). The student's areas of weakness included understanding concepts, following directions, recalling sentences, understanding word classes, giving word definitions, and forming semantic relationships (id.).

The speech-language pathologist indicated that the student needed reminders to listen and maintain focus, and that his success in testing was partially dependent upon his focus and attention (Dist. Ex. 50 at pp. 2, 4). Administration of the Listening Comprehension Test – 2 (LCT-2) yielded a total test standard score (percentile rank) of 93 (32), a standard score of 81 (10) on the main idea subtest, a standard score of 92 (31) on the details subtest, a standard score of 85 (16) on the reasoning subtest, a standard score of 104 (61) on the vocabulary subtest, and a standard score 105 (62) on the understanding messages subtest (id. at p. 4). The student's performance on the vocabulary and the understanding messages subtests were described as areas of strength, but he exhibited areas of weakness regarding his reasoning skills and his ability to understand the main idea through both reading and writing (id.). The student demonstrated age appropriate articulation skills including intelligibility and fluency of speech (id.). The speech-language pathologist concluded that the student presented with a receptive and expressive language disorder which negatively affected his ability to learn and recommended that the student continue to receive speech-language therapy to address language processing, comprehension of directionality, and sequencing skills, as well as his ability to express word classes and semantic relationships (id. at p. 5).

In a June 2008 letter to the parents, the Eagle Hill educational advisor described the academic and social/emotional progress the student exhibited during the 2007-08 school year (Dist. Ex. 50 at pp. 25-26). The advisor indicated that although the student was "nervous" upon introduction to new tasks, he learned to allow the teachers to explain the new material before believing the work was too difficult for him (id. at p. 25). The advisor also indicated that when provided with "reminders" from the teacher, the student was now able to wait until the conclusion of the teacher's explanation prior to asking a question (id.). According to the advisor, the student "was more willing to give new tasks a chance whereas earlier in the year, he would have become overwhelmed very quickly" (id.). The advisor indicated that the student was consistently prepared for class and completed his work (id.). According to the advisor, the student consistently attempted to improve his skills and to understand the material that confused him (id.). The advisor indicated that the student was a "very eager participant" and "an active listener," and that the student's interpersonal relationships were somewhat challenging but that "as the year progressed [he] was able to enjoy his peers more and to laugh along with them" (id. at p. 26). The student completed his homework on a consistent basis in a "thorough and accurate fashion" (id.). The advisor concluded her letter by indicating that the student was proud of his accomplishments and was motivated by the praise of his teachers (id.).

In June 2008, the student's Eagle Hill teachers prepared a progress report reflecting his academic and social/emotional curriculum, and the progress he exhibited during the 2007-08 school year (Dist. Ex. 50 at pp. 27-46). The student's teachers in tutorial, math, writing, literature, and history classes provided a description of their classes along with a list of instructional materials, teacher references, and instructional examples, as well as information regarding the student's progress (id. at pp. 27-42). In tutorial class, the student independently decoded third grade level material and decoded fourth grade level material with assistance (id. at p. 29). Regarding reading comprehension, the student identified pictures that illustrated events, predicted outcomes, identified character traits, and discriminated between relevant and irrelevant information (id. at p. 30). With assistance, the student summarized a story, made inferences, drew conclusions, and made reasonable emotional responses to reading (id.). The student used capitalization and ending punctuation and, with teacher assistance, wrote summary paragraphs (id.).

The June 2008 Eagle Hill progress report indicated that, with regard to math class, the student was able to read numerals, recognize and identify place value, and complete multi-digit addition and subtraction problems (Dist. Ex. 50 at p. 33). The student was able to multiply two and three digit numbers by one digit when provided with verbal cues (id.). He was able to use concrete and pictorial models to demonstrate the relationship between division and multiplication (id.). The student demonstrated the ability to identify shapes, measure length, read time on clocks, and interpret information on graphs when provided with cues and directed questioning (id. at p. 34).

The June 2008 Eagle Hill progress report also indicated that, with regard to writing, the student was able to write well spaced sentences, identify spelling errors, engage in proofreading, and write sentences containing compound subjects (Dist. Ex. 50 at p. 36). With regard to literature class, the student was able to recall facts/details and sequence events when provided with assistance as well as relate personal experiences to the reading material (id.). He had the ability to identify and create examples of literary concepts, illustrate words, and complete objective format vocabulary exercises (id.). With regard to history class, the student was able to utilize cardinal and intermediate directions, recognize models and symbols to present actual objects/places, and interpret map symbols using a legend (id. at p. 42). The student was able to locate his community, state, and nation on a map when provided with activities that were "anchored" to his background knowledge (id.). The student was able to read a timeline and compare and contrast objects (id.).

The Eagle Hill report dated June 2008 described the student's goals and progress in the area of "motor training" (Dist. Ex. 50 at pp. 45-46). The instructor indicated that the student received two sessions per week of motor training in a group of five students (id. at p. 45). The student's primary long-term goal was to increase his independence during small group social interactions, and his secondary goal was to improve his overall body strength and endurance (id.). According to the report, the student had shown frustration when "game situations present[ed] him with difficulty" but, when provided with teacher guidance and a break, he was usually able to regain his composure (id.). The instructor reported that the student demonstrated improvements in strength, fitness, and coordination, and that he responded well to instruction and correction (id. at pp. 45-46).

An undated Eagle Hill report described beneficial instructional strategies that were used at Eagle Hill for the student (Dist. Ex. 50 at pp. 47-48). The report reflected several instructional strategies including rephrasing information, cueing, provision of oral and written directions, a predictable daily routine, provision of an overview of the lesson prior to instruction, and use of charts, graphs and pictures to illustrate verbal information (id. at p. 47). Additional strategies included chunking, modeling, visual and oral instructional format, verbal praise, and multisensory activities (id. at p. 48).

An Eagle Hill report dated 2007-08 included results from individual standardized testing of the student (Dist. Ex. 50 at p. 52). To assess the student's reading and writing, the evaluator administered the Gray Oral Reading Test – Fourth Edition (GORT-4), the Slosson Oral Reading Test (SORT), and the ERB Writing Assessment Program (ERB WrAP) (id.). Administration of the GORT-4 (form A) in spring 2008 yielded the following grade equivalent scores (percentile rank): rate, 6.2 (75); accuracy, 6 (63); fluency, 6 (75); and comprehension, 4.2 (37) (id.). Administration of the GORT-4 (form B) in fall 2007 yielded the following grade equivalent scores (percentile rank); rate, 5.7 (75); accuracy, 6.7 (84); fluency, 6.4 (84); and comprehension, 3 (16) (id.). To assess the student's ability to read sight words in isolation, the evaluator administered the SORT in the spring 2008 and fall 2007 which yielded a standard score (grade equivalent) of 112 (7.1) and a 103 (5.1) respectively (id.). Administration of the ERB WrAP yielded a percentile rank (stanine) of 13 (3) with suburban school students as the normative group and 8 (2) with independent school students as the normative group (id.).

On June 11, 2008, an occupational therapist conducted a classroom observation of the student at Eagle Hill during social studies class as part of the triennial review (Dist. Ex. 50 at pp. 6-8). The occupational therapist reported that the teacher instructed the students using a "Jeopardy" style game as the students sat at their desks (id. at p. 7). The tasks involved in the game ranged from teacher directed to independent (id.). The student participated in the lesson but had some difficulty maintaining his attention (id.). He often interrupted the lesson by talking and asking questions, but with teacher redirection was able to "focus back on the activity" (id.). The occupational therapist indicated that the student "could initiate tasks with verbal cues from the teacher, but needed constant reminders to stay on task without interruptions" (id.). However, the occupational therapist also indicated that the student "could work independently with verbal cues from the teacher" (id. at pp. 7-8). The occupational therapist reported that the student demonstrated adequate handwriting ability (id. at p. 8).

On June 13, 2008, the district school psychologist conducted an assessment of the student as part of the triennial review (Dist. Ex. 50 at pp. 16-19). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a standard score (percentile rank) of 99 (47) in verbal comprehension, a standard score of 75 (5) in perceptual reasoning, a standard score of 88 (21) in working memory, a standard score of 83 (13) in processing speed, and a full scale IQ of 84 (14) (id. at p. 17). The school psychologist reported that the intersubtest scatter of the student's scores was indicative of "unevenness among his cognitive abilities" (id. at p. 18). The student's verbal reasoning and verbal comprehension abilities fell within the average range (id.). Overall, the student's skills were significantly weak in the area of perceptual reasoning (id. at pp. 18-19). The school psychologist reported that results of this evaluation were consistent with prior psychological testing completed in April 2005 (id. at p. 19).

