



The University of the State of New York

The State Education Department State Review Officer

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No. 12-151

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Middle Country Central School District

DECISION

Appearances:

Law Office of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

Ingerman Smith LLP, attorneys for respondent, Christopher Venator, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for the costs of the student's tuition at the Eagle Hill School (Eagle Hill) for the 2009-10, 2010-11 and 2011-12 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

For sixth grade during the 2008-09 school year, the student attended a 15:1 special class placement in the district's public school pursuant to a June 2008 IEP, which subcommittees of the CSE later modified in October and December 2008 with respect to related services recommendations (compare Dist. Ex. 3 at pp. 1, 9-10, with Dist. Ex. 14 at pp. 1-3, 6, and Dist. Ex.

20 at pp. 1-2, and Dist. Ex. 21 at pp. 1-3, 6).¹ The student was eligible for special education programs and related services during the 2008-09 school year as a student with autism (Dist. Ex. 3 at p. 1).

On June 12 and 24, 2009, the CSE convened to conduct the student's annual review and to develop an IEP for the 2009-10 school year (seventh grade) (see Dist. Exs. 39 at pp. 1-3; 40 at p. 1). Finding that the student remained eligible for special education and related services as a student with autism, the June 2009 CSE recommended five 40-minute sessions per subject, per week of integrated co-teaching (ICT) services for instruction in English, mathematics, science, and social studies; five 40-minute sessions per week of instruction in a 12:1 special class placement;² ten 40-minute sessions per week of 1:1 home-based instruction (80 minutes per day of specialized reading instruction); and related services of counseling, occupational therapy (OT), and speech-language therapy, as well as OT and physical therapy (PT) consultation services (see Dist. Exs. 39 at pp. 1-3; 40 at pp. 1-2).^{3,4} In addition, the June 2009 CSE recommended assistive technology devices and services consisting of the use of an "FM auditory trainer" and textbooks on tape for textbook reading (all classes) (see Dist. Ex. 40 at p. 3).⁵

In a letter dated August 18, 2009, the parent informed the district that he did not agree with the "placement, program and related services" recommended by the June 2009 CSE (Dist. Ex. 41). The parent indicated that the June 2009 IEP did not address the student's "significant social, emotional and academic needs," and the June 2009 IEP was not appropriate because of the "lack of intensity," the failure to recommend teaching methodologies, and the student's inclusion for instruction with other students who were "far ahead" of her abilities (id.). By letter dated August 20, 2009, the parent notified the district of his intentions to unilaterally place the student at Eagle

¹ State regulation provides that a 15:1 special class placement is designed for students "whose special education needs consist primarily of the need for specialized instruction" (8NYCRR 200.6[h][4]).

² A notation in the IEP clarified that for students receiving ICT services, the district provided those students with "one period per day of instructional strategies" in a special class placement (see Dist. Ex. 40 at p. 2). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction . . . to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

³ The parent expressed disagreement with the related services recommendations at the June 2009 CSE meeting (see Dist. Ex. 39 at p. 2). During July and August 2009, the parent privately obtained a PT evaluation, an OT evaluation, and an assistive technology evaluation of the student (see Dist. Exs. 42-44). In September 2009, the district reevaluated the student in the area of PT (see Dist. Ex. 45).

⁴ The student's eligibility for special education programs and related services as a student with autism for the 2009-10 school year is not in dispute (see 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

⁵ The district's coordinator of special education testified that an "FM trainer" was used to "amplify the teacher's voice" in the classroom (Tr. pp. 66-68).

Hill for the 2009-10 school year and to seek reimbursement for the costs of the student's tuition at Eagle Hill (see Parent Ex. R).^{6, 7}

In September 2009, the student began attending Eagle Hill (see Tr. pp. 104-05, 1247-48, 1263).

On September 30, 2009 the CSE reconvened to review the parent's privately obtained PT, OT, and assistive technology evaluations of the student, as well as a September 2009 PT evaluation of the student conducted by the district (see Dist. Exs. 46 at pp. 1-2; 47 at pp. 1-2, 6-7; see also Dist. Exs. 42-45; Parent Ex. AAA at pp. 1-3). Based upon the new evaluative information and input from Eagle Hill staff, the September 2009 CSE modified the student's June 2009 IEP to add annual goals targeting the student's needs in the areas of keyboarding and motor skills (see Dist. Ex. 46 at p. 2; compare Dist. Ex. 47 at pp. 11-12, with Dist. Ex. 40 at pp. 11-12). The September 2009 CSE also modified the student's June 2009 IEP in the area of assistive technology devices and services, adding the use of a laptop (with software such as Kurzweil 3000), digitalized graphic organizers, and scanned textbooks (see Dist. Ex. 46 at p. 2; compare Dist. Ex. 47 at pp. 2-3, with Dist. Ex. 40 at p. 3). Finally, the September 2009 CSE recommended adapted physical education and OT and assistive technology consultation services for school personnel (see Dist. Ex. 46 at p. 2; compare Dist. ex. 47 at pp. 3-4, with Dist. Ex. 40 at pp. 3-4).⁸

On June 9, 2010, the CSE convened for the student's annual review and to develop an IEP for the 2010-11 school year (eighth grade) (Dist. Exs. 49 at p. 1; 48 at p. 1).⁹ Finding that the student remained eligible for special education and related services as a student with autism, the June 2010 CSE recommended five 40-minute sessions per subject, per week of ICT services for instruction in English, science, and social studies; five 40-minute sessions per week of instruction in mathematics in a 15:1 special class placement; ten 40-minute sessions per week of 1:1 reading instruction; and five 40-minute sessions per week of instruction in a 12:1 special class placement

⁶ The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁷ On the first day of the impartial hearing, the IHO suggested that the parent's exhibits should be labeled with letters, as opposed to numbers; therefore, on the parent's exhibit list, the IHO reassigned the parent's exhibits handwritten letters, but the IHO did not relabel each individual parent exhibit (see Tr. pp. 18-28; Parent Ex. List at pp. 1-4). For clarity, this decision will continue to identify the parent's exhibits with the handwritten letters as indicated on the parent's exhibit list.

⁸ For the purpose of clarity, the June 2009 IEP was superseded as a result of the September 2009 CSE meeting and the resulting September 2009 IEP—which modified the June 2009 IEP as indicated above—and thus the September 2009 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review (see Tr. pp. 69-70; Dist. Exs. 4; 12; see also McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Consequently, this decision will refer to the September 2009 IEP as the IEP at issue for the 2009-10 school year.

⁹ In May 2010, the district administered a "Level I Career Assessment" through a parent questionnaire and student worksheet/interview (see Dist. Exs. 54 at pp. 1-2; 55 at pp. 1-3).

(Dist. Exs. 49 at pp. 1-2; 48 at p. 2).^{10, 11} The June 2010 CSE also recommended related services consisting of two 40-minute sessions per week of speech-language therapy in a small group, one 40-minute session per week of individual speech-language therapy, one 30-minute session per month of individual counseling, and one 30-minute session per week of counseling in a small group (see Dist. Ex. 49 at pp. 1-2). The June 2010 CSE also recommended that the student participate in five 40-minute biweekly sessions of adapted physical education in a 15:1 setting (id. at p. 1).¹² In addition, the June 2010 CSE recommended assistive technology devices and services consisting of the use of an FM auditory trainer, use of a laptop (with software such as Kurzweil 3000), digitalized graphic organizers, and scanned textbooks (id. at p. 3). The June 2010 CSE also recommended OT and assistive technology consultation services for school personnel (id.).

In a letter dated July 20, 2010, the parent expressed concerns about some of the annual goals in the student's June 2010 IEP, noting specifically that they were neither "meaningful nor measurable," annual goals numbered "1" through "4" did not provide a clear explanation of the evaluation criteria and schedule, and the language in the annual goals was "very vague and unclear" (Dist. Ex. 61).

In a letter dated August 16, 2010, the parent informed the district that he did not agree with the "placement, program and related services" recommended by the June 2010 CSE (Parent Ex. L). The parent indicated that the June 2010 IEP did not address the student's "significant social, emotional and academic needs," and the June 2010 IEP was not appropriate because of the "lack of intensity," the failure to recommend teaching methodologies, and the student's inclusion for instruction with other students who were "far ahead" of her abilities (id.). In a separate letter dated August 16, 2010, the parent notified the district of his intentions to unilaterally place the student at Eagle Hill for the 2010-11 school year and to seek reimbursement for the costs of the student's tuition at Eagle Hill (see Parent Ex. K).

On September 22, 2010, a subcommittee of the CSE convened to address the parent's concerns regarding the annual goals as expressed in the July 2010 letter (see Dist. Exs. 62 at pp. 1-2, 6; 63 at pp. 1-2). According to a committee summary information form, although the September 2010 CSE subcommittee could not reach a consensus with the parent, the most recent evaluative information reviewed supported a continuation of the services as set forth in the June

¹⁰ A notation in the IEP clarified that the district provided students receiving ICT services with "one period per day of instructional strategies" in a special class placement (see Dist. Ex. 49 at p. 2; compare Dist. Ex. 49 at p. 2, with Dist. Ex. 47 at p. 2 and Dist. Ex. 40 at p. 2).

¹¹ The student's eligibility for special education and related services as a student with autism for the 2010-11 school year is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

¹² According to the IEP, the student would also receive "instructional services to meet her individual language needs for a minimum of 60 minutes daily not to exceed a group of six" and an assistive technology consultation to develop a "technology plan" (Dist. Ex. 49 at p. 2).

2010 IEP (see Dist. Ex. 63 at p. 1).¹³ In addition, the committee summary indicated that the parent did not agree with the "IEP that was developed" (id.).¹⁴

On June 14, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (ninth grade) (Dist. Ex. 76 at p. 1; see Dist. Ex. 75 at p. 1). Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the June 2011 CSE recommended a 15:1 special class placement (twenty 40-minute sessions per week),¹⁵ five 40-minute sessions per week of reading instruction in a small group, three 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a small group (see Dist. Ex. 76 at pp. 1, 9-10, 14). In addition, the June 2011 CSE recommended assistive technology devices and services consisting of the use of an FM auditory trainer, access to Kurzweil computer software, one 60-minute session per week of assistive technology services, access to a computer, and assistive technology consultation services for staff (one 60-minute session per week) (see Dist. Exs. 75 at p. 1; 76 at pp. 1, 6, 12). The June 2011 CSE also recommended the use of a laptop computer, among other things, as supplementary aids and services/program modifications/accommodations (see Dist. Ex. 76 at pp. 9-12). The June 2011 CSE developed a transition plan for the student, which described her transition needs and related post-secondary goals (see id. at pp. 13-14).

In a letter dated July 6, 2011, the parent informed the district that he did not agree with the "placement, program and related services" recommended by the June 2011 CSE (Parent Ex. E). The parent indicated that the June 2011 IEP did not address the student's "significant social, emotional and academic needs," and the June 2011 IEP was not appropriate because of the "lack of intensity," the failure to recommend teaching methodologies, and the student's inclusion for instruction with other students who were "far ahead" of her abilities (id.). In a separate letter dated July 6, 2011, the parent notified the district of his intentions to unilaterally place the student at Eagle Hill for the 2011-12 school year and to seek reimbursement for the costs of the student's tuition at Eagle Hill (see Parent Ex. D at pp. 1-2).¹⁶

¹³ A review of the annual goals in the September 2010 IEP reveals that the September 2010 CSE subcommittee modified some of the annual goals from the June 2010 IEP (compare Dist. Ex. 49 at pp. 7-9, with Dist. Ex. 62 at pp. 7-9).

¹⁴ For the purpose of clarity, the June 2010 IEP was superseded as a result of the September 2010 CSE subcommittee meeting and the resulting September 2010 IEP—which modified the June 2010 IEP as indicated above—and thus the September 2010 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review (see Tr. pp. 69-70; Dist. Exs. 4; 12; see also McCallion, 2013 WL 237846, at *8; see also Application of the Dep't of Educ., Appeal No. 12-215). Consequently, this decision will refer to the September 2010 IEP as the IEP at issue for the 2010-11 school year.

