



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-124

Application of the BOARD OF EDUCATION OF THE VALHALLA UNION FREE 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:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Jeffrey J. Schiro, Esq., of counsel.

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Stewart Karlin, Esq., of counsel.

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which determined that it failed to offer an appropriate educational program to respondents' (the parents') daughter for the 2007-08 and 2008-09 school years, that the parents' placement of the student at the Eagle Hill School (Eagle Hill) for the 2007-08 and 2008-09 school years was appropriate, and that equitable considerations favored the parents and supported an award of partial tuition reimbursement for the student's 2007-08 and 2008-09 school years at Eagle Hill. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending fifth grade at Eagle Hill, an out-of-State private school which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 740; see 8 NYCRR 200.1[d], 200.7). According to evidence contained in the hearing record, shortly before her sixth birthday, the student received diagnoses of static encephalopathy¹ and muscular hypotonia,² and was determined to have an attention deficit disorder (ADD)³ (Tr. pp. 458-61; see

¹ The hearing record defines "static encephalopathy" as a neurologically based condition "manifested by problems in speech and language" as well as "central auditory processing problems ... immediate and intermediate auditory memory ... coordination problems involving fine finger, gross eye/hand and fine finger motor coordination" and "significant difficulties with handwriting coupled with muscular hypotonia" (Tr. pp. 459-60).

² The hearing record defines "muscular hypotonia" as "the decrease in muscle tone" (Tr. pp. 460, 538).

³ The hearing record defines an "ADD" as "a neurologically based condition which comes under the umbrella of static encephalopathy" and typically manifests itself in "problems with focus, short attention span, impulsivity, distractibility, often a low frustration threshold and ... behavior consequences, outbursts, and so on" (Tr. p. 460).

Parent Ex. R at p. 2). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student's mother revealed that when the student was approximately 1.5 or 2 years old, the parents "were concerned [that] some of her actions were not deliberate" and upon the advice of her pediatrician, secured occupational therapy (OT) and psychological evaluations of the student through the Early Intervention (EI) Program (Tr. pp. 537-38). The EI evaluations confirmed unspecified "delays" and hypotonia, and resulted in the provision of OT services twice per week (Tr. pp. 538-39). Approximately six months later, also through EI, the student underwent a physical therapy (PT) examination that identified deficits in gross motor coordination, resulting in the addition of PT services twice per week (Tr. p. 539). Due to concerns expressed by the student's daycare teacher, an educational evaluation and speech-language evaluation were conducted when the student was three years old (Tr. pp. 540-42). The evaluations revealed deficits in the student's expressive and receptive language skills as well as problems with distractibility, which resulted in a Committee on Preschool Special Education (CPSE) recommendation for speech-language services twice per week for 45 minutes per session, as well as a special education itinerant teacher (SEIT) to "shadow" the student in her day care program two days per week for two hours per day (Tr. pp. 541-42; Parent Ex. R at p. 2). The student continued to receive OT and PT services (Tr. p. 542).

For kindergarten, the student was classified as having a speech or language impairment by the Committee on Special Education (CSE), which recommended a 12:1+2 self-contained communication skills class; however, the parents rejected this recommendation in favor of a traditional kindergarten program in the district that also provided the student with a 1:1 teacher aide in the classroom (Tr. pp. 543-47; Dist. Ex. 17 at p. 1; Parent Ex. R at p. 2). The student also received related services consisting of OT twice per week in a 1:1 setting and speech-language therapy twice per week in a group setting (Dist. Ex. 17 at p. 1; Parent Ex. R at p. 2). The student's mother stated that while the student initially adapted well to the class, "as the material started to become a little bit more demanding, and her attentional issues were impacting the demand of that material," the student's performance declined (Tr. pp. 548, 551). She added that an attempt by the student's private neurologist to reverse the situation through pharmaceutical treatment for the student's ADD proved unsuccessful, as did her attempt to obtain resource room support for her daughter (Tr. pp. 549-51).

For first grade (2004-05), the district again recommended a 12:1+2 self-contained communication skills class without a 1:1 teacher aide, related services consisting of OT twice per week in a 1:1 setting, and speech-language therapy twice per week in a 3:1 setting, and extended school year (ESY) services consisting of one hour of home-based tutoring per day and OT once per week for 45 minutes per session (Parent Ex. S at pp. 1, 5; but see Tr. pp. 554-56 [student's mother advised that the student received OT for 30 minutes per session during the ESY program]).

Midway through the student's first grade year, the parents procured an independent psychological evaluation of the student (Parent Ex. R; see Tr. pp. 557-58). The evaluating psychologist reported that the majority of the student's cognitive skills fell into the low average range, but identified several "relative strengths" in verbal domains, including verbal reasoning, and her "fund of information and ability to explain routine social rules" (Parent Ex. R at p. 8). Academically, the evaluating psychologist assessed the student's single word reading as average and her spelling and writing as low average, but identified certain aspects of her expressive language, namely "her ability to construct grammatically appropriate sentences and her verbal

fluency," as relative strengths (id.). The evaluating psychologist characterized the student's phonological processing as low average, and her planning and inhibition as borderline (id.).

The evaluating psychologist also identified areas of struggle for the student, including her visuospatial reasoning, which she described as "less well-developed than her verbal skills" (Parent Ex. R at p. 8). She described the student's fine motor skills and tactile perception as "very weak" and observed "directional confusion" (an inability to distinguish right from left) in her behavior (id.). These deficits posed problems for the student "when she must integrate visuospatial reasoning with motor output to perform constructional tasks" and contributed to her "tremendous difficulty in forming letters appropriately, with poor pencil control and letter reversals" (id.). The evaluating psychologist posited that the student's "math reasoning is the academic skill that is currently least developed for her," and cautioned that "[t]his pattern of weakness in visual-spatial reasoning, fine motor coordination, and tactile perception suggest that [the student] is at risk for developing a non-verbal learning disability" (id.). The evaluating psychologist noted both the student's receptive language difficulty, especially for tasks requiring focused attention and understanding of spatial and directional concepts, and her expressive language difficulty, particularly in her repetition of sentences and difficulty employing grammatically correct word structures (id.). The evaluating psychologist recorded the student's difficulty remembering more complex visual material, and surmised that her ability to do so "is dependent on her attentional capacity, which is highly variable" (id.). She characterized the student's ability to focus as "quite impaired," thus giving rise to the student's need for frequent redirection, and further described the student as "mildly hyperactive and impulsive," exhibiting "attention problems, learning issues, and motor delays [that] are consistent with her previous diagnosis of static encephalopathy" (id.). While describing the student as "doing well at this time" emotionally, the evaluating psychologist added that "[s]he is, however, delayed in her development of adaptive living skills, which are in the [b]orderline range overall" (id.).

The evaluating psychologist proffered several recommendations relative to the student's ongoing instruction including: (1) a classroom with a high teacher-to-student ratio; (2) longer viewing times and repeated viewings of visually presented information; (3) special attention to the improvement of the student's math skills; (4) a "multisensory approach such as ... Orton-Gillingham or Lindamood-Bell ... is recommended to strengthen her reading skills," whereas the "whole language approach ... is not appropriate for [the student];" (5) continued intensive OT; (6) continued speech-language therapy; (7) shortening of and repetition of the presentation of verbal information; (8) a rewards system for on-task behavior and a minimization of exposure to distractions; (9) frequent, short breaks between assignments and completion of homework; (10) additional assistance with written expression as her workload becomes more challenging; (11) extended time for testing; and (12) continued pharmaceutical management of her attentional weaknesses (Parent Ex. R at pp. 9-10).

For the student's second grade school year (2005-06), the CSE recommended a 12:1+2 special class; related services consisting of OT twice per week for 30 minutes per session, an OT consultation once per week for 30 minutes per session, and speech-language therapy twice per week for 30 minutes per session; numerous program modifications and testing accommodations; and found the student eligible for ESY services (Parent Ex. T at pp. 1-2, 6). The CSE meeting minutes reflected that "it was discussed that the parents would be sending [the student] to a private school" (id. at p. 6; see Tr. p. 585). The hearing record reflects that for the 2005-06 (second grade) and 2006-07 (third grade) school years, the student was parentally placed at Eagle Hill (Tr. pp. 402, 585, 606).

In December 2006, the student's educational advisor at Eagle Hill provided the parents with a progress report documenting her adjustment to Eagle Hill's program (Parent Ex. C at pp. 1-2). The December 2006 progress report detailed the student's performance in each of her classes, including tutorial, math, writing, oral language, oral literature/social studies/science, "core,"⁴ and motor training (*id.* at pp. 3-21). The advisor reported that during the fall semester, the student had attempted to demonstrate appropriate learning and active listening behaviors, but that she had difficulty sustaining them throughout a class period (*id.* at pp. 1-2). The advisor opined that the student "continue[d] to benefit from the small group class and 'microunited' instruction within [the Eagle Hill] program" (*id.* at p. 1). She noted that the student had "shown progress within each academic area, and while the rate of progress [was] slow, she [was] demonstrating greater accuracy and independence with skills" (*id.*). She also conceded that the student's "[a]ttention difficulties can still impact her learning as it interrupts the learning process and she misses pieces of information," that "she ha[d] difficulty focusing on details," and that "[b]y the end of the day, she [was] less focused and more easily distracted by external factors" (*id.* at p. 2). The advisor reported that some of the student's "intrusive" behaviors from the previous year, such as copying student's answers, assuming the role of teacher, and fixating on one other person, resurfaced, and although the student was aware of the effect of these behaviors on her relationships, she had difficulty controlling them (*id.*). She informed that Eagle Hill would try to increase the student's awareness of the behaviors "by cueing her in class and providing more direct feedback through a behavior sheet" (*id.*).

The student's tutorial teacher advised that the student was able to decode first grade level materials with support, could independently read and spell "CVC" words with mixed vowels, and could complete literal comprehension questions with support (Parent Ex. C at pp. 5-6). In math, the student was able to read numerals, add single digits with sums less than 20, and determine the value of coins and bills (*id.* at pp. 8-9). The student's writing teacher informed that with support, the student could write all upper and lower case manuscript letters and write simple sentences from dictation (*id.* at pp. 11-12). With regard to oral language, her teacher stated that the student was able to greet adults and classmates independently and to initiate a conversation with support (*id.* at pp. 14-15).