In a June 18, 2008 meeting notice for an annual review, the CSE chairperson informed the parents of the date and time of the scheduled June 27, 2008 CSE meeting (Dist. Ex. 46). The parents were advised of their rights to participate fully in the decision making process, as well as their right to bring another individual to the meeting who had special knowledge or expertise regarding the student (id. at p. 1). The notice further indicated that a "Procedural Safeguards Notice" was attached (id.).

On June 25, 2008, a district special education teacher conducted an education evaluation of the student as part of his triennial review, which included administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), the GORT-4, and the Test of Written Language – 3 (TOWL-3) (Dist. Ex. 50 at pp. 9-15). Administration of the WJ-III ACH yielded a standard score (percentile rank) of 99 (48) in broad reading, a standard score of 107 (69) in basic reading skills, a standard score of 110 (75) in letter-word identification, a standard score of 93 (31) in reading fluency, a standard score of 97 (42) in passage comprehension, and a standard score of 103 (58) in word attack (id. at p. 10). On the spelling subtest, the student achieved a standard score (percentile rank) of 106 (66) (id. at p. 11). In the area of math, the student achieved a standard score (percentile rank) of 86 (17) in broad math, a standard score of 88 (21) in the math calculation skills cluster, a standard score of 83 (13) in the math reasoning cluster, a standard score of 93 (33) in calculation, a standard score of 74 (4) in math fluency, a standard score of 84 (14) in applied problems, and a standard score of 84 (14) in quantitative concepts (id. at pp. 12-13).

Administration of the Gray Oral Reading Tests – Fourth Edition (GORT-4) yielded a percentile rank of 63 in rate, 75 in accuracy, 63 in fluency, 25 in comprehension and a standard score (percentile rank) of 97 (42) for the oral reading quotient (Dist. Ex. 50 at p. 11). The special education teacher reported that the student "read[] fluently, with few errors, but his comprehension appeared compromised by the multiple choice format of this test" (id.).

Administration of the TOWL-3 yielded a percentile rank of 91 (above average) in contextual conventions, a percentile rank of 63 (average) in contextual language, and a percentile rank of 63 (average) in story construction (Dist. Ex. 50 at pp. 11-12). The special education teacher noted that the student utilized the entire 15 minutes allowed for the test, which included time spent rereading his story and completing edits (id.).²

As part of the education evaluation, the special education teacher determined that the student exhibited a relative strength in his ability to read sight words and decode unfamiliar words, as well as demonstrated the ability to read grade level material fluently and accurately

² As part of the education evaluation, the special education teacher reported the student's WJ-III ACH scores from his May 2007 assessment (Dist. Ex. 50 at p. 9). Administration of the WJ-III ACH in May 2007 yielded a standard score (percentile rank) of 94 (35) in broad reading, a standard score of 101 (52) in basic reading skills, a standard score of 99 (48) in letter-word identification, a standard score of 90 (26) in reading fluency, a standard score of 94 (35) in passage comprehension, and a standard score of 103 (58) in word attack (id. at p. 10). On the spelling subtest, the student achieved a standard score (percentile rank) of 98 (45) (id. at p. 11). With regard to math, the student achieved a standard score (percentile rank) of 87 (19) in broad math, 88 (22) in math calculation skills cluster, 89 (23) in calculation, 86 (18) in math fluency, and 85 (16) in applied problems (id. at pp. 12-13).

(Dist. Ex. 50 at p. 14). The student's skills in spelling and mechanics were areas of strength, and he exhibited a relative weakness in the area of math (id.).

On June 27, 2008, the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 51). Meeting attendees included the CSE chairperson, a district school psychologist, a district special education teacher, a district speech-language pathologist, a district regular education teacher, an additional parent member, and the student's parents (Dist. Exs. 50 at p. 1; 51 at p. 7). The student's Eagle Hill advisor participated in the meeting by telephone (id.). The June 2008 CSE considered the district's June 2008 educational and psychological evaluation reports, Eagle Hill's June 2008 educational progress report, the June 2008 classroom observation, the district's May 2008 speech-language evaluation report, the May 2008 social history update, the August 2007 physical examination report, the June 2007 OT evaluation report, and the July 2000 social history (Dist. Exs. 50 at pp. 2-48; 51 at p. 9).

The June 2008 CSE discussed the student's needs and developed present levels of performance in the areas of academic performance, social/emotional performance, and health and physical development (Dist. Ex. 51 at pp. 3-7). According to the resultant IEP, the student's academic management needs included a structured, small class for language arts and math (id. at p. 5). His academic management needs also included reading instruction primarily to address reading comprehension, as well as math instruction that included assistance with math vocabulary, multi-step problems, and math facts (id.). His social/emotional management needs included group instruction in social skills, guidance for initiating conversations, and reading social cues (id. at p. 6). The June 2008 IEP contained 48 annual goals in the areas of study skills, reading, writing, math, speech-language, social/emotional/behavioral, and motor (id. at pp. 10-18). The June 2008 IEP also included testing accommodations which provided for extended time (1.5); a [separate] location; directions read, repeated, and explained; and repetition of oral/listening comprehension questions (id. at p. 2).

The June 2008 CSE determined that the student was eligible for special education and related services as a student with a learning disability, and recommended an 8:1+1 special class for language arts and math, as well as one daily 45-minute session of individual resource room services (Dist. Ex. 51 at p. 1). The CSE also recommended a 3:1 aide during general education classes, specials, lunch, and recess for three 45-minute sessions per day (Tr. p. 269; Dist. Ex. 51 at p. 1). The CSE recommended that the student receive one 45-minute session per week of group counseling, one 45-minute session per week of individual OT, one 30-minute session per month of OT consultation, one 45-minute session per week of individual physical therapy (PT), one 30-minute session per month of PT consultation, two 45-minute sessions per week of group speech-language therapy within his special class, one 45-minute session per week of individual speech-language therapy, and adapted physical education (Dist. Ex. 51 at pp. 1-2).

In June 2008, the parents e-mailed the CSE chairperson requesting that the CSE include a recommendation regarding "[s]ummer tutoring" for their son (Dist. Ex. 49). The parents indicated that the student was currently receiving twice weekly 60-minute sessions of tutoring services from an Eagle Hill teacher to maintain his reading comprehension and math skills, as well as to avoid regression (id.).

By letter dated July 10, 2008, the CSE chairperson informed the parents that the June 2008 IEP indicated that during the June 2008 CSE meeting, the district did not review the student's eligibility for extended school year (ESY) services, but that the district would reinstate ESY services in the form of two 45-minute sessions per week of individual speech-language therapy services at the parents' request (Dist. Ex. 56). The CSE chairperson also informed the parents that the student had no specific entitlement to academic tutoring during July and August 2008 because the student's August 2007 IEP did not provide for such services (id. at p. 1).

On July 18, 2008, the parents e-mailed the CSE chairperson indicating that upon review of the June 2008 IEP they had difficulty understanding how all of the recommended services would be able to be provided during the school day (Dist. Ex. 57). Therefore, the parents requested the district provide them with a "sample detailed prototypical program that would represent each of the days in a typical week" (id.). Additionally, the parents indicated that they were misquoted on the June 2008 IEP and would like the student's June 2008 IEP to reflect that they challenged the CSE's proposed program at the CSE meeting (id.).

In a letter dated July 24, 2008, the assistant director of special services responded that the district made the correction to the June 2008 IEP as requested by the parents and included a copy of the revised IEP and proposed program schedule (Dist. Ex. 58 at pp. 1-19).

In a letter to the assistant director of special services dated August 15, 2008, the parents again opined that the level of services recommended by the June 2008 CSE would not be able to be provided in a school week (Dist. Ex. 59). The parents noted several differences between the recommended program as indicated on the student's IEP and the program schedule (id. at p. 1). The parents indicated that the student would return to Eagle Hill in fall 2008 and that they would seek tuition reimbursement for Eagle Hill and reimbursement for summer 2008 tutoring (id. at p. 2).

By letter dated August 29, 2008, the assistant director of special services provided the parents with clarification regarding their concerns (Dist. Ex. 61). The assistant director of special services indicated that within the student's schedule he would receive the recommended amount of related services and that the student would receive social skills training (id. at p. 1). Additionally, the assistant director of special services indicated that the student's study skills annual goals would be addressed by multiple instructors (id. at pp. 1-2). The assistant director of special services enclosed a revised schedule and a procedural safeguards notice for the parents (id.). Additionally, the assistant director of special services indicated that the student's schedule would be revised as needed in accordance with the student's IEP and related needs (id. at p. 2).

