



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-074

### Application of the

for review of a determination of a  
hearing officer relating to the provision of educational services  
to a student with a disability

#### Appearances:

Ingerman Smith, LLP, attorneys for petitioner, Susan M. Gibson, Esq., of counsel

The Law Offices of Gerry McMahon, LLC, attorneys for respondents, Gerry McMahon, Esq., of counsel

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2012-13 school year. The appeal must be dismissed.

#### II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

With regard to the student's educational history, the hearing record shows that, after receiving special education itinerant teacher (SEIT) and related services while attending preschool, the student attended a general education kindergarten classroom at a district elementary school with the support of a 1:1 aide and related services of counseling and speech-language therapy during the 2008-09 school year (see Dist. Exs. 3 at pp. 2-3; Parent Exs. 2 at pp. 1-2; 3 at pp. 1-2; 3 at pp. 1-2). Subsequently, the hearing record shows that the student repeated

the first grade and, for both the 2009-10 and 2010-11 school years, attended an 8:1+2 special class with the support of a 1:1 aide and received counseling and speech-language therapy at a district public school (Dist. Exs. 4 at pp. 1, 4; 5 at pp. 1, 4; 6 at pp. 2-3; 7 at p. 1-30 at p. 1; 31 at p. 1). The hearing record indicates that the student was mainstreamed into the general education classroom setting with the support of his 1:1 aide to an increasing degree during the 2010-11 school year (see Tr. pp. 639-40). At all times relevant to this appeal, the parties do not dispute that student was eligible for special education as student with an other health-impairment (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

On March 14, 2011, the CSE convened to review the student's triennial reevaluation and to develop an IEP for the student for the 2011-12 school year (Dist. Ex. 8 at p. 1). The March 2011 CSE recommended that the student be placed in a general education setting with the full-time support of a 1:1 aide, and receive one 30-minute session of counseling per week in a small group (5:1) (id. at pp. 1, 3, 8-9). In addition, the March 2011 IEP included three social/emotional/behavioral annual goals, testing accommodations (extended time and flexible setting), and supports for the student's management needs, including provision of a daily schedule of activities with an agreed upon reward at the end of the day and provision of choices and expectations (id. at pp. 7-10). The IEP noted that, if the student exhibited "shutting down" or tantrum behaviors, he might require adult assistance "to move on . . . and re-enter the group situation without embarrassment" (id. at pp. 6-7).

In October and November 2011, the district conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) for the student (see generally Dist. Exs. 34; 35).<sup>1</sup> At the parent's request, the CSE reconvened on December 16, 2011 (Dist. Ex. 9 at pp. 1-2). The December 2011 CSE reviewed the student's FBA and BIP (id. at p. 2). The CSE adjourned to review a private psychoeducational evaluation report provided by the parents and so that additional evaluations could be completed by a psychiatrist and a neurologist (id.; see generally Dist. Ex. 33). Comments included in the December 2011 IEP indicated that the parents would be contacted if the student experienced a "behavioral episode" that was long-lasting or that created an unsafe environment (Dist. Ex. 9 at p. 2).

On May 9 and June 1, 2012, the parents signed an enrollment contract with Eagle Hill for the student's attendance during the 2012-13 school year (see Parent Ex. 34 at p. 1).<sup>2</sup>

On June 11, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 10 at pp. 1, 3). The June 2012 CSE reviewed the private psychoeducational evaluation report and indicated that the testing results revealed deficits in the area of reading, which differed from results reported in a March 2011 district educational evaluation (id. at p. 2; see generally Dist. Exs. 27; 33). Thus, the CSE determined that additional data was warranted and recommended "a comprehensive reading

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<sup>1</sup> Neither the student's March 2011 IEP nor the student's subsequently developed IEPs recorded the student's need for a BIP (see Dist. Exs. 8 at p. 7; 9 at p. 7; 10 at p. 7).

<sup>2</sup> 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).

evaluation" (Dist. Ex. 10 at p. 2). The June 2012 CSE continued the recommendation that the student attend a general education class placement with the full time support of a 1:1 aide but added four weekly 45-minute sessions of resource room in a small group (5:1) (id. at pp. 1, 9-10). The June 2012 CSE also recommended two 30-minute sessions of counseling per week, one individually and one in a small group (5:1), as well as a counseling consult once per month (id. at pp. 1, 9). The IEP specified that the 1:1 aide would assist the student with transitions during the school day and collect data regarding the student's behavior (id. at p. 7). The June 2012 IEP also recommended supports for the student's management needs (choices, frequent breaks, positive praise, a daily schedule, daily rewards, and direct reading instruction "to remediate reading deficits"), 16 annual goals in the areas of reading, writing, and social/emotional/behavioral, and testing accommodations (id. at pp. 7-11).

By letter, dated August 9, 2012, the parents informed the district that they believed the June 2012 IEP was not appropriate for the student and, therefore, that they intended to unilaterally place the student at Eagle Hill for the 2012-13 school year at public expense (Dist. Ex. 44 at p. 1).

#### **A. Due Process Complaint Notice**

In a due process complaint notice, dated May 10, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11, 2011-12, and 2012-13 school years (see Dist. Ex. 1 at pp. 1, 11). The parents set forth factual allegations relating to the student's special education needs and program from 2008-09 through the 2012-13 school year (id. at pp. 2-8). For the 2010-11 school year, the parents alleged that, as a result of the student's lack of progress during the 2009-10 school year, the district made the student repeat the first grade, rather than develop an appropriate IEP (id. at p. 11). The parents also asserted that, despite the student's needs in reading, the CSE failed to include academic goals or objectives in the student's IEP for the 2010-11 school year until an October 2010 CSE meeting (id. at p. 4).

For the 2011-12 school year, the parents asserted that the CSE inappropriately removed services from the student's IEP, notwithstanding evaluation results indicating inconsistencies and deficits in the student's abilities (Dist. Ex. 1 at pp. 4-5, 11). Specifically, the parents asserted that the CSE inappropriately removed from the student's special education program: the special class setting, direct instruction, speech-language therapy, and all academic annual goals (id. at p. 5). In addition, the parents alleged that the student failed to make meaningful progress with respect to his social/emotional and behavioral needs (id. at pp. 7, 11; see id. at pp. 5-6).