On January 27, 2007 the student was evaluated by her private neurologist (Parent Ex. N). The neurologist stated that the student had shown some improvement compared to a previous evaluation which took place in June 2006, but qualified that the improvement was less than expected (*id.* at p. 2). He characterized the student's fund of knowledge as "deficient for [her] age" (*id.* at p. 1). Although reporting that the student's reading had improved, he noted that when she read a paragraph written at a late second to early third grade level, the student's decoding was slow and she pointed to each word (*id.* at p. 2). The neurologist confirmed that the student possessed the abilities to complete addition and subtraction problems using finger counting and to recognize coins, although she exhibited some problems in coin conversion and addition, and that she experienced difficulty telling time (*id.*). Regarding the student's graphomotor functions, the neurologist surmised that "although deficient, [they] have improved considerably when compared to the June 2006 evaluation with improved formation and spacing of letters" (*id.*). Behaviorally, the neurologist reported that the student "at times tends to invade the other children's space and may tend to be bossy," but added that "[a] chart system was initiated at Eagle Hill and appears to be efficacious" (*id.* at p. 1). The neurologist opined that it was "apparent that the Eagle Hill School

⁴ According to the hearing record, the "core" class included literal comprehension, upper level comprehension, literary concepts, vocabulary, map and globe skills, and science concepts (Parent Ex. C at pp. 18-19).

is appropriate," citing the school's small class size and "individual program as described" (*id.* at p. 2). While offering that a self-contained class in the district could represent an alternative to Eagle Hill for the 2007-08 school year, he cautioned that "before any opinion can be supplied information relative to this specialized class would be necessary" and added that "at this time it is recommended that [the student] continue in the Eagle Hill School" (*id.* at p. 3).

By letter to the parents dated March 27, 2007, the district requested that the parents provide copies of the student's report cards and teacher reports from Eagle Hill so that the CSE could review the reports at the student's annual review (Dist. Ex. 31).

On March 29, 2007 the student's educational advisor at Eagle Hill completed a "teacher input" form for the student's annual review by the district (Dist. Ex. 30). The advisor indicated that the student was able to copy from the board, but experienced "much difficulty with far point copying;" that she was able to read assigned materials provided that the reading material was at her decoding level; and that the student was able to generate her own ideas with guided questioning and much encouragement (*id.* at p. 1). The advisor opined that the student required daily review of instructional materials and periodic review of previously taught skills, was able to follow 1-2 step directions when the task was familiar and directions were reviewed, had difficulty expressing herself verbally but improved with guided questioning, and exhibited difficulties with handwriting and organizing expressive language (*id.*). With respect to the student's social skills and behavior, the advisor confirmed that the student's difficulties with language processing and reading non-verbal cues affected her interactions with peers, that the student had significant attention needs and required much cueing to complete work, and that she did not demonstrate age appropriate behavior (*id.*). The advisor opined that the student had been successful "within the small group, highly structured environment" of Eagle Hill classes "with skills taught directly and when provided with much review and reinforcement through multisensory activities" (*id.* at p. 2). The results of standardized testing, conducted by Eagle Hill in spring 2007, revealed that many of student's reading and math skills fell below the 5th percentile (Dist. Exs. 42; 46; 49; Parent Ex. D).

On April 24, 2007, the district's occupational therapist issued an annual review report, in which she indicated that the student would benefit from continued OT services designed to address handwriting, visual perceptual skills, distractibility, and computer keyboarding skills (Dist. Ex. 29 at p. 2).

On April 26, 2007, the CSE subcommittee convened for the student's annual review in order to develop an education program for the student's fourth grade school year (2007-08) (Dist. Ex. 28). In attendance were the CSE chairperson, a special education teacher, an occupational therapist and a speech-language therapist from the district, and the parents; the student's special education teacher and educational advisor from Eagle Hill participated telephonically (*id.* at pp. 5, 10; *see* Tr. pp. 13, 18, 245-46, 261-62, 370). According to the meeting minutes, the CSE reviewed the student's program at Eagle Hill and discussed her educational needs, noting her academic regression (Dist. Ex. 28 at pp. 5-6). The parents expressed concern that there were some areas where the student had made no progress, and questioned whether the student was "not being pushed" or did not have the requisite skill level (*id.* at p. 5). The April 2007 CSE recommended a 12:1+2 special class for 3.5 hours daily;⁵ related services consisting of OT twice per week for 45 minutes per session in a 1:1 setting and speech-language therapy twice per week for 30 minutes

⁵ According to the special education teacher of the district's recommended class, the balance of the student's day would be spent in mainstream grade level specials and events, during which she would continue receiving related services (Tr. pp. 28-29).

per session in a 3:1 setting; program modifications consisting of refocusing and redirection, visual cues, repetition of information, and check for understanding; testing accommodations consisting of extended time (2.0), location with minimal distractions, directions read/rephrased, and questions read/rephrased; and ESY services consisting of a 12:1+1 special class for 2.5 hours daily, OT once per week for 30 minutes per session in a 1:1 setting, and speech-language therapy twice per week for 30 minutes per session in a 3:1 setting (id. at pp. 1-2). The resultant April 2007 individualized education program (IEP) also included annual goals related to study skills, reading, writing, mathematics, speech-language development, and motor skills (id. at pp. 6-9).

In June 2007, the student's educational advisor at Eagle Hill provided the parents with a progress report documenting her performance during the second semester of the 2006-07 school year (Parent Ex. F). The June 2007 progress report detailed the student's performance in each of her classes (id. at pp. 4-22).⁶ The advisor reported that the student "move[d] through the routines of the school day very independently," but continued to require frequent cueing throughout class to remain focused on instruction or assigned seat work (id. at p. 1). The advisor opined that the student "continue[d] to benefit from a very structured and systematic approach to instruction," suggesting that in order for the student to maintain previously learned skills and concepts, she required ongoing review (id. at p. 2). The advisor explained that within the structure of Eagle Hill's program, the student had made "observable progress in each of her classes," citing specific improvements in her decoding skills; and while acknowledging that reading comprehension remained difficult for the student, the advisor confirmed that the student's ability to recall facts from short passages had improved (id. at pp. 1-2, 14-15).

In math, the advisor revealed that the student was able to add multi-digit numbers with regrouping with greater accuracy; however, she qualified that the student continued to confuse operational signs (Parent Ex. F at pp. 1-2, 17-19). She also cited improvements in the student's handwriting and in her fine motor skills such as drawing, coloring and using scissors (id. at p. 2). The advisor offered that the student demonstrated improvements in her understanding of concepts taught in oral language class, and in her improved eye contact and focus during structured conversations, but also noted that conversations continued to be difficult for the student to follow, and that the student often talked "at" others and was unaware when others were not listening (id. at pp. 2, 5-6). Socially, the advisor opined that the student progressed most during the 2006-07 school year, observing that "she has shown good effort to refrain from ... behaviors that in the past drew negative responses from her classmates," such as copying others' behavior and telling others what to do, and further noted that the student was interacting with a larger peer group outside of class instead of fixating on only one or two students (id. at p. 2). With respect to homework, the advisor reported that the student required "much" individual support to complete her homework during afternoon study hall because she tended to be less focused at that time of day (id.).

On August 6, 2007 the student's private neurologist issued a report summarizing his findings from the student's neurological reevaluation conducted on July 28, 2007 (Parent Ex. O). The neurologist reported that the student's "speech and language was [sic] complicated by a mild slurring of words and often [her] conversation included irrelevant issues" (id. at p. 1). He observed that the student demonstrated problems with auditory processing, as demonstrated by "a long latency between stimulus and response," and characterized the student's immediate auditory memory as "deficient" (id. at pp. 1-2). The neurologist assessed the student's spelling and reading

⁶ The June 2007 progress report addressed the same classes as the December 2006 progress report (compare Parent Ex. C at pp. 3-21, with Parent Ex. F at pp. 4-22).

skills at a second grade level, remarking that her spelling was complicated by "b-d" confusions and sequencing problems, and further observed the student's difficulties decoding and comprehending a third grade level reading paragraph (id. at p. 2). In math, the neurologist advised that the student finger counted "with errors involving both addition and subtraction" and was unable to complete problems involving regrouping, but noted that she was capable of telling time by the hour, half hour, and quarter hour (id.).

The student continued attending Eagle Hill for the 2007-08 school year (Tr. p. 613). In December 2007, Eagle Hill provided the parents with a progress report documenting her performance during the first semester of the 2007-08 school year (Parent Ex. G). The student's educational advisor ⁷ opined that the student "continues to learn best in a classroom with a small student [to] teacher ratio, where the instruction is multisensory and new skills are broken down into smaller components" (id. at p. 2). She offered that the student continued to require very explicit instruction of skills accompanied by guided practice before completing independent tasks, and she observed that the student still experienced difficulty attending to and processing "lengthy auditory information" (id.). She reported that problem-solving skills were being emphasized with the student, noting that the student's ability to think beyond concrete solutions was limited (id.). The educational advisor acknowledged that the student could generate solutions within the structure of her oral language class, but qualified that she experienced difficulty doing so "in the moment" (id.). She added that although the student continued to require "much" cueing during study hall to stay focused on her work, when focused, the student understood the skills and concepts presented (id.).

The student's tutorial teacher reported that the student "is making progress reading introduced sight words in isolation and in context, which will begin to increase her fluency as well," and confirmed her ability to independently decode first grade material (Parent Ex. G at p. 5). The student's math teacher noted improvement in the student's understanding of addition and subtraction concepts (id. at p. 10). The student's writing teacher advised that the student could both write all upper and lowercase manuscript letters and write simple sentences from dictation independently (id. at p. 13). According to her oral language teacher, with cueing, the student could demonstrate interest in another person, notice when she had lost her audience, close a conversation, and read emotions in others' faces (id. at p. 17). Her oral language teacher posited that the student needed to improve her ability to avoid obvious questions, her awareness of personal body space, her ability to stand up for herself in social situations, and her ability to evaluate the seriousness of a problem, among other things (id.). The student's motor training teacher advised that "[s]trength and endurance remain areas of emphasis in [the student's] class" (id. at p. 18).

