The University of the State of New York

The State Education Department
State Review Officer
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No. 17-043

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

Appearances:
The Cuddy Law Firm, PLLC, attorneys for petitioner, Kerry McGrath, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Garrett L. Silveira, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Eagle Hill School (Eagle Hill) for the 2016-17 school year. The appeal must be sustained.

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

The student has been the subject of a prior administrative appeal related to the 2013-14 and 2014-15 school years, and as a result the parties' familiarity with her earlier educational history and prior due process proceedings is assumed and will not be repeated here in detail (Application of a Student with a Disability, Appeal No. 16-058). Briefly, the student attended Eagle Hill for the 2015-16 school year and was enrolled at the school at the time of the impartial hearing (Parent Exs. L at p. 19; Q).

In spring 2016, the parents' sought a reevaluation of the student by their private pediatric neuropsychologist "in order to assess [the student's] progress" (Parent Ex. K at p. 1). In a report dated April 2016, the neuropsychologist concluded that the student exhibited a "diffuse pattern of primary language and higher order skill deficits that interact to reduce what [the student] can

process and understand" (id. at p. 5). The neuropsychologist stated that the student had made incremental gains in reading; however, her writing skills had not improved from baseline and the student showed no gains in mathematical skills (id.). He also noted that despite medication, the student's attention remained poor (id. at p. 3). Based on the nature of the student's disabilities, and evidence that she was making gains in reading, the neuropsychologist "strongly recommended" that the student continue at Eagle Hill (id. at p. 6).

On June 9, 2016, a CSE convened to conduct an annual review and to develop the student's IEP for the 2016-17 school year (Parent Ex. B at pp. 2, 3). Finding that the student remained eligible for special education and related services as a student with a learning disability, the CSE recommended her for a 12:1+1 special class placement for English, social studies, science, and math; along with a 12:1 special class placement for skills instruction three times per six day cycle and a 5:1 special class for reading, daily (Parent Ex. B at pp. 1,2).[1] In addition, the June 2016 CSE recommended that the student receive related services of two 42-minute sessions of OT per week in a group of five, two 42-minute sessions of speech-language therapy per week in a group of five, one 42-minute session of speech-language therapy per week in a group of two, one 42-minute session of counseling per week in a group of five, and one 42-minute session of individual counseling per week (Parent Ex. B at p. 2). Although the CSE discussed providing the student with OT during the summer, it was determined that the family would continue to work on the student's typing skills at home, and no OT services were recommended (Parent Ex. B at p. 3). However, the IEP indicated that the student would be attending "the summer reading camp" (Parent Ex. B at p. 3).[2]

By letter dated August 17, 2016, the parent rejected the programming discussed during the June 2016 CSE meeting, informed the district she had not yet received a copy of the IEP, and notified the district that she was unilaterally placing the student at Eagle Hill and would seek reimbursement of all tuition costs (Parent Ex. N at pp. 1-2). Among other things, the parent stated that the district failed to recommend a small class that utilized research-based multisensory methods, provided the speech-language support the student needed, or addressed the student's math disability and social emotional needs (id. at p. 1). On or around August 30, 2016, the parent received a copy of the June 2016 IEP (Tr. pp. 1286, 1291-92, Parent Ex. B).

A. September 2016 Due Process Complaint Notice

By due process complaint notice, dated September 26, 2016, the parent alleged that the district failed to provide the student with a free appropriate public education (FAPE) (Parent Ex. A at pp. 6-8).[3] The parent asserted that the district did not appropriately evaluate the student or conduct any testing to assess her current needs and, as a result, the CSE failed to recommend

[1] The student's eligibility for special education services and classification as a student with a learning disability during all school years at issue is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] The director of pupil personnel services testified that the district ran a two-week summer reading camp that the student attended (Tr. pp. 179-80, 383-84). The camp was not part of the district's special education programs (id.).

[3] Although, the request for review was filed by the student's mother, both the September 2016 and December 2016 due process complaint notices were filed by the student's parents; however, for the purposes of consistency references herein are to the parent.

appropriate services based on current evaluative data, specifically identifying the recommendation for OT two times per as not being appropriate (id. at p. 6). The parent also claimed that the student's IEP for the 2016-17 school year did not accurately reflect the student's current needs, present levels of educational performance, or appropriate goals because much of the content was carried forward from the IEP for the 2015-16 school year and it did not account for new information presented at the CSE meeting (id.). The parent further alleged that the district failed to recommend home-based assistive technology services and failed to discuss or address the student's needs for assistive technology with the parents or conduct an agreed to assistive technology evaluation (id. at p. 7). Additional claims raised by the parent included the CSE's failure to recommend multisensory teaching methodologies or multisensory-based services, its failure to recommend an appropriate class size for the student, its failure to consider other classroom ratios, and the district's inability to implement a 12:1+1 special class at the recommended school location (id. at pp. 7-8). The parent also alleged that the district should have recommended transitional support services for the student because the district had proposed moving the student to a larger classroom (id. at p. 7).