Specific to the 2012-13 school year, the parents alleged that the IEP inappropriately included the same program and services and similar goals despite the student's lack of "meaningful progress over the course of several years" (Dist. Ex. 1 at pp. 8, 11). The parents asserted that the CSE developed an IEP for the student "that had no hope of closing the significant gap that had developed between [the student] and his peers due to years of inappropriate programs" (id. at p. 7).

In addition, the parents alleged that Eagle Hill was an appropriate unilateral placement and that the student made progress during the 2012-13 school year (Dist. Ex. 1 at pp. 8-11). As relief, the parents requested tuition reimbursement for the costs of the student's tuition at Eagle Hill for the 2012-13 school year (id. at p. 12). The parents also requested "compensatory education in the form of tuition reimbursement" for the same school year (id.).

## **B. Impartial Hearing Officer Decision**

On September 11, 2013, an impartial hearing convened in this matter and concluded on February 24, 2014, after nine days of proceedings (Tr. pp. 1-1562). By decision dated April 10, 2014, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Eagle Hill was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 19-38).

As an initial matter, during the impartial hearing, the IHO rendered an interim ruling that the two-year statute of limitations barred any of the parents' claims relating to the timeframe prior to May 13, 2011 (see Tr. pp. 625-27). In addition, in her decision, the IHO noted that the parents' requested relief in the form of tuition as compensatory education was not an appropriate remedy under the circumstances and that, therefore, her review of facts relevant to school years prior to the 2012-13 school year would be only for the purpose of reviewing the appropriateness of the educational program recommended for the student's 2012-13 school year (IHO Decision at p. 20).

Thus, the IHO reviewed the student's needs and educational history leading up to the 2012-13 school year and noted several pieces of evidence showing that the student had deficits in areas that were left unaddressed by the student's special education program (see IHO Decision at pp. 20-27). Reviewing evaluative information about the student from 2010 and 2011, the IHO noted that scores on certain standardized testing measures tended to show that the student exhibited deficits in the areas of decoding and phonological processing (see id. at pp. 21-23). Based on these areas of need, the IHO found that the March 2011 IEP should have included academic annual goals (id. at p. 24). In addition, the IHO found that the supports and services recommended in the May 2011 IEP were insufficient to meet the student's academic or behavioral needs (id. at pp. 24-25). The IHO reviewed the student's October 2011 FBA and November 2011 BIP and found that the documents reflected "little understanding of the [s]tudent's behavior," included strategies that were insufficiently specific or of questionable effectiveness and, further, included information reflecting that the student required academic goals in his IEP (id. at pp. 25-26). The IHO found that, when the CSE reconvened in December 2011, it should have "reviewed the student's program, added academic goals, and reconsidered the general education setting" (id. at pp. 26-27). In addition, the IHO found that the student's attentional needs, as well as his need for an environment with few distractions and opportunities for movement, were not addressed by the recommendations in the March and December 2011 IEPs (id. at p. 27).

As to the student's progress during the 2011-12 school year, the IHO noted that the student exhibited an increase in disruptive behaviors as the school year continued (IHO Decision at pp. 25, 31). Citing behavioral data collected by the district during the 2011-12 school year,

the IHO noted the "high intensity" and constant nature of the student's behaviors and evidence that they "affected other students" and, on certain occasions, "even . . . other classes" (id. at p. 31). The IHO relied on an email sent during the 2011-12 school year in finding that the district school psychologist had informed the parents of her belief that the student might require a different setting that was similar to the special class he attended during the 2009-10 and 2010-11 school years (id. at p. 31). Citing testimony from the student's teacher from the 2011-12 school year and the parents, the IHO opined that the student needed "a setting that provided opportunities—at least a[t] times—for learning in a less threatening environment than . . . the general education class" (id. at pp. 32-33)

Next, the IHO reviewed the description of the student's needs in the November 2011 private psychoeducational evaluation report, as well as testimony from the student's teacher about the student's needs in the general education class setting during the 2011-12 school year (IHO Decision at p. 28). Turning to the recommendations in the June 2012 IEP, the IHO found that the IEP failed to include many of the strategies and supports recommended in the November 2011 private psychoeducational evaluation report or utilized by the student's teacher during the 2011-12 school year (id. at p. 29). The IHO determined that the June 2012 IEP "relied on general strategies that had not worked in the past instead of instituting a systematic approach to helping the [s]tudent develop a sense of control over his behaviors" (id. at pp. 29-30). In addition, the IHO also questioned why, given the new information available to the CSE and the fact that the student had not exhibited improvement with his behavioral needs, the June 2012 CSE did not conduct a new FBA or develop a new BIP for the student (id. at p. 30). The IHO concluded that the student needed a "very nuanced program" with "[s]pecific strategies" set forth in a BIP or in the IEP (id. at pp. 30-31, 35). As to the student's academic needs, the IHO noted that, although the June 2012 IEP address the student's reading deficits, it failed to "focus on his difficulties in other areas of learning" or on "his self-perception that he had difficulties" (id. at p. 34).

In summary, the IHO concluded that the June 2012 IEP was "not reasonably calculated to provide educational benefits" (IHO Decision at p. 33). The IHO found that the district failed to consider the connection between the student's behavioral needs and his ability to learn (id.). The IHO found the strategies included in the IEP insufficient to allow the student to make progress in a general education class setting and further opined that the student's past successes were attributable to his "familiarity with and rapport with providers and teachers" (id.). The IHO found that the June 2012 CSE should have considered a special class for the student since he had "never successfully attended a general education class without the safety net of a self-contained class," or a teacher's use of additional strategies and 1:1 instruction (id. at pp. 33-34).<sup>3</sup>

Turning to the appropriateness of the unilateral placement, the IHO found that Eagle Hill offered specially designed instruction to meet the student's needs (see IHO Decision at pp. 35-37). The IHO noted that Eagle Hill took steps to understand the student's functioning and needs and developed strategies and approaches based thereon (id. at p. 35). The IHO noted Eagle Hill's approaches to the student's needs through a behavior plan and a "structured and focused approach to counseling" (id. at pp. 35-36). In addition, the IHO cited evidence of the student's

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<sup>3</sup> Any 1:1 instruction that was provided by the student's teacher exceeded the requirements of his IEPs appearing in the hearing record.

progress at Eagle Hill during the 2012-13 school year in the social/emotional and behavioral realms (id. at pp. 36, 37). As for academics, the IHO also found that Eagle Hill recognized the student's need for a "structured and explicit approach to acquiring decoding and comprehension skills" and noted evidence that the student began to take "academic risks," exhibited comfort with expectations and routines and steady attention, participated frequently, and was able to help classmates (id. at pp. 36-37). The IHO also found many of the approaches and strategies utilized by Eagle Hill comported with the recommendations in the November 2011 private psychoeducational evaluation, as well as the experiences of the parents and the student's teacher from the 2011-12 school year (id. at pp. 36, 37).

Finally, the IHO concluded that equitable considerations weighed in favor of the parents' requested relief, noting that the parents cooperated and expressed concerns to the CSE and procured and submitted to the CSE the November 2011 private psychoeducational evaluation report (id. at pp. 37-38). In contrast, the IHO noted that, after receiving the private evaluation and despite evidence that the student's educational program required changes, the CSE did not reconvene until June 2012 (id. at p. 38). Consequently, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Eagle Hill for the 2012-13 school year (id.).

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

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that Eagle Hill was an appropriate unilateral placement for the student, and that equitable considerations supported the parents' request for relief. Initially, the district asserts that the IHO improperly ignored her own interim ruling applying the statute of limitations to the instant case and erroneously made substantive findings about events preceding the actionable timeframe. Further, the district argues that the IHO erred in offering a diagnosis for the student absent support in the hearing record and misconstrued certain standardized testing results about the student. The district argues that the hearing record did not include evidence to support the IHO's finding that the student's phonological processing needs impacted his reading by March 2011.

With respect to the 2011-12 school year, the district asserts that the CSE appropriately determined that the student no longer required a special class setting and that the IHO erred in finding the student's March and December 2011 IEPs failed to sufficiently address the student's academic and social/emotional needs. In addition, the district argues that the IHO erred in finding that the student's FBA revealed the district's lack of understanding of the student's behaviors or that the strategies in the BIP were insufficient or inappropriate. The district further argues that the IHO erred in determining that the December 2011 CSE had plenty of reasons to suspect that the student's program was not meeting his needs and that a substantial change was needed.

Next the district argues that the IHO failed to consider evidence of the student's progress during the 2011-12 school year, such as classroom assessments. Further, the district asserts that, contrary to the IHO's findings, behavioral data collected during the 2011-12 school year did not indicate that the student's highest intensity behaviors remained constant through the school year or that he exhibited serious behaviors on a daily basis. As for the 2012-13 school year, the

district asserts that the June 2012 IEP offered the student an appropriate program, including, contrary to the IHO's determination, many of the supports and strategies recommended in the November 2011 private psychoeducational evaluation report and used by the student's classroom teacher during the 2011-12 school year.

The district also asserts that the parents failed to meet their burden to show that Eagle Hill was an appropriate unilateral placement for the student. The district argues that no evidence in the hearing record supported a finding that the student required a placement so restrictive in order to benefit from instruction. The district further notes that the parents presented no witness from Eagle Hill and that the testimony from the parents and the psychologist, who acted as an advocate for parents seeking tuition reimbursement from districts for the costs of attendance at Eagle Hill, was insufficient to offer the necessary detail to meet the parents' evidentiary burden. In addition, the district asserts that academic instruction provided to the student at Eagle Hill was less rigorous than that offered at the district. The district asserts that the student did not fit the profile of the students at Eagle Hill, which included students with language-based learning disabilities. Further, the district points to evidence in the hearing record that the student did not make academic progress at Eagle Hill.

Finally, the district asserts that equitable considerations warranted a reduction or denial of the parents' requested relief, citing evidence that the parents never followed through on the December 2011 CSE's recommendation for psychiatric and neurological evaluations, despite the district's efforts in obtaining parental consent and setting up an evaluation. In addition, the district asserts that the parents conceded that they did not make the student available for a comprehensive reading evaluation recommended by the June 2012 CSE. Moreover, the district indicated that the parents failed to inform the June 2012 CSE about their intentions to unilaterally place the student at Eagle Hill even though they had already signed an enrollment contract. Consequently, the district seeks an order reversing the IHO's decision in its entirety.

In an answer, the parents respond to the district's petition by variously admitting or denying the allegations raised by the district and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Eagle Hill was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition. In addition, the parents assert that the IHO did not err in reviewing information that predated the actionable timeframe, arguing that the evidence reviewed was relevant to show that the district was on notice of the student's unique needs over the course of several years.

## **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## VI. Discussion

### A. Scope of Review and Statute of Limitations

The district asserts that the IHO erred in making substantive findings about facts that predated the timeframe within the scope of the impartial hearing based upon the application of the two-year statute of limitations.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57, 2014 WL 519641 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at \*2, \*4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).<sup>4</sup>

In this instance, where the parents filed their due process complaint notice on May 10, 2013 and do not dispute that the scope of the impartial hearing was limited to the two-year period preceding the filing of the due process complaint notice, any of the parent's claims relating to the 2010-11 school year were barred by the statute of limitations (see Tr. pp. 625-27; Dist. Ex. 1 at p. 1). To the extent the IHO made findings about the adequacy of the student's educational program set forth in the student's March 2011 IEP or before, review of the IHO's decision reveals that such findings are of little consequence as she did not expressly find a denial of a FAPE to the student in the 2011-12 school year and no relief was awarded to the parent relative to any school year other than the 2012-13 school year (see IHO Decision p. 28).

Relatedly, as the parents did not assert a cross-appeal of the IHO's determination that the request for compensatory education in the form of tuition reimbursement at Eagle Hill was not an appropriate form of relief in this instance, that determination has become final and binding on the parties (see IHO Decision at p. 20; see also Educ. Law § 4404[1]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Consequently, no relief may be granted relative to the parents' claims about the student's 2011-12 school year.

As such, the only the IHO's findings stemming from the 2012-13 school year must, at this juncture, be reviewed. While the claims may relate to a specific school year, this does not, however, as the district implies, foreclose admissibility relevant evaluative evidence about the student or evidence regarding the student's progress that was available in the hearing record but

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<sup>4</sup> New York State has not explicitly established a different limitations period.

which may have been conducted or recorded at varying points in time preceding the development of 2012-13 school year IEP.<sup>5</sup>

## **B. June 2012 IEP**

### **1. Evaluative Information**

While there is no dispute about the sufficiency or consideration of the evaluative information before the June 2012 CSE, a review thereof facilitates a discussion of the adequacy of the educational placement recommended for the student's 2012-13 school year. The hearing record indicates that the June 2012 CSE had available to it the following: a March 2009 psychiatric evaluation report, March and April 2010 educational testing results; a February 2011 psychoeducational evaluation report; March 2011 classroom observation and social history update reports; a March 2011 educational evaluation report, a March 2011 speech-language progress summary report, an October 2011 FBA and a November 2011 BIP, a November 2011 private psychoeducational evaluation report; as well as information provided by the parents and the student's teacher (see Dist. Ex. 10 at pp. 2-5; see generally Dist. Ex. 21; 23-25; 27-31; 34-35).

In March 2009, the district conducted a psychiatric assessment of the student (see generally Dist. Ex. 21). The assessment consisted of a review of records, a meeting and a telephone conference with the parents, a meeting with school personnel including the school psychologist, and a mental status examination of the student (id. at p. 1). The psychiatric consultant indicated that, at the age of one and one-half years, the student began to have significant temper tantrums when he could not get his way, when he was physically uncomfortable, or if he was redirected (id.). The consultant reported that the student attended nursery school for three years and, during his first, exhibited a very significant separation anxiety (id. at pp. 1-2). The consultant also indicated that the student had a difficult time in kindergarten with respect to his behaviors, including tantrums (id. at p. 2). The consultant reported that, at the beginning of kindergarten, the student took prescription drugs, relative to his receipt of diagnoses of a bipolar disorder and a dysregulation disorder and had begun seeing a psychotherapist (id.).

The psychiatric consultant described that the student presented with defenses such as avoidance, rigidity, and regression (Dist. Ex. 21 at p. 2). He indicated that the student's "style" consisted of being "sweet and related when he c[ould] be and oppositional and avoidant when feeling uncomfortable" (id.). The consultant opined that, while definitive diagnoses could not be made in the context of the meeting, the student exhibited characteristics of a mood disorder (including racing thoughts as observed by others, irritability, and temper tantrums) and an anxiety disorder (including separation anxiety and worry about failing) (id. at p. 3). The consultant further observed that the student had a very difficult time managing emotions and easily regressed to tantrums (id.). The consultant made several recommendations, including

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<sup>5</sup> The distinction between contested issues and relevant, admissible evidence was recognised in the context of express regulations in P. v. Greenwich Bd. of Educ., 929 F. Supp. 2d 40, 48 (D. Conn. 2013), but the distinction is nevertheless present regardless of whether it is express or implied.

possible consideration of an educational program with "more emotional support and structure while at the same time maintaining academics at [the student's] very high ability level" (*id.* at p. 4). He further noted that the student might benefit from a safe place in school to go when upset (*id.*). The consultant further recommended that the student continue to receive psychotherapy and outpatient mental health intervention, and undergo a psychiatric examination to more clearly define the student's needs related to anxiety and mood and to initiate treatment (*id.*).

The district conducted an educational evaluation of the student in March and April 2010, which included administration of: the Wechsler Individual Achievement Test, Second Edition (WIAT-II); the Comprehensive Test of Phonological Processing (CTOPP); and the Woodcock Reading Mastery Test-Revised (WRMT-R) (Dist. Exs. 23; 24 at p. 1; 25 at p. 1). The student's performance on the WIAT-II yielded scores in the low average range in reading, in the low average to average range in written language, and in the average range in mathematics and oral language (Dist. Ex. 23). On the CTOPP, the student scored in the average range, with the exception of the memory for digits subtest and the phonological memory composite, which fell in the below average range (Dist. Ex. 24 at p. 1). On the WRMT-R, the student scored in the borderline range on the word attack subtest and in the average range on the passage comprehension subtest (Dist. Ex. 25 at pp. 1-2). All other reading subtests and clusters fell into the low average range (*id.*).

A February 2011 psychoeducational evaluation report about the student included a social history update, a classroom observation, behavioral observations at the time of testing, the results of standardized intelligence testing, and a description of the student's emotional functioning (Dist. Ex. 31 at pp. 2-7).<sup>6</sup> As part of the social history update, the evaluating psychologist described the student's tantrums in the classroom setting and indicated that most instances were related to the student's perception that a task was too difficult or his feelings of frustration or embarrassment (*id.* at p. 2). She indicated that, while enrolled in the special class during the 2010-11 school year, the student's "tantrums and meltdowns were seen with less aggression" (*id.*). She further reported that the student had made excellent progress socially (*id.*). As part of her assessment, the psychologist observed the student in his first grade classroom (*id.*). She described the student's individual work, calm body and focus, "seamless transition" to the group meeting, understanding of expectations and routines, and "overall" appropriate interaction with peers and teachers (*id.* at pp. 2-3). With respect to her observations of the student's behavior during the testing situation, the psychologist noted the student's ability to "maintain mental energy for about twenty minutes" and his ability to calmly inform the examiner that he did not know an answer, rather than shutting down as sometimes observed in the classroom (*id.* at p. 3). The psychologist also noted that the student benefited from opportunities for movement, breaks, and information about the session schedule (*id.*).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following standard scores (and percentiles): verbal comprehension 100 (50), perceptual reasoning 117 (87), working memory 77 (6), processing speed 115 (84), and a full

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<sup>6</sup> The February 2011 psychoeducational evaluation report appears to summarize the results of a social history update and a classroom observation, which took place in March 2011 and which also appear in the hearing record as separate documents (compare Dist. Ex. 31 at pp. 2-3, with Dist. Exs. 29; 30 at pp. 1-2).

scale IQ of 105 (63) (Dist. Ex. 31 at p. 5). According to the psychologist, due to the scatter among the student's scores, his abilities were not easily summarized by one score (id. at pp. 3, 7). She noted that the student's nonverbal reasoning abilities were better developed than his verbal reasoning abilities (id.). The psychologist noted further variability in the student's performance on the verbal subtests and indicated that this was "unusual for a child his age" (id. at p. 4). Specifically, the psychologist reported that the student received stronger scores on verbal reasoning tasks on the similarities subtest (which examines the ability to abstract meaningful concepts and relationships from verbally presented material) compared to "significantly weaker" scores on the comprehension subtest (which assesses comprehension of social situations and social judgement, as well as knowledge of conventional standards of social behavior) (id.). With respect to nonverbal reasoning, the psychologist also observed variable scores, including a significantly higher score on a subtest designed to assess nonverbal fluid reasoning and the ability to mentally organize visual information (id.). The psychologist reported that the student's abilities to sustain attention, concentrate, and exert mental control were in the borderline range and constituted a relative weakness for the student (id.). In the processing speed task, the psychologist noted that the student performed better on a subtest more demanding of fine-motor skills, short-term memory, and learning ability than on one more demanding of attention to detail and mental control (id. at p. 5).

An updated March 2011 educational evaluation report indicated that administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) yielded scores in the average range in reading, written expression, and mathematics (Dist. Ex. 27 at pp. 1, 2-3). In the area of listening comprehension, the student scored in the average range for receptive vocabulary and in the superior range for oral discourse comprehension (id. at pp. 1, 3). In the area of oral expression, the student scored in the average range in expressive vocabulary and sentence repetition and in the below average range in oral word fluency (id. at pp. 1-2, 3). In the area of math fluency, the student scored in the average to above average range (id. at pp. 2, 3). The scores on the WIAT-III were derived from grade-based norms (id. at p. 1).

A March 2011 speech-language progress summary report indicated that administration of the Goldman-Fristoe Test of Articulation (GPTA-2) to the student yielded a "solid average" score, indicating that the student's articulation development was within normal limits (Dist. Ex. 28).

In October and November 2011, the district school psychologist conducted an FBA and developed a BIP for the student (see generally Dist. Exs. 34; 35). The October 2011 FBA set forth that the student's behaviors of concern included: falling on the floor and not responding to questions or dialogue; crying or screaming while on the floor; and occasionally, flipping over a chair or striking others when too close to him (Dist. Ex. 34 at p. 1). The FBA indicated that, based on the student's low score on an assessment of reading comprehension, the special education teacher would assess the student's reading directly in consultation with the academic intervention teacher (id. at p. 2). However, the FBA indicated that, due to days of interfering behaviors, the teacher was unable to adequately assess the student in reading (id.). The FBA set forth multiple preventative/proactive components of the student's behavior (id.). As motivators/incentives for positive behavior, the FBA listed: opportunities to make choices and feel control; positive adult attention; praise; and use of a positive reinforcement system (id. at pp.

2-3). Consequences for inappropriate behavior included: negative punishment or negative or positive reinforcement from peers; positive reinforcement from aide; negative punishment from teacher; and withholding of opportunities to engage in desired activities (*id.* at p. 3). The FBA indicated that the student's prosocial behaviors, which could be reinforcing, included his strength in math, his preference for and talent in art, and his outgoing and social nature (but within a limited circle) (*id.*). With respect to the shutting down and, at times, injurious behaviors, the FBA indicated that such behaviors occurred on a daily basis and lasted from a few minutes to two hours (*id.*). The behaviors were noted to occur during academic, unstructured, or perceived challenging tasks, when the student lacked an opportunity to be individually recognized, when the student was brainstorming, before music, or when getting off the bus (*id.*). The FBA noted that the duration and intensity of the student's behaviors was increasing and that his peers found it frightening, unusual, and distracting (*id.*). The FBA identified several possible triggers and functions for the student's behaviors (*id.* at p. 4). Behavioral goals included developing and implementing coping strategies, seeking adult attention when a task or coping became unmanageable, and using words to express the trigger of a behavior (*id.* at pp. 4-5). Strategies identified for achieving behavioral goals included continuing counseling to identify and practice coping strategies/techniques, transfer of such strategies to triggering environments, use of known calming activities before stressful environments and as a reward, and use of visuals as cues to use calming techniques (*id.* at p. 5). The student's November 2011 BIP set forth antecedent strategies to decrease the student's negative behaviors and increase his desirable behaviors (Dist. Ex. 35 at pp. 1-2). With respect to both, the BIP emphasized the student's self-esteem with respect to academics and anxiety with testing (*id.*). In addition, the BIP noted that, at times, the student displayed an "extreme reaction to unpredictable things," such as a moved desk or a dropped pencil (*id.* at p. 1).

The November 2011 private psychological evaluation was conducted at the parents' request to examine the student's anxiety and frustration with school and his difficulty with reading (Dist. Ex. 33 at p. 1). Behaviorally, the private psychologist noted that the student was "friendly, polite and cooperative" throughout the assessment (*id.* at p. 3). The psychologist administered standardized tests, including, among others, the WISC-IV and the WIAT-III (*id.* at pp. 2-3). The tests administered by the private evaluator were normed by age, unlike the district's testing, which was normed by grade (*compare* Dist. Ex. 27 at p. 1, *with* Dist. Ex. 33 at p. 15; *see* Tr. pp. 483-484, 493, 539-540). Administration of the WISC-IV yielded the following standard scores (and percentiles): verbal comprehension 100 (50), perceptual reasoning 125 (95), working memory 104 (61), processing speed 91 (27), and a full scale IQ of 109 (73) (Dist. Ex. 33 at p. 3). The evaluating psychologist observed that the student's intellectual status fell within the average range but that "due to the tremendous variability in scores," the student's overall score was "meaningless" (*id.* at p. 15). As an example, the psychologist noted that, while the student's score in nonverbal reasoning was higher, his score in the area of processing speed was significantly lower (*id.*). The psychologist opined that, while the student exhibited attention deficits, "his strong reasoning skills [put] him in good stead for learning (*id.* at p. 16). He indicated that the student showed "glimpses of genius interspersed with delays and atypical features" (*id.*). In addition to difficulties in social interactions, social skills, and behavioral flexibility, the psychologist indicated that the student's core educational skills were "at the first grade level and significantly below aptitude" (*id.*). Not unlike the district's February 2011 psychoeducational evaluation report, the November 2011 private psychological evaluation report

noted that the student scored high on the similarities subtest but low on the comprehension subtest of the WISC-IV (id. at pp. 16-17; see Dist. Ex. 31 at p. 4).

The November 2011 private psychological evaluation also reported the results of administration of the Developmental Neuropsychological Assessment Test (NESPSY), and the evaluating psychologist observed that the student scored in the fifth percentile on the narrative memory subtest (Dist. Ex. 33 at pp. 9, 18). The psychologist also reported that the student's "vivid imagination resulted in some unusual interpretations of the material . . . read to him"—an "indication of a mild tangential process in his language system" (id. at p. 18). He further reported evidence that the student exhibited "significant faulty processing of auditory information, which," the psychologist opined "could have dire implications . . . in the classroom" (id.). With respect to pragmatic language, the student received a score on the eighteenth percentile on the Test of Pragmatic Language-Second Edition (TOPL-2) and the psychologist noted that the student was not always responsive to the needs of his listener, tended to "tune out and misperceive social cues," and "struggled with attending to setting, event, situational and context characteristics that direct social language" (id. at pp. 18-19).

The psychologist reported that, on the Conners' Parent Rating Scales-Third Edition, the maternal ratings of the student were significant for inattention and hyperactivity/impulsivity and elevated for executive function needs (Dist. Ex. 33 at p. 20). Additional assessments also revealed deficits in the areas of executive function and attention (id. at pp. 21-23). The psychologist reported that the student presented with variability in his attention span, distractibility (internal and external), impulsivity, and lower frustration tolerance, which he indicated was "complicated" by the student's misreading of social cues, anxiety, rigidity, and perseveration (id. at p. 23). The psychologist indicated that the student exhibited characteristics consistent with impulsive and "overfocused" attention deficit disorder (ADD) (id. at pp. 23, 26).

With respect to academics, the psychologist characterized the student's reading skills as "significantly below aptitude" and his word reading speed (a measure of reading fluency) as "perilously low" (Dist. Ex. 33 at p. 23). Administration of the Comprehensive Test of Phonological Processing (CTOPP) indicated that the student's phonological processing and phonemic representation of language were "extremely weak," which the psychologist indicated "set[] the stage for a reading disability" (id. at p. 24). In addition, the psychologist noted that the student exhibited "weak written language" (id.).

The evaluating psychologist set forth numerous recommendations relative to the student's treatment and education (Dist. Ex. 33 at pp. 27-29). Specific to the classroom, the psychologist recommended a setting with a balance between structure and flexibility (id. at p. 27). Recommended strategies/supports to address the student's needs included provision of: consistent, predictable routine with intermittent changes; clear, specific, and external rules and directions, reviewed frequently; behavioral expectations before challenging activities; incentives and rewards; positive emphasis; specific consequences in advance; opportunities for movement; external visual supports; tasks specific or broken down; requirements and time limits; a model of problem solving by successive approximations; a model of organization; period self-pacing; immediate, unemotional, and brief verbal reminders or reprimands, if needed; earphones to learn

to shut out conflicting sounds; praise and reinforcement; and meaningful gestures and visual aids (id. at pp. 27-29).

## 2. Educational Placement

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether a subsequent or future IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; 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. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]). Furthermore, "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 Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

Results of testing performed by the district during the 2011-12 school year, as well as the student's report cards, indicate that the student made some progress in the area of academics in the general education classroom setting with supports (see Tr. pp. 946-960, 965-966; see generally Dist. Exs. 39; 40; 50; 51). However, the hearing record supports the IHO's conclusion that the district had knowledge, as the 2011-12 school year progressed, that the student's behavior was deteriorating in the general education class setting (see IHO Decision at p. 31). A review of the behavioral data for the 2011-12 school year reveals that the student increasingly engaged in self-injurious behaviors, as well as injurious behaviors toward other students in the general education setting, including: pulling out his own hair; biting himself; hitting his head on the desk and floor; scratching his face; yelling at other students; having to be carried off the bus; flipping his desk; kicking his desk; throwing his desk and chair; hitting his head with a pencil case; yelling at other students and putting his hands on them; biting another student; screaming, kicking chairs, and dropping himself on the floor prompting the removal of his classmates into the hallway; and attempting to punch and bite another student (Dist. Ex. 42 at pp. 1-43; see Tr. pp. 183, 186, 201, 222-23, 308, 313). A review of the log also shows that the intensity of the student's behaviors increased throughout the 2011-12 school year, with most behavioral incidents occurring at an intensity level five on a scale of one to five from the end of April 2012 through June 2012 (Dist. Ex. 42 at pp. 1, 12-14, 20-23).

The district school psychologist testified that the student's behaviors were aggressive and unsafe, that it was frightening for the other students in the class, and made it difficult for them to do their work (Tr. p. 201). In an e-mail, dated February 29, 2012, she also shared her opinion with the parents that they needed to consider an educational program for the student similar to the special class he attended during the 2010-11 school year, to "give[] him an opportunity to participate fully [in the mainstream setting] on good days, and have a quieter place on the more

challenging days" (Parent Ex. 31).<sup>7</sup> A June 2012 annual goal progress report revealed that, by the end of the school year, the student did not meet any of his three annual goals, all of which related to his social/emotional needs (Dist. Ex. 49 at p. 2).

Thus, the district had knowledge that the student's social/emotional and behavioral functioning in the general education setting deteriorated throughout the 2011-12 school year, which included self-injurious behaviors and injurious behaviors toward others, yet it continued to recommend a general education class setting for the 2012-13 school year (see Dist. Ex. 10 at pp. 1, 9-10). The district's August 2012 prior written notice indicates that the June 2012 CSE did not consider any other options for the student (*id.* at p. 13). The failure to consider other options was particularly inappropriate given the district school psychologist's acknowledgement that the student might benefit from a special class, which she had already expressed to the parent earlier in the school year (Parent Ex. 31). While the June 2012 IEP included the addition of five weekly sessions of small group resource room services, review of the IEP indicates that such service was intended to address the students' needs in reading and writing, not the increases in the student's injurious behaviors toward self and others (see Dist. Ex. 10 at pp. 6-7, 9). The IHO explored a hypothesis about a possible interrelationship between the student's reading deficits and his behaviors (see IHO Decision at p. 33); however, the evidence in the hearing record did not substantiate this connection in a manner sufficient to conclude that the resource room offered adequate support to address the student's escalating behaviors in the general education class setting.

Related to the student's behaviors, the June 2012 IEP reflected the student's need for adult support, "structure and routine," and counseling (Dist. Ex. 10 at p. 7). Aligned with this description, the June 2012 IEP provided for a 1:1 aide and individual and small group counseling; however, there is no indication in the hearing record that a general education classroom setting could be deemed sufficiently structured and routinized to support the student's attentional and behavioral needs (*id.* at pp. 7, 9). Indeed, as described above, the student's experience in the general education class with a 1:1 aide and counseling services during the 2011-12 school year reflected that such combination of setting and services was not sufficiently addressing.<sup>8</sup>

Accordingly, a review of the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year.

### **C. Unilateral Placement**

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 must provide an educational program which

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<sup>7</sup> The student's teacher testified that, during the 2011-12 school year, "at one point when [the student] was upset," he was sent to the first grade special class "in order for him to be in a more structured environment" (Tr. p. 1081). She indicated, however, that the district school did not offer a second grade special class (Tr. p. 1082).

<sup>8</sup> Additional information about the student's needs may have influenced the June 2012 CSE's recommendations; however, the hearing record indicates that the psychiatric and neurological evaluations, recommended at the December 2011 CSE meeting were never conducted (see Dist. Ex. 9 at p. 2).

meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). 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 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). 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; 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 CFR 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, at \*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, quoting Frank G., 459 F.3d at 364-65).

The evidence in the hearing record is adequate to support the IHO's finding that Eagle Hill offered specially designed instruction to meet the student's unique needs. Specifically,

Eagle Hill offered small group instruction, "consistent expectations," and "consistent classroom routines" (Dist. Ex. 47 at p. 1; Parent Ex. 25 at p. 2; see Tr. p. 1483).<sup>9</sup> Eagle Hill advisor reports noted the student's need for "a very structured and explicit approach [to] acquiring academic skills" (Dist. Ex. 47 at p. 1; Parent Ex. 25 at p. 2). Academically, the advisor noted that the student benefited from "continuous review and repetition of skills," as well as positive praise (Parent Ex. 25 at p. 2). The educational consultant for Eagle Hill testified that the student worked in a 2:1 daily reading tutorial to address his weaker phonemic awareness and decoding abilities (Tr. p. 1473).<sup>10</sup> With respect to his behavioral needs, the evidence in the hearing record shows that, for the second half of the 2012-13 school year, the school utilized a behavior chart recommended by the student's private psychiatrist, which allowed the student to earn points for expressing himself appropriately in a challenging situation (Parent Ex. 25 at p. 2; see Tr. p. 1482). In addition, the student received individual counseling once per week, as well as one weekly push session each of counseling and speech-language therapy, described as a "collaborative model" (Tr. pp. 1475-76). In addition, the educational consultant testified that the student's Eagle Hill team met with the private psychiatrist to describe the strategies used by Eagle Hill to address the student's needs and "to see if there was anything else that they were missing that needed to be put into place" (Tr. pp. 1478-79). Thus, Eagle Hill offered the student an individualized structure and routine that was lacking in the district's educational program, as well as specific supports that were tailored to address his reading difficulties and social/emotional and behavioral needs.

A December 2012 report completed by the student's educational advisor at Eagle Hill acknowledged that the student had a "somewhat challenging adjustment" to the school but was "beginning to internalize strategies and coping mechanisms" (Dist. Ex. 47 at p. 1; see Tr. p. 1102). The advisor noted that the student enjoyed socializing and was friendly and outgoing (Dist. Ex. 47 at p. 1). She reported that the student's "main struggle[s]" included his frustration with learning and his tendency to misinterpret social situations (id.). The advisor described the student's need for support to express his feelings and opined about the causes for the student's frustration (id.). She noted that, as the year progressed, the student began accessing support from adults during tough times (id.). Academically, the advisor reported that the student was demonstrating more success in learning word patterns and noted that the student felt self-pride with such success, enjoyed participating in discussions and activities, and learned "best in classes where student involvement [wa]s expected" and the instructors used visuals and multisensory activities (id.). In addition, the advisor indicated that the student seemed to have adjusted to his classroom routines and come to be comfortable with the expectations in his classes (id.). The

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<sup>9</sup> While the district correctly argues that the parents failed to present testimony at the impartial hearing from any Eagle Hill staff who worked directly with the student, the documentary evidence in the hearing record, as further corroborated by the testimony of the educational consultant for Eagle Hill, sufficiently established the specially designed instruction offered at Eagle Hill (see generally Tr. pp. 1414-1547; Dist. Exs. 46-47; Parent Ex. 25).

<sup>10</sup> The hearing record shows that the educational consultant retired from working at Eagle Hill after 34 years and, subsequently, assumed the role of a consultant or advocate for, among others, parents pursuing public funding for Eagle Hill tuition (see Tr. pp. 1422-24, 1518-19). According to the consultant, she testified at impartial hearings relating to Eagle Hill students because the school does not permit teachers or administrators to absent themselves from their duties in order to participate in impartial hearings during the school year (Tr. pp. 1447-48).

advisor indicated that the student's attention was "steady" and optimal if class activities varied every 10 to 15 minutes (id.).

On April 24, 2013, the district conducted an observation of the student at Eagle Hill (Dist. Ex. 46). The district school psychologist observed the student in his writing class and noted that he raised his hand, correctly identified errors in a sentence, and made the corrections on the smartboard (id.). During a writing task, the psychologist observed the student displaying "silly behaviors" and, after the teacher responded with prompts, the student became still and quiet and then began to cry (id.). The teacher responded with encouragement that the student use his words and his chart but the student cried for about another eight minutes (id.). Then, the student responded to the teacher's cue to draw a picture of what he wanted to write and seemed to calm (id.). At the end of the class, the psychologist observed the student reviewing his behavior chart, which asked the student to "reflect on whether he stayed calm and . . . used words to express his feelings instead of shutting down" (id.). The psychologist also noted that the student transitioned well into the hallway and greeted a classmate between classes (id.).