From December 2007 through January 2008, the district conducted a classroom observation and educational, speech-language, psychological, and OT evaluations of the student as part of its reevaluation of the student in preparation for developing an education program for the student's fifth grade school year (2008-09) (Dist. Exs. 14; 15; 16; 17; 18).

On December 10, 2007, the district's occupational therapist conducted the student's OT triennial evaluation (Dist. Ex. 18). In order to assess the student's motor functioning, the evaluating occupational therapist administered the Beery-Buktenica Test of Visual Motor Integration (VMI), the Bruininks-Oseretsky Test of Motor Proficiency, and the Motor Free Visual Perception Test

⁷ The December 2007 progress report contained in the hearing record does not contain a signature page identifying the author; however, the hearing record suggests that this report originated from the student's academic advisor, as did each of the other progress reports contained therein (see Parent Exs. C; F; I; J).

(id. at pp. 1-2). The student achieved the following percentile ranks on the VMI: VMI, 2nd percentile; visual, < 1st percentile; and motor, < 1st percentile (id. at p. 1). On the Motor Free Visual Perceptual Test, the student performed below the first percentile, at the 4 year, 10 month level (id.).

The evaluating occupational therapist observed that the student experienced difficulties with right/left discrimination, visual scanning, and letter reversals, and opined that her visual perceptual and motor control deficits affected her abilities to copy shapes and to produce legible handwriting (Dist. Ex. 18 at p. 2). Although citing an improvement in the student's handwriting, the evaluating occupational therapist identified a decrease in the student's handwriting speed, and observed that she made errors in sizing, alignment, and spacing (id.). She observed that the student's extremity speed and dexterity were moderately to maximally delayed, as manifested in the student's lack of speed when attempting to place pennies in a container, sort cards, string beads, and move pegs on a peg board (id. at pp. 1-2). She discerned that the student had minimal difficulty with accuracy while cutting with scissors or drawing a line through pathways, and that she did not demonstrate any significant sensory defensive behaviors or sensory seeking behaviors (id. at p. 2). She described the student's motor planning/coordination as "fairly good" for gross motor tasks, but observed "significant attention and processing issues" that "worsen in more stimulating settings such as the classroom" (id.). The evaluating occupational therapist recommended that the student continue to receive OT twice weekly for 30 minutes per session in a 1:1 setting, and also recommended ESY services once per week for 45 minutes per session in a 1:1 setting to avoid regression in handwriting and sensory processing skills (id. at p. 3).

On January 2, 2008, the district conducted its psychological evaluation (Dist. Ex. 17). The district's school psychologist confirmed that the student's attention was an interfering factor in her test performance, noting that the student remained on task for only brief periods of time and required redirection to task (id. at p. 3). She reported that the student required frequent breaks and repetition of directions, and advised that she gave the student much praise and reinforcement during the evaluation (id.). The school psychologist observed that the student had a difficult time completing motor and written tasks and suggested that her evaluation was a "low estimation of [the student's then] current abilities due to her distractibility" (id.).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following composite scores and percentile ranks: verbal comprehension, 65 (1st percentile); perceptual reasoning, 53 (<1st percentile); working memory, 80 (9th percentile); processing speed, 70 (2nd percentile); and full scale IQ, 58 (<1st percentile) (Dist. Ex. 17 at p. 3). The school psychologist determined that the student's overall ability fell in the "[e]xtremely [l]ow" range of intellectual functioning, and that her verbal comprehension skills also fell in the "[e]xtremely [l]ow" range for her age, observing that the student experienced difficulties verbalizing simple similarities, defining words, and using social comprehension skills (id. at pp. 4-5). She described the student's nonverbal reasoning skills as "quite weak," and opined that the student's scores evidenced that the student had "a great deal" of difficulty with visual-spatial reasoning, perceptual-organizational skills, and motor planning (id. at p. 5). Although noting that the student had "a great deal" of difficulty maintaining attention to task, the school psychologist identified the student's short-term memory and her abilities to sustain attention, to concentrate, and to exert mental control as relative strengths, adding that her skills in these areas fell within the low average range (id.). The school psychologist advised that the student achieved a "quotient" of 73 (4th percentile) on the Test of Nonverbal Intelligence, Third Edition (TONI-3), which the evaluating psychologist administered in order to obtain a "language-free" measure of the student's nonverbal intelligence (id.).

As a measure of the student's adaptive functioning, the parents and her teachers at Eagle Hill completed the Adaptive Behavior Assessment System-Second Edition (ABAS II) (Dist. Ex. 17 at p. 6). Based on responses obtained, the school psychologist determined that the student's "social skills appear to be a strength for her, as well as areas of health and safety and self-care within the school setting" (id.). She assessed the student's responses on the Piers Harris Children's Self-Concept Scale as indicating that the student was happy and got along with peers, but also that she found it difficult to make new friends and was sometimes slow in finishing her schoolwork (id. at p. 7).

On the basis of her evaluation, the school psychologist posited that the student "has a realistic view of her own strengths and weaknesses," and "would continue to benefit from small group instruction with much repetition and rehearsal. She requires new information to be presented in a variety of modalities" (Dist. Ex. 17 at pp. 7-8). She cautioned that based upon the student's short attention span within a classroom setting, she might require prompts for inattention, as well as short breaks and redirection to task, and recommended that the CSE consider testing modifications for the student consisting of extra time, alternative location, redirection and prompts for attention, and clarification of understanding directions (id. at p. 8).

On January 3, 2008, the district's special education teacher completed her educational reevaluation of the student (Dist. Ex. 15). She administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), the Woodcock Reading Mastery Test-Revised (WRMT-R), the Norris Educational Achievement Test (NEAT) and the KeyMath Revised (id. at pp. 1, 5). She advised that as measured by the WJ-III ACH, the student's broad reading skills fell within the first percentile, and posited that the student had internalized some of the decoding/word attack skills learned at Eagle Hill and that she still needed further remediation in this area (id. at p. 3). The evaluating special education teacher surmised that the student's comprehension was affected by decoding errors and the amount of time the student took to sound out words; commented that the student provided "very concrete" responses to questions but was often unable to add details, make predictions or give antonyms and synonyms; and opined that the student's speech and language needs affected her performance on language arts tasks and that her word recall and memory also affected her work (id. at pp. 3, 5).

In writing, she reported that the student displayed a relative strength on some of the written language subtests, explaining that the student applied some of the skills she learned at Eagle Hill, and suggested that the structure of the WJ-III ACH assisted her in sentence formulation (Dist. Ex. 15 at pp. 3-4). The evaluating special education teacher reported that on a written expression task on the NEAT, the student produced simple sentences that were accurate and sequential, but lacked detail (id. at p. 4). She confirmed that the student's motor weaknesses affected her writing mechanics, and concluded that test results demonstrated that the student was able to apply explicit spelling skills that she learned to spelling tasks (id.). She credited Eagle Hill's "multi-sensory, sequential, structured approach" with allowing the student to achieve some success relative to spelling (id.).

In math, the evaluating special education teacher observed that during testing, the student successfully completed basic addition and subtraction tasks, but confused operational signs and was unable to perform addition with regrouping (Dist. Ex. 15 at p. 5). These results prompted her to suggest that the student required remediation of her basic math skills, but she noted that the student's performance on a time and money subtest denoted these areas as relative strengths for the student (id.).

The evaluating special education teacher opined that the student continued to require direct instruction and consistent support in content areas in order to make progress (Dist. Ex. 15 at p. 5). Based upon the student's testing results, the evaluating special education teacher concluded that the student was responding to reading and writing instruction provided by Eagle Hill; however, she also identified the student's need to further develop those skills (id.). She also posited that the student would benefit from further explicit instruction in decoding, encoding, and written expression skills (id.). In math, she concluded that the student needed to work in small groups with direct instruction and few distractions in order to make progress, adding that the student "may also benefit from additional time to process/review material and complete tasks" (id. at p. 6). She commented that "[a]ll support services currently in place are assisting the student with her learning. It is recommended these remain" (id.).

Additionally on January 3, 2008, the district's speech-language therapist conducted a speech-language evaluation of the student (Dist. Ex. 16). According to the evaluating speech-language therapist, as measured by the "Peabody Picture Vocabulary Test" (PPVT), the student's single word receptive vocabulary skills fell in the "poor" range (SS 60, 2nd percentile), as did her single word expressive vocabulary and word retrieval skills, as measured by a test referred to in the record as the "Expressive Vocabulary Test-R" (SS 68, 2nd percentile) (id. at pp. 1-3). In order to assess the student's semantics, syntax and morphology, recall and memory, the speech-language therapist administered the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) to the student, who achieved a core language score of 58 (< 1st percentile), placing her in the "very low" range of functioning; additionally, the student's percentile ranks on the receptive and expressive language indices and the language memory index each fell below the 1st percentile (id. at p. 2). The evaluating speech-language therapist recommended that the student continue to receive speech-language services (id. at p. 4).

On January 24, 2008, the school psychologist conducted an observation of the student in her tutorial class at Eagle Hill (Dist. Ex. 14 at p. 1). The student attended the tutorial with two other students (id.). The school psychologist concluded that while the student worked well in the small group setting; for academics, she appeared to require more direct instruction and redirection than the other two students (id. at p. 2). Behaviorally, she commented that the student was quieter than the other two students and characterized her as "very well behaved" (id.).