¹⁵ According to the June 2011 IEP, the student would not participate in regular education in the following areas: mathematics, reading, science, social studies, and English (see Dist. Ex. 76 at p. 14).

¹⁶ The student has continuously attended Eagle Hill since September 2009 (see Parent Exs. D; K; R).

A. Due Process Complaint Notice

By due process complaint notice dated August 19, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10, 2010-11 and 2011-12 school years (see Parent Ex. A at pp. 1-6). Generally, the parent asserted the following with respect to all three school years: (1) the CSEs lacked sufficient evaluative information to support particular changes made to the student's IEPs from year to year ("seventh to eighth to ninth grade"); (2) the CSEs failed to recommend sufficient behavioral interventions to address the student's "social difficulties, anxiety problems and attentional delays," and did not conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student; (3) the IEPs were not appropriate because the annual goals and short-term objectives were "vague, immeasurable, and essentially meaningless," and failed to include baselines for measuring progress; (4) the student required a "smaller school setting" to receive educational benefit and to address her "anxiety, social needs, learning and language disabilities, attentional problems, and developmental problems;" (5) the CSEs did not recommend mandatory services for students with autism, such as transitional support services, regardless of the student's eligibility classification; and (6) the CSEs did not recommend a plan to assist the student's transition from a nonpublic school to a public school in IEPs that were in effect while the student attended Eagle Hill (id. at pp. 3-4).

With respect to the 2011-12 school year, the parent additionally asserted that the transition plan in the student's June 2011 IEP was vague and meaningless, as well as contradictory because it included recommendations for the student to pursue both college and employment, and therefore, the transition plan was not appropriate (see Parent Ex. A at pp. 4-5). Finally, the parent asserted that the unilateral placement of the student at Eagle Hill for the 2009-10, 2010-11, and 2011-12 school years was appropriate, and requested reimbursement of the costs of the student's tuition at Eagle Hill for the 2009-10 and 2010-11 school years (id. at pp. 5-6). In addition, the parent sought reimbursement or prospective payment of the costs of the student's tuition at Eagle Hill for the 2011-12 school year (id. at p. 6). As further relief, the parent requested "additional services" for the failure to provide appropriate services, payment of attorneys' fees and expenses, and any other further relief deemed just and proper (id.).

B. Impartial Hearing Officer Decision

On December 16, 2011, the parties proceeded to an impartial hearing, which concluded on March 1, 2012, after eight hearing dates (see Tr. pp. 1-1678). In a decision dated June 15, 2012, the IHO concluded that the district offered the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years because the IEPs were "reasonably calculated to provide some meaningful educational benefit" to the student (see IHO Decision at pp. 17-24).¹⁷

¹⁷ Before reaching the ultimate determinations, the IHO indicated that the evidence demonstrated that the student's failure to receive passing grades on three out of four final examinations at the conclusion of the 2008-09 school year related to her weaknesses in long term memory and retention of facts, and was not generally "consistent" with the student's overall progress during the 2008-09 school year (IHO Decision at p. 22). The IHO further indicated, however, that although the parent had not raised issues regarding the 2008-09 school year for resolution at the impartial hearing, the applicable statute of limitations effectively barred issues related to the 2008-09 school year (id.).

After summarizing testimonial evidence and setting forth legal standards, the IHO found that the CSEs "carefully considered" the recommendations in the student's 2009-10, 2010-11, and 2011-12 IEPs, and "made adjustments" to the individual IEPs based upon evaluations and progress reports from district staff, Eagle Hill staff, and standardized testing (IHO Decision at pp. 1-22). According to the IHO, the evidence demonstrated that the CSEs met their obligations to consider input, opinions, and evaluative information from the parent's privately obtained providers, and the CSEs did not err in opting to follow the opinions of its own staff, which were based upon the same information available to the parent's private evaluators (id. at p. 22). The IHO also found that the CSEs reasonably rejected a recommendation by a private evaluator to conduct an FBA of the student because the student did not exhibit any behaviors that interfered with her ability to learn (id.).

As specifically related to the 2009-10 school year, the IHO found that the district did not deny the student a FAPE based upon her allegedly sustaining "severe emotional problems, excessive anxiety and psychosomatic complaints" arising from her district public school program and placement during the 2008-09 school year, as indicated in the parent's testimony (IHO Decision at p. 22). Contrary to the parent's assertions, the IHO found little, if any, evidence in the hearing record to support this allegation, and gave little weight to the testimonial evidence of a district special education teacher who taught the student for approximately 10 weeks at the end of the 2008-09 school year (id. at pp. 22-23).

Next, the IHO noted that although the parent alleged during the course of the impartial hearing that the district failed to offer the student adequate assistive technology during the 2009-10 and 2010-11 school years and the district offered "extensive testimony of the scope and breadth of assistive technology provided" to the student, the IHO declined to address the allegations because the parent did not raise the issue in the due process complaint notice (see IHO Decision at p. 23).

Turning, collectively, to the annual goals in the IEPs, the IHO did not find the parent's testimony that the annual goals were neither "meaningful nor measureable" to be persuasive due to her lack of educational expertise (IHO Decision at p. 23). The IHO also found unpersuasive the testimony of a former district employee concerning the student's purported interfering behaviors and poor environmental conditions during the student's 2008-09 school year, noting that there was no documentary evidence to support the former employee's conflicting viewpoint (id.).¹⁸

Specific to the 2011-12 school year, the IHO rejected the parent's assertion that the failure to recommend "transitional services" and a "transition plan" denied the student a FAPE, and he found that the CSE considered a "level one career assessment for a post secondary school career" in developing the student's coordinated set of transition activities in the June 2011 IEP and that the "CSE could not implement transition services" because the student did not attend a district public school (IHO Decision at p. 23). In addition, the IHO was not convinced by the parent's testimony

¹⁸ The IHO described the witness as a "disgruntled" ex-employee (IHO Decision at p. 23). The IHO further noted that the parent did not raise behavior problems within the student's classes during the 2008-09 school year as an issue in the due process complaint notice (id.).

that the 15:1 special class placement offered by the district for the 2011-12 school year was "unruly" and included "some students" who could not read (id.).

Having found that the district prevailed with respect to the parent's claims that it failed to offer the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years, the IHO determined it was not necessary to address whether the student's unilateral placement at Eagle Hill was appropriate or whether equitable considerations weighed in favor of the parent's requested relief, and accordingly, denied the parent's request to be reimbursed for the costs of the student's tuition at Eagle Hill (see IHO decision at pp. 23-24).

IV. Appeal for State-Level Review

The parent appeals, and contends that the IHO erred in finding that the district offered the student a FAPE for the 2009-10, 2010-11 and 2011-12 school years. Initially, the parent contends that the IHO should be disciplined because he failed to comply with the timelines for issuing and mailing a copy of the decision. For the 2009-10, 2010-11 and 2011-12 school years, the parent argues that the IHO erred in determining that the CSEs considered appropriate evaluative information when making changes to the student's IEPs, and the IHO failed to cite to evidence to support that determination. The parent also asserts that the IHO erred in determining—without explanation—that the annual goals and short-term objectives in each IEP were appropriate for the student, and the IHO ignored the district's failure to provide the student with assistive technology and erroneously determined that assistive technology was not raised as an issue in dispute in the due process complaint notice. The parent also asserts that the IHO erred in concluding that the district's failure to provide "transitional support services" to assist the student's return to a public school did not result in a failure to offer the student a FAPE.

Specific to the 2009-10 school year, the parent argues that the IHO erred by ignoring evidence that the CSE ignored the recommendations of the teacher who taught the student during the last 10 weeks of the 2008-09 school year. Specific to the 2011-12 school year, the parent contends that the IHO erred in finding that the student's "transition plan" was appropriate because the plan was vague and "self-contradictory." Finally, the parent argues that the IHO erroneously rejected the former district employee's testimony and erroneously credited the testimony of other district employee witnesses. The parent also argues that the IHO's findings of fact were arbitrary and capricious.

Next, the parent asserts that the student's unilateral placement at Eagle Hill for the 2009-10, 2010-11, and 2011-12 school years was appropriate, that equitable considerations weighed in favor of tuition reimbursement, and that the IHO's decision denying the costs of the student's tuition at Eagle Hill should be reversed.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's findings that the district offered the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years. In addition, the district contends that neither the timing nor the method of receipt of the IHO's decision affected the merits of the IHO's determinations, and any post-hearing disciplinary proceedings should be handled separately with the State Education Department. The district also contends that Eagle Hill was not appropriate for the student because it is too restrictive given that student could be educated among her typically developing peers and because the record did not show that she required placement in a residential setting.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with

disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. 2009-10 CSE Process

1. Evaluative Information

The parent contends that the June and September 2009 CSEs (2009 CSEs) did not have sufficient evaluative information to support the recommendations in the September 2009 IEP or to support changes in the student's program from year to year. The district denies these allegations, noting that the student's progress during the 2008-09 school year, her cognitive abilities, and her functional performance within the classroom—as reflected and reported in the evaluative information—supported the recommendations in the September 2009 IEP, as well as any changes to the student's program from the previous school year. A review of the evidence in the hearing record does not support the parent's contentions, and thus, there is no reason to disturb the IHO's findings.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the hearing record indicates that the 2009 CSEs considered the following evaluative information to develop the September 2009 IEP: a February 2009 OT progress summary

(Dist. Ex. 81 at pp. 1-2; see Dist. Ex. 47 at p. 7); a March 2009 counseling progress summary (see Tr. pp. 81-82; Dist. Exs. 28 at p. 5; 39 at p. 1; 47 at p. 7); a May 2009 teacher progress summary (IEP goals) (Parent Ex. YYY at pp. 1-7; see Tr. pp. 88-89; Dist. Exs. 36; 47 at p. 7); a June 2009 speech-language progress summary (Dist. Ex. 33 at pp. 1-4; see Tr. pp. 85-86; Dist. Exs. 39 at p. 1; 47 at p. 7); a June 2009 PT progress summary (Dist. Ex. 35; see Tr. pp. 87-88; Dist. Exs. 39 at pp. 1-2; 47 at p. 7); a June 2009 educational evaluation (Dist. Ex. 37 at pp. 1-4; see Tr. pp. 89-90; Dist. Exs. 39 at p. 1; 47 at p. 7); a July 2009 PT evaluation (Dist. Ex. 42 at pp. 1-3; see Tr. pp. 102-03; Dist. Ex. 46 at pp. 1-3; 47 at p. 7); a July 2009 OT evaluation (Parent Ex. AAA at pp. 1-4; see Dist. Exs. 46 at pp. 1-3; 47 at p. 7); an August 2009 OT evaluation (Dist. Ex. 43 at pp. 1-4; see Tr. pp. 103-04; Dist. Exs. 46 at pp. 1-3; 47 at p. 7); an August 2009 assistive technology evaluation (Dist. Ex. 44 at pp. 1-10; see Tr. p. 104; Dist. Exs. 46 at pp. 1-3; 47 at p. 7); and a September 2009 PT evaluation (Dist. Ex. 45 at pp. 1-2; see Tr. pp. 104-05; Dist. Exs. 46 at pp. 1-3; 47 at p. 7).¹⁹ Although not listed in the September 2009 IEP, the hearing record indicates that the 2009 CSEs also considered information from the following sources of evaluative information to develop the student's September 2009 IEP: March and June 2009 teacher progress reports (Dist. Ex. 26 at pp. 1-5; see Tr. pp. 77-80; Dist. Ex. 39 at p. 1); an April 2009 Lindamood-Bell evaluation (Dist. Ex. 27 at pp. 1-10; see Tr. pp. 80-81; Dist. Ex. 39 at p. 2); an April 2009 speech-language evaluation (Parent Ex. DDD at pp. 1-8; see Tr. pp. 1073-74; Dist. Ex. 39 at p. 1); a May 2009 annual review presentation prepared by the student's substitute special education teacher (Dist. Ex. 34 at pp. 1-2; see Tr. pp. 86-87, 1064-68); a draft IEP (Dist. Ex. 38 at pp. 1-11; see Tr. pp. 90-91); and input from individuals attending the CSE meetings, including Eagle Hill staff who participated at the September 2009 CSE meeting (see Dist. Exs. 39 at pp. 1-2; 46 at pp. 1-2).

In a February 2009 OT report, the occupational therapist indicated that from September 2008 to November 2008, the student received two 30-minute sessions per week of individual OT, and from November 2008 through June 2009, she received one 30-minute session per week of individual OT (see Dist. Ex. 81 at p. 1). The OT sessions focused on the student's bilateral motor integration for classroom tool use, visual motor integration for graphs and charts, keyboarding, and visual/perceptual/motor skills (id.). Results of standardized assessments indicated that the student's handwriting speed was at the seventh grade level, and she typed at an average speed of 13 words per minute with 93 percent accuracy (id.). Overall, the student exhibited "significant improvement" in her OT annual goals, her fine motor skills, and her visual motor skills, including "neat and legible" handwriting (id. at p. 2). At that time, the student could also "appropriately form" her numbers, and showed improvement in her "ability to read maps, draw bar graphs and highlight areas on maps" (id.). In addition, the student's teacher reported some difficulty in the student's ability to "imitate folding paper," but the student improved at this task as a result of OT (id. at p. 2). Based upon the student's progress, the occupational therapist recommended reducing the OT services to three 30-minute consultations per month with the student's teachers in order to

¹⁹ The September 2009 IEP also listed a June 2009 vocational evaluation I as being considered in the development of the September 2009 IEP; however, the hearing record does not include a document identified as such in evidence (see Tr. pp. 1-1678; Dist. Exs. 1-83; Parent Exs. A-Z; AA-ZZ; AAA-ZZZ; AAAA-LLLL). A May 2009 annual review presentation, however, notes the student's interest in attending college based upon a "Level 1 Career Assessment" (Dist. Ex. 34 at p. 1).

discuss and review "adaptations used" to assist the student in "independence and continued success in the classroom" (id.).²⁰

According to the March and June 2009 teacher progress reports, the student was "very focused" in class and completed all of her work to the "best of her ability" in art (Dist. Ex. 26 at pp. 1, 4). In health, the student completed her homework, but did not "verbally participate" in class (id. At pp. 2, 5). In reading, the student, at times, needed "prodding to participate," but made consistent progress in her 1:1 structured Wilson reading program during the school year (id. at p. 3). In addition, the student was cooperative, but needed "short breaks" to address her frustration (id.).

In April 2009, the parent privately obtained a Lindamood-Bell evaluation, which included results from several standardized assessments used to measure the student's learning aptitude and academic achievement (see Dist. Ex. 27 at pp. 1-3).²¹ An administration of the Peabody Picture Vocabulary Test—Fourth Edition (PPVT-4) and the Detroit Tests of Learning Aptitude—Fourth Edition (DTLA-4) to the student yielded standard scores, respectively, of 67 and 4, which indicated weaknesses in receptive oral and expressive oral vocabulary (id. at pp. 1, 3). With respect to the Woodcock Reading Mastery Test—Revised normative update (WRMT-R-NU) word attack subtest and the Slosson Oral Reading Test—Revised Third Edition (SORT-3), the student achieved standard scores, respectively, of 91 and 82, which indicated weaknesses in the student's ability to decode nonsense words, phonetically process unfamiliar words, decode real words, and in word recognition (id. at pp. 2, 5-6). An administration of the Wide Range Achievement Test—Fourth Edition (WRAT-4) to the student yielded the following standard scores: spelling, 94; and mathematics computation, 89 (id. at pp. 2, 6-7). Finally, an administration of the Gray Oral Reading Test—Fourth Edition (GORT-4) yielded the following standard scores: reading rate, 8; accuracy, 5; fluency, 5; and comprehension, 5 (id. at p. 2).

According to the April 2009 Lindamood-Bell evaluation report, the student demonstrated difficulties with receptive oral vocabulary, expressive oral vocabulary, word attack skills, word recognition, contextual reading, phonemic awareness, oral language comprehension, following directions, reading comprehension, and reading recall (see Dist. Ex. 27 at pp. 3-11). With respect to reading, the student's sensory-cognitive weakness affected her ability to judge the order,

²⁰ An August 2009 OT evaluation conducted by the district revealed similar results, and continued the recommendation for OT consultation services (compare Dist. Ex. 43 at pp. 1-4, with Dist. Ex. 81 at pp. 1-2). The parent's privately obtained July 2009 OT evaluation recommended one 30-minute session per week of OT to improve the student's typing and word processing skills, as well as OT consultation services (see Parent Ex. AAA at p. 3).

²¹ The purpose of the evaluation was to "determine [the student's] present levels of sensory-cognitive processing as related to language function and her potential for further development in these areas" (Dist. Ex. 27 at p. 1). At that time, the parent reported that the student "struggle[d]" with "reading, reading comprehension, spelling, arithmetic, following directions, understanding conversations, study skills, vocabulary acquisition, and sustaining attention" (id.). The evaluation report indicated that the student had previously received diagnoses of an attention deficit hyperactivity disorder (ADHD), pervasive developmental disorder (PDD), a central auditory processing disorder, a language disability, a multiple anxiety disorder, and developmental motor disorders (id.). The parent brought the April 2009 Lindamood-Bell evaluation report to the June 2009 CSE meeting (see Dist. Ex. 39 at pp. 102). In addition to the April 2009 Lindamood-Bell evaluation, the parent also privately obtained an April 2009 speech-language evaluation, which the evaluating speech-language pathologist discussed at a CSE meeting (Parent Ex. DDD at pp. 1-8; see Tr. pp. 1073-74; Dist. Ex. 39 at p. 1).

number, and identity of sounds and letters within words, and formed the basis for her "poor performance in tests of decoding and spelling" (id. at p. 9). In the area of mathematics, the student computed basic addition, subtraction, multiplication, and division, but could not complete calculations regarding fractions and decimals (id. at p. 6). Recommendations included intensive instruction to develop language and literacy skills, and additional instruction in mathematics to develop her reasoning and computation skills (id. at pp. 10-11).

In a May 2009 teacher progress summary, the student's progress related to her IEP annual goals was summarized for quarters one, two, and three in the areas of reading, mathematics, speech-language skills, social/emotional and behavioral skills, and motor skills (see Parent Ex. YYY at pp. 1-7). For the third quarter in reading, the student achieved six annual goals, had not yet started to work on two annual goals, progressed satisfactorily on one annual goal, and exhibited some progress on three annual goals (id. at pp. 2-3). For the third quarter in mathematics, the student progressed satisfactorily on the annual goal (id. at pp. 3-4). With respect to speech-language skills, the student progressed satisfactorily on all seven of her annual goals (id. at pp. 4-5). In the areas of social/emotional and behavioral skills, the student progressed satisfactorily on three annual goals and exhibited some progress on the one remaining annual goal (id. at pp. 5-6). With respect to motor skills, the student achieved two annual goals, progressed satisfactorily on two annual goals, and exhibited some progress on one annual goal (see Dist. Ex. 36 at pp. 6-8).

According to a June 2009 speech-language summary, the student received two sessions per week of speech-language therapy on a push-in basis and one session per week of speech-language therapy in a small group (see Dist. Ex. 33 at p. 1). During therapy sessions, the student followed "basic teacher directives without additional prompts from the therapist," and followed another student's lead when she did not understand the directions, which allowed her to complete the task at hand (id.). The student was "cooperative and pleasant" during therapy sessions, but sometimes refused to wear her FM system (id.). In addition, the summary described the student's eight annual goals and the student's progress in all areas (id.). The student's annual goals addressed sequencing, cause and effect, fact and opinion, comprehension, "wh-questions," auditory comprehension, receptive vocabulary, pragmatic language, expressive language, and communication (id. at pp. 1-3). Based upon the student's progress, the speech-language pathologist recommended that the student receive two sessions per week of speech-language therapy in a small group and one session per week of individual speech-language therapy for the 2009-10 school year (id. at p. 4).²²

The June 2009 PT progress summary indicated that initially during the 2008-09 school year, the student received one 30-minute session per week of individual PT; however, upon the student's adjustment to her "new school," the student no longer required individual PT and the service was changed to a monthly PT consult (see Dist. Ex. 35). Given that the student was "completely functional within her school environment," the physical therapist recommended that

²² In the parent's privately obtained April 2009 speech-language evaluation, the evaluator "suggested" that the student receive "speech services" five times per week, consultation services with the student's teachers, a language processing program (i.e., Fast ForWord), visual reinforcement of verbally presented materials, checks for comprehension, and extended time to complete tasks (see Parent Ex. DDD at p. 8).

the student continue to engage in home exercises and recommended monitoring the student through a quarterly consult beginning in September 2009 (id.).²³

As part of the student's annual review, the district conducted a June 2009 educational evaluation of the student (see Dist. Ex. 37 at pp. 1-2). An administration of the Woodcock-Johnson Tests of Achievement (WJ-III ACH) to the student yielded the following standard scores: brief reading, 77; brief mathematics, 75; and brief writing, 86 (id. at p. 1). During the evaluation, the student cooperated, and responded slowly and carefully (id. at p. 3). The student maintained her attention and used decoding strategies to sound out words (id.). Results of the assessment indicated that the student exhibited academic skills in the "low range" for her age, (id.). In addition, the assessment described the student's performance on the Wilson Assessment for Decoding and Encoding (WADE), including a comparison to results from the previous school year, which demonstrated that the student made progress (id. at p. 4).

Finally, the 2009 CSEs considered an August 2009 assistive technology evaluation privately obtained by the parent (see Dist. Ex. 44 at pp. 1-10; 77 at p. 7; see also Dist. Ex. 46 at p. 1-2). Based upon the assessment results, the evaluator indicated that the student "may benefit" from assistive technology strategies to support her reading comprehension and writing (Dist. Ex. 44 at p. 9). In addition, the evaluator indicated that the student "may benefit" from the graphic organizer software (such as "Inspiration"), as well as digitized print materials and access to keyboarding and a "text-to-speech word processor" (Kurzweil 3000 software) (id.). The evaluator also suggested that the "team" could explore free, web based resources and specific curricular approaches, such as "'Step Up to Writing'" (id.).

In this case, committee summary information forms created during each CSE meeting held in 2009 to develop the September 2009 IEP reflect that the CSEs reviewed and discussed the student's then-current functioning and progress by reviewing the evaluative information (see Dist. Exs. 39 at pp. 1-2; 46 at pp. 1-3). The same summary forms indicated that the 2009 CSE members participated in the development of the September 2009 IEP by providing information about the student's needs, annual goals, and placement (id.). A review of the hearing record indicates that September 2009 IEP reflected—consistent with the evaluative information relied upon by the 2009 CSEs—the student's abilities and deficits in the areas of cognition, academics (reading and mathematics), language skills, language processing skills, social/emotional functioning, and fine and gross motor skills (compare Dist. Ex. 47 at pp. 4-6, with Dist. Exs. 26-28; 33-38; 42-45; 81; and Parent Exs. AAA; DDD; YYY). Therefore, based upon the foregoing—and consistent with the IHO's findings—the district had sufficient evaluative information relative to the student's present levels of academic achievement and functional performance to develop an IEP that accurately reflected the student's special education needs for the 2009-10 school year.

²³ The physical therapist who conducted the parent's privately obtained July 2009 PT evaluation recommended an unspecified level of PT services and for the parent to practice exercises with the student at home (see Dist. Ex. 42 at p. 3). In the district's August 2009 PT evaluation, the physical therapist did not recommend PT services for the student, but indicated that the student's physical endurance may be an appropriate consideration by the CSE (see Dist. Ex. 45 at p. 2).

B. September 2009 IEP

1. Annual Goals

Turning to the annual goals in the September 2009 IEP, the parent asserts that the IHO erred in determining that the annual goals and short-term objectives were appropriate for the student. The district denies this allegation. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).²⁴ As discussed more fully below, the annual goals in the September 2009 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from her disability, enabled her to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability.

In this case, the September 2009 IEP included 34 annual goals to address the student's identified needs in the areas of reading, including reading comprehension, decoding, vocabulary, and spelling; speech-language skills; social/emotional and behavioral skills (including communication, awareness of social cues, and social skills); motor skills (including visual motor, perceptual motor, organizational skills, school related self-care skills, and keyboarding); and mathematics skills (including solving one-step and two-step problems, calculations, and plotting points) (see Dist. Ex. 47 at pp. 7-13). A careful review of the annual goals reveals that, contrary to the parent's assertions, each annual goal included an evaluative criteria (i.e., 100 percent success over 2 weeks, 7 out of 10 trials over 2 weeks), an evaluation schedule (i.e., quarterly, monthly, by June), and a procedure to evaluate the goals (i.e., observation checklists, teacher devised tests or worksheets, recorded observations, portfolio materials) (id.). In addition, a review of the September 2009 IEP indicates that the annual goals included specific content related to the student's identified areas of need: for example, one annual goal indicated that "[u]sing contextual clues and the dictionary for content area materials, [the student] will define and use 5 vocabulary words in a written assignment" (id. at p. 8). In developing the annual goals in the September 2009 IEP, the district's coordinator of special education testified that the draft IEP contained proposed annual goals to assist the CSEs' review of all of the annual goal, which the CSEs discussed "goal by goal" (Tr. pp. 37-39, 90-92, 99-100, 105-06; see Dist. Ex. 38 at pp. 7-11; 39 at pp. 1-2; 46 at pp. 1-2). The CSEs evaluated each annual goal and modified the goals as needed to address the student's academic, social/emotional, language, and motor needs (see Tr. pp. 91-108). Overall, the

²⁴ To the extent that the parent asserts that the annual goals were not appropriate because they lacked baselines upon which to measure progress, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable."

annual goals in the September 2009 IEP were sufficiently detailed and measurable, and addressed the student's identified areas of need—as such, the annual goals in the 2009 IEP were appropriate.

2. Special Factors—Assistive Technology

To the extent that the parent argues that the September 2009 IEP failed to address the student's needs pertaining to assistive technology—and in particular, that the district failed to include assistive technology within the student's IEP—a review of the evidence in the hearing record does not support this argument.²⁵ One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121). Here, the evidence indicates that based upon the August 2009 assistive technology evaluation, the district modified the student's IEP in September 2009 to include the provision of assistive technology devices and services—as described previously and as explained more fully below—such that the assistive technology supports in the September 2009 IEP were consistent with the student's needs as identified by the 2009 CSEs (compare Dist. Ex. 44 at p. 9, with Dist. Ex. 47 at pp. 2-3).

3. ICT Services

Next, a review of the hearing record does not support the parent's arguments that the ICT services recommended in the September 2009 IEP were not appropriate because the recommendation was not supported by evaluative information and the CSEs ignored the recommendation of a 15:1 special class placement made by the student's substitute special education teacher who taught the student for approximately 10 weeks during the 2008-09 school year.

In this case, the hearing record reflects that the 2009 CSEs recommended ICT services for the student's instruction in English, mathematics, science, and social studies; ten 40-minute sessions per week of 1:1 home instruction; 80 minutes per day of reading instruction provided to the student outside of school; and five 40-minute sessions per week of instructional strategies in a 12:1 special class placement (see Dist. Ex. 47 at pp. 1-2; see also Tr. pp. 95-99). The 2009 CSEs

²⁵ To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013] [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), a review of the hearing record reveals that, although not alleged by the parent as an issue in the due process complaint notice, the district initially raised the issue of assistive technology during counsel's opening statement and through the direct examination of a district witness such that it "open[ed] the door" to this issue under the holding of M.H. (see, e.g., Tr. pp. 33-35, 42, 55, 90-92, 100-02, 105-06).

also recommended related services of speech-language therapy, counseling, and OT consultation services (id. at pp. 1-2). In addition, the 2009 CSEs recommended program modifications, accommodations, and supplementary aids and services; assistive technology devices and services; support for school personnel on behalf of the student; testing accommodations; and adapted physical education (see id. at pp. 2-4).

In reaching the decision to recommend ICT services, in part, for all major subject areas during the 2008-09 school year, the district's coordinator of special education testified that the 2009 CSEs considered the student's progress during the 2008-09 school year (see Tr. pp. 37-39, 77-90, 94-95; Dist. Ex. 39 at pp. 1-2; see also Tr. pp. 1076-77). Given the student's progress, the 2009 CSEs determined that the student no longer required a special class placement, and the student could be successful in a less restrictive setting, such as with ICT services (see Tr. pp. 94-96). Based upon the hearing record, the 2009 CSEs considered and rejected other placement options, including a general education setting both with and without support services, related services, and consultation services—but determined these options were not adequately supportive of the student's academic and language needs (see Dist. Ex. 47 at p. 7). The 2009 CSEs also considered a full-time special class placement option, which was rejected because it was overly restrictive (id.). With respect to the 2008-09 substitute teacher's May 2009 annual review presentation, the district coordinator explained that the reference in the report to the student requiring a "more intensive program to develop reading decoding and reading comprehension skills" and a "more intensive program to develop math concepts and calculation," meant that the student required a more intensive setting than a general education setting (Tr. pp. 194-98; see Dist. Exs. 34 at p. 1; 39 at p. 1; 40 at p. 4; 47 at p. 4).²⁶ According to the parent's testimony, however, the substitute special education teacher recommended a 15:1 special class placement for the student, and the parent expressed her disagreement with the recommendation for ICT services at the meeting (see Tr. pp. 1075-83).

At the impartial hearing, the student's 15:1 special education teacher during the majority of the 2008-09 school year testified that the student demonstrated academic progress during the 2008-09 school year (see Tr. pp. 579-82, 587, 593-97, 600-02; see also Dist. Exs. 18 at pp. 1-2; 19 at pp. 1-3; 22 at pp. 1-2; 24 at pp. 1-2; 36 at pp. 1-8).²⁷ The special education teacher testified that during the 2008-09 school year, the student followed directions, completed homework, and participated in class (see Tr. pp. 584-85). In addition, the student did not have any behavior issues and she was the "student that all teachers" wanted in their classrooms (id.). The special education teacher testified that the recommendation for ICT services for the 2009-10 school year was appropriate based on the student's need for support (see Tr. pp. 604-06, 609, 633). In particular, the special education teacher noted that during the 2008-09 school year, the student did not require the "level of support" typically required by a student in a 15:1 special class placement—for example, the student did not require the redirection or prompts to do homework similar to other students, and the student was "capable of doing things that students in the 15:1 [were] not capable

²⁶ The 2008-09 substitute teacher who prepared the May 2009 annual review presentation report did not testify at the impartial hearing (see Tr. pp. 1-1678).

²⁷ The student's primary special education teacher in the 15:1 special class placement during the 2008-09 school year testified that she departed for maternity leave on April 16, 2009, and returned to the classroom on June 15, 2009 to administer final exams (see Tr. pp. 597-98, 600).

of doing" (Tr. p. 605; see Tr. p. 606). Moreover, with ICT services the student would have the support of both the regular education teacher and the special education teacher, and the student would receive 1:1 support for reteaching or preteaching within the 12:1 special class each day (see Tr. pp. 604-06; Dist. Ex. 47 at pp. 1-2).

In addition to the student's 15:1 special education teacher, several other services' providers during the 2008-09 school year also testified regarding the student's progress. The student's 2009 Wilson reading teacher testified that the student exhibited progress regarding her reading skills (see Tr. pp. 440-56; see also Dist. Ex. 24 at pp. 1-2; 31). The student's guidance counselor for the 2008-09 school year who provided counseling services to the student testified that she demonstrated progress in the areas of social/emotional functioning (see Tr. pp. 264-83; see also Dist. Ex. 28 1-7). According to the guidance counselor, the student did not exhibit anxiety during school, and although she demonstrated difficulty with conversational skills, the student initiated both conversations and asking questions (see Tr. pp. 268-69, 277, 279). The student's occupational therapist for the 2008-09 school year testified that the student exhibited progress regarding her fine motor skills and achieved her IEP annual goals (see Tr. pp. 319-24, 329-38, 361-63, 370-71; see also Dist. Exs. 77 at pp. 1-2; 81 at pp. 1-2). As a result of the student's progress, the occupational therapist recommended terminating direct OT services to the student, and instead, recommended OT consultation services (see Tr. pp. 357-63, 365-66; see also Tr. pp. 366-70; Dist. Ex. 43 at pp. 1-4).

To provide additional support to the student, the 2009 CSEs recommended the following: monitoring the student closely regarding assignments; providing opportunities for independence; simplifying complex directions; providing the student with close proximity to teacher when giving directions; providing study guides and questions for exam preparation; reviewing key points of lessons with the student; providing a copy of class notes to the student; providing clarification of assignments; using a multisensory approach; checking with the student for understanding directions; providing an FM auditory trainer for large group instruction; providing the student with a laptop (Kurzweil 3000 software); providing the student with digitalized graphic organizers (Inspiration software); and providing the student with scanned textbooks (Dist. Ex. 47 at pp. 2-3). The September 2009 IEP also included the following testing accommodations: directions read, oral and listening comprehension passages repeated, directions simplified, special location, tests read, and extended time (id. at p. 3).

Therefore, even assuming that the 2008-09 substitute special education teacher recommended a 15:1 special class placement for the 2009-10 school year, the evidence in the hearing record established that the 2009 CSEs had a sufficient basis upon which to recommend a less restrictive environment for the student—such as ICT services—and moreover, that the program recommendations in the September 2009 IEP were reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2009-10 school year.

C. 2010-11 CSE Process

1. Evaluative Information

Turning to 2010-11 school year, the parent contends that the June and September 2010 CSEs (2010 CSEs) did not have sufficient evaluative information to support the specific recommendations in the September 2010 IEP or to support changes in the student's program from

year to year. The district denies these contentions, and generally notes that the evaluative information—including evaluation, Eagle Hill teacher progress reports, and the student's classroom functioning, as well as input from CSE members—supported the recommendations in the September 2010 IEP, as well as any changes to the student's program from the previous school year. In light of the standards set forth previously, a review of the evidence in the hearing record does not support the parent's contentions, and thus, there is no reason to disturb the IHO's findings.

In this instance, the hearing record indicates that the 2010 CSEs considered the following evaluative information in the development of the September 2010 IEP: an April 2010 observation (Dist. Ex. 51; see Tr. pp. 787, 789, 791-95; Dist. Ex. 62 at p. 6); a May 2010 vocational evaluation I (Dist. Exs. 54-55; see Tr. pp. 795-97; Dist. Exs. 48 at p. 1; 62 at p. 6); a May 2010 classroom teacher progress report (Dist. Ex. 58 at pp. 1-4; see Tr. pp. 798-99, 1271-72; Dist. Exs. 48 at p. 1; 62 at p. 6); a June 2010 speech-language progress summary (Parent Ex. LLL at pp. 20-21); a June 2010 teacher progress summary (Parent Ex. LLL at pp. 1-19, 22; see Tr. pp. 801-02; Dist. Ex. 48 at pp. 1-2; 62 at p. 6); and a June 2010 educational evaluation (Parent Ex. LLL at pp. 23-26; see Dist. Exs. 48 at pp. 1-2; 62 at pp. 5-6). Although not listed in the September 2010 IEP, the hearing record indicates that the 2010 CSEs also considered information from the following sources of evaluative information to develop the student's September 2010 IEP: an August 2009 neuropsychological evaluation (Dist. Ex. 57 at pp. 1-5; see Tr. pp. 797-99; Dist. Exs. 48 at pp. 1-2; 56 at pp. 1-2); a December 2009 teacher progress summary (Dist. Ex. 59 at pp. 1-16; see Tr. pp. 799-801, 1271-73; Dist. Exs. 48 at pp. 1-2); and input from the 2010 CSEs members, including the student's Eagle Hill teachers attending the 2010 CSEs (see Tr. pp. 802-11; Dist. Ex. 48 at pp. 1-2; 63 at pp. 1-2).

The April 2010 observation indicated that on April 30, 2010, the district's coordinator of pupil personnel services conducted a classroom observation of the student at Eagle Hill during her literature and writing classes (see Dist. Ex. 51). The literature class consisted on six students, who all had laptop computers (id.). During the class, the teacher used a Smart-Board to display a story together with comprehension questions (id.). The observation report indicated that the student participated in the lesson, but only when called upon by the teacher (id.). According to the report, the student appeared to understand the lesson (id.). In writing class, which consisted of three students, the student was a "more active participant" (id.). The students earned a score of 100 percent on the spelling quiz administered in class (id.). The student followed the teacher's directive to copy down the homework assignment (id.).

According to a May 2010 vocational evaluation I, the parent, the student, and the student's Eagle Hill language arts remedial instructor (Eagle Hill tutorial instructor) completed the level 1 career assessment requested by the district (see Dist. Exs. 50 at pp. 1, 3-6; 54 at pp. 1-2; 55 at pp. 1-3; compare Parent Ex. LLL at p. 4, and Dist. Ex. 58 at p. 4, with Dist. Ex. 54 at p. 2). The parent indicated that the student "usually" cooperated at home, followed directions at home, stayed on task at home, completed chores at home, related well with parents and siblings at home, used free time constructively at home, and completed homework without being told do so at home (see Dist. Ex. 54 at p. 1). According to the parent's responses, the student "sometimes" related well with friends and accepted constructive criticism within the home setting (id.). With respect to "jobs" performed, the parent indicated that the student engaged in chores and responsibilities both at home and at school, and engaged in community service (id.). The parent also indicated that the student expressed interest in becoming a teacher (id.). According to the parent, the student demonstrated

several strengths, such as recalling directions, data and information pertaining to calendar schedules (i.e., doctor appointments, sports commitments), and using computers (id.). The parent further indicated that the student had a "great memory" (id.). The Eagle Hill tutorial instructor rated the student in the areas of job related skills, work behaviors, motivation, preparation, and self-advocacy (id. at p. 2). In her own questionnaire, the student indicated her desire to be a teacher; in addition, she rated her academic skills and her social development, and identified her disability as "reading" (Dist. Ex. 55 at pp. 1-3). As noted by the interviewer, the student's "perceptions of her academic and social skills [were] higher than" her actual academic and social skills (id. at p. 3).

Pursuant to the district's request, the student's Eagle Hill teachers completed May 2010 classroom teacher progress reports (see Dist. Exs. 50 at p. 1; 58 at pp. 1-5; see also Tr. pp. 798-99). At that time, the student's teachers rated her progress in science and mathematics as "average," but otherwise rated her progress as "slow" in literature, tutorial, and mathematics (Dist. Ex. 58 at pp. 1-5). In science, the teacher noted that the student "volunteered" to lead homework corrections and "consistently" took notes in class (id. at p. 1). In tutorial, the teacher noted that the student was a "pleasure" to have in class, and further described the student as "very organized, friendly, [and] enthusiastic about working" (id. at p. 4). In addition, the teacher indicated that the student did "best" with clearly presented and predictable assignments, as well as "simple instructions" (id.). In mathematics, the teacher reported that the student benefitted "most" from repetition and having tasks and concepts "broken down into very small steps," and the student did not "transfer skills and concepts with ease" (id. at p. 5).

In a June 2010 speech-language progress summary, the student's Eagle Hill speech-language pathologist reported that the student received therapy during the 2009-10 school year through a "pull-out session," a pragmatics group, and "collaborative support in her [l]iterature class each week" (Parent Ex. LLL at p. 20). The student's "long term" goals targeted her receptive, expressive, and pragmatic language skills (id.). The speech-language pathologist described the focus of both the student's long term and short term goals, and indicated that she exhibited progress in all areas, including auditory processing, figurative language, vocabulary skills, and conversational skills (id. at pp. 20-21). The speech-language pathologist noted that, per parent request, the student's express language skills "emphasized" the written format (id. at p. 20). Without references to duration or frequency, the speech-language pathologist recommended a continuation of services to address the student's core and pragmatic language skills (id. at p. 21).

In the June 2010 teacher progress summary, the student's Eagle Hill teachers described the student's functioning and progress during the 2009-10 school year in the areas of tutorial (language arts remedial instruction), mathematics, writing, literature, Earth science, and dormitory life (see Parent Ex. LLL at pp. 1-19, 22). Generally, the summary indicated that the student benefitted from the "remedial support and modifications of the total immersion language program and a small nurturing environment, including a residential component," and while she demonstrated "significant progress," she continued to require support (id. at pp. 2-3). According to the summary, the student's participation varied from class to class, but she tended to be "quieter" in larger classes (id. at p. 2). Socially, the student's gains were described as "tremendous" as a result of her participation in both the "academic and the residential program" (id.). With respect to the particular subjects, the summary revealed that the student "[m]astered" several skills, but also continued to require "[d]irect [i]nstruction" in many areas (id. at pp. 4-18). The summary also

provided lists of the classroom modifications "useful" to the student in each academic subject, including but not limited to study guides, verbal and visual cues, provision of sample problems, manipulatives, provision of intensive teacher assistance, and outlines (*id.* at pp. 7, 11, 18-19).

A June 2010 educational evaluation reflected the administration of the Gray Oral Reading Test (GORT-4) to the student in fall 2009, which yielded the following percentile ranks: rate, 16; accuracy, 25; fluency, 16; and comprehension, 2 (see Parent Ex. LLL at p. 24; see also Dist. Ex. 62 at p. 5). Similarly, the administration of the GORT-4 to the student in spring 2010 yielded the following percentile scores: rate, 16; accuracy, 16; fluency, 9; and comprehension, 9 (*id.*). On the fall 2009 and spring 2010 administrations of the Slosson Oral Reading Test (SORT), the student achieved a standard score of 85 (*id.*). On the ERB writing assessment used to measure the student's written expression in June 2010, the student achieved a percentile rank of 9 (*id.*). According to the June 2010 educational evaluation, the student was assessed in April 2010 using the Stanford Diagnostic Mathematics Test—Fourth Edition (SDMT), and achieved the following percentile ranks: concepts/applications, 6 (3.8 grade equivalent); computation, 21 (5.2 grade equivalent); and an SDMT total, 9 (4.4 grade equivalent) (see Parent Ex. LLL at p. 25; see also Dist. Ex. 62 at p. 5). Also in April 2010, the student was assessed using the Stanford Diagnostic Reading Test—Fourth Edition (SDRT), and achieved the following percentile ranks: vocabulary, 6 (3.8 grade equivalent); comprehension, 4 (2.5 grade equivalent); scanning, 54 (8.3 grade equivalent); and an SDRT total, 11 (3.6 grade equivalent) (see Parent Ex. LLL at p. 26; see also Dist. Ex. 62 at p. 5).

At the impartial hearing, the district's coordinator of pupil personnel services who acted as the chairperson of the 2010 CSEs (chairperson) testified about the process used to develop the September 2010 IEP, which included reviewing "all of the evaluations" and the Eagle Hills reports, and then asking the Eagle Hill participants to describe how the student was doing at that time (Tr. pp. 802-03; see Dist. Ex. 48 at p. 1). The chairperson further testified that the 2010 CSEs asked the Eagle Hills participants about the "accommodations" and "program modifications" used with the student at Eagle Hill, and discussed the annual goals and short-term objectives and the student's eligibility classification (Tr. pp. 803-04). In developing the September 2010 IEP, the chairperson testified that the 2010 CSEs "went through the IEP," the student's "current academic abilities," and the student's needs (Tr. p. 859). The 2010 CSEs received a "lot of information from Eagle Hill on the phone," and the 2010 CSEs relied upon information provided by Eagle Hill related to their evaluations and report cards (Tr. pp. 859-60). The parent also provided input during the 2010 CSEs, and Eagle Hill "helped" with the annual goals (Tr. p. 860).

A review of the hearing record indicates that September 2010 IEP reflected—consistent with the evaluative information relied upon by the 2010 CSEs—the student's abilities and deficits in the areas of cognition, academics (reading, writing, and mathematics), language skills, language processing skills, social/emotional functioning, and fine and gross motor skills (compare Dist. Ex. 62 at pp. 4-6, with Dist. Exs. 51; 54-55; 58, and Parent Ex. LLL). Therefore, based upon the foregoing—and consistent with the IHO's findings—the district had sufficient evaluative information relative to the student's present levels of academic achievement and functional performance to develop an IEP that accurately reflected the student's special education needs for the 2010-11 school year.

D. September 2010 IEP

1. Annual Goals

Turning to the annual goals in the September 2010 IEP, the parent asserts that the IHO erred in determining that the annual goals and short-term objectives were appropriate for the student. The district denies this allegation. As discussed more fully below and in light of the standards set forth previously, the annual goals in the September 2010 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from her disability, enabled her to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability.

In this case, the September 2010 IEP included 32 annual goals to address the student's identified needs in the areas of reading, including reading comprehension, decoding, vocabulary, and spelling; speech-language skills; social/emotional and behavioral skills (including communication, awareness of social cues, and social skills); motor skills (including visual motor, perceptual motor, organizational skills, school related self-care skills, and keyboarding); and mathematics skills (including solving one-step and two-step problems, calculations, and plotting points) (*see* Dist. Ex. 62 at pp. 7-12). A careful review of the annual goals reveals that, contrary to the parent's assertions, each annual goal included an evaluative criteria (i.e., 100 percent success over 2 weeks, 7 out of 10 trials over 2 weeks), an evaluation schedule (i.e., quarterly, monthly, by the end of each marking period), and a procedure to evaluate the goals (i.e., observation checklists, teacher devised tests or worksheets, structured observations of targeted behavior, work samples) (*id.*). In addition, a review of the September 2010 IEP indicates that the annual goals included specific content related to the student's identified areas of need: for example, one annual goal indicated that "[w]hen given a list of 15 real words and 5 nonsense words at the 5th grade level, [the student] will orally identify the rules for word attack skills regarding 'r' controlled vowel sounds (e.g., bark, lurk) and read the words" (*id.* at p. 7).

In developing the annual goals in the September 2010 IEP, the chairperson testified that 2010 CSEs "took the [student's] previous IEP" and reviewed annual goals from the previous year (Tr. p. 808). The 2010 CSEs discussed the annual goals with the Eagle Hill staff on the telephone, and "talked through the goals and whether or not [the] goals were still appropriate, needed to be changed, [or] needed to be tweaked" (*id.*). According to the chairperson's testimony, the 2010 CSEs reviewed "each of the goals pretty extensively" and "made changes" (*id.*). The annual goals were also developed based upon input from the parent and Eagle Hill participants (*id.*). The 2010 CSEs created the speech-language annual goals in a similar manner, with input from the student's previous speech-language provider and Eagle Hill participants, and created the social/emotional and behavioral annual goals based upon input from the student's previous guidance counselor and the parent (*see* Tr. p. 809). Overall, the annual goals in the September 2010 IEP were sufficiently detailed and measurable, and addressed the student's identified areas of need—as such, the annual goals in the September 2010 IEP were appropriate.

2. Special Factors—Assistive Technology

To the extent that the parent argues that the September 2010 IEP failed to address the student's needs pertaining to assistive technology—and in particular, whether the district's failure to develop an assistive technology plan resulted in a failure to offer the student a FAPE—a review

of the evidence in the hearing record does not support this argument. As explained more fully below and in light of the standards already set forth, the evidence indicates that the district continued the assistive technology recommendations made in the student's September 2009 IEP in the September 2010 IEP (compare Dist. Ex. 47 at pp. 2-3, with Dist. Ex. 62 at p. 3). In addition, the September 2010 IEP included a recommendation for 15 monthly sessions of assistive technology consultation services to be provided in the student's classroom and an assistive technology consultation to be provided in the student's home in order to educate the student's parent in the use of the assistive technology provided to the student (id.). Even assuming, however, that the failure to develop an assistive technology plan constituted a procedural violation, the parent alleges no factual or legal basis upon which to conclude that such inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii], especially when the student did not attend a district public school during the 2010-11 school year. As a result, the assistive technology supports and services in the student's September 2010 IEP were appropriate, consistent with the student's needs as identified by the CSEs, and supported by sufficient evaluative information.

