



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-009

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Brewster Central School District**

### **Appearances:**

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

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, David H. Strong, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at Eagle Hill for the 2013-14 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

In this case, the student attended the district public school through the 2012-13 school year (sixth grade) (see Dist. Exs. 1-7; see also Parent Ex. L at p. 1). Beginning June 2010, the student received the following accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 [1998]) (section 504): modified homework assignments on an as needed basis, and unlimited use of restroom facilities (see Dist. Ex. 1 at p. 1). In addition, the June 2010 section 504 committee recommended that the student receive testing accommodations consisting of extended time, flexible setting, and flexible scheduling (id. at p. 2). In April 2011, the district modified the student's 504 plan for the 2011-12 school year to include modified homework assignments on an as needed basis or at the teacher's discretion, breaks as needed to allow the student to release his tics, and preferential seating at the student's discretion, as program

modifications (see Dist. Ex. 2 at p. 2). In addition, the April 2011 section 504 committee recommended testing accommodations consisting of extended time, flexible setting, and flexible scheduling at the teacher's discretion (id. at p. 3).

In an undated letter sent to the district via facsimile on December 9, 2011, the parents referred the student to the CSE to discuss the student's "classification and/or a program change" (Parent Ex. P at p. 1).<sup>1</sup> After completing evaluations of the student, the CSE convened on January 20, 2012, and found the student eligible for special education and related services as a student with an other health-impairment (see Dist. Ex. 3 at pp. 1-2; see also Dist. Exs. 20; 22; 25 at pp. 1-6).<sup>2</sup> As a result, the January 2012 recommended integrated co-teaching (ICT) services for instruction in English, mathematics, science and social studies (id. at pp. 1, 9).<sup>3</sup> The January 2012 CSE also recommended the following program modifications: modified homework assignments, breaks as needed, preferential seating, checking for understanding, use of a calculator, refocusing and redirection, directions clarified, and the use of a study guide (id. at pp. 9-10). In addition, the January 2012 CSE recommended assistive technology devices or services, including access to a word processor for lengthy writing assignments on an as needed basis (id. at p. 10). The January 2012 IEP also included the following testing accommodations: extended time, flexible setting, flexible scheduling, checking for understanding of directions, and redirection and refocusing (id. at p. 11). The January 2012 CSE also developed annual goals to address the student's needs in the areas of study skills, reading, writing, and mathematics (id. at pp. 8-9). As noted in the IEP, the parents "agree[d]" with the January 2012 CSE's recommendations (id. at p. 2).<sup>4</sup>

On May 7, 2012, a subcommittee of the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (sixth grade) (see Dist. Ex. 5 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the May 2012 CSE subcommittee recommended ICT services for instruction in English, mathematics, science, and social studies; consultant teacher services; and indirect consultant teacher services (id. at pp. 1, 8). In addition, the May 2013 CSE subcommittee

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<sup>1</sup> In October 2011, the parents privately obtained a psychiatric evaluation of the student, and in October through December 2011, the parents privately obtained a psychological evaluation of the student (see Dist. Exs. 23 at pp. 1-5; 24 at pp. 1-14). The October 2011 psychiatric evaluation summary included a recommendation for "habit reversal therapy" and continued medication treatment (Dist. Ex. 23 at pp. 4-5); and according to the December 2011 psychological evaluation report, the evaluator recommended, among other things, a continuation of the student's "accommodations already in place on his 504 [p]lan, including unlimited use of the bathroom, preferential seating, modified homework assignments, and flexible settings/scheduling and extended time for tests" (Dist. Ex. 24 at p. 9). On December 20, 2011, the parents provided their consent for the district to evaluate the student, and at that time, provided the district with a copy of the October 2011 psychiatric evaluation and a "list of tests completed" in the December 2011 psychological evaluation (Dist. Ex. 20).

<sup>2</sup> The January 2012 IEP was expected to be implemented from February 29, 2012 through June 22, 2012 (see Dist. Ex. 3 at p. 1).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>4</sup> Subsequent to the January 2012 CSE meeting, the district's instructional support team determined that the student required "building level" speech-language therapy (see Dist. Ex. 4 at p. 1). On May 7, 2012, a subcommittee of the CSE also convened for a program review and modified the January 2012 IEP to include a recommendation for two 30-minute sessions per week of speech-language therapy in a small group (id. at pp. 1, 7).

recommended two 30-minute sessions of speech-language therapy in a small group (id.). The May 2012 CSE subcommittee also recommended the following program modifications for the student: modified homework assignments, breaks as needed, preferential seating, checking for understanding, use of a calculator, refocusing and redirection, and the use of visual references (id. at pp. 9-10). The May 2012 CSE subcommittee further recommended assistive technology devices or services, which included access to a word processor for lengthy writing assignments, access to audio books provided through Bookshare, and access to speech recognition software (id. at p. 10). The May 2012 CSE subcommittee also recommended testing accommodations, such as extended time; flexible setting; flexible scheduling; checking for understanding of directions; redirection and refocusing; test passages, questions, items, and multiple choice responses to be read to the student; and listening section repeated more than the standard number of times (id. at pp. 11-12). In addition, the May 2012 CSE subcommittee developed approximately 12 annual goals to address the student's needs with respect to study skills, reading, writing, mathematics, and speech-language therapy (id. at pp. 7-9). Finally, as noted in the IEP, the parents "agree[d]" with the May 2012 CSE subcommittee's recommendations (id. at p. 2).

On October 7, 2012, the parents submitted an application for the student's admission to Eagle Hill for enrollment as a day student beginning in September 2013 (see Parent Ex. YYY at pp. 1-2).<sup>5</sup>

On March 21, 2013, a CSE subcommittee convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (seventh grade) (see Dist. Ex. 6 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student with an other health-impairment, the March 2013 CSE subcommittee recommended ICT services for instruction in English, mathematics, science, and social studies (id. at pp. 1, 9). In addition, the March 2013 CSE subcommittee recommended a 15:1 special class (academic support lab) every other day (id.). The March 2013 CSE subcommittee also recommended two 30-minute sessions per week of speech-language therapy in a small group (id.). As program modifications, the March 2013 CSE subcommittee recommended the following: modified homework assignments, breaks as needed, preferential seating, checking for understanding, use of a calculator, refocusing and redirection, and the use of visual references (id. at pp. 9-10). As assistive technology devices or services, the March 2013 included the following: access to a word processor for lengthy writing assignments, access to audio books provided through Bookshare, and access to speech recognition software (id. at pp. 10-11). With respect to testing accommodations, the March 2013 IEP included the following: extended time; flexible setting; flexible scheduling; checking for understanding of directions; redirection and refocusing; test

passages, questions, items, and multiple choice responses to be read to the student; listening section repeated more than the standard number of times; and preferential seating (id. at pp. 11-12). The March 2013 CSE subcommittee also developed annual goals that targeted the student's needs with respect to study skills, reading, writing, and speech-language therapy (id. at pp. 8-9). Finally, the March 2013 CSE subcommittee recommended supports for school personnel on behalf of the

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<sup>5</sup> The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

student, which included dissemination of information on "[d]isability and [i]mplications for [i]nstruction" (id. at p. 11).

On May 3, 2013, the parents executed an enrollment contract with Eagle Hill for the student's attendance during the 2013-14 school year from September 2013 through June 2014 (see Parent Ex. I at p. 1).

In a letter dated May 10, 2013, the student's neurologist indicated that due to "severe Tourette Syndrome with incapacitat[ing] verbal and motor tics," the student could no longer attend school, but suggested the student could "start part time 2 hours per day and advance [as] time tolerated" (Parent Ex. W).