In a letter to the assistant director of special services dated September 30, 2008, the parents indicated that they "remain[ed] unhappy" with the proposed program for their son and that the district did not adequately address their concerns (Dist. Ex. 62). The parents also indicated that they reserved the right to retain an attorney and file for an impartial hearing (id.).

A December 2008 Eagle Hill progress report prepared by the student's teachers reflected the student's academic and social/emotional progress (Dist. Ex. 63 at pp. 1-15). The student's tutorial, math, writing, literature, and science teachers provided a description of their classes along with a list of instructional materials, teacher references, instructional examples, and

information about the student's progress (id.). The student's tutorial teacher indicated that the student decoded fourth grade level material, recalled facts, identified main ideas, identified supporting details, and sequenced events (id. at p. 2). The student spelled sight words and multisyllabic words with assistance from the teacher (id.). The student predicted outcomes, made connections, developed opinions about characters, defined vocabulary words, used capitalization, used ending punctuation, and wrote complete sentences (id. at p. 3). The student's math teacher reported that the student demonstrated an understanding of math vocabulary, sorted by attributes and numbers, recognized and extended patterns, solved a problem, and checked the validity of his responses (id. at p. 6). He completed multi-digit addition problems and multi-digit subtraction problems with regrouping (id.). The student multiplied two and three digit numbers by one digit with regrouping, identified coin values, and read/wrote money symbols (id. at pp. 6-7). The student's writing teacher indicated that the student wrote using appropriate spacing, and that he wrote in cursive with assistance (id. at p. 9). He wrote simple sentences and single paragraphs as well as proofread for capitalization rules (id.). According to the student's literature teacher, the student identified literary concepts, made predications, and related personal experiences to reading (id. at p. 12). The student's science teacher reported that the student identified and defined vocabulary terms, recognized and applied scientific method of inquiry, and discriminated fact from opinion (id. at p. 15).

The December 2008 Eagle Hill progress report described the student's speech-language goals and progress in speech-language therapy (Dist. Ex. 63 at p. 16). The student's long-term goals were to improve his receptive, expressive, and pragmatic language skills (id.). The speech-language pathologist noted that the student continued to act impulsively by interrupting instruction and having conversations during class and therapy sessions, but that he was "highly responsive to verbal prompting" (id.). However, the speech-language pathologist also noted that the student's responsiveness to teacher correction continued to be inconsistent (id.). The speech-language pathologist reported that "[a]t times he demonstrate[d] the tendency to defend his responses verbally and require[d] constant redirection to accept the teacher's instruction" (id.). The student's ability to comprehend questions that involved high level reasoning continued to be an area of weakness (id.). He demonstrated improvement in his ability to provide multiple solutions to a given problem with minimal guided questioning (id.). The primary focus of therapy was to generalize learned skills to the classroom setting (id.).

In a letter to the student's parents dated January 29, 2009, the Eagle Hill headmaster recommended that the student continue at Eagle Hill for the 2009-10 school year (Parent Ex. B). According to the headmaster, the student had made academic and social progress but continued to require further remediation (id.). The headmaster attached a school contract for the 2009-10 school year for the parents to sign and return to Eagle Hill (id.). In February 2009, the student's parents signed the Eagle Hill enrollment agreement for the 2009-10 school year (Dist. Ex. C at pp. 1-2).

A district CSE chairperson sent the parents a notice dated February 3, 2009, entitled "Parent Unilateral Placement Planning for Annual Review," requesting that the parents complete an enclosed planning form to prepare for the student's annual review (Dist. Ex. 19). The chairperson informed the parents that even though their child attended a private school, they had a right to an annual review for the student (id. at p. 1). The chairperson indicated that the parents would be notified regarding the date/time/place of the meeting, and that the "parent unilateral

placement planning for annual review" form and a procedural safeguards notice were attached (id. at pp. 1-3). In April 2009, the parents signed and returned the parent unilateral placement planning for annual review form (Dist. Ex. 21). The signed form allowed for the exchange of information between the district and Eagle Hill (id.). Additionally, the form allowed the CSE to observe the student at Eagle Hill and for Eagle Hill staff to attend the student's annual review (id.).

In a May 5, 2009 meeting notice for an annual review, the CSE chairperson informed the parents of the date and time of the scheduled June 5, 2009 CSE meeting (Dist. Ex. 22). The parents were advised of their rights to participate fully in the decision making process, as well as their right to bring another individual to the meeting who had special knowledge or expertise regarding the student (id. at p. 1). The notice further indicated that a "Procedural Safeguards Notice" was attached (id. at pp. 1-2). A second meeting notice was sent to the parents on May 26, 2009, indicating that the student's CSE subcommittee meeting was rescheduled for June 8, 2009 (Dist. Ex. 23 at pp. 1-2).

On May 7, 2009, the district special education teacher conducted a 40-minute classroom observation of the student at Eagle Hill during a math class that consisted of five students (Dist. Ex. 31). The special education teacher indicated that the student "infrequently" exhibited difficulty in following classroom procedures and "never" exhibited difficulty with organizational skills (id. at p. 1). The student "sometimes" appeared distractible and exhibited disruptive behavior (id.). He "often" exhibited an ability to work independently and "never" exhibited difficulty in changing tasks (id.). According to the special education teacher, the student "sometimes" exhibited appropriate peer relations and "often" exhibited an appropriate relationship with the teacher (id.).

In her classroom observation report, the special education teacher indicated that the student's teacher and the student discussed the homework assignment on the topic of "finding area" (Dist. Ex. 31 at p. 2). The teacher and student further discussed the homework and the student corrected an error he had made (id.). The teacher reviewed the homework assignment with the class (id.). As the teacher was presenting her lesson to the class, the student called out several times and was reminded to raise his hand (id. at pp. 2-3). The student continued to complete the math problems along with class until the lesson was completed (id. at p. 3).

On June 8, 2009, a subcommittee of the CSE convened for the student's annual review and to develop his IEP for the 2009-10 school year (Dist. Ex. 12). Meeting attendees were the subcommittee chairperson, a district school psychologist, a district special education teacher, a regular education teacher, a speech-language pathologist, and the student's mother (Dist. Exs. 12 at p. 9; 30). The student's father, the Eagle Hill advisor, and the student's Eagle Hill tutorial teacher participated in the meeting by telephone (id.). The June 2009 CSE subcommittee considered the May 2009 classroom observation, the December 2008 Eagle Hill progress report, the December 2008 Eagle Hill speech-language progress summary, the district's June 2008 educational and psychological evaluation reports, the district's May 2008 speech-language evaluation report, the May 2008 social history update, the August 2007 physical examination report, and the June 2007 OT evaluation report (Dist. Exs. 12 at p. 10; 50 at pp. 2-5, 9-19, 20-24; 63 at pp. 1-16). The June 2009 CSE subcommittee determined that the student was eligible for special education programs and services as a student with a learning disability (Dist. Ex. 12 at p.

1). The June 2009 CSE subcommittee discussed the student's needs and developed present levels of performance in the areas of academic performance, social/emotional performance, and health and physical development (id. at pp. 3-9). The student's academic, social/emotional, and physical development management needs included methods of addressing the student's needs in the areas of reading, math, writing, social skills, anxiety, and motor skills (id. at pp. 5-9). The resultant June 2009 IEP contained 47 annual goals in the areas of study skills, reading, writing, math, speech-language, social/emotional/behavioral, and motor skills (id. at pp. 11-19). The resultant June 2009 IEP also included testing accommodations which provided for extended time (1.5), a separate location, directions read, repeated, and explained, and repetition of oral/listening comprehension questions (id. at p. 2).

The June 2009 CSE recommended that for the 2009-10 school year the student receive a 12:1 special class program for language arts, math, science, and social studies (Dist. Ex. 12 at p. 1). The student was recommended to receive related services of one counseling session per week in a group of five for 45 minutes, one OT session per week individually for 45 minutes, one OT consultation session per month for 30 minutes, one PT session per week individually for 45 minutes, one PT consultation session per month for 30 minutes, two speech-language therapy sessions per week in a group of five within his special class for 45 minutes, one speech-language therapy session per week individually for 45 minutes, and adapted physical education (id. at pp. 1-2). The student's program modifications and accommodations included providing refocusing and redirection; preferential seating; information in small sequential units; checking for understanding; repeating oral directions; additional time to process responses; teaching abstract concepts concretely; clarifying directions; use of graphic organizers; and use of visuals and/or manipulatives (id. at p. 2). The June 2009 CSE subcommittee also considered, but rejected, placing the student in a general education setting with support services and a full-time special day school program (id. at p. 11).

