



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-011

**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 Regina Skyer & Associates, LLP, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

Keane & Beane, PC, attorneys for respondent, Stephanie M. Roebuck, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for the costs of their son's tuition at the Eagle Hill School (Eagle Hill) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it was obligated to evaluate the student, determine the student's eligibility to receive special education programs and related services, and develop an individualized education program (IEP) for the 2009-10 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending Eagle Hill where he had been unilaterally enrolled by his parents since the 2008-09 school year (fourth grade) (Tr. pp. 7, 10, 18, 219-23, 240-42, 254-57; see Joint Ex. 6). Previously, the student had attended district schools for kindergarten through third grade, where he continuously received accommodations and services under section 504 of the Rehabilitation Act of 1973 (section 504)<sup>1</sup> in a general education setting (see Joint Ex. 6 at pp. 1-2). The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

### **Background**

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<sup>1</sup> 29 U.S.C. §§ 701-796(l) (1998); 34 C.F.R. § 300.104.

The parties' familiarity with the student's educational history described in Application of the Bd. of Educ., Appeal No. 10-005, dated March 10, 2010, is presumed, and will not be discussed in detail in the present appeal (see Joint Ex. 6 at pp. 1-11). The student's eligibility for special education programs and related services as a student with an other health-impairment (OHI), as determined in the previous appeal, is not in dispute in this proceeding (see Joint Ex. 6 at pp. 17-18).<sup>2</sup>

During the student's first year at Eagle Hill in the 2008-09 school year, the parents executed an enrollment contract on February 6, 2009, to reenroll the student at Eagle Hill for the 2009-10 school year (Parent Ex. J at pp. 1-2; see Tr. pp. 166-67, 199-200).<sup>3</sup> The express terms of the contract obligated the parents to pay tuition costs for the "full academic year" (September 2009 through June 2010) at Eagle Hill unless the parents canceled the contract on or before July 15, 2009, and further indicated that "no portion of such charges so paid or outstanding w[ould] be refunded or canceled notwithstanding subsequent absence, withdrawal or dismissal from Eagle Hill School for whatever reason" (Parent Ex. J at p. 1). The parents paid the first required 50 percent tuition payment and a 10 percent nonrefundable deposit prior to the contractual deadline of June 1, 2009 (Tr. pp. 244-45; see Tr. pp. 199-201; Parent Ex. J at p. 3).

By letter dated July 22, 2009, the parents requested a Committee on Special Education (CSE) meeting to develop an IEP for the student and to review the student's "eligibility" for the 2009-10 school year (Parent Ex. A; see Joint Ex. 6 at pp. 9, 11). By letter dated August 20, 2009, the district informed the parents of the CSE meeting, which had been scheduled for September 3, 2009 (Parent Ex. B).

By letter dated August 24, 2009, the parents notified the district of their intent to unilaterally enroll the student at Eagle Hill for the 2009-10 school year and to seek reimbursement from the district for the costs of tuition (Parent Ex. D at p. 1). The parents asserted that the district failed to offer the student a free appropriate public education (FAPE) based upon both procedural and substantive violations, and that, to date, the district had failed to convene a CSE meeting to develop an IEP or to recommend a program for the 2009-10 school year (id.).

On September 3, 2009, the CSE convened as scheduled (Parent Ex. C at pp. 2-4). Before the "official start" of the CSE meeting, the parent explained "why" she referred the student to the district "for services," noting that she wanted to "know what the [d]istrict w[ould] provide her son when he return[ed] to one of the [p]ublic [s]chools" (id. at p. 2). When asked if she would be

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<sup>2</sup> Regulations define "other health-impairment" as "having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to . . . attention deficit disorder or attention deficit hyperactivity disorder . . . which adversely affects a student's educational performance" (8 NYCRR 200.1[zz][10]; see 34 C.F.R. § 300.8[c][9]).

<sup>3</sup> In February at Eagle Hill, staff conclude the annual decision-making process regarding whether to recommend that current students either remain at Eagle Hill for the upcoming school year—and thus, offer renewal contracts to reenroll at Eagle Hill—or whether current students are ready to transition to a "more traditional" school setting for the upcoming school year (Tr. pp. 166-67, 198-200). Students typically remain at Eagle Hill for an average of four years before transitioning to a "more traditional" school setting (Tr. pp. 159, 163).

presently enrolling the student in the district, the parent responded that "she would not do that until she was certain that the [d]istrict could meet his needs" (id.).