On May 17, 2013, a CSE subcommittee convened to conduct a program review of the student's May 2012 IEP for the 2012-13 school year (see Dist. Ex. 7 at p. 1). As noted in the May 2013 IEP, the student had been "experiencing increasingly more challenging episodes of Tourette's," and he could not attend school for a full day at that time (id.). The May 2013 IEP further reflected that the student experienced "very strong physical tics, as well as loud vocal tics" (id.). Consequently, the May 2013 CSE subcommittee recommended tutoring support, transportation services, and a partial day program until the student could return to school on a full-time basis (id.). At that time, the May 2013 CSE subcommittee modified the student's IEP to include one 60-minute session per day of 1:1 special class (home instruction) services beginning June 12, 2013 (compare Dist. Ex. 5 at pp. 1, 9, with Dist. Ex. 7 at pp. 1, 8). In addition, the May 2013 CSE subcommittee also noted that the student would have "flexible attendance" and "transportation services," and if the student's "current situation continue[d], a meeting c[ould] be held prior to the start of next year to accommodate [the student's] needs" (Dist. Ex. 7 at p. 1).

In a letter dated May 31, 2013, the student's neurologist indicated that after a recent trial of medication, the student was "worse, disinhibited and worse tics" (Parent Ex. X at p. 1). The neurologist further noted that "[i]t ha[d] gotten to the point where [the student] cannot attend school" (id.). Noting that the student would attend Eagle Hill "next year," the neurologist opined that "[h]opefully, this will be better for him" (id.). In addition, the neurologist wrote that while the student had a "good self-esteem and attitude . . . it [was] taking a toll on him and everybody" (id. at p. 2). In an e-mail dated June 2, 2013, the parents advised the district guidance counselor that "it would be best to discontinue the two hour day," and that the student would "remain home for the remainder of the school year" (Parent Ex. AA at p. 189). The parents further indicated that they would "need to discuss [the student's] instruction" (id.).<sup>6</sup>

In a letter dated August 15, 2013, the parents indicated that after reviewing the student's 2013-14 IEP, they believed the district failed to offer the student an "appropriate program that w[ould] allow him to make meaningful social, emotional, and academic progress" (Parent Ex. BB). In addition, the parents notified the district of their intentions to enroll the student at Eagle Hill and to seek reimbursement for the costs of the student's tuition for the 2013-14 school year (id.). The parents also requested round-trip transportation services (id.).

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<sup>6</sup> The parents testified at the impartial hearing that the student could only tolerate one hour per day of tutoring by the end of the school year (see Tr. pp. 583-85).

On September 12, 2013, a CSE subcommittee convened to conduct a program review, noting in the comments section of the IEP that the parents "recently decided to unilaterally place the student at Eagle Hill" (see Dist. Ex. 8 at pp. 1-2). According to the IEP, the student recently underwent an "adjustment to a new medication regimen" and "had a good summer" (id. at p. 2). In addition, the IEP indicated that although the student "ended the school year on a modified school day," he had a "successful year academically" and "passed all of his classes" (id.). Consequently, the September 2013 CSE subcommittee determined that the student's current special education program was appropriate and recommended that it continue (id.). The September 2013 IEP reflected the parents' disagreement with the CSE subcommittee's decision, and further, that the parents planned to "exercis[e] their due process rights" (id.).

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

By due process complaint notice dated October 21, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12, 2012-13, and 2013-14 school years (see IHO Ex. 1 at pp. 1-2, 16-17). More specifically, the parents alleged that the district failed to timely evaluate and identify the student as a student eligible for special education and related services during the 2011-12 school year (id. at pp. 5-9, 16). With respect to the 2012-13 school year, the parents asserted that although the district was aware of the "severity of [the student's] tics, their interference with his access to the learning environment, and his insecurities about leaving the classroom to relieve his tics," the May 2012 IEP did not address the student's educational needs (id. at p. 10). The parents further asserted that the May 2012 IEP was not designed to address the student's unique social/emotional and academic needs and failed to provide the student with an appropriate accommodation to release his tics (id. at pp. 14, 16). The parents further asserted that during the 2012-13 school year, the student's reading ability regressed (id. at p. 13). Moreover, the parents asserted that the district failed to fully implement the May 2012 IEP by failing to provide the student with consultant teacher services from one provider, and by failing to provide the student with the following accommodations: use of a calculator; training on the use of assistive technology; reading tests and quizzes to the student; providing class notes to the student; checking for understanding; and providing graphic organizers to the student (id. at pp. 13-14). In addition, the parents alleged that the homebound tutoring program provided to the student near the conclusion of the 2012-13 school year was not appropriate, and the district failed to reflect the homebound program in the student's IEP (id. at p. 15).

With respect to the 2013-14 school year, the parents alleged that the district failed to consider any alternative, district based programs—such as a Board of Cooperative Education Services' (BOCES) programs or "consortium programs"—and therefore, the district failed to offer the student a FAPE (IHO Ex. 1 at p. 16). In addition, the parents asserted that the district failed to implement the academic support lab and placed the student in a daily reading skills course, which the district did not discuss with the parents (id. at pp. 14-15). The parents further asserted that the March 2013 IEP was not appropriate for the student and that it would have increased his anxiety and stress and resulted in further academic regression (id.).

The parents also alleged that Eagle Hill was an appropriate placement for the student (IHO Ex. 1 at p. 16). As relief, the parents requested an award of compensatory education in the form of tuition reimbursement at Eagle Hill for the 2013-14 school year to remedy the district's failure

to offer the student a FAPE for the 2011-12 and 2012-13 school years, and in addition, the parents requested reimbursement for the costs of the student's tuition at Eagle Hill for the district's failure to offer the student a FAPE for the 2013-14 school year (id. at p. 17).

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

On December 13, 2013, and January 14, 2014, the IHO conducted prehearing conferences; thereafter, on March 3, 2014, the parties proceeded to an impartial hearing, which concluded on October 6, 2014, after seven days of proceedings (see Tr. pp. 1-832). By decision dated December 4, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year, and thus, the IHO denied the parents' request to be reimbursed for the costs of the student's tuition at Eagle Hill for the 2013-14 school year (IHO Decision at pp. 5-12, 14-18).

Initially, the IHO deemed the parents' request for tuition reimbursement as relief for the district's alleged failure to offer the student a FAPE for the 2011-12 and 2012-13 school years as "moot" because the parents did not incur any tuition expenses for those particular school years, nor did they did request compensatory educational services in the form of additional services as a remedy for the district's alleged failure to offer the student a FAPE (IHO Decision at p. 14). In addition, the IHO also determined that the parents' child find claims dating back to the "third, fourth, and fifth grades beginning September 2009, 2010 and 2011" were "not within the scope of this due process claim" (id.). However, to the extent that the parents properly raised any child find claims, the IHO concluded that there was insufficient evidence in the hearing record to establish that the district violated its child find obligation to the student for the 2011-12 school year (id.). In particular, the IHO found that the district provided the student with accommodations pursuant to section 504 during the 2011-12 school year and that the student "was doing reasonably well with his studies at that time" (id.). Additionally, the IHO found that at the beginning of the 2011-12 school year, the student exhibited "average abilities in reading, writing and math"—as indicated in the December 2011 psychological evaluation report—and that the evaluator did not recommend a referral to the CSE, but rather, recommended that the student continue to receive the accommodations already in place under his section 504 plan (id.).

Next, the IHO determined that the parents "did not allege specific procedural violations in the due process complaint" nor did they raise any allegations to assert that the annual goals were not appropriate (IHO Decision at p. 15). In addition, the IHO noted that the parents "participated in the CSE meetings," and the hearing record lacked sufficient "evidence to show that the parents were prevented from participating in the production of the IEP" for the 2013-14 school year (id. at pp. 15, 17). The IHO also determined that the district did not have any updated testing to indicate a change in the student's needs for the 2013-14 school year to indicate that the student needed a different educational setting (id. at pp. 15-16). Lastly, the IHO noted that the student's neurologist described the student's difficulties with his medication regimen, which might have exacerbated the student's tics and required him to receive homebound instruction at the end of the 2012-13 school year (id. at p. 16). Based upon the foregoing, the IHO concluded that he need only decide whether the district offered the student a FAPE for the 2013-14 school year, as it was the only school year for which the parents' requested relief of tuition reimbursement that was "potentially available" (id.). Finding no procedural or substantive violations, the IHO concluded that the district offered the student a FAPE for the 2013-14 school year (id. at pp. 16-18).