On June 12, 2009, the CSE chairperson sent the IEP annual goals to the student's Eagle Hill adviser, with a request that the advisor revise the student's annual goals as needed. By facsimile dated June 26, 2009, the Eagle Hill adviser returned the student's revised June 2009 IEP annual goals to the CSE chairperson (Dist. Ex. 26 at pp. 1-9). The Eagle Hill adviser indicated that she would provide the district's proposed annual goals related to motor skills to the motor training teacher (id. at p. 8). By facsimile dated July 13, 2009, the Eagle Hill motor training teacher provided the district with the revised motor annual goals for the June 2009 IEP (Dist. Ex. 27 at pp. 1-3). The hearing record reflects that the revisions provided by the staff of Eagle Hill were included in the June 2009 IEP (Dist. Ex. 32 at pp. 10-18; see Dist. Exs. 26; 27).

The district sent the parents a Committee Recommendation for Continuation of Services letter dated July 27, 2009, along with the student's June 8, 2009 IEP (Dist. Ex. 32 at pp. 1-18). In a second letter to the student's parents dated July 27, 2009, the assistant director of special services indicated that the district had worked collaboratively with Eagle Hill to develop the annual goals for the June 2009 IEP as discussed at the June 2009 CSE subcommittee meeting (Dist. Ex. 33 at p. 1). The assistant director of special services also indicated that the June 2009 IEP and sixth grade class profiles were attached (id. at pp. 1-3).

On April 15, 2010, the district school psychologist conducted an observation of the student at Eagle Hill during his math class (Dist. Ex. 11). The school psychologist reported that

the student participated in the lesson, interacted with a peer, and "often commented aloud while working" (*id.* at pp. 1-2). The school psychologist noted that the student appeared distracted while the teacher reviewed a long division problem, and that the student appeared to be "off task" at one time (*id.* at p. 1).

On April 23, 2010, a physical therapist conducted a PT initial evaluation of the student (Dist. Ex. 10).³ The physical therapist reported that the student did not exhibit significant weaknesses in the areas of range of motion, posture, gait, gross motor, strength, muscle tone, endurance, balance, equilibrium, and coordination that would negatively affect his safety or ability to fully participate in the school setting (*id.* at pp. 1-2). The physical therapist reported that the student would benefit from participation in activities that would "fine tun[e]" his gross motor skills and recommended that he continue to participate on the cross-country running team and in the motor training program (*id.* at p. 2).

The parents filed a due process complaint notice dated May 7, 2010, alleging that the student was denied a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years (Dist. Ex. 1). Specifically, among other things, the parents alleged that the recommended programs were inappropriate for the student; would not confer a meaningful educational benefit to the student; were too large in physical size and in the number of students enrolled; contained a widely varying range of students and functioning levels; and would be extremely distracting to the student due to the unpredictable and varying settings of the programs (*id.* at p. 2). The parents alleged that the student would be subjected to large disorderly crowds and forced into noisy and highly distracting and anxiety inducing situations (*id.* at p. 3). They stated that placing the student in a program containing a widely varying student body, such as those proposed by the district, would have negative effects on the student, as well as his peers, and that the student needed constant special education support in a small, highly structured and predictable academic program (*id.*). The parents alleged that the recommended programs did not offer the student the continuous special education support that he required throughout the entirety of the school day, and that the student's program must only include peers with similar disabilities to eliminate stress associated with low self-esteem (*id.*). The parents alleged that the student required a more stable academic environment than offered by the district, and that the student would become overwhelmed in the programs offered by the district (*id.* at pp. 3-4). The parents further alleged that the student required a fully comprehensive and highly individualized, fully integrated, full-time special education program, with a continuous small student-to-teacher ratio throughout the entirety of every school day, in a small specialized school (*id.* at p. 4). The parents stated that the student was incapable of gaining any meaningful academic progress in a large public school environment and that the programs offered by the district were completely inappropriate for the student, who is not prepared for a mainstream environment (*id.* at p. 8). The parents maintained that the student needed a program with fewer pull out services in order to make any meaningful progress, with more of his related services integrated into the classroom for him to learn how to apply the strategies that he learned during his therapy sessions into the classroom (*id.* at p. 9).

³ It is not clear from the hearing record whether a district or private physical therapist conducted the PT evaluation (*see* Dist. Ex. 10). Although, the evaluation was described as an "initial" evaluation the student was already receiving PT (Dist. Exs. 12; 51).

The parents alleged that Eagle Hill was an appropriate placement for the student, and that the student's progress in the program at Eagle Hill illustrated the student's need for a full-time, highly structured, intensive special education program (Dist. Ex. 1 at pp. 10-12). As for a resolution, the parents proposed, among other things, that they be reimbursed for tuition and other related educational expenses and services provided to the student during the 2008-09 and 2009-10 school years (id. at p. 13).

The district responded to the parents' due process complaint notice, generally denying the allegations therein and specifically addressing the student's 2008-09 and 2009-10 school year IEPs (Dist. Ex. 2). The district stated that its responses were provided in order to clarify and narrow the issues in preparation for a resolution session (id. at p. 8).

A resolution session was scheduled for May 19, 2010, and the parents indicated that they would attend the session (Dist. Exs. 5; 6).

An impartial hearing convened on July 21, 2010 and concluded on August 19, 2010 after four days of proceedings (Tr. pp. 1-641).

In a decision dated November 4, 2010, the impartial hearing officer determined that the student's IEPs for the 2008-09 and 2009-10 school years accurately and comprehensively set forth the student's testing results, described his current levels of performance, and identified his special education needs, as well as correctly summarized the areas in which the student experienced special education needs (IHO Decision at p. 43).

Regarding the 2008-09 school year, the impartial hearing officer found that the evidence established that the district offered the student a FAPE (IHO Decision at p. 46). Specifically, she found that small classes for language arts and math with instruction and support provided by a special education teacher and support provided by an aide were "precisely the type of classes and supports [that the student] needed to address his academic and language (particularly comprehension) delays" (id. at p. 44). The impartial hearing officer determined that the student would have the support of an aide for larger mainstream classes of science and social studies (id.). She found that the recommended resource room would have provided the student with "an additional and important level of support to address [his] academic delays and assist with skill development, organization and transition," and that his IEP included an "extensive array of program modifications to be implemented by [the student's] teachers that would have addressed his learning needs and his behavioral needs in the classroom" (id. at p. 45). The impartial hearing officer opined that, considering the student's scores on the WJ-III ACH, the WISC-IV, and Eagle Hill testing, the CSE "could reasonably conclude that [the student] could function in a program with the totality of [these] types and levels of support" (id.). Additionally, the impartial hearing officer determined that the recommended "lunch time social skills group" counseling with the school psychologist would have addressed the student's social skills IEP goals (id.). Although the 2008-09 recommended program did not provide the full-time small special education environment that the parents believed the student needed, the impartial hearing officer determined that the program offered was sufficient under the Individuals with Disabilities Act (IDEA) to meet the statutory standard of an appropriate education for the student (id. at p. 46). She denied the parents' request for tuition reimbursement for the 2008-09 school year (id. at p. 55).

Regarding the 2009-10 school year, the impartial hearing officer found that the evidence established that the district did not offer the student a FAPE (IHO Decision at p. 48). She observed that the district did not provide justification for changing the student's special class size from eight students to twelve students, and without the support of a classroom aide, other than to state that it was recommended to foster the student's independence (id. at p. 47). The impartial hearing officer determined that the student "was not ready for such independence . . . and still required the supports of smaller classes and more direct teacher attention" (id.). She also observed that the student would have lost his mainstreaming for science and social studies, which she found to be legitimately based on the explanation that the student would not have been able to meet the more rigorous academic demands of sixth grade in a large general education class, and she found that the student still would have needed some additional support (id.). The impartial hearing officer noted that, without explanation, the CSE had eliminated the student's recommended 1:1 resource room (id.). She found that the hearing record was sparse regarding the description of the sixth grade program at the district's middle school and how the student's IEP would have been implemented in that program (id. at p. 48).