When the additional parent member arrived, the meeting proceeded (Parent Ex. C at p. 2). The CSE distributed an Eagle Hill report provided by the parent (id.). The district's director of special education (director) stated that based upon "test results" from the "fall of 2008" at Eagle Hill, the student's scores reflected an "average range in reading," and upon retesting in spring 2009, the student's scores "showed improvement" (id.; see Parent Ex. F at p. 1). The test scores also indicated that the student's writing skills fell within the "average range," his mathematical computation skills fell "just below the average range," and his "concepts and application skills" fell within the "lower end of the average range" (Parent Ex. C at p. 2). In addition, the student's Eagle Hill advisor had not "report[ed] any concern that could not be addressed in a regular class program particularly with the 504 acc[o]mmodations previously developed" (id.).<sup>4</sup>

The director opined that the student's test results "did not indicate a disability" (Parent Ex. C at p. 2). The parent referred to a previous evaluation conducted in April 2007 (id.). The psychologist attending the CSE meeting indicated that when a previous CSE had considered the April 2007 evaluation report, the CSE determined that although the student was not eligible for special education services, he remained eligible for services and accommodations through a section 504 plan (id. at pp. 2-3).

When asked what services her son required, the parent described a "collaborative teaching model where [the student] would be in a regular classroom assisted by a special education teacher" (Parent Ex. C at p. 3). The director then recommended a new evaluation of the student since the student had not been in the district for one year and previous evaluations were over two years old (id.). The director asked the parent whether the district where Eagle Hill was located (district of location) "believe[d]" that the student required an evaluation or whether Eagle Hill had contacted the district of location (id.). When the parent expressed confusion regarding the district of location's involvement, the director "explained the provision of the law pertaining to unilateral placements in private schools and the responsibility of the district of location" (id.). The parent opined that since she "p[aid] taxes" in the district (district of residence), she believed the district of residence "ha[d] the obligation" to evaluate the student (id.).<sup>5</sup> The director explained, however, that "the regulations call[ed] for the process to work differently unless the parent[] intend[ed] to enroll" the student in the district (id.).

After the director provided the parent with a copy of the "Procedural Safeguards," the principal attending the CSE meeting asked about her "intentions," and the parent indicated that she would not "enroll" the student in the district until the district conducted an evaluation of the

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<sup>4</sup> The "previously developed" section 504 plan refers to those services and accommodations recommended by the 504 committee at the student's annual review on May 20, 2008, which were to be implemented within a general education setting and included the following: two 45-minute sessions of resource room per week in a group of six; three hours of aide support per day (5:1); two 30-minute sessions of individual occupational therapy (OT) per week; and one 30-minute session of speech-language therapy per week in a group of five (see Joint Ex. 6 at p. 10). The parents declined the district's offer to provide OT and speech-language therapy services to the student, and instead, chose to arrange for the provision of those services privately (id.).

<sup>5</sup> The terms "district" and "district of residence" refer to the same school district in this appeal and may be used interchangeably throughout this decision.

student and offered what she considered to be an "appropriate program" (Parent Ex. C at p. 3). The additional parent member asked how long it would take to complete the student's evaluation if enrolled in the district, and the director responded that the evaluation could "begin immediately" and would be completed "within 2 weeks" (id.). The director advised the parent that either she or Eagle Hill could contact the district of location to inquire about an evaluation of the student, and that upon the student's enrollment in the district, the district of location's evaluation would be considered (id.). However, the director also noted that the district would not "proceed with an evaluation" until the student enrolled in the district (id.).

By letter dated September 10, 2009, the district notified the parents of the CSE's determination that the student was not eligible for special education programs and related services as a student with a disability (Parent Ex. C at p. 1). The district informed the parents that they could seek special education services and programs from the district of location (id.).