A June 2013 report completed by the student's Eagle Hill educational advisor reflected that, "while [the student] still struggle[d] to consistently manage his emotional response to frustrations, he ha[d] made significant improvement in this area throughout the school year" (Parent Ex. 25 at p. 2). The advisor noted that the frequency of the student's "shut down" behaviors had decreased and that he had responded positively to the use of a behavior chart (id.). She noted that, both socially and academically, the student exhibited inconsistent problem solving and coping skills, at times requiring of "a great deal of teacher support" (id.). However, the advisor noted that student had successfully developed friendships with his peers and was "consistently helpful and kind to his classmates" (id.). Academically, the advisor observed that the student was eager and liked to participate and demonstrate his skills (id.). In addition, she reported that the student attention span had increased to 10 to 20 minutes on one activity (id.).

Both the December 2012 and June 2013 classroom reports from the student's teachers reflected the student's level of mastery of various concepts and skills, and set forth different modifications found useful for the student specific to the particular class subject (Dist. Ex. 47 at pp. 2-17; Parent Ex. 25 at pp. 4-19). The modifications included, among others, provision or use of incentives, reminders, visual or verbal cues, frequent review, prompting, guided questions and cueing, repeated directions, teacher modeling, role play, highlighting, teacher support and correction, dictation and enunciation, dictionary, graphic organizers and spelling word bank, and multisensory activities, as well as instructed reading strategies and creation or use of illustrations, objects, or manipulatives to visualize a concept (Dist. Ex. 47 at pp. 4-5, 8, 11, 14, 17; Parent Ex. 25 at pp. 6, 9, 12, 16, 19)

The district asserts that Eagle Hill was specifically a school for students with language-based learning disabilities and offered instruction, the rigor of which was not challenging to the student (see Tr. p. 1543). For example, the hearing record shows that the student was instructed in reading during the 2012-13 school year at Eagle Hill using second grade controlled texts, even though he was reading at the end of the second grade level when he left the district's program at the end of the 2011-12 school year (see Tr. pp. 503-04, 965-66; Dist. Exs. 47 at p. 2; Parent Ex. 25 at p. 13; see also Dist. Ex. 50 at pp. 1-5). While Eagle Hill may not have offered the ideal

level of challenge to the student in terms of academic instruction, "the test for the parents' private placement is that it is appropriate, and not that it is perfect" (Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]). The totality of the circumstances presented in this case, namely, the individualized academic supports, the behavioral/social supports and planning, and the reports of the student's progress during the 2012-13 school year, lead to the conclusion that the supports provided by Eagle Hill for the student's more pronounced social/emotional and behavioral needs were sufficiently balanced with his academic needs such that it was appropriate for the student.

Finally, the district's challenge to the restrictiveness of the unilateral placement is also without merit (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837 [2d Cir. 2014] [holding that "while the restrictiveness of a private placement is a factor" in assessing the appropriateness of a unilateral placement, it is "by no means . . . dispositive" and that "where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option"]; see also Tr. pp. 1528, 1543). In this instance the restrictiveness of Eagle Hill does not outweigh the other factors in the calculus of whether it is appropriate for the student.

Based on all of the foregoing, the evidence in the hearing record supports the IHO's finding that Eagle Hill constituted an appropriate unilateral placement for the student for the 2012-13 school year and the district's arguments for overturning the IHO's determination are unavailing.

#### **D. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

In support of its claim that the IHO erred in finding equitable considerations weighed in favor of the parents' requested relief, the district argues that the parents did not follow through on the psychiatric and neurological evaluations recommended at the December 2011 CSE meeting (see Dist. Ex. 9 at p. 2). There is some indication in the hearing record that the district and the parents understood that the student's private psychiatrist would conduct the psychiatric evaluation at district expense (see Tr. pp. 388, 1349-51). It appears that the parents never pursued the psychiatric evaluation with the private psychiatrist (Tr. pp. 1353-1354); however, neither is there evidence that the district inquired as to the status of the psychiatric evaluation.

As to the neurological evaluation, the hearing record shows that the parents provided their consent and, on December 19, 2011, the district sent a request for the evaluation to a neurologist with whom it contracted (Tr. pp. 388-89; see Dist. Ex. 48 at pp. 1, 5). In a note accompanying the request, the district asks the neurologist whether he would contact the parents directly or if the parents needed to call to set up the evaluation (Dist. Ex. 48 at p. 2). Thus, while the district director of pupil personnel services testified that the parents failed to schedule an appointment with the neurologist, the parent testified that no one from the district informed them that they needed to do so and the district's note to the neurologist lends support to the parents' viewpoint (Tr. pp. 388-89, 1227-28; Dist. Ex. 48 at p. 2). Indeed, the hearing record shows that there was no follow-up by the district about the neurological evaluation (see Tr. pp. 422-26).

Finally, the district's assertions regarding the parents' failure to follow up on the reading evaluation recommended at the June 2012 CSE meeting, even if true, would not affect the balance of equitable considerations in this case, as the efforts or lack thereof would have postdated the June 2012 CSE meeting and, therefore, would have had little impact on the district's ability to defend the IEP at issue in this case. To that end, I express no opinion on whether the parents' conduct had any effect upon events subsequent to the development of the challenged IEP in this case.

Lastly, the district argues that the parents failed to inform the June 2012 CSE that they had already signed an enrollment contract for the 2012-13 school year and intended to unilaterally place the student. This argument is without merit. The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I] [emphasis added]; see 34 CFR 300.148[d][1]). By letter dated August 9, 2012 the parents provided the district with timely notice of their intent to unilaterally place the student, consistent with the IDEA's notice requirement (Dist. Ex. 44).

Accordingly, there is no basis in the hearing record to disturb the IHO's consideration of equitable factors and decision to grant reimbursement for the costs of the student's tuition at Eagle Hill without reduction.

**VII. Conclusion**

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

**THE APPEAL IS DISMISSED.**

**Dated:**        **Albany, New York**  
                  **April 27, 2015**

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