Turning to the parents' unilateral placement of the student for the 2009-10 school year, the impartial hearing officer found that the evidence supported that Eagle Hill was appropriate for the student (IHO Decision at p. 49). Reasons cited by the impartial hearing officer include: small classes; intensive instruction in language and reading comprehension skills; a predictable educational environment to minimize the student's anxiety; multisensory teaching techniques; push-in and pull-out speech and language therapy services; classes that targeted the student's specific academic needs; teachers in small classes that were able to, and did, closely monitor the student's attentiveness and frequently and immediately redirect him to an appropriate task and ensure that he was comprehending the material presented; teachers that paced instruction and the introduction of new material so as not to overload the student; skills modeled for the student; guided practice of new skills; concepts introduced individually; assignments broken-down for the student; prepared outlines to assist the student in note-taking; and the reviewing and reinforcing of previously taught skills and material (id. at pp. 49-50). The impartial hearing officer also found that Eagle Hill provided the student with a homeroom period to assist him in preparing for his day, a call-back period to provide the student with additional help in an academic class or structured time to work on social skills under the supervision of his advisor, and a structured lunch period to work on language and social skills (id. at p. 50). She determined that Eagle Hill specifically and directly addressed the student's pragmatic language deficits and social skills deficits on a daily basis, addressed the student's impulsivity in the classroom through both verbal and nonverbal cues, addressed the student's inclination to perseverate on extraneous details, and responded to the student's various levels of anxiety with prompt positive feedback (id.). The impartial hearing officer found that the student made "slow but discernable progress in line with his significant attentional problems, learning difficulties, impulsivity and anxiety;" improved his ability to complete his academic work and work in groups of students; improved his decoding and reading comprehension skills; learned to complete independently multi-digit addition and subtraction problems with regrouping; learned multi-digit multiplication and division with regrouping; improved his written work; made progress in spelling and the use of punctuation; progresses in the areas of attention, vocabulary, receptive and expressive language, and comprehension; and improved his ability to maintain self-control in a small group setting (id. at p. 51). Upon considering the hearing record as a whole and the student's range of identified

special educational needs, the impartial hearing officer concluded that the student had made progress while attending Eagle Hill (*id.* at p. 52). The impartial hearing officer also determined that the student demonstrated "normal pre-adolescent anxieties" that have been "exacerbated by his existing anxiety and recognition that he has learning difficulties," but that the teachers at Eagle Hill were acutely aware of the student's needs and his anxieties could be managed to the degree where he was available for learning (*id.* at p. 52-53).

The impartial hearing officer determined that the parents cooperated with the district and provided sufficient notice to the district of their intent to unilaterally place the student at Eagle Hill (*id.* at pp. 53-54). The impartial hearing awarded tuition reimbursement to the parents for the 2009-10 school year (*id.* at pp. 55).

This appeal ensued. The parents appeal that part of the impartial hearing officer's decision which found that the district offered the student a FAPE for the 2008-09 school year and denied their request for the student's 2008-09 tuition at Eagle Hill. Regarding the program offered to the student by the district for the 2008-09 school year, the parents allege that (1) the impartial hearing officer erred in refusing to consider the district's compliance with procedural requirements; (2) the IEP created for the student failed to address the complexity of the student's needs, or recommend an appropriate program; and (3) the proposed placement for the 2008-09 school year constituted a denial of a FAPE.

With respect to the impartial hearing officer's alleged failure to consider the parents' arguments that the student's anxiety was not addressed through his IEP and his recommended program, and that adequate documentation was not reviewed at CSE meetings, the parents contend that these issues were properly before the impartial hearing officer because the parents' due process complaint notice put the district on notice of the parents' allegations, the parents raised procedural matters on direct examination without objection from the district, and the district elicited further information regarding sufficiency of documentation and the student's medication. The parents allege that, had the impartial hearing officer properly addressed these procedural issues, she would have found that the district's violations resulted in a denial of a FAPE.

With regard to 2008-09 IEP, the parents assert that the district failed to address the complexity of the student's needs or recommend an appropriate program. The parents allege that the IEP failed to accurately describe the extent of the student's diagnoses, history of medication, or how his anxiety affects him in the classroom. According to the parents, the district failed to create goals addressing that significant area of need for the student, that the IEP was lacking a behavioral intervention plan to manage the student's behaviors in the classroom, and that the recommended class was inappropriate given the student's distractibility problems and pervasive language difficulties.

The parents also assert that the proposed placement for the 2008-09 school year constituted a denial of a FAPE, alleging that even if the district had produced a valid IEP for the student, the district was unable to provide the student with an appropriate education consistent with the 2008-09 IEP. The parents assert that the 2008-09 IEP recommendations differ significantly from the program offered to the student, that the district failed to demonstrate that the class presented at the impartial hearing was the class that was recommended for the student;

that the district failed to demonstrate how instruction would be modified to specifically address the student's needs in language and math; that the student would not have been grouped with similarly functioning peers; that there was no indication that the student's distractibility would have been addressed in the general education classroom; that the district failed to demonstrate how the student's academic needs would have been met in the general education classroom; that the district failed to describe the implementation of the modifications on the student's IEP; that the student would not have adequate social support; that the program did not have the structure that the student required; and that the impartial hearing officer erred in finding that, based on the student's test scores, the district could reasonably conclude that the student could function in the recommended program.

The parents allege that they met their burden of establishing that Eagle Hill was an appropriate unilateral placement for the student by demonstrating that Eagle Hill addressed all of the student's academic, social, and emotional needs. They also argue that equitable considerations support an award of tuition reimbursement because the parents cooperated with the district and provided the district with sufficient notice of their concerns and their intent to unilaterally enroll the student at Eagle Hill and seek tuition reimbursement.

The district submitted an answer in which it denies many of the allegations in the petition and asserts that the parents have proffered a distorted view of the hearing record, that the parents have failed to meet their burden of proof that Eagle Hill was an appropriate placement for the student for the 2008-09 school year, and that the equities do not support an award of reimbursement to the parents for the 2008-09 school year. The district also cross-appeals from the portion of the impartial hearing officer's decision relating to the 2009-10 school year that determined that the district did not offer the student a FAPE, Eagle Hill was an appropriate placement for the student, and equitable considerations favored an award of tuition reimbursement for the parents, and the portion of the decision that ordered the district to reimburse the parents for the cost of tuition at Eagle Hill for the 2009-10 school year. Regarding the 2009-10 IEP, the district alleges that the impartial hearing officer failed to consider evaluations, test scores, observations, and reports available to the CSE at the time the student's IEP was promulgated; that the impartial hearing officer substituted her judgment for that of educational specialists; that the testimony of the parents' witnesses was not relevant to the CSE's recommendations; and that the placement offered to the student was the least restrictive environment (LRE).

The district further alleges that Eagle Hill was not an appropriate placement for the student and, in particular, that the student did not make meaningful progress and lost gains previously made, that Eagle Hill failed to provide the student with mandated services, and that Eagle Hill did not provide the student with access to typical peers. The district also alleges that equitable considerations do not favor an award of reimbursement to the parents because the parents did not cooperate with the school district and, instead, intentionally obstructed the district's efforts to provide the student with a FAPE. The district requests that the impartial hearing officer's decision be reversed with respect to the 2009-10 school year.

The parents submitted an answer to the district's cross-appeal in which they deny many of the district's allegations.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388

[S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

Upon review of a claim that a district has failed to implement a student's IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007). It has been held that a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]).

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

of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Turning first to the parent's contention that the impartial hearing officer failed to address alleged procedural defects, the hearing record shows that after the impartial hearing concluded, the parents argued in their closing brief that the district failed to consider adequate documentation in the development of the student's 2008-09 IEP (Pet'r Post-Hr'g Br. at pp. 2-4). The hearing record does not show that a lack of adequate evaluative information before the June CSE for the purpose of developing the student's IEP was a reasonably identifiable area of concern in the parents' due process complaint notice and, therefore, I find no reason to disturb the impartial hearing officer's decision with regard to this issue (see Dist. Ex. 1; Application of a Student with a Disability, Appeal No. 08-015 [holding that the scope of issues determined in an impartial hearing is limited to those raised in the requesting party's due process complaint notice absent an agreement with the opposing party to add new issues or permission of the impartial hearing officer, and that waiver of this principle is not provided for in State regulations]).