Shortly after the September CSE meeting for the 2009-10 school year, the parties proceeded to an impartial hearing regarding the parents' allegations concerning the 2008-09 school year (Joint Ex. 6 at p. 11). In that case, the impartial hearing officer rendered a decision, dated December 21, 2009, which the district appealed (id. at pp. 11-13). Notably, the decision on appeal concluded the following:

although the district erred by failing to classify the student as a student with a disability under the I[n]dividuals with D[isabilities] E[ducation] A[ct], the student was appropriately placed in a general education classroom with special education supports and services described herein and that the provision of supports and services within the context of a general education program enabled the student to achieve educational progress and allowed the student the opportunity to interact with his non-disabled peers

(id. at p. 22). In addition, the decision determined that the district should have found the student eligible for special education programs and related services as a student with an OHI, and its failure to do so denied the student a FAPE (id. at p. 17). However, having found that the student made progress and that he experienced success in a "general education program with special education programs and supports," a State Review Officer concluded that the student "did not require a special education environment such as Eagle Hill, which provided no opportunity for the student to interact with nondisabled peers," and the parents' request for reimbursement for the costs of the student's tuition was denied (id. at pp. 20-23).<sup>6</sup>

### **Due Process Complaint Notice**

In the present case, the parents alleged in their due process complaint notice, dated June 4, 2010, that the district failed to offer the student a FAPE for the 2009-10 school year based upon both procedural and substantive violations (Parent Ex. E at pp. 1-2). The parents asserted that the district violated its child find obligations by failing to refer the student to the CSE as a student suspected of having a disability; the district's failure to develop an IEP for the student

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<sup>6</sup> The parents have appealed the denial of tuition reimbursement in Application of the Bd. of Educ., Appeal No. 10-005, to federal district court (Pet. p. 3 n.4; see IHO Decision at pp. 10, 16; Tr. p. 45).

denied the student a FAPE; the additional parent member of the CSE did not attend the entire CSE meeting and failed to "assist" the parents during the meeting, which deprived the parents of the opportunity to meaningfully participate in the CSE meeting; the CSE failed to discuss the student's educational needs; all of the CSE members did not participate in the meeting; and the district failed to evaluate the student or "consider" the student for an IEP pursuant to the parents' request (id. at pp. 2-3). The parents noted that the student had been unilaterally enrolled at Eagle Hill for the 2009-10 school year, that Eagle Hill was appropriate to meet the student's academic and social/emotional needs, and that they sought reimbursement for the costs of the student's tuition at Eagle Hill for the 2009-10 school year as a remedy for the denial of a FAPE (id. at pp. 3-4).

### **Impartial Hearing Officer Decision**

Before proceeding to an impartial hearing in this matter, the district moved to dismiss the parents' due process complaint notice (Joint Exs. 1-4). The district argued that because the student was not enrolled in the district of residence and the parents intended to continue the student's enrollment in a nonpublic school located in another district (district of location), the district of residence was not obligated to offer the student special education programming, to develop an IEP, or to reimburse the parents' for the student's tuition costs at Eagle Hill pursuant to Education Law § 3602-c and a 2007 guidance memorandum issued by the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) interpreting recent amendments to § 3602-c (id.; see Parent Ex. Q).

The parties then proceeded to an impartial hearing that occurred on October 18 and 19, 2010 (Tr. pp. 1, 99). In his decision dated December 14, 2010, the impartial hearing officer initially noted that neither party objected to the student's classification of OHI, as determined in previous decisions relating to the 2008-09 school year, and further, that he agreed that the student remained eligible for special education programs and related services as a student with an OHI (IHO Decision at pp. 16-20). In particular, the impartial hearing officer noted that the student exhibited a "continued presence of a short attention span," which "manifested itself most notably in math applied problems" (id. at p. 20). The impartial hearing officer also noted that the student exhibited the "'greatest difficulty'" with abstract reasoning tasks that required the student to "'organize the task and execute in a more efficient manner [and] was in the impaired range'" (id.).<sup>7</sup> Consequently, he concluded that the district's failure to classify the student for the 2009-10 school year denied the student a FAPE (id. at p. 22).<sup>8</sup>

Turning to the issue of reimbursement, the impartial hearing officer noted that a board of education may be required to pay for educational services obtained by parents if the board's services were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations supported the parents' claim (IHO Decision at p. 22). He further

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<sup>7</sup> The evaluations relied upon by the impartial hearing officer to support this finding, however, were never before the September 3, 2009 CSE for consideration, as the evaluations had been completed in June and August 2010 (IHO Decision at p. 20; see Parent Exs. H at p. 1; I at p. 1).