3. ICT Services and 15:1 Special Class Placement

Next, a review of the hearing record does not support the parent's assertion that the ICT services and 15:1 special class placement recommendations in the September 2010 IEP were not appropriate because the recommendations were not supported by evaluative information and ignored evidence that the student would shut down in large class settings.

Here, the hearing record reflects that the 2010 CSEs recommended ICT services for the student's instruction in English, science, and social studies; a 15:1 special class placement for the student's instruction in mathematics; ten 40-minute sessions per week of 1:1 reading instruction; and five 40-minute sessions per week of instruction in a 12:1 special class placement (see Dist. Ex. 62 at pp. 1-2; see also Tr. pp. 806-07). The 2010 CSEs also recommended related services of speech-language therapy, counseling, and OT consultation services (id. at pp. 2-3). In addition, the 2010 CSEs recommended program modifications, accommodations, and supplementary aids and services; assistive technology devices and services; support for school personnel on behalf of the student; testing accommodations; and adapted physical education (id. at pp. 2-4).

In reaching the decision to recommend ICT services for the English, science, and social studies, the chairperson testified that the 2010 CSEs considered the student's academic and social needs—as well as her progress in these areas—in addition to the evaluative information reviewed and considered by the 2010 CSEs (see Tr. pp. 803-04). To further support the student within her ICT classes, the 2010 CSEs recommended a 12:1 special class for instructional strategies, which was described as a "resource room" setting that provided the student with a special education teacher who would "address IEP goals," review materials, provide preteaching and post-teaching, and provide the student with "strategies" (see Tr. pp. 804-05; Dist. Ex. 62 at pp. 1-2). Based upon the 2010 CSEs' discussions about the student's mathematics skills and abilities, the 2010 CSEs recommended a 15:1 special class placement to allow the student to strengthen her foundational skills and to prepare the student to take algebra the following school year (see Tr. pp. 804, 806; Dist. Ex. 62 at p. 1).

The chairperson further testified that the 2010 CSEs discussed and explained the district's inclusion classes, as well as the 15:1 special class placement, to the Eagle Hill staff participating via telephone at the meetings (see Tr. pp. 860-61). He also recalled discussing the district's eighth grade mathematics course (pre-algebra program) at the 2010 CSEs with the Eagle Hill participants, and in particular, noting that the student did not "have a lot of background support"—which ultimately led to the 2010 CSEs' recommendation for a 15:1 special class placement for mathematics instruction (id.; Tr. pp. 864-65). The chairperson explained that in the 15:1 special class placement for mathematics, the student would "learn how to do and solve algebraic equations, simple equations, [and] those types of things"—but it would not be appropriate to expect the student to take the eighth grade Regents examination (Tr. p. 865). With regard to the 15:1 special class placement for mathematics, the chairperson did not, however, solicit opinions from the Eagle Hill staff regarding an "appropriate class size" for the student; rather, the 2010 CSEs reviewed the continuum of services and "what would be the appropriate program for [the student]" (Tr. p. 61). The chairperson did not recall any disagreement expressed from the 2010 CSEs' members about the 15:1 special class placement recommendation, other than the parent (see Tr. p. 864).

The parent testified that during the 2010 CSE meetings, Eagle Hill staff advised the CSEs that although the student was "making progress," she continued to struggle (Tr. pp. 1271-72). In addition, the parent testified that Eagle Hill staff reported the student "shutting down" in larger class settings with "seven and eight students," but being "more comfortable and willing to participate" in "smaller classrooms" (Tr. pp. 1272-73). At that time, the student worked "very hard" and was experiencing success (Tr. p. 1273).

In addition to the ICT services and the 15:1 special class placement, the September 2010 IEP included additional support for the student through the following recommendations: monitoring the student closely regarding assignments; providing opportunities for independence; simplifying complex directions; providing the student with close proximity to teacher when giving directions; providing study guides and questions for exam preparation; reviewing key points of lessons with the student; providing a copy of class notes to the student; providing clarification of assignments; using a multisensory approach; checking with the student for understanding directions; providing an FM auditory trainer for large group instruction; providing the student with a laptop (Kurzweil 3000 software); providing the student with digitalized graphic organizers (Inspiration software); and providing the student with scanned textbooks (see Dist. Ex. 62 at pp. 2-3). The September 2010 IEP also included the following testing accommodations: directions read, oral and listening comprehension passages repeated, directions simplified, special location, tests read, and extended time (id. at pp. 3-4). In addition, the September 2010 IEP identified classroom modifications useful to the student, including reviewing unfamiliar vocabulary and background information prior to reading, encouraging the use of responses modeled by the teacher, and guided questions or script (id. at p. 3).

a. Program Modifications/Home-Based Services

With respect to reading support, the chairperson testified that 2010 CSEs recommended individual, specialized reading instruction because the student continued to require that same level of support from the previous school year (see Tr. pp. 806-07; Dist. Ex. 62 at p. 2). The chairperson also testified that the individual, specialized reading instruction was changed from a home-based service to a school-based service for the 2010-11 school year because the parent no longer wanted

the service provided at home (see Tr. pp. 852-53). A review of the evidence reveals that the September 2010 IEP maintained the same duration and frequency of the recommended reading instruction as set forth in the September 2009 IEP (compare Dist. Ex. 47 at pp. 1-2, with Dist. Ex. 62 at pp. 1-2).²⁸ Consequently, the evidence in the hearing record demonstrates that the 2010 CSEs' decision to change the student's reading instruction from a home-based service to a school-based service was reasonable under the circumstances and supported by sufficient evaluative information.

Based upon the foregoing, the evidence in the hearing record established that the 2010 CSEs had a sufficient basis upon which to recommend ICT services and a 15:1 special class placement for the student, and moreover, that the program recommendations in the September 2010 IEP were reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2010-11 school year.

E. 2011-12 CSE Process

1. Evaluative Information

Turning to 2011-12 school year, the parent contends that the June 2011 CSE did not have sufficient evaluative information to support the specific recommendations in the June 2011 IEP or to support changes in the student's program from year to year. The district denies these contentions, and generally notes that the evaluative information—including newly conducted evaluations, Eagle Hill teacher progress reports, and input from CSE members—supported the recommendations in the June 2011, as well as any changes to the student's program from the previous school year. In light of the standards set forth previously, a review of the evidence in the hearing record does not support the parent's contentions, and thus, there is no reason to disturb the IHO's findings.

To develop the June 2011 IEP, the hearing record indicates that the June 2011 CSE considered the following evaluative information: a December 2010 speech-language evaluation (Dist. Ex. 65 at pp. 1-6; Parent Ex. WW at pp. 1-7; see Tr. pp. 812-13; Dist. Exs. 75 at p. 1; 76 at pp. 2-3); a December 2010 educational evaluation (Dist. Ex. 68 at pp. 1-5; Parent Ex. VV at pp. 1-7; see Tr. pp. 813-14; Dist. Exs. 75 at p. 1; 76 at pp. 2-3); a December 2010 observation (Dist. Ex. 66 at pp. 1-2; see Tr. p. 813; Dist. Exs. 75 at p. 1; 76 at p. 2); a December 2010 psychological evaluation (Dist. Ex. 67 at pp. 1-11; see Tr. p. 813; Dist. Exs. 75 at p. 1; 76 at pp. 2-3); a December 2010 assistive technology evaluation (Parent Ex. TT at pp. 1-7; see Dist. Exs. 75 at p. 1; 76 at p. 2); a May 2011 psychiatric summary (Dist. Ex. 69 at pp. 1-4; Parent Ex. SS at pp. 1-7; see Tr. p. 814; Dist. Exs. 75 at p. 1; 76 at p. 2); a June 2011 writing evaluation (Parent Ex. JJJ at p. 24; see Tr. p. 816; Dist. Exs. 73 at p. 24; 75 at p. 1; 76 at p. 2); a June 2011 vocational evaluation I (Dist. Exs. 71 at pp. 1-4; 72; see Tr. pp. 815-16; Dist. Exs. 75 at p. 1; 76 at p. 2); a June 2011 speech-language progress summary (Parent Ex. JJJ at p. 21; see Tr. p. 816; Dist. Exs. 73 at p. 21; 75 at p. 1; 76 at p. 2); a June 2011 reading evaluation (Parent Ex. JJJ at p. 25; see Dist. Exs. 75 at p. 1; 76 at p. 2); a June 2011 classroom teacher progress report (Parent Ex. JJJ at pp. 1-27; see Tr. p. 816;

²⁸ The district's coordinator of special education testified that the reason for home-based reading instruction recommendation in the September 2009 IEP was because the student's school schedule did not allow for the reading instruction to be provided during the school day (see Tr. p. 97).

Dist. Exs. 73 at pp. 1-24; 75 at p. 1; 76 at p. 2); a June 2011 social history (Dist. Ex. 70; see Tr. p. 814-15; Dist. Exs. 75 at p. 1; 76 at p. 2); and input from the June 2011 CSE members, including the student's Eagle Hill teachers attending the meeting (see Tr. pp. 816-17, 819-20, 835-36, 874-75; Dist. Ex. 75 at p. 1).

As part of the December 2010 speech-language evaluation, the speech-language pathologist administered the Comprehensive Assessment of Spoken Language (CASL) to the student, which yielded the following standard scores: core composite, 69; lexical and semantic composite, 69; syntactic composite, 67; and supralinguistic composite, 74 (see Parent Ex. WW at pp. 1-2). With respect to subtest tasks, the student exhibited difficulty providing synonyms and antonyms, providing appropriate sentence completions for phrases, providing the correct grammar to incorrect sentences, and interpreting nonliteral language (id. at pp. 3-5). The student also demonstrated difficulty with perspective taking, requesting clarification, and giving directions to a task (id. at p. 6).

For the December 2010 educational evaluation, the evaluator administered the WJ-III ACH to the student, which yielded the following standard scores: brief reading, 74; brief math, 67; and brief writing, 88 (Parent Ex. VV at p. 1). During the letter-word identification subtest, the student used strategies, such as "'chunking' syllables," and decoding strategies to "sound out the beginning of words" (id. at p. 3). Testing results revealed relative strengths for the student in the areas of mathematics calculation and written expression (id.). However, the student's inability to identify contextual cues in the paragraph negatively affected her performance in comprehension (id.). Overall, the student's academic skills fell within the low range when compared to her same age peers (id.). An administration of the WADE to the student in December 2010 yielded the following percentile ranks: total sounds, 43; total words, 81; and total spelling, 75 (id. at pp. 6-7). A May 2009 administration of the WADE yielded the following percentile ranks: total sounds, 48; total words, 65; and total spelling, 69 (id. at p. 6).

In December 2010, a school psychologist conducted a classroom observation of the student at Eagle Hill (see Dist. Ex. 66 at p. 1). First, in a health education class the topic for discussion was "female reproductive organs," and the student did not actively engage at the beginning of class, but slowly engaged by taking notes and interacting with classmates (id.). At times, the student looked around the room and did not respond to the teacher's questions with the rest of the class (id.). After the health education class, the student independently transitioned to her language arts class (id.). According to the school psychologist, the observation of the student during language arts class was "much different" because the student participated a "lot more" by responding correctly to the teacher's questions, speaking directly with the teacher, and interacting with other students (id.).