Turning next to the merits of the parties contentions, upon an independent review of the hearing record and due consideration, I find that the evidence presented in this matter supports the conclusion that the student's 2008-09 recommended program and services were designed to confer educational benefits upon the student and that the district offered the student a FAPE for that year. In considering the appropriateness of the district's recommended program for the student for the 2008-09 school year, I agree with the impartial hearing officer's determination that the student's June 2008 IEP accurately and comprehensively set forth the student's testing results, described his current levels of performance, and identified his special education needs (see IHO Decision at p. 43). As noted above, the June 2008 CSE considered the district's June 2008 educational and psychological evaluation reports, Eagle Hill's June 2008 educational progress report, the June 2008 classroom observation, the district's May 2008 speech-language evaluation report, the May 2008 social history update, the August 2007 physical examination report, the June 2007 OT evaluation report, and the July 2000 social history (Dist. Exs. 50 at pp. 2-46; 51 at p. 9). The hearing record illustrates that the student demonstrated difficulty with math, reading comprehension, anxiety, social skills, impulsivity, attention, and motor skills, as well as receptive, expressive, and pragmatic language (Tr. pp. 35-37, 233, 509, 617; Dist. Ex. 50). The June 2008 IEP described the student's academic and social/emotional/behavioral needs (Dist. Ex. 51 at pp. 3-7).⁴ According to the present levels of functional performance and academic achievement on the June 2008 IEP, the student demonstrated average verbal reasoning abilities and borderline nonverbal reasoning abilities (*id.* at p. 3). In the area of reading, the student exhibited a relative strength in his ability to decode words and read sight words, but had difficulty with reading comprehension (*id.*). With regard to math, the June 2008 IEP indicated that the student's testing performance was in the below average range in the areas of computation, math fluency, concepts, and applications (*id.* at p. 4). In the area of speech-language, the student exhibited strength in understanding vocabulary and messages, but demonstrated weaknesses in his reasoning abilities and his understanding of the "main idea" (*id.*). The June 2008 IEP indicated that, regarding his present levels of social/emotional

⁴ The student's parents contend that the district "chose not to utilize" the student's June 2007 neuropsychological evaluation summary at any of the CSE meetings (Dist. Ex. 1 at p. 5). The district asserts that the parents did not provide the district with any additional reports from psychologists or other mental health professionals (Tr. p. 467).

performance, the student demonstrated difficulty with interpersonal relationships and experienced anxiety related to school performance for which he needed reassurance and encouragement (id. at p. 6). The student's academic and social/emotional management needs included a structured, small class setting for English language arts (ELA), math, and social skills training (id. at pp. 5-6). According to the June 2008 IEP the student exhibited delays in visual-motor skills, motor planning and coordination difficulties, and weaknesses in balance and strength (id. at p. 7). Based on the student's evaluative information that was available to the June 2008 CSE, I find that the student's 2008-09 IEP accurately described the student's academic, social/emotional/behavioral, and motor needs.

Additionally, the hearing record reflects that the annual goals contained in the student's June 2008 IEP specifically targeted the student's identified needs (Dist. Ex. 51 at pp. 10-18). For example, the IEP included annual goals designed to assist the student in improving reading comprehension by reading, paraphrasing, making verbal statements, and answering questions regarding the main idea of a passage (id. at pp. 11-12). The IEP included annual goals targeting the student's anxiety and impulsivity that required the student to maintain his attention during individual and small group activities, and to use strategies such as self-talk to reduce test anxiety (id. at pp. 10-11). With respect to math, the student's annual goals required the student to identify patterns in five number sequences, learn addition and subtraction facts, and solve both single digit multiplication problems and math word problems (id. at pp. 13-14). In the area of speech-language, the IEP included annual goals that targeted receptive, expressive, and pragmatic language skills (id. at pp. 14-15). Regarding the student's social/emotional/behavioral needs, the IEP included annual goals that required the student to interact in a socially acceptable manner with peers and to reduce calling out in class (id. at p. 16). To address the student's motor needs, the June 2008 IEP offered annual goals to improve the student's copy, keyboard, balance, coordination and ball-handling skills; and increase his endurance (id. at pp. 16-18).

To address the student's needs, the June 2008 CSE recommended that the student attend an 8:1+1 special class for ELA and math, as well as receive one 45-minute session per day of individual resource room services (Dist. Ex. 51 at p. 1). The CSE recommended three 45-minute periods per day of 3:1 aide services during general education classes, specials, lunch, recess, and adapted physical education (Tr. p. 269; Dist. Ex. 51 at p. 1). Also recommended for the student was one counseling session per week in a group of five for 45 minutes, one OT session per week individually for 45 minutes, one OT consultation session per month for 30 minutes, one PT session per week individually for 45 minutes, one PT consultation session per month for 30 minutes, two speech-language therapy sessions per week in a group of five within his special class for 45 minutes, and one speech-language therapy session per week individually for 45 minutes (Dist. Ex. 51 at pp. 1-2). Program modifications included refocusing and redirection; preferential seating; information presented in small, sequential units; checking for understanding; repetition of oral directions; provision of additional time to process responses; teaching abstract concepts concretely; clarification of directions; and use of graphic organizers, visuals, and manipulatives (id. at p. 2).

The hearing record reflects that during the 2008-09 school year, when he would have been in fifth grade, the student would have been supported by a "team" of staff that included a special education teacher, two regular education teachers, and an aide (Tr. p. 144). Additionally, the hearing record shows that the district's regular education and special education teachers

collaborated to provide differentiated instruction to students, and that the special education teachers modified instructional materials based upon students' individual needs (Tr. pp. 165, 301-02, 305-07). Testimony at the impartial hearing revealed that either a special education teacher or an aide assisted students during science, social studies, homeroom, and transitions between classes (Tr. pp. 144-45, 150, 305).⁵ The hearing record also shows that the student would have been provided a 3:1 aide during science and social studies classes and that the student would have received resource room on an individual basis to provide additional support (Tr. p. 267-69; Dist. Ex. 51 at p. 1). To address the needs of students in the general education science and social studies classes, the special education teacher and/or special education program aide would have provided small group instruction and modified instructional materials (Tr. p. 163; Dist. Ex. 51 at pp. 2, 9). Testimony by a district fifth grade regular education teacher indicated that the students were provided with opportunities to show their independence, and that they were offered assistance when it was needed (Tr. p. 164).

The June 2008 CSE recommended that the student attend a special class in ELA and math based, in part, on the results of the district's June 2008 education assessment of the student (Tr. p. 222; Dist. Ex. 50 at pp. 9-15). According to a district fifth grade special education teacher, the student needed "a different way of being taught" and additional individual instruction in ELA and math (Tr. p. 222). Testimony from a district fifth grade regular education teacher and a district special education teacher illustrated how district staff offered program modifications and accommodations consistent with those contained in the student's June 2008 IEP. The regular education teacher stated that students are provided with academic strategies regarding reading comprehension, following directions, and note taking (Tr. pp. 163-65). To address a student's calling out behavior, students are provided with verbal cues, manipulative "chips" to track student questions/comments, a "silent signal" by teachers, and sticky notes for student's to write down their questions (Tr. pp. 169-70). The regular education teacher further testified that the students are provided with verbal and visual cues to assist them during transitions (Tr. pp. 152-53). To address student behavior, including impulsivity, the district offers students behavioral contracts, breaks, choices/options regarding instructional activities, a token system, cues, material broken down, and communication with parents (Tr. pp. 298-99). Calling out behavior is addressed based on a student's needs and the function of the behavior (Tr. pp. 309-10). Based on the foregoing, I find that the district was able to offer program modifications and accommodations that were appropriate to address the student's needs as identified in the student's 2008-09 IEP, and that the student did not require a behavioral intervention plan (see Dist. Ex. 51 at pp. 2-7).

With respect to the student's social/emotional needs, the 2008-09 IEP offered weekly counseling sessions during which the student's annual goals could be addressed (Tr. p. 325). Group counseling was available to the student during lunch once a week to address his needs in areas such as attention, impulsivity, anxiety, and social skills (Tr. pp. 323-24). The hearing record reflects that a district elementary school psychologist provided a "second steps" program to students in special classes to teach them coping strategies and anger management techniques through use of role playing and visual cues (Tr. pp. 322-23).

⁵ A fifth grade regular education teacher testified that during the 2008-09 school year there were five teaching teams for the fifth grade (Tr. p. 146).

The parents contend that in the district recommended program, during lunch, recess, art, music, physical education, the hallway during transitions, and science and social studies classes, the student would have been subjected to large disorderly crowds and placed in noisy, highly distracting, and anxiety inducing situations (Dist. Ex. 1 at pp. 2-3). I note that the hearing record reflects that the student was described as being able to transition "fairly well" between classroom buildings at Eagle Hill (Tr. pp. 125-26, 254). Additionally, the student participated on the basketball team and the ultimate frisbee team at Eagle Hill (Tr. p. 121; Dist. Ex. 50 at p. 25). I am not persuaded by the hearing record that the size of the assigned school at the district, or any "crowds" or noise at the assigned school should have been addressed in the student's IEP or that the environment in the public school would preclude the student from having the opportunity to receive educational benefits.