On February 2, 2008 the student's private neurologist reevaluated the student (Parent Ex. P). The neurologist's findings were consistent with his earlier evaluations of the student (compare Parent Ex. P at pp. 2-3, with Parent Exs. N at pp. 2-3, and O at pp. 2-3). He concluded that the student presented with "a significant learning disability" and "ha[d] shown small but definitive improvement with increasing chronologic age," but noted "there are still significant deficiencies" and that "[f]unction is further compromised by ... [ADD]" (Parent Ex. P at p. 3). He added that "[i]t is apparent that [the student] is receiving a dynamic educational experience at [Eagle Hill]" (id.).

Via correspondence dated March 11, 2008, the district notified the parents of a CSE subcommittee meeting scheduled for April 1, 2008 for the purpose of conducting the student's "Reevaluation/Annual Review" (Dist. Ex. 13). The district enclosed a parent invitation response form, which it requested the parents return at least one week prior to the scheduled meeting date (id.). The student's mother stated that she telephoned the district to request that the April 1, 2008 CSE meeting be rescheduled, but the district denied her request (Tr. pp. 626-27, 707-08). On March 31, 2008, the district received a signed parent invitation response form from the student's mother (Dist. Ex. 12). The form indicated that the student's mother would not be attending the

April 1, 2008 CSE meeting, and acknowledged that the meeting would proceed in her absence subject to her right to request a follow-up meeting thereafter (*id.*). The form further indicated that the student's mother had the opportunity to address the CSE in writing and her understanding that she would be informed of the CSE's recommendations by mail (*id.*). The student's mother's handwritten notation on the form indicated that she had asked Eagle Hill staff to attend the April 1, 2008 CSE meeting via teleconference (*id.*).

On April 1, 2008, the CSE subcommittee convened for the student's reevaluation/annual review in order to develop an IEP for the student's fifth grade school year (2008-09) (Dist. Ex. 11). In attendance were a CSE chairperson who also served as the district regular education teacher, a special education teacher, occupational therapist, and a school psychologist from the district; the student's tutorial teacher and educational advisor from Eagle Hill participated telephonically (*id.* at pp. 6, 10). The parents were not in attendance (Tr. pp. 624, 628; *see* Dist. Ex. 11 at pp. 6, 10). The April 2008 IEP reflected that the CSE considered the results of district testing and progress reports from Eagle Hill (Dist. Ex. 11 at pp. 3-5). The April 2008 CSE recommended a 12:1+2 special class for 3.5 hours daily; related services consisting of OT twice per week for 30 minutes per session in a 1:1 setting and speech-language therapy twice per week for 30 minutes per session in a 3:1 setting; program modifications consisting of refocusing and redirection, visual cues, repetition of information, check for understanding, and allowance for additional processing time; testing accommodations consisting of extended time (1.5), location with minimal distractions, directions read/rephrased, and questions read/rephrased, refocusing prompts for inattention, and allowance for short breaks; and ESY services consisting of a 12:1+1 special class for 5 hours per day, OT once per week for 45 minutes per session in a 1:1 setting, and speech-language therapy twice per week for 30 minutes per session in a 3:1 setting (*id.* at pp. 1-2).⁸

Eagle Hill staff administered the Gray Oral Reading Test-Fourth Edition (GORT-4) to the student in spring 2008, yielding the following grade equivalents and percentile rankings: rate, 2.2 (2nd percentile); accuracy, 1.2 (1st percentile); fluency, 1.7 (1st percentile); and comprehension, 2.4 (9th percentile) (Dist. Ex. 43; Parent Ex. H).⁹ Additionally, on the Slosson Oral Reading Test (SORT), the student attained a grade equivalent of 2.8 and a standard score of 80 (Dist. Ex. 43). In June 2008, the student participated in the "ERB Writing Assessment" and achieved the following category scores, based on a scale of 1-6: overall development, 2.0; organization, 2.0; support, 2.0; sentence structure, 2.0; word choice, 2.0; and mechanics, 3.0; the student's overall performance placed her in the 1st percentile (*id.*). The Fourth Edition of the Stanford Diagnostic Reading Test (SDRT) and Stanford Diagnostic Mathematics Test (SDMT) were administered to the student in April 2008 (Dist. Exs. 47; 50). On the SDRT, the student attained a grade equivalent

⁸ The hearing record demonstrates that there were minor differences between the programs recommended in the April 2007 and April 2008 IEPs including: the April 2008 IEP recommended 30 minutes of OT per session as opposed to the 45 minutes per session recommended in the April 2007 IEP; the April 2008 IEP contained an additional program modification (allowance for additional processing time); the April 2008 IEP contained two additional testing accommodations (refocusing prompts for inattention and allowance for short breaks); and the April 2008 IEP recommended a special class for 5 hours per day as ESY services, as opposed to the 2.5 hour per day class recommended in the April 2007 IEP (*compare* Dist. Ex. 11 at pp. 1-2, *with* Dist. Ex. 28 at pp. 1-2).

⁹ The hearing record contains duplicative exhibits. For the purposes of this decision, only District exhibits were cited in instances where both a District exhibit and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; *see Application of a Student with a Disability*, Appeal No. 09-096; *Application of a Student with a Disability*, Appeal No. 09-079; *Application of a Student with a Disability*, Appeal No. 09-038; *Application of a Child with a Disability*, Appeal No. 07-119; *Application of the Bd. Of Educ.*, Appeal No. 06-074).

of 2.6 (18th percentile) on comprehension (Dist. Ex. 47). On the SDMT, the student attained grade equivalents of 2.4 (8th percentile) on concepts/application, 2.2 (2nd percentile) on computation, and an SDMT total grade equivalent of 2.3 (4th percentile) (Dist. Ex. 50).

In June 2008, Eagle Hill provided the parents with a progress report documenting the student's performance during the second semester of the 2007-08 school year (Parent Ex. I). The student's educational advisor at Eagle Hill reported that problem solving skills and strategy development remained difficult for the student (*id.* at p. 1). The advisor reviewed strategies, outlined in previous progress notes that were beneficial to the student, particularly "[t]alking through problem solving situations" with the student and having problem solving processes and active learning skills modeled specifically for her (*id.*). According to the advisor, the student began to "branch out socially" during the 2007-08 school year and connect with some of the new students (*id.* at p. 2). The advisor added that the student continued to experience minor conflicts with some peers; however, when such conflicts arose, the advisor observed that the student was beginning to stand up for herself and was attempting to verbalize her feelings in a more appropriate manner (*id.*). The advisor commented that with prompting, the student could stay engaged in a conversation with peers for a longer period of time, and while acknowledging that her progress was "slow," the advisor noted that the student "is not discouraged by this and remains motivated to learn new skills and information" (*id.*).

The student's tutorial teacher at Eagle Hill reported that the student was able to independently decode second grade level material, to blend sounds or syllables into words, and to complete phoneme discrimination activities (Parent Ex. I at p. 9). She reported that the student required reminders to use strategies to sound out words and improve fluency (*id.*). In spelling, the student's tutorial teacher observed that the student was able to independently spell "CVC" words with mixed vowels and words with initial and final consonant blends and digraphs (*id.* at p. 10). She revealed that the student was able to illustrate words and to identify pictures illustrating events (*id.* at pp. 10-11). According to her writing teacher, the student could independently write "a completion" for sentence starters (*id.* at p. 17). Her math teacher confirmed that the student was able to independently differentiate odd and even numbers (*id.* at p. 13). The student's motor training teacher identified that the student had improved her form on several core strengthening tasks, and increased the duration for which she could perform some of them (*id.* at p. 19). Her oral language teacher advised that the student demonstrated progress toward noticing when she had lost her audience, closing a conversation, developing awareness of personal body space, and evaluating the seriousness of problem (*id.* at p. 4).

The parents reported receiving a copy of the April 2008 IEP in early September 2008 (Tr. pp. 628-31, 716-17; Dist. Ex. 5; Parent Ex. V).¹⁰ By correspondence to the district's director of pupil personnel services and special education (PPS director) dated September 26, 2008, the parents rejected the April 2008 IEP, contending that the proposed IEP did not adequately address the student's educational needs, specifically citing the student's level of distractibility and the parents' concern that the movement of students in and out of the recommended special class would be a distraction to the student (Parent Ex. V). The parents further asserted that the student's speech and language needs could not be met within the recommended frequencies of speech-language therapy, and concluded that the recommended IEP did not provide a sufficient level of integrated

¹⁰ I note that the hearing record includes correspondence dated August 7, 2008 from the district to the parents that purported to enclose copy of April 2008 IEP (Dist. Ex. 6). However, there was no testimony at the impartial hearing regarding this document, nor was there any testimony that rebutted the student's mother's assertion that she did not receive the April 2008 IEP until September 2008.

support in a full-time day special education school (id.). The parents also alleged that "[w]e had asked for the [s]ubcommittee meeting held on April 1st to be rescheduled due to conflicts with our schedules. That request was denied" (id.). The parents further contended that the representatives from Eagle Hill who had participated in the April 2008 CSE meeting had stated that "'it was the quickest IEP meeting that they ever attended'" (id.). The parents concluded their letter by requesting that the district reimburse them for the student's 2008-09 school year at Eagle Hill (id.).

On October 30, 2008, the PPS director responded to the parents' September 26, 2008 letter, countering that the student would receive "direct instruction and consistent support in content areas from highly qualified teachers" in the district's recommended class (Dist. Ex. 4 at p. 1). Additionally, she cited program modifications and annual goals developed by the CSE subcommittee designed to address the student's identified needs (id.). The PPS director advised that although the school in which the recommended program was located used a pull-out model of related service delivery, if the student were to attend the school, her teachers and therapists would rotate the schedule of the student's related services, minimize any distraction caused by student's exiting and returning from related services, and assist the student with transitions to and from her related services (id.). The PPS director "respectfully declined" the parents' request for reimbursement for their unilateral placement, maintaining that the district lacked the authority to contract for the placement of a student with a disability in an unapproved private school (id. at pp. 1-2). The PPS director represented that the CSE was available to convene and discuss the parents' concerns regarding the April 2008 IEP, and invited the parents to contact her to arrange such a meeting if they so desired (id. at p. 2).