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

The parents appeal and assert that the IHO erred in finding that they were not entitled to tuition reimbursement as a form of compensatory education for the district's child find and FAPE violations for the 2011-12 and the 2012-13 school years, and the IHO failed to address the issue of child find related to the 2011-12 school year, as well as the FAPE violation related to the 2012-13 school year. With respect to the 2012-13 school year, the parents also allege that the IHO ignored the district's failure to reconvene a CSE meeting to "appropriately plan a full homebound program" for the student after receiving the May 2013 letter from the student's neurologist. In addition, the parents assert that the student was entitled to compensatory educational services for the district's failure to provide speech-language therapy services during homebound instruction. Next, the parents allege that the IHO erred in finding that the due process complaint notice did not include a challenge to the annual goals for the 2012-13 school year.

With respect to the 2013-14 school year, the parents assert that the IHO erred in finding that the district offered the student a FAPE, and that the IHO misapprehended the law and the facts in reaching this conclusion. The parents argue that the evidence did not support the IHO's finding that ICT services were appropriate because the student made progress in that setting. In addition, the parents argue that the IHO erred in finding that the absence of changes in the student's needs supported the March 2013 CSE's decision to recommend ICT services. Finally, the parents argue that the IHO failed to address whether Eagle Hill was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' requested relief.

In an answer, the district responds to the parents' allegations, and generally argues to uphold the IHO's decision in its entirety. The district further asserts that Eagle Hill was not an appropriate unilateral placement and equitable considerations did not weigh in favor of the parents' requested relief.

#### **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. 2011-12 School Year—Child Find**

Turning first to the parents' assertion that the district failed to meet its child find obligation to the student during the 2011-12 school year, as explained more fully below, the evidence in the hearing record does not support the parents' contention, and thus, there is no reason to disturb the IHO's conclusion.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the

State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [ finding that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D.Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]).

Here, the evidence in the hearing record reveals that during the 2010-11 and 2011-12 school years, the district provided the student with a section 504 accommodation plan (see generally Dist. Exs. 1-2). During the April 2011 section 504 committee meeting, the parents reported that the student had done "exceptionally well this year," and credited the student's "success to the compassionate team of teachers 'going above and beyond' to develop a plan that helped [the student] manage his tics and gain self-confidence" (Dist. Ex. 2 at p. 1). Further, the student's classroom teacher described the student as hardworking, and she further reported that he had a positive attitude toward school (id.). The April 2011 section 504 accommodation plan also reflected that the student managed his Tourette's syndrome very maturely and that he had become more confident and secure (id.). In addition, the student met the proficiency standards on the May 2011 administration of the New York State assessments in English language arts (ELA) and mathematics (see Parent Ex. DD at pp. 1-4). The evidence in the hearing record also reveals that the student attained the following grades at the conclusion of the 2010-11 school year: reading, 90; writing, 90; mathematics, 89; science, 91; and social studies, 99 (see Dist. Ex. 29 at p. 1).

In an e-mail dated October 23, 2011, the parent advised the student's classroom teacher that he was undergoing a "neuropsychological evaluation" and requested the completion of rating scales as part of the evaluation process (see Parent Ex. WWW at p. 17). The parents further indicated that the student presented "himself well verbally" and that he was "good at masking and self modulating" (*id.*). The parents further noted that the student would not allow the teacher to see him as the parents saw him at home (*id.*). In an e-mail to the student's teachers dated October 26, 2011, the parents indicated that the student enjoyed attending classes (*id.* at p. 22). While the parents acknowledged that the student could self-modulate his tics while he was in school, they also indicated that the student's tics at home had increased "over the past few weeks, especially at night," which the parents attributed to the student "hold[ing] his body together" during the day (*id.*). In an e-mail dated November 14, 2011, the parents requested a meeting with the student's classroom teachers, which was scheduled to occur on November 23, 2011 (*id.* at p. 3; see Tr. p. 487).

When the parents referred the student to the CSE in December 2011, the parents noted in the undated letter that although the student received accommodations pursuant to section 504, at that time, such accommodations did "not suffice in order for him to be successful academically, socially and emotionally" (Parent Ex. P at p. 1). According to the parents, approximately one month earlier, the student's neurologist recommended additional testing given that the student "struggle[d] with his academics and [was] so painfully overwhelmed each and every day" (*id.*). The parents recounted that at that time, the district "welcomed" additional testing of the student, and that they obtained an additional evaluation of the student (*id.*). The parents further indicated that the student had "pronounced motor and vocal tics" and he was "under the care of multiple specialists" (*id.*). They explained that the student had "some ability to self-modulate his tics within class using techniques that he ha[d] been taught in therapy but when home the student's tics [were] frequent" (*id.*). Although the student had "come so far within the past two years and work[ed] hard with his therapists," and his "class grades and test scores reflect[ed] average performance," the parents did not believe this was a "true reflection of his academic ability," because he received additional support within the classroom and extensive support at home to reteach material that he did not understand during the day in order to study for tests and quizzes and to complete homework assignments (*id.* at pp. 1-2). The parents described the difficulties that the student experienced as a result of suppressing his tics during the school day, noting that despite short breaks during the day, the student received minimal relief (*id.* at p. 2). According to the parents, in November 2011, the student's teachers noted that the student managed his tics well in class; however, they also had concerns about the student's academics and emotional status (*id.*). The parents outlined their concerns about the student, which included attention and concentration; writing; organization; reading; processing information; mathematics; behaviors that were different at home and school; homework, anxiety; and the results of State assessments, which they did not deem to be an "accurate representation of his ability" (*id.* at pp. 2-3). Lastly, the parents noted that the student's teacher agreed that "a possible program change and/or classification" for the student would be the best course of action and requested that the CSE reconvene (*id.* at p. 3).

Based on the foregoing, the evidence in the hearing record does not support a finding that during the beginning of the 2011-12 school year the district had reason to suspect that the student was a student with a disability and thereby required special education programs and related services. Notably, the hearing record lacks evidence that the district overlooked clear signs of a disability and was negligent by failing to order testing, or had no rational justification for deciding

not to evaluate the student. As such, the district did not violate its child find obligations for the student and the parents' contentions must be dismissed.<sup>7</sup>

## **B. 2012-13 School Year**

### **1. May 2012 IEP—Annual Goals**

Generally, the parents allege that the IHO erred in finding that they did not assert any challenges to the annual goals in the May 2012 IEP. More specifically, the parents assert that the annual goals recommended in the May 2012 IEP related to the student's speech-language therapy services were not appropriate because the annual goals did not address a number of skill deficits. In addition, the parents argue that the criterion for mastery of these annual goals was "unreasonably low." As explained more fully below, the evidence in the hearing record fails to support the parents' assertions.

According to a February 2012 speech-language evaluation report, the student exhibited difficulties with receptive language and the recollection of specific information presented orally, which the evaluating speech-language pathologist suggested might affect other areas of language function, including "language memory" (Dist. Exs. 26 at p. 3; 27 at p. 3). The speech-language pathologist also noted that these difficulties might also contribute to the student's difficulty organizing his thoughts and "respond[ing] quickly," consistent with findings in the December 2011 psychological evaluation related to the student's verbal memory skills (compare Dist. Ex. 26 at pp. 3-4, and Dist. Ex. 27 at pp. 3-4, with Dist. Ex. 24 at pp. 4-5, 9). In an April 2012 progress update, the speech-language pathologist identified strategies to address the student's challenges, such as highlighting information, note-taking with visual organizers, and summarizing important details (see Dist. Ex. 27 at p. 4). At the impartial hearing, the parents testified that they agreed with the findings in the February 2012 speech-language evaluation report, and they agreed with the instructional strategies in the April 2012 progress update (see Tr. pp. 503-06; see also Dist. Exs. 26 at pp. 3-4; 27 at pp. 3-4).