<sup>8</sup> The impartial hearing officer's decision contains two pages numbered as page "22" (see IHO Decision at p. 22). In this decision, citations to the first page numbered as "22" in the impartial hearing officer's decision will be referred to as page "22," and citations to the second page numbered as "22" in the impartial hearing officer's decision will be referred to as page "22a."

noted that the parents bore the burden of persuasion and production to demonstrate the appropriateness of the services obtained, and to meet that burden, the parents "must show that the services were 'proper under the act' [IDEA] . . . and that the private school offered an educational program which met the [student's] special education needs" (*id.*). In addition, the impartial hearing officer noted that the student's placement in "a school for children with disabilities" must also be "consistent with the requirement" that the student be educated in the "least restrictive environment" (LRE) (*id.* at pp. 22-22a). The impartial hearing officer then clarified that prior to determining whether the student "required a full-time special education placement," he first needed to identify the student's special education needs (*id.* at p. 22a).

To determine the student's needs, the impartial hearing officer primarily relied upon two Eagle Hill progress reports, dated December 2008 and June 2009; information contained in a privately obtained psychoeducational evaluation report, dated August 2, 2010; and testimonial evidence provided by the psychologist who conducted the privately obtained psychoeducational evaluation (IHO Decision at p. 22a; *see* Tr. pp. 101, 105-10; Parent Exs. H at p. 4; K-L). The impartial hearing officer agreed with the "evaluator" that the student would need "specialized assistance academically," but he also noted that the student's "deficits areas [mathematics, language arts & study skill] were not severe enough to materially affect his ability to function in a regular education program" (IHO Decision at pp. 22a-23). The impartial hearing officer also noted that although the "evaluator's major concern appeared to be in the emotional realm," the evaluator only recommended that the student's needs be "monitored" and did not recommend either "in school or outpatient counseling services" (*id.* at p. 23). Based upon the evidence, the impartial hearing officer concluded that the student could "benefit from attending mainstream classes with modifications and accommodations" and that his "management needs in executive function" could be "addressed within a special education program and appropriate services" (*id.*). Therefore, the impartial hearing officer determined that the student did not require "specialized instruction throughout the day," and denied the parents' request to be reimbursed for the costs of the student's tuition at Eagle Hill (*id.* at pp. 23-24). The impartial hearing officer also concluded that based upon his findings, he need not reach the issue of equitable considerations (*id.* at p. 24).

### **Appeal for State-Level Review**

On appeal, the parents assert that the impartial hearing officer erred in finding that they were not entitled to reimbursement for the costs of the student's tuition at Eagle Hill for the 2009-10 school year. The parents argue that the impartial hearing officer relied upon an improper standard to render his determination. Specifically, the parents assert that legal authority does not require the parents' unilateral placement to conform to the LRE or FAPE standards in the Individuals with Disabilities Education Act (IDEA) or that the parents' unilateral placement must address all of the student's areas of need. The parents allege that the impartial hearing officer failed to consider the totality of the circumstances in analyzing the appropriateness of Eagle Hill and that the LRE of a unilateral placement is not as strictly construed against the parents as it is against districts.

Moreover, the parents contend that the impartial hearing officer mistakenly found that the student's needs did not require removal from the general education setting, which was contrary to the weight of the evidence. In addition, the parents contend that the impartial hearing officer's finding that the student could be appropriately educated in the district ignored evidence of the district's failure to offer the student a FAPE for the 2008-09 school year, which led to his initial

enrollment at Eagle Hill. The parents argue that the impartial hearing officer failed to recognize that placing the student in a less restrictive environment would necessitate frequent removal from the classroom setting in order to provide the education and emotional supports required by the student. The parents also assert that Eagle Hill provides an academic environment, strategies, and supports for the student to learn, and although the impartial hearing officer found that the student might require counseling, his finding was not supported by the evidence, which demonstrated that the student's confidence and awareness improved at Eagle Hill. The parents also allege that the student's enrollment at Eagle Hill was specifically designed to address his educational needs. Finally, the parents argue that the impartial hearing officer's determination that the parents failed to cooperate by not referring the student to the district of location for an evaluation is incorrect as a matter of law.