According to a December 2010 psychological evaluation, the student had previously received diagnoses of an attention deficit hyperactivity disorder (ADHD), anxiety disorder, pervasive developmental disorder, not otherwise specified (PDD-NOS), learning disability, and auditory processing deficits (see Dist. Ex. 67 at p. 2). At that time, the student was eligible for special education as a student with autism, given her diagnosis of PDD-NOS (id.). Based upon a review of previous records, the evaluator indicated that the student presented with a full scale IQ that fell within the borderline range, with "lower standard scores" in the areas of reading comprehension, mathematics reasoning, as well as "some academic fluency difficulty" (id.). In

addition, previous cognitive testing revealed "mostly" borderline and low average standard scores with the "greatest area of difficulty" in the area of perceptual reasoning (*id.*). As part of the December 2010 psychological evaluation, the Woodcock-Johnson III Tests of Cognitive Abilities (WJ III COG) was administered to the student, which yielded a general intellectual ability (GIA) standard score of 73 (below average) (*id.* at pp. 4-5).²⁹ The evaluator indicated that the student's GIA score was consistent with her previous neuropsychological evaluations (*id.* at p. 6). The student's standard scores on individual tests (i.e., verbal comprehension, visual matching, and sound blending) ranged from 70 (below average) to 104 (average) (*id.* at pp. 5-8). Based upon testing results, the student exhibited "significant cognitive processing deficits" indicating a "severe learning disability" (*id.* at p. 9). In addition, the evaluator also noted that although "some history of autism spectrum diagnoses" existed, the student did not exhibit "symptoms consistent with this disorder . . . at school or during the testing sessions" (*id.* at p. 10). While the student demonstrated "[s]ome social difficulties" characteristic of an autism spectrum disorder, the evaluator attributed the student's social difficulties to social anxiety (*id.*). Generally, the evaluator recommended that the student continue to receive special education services in a supportive, structured classroom, which would allow her to receive individualized attention (*id.* at p. 11).³⁰

The June 2011 CSE also considered a December 2010 assistive technology evaluation of the student (*see* Dist. Ex. 76 at p. 2; Parent Ex. TT at pp. 1-7). To support the student's two primary areas of concern—her ability to decode and comprehend text, and her ability to organize her thoughts and produce coherent compositional writing—the evaluator recommended similar assistive technology supports as previously recommended in the 2009 assistive technology evaluation, such as graphic organizer software (Inspiration), digitized print materials and access to keyboarding and a "text-to-speech word processor" (Kurzweil 3000 software), and the exploration of free, web based resources (*compare* Parent Ex. TT at pp. 3, 7, *with* Dist. Ex. 65 at p. 9). In addition, the evaluator noted additional "mainstream technology supports" for the student's reading comprehension, such as a laptop computer and software programs (Parent Ex. TT at p. 7). To further support the student's ability to organize her thoughts into written form, the evaluator noted that she "may benefit" from "outliner software" ("Draftbuilder 6"), as well as specific software to support spelling and retrieval of vocabulary ("CoWriter 6") (*id.*).

According to a May 2011 psychiatric summary—which incorporated the psychiatrist's own treatment of the student, as well as information from previous evaluations—the student demonstrated a "wide range of difficulties" that included delays in speech development, "motor skills, cognitive deficits [and] learning disabilities, social immaturity with poor comprehension and social understanding, and difficulty sustaining attention" (Parent Ex. SS p. 1).³¹ Although the student demonstrated progress in her social/emotional functioning, appeared more confident, and improved her ability to manage stress, the student continued to exhibit social/emotional impairments within the context of a neurodevelopmental disorder, which affected "many aspects of learning and adaptive abilities" (*id.* at pp. 2-3). Overall, the psychiatrist noted that he "witnesses

²⁹ The GIA score provided an "estimate" of the student's overall cognitive functioning (Dist. Ex. 67 at p. 5).

³⁰ The school psychologist who conducted the December 2010 psychological evaluation attended the June 2011 CSE meeting (*compare* Dist. Ex. 67 at p. 11, *with* Dist. Ex. 76 at p. 1).

³¹ The psychiatrist's treatment of the student included pharmacological management of an ADHD and anxiety (*see* Parent Ex. TT at p. 2). The psychiatrist indicated that, clinically, the student made "remarkable gains" (*id.*).

tremendous growth in all areas" of the student's functioning while she attended Eagle Hill and that the "small classes in a supportive, highly structured setting" appeared to be most beneficial for the student (id. at pp. 3-4).

According to a June 2011 vocational evaluation I, the parent, the student, and an Eagle Hill teacher completed a level 1 career assessment requested by the district (see Dist. Exs. 71 at pp. 1-4; 72). When compared to the May 2010 vocational evaluation I, both the parent's response and the student's responses remained consistent, if not identical (compare Dist. Ex. 54 at p. 1 and Dist. Ex. 55 at pp. 1-3, with Dist. Ex. 71 at pp. 2-4 and Dist. Ex. 72). At that time, the student continued to indicate her desire to become a teacher (see Dist. Ex. 1). According to the Eagle Hill teacher who interviewed the student, the student's perception of herself and her abilities was a "bit inflated," but further noted that the student would be "great working with young children in a nursery/preschool setting" (id. at p. 4).

In the June 2011 teacher progress summary, the student's Eagle Hill teachers described the student's functioning and progress during the 2010-11 school year in the areas of language arts tutorial (language arts remedial instruction), language arts English, mathematics, health, language arts study skills, and dormitory life (see Parent Ex. JJJ at pp. 1-20, 22). Generally, the summary indicated that the student benefitted from the "remedial support and modifications of the total immersion language program and a small nurturing environment," and residential life allowed the student to work on "social skills and independent living" (id. at p. 2). Although the student's overall attention, social skills, and attention to work product improved, she continued to exhibit "struggle with many academic tasks" (id. at pp. 2-3). During the 2010-11 school year, the student's ability to remain focused improved, and she demonstrated an increased "level of responsibility" toward academic classes and assignments (id. at p. 2). However, the student continued to "struggle" with "long-term follow through" as a result of the amount of repetition required in order for the student to "own anything on an independent level" (id.). In addition, scripted information and language scaffolding and support remained "crucial" to the student's "success" (id.). Socially, the student's "confidence and a greater repertoire of social skills" improved her ability to reach out to a "larger number of students" (id. at p. 3). With respect to the particular subjects, the summary revealed that the student "[m]astered" several skills, but also continued to require "[d]irect [i]nstruction" in many areas (id. at pp. 4-20). The summary also provided lists of the classroom modifications "useful" to the student in each academic subject, including but not limited to outlines, study guides, verbal prompts, visual cues, manipulatives, and the provision of frequent reviews (id. at pp. 6, 11, 15, 20).

As part of the June 2011 classroom teacher progress report, the student's speech-language pathologist completed a June 2011 speech-language progress summary (see Parent Ex. JJJ at p. 21). The report included a description of the student's long term and short term goals in the areas of comprehension and written and oral expression, as well as the student's progress in these areas (id.). During the 2010-11 school year, the student received speech-language therapy in a "pull-out session with one other student and through weekly collaborative services" in her language arts class (id.). According to the report, the student improved her "categorical knowledge"—such as continents, countries, and cities (id.). In essay writing, the student continued to require teacher or clinician support to break down a topic into main ideas, and vocabulary remained a "major focus" of therapy sessions (id.). The speech-language pathologist recommended continued services, with

goals focusing on oral formulation of expository patterns, multiple meaning words, and figurative language (*id.*).

The June 2011 classroom teacher progress report also included the results of a June 2011 reading evaluation, which the June 2011 CSE relied upon to develop the June 2011 IEP (*see* Dist. Ex. 76 at p. 2; Parent Ex. JJJ at p. 25). An administration of the SDRT to the student in April 2011 yielded the following percentile ranks: vocabulary, 8 (4.6 grade equivalent); comprehension, 6 (3.0 grade equivalent); scanning, 11 (4.5 grade equivalent); and SDRT total, 6 (3.6 grade equivalent) (*see* Parent Ex. JJJ at p. 25). Similarly, the June 2011 classroom teacher progress report included the results of the student's performance on the ERB writing evaluation (June 2011 writing evaluation), which revealed that the student achieved a percentile rank of 25 (*id.* at p. 24).

Finally, in a June 2011 social history the parent described the student as shy, happy, friendly, helpful, and respectful; lacking self-confidence; and demonstrating a short attention span (*see* Dist. Ex. 70). In addition, the parent reported that the student experienced many fears; unusual fears; and was also distractible, depressed, anxious, and impulsive (*id.*). The parent further reported that the student was close to her siblings and maintained friendships with her classmates (*id.*). The parent also indicated that the student "love[d] her school and ha[d] been successful" (*id.*).

Based upon the foregoing, a review of the hearing record indicates that June 2011 IEP reflected—consistent with the evaluative information relied upon by the June 2011 CSE—the student's abilities and deficits in the areas of cognition, academics (reading, writing, and mathematics), language skills, language processing skills, social/emotional functioning, and fine and gross motor skills (*compare* Dist. Ex. 76 at pp. 3-6, 13-14, *with* Dist. Exs. 66-67; 69-72; Parent Exs. SS-TT; WW; JJJ). Therefore, consistent with the IHO's findings, the district had sufficient evaluative information relative to the student's present levels of academic achievement and functional performance to develop an IEP that accurately reflected the student's special education needs for the 2011-12 school year.

2. Eligibility Classification

The parent argues, without explanation, that the student's eligibility classification of multiply disabled is in dispute.³² A review of the hearing record does not support this assertion.

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). While federal and State regulations do not require the district to offer the student a "diagnosis," they do require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; *see* 8 NYCRR 200.4[b][1]). Courts have given

³² Similar to the issue regarding assistive technology noted previously, a review of the hearing record reveals that, although not alleged by the parent as an issue in the due process complaint notice, the district initially raised the issue of the student's classification category through the direct examination of a district witness such that it "open[ed] the door" to this issue under the holding of *M.H.* (*see, e.g.,* Tr. pp. 817-19).

considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]).

In this case, the chairperson testified that the June 2011 CSE changed the student's classification category from autism to multiply disabled because the evaluative information available did not provide a basis upon which to continue the student's eligibility classification of autism (see Tr. pp. 817-19; see also Dist. Ex. 67 at p. 11 [attributing the student's social difficulties to social anxiety, as opposed to an autism spectrum disorder]). In particular, the chairperson testified that the June 2011 CSE discussed "different disability categories," such as learning disabled, speech or language impairment, and other health impairment, and due the student meeting elements of these various categories, the June 2011 CSE determined that multiply disabled was the most "accurate descriptor" of the student's needs (Tr. pp. 818-19). The chairperson also testified, however, that the change in the student's classification had no "impact in terms of placement recommendations of the level of services recommended" in the June 2011 IEP (Tr. p. 819). Therefore, given that the special education programs and related services recommended to address a student's individual needs is often of more import than the student's actual eligibility classification or failure to include a diagnosis in the IEP (see Fort Osage, 641 F.3d at 1004; Draper, 480 F. Supp. 2d at 1342), the change in the student's classification category, alone, would not result in a failure to offer the student a FAPE for the 2011-12 school year.

F. June 2011 IEP

1. Annual Goals

Turning to the annual goals in the June 2011 IEP, the parent asserts that the IHO erred in determining that the annual goals and short-term objectives were appropriate for the student. The district denies this allegation. As discussed more fully below and in light of the standards set forth previously, the annual goals in the June 2011 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from her disability, enabled her to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability.

In this case, the June 2011 IEP included 27 annual goals to address the student's identified needs in the areas of study skills, reading (word identification, vocabulary, decoding, and reading comprehension), writing (spelling), mathematics (solving applied problems), speech-language skills (communication), and social/emotional and behavioral skills (social skills, coping skills, and self-advocacy) (see Dist. Ex. 76 at pp. 6-9). A careful review of the annual goals reveals that,

contrary to the parent's assertions, each annual goal included an evaluative criteria (i.e., 100 percent success over 4 weeks, 9 out of 10 trials over 4 weeks), an evaluation schedule (i.e., by the end of each marking period, monthly), and a procedure to evaluate the goals (i.e., recorded observations, writing samples, classroom tests) (*id.*). In addition, a review of the June 2011 IEP indicates that the annual goals included specific content related to the student's identified areas of need: for example, one annual goal indicated that "[w]hen asked to listen to a series of separate syllables or phonemes, [the student] will blend sounds into complete words" (*id.* at p. 8).