Based upon the evidence in the hearing record, the May 2012 CSE subcommittee considered the February 2012 speech-language evaluation report and the subsequent April 2012 progress update in the development of the May 2012 IEP (see Dist. Ex. 5 at p. 2). Furthermore, the student's then-current speech-language pathologist attended the May 2012 CSE subcommittee meeting and provided the CSE with information regarding the student's strengths and needs based upon the assessment and the student's therapy sessions (id.). According to the May 2012 IEP, the student easily accepted and sought guidance when needed, such as maintaining the momentum to complete an assignment in a timely manner (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 27 at p. 4). The speech-language pathologist further reported that the student's ability to acquire information from visually presented material—such as planning accurate responses, providing specific

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<sup>7</sup> To the extent that the student's receipt of accommodations pursuant to section 504 during the 2010-11 and beginning of the 2011-12 school year constituted a basis upon which to infer that the district either knew or should have known that the student might be a student with a disability in need of special education and related services, in this particular instance, the evidence in the hearing record indicates that the student was responsive to the section 504 accommodations provided to him by the district, and therefore, his receipt of such accommodations, alone, did not automatically trigger the district's child find responsibility (see Application of the Bd. of Educ., Appeal No. 10-005; see also Application of a Student Suspected of Having a Disability, Appeal No. 10-128).

terminology, and analyzing that information—was an area of strength (*id.*). According to the May 2012 IEP, the student needed extra time to organize his thoughts when formulating his responses (see Dist. Ex. 5 at p. 2). At that time, the speech-language pathologist described the student as "an integral member of the group, [who had] become more motivated to excel" (*id.*).

With specific regard to the May 2012 IEP speech-language annual goals, the goals targeted the student's needs as identified in the February 2012 speech-language evaluation report and the April 2012 progress update (see Tr. pp. 503-06; Dist. Exs. 5 at pp. 8-9; 26 at pp. 2-4; 27 at p. 2-4). For example, the speech-language annual goals addressed the student's ability to "identify and utilize" memory enhancing techniques, as well as enhance his literacy-related language skills, such as providing detailed information regarding a story or event and discussing main ideas (Dist. Exs. 5 at pp. 8-9; 26 at pp. 2-4; 27 at pp. 2-4). In addition, a review of the annual goals reveals that each annual goal included an evaluative criteria (i.e., 90 percent success over 5 weeks, 70 percent success on 3 consecutive occasions), an evaluation schedule (i.e., by the third or fourth marking period), and a procedure to evaluate the goals (i.e., work samples, observation checklists, teacher devised tests or worksheets) (*id.*). With respect to the parents' contention that the criterion for mastery of the two speech-language annual goals was "unreasonably low," even assuming this was true, this finding alone would not be sufficient to establish that the annual goals were not appropriate or that the district failed to offer the student a FAPE for the 2012-13 school year.

Next, notwithstanding the parents' contention that the May 2012 CSE subcommittee failed to develop annual goals that focused on "unremediated deficits" in sentence formulation, understanding the language of mathematics, written language skills, delayed recall of story information and large chunks of information and identifying the main idea from details, making inferences and summarizing, a review of the May 2012 IEP reveals that the May 2012 CSE subcommittee addressed these "deficits" within other annual goals (see Dist. Ex. 5 at pp. 7-9). For example, the May 2012 IEP included three annual goals for mathematics that targeted the student's ability to identify relevant information, determine the correct operation to solve "word problems," and find equivalent measures of volume—all of which detail specific examples of "the language of math" (*id.* at p. 8). The May 2012 IEP also included an annual goal for study skills designed to improve the student's ability to identify important information, an annual goal for reading intended to enrich his vocabulary encountered in text, and two written language annual goals that addressed composition with attention to "complete and grammatically correct" sentences (*id.*).

Therefore, based upon the evidence in the hearing record, the annual goals related to the student's speech-language therapy services—as well as the other annual goals in the May 2012 IEP—adequately addressed the student's speech-language needs.

## **2. May 2012 IEP—ICT Services**

Turning next to the parents' allegation that the ICT services recommended in the May 2012 IEP and the accommodations to release the student's tics in the May 2012 IEP were not appropriate to address the student's special education needs, as explained more fully below, a review of the evidence in the hearing record does not support the parents' allegations.

In this instance, although the sufficiency of the evaluative information and the present levels of performance in the May 2012 IEP are not directly in dispute, a discussion thereof provides

context for the discussion of the issues to be resolved—namely, whether ICT services and accommodations were appropriate to meet the student's needs.

In this case, the evidence in the hearing record demonstrates that the May 2012 CSE subcommittee reviewed the following evaluative information to develop the May 2012 IEP: a February 2012 speech-language evaluation report, a March 2012 progress report, a March 2012 report card, an April 2012 CSE teacher report, an April 2012 progress update report, and January and April 2012 computer-based screening reports (see Dist. Exs. 5 at pp. 1-3; 27 at pp. 1-4; Parent Exs. GG at pp. 1-3; EEE at pp. 1-9). The May 2012 IEP also incorporated testing results from the administration of the December 2011 psychological evaluation, as well as the results of State and district-wide assessments (see Dist. Exs. 5 at pp. 3-5; 24 at pp. 1-14). Furthermore, the evidence in the hearing record reflects that the May 2012 CSE subcommittee considered input provided by the parents, the student's regular education classroom teacher, the student's special education teacher, and the student's speech-language pathologist (see Dist. Ex. 5 at pp. 1-2).

In addition, the May 2012 CSE subcommittee described the student's academic and general classroom functioning within the present levels of academic achievement, functional performance and learning characteristics section of the IEP (see Dist. Ex. 5 at pp. 5-7). In mathematics, the May 2012 IEP denoted that the student demonstrated grade level numeration and operation skills, but exhibited below grade level application skills (id. at p. 5). In reading, the May 2012 IEP indicated that, consistent with the April 2012 CSE teacher report, the student demonstrated difficulty with "inferential reading comprehension" and with "integrating and synthesizing materials" (Dist. Ex. 5 at p. 5; Parent Ex. GG at pp. 1-2). With regard to writing, the May 2012 IEP described the student as "functioning below grade level in written expression" (Dist. Ex. 5 at p. 6). The May 2012 IEP further indicated that the student demonstrated difficulty with writing sufficient details (id.). In addition, the May 2012 IEP indicated that while the student could express his ideas verbally, he had greater difficulty expressing his idea in writing (id.; see Parent Ex. GG at p. 2). Due to executive functioning weaknesses, the May 2012 CSE subcommittee also recommended the use of "graphic organizers" to help the student organize his thoughts, (id.). Next, with respect to study skills, May 2012 IEP recorded the student's rate of progress as "inconsistent" and further described his learning style as "multi-sensory" (Dist. Ex. 5 at p. 5). According to the May 2012 IEP, the student demonstrated difficulty in integrating and synthesizing materials (id.). The May 2012 IEP also noted that the student was beginning to acquire "grade appropriate organizational and study skills," and he completed class assignments and independently performed assignments (id.).