The parents also contend that the district would not have grouped the student with similarly functioning peers for ELA and math special classes (Dist. Ex. 1 at p. 2). The hearing record includes a class profile for a district 8:1+1 math special class for the 2008-09 school year, which was comprised of seven students with educational classifications of learning disabilities, other health impairments, and speech or language impairments (Tr. p. 297; Dist. Ex. 52 at pp. 1-2). With regard to cognition, the students' WISC-IV standard scores had a range of 77 to 120 and the students' abilities in the area of math had a range from the 7th percentile to the 55th percentile (Dist. Ex. 52 at pp. 1-2). With regard to social/emotional functioning, three of the seven students interacted appropriately with both peers and adults, one student had a history of anxiety and interacted appropriately with peers and adults, and one student had difficulty with making friends and difficulty modulating emotions with adults (*id.*). Additionally, one student experienced anxiety regarding social relationships with peers and another student experienced anxiety in relation to school and needed adult support to work with peers (*id.*). The class profile indicated that two of the students were inattentive (*id.*). The students' management needs included individual adult support, reinforcement of concepts, practice of concepts, refocusing, redirection, a small group setting, positive reinforcement, support with transitions, a structured class, a seat within close proximity to teacher, checking for understanding, repetition of directions, and breaking down of tasks (*id.*).

The hearing record also includes a class profile for a district 8:1+1 ELA special class for the 2008-09 school year, which was comprised of seven students with educational classifications of learning disabilities, other health impairments, and speech or language impairments (Dist. Ex. 52 at pp. 3-4). With regard to cognition, the students' WISC-IV standard scores had a range of 77 to 121, the students' abilities in the area of ELA had a range from the 2nd percentile to the 53rd percentile, and the students' writing abilities had a range from the 16th percentile to the 50th percentile (*id.*). With regard to social/emotional functioning, three of the seven students interacted appropriately with both peers and adults, one student interacted appropriately with peers but withdrew from non-preferred activities, one student had difficulty with making friends and had difficulty modulating emotions with adults, and one student experienced anxiety related to school and needed adult support to work with peers (*id.*). The students' management needs included positive reinforcement, a structured class, planned breaks, a small class, simplified directions, chunking, support regarding organization of materials, directions repeated, reinforcement, practice, modified lessons, prompts to focus, and adult support to complete tasks (*id.*).

The hearing record reflects that students in the ELA special class possessed cognitive abilities reflecting a "little bit of a range," and exhibited difficulties with decoding and reading comprehension; consistent with the student's cognitive and academic reading needs (Tr. pp. 297-98). The ELA and math class profiles for the 2008-09 school year indicated that the students' areas of need in reading comprehension, math computation, and math application were consistent with the student's below average math skills in the areas of concepts, applications, and computation, and with the student's difficulty with reading comprehension (Dist. Exs. 51 at pp. 3-4; 52 at pp. 1-4). The student's June 2008 IEP indicated that his academic management needs included a structured small class setting for ELA and math, which was consistent with the needs of the seven students in the district's ELA and math special classes (Dist. Exs. 51 at p. 5; 52 at pp. 1-4). To address varying levels of academic needs, a district fifth grade special class teacher stated that students were provided with small group instruction and a modified curriculum (Tr. pp. 300-02). Additionally, students were to be provided with instructional materials based on their individual academic level of functioning (Tr. p. 302). The fifth grade special class teacher also stated that the students in the 8:1+1 special classes did not exhibit any "extreme" behaviors, and that the behaviors of the students were "pretty manageable" (Tr. p. 298).

Based on the evidence in the hearing record, including the 2008-09 class profiles for the ELA and math special classes and the testimony of the district fifth grade special class teacher, I am not persuaded that the student would not have been suitably grouped for instructional purposes within the recommended 8:1+1 ELA and math special classes (Tr. pp. 297-302; Dist. Ex. 52 at pp. 1-4).

The hearing record demonstrates that the special education program and related services recommended by the June 2008 CSE for the 2008-09 school year would have allowed the student to attend his home school and interact with his nondisabled peers (Tr. pp. 222-23, 326; Dist. Ex. 51). The district fifth grade special education teacher testified that, based upon her knowledge of the student's needs and her June 2008 educational evaluation of the student, the student would have been able to function within a mainstream environment (Tr. p. 223; Dist. Ex. 50 at pp. 9-15), and in view of this evidence, I find that the district's recommendation was appropriate with respect to the two-pronged test for determining whether an IEP offers a student a placement in the LRE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 119-20 [2d Cir. 2008]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 430 [W.D.N.Y. 2008]; see also Oberti v. Bd. of Educ., 995 F.2d 1204, 1217-18 [3d Cir. 1993]; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]).

Based on a review of the hearing record and due consideration of the totality of circumstances presented therein, I find that the student's June 2008 IEP was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The June 2008 IEP identified the student's academic, motor, and social/emotional/behavioral needs, and contained annual goals to address the student's identified needs. The evidence also demonstrates that, had the student attended the district's school, the district was able to suitably group the student for instructional purposes in the recommended placement. Accordingly, I find that the hearing record supports a determination that the district offered the student a FAPE for the 2008-09 school year in the least restrictive environment.

Turning now to consider the special education program the district recommended for the student for the 2009-10 school year, I agree with the impartial hearing officer that the student's the student's June 2009 IEP accurately and comprehensively set forth the testing results that were available to the June 2009 CSE subcommittee, described his current levels of performance and identified his special education needs. However, I find that the hearing record does not support the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year.

The June 2009 CSE subcommittee considered the student's May 2009 classroom observation, the December 2008 school report, the December 2008 speech-language progress summary, the June 2008 educational evaluation, the June 2008 psychological evaluation, the May 2008 speech-language evaluation, the May 2008 social history update, the August 2007 physical examination, and the June 2007 OT evaluation (Dist. Ex. 12 at p. 10). The hearing record shows that the student demonstrated difficulty with math, reading comprehension, anxiety, social skills, impulsivity, attention, and motor skills, as well as receptive, expressive, and pragmatic language, needs which were identified in the student's June 2009 IEP (Dist. Exs. 12 at pp. 3-9; 50 at pp. 2-5, 9-24; 63 at pp. 1-16).

According to the June 2009 IEP, the parent reported that the student had made progress in the areas of academics and social skills (Dist. Ex. 12 at p. 3). The student's present levels of academic performance indicated that the student exhibited strong decoding and word recognition skills, but that he had difficulty with reading comprehension, summarizing material, and identifying the main idea and "deeper information" in stories (id. at pp. 3-4). Regarding math, the student demonstrated difficulty with long division, multiplication, and multi-step problems, and he needed "much repetition and practice in computation" (id. at p. 4). Additionally, the student was not yet comfortable with all grade appropriate math concepts and the IEP noted that his language difficulties could interfere with mathematical problem solving (id. at pp. 4-5). In the area of speech-language, the student was better able to participate in group therapy sessions, but his impulsivity and anxiety negatively affected his progress (id. at p. 4). Although improvement was noted, the student continued to exhibit difficulty with language concepts, and he demonstrated difficulty expressing his ideas in an organized manner (id. at pp. 3-4). The student possessed good vocabulary skills and formulated grammatically correct sentences (id. at p. 5). In the area of writing, the student was developing his ability to write organized paragraphs, used graphic organizers, and with teacher assistance, completed three to five paragraphs on a topic (id. at p. 4).

The June 2009 IEP reflected the results of WISC-IV testing completed in June 2008, which indicated that the student's verbal abilities were in the average range and his nonverbal abilities were in the borderline range of cognitive functioning (id.). Furthermore, as reflected in the student's June 2009 IEP and according to Eagle Hill reports, the student was an "anxious child, who[se] level of anxiety can 'wax and wane'" (id. at p. 3). The speech-language pathologist noted that the student's anxiety and impulsivity negatively affected his functioning (id. at p. 4). The IEP indicated that the student "perform[ed] best" in a small classroom environment, and when he received "much validation" from his teachers (id. at p. 3). The student's social skills "need[ed] improvement," his language abilities could interfere with social interactions, and he required direct social skills development in order to apply his skills (id. at p. 3). According to the June 2009 IEP, the student exhibited difficulty with ball-handling skills,

and decreased endurance, strength and stamina for physical activities (id. at p. 8). Based on the evaluative information available to the June 2009 CSE, I find that the June 2009 IEP accurately described the student's academic, social/emotional/behavioral, and motor needs.