The chairperson of the June 2011 CSE meeting testified that the CSE discussed the student's abilities, needs, and annual goals "as each presenter presented their evaluations and their reports" (Tr. pp. 835-36). He clarified that although the June 2011 CSE discussed the annual goals, the CSE did not proceed "goal by goal" (Tr. p. 836). Eagle Hill staff participating via telephone provided input concerning the student's then-current functioning, as well as "things that they were working on" with the student and "suggestions for some of the things we would be working on" with the student (*id.*).

Overall, the annual goals in the June 2011 IEP were sufficiently detailed and measurable, and addressed the student's identified areas of need—as such, the annual goals in the June 2011 IEP were appropriate.

2. Assistive Technology

To the extent that the parent argues that the June 2011 IEP was not appropriate due to the lack of assistive technology support, a review of the evidence in the hearing record does not support this argument. As explained more fully below, the evidence demonstrates that the June 2011 CSE recommended a variety of assistive technology devices and services, as well as assistive technology services for school personnel, to address the student's assistive technology needs (*see* Dist. Ex. 76 at pp. 10-11). As a result, the assistive technology supports and services in the student's June 2011 IEP were appropriate, consistent with the student's needs as identified by the CSE, and supported by sufficient evaluative information.

3. 15:1 Special Class Placement

Next, a review of the hearing record does not support the parent's assertion that the 15:1 special class placement recommendations in the June 2011 IEP was not appropriate because the recommendation was not supported by evaluative information and ignored evidence that the student required a smaller class size with a smaller integrated school program to address the student's academic and social/emotional needs.

Here, a review of the hearing record indicates that the June 2011 CSE the June 2011 CSE recommended a 15:1 special class placement for the student's instruction in mathematics, reading, science, social studies, and English (twenty 40-minute sessions per week) (*see* Dist. Ex. 76 at pp. 1, 9, 14). In addition, the June 2011 CSE recommended related services consisting of three 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a small group (*see id.* at pp. 1, 9-10).

In reaching the decision to recommend a 15:1 special class placement for the student's core academic instruction, the chairperson testified that the June 2011 CSE considered and discussed the student's eligibility classification, the newly acquired evaluative information, and information provided through individuals attending the CSE meeting (see Tr. pp. 816-25). The June 2011 CSE also discussed and considered several placement options, but "quickly eliminated" a general education setting with no related services and then rejected an out-of-district placement, such as a Board of Cooperative Educational Services (BOCES)—as a full-time special education program—as too restrictive with no opportunities for mainstreaming (Tr. pp. 827-28). The chairperson testified that the June 2011 CSE did not consider Eagle Hill as a placement option because it was "[o]verly restrictive," and "other options" existed before the CSE arrived at an out-of-State nonpublic school placement (Tr. pp. 828-29). At that time, district high school placement options included two 12:1+1 special class placements, a 15:1 special class, and ICT services (see Tr. p. 829). In addition, the parent raised concerns at the June 2011 CSE meeting about the student's transition from a "small program to the big high school, the number of students at the high school, [and] transitions between classes," so the CSE discussed "various things" to acclimate the student to the high school—including meeting with the counselor before the start of school, taking a tour of the school, and introducing her to teachers (Tr. pp. 834-35).

The June 2011 CSE ultimately recommended the 15:1 special class placement based upon the student "transitioning back from such a small setting" and her being "new to the high school;" the student's testing results, which were similar to other students within the 15:1 special class based upon an available class profile; and the CSE's concern with the student's reentry into the high school into an "integrated class" (Tr. pp. 830-36; see Dist. Ex. 74). Given the class profile, the June 2011 CSE's discussions, input from Eagle Hill, and the evaluative information, the chairperson testified that the 15:1 special class placement was a "good fit" and would allow the student to address her IEP annual goals (Tr. pp. 833-36). However, the committee summary information form dated June 2011 indicated that the parent did not agree with the CSE recommendations (see Dist. Ex. 75 at p. 1). The parent testified that the 15:1 special class placement was not appropriate because it consisted of "15 students," Eagle Hill reports showed that the student did not "participate in large groups," and other CSE members indicated that the student functioned or learned "better in smaller groups" (see Tr. pp. 1298-99).

In addition to the 15:1 special class placement, the June 2011 CSE included additional support for the student through the following recommendations: monitoring the student closely when beginning work, support for organizational skills, clarification of assignments, checking for understanding of directions, provision of study guides and questions in preparation for exams, highlighting work, providing a copy of class notes, use of graphic organizers, provision of copies of study guides, teacher provided visual aids, reteaching of materials, use of a laptop, providing the student with access to software (bookshare.org, Inspiration, PowerPoint, and Keynote), and providing the student with instructional materials in digital format (see Dist. Ex. 76 at pp. 9-11). The June 2011 CSE also recommended providing the student with an FM auditory trainer for large group instruction, providing the student with access to Kurzweil software, and providing the student with access to assistive technology services and a computer (see id. at pp. 11-12). The June 2011 CSE further recommended one 60-minute session per week of assistive technology consultation services for school personnel on behalf of the student (id. at p. 12). The June 2011 IEP also included the following testing accommodations: directions read to student, oral and listening comprehension passages repeated, directions simplified, test location with minimal

distractions, test passes read, and extended time (id. at p. 13). In addition, the June 2011 IEP identified classroom modifications useful to the student, including reviewing unfamiliar vocabulary and background information prior to reading, encouraging the use of responses modeled by the teacher, and guided questions or script (id. at p. 11).

a. Program Modifications/Adapted Physical Education

Here, a review of the evidence in the hearing record does not support a finding that the June 2011 IEP was not appropriate due to a failure to recommend adapted physical education or that the June 2011 CSE did not have sufficient evaluative information to justify removing adapted physical education from the student's program from the previous school year.

State regulation defines adapted physical education as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). If a student with a disability is not participating in a regular physical education program, the IEP shall describe "the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education" (8 NYCRR 200.4[d][2][viii][d]).

It is undisputed that the June 2011 CSE did not recommend adapted physical education in the June 2011 IEP (see Dist. Ex. 76 at pp. 1-15). However, the evidence in the hearing record does not indicate that the student required adapted physical education because she could not safely or successfully engage in a regular physical education program (see Tr. pp. 1-1678; Dist. Exs. 1-83; Parent Exs. A-Z; AA-ZZ; AAA-ZZZ; AAAA-LLLL). Instead, the June 2011 CSE noted in the IEP that, consistent with the evaluative information, the student safely navigated the school building, enjoyed sports, and played field hockey, basketball, and baseball (compare Dist. Ex. 76 at p. 5, with Dist. Ex. 72 and Dist. Ex. 66 at pp. 1-2). In addition, the June 2011 IEP indicated that the student exhibited "no physical or motor needs that should be addressed through special education," and the parent did not express any concerns at the June 2011 CSE meeting regarding the student's physical development (see Dist. Ex. 76 at p. 5).

b. Program Modifications/Related Services

Next, a review of the evidence in the hearing record does not support a finding that the June 2011 IEP was not appropriate as a result of the related services recommendations or that the June 2011 CSE did not have sufficient evaluative information to justify modifying the related services recommendations in the student's program from the previous school year.

In this case, the evidence indicates that the September 2010 IEP included related services consisting of the following: two 40-minute sessions per week of speech-language therapy in a small group, one 40-minute session per week of individual speech-language therapy, one 30-minute session per week of counseling in a small group, and one 30-minute session per month of individual counseling (see Dist. Exs. 62 at p. 2; 63 at p. 2). However, the June 2011 IEP included related services consisting of the following: three 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of counseling in a small group, and one 30-minute session per week of individual counseling (see Dist. Ex. 76 at p. 1). A comparison of the related services

recommended in both IEPs indicates that the June 2011 CSE increased the frequency of the student's counseling services and maintained the same total amount of the student's speech-language therapy services (compare Dist. Ex. 76 at p. 1, with Dist. Ex. 62 at p. 2). More specifically, instead of recommending one 30-minute session per month of individual counseling services as in the September 2010 IEP, the June 2011 CSE recommended that the student receive one 30-minute session per week of individual counseling services (see id.). With respect to speech-language therapy services, both the September 2010 IEP and the June 2011 IEP recommended a total of 120 minutes of individual and small group speech-language therapy; thus, when viewed as a whole, this minor adjustment of speech-language therapy services does not rise to the level of a denial of a FAPE even if the modifications were otherwise unwarranted (id.).

4. Transition Services

The parent contends that the June 2011 IEP failed to include appropriate transition services because the plan was vague, self-contradictory, and incoherent. A review of the evidence in the hearing record does not support this contention.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401 [34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1 [fff]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401 [34][B]-[C]; 8 NYCRR 200.1 [fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414 [d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4 [d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

A review of the June 2011 IEP indicates that it included a transition plan with a coordinated set of transition activities and post-secondary goals (see Dist. Ex. 76 at pp. 6, 13-14). The coordinated set of transition activities recommended, among other things, that the student receive instruction by the school counselor to identify and discuss the student's community interests, independent living, and career interests (id. at pp. 13-14). Post-secondary goals in the June 2011 IEP indicated that the student would attend a four year college with a concentration in education and pursuing competitive employment after graduation, as well as living independently (id. at p. 6). Based upon the June 2011 vocational evaluation I, this particular post-secondary goal accurately reflected the student's expressed desire to attend college and to pursue teaching when she finished school (compare Dist. Ex. 71 at p. 2, with Dist. Ex. 76 at pp. 6, 13-14). In addition, the June 2011 IEP indicated that—consistent with the June 2011 vocational evaluation I—the

student needed to complete post-secondary education application forms and coursework for a Regents high school diploma (*id.*). Consequently, a review of the hearing record indicates that consistent with legal standards, the June 2011 CSE developed transition services that were related to the student's post-secondary needs.

5. Transition

Finally, the parent contends that the IHO erred in finding that the failure to provide the student with any "transitional support services" to aid in the student's return to the public school did not deny the student a FAPE. A review of the hearing record does not support the parent's contention, and thus, there is no reason to disturb the IHO's finding.

Initially, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (*A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; *F.L. v. New York City Dep't of Educ.*, 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; *A.L. v. New York City Dep't of Educ.*, 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; *E.Z-L. v. New York City Dep't of Educ.*, 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. *R.E.*, 694 F.3d 167; see *R.E.*, 694 F.3d at 195).

Next, the hearing record does not contain evidence indicating that transitional support services were required in order to offer the student a FAPE. Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

Moreover, the hearing record reflects that the June 2011 CSE engaged in a discussion about strategies to ease the student's reentry into the public school after having attended Eagle Hill for the 2009-10 and 2010-11 school years, including meeting with the counselor before the start of school, taking a tour of the school, and introducing her to teachers (see Tr. pp. 834-35). In addition to the recommended counseling services, the June 2011 CSE discussed allowing the student to begin attending the district program as a part-time student, and over time, increasing the student's attendance to full-time based upon her readiness (see Tr. pp. 759-60). There was no indication that school personnel would lack the skills to work with the student in this case. The IHO's determination that the lack of such services.

To the extent that the parent's argument is construed to allege that the student required transitional support services as a result a change in restrictiveness, her anticipated transition from Eagle Hill—a nonpublic special education setting—to primarily a 15:1 special class setting in a district public school, I find this this argument insufficient to support a finding of a denial of a FAPE as the differences in access to non-disabled peers was not substantial.

Based upon the foregoing, the evidence in the hearing record established that the June 2011 CSE had sufficient evaluative information upon which to recommend a 15:1 special class placement, and moreover, that the program recommendations in the June 2011 IEP—including the removal of adapted physical education services and modifications to the related services' recommendations—were reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2011-12 school year.

VII. Conclusion

Upon due consideration of the evidence in the hearing record, the IHO properly concluded that the district offered the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years. Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2009-10, 2010-11, and 2011-12 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Eagle Hill for the 2009-10, 2010-11, and 2011-12 school years was appropriate or whether equitable considerations support the parent's request for tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

In addition, the parties' remaining contentions, including the parent's arguments concerning the IHO's credibility determinations, need not be addressed in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 30, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**