In its answer and cross-appeal, the district alleges that the impartial hearing officer erred in holding the district responsible for evaluating and identifying the student for classification purposes for the 2009-10 school year, and thus, improperly held the district responsible for reimbursing the parents for its failure to identify and evaluate the student.

In a reply, the parents assert as affirmative defenses that the district's cross-appeal improperly attempts to incorporate by reference allegations included in documents other than the cross-appeal. As such, the parents argue that any factual allegations included in other documents, but not included in the district's cross-appeal, must not be considered on appeal. The parents also contend that the district's Memorandum of Law must be rejected because it does not include a table of contents, which fails to adhere to regulation.

### **Applicable Standards**

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

In 2007, New York State amended Education Law § 3602-c to comply with the reauthorization of 20 U.S.C. § 1412(a)(10) ("Children in Private Schools") and its implementing regulations, 34 C.F.R. §§ 300.130-300.147 (see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007; Parent Ex. Q at p. 1). In September 2007, VESID published a guidance memorandum—"Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c"—to "inform school districts of their responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents" (Parent Ex. Q at p. 1). Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). The district of location's CSE must review the request for services and develop an individualized education service program (IESP) based upon the

student's individual needs and "in the same manner and with the same contents" as an IEP (id. § 3602-c[2][b][1]). In addition, the district of location's CSE "shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).

## **Discussion**

### **District's Recommendation—2009-10 School Year**

Although the district stipulated at the impartial hearing that it did not develop an IEP for the 2009-10 school year or evaluate the student "in relation to the development of an IEP for the 2009-10 school year," the district argues in its cross-appeal that the impartial hearing officer erred in finding the district of residence responsible for evaluating the student, determining the student's eligibility to receive special education programs and related services, and developing an IEP for the 2009-10. In particular, the district argues that it had none of these obligations to the student in this case because the parents' actions made it clear that they intended to continue the student's enrollment at Eagle Hill. However, the district's argument is misplaced.

The district relies principally upon the following question and answer provided in the September 2007 VESID guidance memorandum to support its assertion:

12. Must a district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP?

USED has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep the child enrolled in the nonpublic elementary or secondary school, the district of residence need not develop or annually review an IEP for the student.

(Parent Ex. Q at p. 17). The district argues that the parents' actions—through the payment of 60 percent of the total tuition costs by June 1st, by failing to reenroll the student in the district of residence for the 2009-10 school year, and by unilaterally enrolling the student at Eagle Hill prior to the September 3, 2009 CSE meeting—made it clear that they intended to keep the student enrolled at Eagle Hill, and thus, as the district of residence, it had no obligation to develop an IEP for the student. However, the district ignores the necessary condition precedent in order to displace its obligation to evaluate the student, determine the student's eligibility to receive special education programs and related services, and develop an IEP for the student in this case: namely, that the district of location has already determined "through the child find

process . . . that the child needs special education and related services" (Parent Ex. Q at p. 17; Application of the Bd. of Educ., Appeal No. 10-049).

Here, the parents did not exercise their right to dually enroll the student in the district of location, did not seek to obtain special education programs and services from the district of location, did not have the student evaluated by the district of location, and did not accept an IESP developed by the district of location or accept services provided by the district of location (Cf. Application of the Bd. of Educ., Appeal No. 10-049; Application of a Student with a Disability, Appeal No. 09-133). Moreover, the facts in this case are not consistent with the facts underlying the decision rendered in Application of a Student with a Disability, Appeal No. 09-133, which the district also relies upon in support of its assertion. In Application of a Student with a Disability, Appeal No. 09-133, the parents did not consent to the district of residence's request to evaluate the student, but then proceeded to seek an evaluation by the district of location, whose CSE—after evaluating the student—convened a CSE meeting, found the student eligible for special education programs and services, and developed an IESP to provide services to the student while he attended the nonpublic school in the district of location (see Application of a Student with a Disability, Appeal No. 09-133).