In the area of social development, the May 2012 IEP indicated that the student's social/emotional levels were within age expectations (see Dist. Ex. 5 at p. 6). Further, the May 2012 IEP depicted the student as a "friendly, caring young man who persevere[d] through his tics," which was consistent with observations noted in the April 2012 CSE teacher report and the December 2011 psychological evaluation (Dist. Ex. 5 at p. 6; see Parent Ex. GG at p. 3). According to the May 2012 IEP, the student advocated for himself and expressed when he needed a break, and was always willing to help anyone around him (see Dist. Ex. 5 at p. 6; see also Parent Ex. GG at p. 1, 3).

Physically, the May 2012 IEP indicated the student had received a diagnosis as having Tourette's syndrome, which "impact[ed] on learning" (Dist. Ex. 5 at p. 6). According to the May

2012 IEP, the student exhibited pronounced vocal and motor tics, and he was "under the care of multiple specialists outside of the school setting" (*id.*). In addition, the May 2012 IEP included the findings of the December 2011 psychological evaluation report, which indicated that the student met the criteria for an attention deficit hyperactivity disorder, inattentive type (ADHD), an adjustment disorder with mixed anxiety and depressed mood, and an obsessive-compulsive disorder (*see* Dist. Exs. 5 at p. 6; 24 at pp. 2, 7, 9). However, the May 2012 IEP also indicated that the student presented "differently throughout a day, day-to[-]day and even week-to-week," but the May 2012 IEP also noted that the "one constant" was the student's "determination to do his best" (Dist. Ex. 5 at p. 6).

In the instant case, the evidence in the hearing record shows that the student's special education needs could be met through the provision of ICT services, coupled with consultant teacher services, annual goals, related services, management needs, program modifications, testing accommodations, and assistive technology services (*see* Dist. Ex. 5 at pp. 7-12). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In reaching the decision to recommend ICT services, as noted above, the May 2012 CSE subcommittee relied upon several sources of evaluative information, including an April 2012 CSE teacher report. Significantly, the April 2012 CSE teacher report indicated that despite the challenges presented by the student's tics, the student benefitted from direct instruction regarding study skills; he was easily redirected when distracted; and in general, he was a cooperative, responsive student (*see* Parent Ex. GG at p. 1). According to the April 2012 CSE teacher report, the student was "more willing to volunteer to read aloud in a small groups setting especially in our special education small groups" (*id.* at pp. 1-2). Moreover, the May 2012 CSE subcommittee noted in the IEP that according to the student's then-current classroom teacher, the student responded well to the classroom's structure, routines and organization, and that he had good friends in the class, which acted like a safety net for him (*see* Dist. Ex. 5 at p. 2). According to the May 2012 IEP, the May 2012 CSE subcommittee also considered the parents' input, which indicated that since the "program change in January 2012," the student was "doing well," he appeared "happier," and he "love[d] the support (*id.* at p. 2).

In addition, the May 2012 IEP delineated strategies to address the student's management needs, including the student's need for the "additional support of special education services to be successful in the regular education classroom," which could be accomplished through the support of both a regular education and a special education teacher offered through ICT services (Dist. Ex. 5 at pp. 6-7; 24 at p. 9; Parent Ex. GG at pp. 1-2). More specifically, the May 2012 IEP indicated the student's need for teacher redirection to stay on task, the use of nonverbal cues to stay on task, and a structured—yet flexible—environment in order to accommodate the student's "ever changing tics"—all of which could be provided through ICT services (Dist. Exs. 6 at pp. 6-7). Therefore, a review of the evidence in the hearing record supports a finding that the May 2012 CSE subcommittee appropriately considered the student's identified areas of need, including his management needs, and determined that the student's needs could be met through the provision of ICT services for instruction in the student's core academic courses.

Next, notwithstanding the parents' testimony that the student's grades did not accurately reflect the student's "performance," the student's teachers testified the student's report card grades were based on the completion of in-class writing assignments, as well as quizzes and tests, and on



a limited number of "take home" assessments (Tr. pp. 382-85, 489-90). Further, despite the parents' testimony that the student "felt stupid" and "would cry all the time," his teachers described him as "delightful" and "bright," as someone who could "provide insightful suggestions to peers," and as a student admired and liked by his peers (Tr. pp. 179, 386, 512-13; see Dist. Ex. 5 at p. 2; Parent Ex. GG at p. 2). The student's teachers also noted that although the student appeared to lack confidence at times, he sought and accepted assistance when he felt it was necessary (see Dist. Exs. 5 at p. 2; 27 at p. 4; Parent Ex. GG at p. 1).

With respect to the parents' contention that the May 2012 IEP did not appropriately address the student's tics, at the May 2012 CSE subcommittee meeting the student's then-current special education teacher reported that although the student's tics were "ever changing" and could "interfere with his access to learning at various degrees throughout the school day," she also indicated that "[c]onstant communication [was] the key to his success, so that medication [could] be properly monitored" (Dist. Ex. 5 at p. 2). While the special education teacher also noted that the student expended a "lot of energy keeping himself together in school," she also described the parents as a "great resource to see how he [was] truly doing and understanding" (id.). As a special alert on the May 2012 IEP, the May 2012 CSE subcommittee noted that the student took medication to address "symptoms of his medical diagnosis of Tourette's syndrome," and furthermore, that the student regulated his tics "by visiting the school nurse's office or guidance office whenever he fe[lt] the need to release his tics" (id. at p. 1).

In support of the contention that the May 2012 IEP did not adequately address the student's tics, the parents presented evidence during the impartial hearing attempting to illustrate the worsening of the student's symptoms related to his Tourette's syndrome during the 2012-13 school year (see Parent Exs. A-B). However, as the May 2012 CSE subcommittee can only rely upon information available at the time of the meeting, the evidence in the hearing record supports a finding that the accommodations in the May 2012 IEP were appropriate to address the student's need to release his tics (see Dist. Ex. 5 at p. 1). Thus, under the facts and circumstances of this case, the evidence in the hearing record established that the recommended ICT services—together with annual goals, related services, management needs, program modification, testing accommodation, and assistive technology devices or services—offered the student an appropriate educational program that would address the student's needs during the school day.

### **3. May 2012 IEP—Accommodations**

Next, the parents allege that the district did not provide the student with consistent consultant teacher services or consistently provide the student with the accommodations recommended in the May 2012 IEP during the 2012-13 school year. Contrary to the parents' assertions, the evidence in the hearing record does not support a finding that the district substantially or significantly failed to provide the student with the accommodations in the May 2012 IEP in a material way, such that the district failed to offer the student a FAPE for the 2012-13 school year.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant

provisions of the student's IEP in a material way (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, \*14 [E.D.N.Y. Mar. 30, 2012]; D.D-S., 2011 WL 3919040, at \*13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimis failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (see Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524–25 [3d Cir. 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that a "material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP"]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D. D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

#### **a. Consultant Teacher Services**

In this case, the evidence in the hearing record does not support the parents' assertion that the district's failure to assign one teacher to provide the student's consultant teacher services constituted a failure to substantially or significantly provide the student with this service in a material way. Initially, the May 2012 IEP did not require that the student be assigned to one special education teacher to receive consultant teacher services (see Tr. p. 173; Dist. Ex. 5 at p. 9). At the impartial hearing, the student's consultant teacher testified that she worked with the student in the learning center on some days, while a different teacher worked with him on other days (see Tr. p. 210; see Tr. pp. 155-57, 172-74, 196). She further testified that at the beginning of the 2012-13 school year when the parents advised the district of their concerns that the student was not with the same consultant teacher in the learning center, the district "did [its] best to change" the student's schedule so that he could attend the learning center with the same consultant teacher (see Tr. pp. 118-19; 173-74). The consultant teacher further testified that prior to his schedule change, she sometimes pulled the student from a ninth period class if the student felt the need or if he had a test or needed to work on something (see Tr. p. 174; 208-09). She added that eventually the student had more days of learning center than recommended in the May 2012 IEP (see Tr. p. 173; see also Tr. p. 208). Under the circumstances, the evidence in the hearing record does not support the parents' concerns regarding the provision of consultant teacher services to the student during the 2012-13 school year.