According to the hearing record, the parents filed their due process complaint notice and request for an impartial hearing on October 31, 2008, in which they "challenge[d] the programs recommended for [the student] by the [CSE] for the 2007-08 and 2008-09 school years and [sought] reimbursement for tuition costs incurred by their unilateral placement of the [student]" at Eagle Hill for both school years (IHO Decision at p. 1). On November 10, 2008, the district responded, denying the parents' allegations (Pet. ¶ 37).¹¹

An impartial hearing convened on March 20, 2009, and concluded on July 1, 2009, after five days of testimony.^{12,13} In a decision dated September 22, 2009, the impartial hearing officer first addressed procedural allegations raised by the parents against the district regarding the conducting of both the April 2007 and April 2008 CSE meetings (IHO Decision at pp. 23-26). Relative to the April 2007 CSE meeting, the impartial hearing officer determined that the absence of a school psychologist at the meeting rose to the level of a deprivation of a free appropriate public

¹¹ Neither the parents' due process complaint notice, nor the district's response thereto are included in the hearing record. Both parties and the impartial hearing officer are reminded that a due process complaint notice and a district's response thereto should be included as part of the hearing record.

¹² The hearing record references a "resolution session" that took place during the time period between the parents' filing of the due process complaint notice and the commencement of the impartial hearing (see Tr. pp. 718-19; see also 8 NYCRR 200.5[j][2][i]), but does not include any specifics.

¹³ The parents were represented by counsel at the impartial hearing (IHO Decision at pp. 33-34).

education (FAPE)¹⁴ per 20 U.S.C. § 1414(d)(1)(B)(v) and 8 NYCRR 200.3(a)(iv) (*id.* at pp. 25-26). Relative to the April 2008 CSE meeting, the impartial hearing officer found that by refusing to reschedule the CSE meeting at the parents' request, the district "significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE] to the student" per 20 U.S.C. § 1415(f)(3)(E)(ii) (*id.* at pp. 24-25).

The impartial hearing officer then examined the appropriateness of the district's recommended programs for both the 2007-08 and 2008-09 school years (IHO Decision at pp. 26-28). While acknowledging that both the April 2007 and the April 2008 IEPs accurately and comprehensively set forth the student's testing results, described her present levels of performance, and identified her special education needs; and adding that both IEPs correctly noted that the student had language and motor needs that affected her academics, had attentional problems, and needed improvement across the range of academic areas; the impartial hearing officer concluded that neither IEP set forth a program that sufficiently addressed the student's identified special education needs (*id.*). The impartial hearing officer reasoned that the recommended 12:1+2 program would not have afforded the student the level of individual support she required to remain on task, to remediate her academic delays, and to provide her with adequate repetition and review of new material (*id.*). Additionally, the impartial hearing officer found that the environment of the recommended 12:1+2 class, which featured 12 students with frequent comings and goings to three different grade level specials, related services, and three different lunch periods, "would be extremely distracting to [the student] and would interfere with her learning" (*id.*).

Turning her attention to the appropriateness of the parents' placement of the student at Eagle Hill, the impartial hearing officer found that the evidence contained in the hearing record established that Eagle Hill provided the student with an appropriate special education program for both the 2007-08 and 2008-09 school years because Eagle Hill provided the student with small classes, intensive instruction in both decoding and reading comprehension, a communications class tailored to students with pragmatic language problems, multisensory teaching techniques with language development emphasized throughout the school day, and speech-language therapy (IHO Decision at pp. 29-30). The impartial hearing officer further found that the hearing record demonstrated that the student had "made slow but measurable or discernible progress in line with her low cognitive abilities and significant attentional problems" while at Eagle Hill (*id.* at pp. 29-31).

Finally, in addressing the equitable considerations involved in the parents' reimbursement requests, the impartial hearing officer opined that the evidence contained in the hearing record established that "over the years," the parents had cooperated with the CSE by enrolling the student in the district's programs, having her participate in the evaluation process, attending CSE meetings, and communicating and working with district personnel in order to obtain appropriate services for the student and to learn about the recommended 12:1+2 program (IHO Decision at p. 31).

¹⁴ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

However, the impartial hearing officer decided that the parents were precluded from receiving full reimbursement for the tuition expended during both school years because the four hours per week of after school activities at Eagle Hill were not properly reimbursable "because the hearing record does not support a finding that such services [were] necessary to [the student's] special education program" (*id.*). Accordingly, the impartial hearing officer awarded the parents partial tuition reimbursement at Eagle Hill for both the 2007-08 and 2008-09 school years, reduced by the percentage of each school week devoted to these activities (*id.* at p. 32).

The district appeals, seeking annulment of the impartial hearing officer's decision. The district proffers four principle arguments. First, the district argues that the impartial hearing officer erroneously determined that both the April 2007 and April 2008 CSEs deprived the student of a FAPE based upon procedural deficiencies because: (1) relative to the April 2007 CSE meeting, a school psychologist is only required to attend a CSE meeting when new psychological evaluative data is to be reviewed, or a change in the student's program to a more intensive staff/student ratio is being considered (see 8 NYCRR 200.3[c][2][v]); and relative to the April 2008 CSE, although the parents were not present at the meeting, the evidence contained in the hearing record demonstrates that they were afforded substantial opportunity to participate in the decision-making process, and the hearing record does not support a finding that the district excluded the parents from the process. Second, the district asserts that both the April 2007 and April 2008 IEPs were reasonably calculated to confer meaningful educational benefits upon the student for each respective school year. Third, the district contends that the parents failed to meet their burden of proving that Eagle Hill was an appropriate placement for the student during the 2007-08 and 2008-09 school years because Eagle Hill did not meet the student's needs and the student did not make progress there. Finally, the district argues that the parents failed to provide adequate notice to the district of both their rejection of the recommended programs and their re-enrollment of the student at Eagle Hill at public expense for both the 2007-08 and 2008-09 school years. The district does not assert any other equitable grounds upon which tuition reimbursement should be denied.

The parents, through counsel, answer, alleging that procedurally, the April 2007 CSE was deficient in that it not only lacked a school psychologist, but also a speech-language therapist. The parents further argue that with respect to the April 2008 CSE meeting, the district neither allowed the parents to adjourn the CSE meeting to a mutually convenient date and time, nor attempted to reschedule the meeting; that the student's mother signed the consent form to proceed in their absence only because she felt that she "had no other choice;" that the district failed to provide a copy of the April 2008 IEP until September 2008, after the start of the 2008-09 school year¹⁵ and four months after the CSE meeting had convened, and that upon receiving it, the parents timely responded with a rejection letter; and that contrary to the district's allegation, the district advised at the resolution session that it could not provide any other services to the student that differed from those already offered over the previous four years. The parents also counter that the 12:1+2 program recommended in the April 2007 and April 2008 IEPs was not appropriate for the student because it would have provided the student with a special education program for only 3.5 hours of the school day, the balance of which she would have spent in a mainstream setting; because at most, the classroom teacher in the district's recommended class could offer a maximum of 45 minutes of direct instruction per day, utilizing three different lesson plans for the class; because

¹⁵ In the answer, the parents' attorney asserts that "the record reflects that the [April 2008] IEP was mailed the day after Labor Day, on September 2, 2008, and that school started on September 3, 2008," but fails to cite to the portion of the hearing record upon which he relies (Answer ¶ 31 n.2). During the impartial hearing, the student's mother could not testify definitively as to when the 2008-09 school year started, nor precisely when she received the April 2008 IEP (see Tr. pp. 629, 717-18; see also Parent Ex. V).

the recommended class lacked a sufficient amount of direct instruction; and because the recommended class presented too many distractions and transitions due to the push-in and pull-out services and staggered lunch periods.

The parents also allege that Eagle Hill was an appropriate placement for the student during both the 2007-08 and 2008-09 school years, contending that: (1) the district conceded that the student "needs to work in small groups with direct instruction and few distractions in order to progress" and that "[a]ll support services currently in place [Eagle Hill] are assisting [her] with her learning" (see Dist. Ex. 15 at p. 6); (2) contrary to the district's assertion, the student demonstrated "discernible" progress at Eagle Hill, and the standardized test results cited by the district arguing otherwise may be invalid because multiple tests were administered to the student on the same day, thus "overloading" the student, and, in conjunction with her ADD, may have impacted her performance; (3) Eagle Hill provided the student with a special education program throughout the entirety of the school day, including specials, recess, and lunch, in a constant learning environment; and (4) Eagle Hill provided the student with instruction designed to specifically address the student's special education needs.

The parents also raise five "affirmative defenses," including: (1) the petition fails to state a claim upon which relief may be granted; (2) the impartial hearing officer's decision should be upheld in its entirety because it set forth the factual basis and reasons for its determination which are supported by law; (3) the parents acted in good faith and cooperated with the CSE; (4) the district failed to timely object and thus waived its rights to raise the issues on appeal;¹⁶ and (5) the district did not offer the student a FAPE for the 2007-08 and 2008-09 school years, the placement at Eagle Hill¹⁷ was appropriate for both school years, and equitable considerations support the award of partial tuition reimbursement.

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)

¹⁶ The parents' attorney fails to specify in the answer the particular allegation(s) to which this affirmative defense purportedly applies.

¹⁷ In the answer, the parents' attorney erroneously refers to the placement as "Silverado" instead of Eagle Hill (Answer ¶ 98).

significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Initially, I will address the issue of the composition of the April 2007 CSE subcommittee. The district challenges the impartial hearing officer's determination that the April 2007 CSE subcommittee was improperly constituted in that it lacked a school psychologist, and that this deficiency deprived the student of a FAPE for the 2007-08 school year (IHO Decision at pp. 25-26). Relative to the April 2007 CSE subcommittee meeting, the parents, in their answer, argue that the lack of a speech-language therapist, in addition to a school psychologist, rose to the level of depriving the student of a FAPE (Answer ¶ 31).

It is unclear from the hearing record whether the parents raised the argument regarding the lack of a speech-language therapist at the April 2007 CSE subcommittee meeting below, as the hearing record does not contain the due process complaint notice and the impartial hearing officer's decision does not reference this issue. However, the district did not object to this argument, and therefore, I will consider it in this appeal. The hearing record reflects that the parent's allegation that a speech-language therapist did not attend the April 2007 CSE subcommittee meeting is erroneous as a speech-language therapist did attend that meeting (Dist. Ex. 28 at pp. 5, 10). Therefore, this argument is without merit.

Regarding the lack of a psychologist at the April 2007 CSE subcommittee meeting, the hearing record reflects that a school psychologist did not participate in the meeting (see Dist. Ex. 28 at pp. 5, 10). Under New York State law, subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). The subcommittees are required to evaluate each child with a disability at least annually and report to the CSE (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][6]). In addition, the subcommittee must immediately refer to the CSE, upon written request of the parent, any matter in which the parent disagrees with the subcommittee's recommendation concerning a modification or change in the identification, evaluation, educational placement, or provision of a FAPE to the student (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][5]). Each subcommittee is required to include as members: the parents; one regular education teacher of the student (if the student is or may be participating in the regular education environment); one special education teacher of the student, or, if appropriate, a special education provider of the student; a representative of the school district involved in special education; an individual who can interpret evaluation results; such other persons having knowledge or special expertise regarding the student as the school district or parents shall designate; if appropriate, the student; and a school psychologist whenever a new psychological evaluation is being reviewed or a change to a more restrictive program is being considered; and such other persons having knowledge or special expertise regarding the student (Educ. Law § 4402[1][b][1][d]; see Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[c][2]).

With respect to April 2007 CSE, the hearing record evidences that the subcommittee neither reviewed a new psychological evaluation, nor changed the student's recommendation to a more restrictive program than that contained in the previous IEP dated May 11, 2006 (compare Dist. Exs. 28 at pp. 1-2, 6, with 36 at pp. 1-2, 5-6).¹⁸ Therefore, a school psychologist was not required by State regulation at the April 2007 CSE meeting. Moreover, the April 2007 IEP

¹⁸ The hearing record does not indicate that the parents objected to proceeding without a school psychologist at the April 2007 CSE meeting (see Dist. Ex. 28 at pp. 5-6).

reflected that the CSE had before it the December 2004 and November 2003 psychological evaluations and incorporated scores from those reports into the IEP (Dist. Ex. 28 at pp. 3-4, 6).

Furthermore, I find that under the circumstances of this case, the hearing record does not demonstrate that the lack of a school psychologist at the April 2007 CSE meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. I therefore find that the hearing record does not support the impartial hearing officer's conclusion that the lack of a school psychologist at the April 2007 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Bd. of Educ., Appeal No. 09-101; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student with a Disability, Appeal No. 08-064). Consequently, I will annul that portion of the impartial hearing officer's decision.

I will now consider the appropriateness of the district's recommended program for the 2007-08 school year as set forth in the April 2007 IEP. The impartial hearing officer found that the April 2007 IEP "accurately and comprehensively" reflected the student's testing results, described her present levels of performance, and identified her special education needs (IHO Decision at p. 27). The parents did not cross-appeal the impartial hearing officer's findings with respect to this issue. The hearing record reflects that at the time of the April 2007 CSE meeting, the student had been attending Eagle Hill for almost two years (Tr. pp. 402, 585, 606). The CSE meeting minutes indicated that the student's teacher and educational advisor from Eagle Hill participated in the April 2007 CSE meeting, as did the student's private occupational therapist, who also worked for the district (Dist. Ex. 28 at p. 5).¹⁹ The hearing record reflects that historically, the student exhibited cognitive weaknesses (Parent Ex. R. at pp. 2-4, 11). Reports generated by Eagle Hill and the student's private neurologist during the 2006-07 school year, as well as comments on the student's April 2007 IEP confirmed that the student experienced difficulty listening, that attentional difficulties affected her learning, and that distractibility was a significant factor affecting her ability to complete assignments (Dist. Ex. 28 at pp. 4-5; Parent Ex. C at pp. 1-2). The student demonstrated weaknesses in decoding and reading comprehension, and difficulties with regrouping and problem solving in math (Dist. Ex. 28 at pp. 3, 5). The student's private neurologist and occupational therapist identified deficiencies in the student's graphomotor skills, and her occupational therapist noted visual perceptual deficits as well, which were reflected on the April 2007 IEP (*id.*; Parent Ex. N at p. 2). Eagle Hill progress reports from the 2006-07 school year showed that the student manifested some "intrusive" behaviors in the school setting; specifically, copying other students' answers, assuming the role of "teacher," and fixating on one student (Parent Ex. C at p. 2). Additionally, the April 2007 IEP reflected that the student had difficulty with conversational skills (Dist. Ex. 28 at p. 5).

To address the student's attentional needs, the April 2007 CSE recommended that the student attend a 12:1+2 special class for 3.5 hours daily; receive program modifications consisting of redirection and refocusing, visual cues, repetition of information, and checks for understanding; and testing accommodations consisting of extended time (2.0), location with minimal distractions, directions read/rephrased, and questions read/rephrased (Dist. Ex. 28 at pp. 1-2). To ameliorate

¹⁹ The student's mother testified that she privately supplemented the student's motor training programming at Eagle Hill with OT (Tr. pp. 60, 691). The occupational therapist, who was an independent contractor hired by the district and who also provided OT services to the district's recommended 12:1+2 class, testified that she provided OT to the student after school when the student attended Eagle Hill in second and third grade (Tr. pp. 265-67).

her academic deficits, the April 2007 IEP included annual goals targeting the development of decoding and comprehension skills, regrouping and problems solving skills, attending skills, and the ability to compose complete sentences from phrases (*id.* at pp. 6-7). The April 2007 CSE determined that the student was eligible for ESY services and the hearing record suggests that the parents accepted these services (Parent Ex. O at p. 1).

To address the student's speech-language deficits, the April 2007 CSE recommended that the student receive speech-language therapy twice weekly in a 3:1 setting (Dist. Ex. 28 at p. 1). The IEP supplemented this recommendation with speech-language goals focused on developing the student's ability to follow multi-step directions, identify irrelevant information, use concise language to clarify misconceptions, express a presented predicament, and offer solutions and express reasons for her actions, opinions and feelings (*id.* at pp. 8-9). The district's speech-language therapist explained how she would have implemented the student's speech-language goals had she been the student's therapist for the 2007-08 school year (Tr. pp. 220-23).

In the areas of fine motor and visual perceptual needs, the April 2007 CSE recommended that the student receive individual OT twice per week for 30 minutes per session (Dist. Ex. 28 at p. 1). The IEP included motor goals aimed at developing the student's abilities to search for objects or letters moving left-to-right or top-to-bottom without visual cues, independently complete an interlocking puzzle, independently organize written material on a page with correct spacing between letters and words, use a keyboard, and work amid the presence of sounds and visual stimulation in the classroom (*id.* at p. 9). The student's private occupational therapist, who also worked for the district in the recommended 12:1+2 special class, advised that she developed the OT goals contained in the April 2007 IEP herself after reviewing the student's OT annual review report dated April 24, 2007 (Tr. p. 284; *see* Dist. Exs. 28 at p. 6; 29). The occupational therapist also detailed how she would have implemented the student's IEP goals during the 2007-08 school year had the student attended the recommended placement (Tr. pp. 284-90), adding that she would have "strongly considered" a sensory diet for the student as a means toward addressing the student's distractibility (Tr. pp. 292-94, 317-18). In addition to individual therapy, the occupational therapist commented that during the 2007-08 school year, she provided a weekly motor skills group to the students in the recommended 12:1+2 class, which offered activities designed to develop basic motor skills and sensory motor skills (Tr. pp. 279-81).

The special education teacher of the recommended 12:1+2 special class testified that she was certified as a regular education teacher, grades K-6; special education teacher, grades K-6; and reading teacher, grades K-6 (Tr. p. 17). She testified that she received training in numerous reading programs, including Preventing Academic Failure (PAF), Edmark, Reading Milestones, and the Wilson Reading System (Wilson) (Tr. pp. 18-21). She further confirmed that she had previously worked at a private school designed for children with language-based learning disabilities that she likened as being "very parallel to Eagle Hill" (Tr. pp. 16, 199). In addition to herself, the special education teacher explained that the recommended 12:1+2 special class was staffed by two classroom aides who assisted her by helping with lessons, escorting students to and from specials, aiding students in specials, monitoring students in the lunchroom and on the playground, working 1:1 with students implementing lesson plans, setting up homework, and assisting students in preparing for "pack up" for the day, and added that one of her aides held a teaching certificate of her own and was pursuing a degree in special education, while the other aide pursued a degree in OT (Tr. pp. 27-28, 131-32).

The special education teacher characterized the recommended class as a communication-based language development class with a "heavy thrust" on language development and

communication, including understanding social communication, social comprehension, and social norms and cues (Tr. p. 37; see Tr. pp. 50-51). She advised that for the 2007-08 school year, the class roster included 10 students, ages 7 through 11, enrolled in the recommended class, which encompassed grades 3 through 5 (Tr. p. 46). She explained that during the 2007-08 school year, she utilized various reading programs and methodologies including "the Orton-Gillingham PAF program" ("a linguistic-based phonemic program"), the Edmark reading program ("a whole word visual based program"), the Reading Milestones program (a "visual and whole word reading" program), and trade books (Tr. pp. 48-49). The special education teacher revealed that that the recommended classroom's writing program included the "EPS basic writing skills program" and the "Diana Hanbury-King program," which, as she explained, included the "basic Orton program of words, phrases and sentence kernel development and the introduction of conjunctions" (Tr. p. 49). In math, she testified that she utilized a modified "touch math" program, the "SRA connecting math program," the school-based Scott Foresman math program, and supplementary materials for word problems and math language (Tr. pp. 49-50). She further testified that she was familiar with the New York State curriculum for fourth grade social studies and science and confirmed the students in the recommended class received content area instruction on topics that fell within the three grade levels encompassed in the recommended class (Tr. p. 40).

The special education teacher testified that during the 2007-08 school year, she provided life skills instruction, which included developing such practical skills as working with clothes fasteners while dressing, transitioning students from the classroom to specials, and developing time and money reckoning skills (Tr. pp. 42-43). The district's school psychologist testified that she conducted a weekly social skills group in the recommended 12:1+2 class, in which she explained, the social needs of the class members helped shape the content of the program (Tr. p. 347). Behaviorally, the special education teacher apprised that she employed a classroom management program, as well as individual student-based programs when necessary (Tr. pp. 43-44). She also noted that the students in the recommended 12:1+2 class participated in mainstream specials such as art, music, physical education, computers, and library (Tr. pp. 28-29).

The special education teacher opined that the student would have "fit in beautifully" in the recommended class and would have benefited from its educational program (Tr. p. 58). She concluded that the student's needs, abilities, and overall functioning "paralleled" those of the other students in her class (Tr. pp. 26-27, 53-54, 58; see Dist. Ex. 2). She testified that she would have addressed the student's academic goals set forth in the April 2007 IEP by employing the various programs and methodologies she described (Tr. pp. 55-57). She added that she would have addressed the student's distractibility issues "as seem[ed] fit for [the student]," including the use of a behavior chart or visual reminders on the student's desk (Tr. p. 57). She confirmed that she also would have been able to implement the recommended program modifications and testing accommodations contained in the April 2007 IEP (Tr. pp. 38-39). In the area of related services, she described her collaboration with related services providers to address the individual needs of the students in the recommended class (Tr. pp. 32-35). The student's educational advisor at Eagle Hill concurred that the majority of goals contained in the April 2007 IEP were appropriate for the student and were in fact, addressed by Eagle Hill during the 2007-08 school year (Tr. pp. 430-33).

A student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with

disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

In the case at bar, the hearing record evidences that the district's recommended program would have provided the student with a special education program and related services in the LRE. The student would have been afforded opportunities to interact with typically developing peers during mainstream specials including art, music, physical education, computers, and library (Tr. pp. 28-29; Dist. Ex. 28 at p. 2). Furthermore, the April 2007 IEP reflected that the CSE considered and rejected a general education setting with support services and rejected this option "because the student's current academic and language functioning indicates that a more intensive setting with support is needed to address the student's needs" (Dist. Ex. 28 at p. 6).

In summary, I do not concur with the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2007-08 school year because the evidence contained in the hearing record demonstrates that the special education program and services recommended by the district for the 2007-08 school year would have conferred educational

benefits to the student. As discussed above, the hearing record reflects that the April 2007 CSE developed an IEP that accurately and comprehensively set forth the student's testing results, described her current levels of performance, identified her special education needs, and correctly noted that the student's language and motor needs affected her academics, that she had attentional problems, and that she needed improvement across a range of academic areas. The hearing record also demonstrates that in addition to considering relevant educational data pertaining to the student, the April 2007 CSE also engaged in discussion with the parents and teachers from Eagle Hill who had knowledge of her special education needs and developed a 12:1+2 special class program with related services that would have provided her with the structured instructional setting necessary to address the student's cognitive deficits, attentional difficulties, speech-language needs, and motor weaknesses (see Tr. p. 58; Dist. Ex. 28 at pp. 1-6, 10).

I find that with respect to the 2007-08 school year, careful review of the evidence contained in the hearing record supports a conclusion that the district's recommended special education program and related services in the April 2007 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F3d at 1120; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). Consequently, I do not find that the impartial hearing officer's determination to the contrary is supported by the evidence contained in the hearing record, and I will annul that portion of her decision.

Having determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issue of whether Eagle Hill was appropriate for the 2007-08 school year, and the necessary inquiry for that school year is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

Turning now to the student's fifth grade school year (2008-09), the district challenges the impartial hearing officer's determination that by refusing to reschedule the April 2008 CSE meeting at the parents' request, the district "significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE] to the student" per 20 U.S.C. § 1415(f)(3)(E)(ii) (IHO Decision at pp. 24-25). The IDEA and the federal and State regulations set forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]; see 34 C.F.R. § 300.501[b][1][i], [ii]; see also 8 NYCRR 200.5[d]). Parents of a student with a disability are mandated team members of a CSE (8 NYCRR 200.3[a][1][i]; see 34 C.F.R. § 300.321[a][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's

CSE meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322[a]; 8 NYCRR 200.5[d]; see Mr. M v. Ridgefield Bd. of Educ., 2007 WL 987483 [D. Conn. Mar. 30, 2007]).

If neither parent can attend a CSE meeting, the school district must use other methods to ensure parent participation, including individual or conference telephone calls (34 C.F.R. §§ 300.322[c], 300.328; see 8 NYCRR 200.5[d][1][iii], [d][7]). A CSE meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend (34 C.F.R. § 300.322[d]; see 8 NYCRR 200.5[d][3]). The school district must keep a record of its attempts to arrange a mutually agreed upon time and place, such as telephone call records, correspondence, and detailed records of visits made to the parents' home or place of employment and the results of those visits (34 C.F.R. § 300.322[d]; see 8 NYCRR 200.5[d][3] - [4]).

In the case at bar, the hearing record evidences that on March 11, 2008, the district's PPS director forwarded written notice to the parents of the CSE meeting scheduled for April 1, 2008 (Dist. Ex. 13; see Tr. p. 707). In pertinent part, the notice contained the following language: "[w]e hope that you and your child, if appropriate, will make every effort to attend. The Committee schedules meetings at mutually agreeable times. If you are unable to attend the meeting, at your request, we will arrange for alternative means of meeting participation, such as video conferences or telephone conference calls" (Dist. Ex. 13) (emphasis added). The student's mother testified that she was unable to attend the April 1, 2008 CSE meeting due to work concerns, but that she communicated to the district that she "would be available any time from May 13 on, my schedule was wide open" (Tr. pp. 624-25, 710-11). She added that "[i]n the past I believe there was one meeting we were not able to attend," at which time she "called into the district office, explained we were not able to attend and graciously another meeting was scheduled that was mutually acceptable to all parties" (Tr. p. 624; see Tr. p. 708). She explained that relative to the April 1, 2008 CSE meeting, she telephoned the district's special education secretary, explained the situation to her, and requested a rescheduling of the CSE meeting (Tr. pp. 625, 707-08; see Parent Ex. V). She contended that the district's secretary "said that she would see if that was possible to postpone the date" and that ultimately, "she did get back to me and they were not capable of postponing the day[,] they would hold the meeting without us, they would like to get the meeting done, they would inform us after the meeting took place" (Tr. pp. 626-27, 708; see Parent Ex. V). The student's mother also recollected discussing her unavailability directly with the district's PPS director prior to the April 1, 2008 CSE meeting (Tr. pp. 710-15).

The student's mother further testified that she "was asked to sign a form" and ultimately did so (Tr. pp. 627, 708-09; see Dist. Ex. 12). The hearing record contains the signed parental invitation response form which bears a handwritten notation modifying the original typewritten content, reading in pertinent part that the student's mother "w[ould] not attend the Committee meeting. I understand that the meeting will be held in my absence and that I have the opportunity to address the committee in writing. I also understand that I will be informed of the committee's recommendation by mail and that I will request another meeting to follow-up as discussed" (Dist. Ex. 12; see Tr. pp. 713-14). The form was stamped as received by the district on March 31, 2008 (Dist. Ex. 12). While acknowledging that she consented to the district's conducting of the April 2008 CSE meeting in her absence, the student's mother reflected that "it didn't seem I was given an alternative. I was asked to sign the form ... and the years we have been in the district my husband and I have been very cooperative, we at no point have been adversarial with the district" (Tr. pp. 714-15). The CSE meeting proceeded in the parents' absence on April 1, 2008 (Tr. pp. 627-28; see Dist. Ex. 11 at pp. 1, 6, 10).

The evidence contained in the hearing record does not demonstrate that the district took steps to ensure that parents were present at the student's CSE meeting or were afforded the opportunity to participate through an accommodation of their request for a rescheduling of the April 1, 2008 CSE meeting (see 34 C.F.R. § 300.322[a]; 8 NYCRR 200.5[d]). Furthermore, the hearing record evidences that the district was not unable to convince the parents that they should attend; to the contrary, the student's mother advised district personnel that she "would be available any time from May 13 on" (Tr. p. 713) and the district declined to reschedule the CSE meeting at a mutually agreeable time. Consequently, I find insufficient evidence in the hearing record to overturn the impartial hearing officer's determination that the district's refusal to reschedule the April 1, 2008 CSE meeting "significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE] to the student" per 20 U.S.C. § 1415(f)(3)(E)(ii), and that this violation rose to the level of depriving the student of a FAPE for the 2008-09 school year (IHO Decision at pp. 24-25; see Application of the Bd. of Educ., Appeal No. 07-087).

I will now consider whether the parents' placement of the student at Eagle Hill was appropriate for the 2008-09 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 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 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The hearing record demonstrates that the student's needs did not change significantly between the 2007-08 and 2008-09 school years. Academically, the student continued to demonstrate weaknesses in decoding and reading comprehension, attending to operational signs, performing basic mathematical calculations, and solving complex word problems (Dist. Exs. 11 at pp. 3-5; 15 at pp. 3-5; Parent Ex. Q at p. 2). Additionally, the student demonstrated attending difficulties, fine motor and visual perceptual weaknesses, and deficits in speech and language (Dist. Exs. 11 at pp. 3-5; 15 at pp. 3-5; 16; 18; Parent Exs. I; Q).

The hearing record describes Eagle Hill as a school for students with learning disabilities consisting of a student population of approximately 230 students evenly divided between a lower school (grades 1-6) and an upper school (grades 7-9) and ranging from 6 to 16 years of age (Tr. pp. 372, 375, 740-42). All of the students who attend the school require special education (Tr. pp. 378, 741). Eagle Hill staff includes a certified social worker, school psychologist, and speech-language therapist (Tr. pp. 743-44). Although there is no occupational therapist on staff, the school's motor training teacher is certified in adapted physical education (Tr. pp. 743, 753). The student's academic teachers for the 2008-09 school year were certified special education teachers (Tr. pp. 747-51). During the 2008-09 school year, there were a total of two students in the student's tutorial (reading) class, five students in her math class, and five students in her writing class (Tr. p. 825).

The student's Eagle Hill schedule for the 2008-09 school year included numerous classes addressing the student's academic needs (Parent Ex. A). According to the student's educational advisor, the student attended a tutorial class twice a day and was grouped with one other student with a similar profile (Tr. pp. 375, 398, 757). The tutorial class was designed to provide intensive remedial instruction in language arts including decoding, comprehension, oral and written expression, spelling, and vocabulary development (Parent Ex. J at pp. 3-6). The student's December 2008 progress report confirmed that the student was working with materials that, according to publishers' notations, were written at approximately a third grade level (id. at p. 3). In decoding, the December 2008 progress report revealed that the student was working on vowel teams; soft "c" and soft "g;" syllable types, including open, closed, silent "e" and consonant "-le;" syllabication rules; identifying suffixes; and identifying compound words (Tr. p. 396; Parent Ex. J at p. 3). With respect to spelling, the December 2008 progress report apprised that the student was working on long "i" spelled "igh" words, vowel teams, soft "c" and soft "g," and silent letters,

and was receiving instruction related to sight words, parts of speech, and vocabulary (Parent Ex. J at pp. 3-4).

In math, the student's class at Eagle Hill reportedly provided "small group instruction in a structured program emphasizing concepts and operations, problem solving, number sense and units in practical application areas" (Parent Ex. J at p. 7). The student's December 2008 progress report advised that she received instruction in addition and subtraction with regrouping, problem solving strategies, place value and number relationships, and practical applications, such as time and money skills (id.).

In writing, the student's class at Eagle Hill focused on practice in the formation of manuscript and/or cursive letters, and activities and exercises designed to improve fine motor skills (Parent Ex. J at p. 10). The class took a structured approach to spelling, which was coordinated with the student's tutorial class and offered daily instruction in sentence structure, basic paragraph writing, and writing mechanics (id.). Instructional examples contained in the progress report revealed that the student was learning to write cursive letters, strategies to reinforce spelling (such as phonemic awareness exercises, sounds-symbol dictation/activities, and identification of misspelled words), and rules for punctuation, capitalization, and comma usage (id.). The educational advisor testified that the writing class used a program called "Empowering Writers" that taught students to write using "a diamond structure" (Tr. p. 774). The hearing record also evidences that during the 2008-09 school year, the student utilized keyboarding as an alternative method of writing (Tr. pp. 775-76). In literature, as detailed in the December 2008 progress report, the student's class endeavored to teach students to enjoy reading as a pleasurable activity while instructing them in reading comprehension, vocabulary and literary concept skills, and utilizing class materials at a third grade level (Parent Ex. J at p. 13).

In addition to academic instruction, Eagle Hill afforded the student services designed to address her deficits in speech-language, social skills, and motor development. The hearing record indicates that Eagle Hill added speech-language therapy to the student's program during the 2008-09 school year (Tr. pp. 638-39). The student's educational advisor at Eagle Hill testified that the student received pull-out speech-language services once per week, as well as two periods per week of "collab," wherein a speech-language teacher pushed in to the student's writing and communication skills classes in order to reinforce skills originally developed during therapy sessions (Tr. pp. 377, 391, 752). The student's speech-language therapist at Eagle Hill further apprised that based upon the district's evaluation of the student, building vocabulary skills became the central focus of the first therapy period, and she identified the following short-term goals for the student: identifying and generating synonyms for a given word, answering "wh" questions, and labeling categories and generating category members (Parent Ex. J at p. 16). In addition to receiving speech-language therapy, during the 2008-09 school year the student attended a communications skills class specifically designed for a small group of students with more significant pragmatic language needs (Tr. pp. 375-76, 384). The purpose of this class, as stated in the student's December 2008 progress report, was "to provide intensive instruction in specific pragmatic language areas. The curriculum is organized to meet the particular needs of the students within a structured small group setting" and "[e]mphasis is placed on conversation skills, nonverbal language and establishing friendships" (Parent Ex. J at p. 15). During lunch period, Eagle Hill reinforced pragmatic language skills by organizing tables of students to promote conversational exchanges between the students (Tr. p. 393).

The hearing record reflects that the student's motor weaknesses were addressed at Eagle Hill during the 2008-09 school year by a motor training class twice per week in which, according

to the student's educational advisor, the student worked on developing gross motor skills, participating in group activities, and building endurance and physical strength (Tr. pp. 391, 418, 756). Included among the student's long-term motor training goals were improving overall strength and endurance, improving ball skills, and expanding her exposure to a variety of leisure games (Parent Ex. J at p. 17). As noted above, the student's fine motor skills were addressed in her writing class (id. at p. 10). The hearing record demonstrates a significant overlap between the annual goals contained in the April 2008 IEP developed by the district and the instruction actually afforded by the Eagle Hill program during the 2008-09 school year (compare Dist. Ex. 11 at pp. 6-9, with Tr. pp. 433-38, and Parent Ex. J at pp. 3-18).

The district argues that, based on the results of standardized testing, the student exhibited negligible progress while attending Eagle Hill. Whether the student made academic progress is only one factor that should be considered in determining whether Eagle Hill was an appropriate placement for the student during the 2007-08 school year (see Gagliardo, 489 F.3d at 115). According to her June 2008 progress report, the student was independently decoding material at a second grade level at the conclusion of the 2007-08 school year (Parent Ex. I at p. 9). By the conclusion of the 2008-09 school year, the hearing record evidences that she could decode third grade material independently, had started reading "uncontrolled" fourth grade level material and, according to her educational advisor at Eagle Hill, was "applying skills she ha[d] learned and [was] using syllabication strategies" (Tr. pp. 398-99, 763). The advisor opined that the student was "reacting to the reading. So she [wa]s showing she [wa]s having better comprehension of what she [wa]s reading so she w[ould] make comments ... which [wa]s just a sign that she [wa]s understanding what she [wa]s reading better" (Tr. p. 399). With respect to writing, the advisor reported that "with a tremendous amount of teacher help," the student was able to produce three to four paragraph stories, an accomplishment that she was unable to achieve at the beginning of the 2008-09 school year (Tr. p. 390). In her literature class, the student demonstrated progress in that she could answer basic questions relating to main characters and recall information about the settings of stories read in class, when properly focused by her teacher (Tr. pp. 382-83). In math, the advisor testified that during the 2008-09 school year, the student mastered addition and subtraction with regrouping, needed reminders to attend to signs "only maybe occasionally," and had "moved into now learning multiplication facts" (Tr. pp. 395-96).

In the area of speech-language, the student's educational advisor at Eagle Hill reported that she had made "some progress. With cues she can organize information a little bit more, and again, some of her social skills have improved somewhat outside of the structure of the classroom" (Tr. pp. 419-20, 767). Specifically, the advisor testified that the student now knew to wait for an appropriate time to say "excuse me" when people were talking, and that with less cueing, she could change the way she initiated a conversation (Tr. pp. 386-87). In December 2008 the student's speech-language therapist reported that "[o]verall, [the student] has been performing well against her set goals. Consequently, level of difficulty will be increased over the next semester and new sentence formulation goals will be introduced" (Parent Ex. J at p. 16). The student's advisor reported with regard to motor training, the student was more comfortable participating in some of the larger group games during recess, recognized more of the rules of the games, and had increased her endurance (Tr. p. 419; see Parent Ex. J at pp. 17-18).

The student's mother maintained that during the 2008-09 school year the student demonstrated progress in reading, math (including multiplication and measurement), writing (including composing paragraphs and writing mechanics), communication skills (including interjecting appropriately and ending conversations), self-advocacy, and peer relationships (including allowing peers their personal space) (Tr. pp. 633-641). A comparison of standardized

test results contained in the hearing record provides a limited basis for evaluating the student's progress during the 2008-09 school year. Eagle Hill's administration of the GORT-4 to the student in spring 2008 yielded the following grade equivalents and percentile ranks: rate, 2.2 (2nd percentile); accuracy, 1.2 (1st percentile); fluency, 1.7 (1st percentile); and comprehension, 2.4 (9th percentile) (Dist. Ex. 43). Additionally, on the SORT, the student achieved a grade equivalent of 2.8 and a standard score of 80 (*id.*). Although Eagle Hill readministered the GORT-4 to the student in spring 2009 detailing the student's test scores, the report contains only the following grade equivalents: rate, 2.4; accuracy, 2.4; fluency, 2.4; and comprehension, 2.4 (Parent Ex. K; *see* Tr. p. 789). The lack of more reliable scores makes it difficult to ascertain if the student made meaningful progress as measured by standardized tests. On the spring 2009 readministration of the SORT, the student achieved a grade equivalent of 3.7 and a standard score of 84 (Parent Ex. K). The student's educational advisor at Eagle Hill opined that the student's standardized test scores reflected "to a degree" some of what the student was capable of doing on a day-to-day basis, but added that "I think it's a slight underestimate of what her ability is" (Tr. p. 822).

After carefully considering the totality of evidence contained in the hearing record, I concur with the determination of the impartial hearing officer that the parents met their burden of proving that Eagle Hill's educational program was appropriate to meet the student's special education needs for the 2008-09 school year, insofar as it provided educational instruction specially designed to meet the unique needs of the student and was supported by such services as were necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; *see* Frank G., 459 F.3d at 364-65).

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; M.C. v. Voluntown, 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"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise 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]; *see* S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 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*, 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 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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]; *see* 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the

child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

I have reviewed the hearing record in the case at bar, and given the circumstances of this case, I decline to modify the impartial hearing officer's decision that equitable considerations do not warrant a denial of reimbursement to the parents for the 2008-09 school year.

I have examined the parties' remaining contentions and I find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision dated September 22, 2009 is annulled to the extent that it determined that the petitioner failed to offer the student an appropriate program for the 2007-08 school year and ordered partial tuition reimbursement for that school year.

**Dated: Albany, New York
December 24, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**