In this case, the parents requested that the district of residence review the student's eligibility for special education programs and related services and develop an IEP for the 2009-10 school year (Parent Ex. A).<sup>9</sup> In addition, when the parents notified the district of residence of their intent to unilaterally enroll the student at Eagle Hill for the 2009-10 school year, the parents alleged that the district failed to offer the student a FAPE and affirmatively placed a FAPE at issue (Parent Ex. D at p. 1; Cf. Application of a Student with a Disability, Appeal No. 09-133).<sup>10</sup> Under the facts of this case, the district of residence remained responsible for evaluating the student, determining the student's eligibility to receive special education programs and related services, and developing an IEP for the 2009-10 school year; the district's failure to develop an IEP consistent with its responsibilities denied the student a FAPE for the 2009-10 school year. Consequently, the district's cross-appeal must be dismissed.

### **Applicable Standards—Unilateral Placement**

Turning to the parents' argument that the impartial hearing officer improperly denied reimbursement for the costs of the student's tuition at Eagle Hill for the 2009-10 school year, it is well settled that 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

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<sup>9</sup> In addition, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that under child find duties, a district that is responsible for offering a student a FAPE must not decline a parent's request to conduct an eligibility evaluation of the student even if the student is attending a private school located in another district (Letter to Eig, 52 IDELR 136 [OSEP 2009]; see Application of the Bd. of Educ., Appeal No. 09-067; see also Application of a Student with a Disability, Appeal No. 10-049).

<sup>10</sup> In Application of a Student with a Disability, Appeal No. 09-133, the parents did not place a FAPE at issue when they informed the district of residence of their intent to continue the student's enrollment at a nonpublic school in the district of location.

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and

regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

### **Parents' Unilateral Placement—2009-10 School Year**

Upon an independent review of the hearing record, the impartial hearing officer properly denied the parents' request for tuition reimbursement in this case because the parents did not sustain their burden to establish that Eagle Hill was an appropriate placement. Specifically, the parents failed to establish that Eagle Hill provided the student with education instruction specially designed to meet the unique needs of a handicapped child (Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).<sup>11</sup> Furthermore, as discussed more fully below, the impartial hearing officer properly considered and weighed the restrictiveness of Eagle Hill as a factor in denying the parents' request for tuition reimbursement.

A review of the hearing record indicates that the parents failed to present sufficient evidence regarding the student's academic functioning, his specific program at Eagle Hill during the 2009-10 school year, or how the educational program at Eagle Hill was specially designed to meet the student's unique special education needs (see, e.g., Application of a Student with a Disability, Appeal No. 09-137; Application of the Dep't of Educ., Appeal No. 09-020; Application of a Student with a Disability, Appeal No. 09-015). While the admissions director testified globally about the Eagle Hill program as it pertained generally to all of the students at Eagle Hill, she admitted that she could not testify about the student's academic functioning or how the program at Eagle Hill addressed the student's specific needs during the 2009-10 school year because she did not work there during the 2009-10 school year (Tr. pp. 155, 158-59, 163-66, 170-92, 194-96, 201-02, 204-05). She also testified that while she may have observed the student during classroom instruction while he attended Eagle Hill in the 2008-09 school year, the purpose of her observations was not to determine the student's "academic or educational growth" (Tr. p. 201).

Moreover, while the clinical psychologist who testified on behalf of the parents expressed familiarity with Eagle Hill based upon his experience with other students attending Eagle Hill, he opined that the Eagle Hill program was appropriate to meet this student's special education needs

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<sup>11</sup> State regulation defines "[s]pecially designed instruction" as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

based upon his review of the student's Eagle Hill progress reports from the 2008-09 and 2009-10 school years, his discussions with staff at Eagle Hill (who provided information "[v]ery similar to their reports"), and his observations of the student in two academic classes—study skills class and social studies class—and during the "call-back" period (Tr. pp. 99, 101, 110-13, 115-19, 130-34).<sup>12</sup> Notably, however, the clinical psychologist's observation of the student at Eagle Hill and his discussions with Eagle Hill staff occurred only two to four weeks before his testimony on October 19, 2010, which was not during the 2009-10 school year—the school year at issue in this case (compare Parent Ex. E at p. 1, with Tr. pp. 99, 101, 115-16, 130-34). Therefore, his testimony regarding the grouping of the classes, the educational instruction, or how Eagle Hill may have implemented the student's program during the 2009-10 school year was not based upon personal knowledge of the student's 2009-10 program or observations of the student during the 2009-10 school year, and therefore, does not provide sufficient probative or relevant facts upon which to analyze whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at Eagle Hill for the 2009-10 school year. In addition, even though the clinical psychologist also relied upon the Eagle Hill progress reports to opine that Eagle Hill was appropriate to meet the student's unique special education needs, the student's progress at Eagle Hill—alone—is not sufficient to sustain the parents' burden regarding the appropriateness of a unilateral placement when seeking the remedy of tuition reimbursement (Tr. pp. 116-17; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]).<sup>13</sup>

In addition, neither the parent's testimony nor the Eagle Hill progress reports—individually or together—provide sufficient evidence to establish that Eagle Hill was appropriate to meet the student's special education needs. According to the parent's testimony, the student attended six 40-minute to 45-minute classes—study skills, mathematics, literature, science, tutorial, and writing—with no more than nine or ten students per class (Tr. p. 235). She also testified that the "materials were broken down" in the student's classes, "[t]here was repetition, because [the student] need[ed] some more repetition in order to learn material," and "it was generally along those lines" (Tr. pp. 235-36). The student's program at Eagle Hill did not include speech-language therapy or occupational therapy, but the student met with the school psychologist to discuss "some of his anxieties" on "four or five occasions" during the call-back period in the 2009-10 school year (Tr. p. 254). The student also received counseling services "outside of Eagle Hill" during the 2009-10 school year and took medication to address his anxiety (Tr. p. 262).

The Eagle Hill progress reports, which identify "classroom modifications" "useful" to the student during the 2009-10 school year, do not provide sufficient evidence regarding how these

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<sup>12</sup> During the "call-back" period, advisory teams reconvene, and the advisor and teachers provide students with additional academic or social support and instruction in either 1:1 or small group settings (Tr. pp. 177-79). The hearing record, however, contains little, if any, evidence describing what services the student required during this call-back period, other than meeting with a school psychologist on four or five occasions throughout the 2009-10 school year (see Tr. p. 254).

<sup>13</sup> Notably, the clinical psychologist found the class size at Eagle Hill to be critically important in Eagle Hill's ability to provide the student with an appropriate program (Tr. pp. 101, 111-16).

modifications constituted specially designed instruction to meet the student's unique educational needs.<sup>14, 15</sup> Additionally, progress reports indicate that the student received teacher support in social situations, additional time to process information, and teacher encouragement; but provide little, if any, information regarding how these strategies were specially designed to meet the student's unique educational needs (see Parent Exs. M at pp. 1-2; N at pp. 1-2). Although the evidence demonstrates that Eagle Hill put in place instruction and support for the student, the services provided to the student at Eagle Hill are the types of "educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115).

Finally, the 2009-10 progress reports reflect that the student had "mastered" or "mastered in isolation but not in context," a majority of skills measured by the end of the 2009-10 school year, and that he required little, if any, "direct instruction" on a small number of skills throughout the school year (compare Parent Ex. M at pp. 3-20, with Parent Ex. N at pp. 3-20). The progress reports do not indicate, however, the appropriateness of providing direct instruction in the areas designated, given the student's age and grade; what the direct instruction consisted of; who provided the direct instruction; or the frequency or the duration of the direct instruction (see Parent Exs. M-N).

Thus, absent sufficient evidence that Eagle Hill provided educational instruction specially designed to meet the student's unique special education needs, the parents cannot sustain their burden to establish that Eagle Hill was appropriate.

## **LRE**

In addition, based upon a review of the hearing record and contrary to the parents' argument on appeal, the impartial hearing officer properly considered and weighed the restrictiveness of Eagle Hill in determining whether Eagle Hill was appropriate to meet the student's educational needs (IHO Decision at pp. 22-23; see S.H. v. New York City Dep't of Educ., et al, 2011 WL 609885, \*9 [S.D.N.Y. Feb. 18, 2011] [noting that "[b]ecause [the parent] chose a private school for [the student] that educated learning disabled students *only*, [the parent] bears the burden of proving that such a restrictive non-mainstream environment was needed to provide [the student] with an appropriate education"] [emphasis in original]). In S.H., the court noted that while

"parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board," . . . ,

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<sup>14</sup> Eagle Hill typically issues only two progress reports during the school year; the first in December, and the second in June (Tr. p. 186; see Parent Exs. K-N).

<sup>15</sup> The following represent some of the "classroom modifications" included in the progress reports: providing frequent review of and opportunity to use new material, visual and verbal cues, highlighted information, assistance for organization, study guides, teacher guidance and modeling, modified worksheets, sample problems, calculators and manipulatives, and graphic organizers (Parent Ex. N at pp. 7, 11, 14, 16, 18, 20; see Parent Ex. M at pp. 6, 10, 13, 15, 17, 20). The Eagle Hill modifications were also similar to those modifications and support services recommended by the district in the student's section 504 plan, which were to be implemented in a general education program during the 2008-09 school year (compare Parent Ex. N at pp. 7, 11, 14, 16, 18, 20, with Joint Ex. 6 at pp. 10).

"the IDEA's requirement that an appropriate education be in the mainstream to the extent possible remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate"

(S.H., 2011 WL 609885, at \*9 [internal citations omitted]).

Here, the evidence indicates that in spring 2009, the student's grade equivalent reading test scores on the Gray Oral Reading Test—Fourth Edition (GORT-4) and Slosson Oral Reading Test, ranged from 6.4 (sixth grade, fourth month) to 9.4 (ninth grade, fourth month)—well above his approximately 4.7 (fourth grade, seventh month) enrollment status at Eagle Hill at that time (see Parent Ex. N at pp. 22-24). Similarly, an administration of the Stanford Diagnostic Reading Test—Fourth Edition (SDRT-4) to the student in April 2009 yielded the following grade equivalent scores: vocabulary, 5.4 (fifth grade, fourth month); comprehension, 4.1 (fourth grade, first month); scanning, 5.7 (fifth grade, seventh month); and an SDRT-4 total grade equivalent score of 5.4 (fifth grade, fourth month) (Parent Ex. L at p. 6). An administration of the Stanford Diagnostic Mathematics Test—Fourth Edition (SDMT-4) in April 2009 revealed the following grade equivalent scores: concepts/applications, 3.8 (third grade, eighth month); computation, 3.4 (third grade, fourth month); and an SDMT-4 total grade equivalent score of 3.6 (third grade, sixth month) (id. at p. 5).

In spring 2010, the student's grade-equivalent reading test scores on the GORT-4 and Slosson Oral Reading Test ranged from 7.4 (seventh grade, fourth month) to 8.7 (eighth grade, seventh month)—again, well above his approximately 5.7 (fifth grade, seventh month) enrollment status at Eagle Hill (see Parent Ex. N at pp. 22). Upon readministration of the SDRT-4 in April 2010, the student obtained the following grade equivalent scores: vocabulary, 8.0 (eighth grade); comprehension, 7.5 (seventh grade, fifth month); scanning, "PHS;" and an SDRT-4 total grade-equivalent score of 9.1 (ninth grade, first month) (id. at p. 23).<sup>16</sup> Upon readministration of the SDMT-4 in April 2010, the student obtained the following grade equivalent scores: concepts/applications, 8.1 (eighth grade, first month); computation, 4.7 (fourth grade, seventh month); and an SDMT-4 total grade equivalent score of 5.8 (fifth grade, eighth month) (id. at p. 24).

Thus, in light of the findings made in Application of the Bd. of Educ., Appeal No. 10-005 that Eagle Hill was an overly restrictive program during the 2008-09 school year and the student's testing results from the 2008-09 and 2009-10 school years—which strongly suggest that the student's academic skills have remained at or above grade level—LRE considerations in the instant matter weigh more heavily against a finding that the student required a full-time special education program, such as Eagle Hill, in order to obtain educational benefits during the 2009-10 school year, and the parents' argument must fail (see IHO Decision at pp. 22-23; Parent Exs. L; N).

Having determined that the parents failed to sustain their burden to establish that Eagle Hill was appropriate to meet the student's special education needs and was overly restrictive, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations

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<sup>16</sup> The acronym "PHS" is not explained in the hearing record.

support the parents' claim for reimbursement (see Burlington, 471 U.S. at 359; Gagliardo, 489 F.3d at 115; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

### **Conclusion**

In conclusion, the hearing record supports the impartial hearing officer's determination that the parents were not entitled to reimbursement for the costs of the student's tuition at Eagle Hill for the 2009-10 school year.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
April 1, 2011



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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**