Regarding the development of the annual goals set forth in the student's June 2009 IEP, the hearing record reflected that the district obtained and utilized input from the student's Eagle Hill advisor and motor training teacher (Dist. Exs. 25-27; 32). The resultant annual goals targeted the student's needs as identified in the student's then-current evaluation and progress reports (Dist. Ex. 12 at pp. 11-19). Specifically, the student's June 2009 IEP included annual goals focusing on improving his test preparation, and self-advocacy skills; reducing test anxiety; and increasing his ability to refocus and attend to tasks without distraction and impulsive responses (Dist. Ex. 12 at p. 12). The student's speech-language annual goals addressed improving the student's ability to use multiple meaning words in written assignments; providing the main idea of a story or event; identifying and using content-area vocabulary, and antonyms and synonyms; expressing conclusions/explanations; discussing objects by various attributes; following multi-step directions; sequencing information presented orally; and listening/taking turns during conversations with peers or adults (id. at pp. 15-17).

In the area of reading, the June 2009 IEP recommended annual goals designed to improve the student's ability to compare and contrast characters and events; summarize a story; create graphic organizers based on reading material; use contextual clues to predict definitions of vocabulary words; answer "wh" questions about stories heard; identify the main idea/details in stories; verbally identify sequences of events in stories; and predict story outcomes (Dist. Ex. 12 at pp. 12-13). The student's annual goals in the area of writing address his need to participate in the "brainstorming process" prior to writing on a particular topic; and focus on improving his ability to use the pre-writing, drafting, revision and proofreading process to compose a three paragraph composition independently (id. at p. 14). In mathematics, the annual goals targeted the student's need to calculate elapsed time; understand and use vocabulary necessary for mathematical applications; solve word problems with the correct operation; compute money problems; solve various multiplication and division problems and interpret bar graph information (id. at pp. 14-15).

To address the student's social/emotional needs, the June 2009 IEP included annual goals to improve the student's ability to apply strategies to foster positive peer relationships; reduce impulsive behaviors in class; display awareness and respond appropriately to social cues; and communicate/interact in a socially appropriate manner with peers (Dist. Ex. 12 at p. 17). The IEP also included annual goals related to the student's motor needs, which required the student to type using a keyboard, perform conditioning exercises, and improve ball-handling skills (id. at pp. 18-19).

For the 2009-10 school year, the June 2009 CSE subcommittee recommended that the student receive two 45-minute periods per day of 12:1 special class language arts instruction; and one hour per day of 12:1 special class math instruction (Dist. Ex. 12 at p. 1). The hearing record described "special class" as a "class consisting of students with disabilities who have been grouped together because of similar individual needs for the purpose of being provided specially designed instruction" (Dist. Ex. 16 at p. 4). The description further indicated that "special educators meet regularly with related service providers to coordinate instruction and monitor

student progress" (*id.*). Although the recommendation for placement in a 12:1 special class in language arts and math was modified from the 2008-09 recommendation for placement in an 8:1+1 special class program, information before the June 2009 CSE subcommittee indicated that the student exhibited some independent skills in those areas, and the June 2009 IEP annual goals continued to address the areas of need identified by Eagle Hill (Dist. Exs. 12 at pp. 12-15; 63 at pp. 1-13).

The June 2009 CSE subcommittee also recommended that the student receive one 45-minute period each of special class social studies and science instruction (Dist. Ex. 12 at p. 1). The district special education teacher who attended the June 2009 CSE subcommittee meeting testified that the CSE subcommittee recommended special classes in all four academic subjects because it took into account the requirements of the social studies and science curricula, and the ability of the special education teacher to teach language arts through science and social studies (Tr. pp. 274-75; Dist. Ex. 12 at p. 9). She further testified that because the student was coming from the private school, the district would "give him the support" of self-contained classes initially, then during the school year attempt to provide "mainstream" opportunities (Tr. p. 276). The chairperson of the June 2009 CSE subcommittee meeting testified that the district offered the student a 12:1 special class program due to his academic levels, needs, and annual goals; and because it was the least restrictive environment (Tr. p. 460; Dist. Ex. 12 at p. 9). She further testified that the CSE subcommittee recommended 12:1 special class instruction in science and social studies because during sixth grade "academics get much more rigorous" than fifth grade, and that the student would have needed more support in those classes (Tr. p. 460).

I also note that during the May 2009 classroom observation of the student at Eagle Hill the student "infrequently" exhibited difficulty in following classroom procedures and "never" exhibited difficulty with organizational skills (Dist. Ex. 31 at pp. 1-3). The special education teacher who conducted the observation reported noted that the student "often" exhibited an ability to work independently and "never" exhibited difficulty in changing tasks (*id.* at p. 1). The hearing record reflected that the student's Eagle Hill tutorial teacher had begun to challenge the student to become more independent, and that the student's recommended program for sixth grade, according to the district assistant director of special services, was meant to "foster independence" in the student and, therefore, did not include an aide (Tr. pp. 460-61; Dist. Ex. 50 at p. 26).

In conjunction with the 12:1 special class setting, the student's June 2009 IEP provided numerous program modifications offered to support his learning in light of his impulsivity, anxiety, attention difficulties, language deficits, and nonverbal cognitive weaknesses (Dist. Ex. 12 at pp. 2, 4). During instruction the student was to be provided with: refocusing and redirection; preferential seating; information presented in small, sequential units; checking for understanding; repetition of oral directions; additional time to process responses; teaching of abstract concepts concretely; clarification of directions; use of graphic organizers and use of visuals/manipulatives (*id.* at p. 2). Testing accommodations included in the June 2009 IEP offered the student extended time; directions read and explained; repetition of oral/listening comprehension questions; and a special location (*id.*).

The June 2009 IEP offered related services to further support the student's special education needs (Dist. Ex. 12 at pp. 1-2). During the 2009-10 school year, the student would

have received two 45-minute group sessions of speech-language therapy "push[ed]-in" to his special classes, as well as one individual 45-minute session in the therapy room (Dist. Exs. 12 at p. 2; 16 at p. 2). A review of the recommended speech-language therapy annual goals revealed that many of the concepts and skills targeted by those goals were also areas of need addressed by special class language instruction (*id.* at pp. 15-17). The June 2009 CSE subcommittee offered the student adapted physical education, OT, OT consultation, PT, and PT consultation services to support his motor needs, which were identified by Eagle Hill and communicated to the district during the development of the student's annual goals, and reflected in the June 2009 IEP (Dist. Exs. 12 at pp. 8, 18-19; 27). To address the student's social/emotional needs, the June 2009 IEP offered one 45-minute group counseling session per week, and social skill annual goals to be evaluated by a psychologist and the student's service providers (Dist. Ex. 12 at pp. 1, 17).

I find that the hearing record supports the conclusion that the June 2009 CSE made appropriate recommendations in the June 2009 IEP for 12:1 special classes for language arts, math, social studies, and science, based on the student's progress during the 2008-09 school year. The June 2009 IEP appropriately set forth the student's present levels of performance, identified needs, and provided suitable program modifications. Additionally, nothing in the hearing record indicated that the district could not implement the student's annual goals in the 12:1 special class setting.

Similar to the program recommended for the 2008-09 school year, I note that the evidence in the hearing record also shows that the special education program and related services recommended by the June 2009 CSE for the 2009-10 school year was appropriate insofar as it would have allowed the student to attend his home school and interact with his nondisabled peers (Dist. Ex. 12; *see* Tr. pp. 402-03). The district assistant director of special services testified that during the June 2009 CSE meeting, there was no objection to the student attending a general education school (Tr. pp. 462-63). I find that the hearing record in its totality, including but not limited to the evidence described above, supports the conclusion that the district offered the student an IEP for the 2009-10 school year that provided for placement in the least restrictive environment.

Based on a review of the hearing record and due consideration of evidence in the hearing record as a whole, I find that the student's June 2009 IEP was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The June 2009 IEP identified the student's academic, motor, and social/emotional/behavioral needs, and contained annual goals to address the student's identified needs. Accordingly, I find that the hearing record supports a determination that the district offered the student a FAPE for the 2009-10 school year in the least restrictive environment.

Having determined that the district offered the student a FAPE for the 2008-09 and 2009-10 school years, it is not necessary to reach the issue of the appropriateness of Eagle Hill as a placement for the student and the necessary inquiry is at an end (*see* M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

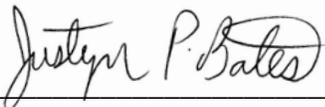
I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated November 4, 2010 which found that the district failed to offer the student a FAPE for the 2009-10 school year and directed the district to reimburse the parents for the costs of the student's tuition at Eagle Hill is hereby annulled.

Dated: Albany, New York
February 09, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER