



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-128

**Application of the BOARD OF EDUCATION OF [REDACTED]  
[REDACTED] SCHOOL DISTRICT for review  
of a determination of a hearing officer relating to the provision  
of educational services to a student with a disability**

### **Appearances:**

Girvin & Ferlazzo, P.C., attorneys for petitioner, Christopher P. Langlois, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Neal H. Rosenberg, Esq., and Nathaniel Kuzma, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2010-11 school year was not appropriate and ordered it to reimburse the parents for their son's private school tuition costs. The parents cross-appeal from that portion of the impartial hearing officer's determination which denied their request for reimbursement for the residential/boarding aspects of their son's private school program. The appeal must be sustained. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending the academic and residential program at the Eagle Hill School (Eagle Hill) in a sixth grade classroom and receiving individual counseling services one time per week (Tr. pp. 53, 233, 282, 312, 539-40). Eagle Hill is an out-of-State, private boarding and day school for students with learning disabilities ages 6 to 16 (Tr. pp. 512-14). Eagle Hill has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with an other health-impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

## Background

The hearing record reflects that the student was first determined eligible for special education programs and related services as a student with an OHI in kindergarten, based on deficits related to an attention deficit hyperactivity disorder (ADHD) (Tr. p. 52; Dist. Ex. 1 at p. 2).<sup>1</sup> During kindergarten, the student was reported to have had difficulty interacting with his peers and doing work without a teacher next to him, was provided with an aide in the classroom, and received occupational therapy (OT) and speech-language therapy (Tr. p. 236). He remained in the district through fourth grade where he initially received two hours per week of indirect consultant teacher services, a full time shared aide and participated in a 30-minute social skills group once in a 6-day cycle and received various program modifications and testing accommodations (Tr. p. 52; Parent Ex. M at pp. 1-2). According to the student's mother, the student did not have a successful fourth grade year even though she provided him with two special education tutors outside of school to supplement his reading instruction and to assist him in test preparation and despite the addition of direct consultant teacher services in English/language arts, resource room services, reading and writing goals, individual counseling services, and additional program modifications in January 2009 (Tr. pp. 240-48; see Parent Ex. L at pp. 1-2).

On April 16, 2009, the student's mother wrote to the principal of the district school enumerating the concerns that the parents had regarding their son's class placement for the 2009-10 school year (Parent Ex. I at pp. 1-3). Among other things, the parent indicated that she felt it was important that the student be placed with teachers who were experienced with and could appropriately address both the student's academic needs as well as his behavioral and social needs relating to his impulsivity, attention deficit, and frustration (id. at p. 1).

In spring 2009, the student underwent a comprehensive psychoeducational evaluation by a private psychologist (Dist. Ex. 1 at p. 2). The resultant report dated June 10, 2009 summarized the student's educational history and indicated that during the evaluation, the student was friendly, chatty, impulsive, and easily distracted but was able to refocus his attention given redirection (id. at pp. 2-6). Overall, the student was reported to be cooperative and worked diligently during the evaluation (id. at p. 6). Administration of a battery of cognitive, academic, and projective testing revealed among other things, that the student was a bright child who demonstrated a "hybrid learning disability" which the evaluating psychologist described as a combination of difficulty formulating and conveying what he means to say (language processing deficit), difficulty organizing his perceptions and differentiating what is essential from what is less important (perceptual deficit), and significant inattention (attention deficit hyperactivity disorder [ADHD]) (id. at p. 16). The report also reflected the student's longstanding sensory sensitivity and integration deficits which reportedly contributed to his distractibility and that each of the student's deficit areas impacted and exacerbated the others (id.). Despite the student's performance on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) which revealed a full scale IQ of 101 in the average range and his overall performance in the average range on the administration of a battery of academic assessments, the psychologist's diagnoses included a mixed receptive-expressive language disorder; learning disorder not otherwise

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<sup>1</sup> The hearing record reflects that the student repeated his kindergarten year in the district (Tr. pp. 229, 236).

specified (NOS) (perceptually based NVLD);<sup>2</sup> attention deficit/hyperactivity disorder combined type; disorder of written expression; and mathematics disorder (id. at pp. 8-10, 17). The psychologist opined that in order to address the student's constant need for assistance, the student should be placed in a small classroom setting with a language based curriculum designed specifically for bright students with learning disabilities and/or significant ADHD (id. at p. 17). The report included a recommendation that the parents consider making an application for the student's enrollment at Eagle Hill and also recommended specific multisensory and structured programs to address the student's academic needs; a physician consult to reassess the student's medication regimen; a comprehensive speech-language assessment; and counseling to increase coping skills and social prowess (id. at pp. 18-20). The student's mother had delivered a copy of the June 10, 2009 psychoeducational evaluation to the district on November 9, 2009 (id. at p. 1).

On August 13, 2009, the CSE met for an annual review of the student and to develop an individualized education program (IEP) for the student's 2009-10 school year in the fifth grade (Parent Ex. H at p. 1). The resultant IEP recommended daily 40-minute direct consultant teacher services in English language arts (ELA); resource room services at a frequency of four 40-minute sessions in a 6-day cycle; a full-time shared aide; one 30-minute individual counseling session in a 6-day cycle; one individual "psych consult" (direct/indirect) per month to facilitate the carry over of social skills to the classroom; and many program modifications to assist the student in maintaining focus, understanding what is expected of him, organization, and behavioral support (id. at pp. 1-3, 5).

The student's mother placed the student at Eagle Hill for the 2009-10 school year reportedly based on her belief that the program offered by the CSE was similar to the district program the student attended during the 2008-09 school year, which she believed had not been successful (Tr. pp. 250, 252). The student attended Eagle Hill for the entirety of the 2009-10 school year and, according to the student's mother, did very well there (Tr. pp. 252-54).

In December 2009 the district contacted the parents for consent to evaluate the student as part of a triennial review (Tr. pp. 65, 113; Dist. Exs. 3; 4). However, the student's mother and the district's director of pupil services mutually decided that the June 2009 private psychoeducational evaluation of the student would provide sufficient evaluative information regarding the student (Tr. pp. 68-70, 256-57).

On February 4, 2010, the parents submitted an application to the district for the student's transportation to Eagle Hill School for the 2010-11 school year (Tr. p. 305; Parent Ex. G).

On February 18, 2010, the district's director of pupil services completed a 35-minute observation of the student at Eagle Hill during a literature class with six other students (Tr. pp. 61-62; Dist. Ex. 6). The observation report reflected that the student was able to answer questions and appeared to follow along with a review of the homework making corrections as necessary despite the presence of a student that spoke out and made noises (Dist. Ex. 6). After the noisy student was removed, the student participated in a class discussion by relating on-topic information regarding his day camp carnival experience (id.). He also copied his homework

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<sup>2</sup> From the context, "NVLD" appears to refer to a nonverbal learning disorder.

assignment in his assignment pad and demonstrated proficient keyboarding skills on the computer during a vocabulary assignment (id.).

On June 7, 2010, the parents signed an enrollment agreement with Eagle Hill for the 2010-11 school year (Dist. Ex. 26).

In a letter to the parents dated June 2010, the student's educational advisor summarized the student's performance in the Eagle Hill program during the 2009-10 school year (Dist. Ex. 9 at pp. 1-2). The educational advisor indicated that the student had made "huge gains" in his interpersonal skills including that he was more accepting of suggestions, advice, and assistance from others; exhibited some flexibility that resulted in more positive peer interactions; was more aware of the impact of his behavior on others; better able to see things from the perspective of others and to share ideas and thoughts in a more positive manner (id. at p. 1). The educational advisor indicated that the student was personable, enjoyable, and funny when engaged with a peer or teacher in a 1:1 situation (id.). With regard to academics, the letter reflected that the student had responded well to the structure and routine of his classes; however, his work rate and ability to manage time was variable, in that at times he either rushed through his work or needed reminders to stay on task due to distractions (id.). The student reportedly responded to consistent cues to maintain focus for longer periods of time; had improved his ability to participate appropriately using reciprocal teaching techniques (listening to others' ideas and responding to them); increased his ability to participate in small group tasks more effectively; had begun to ask clarifying questions more often; and was able to remain positive and employ suggested strategies when faced with academic challenges (id. at pp. 1-2). Enclosed with the educational advisor's letter were reports from each of the student's teachers indicating the specific skills that were worked on in each subject, the student's current performance in each skill, and a list of the academic modifications that were used with the student for each subject (id. at pp. 3-17).

Although the student's annual review to develop an IEP for the 2010-11 school year had initially been scheduled for June 10, 2010, the parents canceled the meeting because they were awaiting receipt of updated academic testing by the private psychologist who had conducted the evaluation of the student in spring 2009 and because they had been approached by Eagle Hill staff with a request that the student be placed in its residential "dorm program" in order to address his social/emotional/behavioral needs (Tr. pp. 72-74, 259; Dist. Exs. 8; 10). According to the student's mother, she wanted to get the opinions of the specialists that had been working with the student before making a decision regarding the dorm program (Tr. p. 259). The district's director of pupil services agreed to reschedule the meeting at a later date (Tr. p. 260).

On June 24, 2010, the student's mother hand delivered a copy of the updated testing completed by the private psychologist to the district's director of pupil services (Dist. 11 at p. 1). The May 17, 2010 academic assessment update report reflected that the student was assessed on two days in April and May 2010, and that although he was cooperative and eager to demonstrate his abilities, his attention and concentration were variable across both test dates and, similar to his initial testing, the student was overly chatty (id. at p. 3). However, the psychologist indicated that the student's overall demeanor and attitude toward performing academic tasks was much improved from his assessment a year earlier, and he was willing to persevere when challenged and exuded a mild sense of self assurance (id. at p. 4). The psychologist administered several of

the same academic assessments that were used to assess the student in June 2009 and the report contains comparisons of the student's performance for each year (*id.* at pp. 4-8). The results of the updated testing revealed that the student had made progress in several areas, including his overall reading, as measured by the Wide Range Achievement Test-Revised (level 1) (WRAT-revised); letter-word identification as measured by the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH); reading rate, accuracy and comprehension as measured by the Gray Oral Reading Test-Fourth Edition (GORT-IV); and in math calculation as measured by the WJ-III ACH (*id.* at pp. 4, 5, 8). However, the psychologist indicated that some of the student's test results on other assessment tools reflected a decrease in performance which was a function of the student's lack of attention during the test session (*id.* at p. 6). The psychologist concluded that the student had demonstrated significant academic improvement and emotional growth since attending Eagle Hill although he was not ready to compete in the academic mainstream, even with academic supports and accommodations, and that the student continued to require the support of a school such as Eagle Hill (*id.* at p. 9).

On July 13, 2010, the student's mother sent an e-mail to the district's director of pupil services requesting to reschedule the student's annual review meeting (Dist. Ex. 13 at p. 1). She attached a copy of a letter she had received from a psychiatrist dated July 9, 2010, which indicated that, due to the limited social/emotional progress the student had made as a day student at Eagle Hill, the psychiatrist agreed with the parents' decision to have the student board at Eagle Hill starting in September 2010 (Tr. p. 260; Dist. Ex. 13 at pp. 1-3). The hearing record reflects that the parents forwarded three similar letters to the district prior to a CSE meeting scheduled for August 9, 2010; one from the psychologist who had conducted the student's June 2009 psychoeducational evaluation and his May 2010 academic assessment update; one from the student's educational advisor at Eagle Hill; and one from the student's developmental pediatrician, all which noted the student's academic progress at Eagle Hill and recommended that the student transition to the residential program at Eagle Hill for the 2010-11 school year in order to address continued social/emotional/behavioral concerns (Tr. pp. 60, 263-65; Dist. Exs. 14; 15; Parent Ex. F).

The CSE convened on August 9, 2010 for the student's annual review and to develop an IEP for the 2010-11 school year (Dist. Ex. 20 at p. 1). In attendance at the CSE meeting were the district's director of pupil services as chairperson, a district school psychologist, a district special education teacher, a district general education teacher, the student's mother and an additional parent member (*id.* at p. 6). The resultant IEP reflected that the CSE considered a June 2009 psychoeducational evaluation and a May 2010 academic update report completed by the student's private psychologist, June 2010 progress reports from Eagle Hill, and a district observation of the student at Eagle Hill (*id.* at p. 7). The August 2010 CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academic and functional performance, social/emotional performance, and health and physical development (Tr. pp. 76-82). The CSE also developed a list of program and testing modifications and accommodations to address the student's academic, organizational, attentional, and behavioral needs (Dist. E. 20 at p. 2). The IEP included 18 annual goals in the areas of study skills, reading, writing, mathematics, and the social/emotional/behavioral domain (*id.* at pp. 7-10).

The August 2010 CSE continued the student's eligibility for special education programs and related services as a student with an OHI and recommended the following program for the 2010-11 school year: direct consultant teacher services of three 40-minute sessions in a six day cycle in ELA and math; resource room services of one 40-minute session per day; one 30-minute individual counseling session in a six day cycle; two 40-minute parent counseling and training sessions per month; two 30-minute direct/indirect psychological consultation sessions in a six-day cycle; support of an assistant teacher (when not supported by a special education teacher) in ELA, writing workshop, math, science, and social studies; and support provided by a shared aide in specials, physical education, and lunch (Dist. Ex. 20 at pp. 1-2). The IEP also indicated that the student was exempt from taking a foreign language (*id.* at p. 6). The IEP reflected that the CSE considered a general education setting without support services but rejected it because the student's current attentional needs required more intensive support (Dist. Ex. 20 at p. 7).<sup>3</sup>

According to the student's mother, she indicated at the August 2010 CSE meeting that she did not believe that the district middle school was appropriate for the student and on August 16, 2010 she hand delivered a letter to the district's director of pupil services stating that she was "sending this letter as a 10-day notice" and that the parents would be seeking reimbursement for their son's tuition for the 2010-11 school year at Eagle Hill (Tr. pp. 275, 351-52; Dist. Exs. 18; 20 at p. 7).

The district sent the parents a copy of the student's 2010-11 IEP on September 1, 2010 (Dist. Ex. 19). The student's mother responded by letter dated September 20, 2010 requesting the proposed schedule for the student; a class profile including the number of students in each class, the number of special education students, and a student to teacher ratio for each class; and the student to teacher ratio for the "shared aide" (Dist. Ex. 21). The district's director of pupil services replied by letter dated September 28, 2010 inviting the student's mother to call him at her earliest convenience to discuss any outstanding concerns or questions that she may have regarding the offered program (Dist. Ex. 22). In a letter dated September 30, 2010, the student's mother requested that the information she asked for in her earlier letter be provided in writing (Tr. p. 280; Dist. Ex. 23).

### **Due Process Complaint Notice**

By due process complaint notice dated December 6, 2010, the parents requested an impartial hearing, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. C). The parents alleged that the student's August 2010 IEP did not provide for adequate special education support and the IEP goals were miscalculated and failed to address the student's needs relating to impulsivity, reading fatigue, and math (Parent Ex. C at pp. 7-10). The parents contended that the IEP's recommended program failed to offer the student the "direct special education instruction" that he required, failed to recommend placement in a special class setting, and did not provide adequate counseling (*id.* at p. 7). Additionally, the parents contended that the CSE failed to perform a functional behavioral assessment (FBA) or create a behavioral intervention plan (BIP) and that

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<sup>3</sup> According to testimony from the district's director of pupil services, several other placement options were discussed at the CSE meeting, but the IEP does not reference these discussions (Tr. pp. 129-37; *see* Dist. Ex. 20 at p. 7).

the large number of modifications and supports added to the IEP demonstrated the inappropriateness of the mainstream class assignment for the student (id. at pp. 8-9). The parents contended that the recommended placement in the general education classroom was insufficient to meet the student's special education needs as identified in the private psychologist's evaluation (id. at pp. 5-7). The parents also asserted that the district's middle school was too large and would cause academic regression and that the student should not be placed in a mainstream setting (id. at p. 5, 9). According to the parents, the district failed to provide them with a class profile and schedule (id. at p. 4). Lastly, the parents contended that the proposed placement did not offer an adequate level of skilled individual instruction and support to address the student's needs (id. at pp. 5-6, 8-9, 12). For relief, the parents sought reimbursement from the district for the costs of the student's attendance at Eagle Hill for the 2010-11 school year (id. at pp.10-13).

In a letter dated December 9, 2010 the district's director of pupil services confirmed receipt of the parents' request for an impartial hearing and advised them of the date and time for a resolution meeting (Dist. Ex. 24 at p. 1-2).

The student's mother responded by letter dated December 14, 2010 indicating that she and her husband could attend the resolution meeting and enclosing a copy of the Eagle Hill enrollment contract which she indicated was paid in full to the amount of \$69,900 (Dist. Ex. 25). She further indicated that they were also seeking reimbursement for the cost of the private psychologist's May 17, 2010 academic assessment update (id.).

In a response to the due process complaint notice, the district made specific admissions and denials regarding the parents' allegations, and stated that the district had offered the student a FAPE and was prepared to proceed to the impartial hearing (Dist. Ex. 27 at pp. 1-4).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on April 25, 2011 and concluded on May 4, 2011, after three days of proceedings (Tr. pp. 1, 225, 389). In his decision, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2010-11 school year, that the day program portion of the parents' unilateral placement was appropriate, but the residential portion was not, and that there were no equitable considerations precluding tuition reimbursement (IHO Decision at pp. 9-16). The impartial hearing officer ordered the district to reimburse the parents for the day program portion of the student's tuition costs at Eagle Hill in the amount of \$54,800 (id. at p. 16).<sup>4</sup>

Regarding the district's proposed program for the student's 2010-11 school year, the impartial hearing officer found that the district had failed to establish that the CSE's recommendation to place the student in a general education setting, even with the variety of

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<sup>4</sup> The impartial hearing officer's decision is not dated, although it identifies an "actual record close date" of September 4, 2011 (IHO Decision at p. 16). The parties do not raise any issues regarding the timeliness of the district's appeal. In addition to noting the record close date, I remind the impartial hearing officer to indicate the date a decision is actually issued. Although of little if any prejudice to the parties in this particular instance, I also note that the decision failed to include a statement informing the parties of their right to appeal to a State Review Officer as required by State regulations (8 NYCRR 200.5[j][5][v]).

recommended supports, was appropriate because the CSE had no independent information to depart from the private psychologist's recommendation that the student be educated in a small school setting with a structured language based curriculum and an Orton-Gillingham reading program (IHO Decision at pp. 11-12). The impartial hearing officer found that the district was not required to follow the private psychologist's recommendation, but also determined that there was no indication in the hearing record that the CSE had seriously considered the psychologist's report and that in the event the CSE wished to depart from the recommendation, the CSE was required to establish through its own evaluation from a persuasive and reliable source that its recommendation was appropriate in order to establish in a hearing that the district offered a FAPE (*id.*). Additionally, the impartial hearing officer found that the August 2010 IEP goals were inappropriate because some were drawn from the student's 2009-10 IEP which was "strongly criticized" by the parents and led to their decision to remove the student from the district that year (*id.* at p. 11). The impartial hearing officer also found that several members of the CSE had expressed doubt that the student could be appropriately placed in a mainstream classroom, that no one on the CSE had an adequate basis to know the student's "then 'current needs,'" and that the district did not have anyone testify at the impartial hearing regarding how the district would implement the proposed program in a district classroom (*id.* at pp. 10-11).

The impartial hearing officer next determined that the parents had established that the day portion of the unilateral placement at Eagle Hill was appropriate because it provided education services that were specially designed to meet the student's unique needs and the student had made some educational progress therein (IHO Decision at pp. 12-14). However, the impartial hearing officer also determined that the overnight residential portion of the Eagle Hill program was not appropriate because the student's social and behavioral concerns did not warrant such a program and the impartial hearing officer was not persuaded by the letters from the parents' private providers that suggested that the student required a residential program (*id.* at pp. 13-15).

Lastly, the impartial hearing officer determined that equitable considerations favored the parents because they had cooperated with the district in good faith, acted reasonably in deciding to enroll the student at Eagle Hill, and risked the loss of a nonrefundable deposit in the event that they decided to accept a public school placement (IHO Decision at pp. 15-16).

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

In its petition, the district argues that the impartial hearing officer erred in finding that it failed to offer a FAPE for the 2010-11 school year because the hearing record shows that the August 2010 IEP accurately reflected the results of evaluations identifying the student's needs, included appropriate annual goals to address those needs, and provided appropriate special education services in the least restrictive environment (LRE).

Specifically, the district argues in part that the impartial hearing officer's findings that the members of the CSE did not have an adequate basis for knowing the student's then-current needs and that the district's only witness at the impartial hearing "made no claim of expertise" regarding the student's needs were in error for two reasons. First, the district asserts that the impartial hearing officer should not have reached the issue because the parents failed to raise a claim concerning the adequacy of the evaluations before the CSE or the accuracy of the August

2010 IEP's statement of the student's present levels of performance and current needs in their due process complaint notice. Second, the district contends that even if the parents had raised these claims, the evaluative information reviewed by the CSE was sufficient to identify all of the student's present levels of performance and special education needs and the impartial hearing officer made no finding that the statements in the IEP regarding the student's present levels of performance and needs were inaccurate or incomplete.

The district also argues that the impartial hearing officer erred in basing his determination that the district failed to offer a FAPE for the 2010-11 school year upon findings regarding the appropriateness of the 2009-10 school year IEP because the 2009-10 school year was not at issue before the impartial hearing officer and there was no basis in the record for the impartial hearing officer to determine that the student's 2009-10 IEP had been unsuccessful because the student had attended Eagle Hill for the entirety of that school year and the district's proposed program had never been implemented. Additionally, the district challenges as similarly improper the impartial hearing officer's finding that the goals on the 2010-11 IEP were inadequate because they were carried over in part from goals that had "already been found to be unsuccessful in 2009-10" because the student had attended Eagle Hill during the 2009-10 school year and the goals in the 2009-10 IEP were never implemented by the district. Moreover, the district asserts that the goals in the 2010-11 IEP were reviewed by the August 2010 CSE anew and the CSE determined that the goals reflected the student's then-current needs, based in part on a lack of progress made by the student during the 2009-10 school year while he attended Eagle Hill.

The district next contends that the impartial hearing officer erred in finding that the August 2010 IEP was inappropriate because the CSE did not adopt the recommendations offered by the parents' private psychologist. The district alleges that although the CSE reviewed the private psychological evaluation, as well as other materials, prior to creating the student's IEP and incorporated the available material into the August 2010 IEP, the CSE was not required to adopt all of the findings, conclusions, and recommendations of the private psychologist. The district also asserts the CSE had reason to decline to follow the private psychologist's recommendation that the student attend Eagle Hill because the private psychologist's own testing of the student indicated that some of the student's skills had regressed while he attended the school. According to the district, the program ultimately recommended by the CSE accurately reflected all of the evaluative data about the student available to the CSE at the time of its meeting and the program specifically addressed each of the student's needs and provided the supports and services required for the student to obtain educational benefits.

The district further argues that the impartial hearing officer erred in finding that the parents met their burden to show that the unilateral placement at Eagle Hill during the 2010-11 school year was appropriate for the student and erred in determining that equitable considerations favored a reimbursement award.

The parents submitted an answer, denying many of the district's allegations and cross-appelling that portion of the impartial hearing officer's decision that denied the parents reimbursement for the residential portion of the student's tuition at Eagle Hill during the 2010-11 school year. Specifically, the parents contend that although they provided the CSE with extensive documentation regarding the student's needs, the information was not sufficiently

considered by the CSE in developing the August 2010 IEP. With regard to the district's recommended program, the parents contend that the CSE failed to identify the depth and complexity of the student's needs, failed to describe how they identified these needs and how they would be addressed, and ultimately recommended a mainstream class program that was not based on an accurate assessment of the student's present levels of performance and needs. The parents further contend that the impartial hearing officer correctly determined that the failure of the CSE to consider the evaluative information before them and the failure of the CSE to include members who were familiar with the student's needs, resulted in the district's failure to offer the student a FAPE. Additionally, the parents contend that the impartial hearing officer did not exceed his jurisdiction in making findings about school years prior to the 2010-11 school year because it was proper for the impartial hearing officer to consider background information in reaching his conclusions. The parents also argue that the impartial hearing officer properly found that the goals on the student's August 2010 IEP were inappropriate because the goals failed to reflect any new evaluations describing the student's current needs, only included one reading goal, and the IEP failed to include a level of instruction for reading, math, or writing. Additionally, the parents contend that the district failed to establish that the supports and related services on the IEP were sufficient to allow the student to be successful in a mainstream class because it did not provide specific evidence at the impartial hearing regarding how the supports and services would meet the student's specific needs.

With regard to Eagle Hill, the parents further allege that the impartial hearing officer correctly determined that the unilateral placement at Eagle Hill was appropriate and that there were no equitable considerations barring reimbursement. However, in their cross-appeal, the parents argue that the impartial hearing officer applied an incorrect standard in finding that they were not entitled to reimbursement for the residential portion of the student's tuition at Eagle Hill; the parents argue that they acted reasonably and the residential component "enhanced" the student's skills. The parents request that the district's petition be dismissed and the portion of the impartial hearing officer's decision addressing the residential aspects of the Eagle Hill placement be reversed.

In an answer to the parents' cross-appeal, the district contends that the impartial hearing officer properly found that the residential placement at Eagle Hill was not appropriate.

### **Applicable Standards**

Two purposes of the Individuals with Disabilities Education Act (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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an 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 least restrictive environment (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]).

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).

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]).

## **Discussion**

### **Scope of Impartial Hearing**

With regard to the district contentions that the impartial hearing officer raised and decided matters not in the due process complaint notice, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, \*8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*8 [S.D.N.Y. Aug. 27, 2010]; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038).

With regard to the 2009-10 school year, I am not persuaded by the district's contention that the impartial hearing officer exceeded his jurisdiction by making findings regarding school years that were not at issue. The district correctly contends that the parents' due process

complaint notice only raised issues regarding the 2010-11 school year and I note that the impartial hearing officer made no FAPE determination regarding the 2009-10 school year (Parent Ex. C at pp. 14-15; IHO Decision at pp. 9-12, 16). A student's progress under a prior IEP is a relevant area of inquiry for purpose of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]).<sup>5</sup> The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3rd Cir.1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011]; J.G.v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Board of Educ. Champaign Community Unit Sch. Dist. #4, 2007 WL 2681207, at \*3 [C.D.Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year" at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle, 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). I therefore decline to find that the impartial hearing officer's discussion of earlier school years in and of itself was improper (see, e.g., Cerra, 427 F.3d at 195-96).<sup>6</sup>

With regard to the district contention that the impartial hearing officer should not have reached the issue of whether the evaluations of the student were adequate, I find that the district is correct. The parents allege in their due process complaint that the district failed to place sufficient weight on the private psychologist's recommendation to place the student in Eagle Hill and on her opinion that the student should not be placed in a mainstream setting. However, the due process complaint notice may not be reasonably read to include the issue of whether there was adequate information to formulate an IEP for the student (see Parent Ex. C at pp. 3-10), and neither party on appeal contends that the August 2010 CSE did not have adequate evaluative information before it to develop an educational program for the student's 2010-11 school year, rather the parties disagree regarding whether the CSE gave adequate consideration to the evaluative information and disagree regarding the CSE's proposed program (see Pet. ¶¶ 16, 28-68, 84; Answer ¶¶ 16, 30, 84). Accordingly, to the extent that the impartial hearing officer's decision may be interpreted as finding that the district was required to conduct further evaluation of the student in order to formulate the student's IEP for the 2010-11 school year, such a

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<sup>5</sup> Located at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> .

<sup>6</sup> However, to the extent that the impartial hearing officer's decision may be construed as making an adverse factual finding that the 2009-10 IEP was inappropriate, that issue was not before the impartial hearing officer. Additionally, the district correctly notes that the student did not attend the district during the 2009-10 school year and did not receive services from the district pursuant to the 2009-10 IEP.

determination would impermissibly exceed the scope of the impartial hearing. The district also correctly points out that there is no challenge to the accuracy of the present levels of performance in the August 2010 IEP and the impartial hearing officer did not address this issue. Accordingly, the issues in this proceeding are confined to whether CSE's recommendations were appropriate in light of the evaluative information presented.<sup>7</sup>

### **CSE Process—Consideration of Evaluative Data**

Turning to the parties' dispute regarding the evaluative information considered by the August 2010 CSE, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]). Additionally, a CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such

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<sup>7</sup> I am concerned with the tenor of the standard articulated by the impartial hearing officer regarding the need for further evaluation of the student. The impartial hearing officer determined that if the CSE was not persuaded by the private evaluator's recommendations, then it was required to conduct further evaluations from a "reliable and persuasive source" before developing an IEP that was similar to the 2009-10 IEP (IHO Decision at p. 12). Although unclear, one reasonable interpretation of the standard he applied is that if a CSE is presented with the results of a privately obtained evaluation, it is impermissible for the CSE to deviate from any of the inferences, conclusions and services as proposed by the private evaluator in the absence of district-obtained evaluations that refute the opinions of the private evaluator. However, neither the IDEA nor State regulations impose such a standard upon districts. Instead in circumstances such as these, a district is only required to (1) ensure that adequate evaluative information has been obtained with regard to the student's areas of need, (2) consider any other information provided by the parents including private evaluations, and (3) recommend an IEP that was reasonably calculated to enable the student to receive educational benefits in the LRE (20 U.S.C. §§ 1412[a][5][A], 1414[b][2][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2], 300.304[b][1][ii]; see Rowley, 458 U.S. at 192; Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Mrs. B., 103 F.3d at 1120; M.H., 2011 WL 609880, at \*10; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007]; 8 NYCRR 200.1[cc], 200.6[a][1]).

evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 C.F.R 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at \*19 [D. Minn.]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Contrary to the impartial hearing officer's finding that the CSE failed to sufficiently consider the June 2009 private psychoeducational evaluation (IHO Decision at pp. 11-12; Dist. Ex. 1), a careful review of the student's August 2010 IEP reveals that the CSE utilized the June 2009 private psychoeducational evaluation in the development of the student's present levels of academic and social/emotional performance, his program modifications, and in determining the recommendation for the student's special education program reflected in the August 2010 IEP.<sup>8</sup> For example, the IEP reflected the results of the student's cognitive testing contained in the June 2009 psychoeducational evaluation, noting a full scale IQ of 101 in the average range of functioning (compare Dist. Ex. 1 at pp. 8, 11, with Dist. Ex. 20 at p. 5). The present levels of academic performance in the IEP also reflected information from the June 2009 psychoeducational evaluation, specifically stating the student's difficulty with consistently creating and organizing his thoughts for written expression, as well as his difficulty with reading comprehension, multi-step math problems, math fluency, and noting the effect of the student's attentional deficits on his academic performance (compare Dist. Ex. 1 at pp. 6, 11, 12, 15, 17, 20, with Dist. Ex. 20 at p. 4). Likewise, the present levels of social/emotional performance in the IEP reflected the student's difficulty adapting and coping when faced with a challenge or change and his need for individual counseling (compare Dist. Ex. 1 at pp. 16, 20, with Dist. Ex. 20 at pp. 5-6). The IEP also reflected many academic program modifications which were noted in the June 2009 private psychoeducational evaluation including, among other things, the provision of visual prompts, repetition of directions, check for understanding ,and tasks broken down into smaller units (compare Dist. Ex. 1 at p. 20, with Dist. Ex. 20 at p. 2). Furthermore, the IEP reflected annual goals related to the student's needs as depicted in the student's present levels of performance (Dist. Ex. 20 at pp. 2-6, 7-10).

In addition to the June 2009 private psychoeducational evaluation discussed above (Dist. Ex. 1), the CSE also utilized June 2010 progress reports from Eagle Hill (Dist. Ex. 9), a May 17, 2010 academic assessment update report by the private psychologist (Dist. Ex. 11), and a February 2010 district observation of the student at Eagle Hill (Dist. Ex. 6) to develop the student's IEP (see Tr. p. 58; Dist. Ex. 20 at p. 7).<sup>9</sup> Testimony by the district's director of pupil services indicated that the reports communicated a consistent theme with regard to the impact of the student's ADHD on his overall academic functioning specifically in reading, writing, and math (Tr. pp. 77-78). He also indicated that the reports reflected an overall deficit in the

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<sup>8</sup> The August 2010 IEP noted that the psychoeducational evaluation that the CSE considered was dated June 30, 2009; however, the evaluation report is actually dated June 10, 2009 (Tr. p. 61; compare Dist. Ex. 1 at p. 2, with Dist. Ex. 20 at p. 7).

<sup>9</sup> Testimony by the district director of pupil services indicated that the CSE also had before them the four letters noted above which recommended residential placement at Eagle Hill (Tr. pp. 58-59).

student's organizational skills, study skills, and in his ability to complete homework, focus in class, and manage transitions (Tr. p. 78). A review of the reports corroborates further testimony by the director that the academic present levels of performance on the student's IEP were consistent with the information provided in the reports, as noted above in the discussion of the CSE's consideration of the June 2009 psychoeducational evaluation (Tr. pp. 76-80). The IEP also contained information gleaned from the 2010 Eagle Hill reports including, among other things, that the student often rushed through assignments, required reminders to check over his work, required graphic organizers to organize his writing during the pre-writing process, needed assistance with multi-step problems, a copy of class notes as a study guide, and visual prompts (Dist. Exs. 9 at pp. 1, 2, 5, 9; 20 at pp. 2, 4). The IEP also reflected the updated academic test scores from the private psychologist's May 17, 2010 academic assessment update which reported the student's continued average overall academic functioning (Dist. Ex. 11 at pp. 4-8).

With regard to the student's social/emotional needs, the district's director of pupil services testified that the description of the student's present level of social/emotional performance was primarily based on the June 2010 Eagle Hill report and that the CSE also took information from the various letters that were submitted (Tr. p. 80). A review of the IEP confirms that the social/emotional present levels of performance section of the IEP contained information gleaned from the 2010 Eagle Hill reports including, among other things, that the student had begun to exhibit flexibility that provided him with more positive peer interactions; had begun to realize the impact of some of his behaviors on others; had increased his ability to see things from the perspective of others and to share ideas and thoughts in a more positive manner; had learned to display greater flexibility when faced with challenging academic situations, recognizing alternatives and trusting himself to filter through and find a solution that worked for him; that although compromise and cooperation remained a challenge, the student's desire to make and keep friends often won out in these situations; and that impulsive sabotaging behaviors sometimes got in the student's way (Dist. Exs. 15 at p. 1; 20 at pp. 5-6). The IEP also reflected information contained in a letter from the student's psychiatrist which indicated that although the student was able to control his behavior at school he was prone to frequent and intense angry outbursts at home (Dist. Exs. 12 at p. 1; 20 at p. 6). The IEP also reflected a number of program modifications to address the student's academic, attentional, and social/emotional management needs which were gleaned in part from the 2009 psychoeducational evaluation and the 2010 Eagle Hill reports (Dist. Exs. 1 at pp. 19, 20; 9 at pp. 1, 2, 5, 9, 14, 17).

With regard to the impartial hearing officer's finding that the CSE had no basis to depart from the recommendations made in the June 2009 private psychoeducational evaluation (IHO Decision at pp. 11-12), I note that the evaluator's interpretation of the student's needs is not consistent with the test results contained in the evaluation report. Although the student demonstrated some areas of relative weakness, overall, the evaluation reflected that based on standard scores and percentile ranks, the student's academic functional level was in the average range (Dist. Ex. 1 at pp. 8-10). As such, I find that the CSE's weighing of the private evaluator's recommendations for services was not inappropriate insofar as the evidence does not support the evaluator's recommendation that the district was required to place the student in a special class setting such as Eagle Hill in order for the student's IEP to be reasonably calculated to receive educational benefits (Dist. Ex. 1 at pp. 17, 18). I note also that State regulations dictate that no single measure or assessment should be used as the sole criterion for determining an appropriate

educational program for a student (8 NYCRR 200.4[b][6][v]). Furthermore, it was not improper for the district to use the information contained in the Eagle Hill reports in developing the student's present levels of performance rather than conducting its own evaluations (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at \*10 [S.D.N.Y. Feb. 16, 2011]). Also, as noted previously, there is no contention that the present levels of performance in the student's IEP were in any way inaccurate.

Based on the foregoing, I find that the August 2010 CSE appropriately considered the information before it when developing the student's IEP – information that largely reflected what was contained in the June 2009 private psychoeducational evaluation and the Eagle Hill reports. Therefore, I will annul the impartial hearing officer's conclusion that found a denial of a FAPE on the basis that the August 2010 CSE failed to consider the June 2009 private psychoeducational evaluation (IHO Decision at pp. 11-12).

### **Annual Goals**

The district argues that the impartial hearing officer erred in finding that the annual goals were improper because they were repeated from a prior year's IEP. The district's director of pupil services testified that the CSE "draw[s] a very straight line between present levels, needs and goals" (Tr. p. 83). In accordance with this, I find upon my review of the hearing record that the goals on the student's August 2010 IEP correlate directly with the student's needs as described in the present levels of performance. The IEP includes several annual goals that address developing skills related to the student's attention deficits such as beginning and completing assignments and organizational skills (goals 1-7, 10, 11, 17); academic goals specifically addressing the student's deficits in reading comprehension, written expression and multi-step math problems (goals 8-12); and social/emotional/behavioral goals which address the student's deficits in peer interactions (goal 15) and the impact of his behaviors on others (goals 13, 14, 16, 17, 18) (Dist. Ex. 20 at pp. 7-10).

Although the IEP contains annual goals that are similar to those on the student's previous 2009-10 IEP, I note that the hearing record shows that the student's needs had not changed significantly since the student's previous IEP (compare Parent Ex. H at pp. 6-8 with Dist. Ex. 20 at pp. 7-10). Testimony by the district's director of pupil services indicated that the study skills goals addressed needs that were "clearly evident and substantially similar to [the student's] presentation from the last time [the CSE] developed an IEP" for the student (Tr. p. 139). The director further testified that four of the five academic goals were relatively new as they had been added to the student's IEP in January 2009 (Tr. p. 140). According to the director of pupil services, the CSE went through the goals at the meeting, made adjustments, and that the consensus of the committee at the time was that the goals were still consistent with the student's needs (Tr. pp. 140-41, 145-47). Testimony by the student's mother revealed that she reviewed the goals prior to the CSE meeting, that she came to the CSE meeting with comments regarding the student's goals, and that the CSE made "some changes to some of the goals, some clarification" in response to her comments (Tr. pp. 358-59). I note that it has been held that "[m]odeling an IEP after the previous year's with appropriate changes, is a sensible practice that, as long as it is not done reflexively and without consideration of the student's individual circumstances and needs, does not signify that no progress has been made" (K.A. v Chappaqua

Cent. Sch. Dist., 09-cv-699 at \* 14 [S.D.N.Y. Mar. 12, 2010]; see S.H., 2011 WL 6108523, at \*10). Accordingly, I will annul the impartial hearing officer's finding that the district failed to demonstrate that it offered a FAPE for the 2010-11 school year on the basis that it repeated prior goals (IHO Decision at p. 10).