#### **b. Use of a Calculator**

Next, the hearing record does not contain sufficient evidence to demonstrate that the district refused to provide the student with the use of a calculator or otherwise failed to provide the student

with a calculator in accordance with the accommodations in the May 2012 IEP such that the district substantially or significantly failed to provide the student with this service in a material way. Rather, the evidence in the hearing record shows that in an e-mail to the consultant teacher, dated February 10, 2013, the parents inquired about the student's use of a calculator on tests in light of his continued difficulty with mathematical facts when trying figure out the steps of a problem (see Parent Ex. AA at p. 124). In an e-mail dated February 11, 2013, the student's consultant teacher advised the parents that the teachers would "give him a calculator, if [she] fe[lt] that [would] give him a boost;" however, she also reminded the parents that student could not use a calculator on State tests (id.). In a separate e-mail dated February 11, 2013, the consultant teacher advised the parents that they would "make sure" that the student had a calculator, if only to check his work, and that way the student could practice his facts and check his work (id. at p. 123). Likewise, the consultant teacher also testified that the student could use a calculator when teachers gave one to all of the students, and in mathematics, when calculation was not the actual task (see Tr. pp. 160, 228). The consultant teacher further testified that she sometimes had to insist that the student take advantage of the use of a calculator (see Tr. p. 197). Accordingly, there is insufficient evidence in the hearing record to support the parents' concerns regarding the provision of a calculator to the student during the 2012-13 school year.

### **c. Assistive Technology Training**

The parents also allege that the use of an iPad was not helpful to the student because the district failed to provide the student with the necessary support to productively use the device or its applications. Initially, the May 2012 IEP did not include a recommendation for the student's use of an iPad among the assistive technology devices or services (see Tr. p. 250; Dist. Ex. 5 at p. 10). In any event, at some point during the 2012-13 school year the district determined that the student needed to have "direct access" or "more access to speech recognition software, as well as some tutorial software, "apps" and "some organization apps" (Tr. p. 251). The district assistive technology specialist testified that she met with the student on four or five occasions to train him to access the iPad (see Tr. p. 252). In an e-mail dated November 15, 2012, the assistive technology specialist informed the parents that she planned to meet with the student to set him up with an iPad to assist with his writing (see Parent Ex. AA at p. 64). According to the assistive technology specialist, during the training sessions with the student they would review the "apps," and how to use them to better access the curriculum, whether using voice detects or graphic organizers to complete his work (see Tr. pp. 253-54). At no time during the 2012-13 school year did the parents express dissatisfaction with the assistive technology specialist's services as far as supporting the student's assistive technology needs (see Tr. p. 258; see also Parent Ex. AA at p. 64). Rather, the assistive technology specialist testified that she "just needed to tweak some things," and the district worked on tweaking them when necessary (Tr. p. 258). Under the circumstances, there is insufficient evidence in the hearing record to support the parents' contentions regarding the district's failure to train the student on the use of assistive technology.

### **d. Testing Accommodations**

Next, the hearing record fails to contain evidence that the district failed to appropriately provide the student with the testing accommodations in the May 2012 IEP such that the district substantially or significantly failed to provide the student with these accommodations in a material way. According to the May 2012 IEP, at the teacher's discretion, the student could take State

assessments and classroom tests in another location with minimal distractions (see Dist. Ex. 5 at p. 11). Additionally, the May 2012 IEP indicated that test passages, questions, items and multiple choice responses should be read to the student (id.). In an e-mail to the parents dated October 24, 2012, the consultant teacher explained that to administer testing accommodations, she read the entire test aloud to the whole class, then she and the classroom teacher met with each student on an individual basis to reread and rephrase each question as necessary (see Parent Ex. AA at p. 46). She added that in so doing, none of the students felt singled out or different by being removed (id.). In an e-mail of the same date, the parents asked if it was "possible" for the consultant teacher to administer the student's testing accommodations as he had previously received them, notably, by separating students with IEP's into a separate location and for the teacher to read the tests to the students "item by item" at the group's pace, which, according to the parents, "aid[ed] comprehension and attention" (id.). Although the May 2012 IEP did not indicate that the student's tests must be read to him item by item or administered to him in a separate location, the consultant teacher testified that following this e-mail exchange with the parents, she acceded to the parents' wishes and administered the testing accommodations to the student in that fashion (see Tr. pp. 163, 171-72; see Dist. Ex. 5 at p. 11-12). Accordingly, the evidence in the hearing records fails to support the parents' contentions regarding how the district provided the student with the testing accommodations in the May 2012 IEP.

#### **e. Provision of Class Notes**

The parents also allege that the student's teachers did not provide him with class notes in accordance with the May 2012 IEP. Significantly, however, the evidence in the hearing record includes a copy of class notes created by the student's teachers (see Parent Ex. RRR at pp. 38-39; see also Tr. pp. 203-04). Likewise, according to the consultant teacher, the May 2012 IEP provided for the use of visual references, and she provided most of them to students; however, the classroom teachers often provided them for all of the students (see Tr. p. 172; see also Tr. p. 160; Dist. Ex. 5 at p. 10). Additionally, the consultant teacher testified that when the student left the room for a break, she took notes for him and made sure that he had any handouts or directions (see Tr. pp. 203, 243). She added that whenever he left the room, she "maintained whatever information flow was happening in the class for him" (Tr. p. 232). In view of the foregoing, the evidence in the hearing record does not support a finding that the district did not provide the student with class notes in accordance with the May 2012 IEP.

#### **f. Checking for Understanding**

Next, with regard to the parents' contention that the district failed to check with the student for his understanding on a consistent basis, as explained more fully below, the evidence in the hearing record weighs against such a finding. Specifically, the consultant teacher testified that when a teacher gave directions to the class, she would either restate the directions to the student or ask him to explain the directions to her (see Tr. pp. 161-62). In addition, according to a February 2013 classroom performance report, the student was "almost . . . too focused on completing tasks, rushing through them before he really ha[d] heard all the directions or comprehend[ed] the task completely" (Parent Ex. OO at pp. 1-2). At times during the 2012-13 school year, the consultant teacher needed to slow the student down and start him over; however, she also characterized the student as "receptive and responsive to any help offered to him" (id.). Although the consultant teacher noted that the student enjoyed "working independently," she further reported that the

student needed "to learn to check in with the teacher more often, to make sure he [was] going down the correct path with an assignment" (*id.*). Based on the foregoing, there is insufficient evidence in the hearing record to show that the student's teachers failed to check the student's understanding in accordance with the May 2012 IEP.

### **g. Provision of Graphic Organizers**

The parents also contend that the district failed to provide the student with graphic organizers; however, as detailed below, the hearing record fails to contain evidence to support this assertion. Rather, the consultant teacher confirmed that she consistently provided the

student with graphic organizers, and the hearing record contains no evidence to the contrary (*see* Tr. p. 172; Parent Ex. RRR at p. 41). Likewise, in a September 2012 e-mail to the parents, the consultant teacher sent home an example of a graphic organizer (*see* Parent Ex. AA at p. 29). In addition, the assistive technology specialist testified that she had many discussions with the parents in an effort to find the best graphic organizers for the student's iPad (*see* Tr. p. 254). Based on the foregoing, the hearing record does not contain sufficient evidence to demonstrate that the district failed to provide the student with graphic organizers in accordance with the May 2012 IEP.