### **District's Recommended Placement**

The hearing record reflects that the CSE recommended a combination of services that collectively addressed all of the student's special education needs. Testimony by the district's director of pupil services indicated that he felt it was his responsibility to place the student in the "most mainstream setting" possible (Tr. p. 133). As such, to address the student's academic needs the CSE recommended direct consultant teacher services in ELA, and math for three days in a six day cycle (Tr. p. 85; Dist. Ex. 20 at pp. 1). The hearing record reflects that the student would receive these services in his mainstream classes of not more than 25 students with not more than five to six classified students (Tr. pp. 86-87). Testimony by the director of pupil services indicated that a special education teacher would go into the student's English class, his writers' workshop class, and his math class every other day (or three days in a six day cycle) and that the student would be supported by an assistant teacher every day when the special education teacher was not in these classes (Tr. pp. 87-90, 99).<sup>10</sup> The IEP also proposed that the student would be supported by an assistant teacher in science and social studies and would also be supported by an aide in "specials," physical education, and lunch (Dist. Ex. 20 at p. 2). The director of pupil services testified that the role of the special education consultant teacher would have been to support the student's IEP goals, to monitor the student's behavior and organization in class, to make sure the student's program modifications were implemented appropriately, to consult with the mainstream teachers, communicate with the student's entire team and serve as the primary contact and support for the student (Tr. p. 89). The director also indicated that in many cases the district provided assistant teachers who were also certified teachers and who brought a higher level of instructional expertise to support students in the classroom (Tr. p. 96). He testified that the program modifications on the IEP were a "guidebook" that the assistant teacher was responsible for implementing in the classroom and that the program modifications primarily addressed the student's attentional and behavioral needs (Tr. pp. 100-01). He also indicated that the student would receive the support of a shared aide along with students with similar behavioral needs, to facilitate his transition back into the district school and to support him throughout his day as needed (Tr. pp. 97-98). The CSE also recommended resource room services once per day for 40 minutes in a group of five (Dist. Ex. 20 at p. 1). The director testified that the focus of the resource room is to meet the student's IEP goals and that time would be spent on organization and skill remediation in terms of reading and writing (Tr. p. 90). He further testified that the resource room is a "safe home base" for students in terms of not only meeting IEP goals but also in feeling emotionally supported (Tr. pp. 90-91). The director testified that the resource room teacher is a contact person for the parents and that often the teacher assigned to the resource room is the same person who is in the mainstream classroom, which provides for a "nice cohesion" (*id.*). The director also testified that because the student

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<sup>10</sup> Testimony by the district's director of pupil services indicated that during the 2010-11 school year, there were times when both the assistant teacher and the consultant teacher assisted in a classroom at the same time (Tr. p. 97).

was not taking a foreign language, he would have had an available class period which could be used for the resource room instead of missing an elective or "special" (Tr. pp. 91-92).

The August 2010 IEP also recommended several components to address the student's social/emotional/behavioral needs (Dist. 20 at pp. 1-2). The hearing record reflects that the individual counseling of one 30-minute session in a six day cycle recommended in the IEP would have been provided by the school psychologist (Tr. p. 92). The IEP also recommended direct/indirect psychological consultation services of two individual 30-minute sessions in a six day cycle wherein, according to the district's director of pupil services, the school psychologist would monitor and support the student's behavior throughout the day by consulting with the student's teachers and working with the aide and assistant teacher to implement a behavior plan (Tr. pp. 94-95; Dist. Ex. 20 at p. 2). He noted that the student could also come into the school psychologist's office if necessary or spend time with the middle school guidance counselor when in need of support (Tr. pp. 94-95). Additionally, the IEP reflected that although the student was able to control his behavior at school, at home, he was prone to frequent and intense outbursts of anger (Dist. Ex. 20 at p. 6). To address this, the CSE recommended parent counseling and training of two 40-minute sessions per month which, according to the director, would have been provided by the school psychologist or through a contract with an outside organization (Tr. pp. 92-93; Dist. Ex. 20 at p. 2).

The IEP also included a recommendation for a BIP (Dist. Ex. 20 at p. 2). Testimony by the director of pupil services indicated that the potential behavior plan would have been put into place by the school psychologist who would initially perform a FBA of the student once he arrived in the district program (Tr. p. 102).<sup>11</sup>

I note also that although the parents contended in their due process complaint and in her testimony that the offered program would not have provided the student with any direct special education services, based on the above and the August 2010 IEP the hearing record clearly indicates that the student would have been provided with direct special education services via the implementation of the recommended direct consultant teacher services in ELA and math, as well as via daily resource room services, the support of an assistant teacher in all academic classes, and the support of an aide in non-academic settings (Tr. p. 271; Dist. Ex. 20 at p. 1; Parent Ex. C at pp. 9, 11, 12). Moreover, contrary to the contention that the district has offered a substantially similar program since the student's fourth grade, a comparison of the services recommended in the student's 2008-09 fourth grade IEP with those recommended in the 2010-11 IEP reveals that the 2010-11 IEP increased the level of support provided to the student as follows: increased the student's direct consultant teacher services by adding three 40-minute sessions in a six day cycle in math to the existing ELA services; increased resource room services from four in a six day cycle to daily 40-minute sessions; added an assistant teacher in all academic settings; and increased the psychological consultation services from one hour per month in a group to two 30-

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<sup>11</sup> I note that in certain circumstances it is not inappropriate for a district to wait until after a student begins to attend a district school to conduct an FBA (see A.C. v. Board of Educ., 553 F.3d 165, 172-73 [2d Cir. 2009]; (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d. Cir. Oct. 27, 2006]; S.H., 2011 WL 6108523, at \*9; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*9-10 (S.D.N.Y. Oct. 28, 2011); Application of a Student with a Disability, Appeal No. 11-032).

minute individual sessions in a six day cycle (direct or indirect) (compare Dist. Ex. 20 at pp. 1-2 with Parent Ex. L at pp. 1-2).

Based on the above, the hearing record demonstrates that the August 2010 IEP offered the student a FAPE for the 2010-11 school year as it appropriately identified the student's needs, included goals to address those needs and recommended a placement and related services that were reasonably calculated to provide the student with educational benefits (Newington, 546 F.3d at 118-19).

### **Conclusion**

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to determine the parents' cross-appeal and therefore I will dismiss the cross-appeal. I also need not reach the issue of whether Eagle Hill was appropriate for the student or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that those portions of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parents for tuition paid to the Eagle Hill School for the 2010-11 school year are annulled.

**Dated:** Albany, New York  
December 15, 2011

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