### **h. Speech-Language Therapy and Homebound Instruction**

Lastly, the parents allege that the student did not receive speech-language therapy services during the homebound instruction, and that the homebound instruction provided was not appropriate. With respect to the aforesaid speech-language claim, the parents raise this claim for the first time on appeal and, accordingly, it is not subject to my review (compare IHO Ex. 1 at p. 15, with Pet. ¶ 32[d]; *see also B.P. v. New York City Dep't of Educ.*, 2014 WL 6808130, at \*7-\*8 [S.D.N.Y. Dec. 3, 2014]). Furthermore, 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 "open[s] the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (*M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 250-51 [2d Cir. 2012]; *see D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; *N.K. v. New York City Dep't of Educ.*, 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; *A.M. v. New York City Dep't of Educ.*, 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 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]), the speech-language issue was initially raised either by counsel on cross-examination of a district witness or through testimony of the parents' own witnesses (*see* Tr. pp. 290, 563-65).

Concerning the appropriateness of the homebound instruction itself, a review of the May 2013 IEP, which was in effect at the time the student received the homebound instruction, indicates that the student was entitled to receive "tutoring support, transportation and a partial day program" (*see* Dist. Ex. 7 at p. 1).<sup>8</sup> Although the parents generally allege that the tutor who provided homebound instruction to the student was not "qualified for all core subjects" and was otherwise an "inappropriate" tutor for the student, there is inadequate evidence in the hearing record to

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<sup>8</sup> The parents are not challenging the May 2013 IEP in this proceeding and a review of the May 2013 IEP indicates that they agreed to it at that time (Dist. Ex. 7 at p. 1).

establish what "make-up" services, if any, would remedy the aforesaid alleged deficiencies in instruction under the particular circumstances of this case. Accordingly, I find no basis in the record for relief related to the alleged inappropriateness of the homebound instruction.

## **C. 2013-14 School Year**

### **1. March 2013 IEP—ICT Services**

Turning next to their claim that the district did not offer the student a FAPE for the 2013-14 school year, the parents allege that the March 2013 CSE subcommittee's program recommendation of ICT services for the 2013-14 school was not appropriate, given that it was identical to the May 2012 IEP and the student did not make progress under the May 2012 IEP. Moreover, the parents contend that March 2013 CSE subcommittee's failure to recommend a BOCES program for the student also rendered the March 2013 program recommendation inappropriate to address the student's needs. As explained more fully below, the evidence in the hearing record does not support the parents' contentions.

Again, although the sufficiency of the evaluative information and the present levels of performance in the March 2013 IEP are not directly in dispute, a discussion thereof provides context for the discussion of the issue to be resolved—namely, whether ICT services were appropriate to meet the student's needs for the 2013-14 school year.

To develop the March 2013 IEP, the March 2013 CSE subcommittee considered and relied upon, in part, evaluative information previously considered and relied upon by the January 2012 CSE and the May 2012 CSE subcommittee, as well as following more recent evaluative information: a February 2013 teacher report,<sup>9</sup> a March 2013 speech-language evaluation report, and State and district-wide testing results (see Dist. Exs. 6 at pp. 3-5; compare Dist. Ex. 6 at pp. 3, 5, with Dist. Ex. 3 at pp. 3-5, and Dist. Ex. 5 at pp. 3-5). In addition, the March 2013 CSE subcommittee considered input from the parents, the student's regular education teacher, the student's special education teacher, and the student's speech-language therapist (see Tr. pp. 193, 274-76, 581-582; Dist. Ex. 6 at pp. 1-2).

According to the March 2013 IEP, the student enjoyed working independently, but "almost to a fault" (Dist. Ex. 6 at p. 5). Consistent with the February 2013 teacher report, the March 2013 IEP noted that at times, the student would "begin a task and work diligently on it," but he did not always realize that he was "doing it incorrectly" (Dist. Ex. 6 at p. 5; Parent Ex. OO at p. 2). The March 2013 IEP also cautioned that the student needed to learn to "check in" with his teacher to ensure that he was "going down the correct path" with an assignment (Dist. Ex. 6 at pp. 5-6; Parent Ex. OO at p. 2). The March 2013 IEP also echoed the February 2013 teacher report regarding the student's improved frustration tolerance despite the increased "physical challenges" the student faced throughout the school year (Dist. Ex. 6 at pp. 5-6; Parent Ex. OO at p. 2).

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<sup>9</sup> Although the March 2013 IEP listed a "January 2013" teacher report as part of the evaluative information considered, the evidence in the hearing record does not include a January 2013 teacher report; instead, it appears that the March 2013 CSE subcommittee considered a February 2013 classroom performance report (February 2013 teacher report) (compare Dist. Ex. 6 at p. 5, with Parent Ex. OO at p. 2).

Within the area of mathematics, the March 2013 IEP indicated the student earned an "82 in math for the second marking period" and that his teacher described him as "highly motivated"

and a "pleasure to have in class" (Dist. Exs. 6 at p. 6; Parent Ex. OO at p. 3). The March 2013 IEP further noted that the student showed "excellent effort" (Dist. Ex. 6 at p. 6). While the March 2013 IEP noted that the student was "not automatic in math facts," the IEP further noted that the student demonstrated "good improvement" (Dist. Ex. 6 at p. 6; Parent Ex. OO at p. 3). The March 2013 IEP also reported the student's difficulty remembering a mathematics function "previously mastered," but also reported that with support, the student could "proceed successfully" (*id.*).

In the area of reading, the March 2013 IEP reflected that the student earned an "88 in English for the second marking period" (Dist. Ex. 6 at p. 6; Parent Ex. OO at p. 3). According to the March 2013 IEP, the teacher comments "indicate[d] excellent effort and good progress," that the student was a "pleasure to have in class," and that the student's "[t]est results d[id] not accurately reflect his skill acquisition" (Dist. Exs. 6 at p. 6; Parent Ex. OO at p. 3). The March 2013 IEP also revealed improvements in the student's written expression, and while the student could "write more smoothly and easily," the student continued to exhibit difficulty with "[p]roof reading and editing skills" (*id.*). The March 2013 IEP indicated that the student did best if he could orally share his ideas prior to writing, and he required graphic organizers to help him organize his writing (*see* Dist. Ex. 6 at p. 6).

In the speech-language domain, the March 2013 IEP reported information consistent with the March 2013 speech-language evaluation report (*compare* Dist. Exs. 6 at 6, *with* Dist. Ex. 30 at pp. 2-3). Specifically, the March 2013 IEP indicated that the student "demonstrate[d] average language abilities," but that the student made "grammatical errors" with the "increased demands of writing" (Dist. Ex. 6 at p. 6; 30 at p. 3). Further, the March 2013 IEP noted that the student should be "encouraged to re-read aloud all written work to check for missing words and incorrect grammar" because the student could detect them immediately when doing so (Dist. Ex. 6 at p. 6). The March 2013 IEP also stated the student responded well to "slow, direct speech" (*id.*; *see* Dist. Ex. 30 at p. 3). Additionally, the March 2013 IEP reflected the student's strong ability to analyze words and his capacity to understand inference "when it applie[d] to situations within his own experience and beyond" (Dist. Ex. 6 at p. 6). Finally, the March 2013 IEP echoed the conclusion of the speech-language therapist, which found that the student did not "present with a communication, language or memory deficit" and therefore, "speech and language intervention [wa]s not recommended" (*id.*; Dist. Ex. 30 at p. 3).

With regard to the student's study skills, the March 2013 IEP reflected information presented in the February 2013 teacher report, such as the student demonstrated "an exceptional level of motivation and task commitment," but that his "inattention related to the Tourette's [could] present challenges" (Dist. Ex. 6 at p. 6; *see* Parent Ex. OO at p. 1). The March 2013 IEP characterized the student as "easily redirected for the most part," and further noted that he welcomed assistance (*id.*). The March 2013 IEP also depicted the student's "level of perseverance and the intensity of his effort [as] noteworthy" (*id.*). Nonetheless, the March 2013 IEP cautioned that the student could be frustrated because his "strong desire to excel academically" could be derailed by "his inability to attend and his efforts to control his tics" (*id.*). The March 2013 IEP also revealed improvements in the student's organizational skills, but that the student continued to receive "intensive support at home" in order to assist him with maintaining his papers and materials

in good order (Dist. Ex. 6 at p. 6; see Parent Ex. OO at pp. 1-2). According to the March 2013 IEP, at times the student could almost become "too focused on completing tasks," rushing through them before he had really heard all of the directions or completely comprehended the task (Dist. Ex. 6 at p. 6; see Parent Ex. OO at p. 2). However, the March 2013 IEP also described the student as "receptive and responsive to any help offered to him" (id.). Finally, among the student's strengths, preferences and interests, the March 2013 IEP noted the student's enjoyment of "all group activities," technology, helping others, an excellent sense of humor, and a solid sense of self-worth (Dist. Ex. 6 at p. 6).

In addition to identifying the student's academic, developmental, and functional needs, the March 2013 IEP catalogued the parents' concerns, which included taking tests in a classroom that was too quiet because it "ma[de] managing the tics he experience[d] even more daunting," as well as the student's difficulties with recall and impulsivity (Dist. Ex. 6 at p. 6). The March 2013 IEP also indicated that according to the parents, the student's "test scores very often d[id] not accurately represent his level of mastery" (Dist. Ex. 6 at pp. 2, 6).

In the area of social development, the March 2013 IEP described the student as a "popular choice for group or partner work;" "bright, fun, and enthusiastic;" and "respectful and appreciative" (Dist. Ex. 6 at p. 6; see Parent Ex. OO at p. 2). As detailed in the February 2013 teacher report and repeated in the March 2013 IEP, the student "demonstrate[d] a high level of emotional maturity," and "manage[d] the many difficult challenges he face[d] on a daily basis with humor and good spirits" (Dist. Ex. 6 at p. 7; see Parent Ex. OO at p. 2). While the March 2013 IEP indicated that, at times, the student could get very frustrated or exhausted with the struggle, the March 2013 IEP also noted that the student was "easily returned to good humor" (Dist. Ex. 6 at p. 7). According to the IEP, the student was "very popular with his peers," and enjoyed "excellent relationships in all of his classes" (id.). The March 2013 IEP further revealed that the student's peers did not "seem to take notice of [the student's] Tourette's," and they accepted him and fully enjoyed him (id.). In sum, the March 2013 IEP noted that there were "no social and emotional needs that should be addressed through special education, at this time" (id.).

Next, the March 2013 IEP revealed that the student's "physical and/or medical problems" had a "moderate impact" on his education, and further, that the student's "Tourette's and related disorders" affected all of the student's academic areas (Dist. Ex. 6 at p. 7). Although the March 2013 IEP depicted him as a "physically active, lively child," the March 2013 IEP indicated the student's need for accommodations for "Tourette's and related disorders" (id.).

In the instant case, the evidence in the hearing record shows that the student's special education needs could be met through the provision of ICT services, coupled with the 15:1 special class (academic support lab), annual goals, related services, management needs, program modifications, testing accommodations, and assistive technology services (see Dist. Ex. 6 at pp. 8-11). Here, the March 2013 IEP included program modifications, including modified homework assignments, breaks as needed, preferential seating, checks for understanding, use of a calculator, refocusing and redirection, and use of visual references (id. at pp. 9-10). In terms of management needs, the March 2013 IEP indicated that the student required modifications to his daily program to accommodate his disability, in addition to frequent breaks to assist him in managing his tics, and academic support for his many challenges (id. at p. 7). According to the March 2013 IEP, the student also required "frequent, intensive support in order to progress academically" (id.). Lastly,



the March 2013 IEP also included testing accommodations, such as extended time; flexible setting; flexible scheduling; checking for understanding of directions; redirection and refocusing; reading test passages, questions, items and multiple-choice responses to the student; repetition of the listening section more than the standard number of times; and preferential seating (id. at pp. 11-12)

With respect to the March 2013 IEP, the parents primarily argue that it was not appropriate because the student did not make progress during the 2012-13 school year through the provision of ICT services. However, contrary to the parents' argument, the evidence in the hearing record demonstrates that the student made educational progress during the 2012-13 school year and that the March 2013 CSE appropriately considered the student's progress in developing the student's IEP for the 2013-14 school year. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Therefore, notwithstanding the parents' concerns, at the time of the March 2013 CSE subcommittee meeting the student had been participating in an unmodified, "Common Core" curriculum during the 2011-12 school year (see Dist. Ex. 6 at p. 2). Moreover, at the time of the March 2013 CSE subcommittee meeting, the student achieved passing grades with quarterly averages ranging from 82 in mathematics to 89 in science, 88 in English, and 85 in social studies (see Dist. Exs. 6 at p. 6; Parent Ex. OO at p. 3). In addition, the student's second quarter report describing his progress towards successful achievement of the annual goals in the March 2012 IEP indicated that he made satisfactory progress in approximately seven annual goals, and while "making less than anticipated progress" toward another three annual goals, the student retained the possibility of achieving those three annual goals (see Tr. pp. 182-83; Parent Ex. AAA at pp. 1-6). The progress report also noted the student's improvement in one skill area with teacher support (completing a four-paragraph writing assignment), and that his work on one annual goal related to numerical expressions had not yet been started (see Parent Ex. AAA at pp.

4-5). Similarly, the consultant teacher described some of the challenges in documenting the student's progress, and testified that "one of the pieces of the complexity of [the student was] that he c[ould] know those vocabulary words one day, [and] the next day if you ask[ed] him, he might not recall them" (Tr. p. 218). Under the circumstances, the consultant teacher further testified that she could not indicate that a skill had been "mastered until [she] could see a consistent demonstration of that skill" (id.). Despite the challenges of measuring progress while the student's facility with various skills fluctuated, both the regular education teacher and the consultant teacher pointed to specific examples of the student's progress towards annual goal achievement, if not complete mastery (see Tr. pp. 185-86, 220, 340).

While the documentation on which the March 2013 CSE subcommittee relied to develop the student's IEP for the 2013-14 school year reflected his need for support and structure, the evidence in the hearing record shows that at the time of the CSE subcommittee meeting, the student was making progress, he was well-liked by his teachers and peers, he was growing in independence, and he was benefitting from instruction (see Tr. pp. 89, 91, 176-77, 179, 185, 221; see also Dist. Exs. 6 at pp. 2-7; 30 at pp. 1-3; Parent Exs. AA at p. 71; OO at pp. 1-3; AAA at pp. 2-6).<sup>10</sup> Accordingly, the March 2013 CSE subcommittee appropriately considered the student's needs, as well as the student's progress during the 2012-13 school year through the provision of ICT services in reaching its decision to recommend ICT services in the March 2013 IEP.

Finally, the evidence in the hearing record does not support the parents' contention that the March 2013 CSE subcommittee's failure to consider either a BOCES' program or a "consortium program" resulted in a failure to offer the student a FAPE for the 2013-14 school year. Generally, when determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [E.D.N.Y. Aug. 19, 2013]; [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"). Thus, in this case the March 2013 CSE subcommittee need not have considered placement in a BOCES' or consortium program for the student.

## **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the district did not violate its child find obligations for the 2011-12 school year, and moreover, that the

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<sup>10</sup> To the extent that the parents argue that the student's placement on homebound instruction due to the exacerbation of his tics supported the allegation that the student did not make progress under the May 2012 IEP, the March 2013 CSE subcommittee convened prior to the events that resulted in the student's change in placement to homebound instruction (compare Dist. Ex. 6 at pp. 1-2, with Parent Exs. X at pp. 1-2; Y). Therefore, the student's placement on homebound instruction may not be relied upon by the parents to determine the appropriateness of the March 2013 IEP (see R.E., 694 F.3d at 186).

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 2012-13 and 2013-14 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Eagle Hill was an appropriate placement or whether equitable considerations supported the parents' requested relief (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
February 11, 2015**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**