The parent alleged that the district committed several procedural errors during the development of the student's IEP including failing to accurately describe the student's medication; failing to include the parent's concerns regarding bullying and the student's social and emotional needs on the IEP, and failing to provide prior written notice of its reasons for denying summer math services and denying a smaller class size (Parent Ex. A at pp. 6-8). Additionally, the parent contended that the district deprived her of the opportunity to meaningfully participate in the IEP process because it failed to provide information regarding the CSE's recommended placement or provide her with a copy of the IEP with enough time to review it carefully prior to the start of the school year (id. at p. 8).

The parent also alleged that Eagle Hill was an appropriate placement for the student and that equitable considerations weighed in favor of granting the parent's request for public funding or reimbursement for the cost of the student's tuition, services, and transportation at Eagle Hill for the 2016-17 school year (Parent Ex. A at pp. 9-10).

B. Facts Post-Dating the September 2016 Due Process Complaint Notice

The district and the parent participated in a resolution session on October 7, 2016 (Tr. p. 72, 344-45, 1292; Parent Ex. HH). The director of pupil personnel services (PPS director) stated that at this meeting they reviewed the allegations within the parent's due process complaint notice and noted that they were unable to resolve any of the complaints (Tr. pp. 74, 77-78; see Tr. pp. 1292-97). The PPS director testified that the group corrected two errors on the IEP; to show that the student was currently prescribed medication and that the class size listed as 12:1+1 was incorrect and should have been 15:1+1 (Tr. pp. 75-76; see Tr. pp. 1294, 1300).[4]

By letter dated October 21, 2016 the district provided its response to the September 26, 2016 due process complaint notice (Dist. Ex. 3 at pp. 1-5). By letter dated October 27, 2016, the district provided "updated" versions of the prior written notice and IEP; however, both documents reflected the original date of the student's June 9, 2016 annual review (Parent Ex. HH). The

[4] The original June 2016 IEP stated that the student was not taking medication at that time (Parent Ex. B at p. 11).

"updated" IEP reflected the "corrections" made by the district at the October 2016 resolution session, namely the recommendation for a 15:1+1 special class placement for English, math, social studies, and science in place of the 12:1+1 special class for academics included on the former June 2016 IEP; and a notation that the student "continue[d] to be prescribed medication for ADHD" (compare Dist. Ex. 2 at pp. 1, 10, 14-15, with Parent Ex. B at pp. 2, 11, 15-16). Around this same time the parents executed an enrollment agreement with Eagle Hill for the 2016-17 school year, which was accepted by Eagle Hill on November 1, 2016 (Parent Ex. Q).

C. December 2016 Due Process Complaint Notice

In a second due process complaint notice dated December 5, 2016, which was later consolidated with the first complaint, the parent set forth claims alleging procedural violations committed by the district after the date of the first due process complaint notice (Parent Ex. LL). The parent alleged that the district improperly modified the student's IEP, failed to invite the parent to a CSE meeting where the student's IEP was unilaterally modified, failed to timely respond to the parent's initial due process complaint notice, failed to convene an appropriate resolution session, failed to seek approval of the IEP from the board of education, failed to have an IEP in place that could be implemented for the 2016-17 school year, and further that the IEP developed unilaterally without the parent in attendance continued to deny the student a FAPE (id. at pp. 9-14). As relief, the parent requested that the district be directed to provide a response to their due process complaint notice within one week and that the district be precluded from entering any newly developed IEP's into evidence, along with their original request for public funding or reimbursement for the cost of the student's tuition, services, and transportation at Eagle Hill for the 2016-17 school year (id. at p. 15).

In a letter dated December 12, 2016 the district provided its response to the second due process complaint (Dist. Ex. 5 at pp. 1-3).

D. Impartial Hearing Officer Decision

Following a prehearing conference on October 17, 2016, the parties convened for an impartial hearing on November 28, 2016, which concluded on March 20, 2017, after six days of proceedings (Tr. pp. 1-1513; IHO Ex. 1). By decision dated April 23, 2017, the IHO determined that the district offered the student a FAPE for the 2016-17 school year (IHO Decision at pp. 16-24). The IHO first addressed the procedural violations raised by the parent (id. at pp. 17-20). At the outset, the IHO set forth nine alleged procedural violations and found that whether considered individually or collectively, they did not rise to the level of a denial of a FAPE (id. at pp. 17-18). The IHO then determined that the district's response to the parent's due process complaint notice was untimely; however, he also determined that the district's untimeliness did not prejudice the parent (id. at pp. 18-19). Concerning the resolution session, the IHO found that a resolution session was held by the district and attended by the parent and that whether the IEP was amended or corrected was inconsequential because the parent had rejected the class sizes contemplated by both of the IEPs in question (id. at pp. 18-20). The IHO then considered the appropriateness of the post-resolution session IEP, and found that the CSE did not predetermine the student's program and placement, that the CSE considered current information regarding the student's needs provided by the student's teachers at Eagle Hill, and that the CSE's recommendations for the 2016-17 school year, including the 15:1+1 special class recommendation, were appropriate (id. at pp. 21-22). Specifically, the IHO noted that but for the change in class size, the similarities between the IEP

developed for the 2016-17 school year and the IEP developed for the 2015-16 school year, which had been found appropriate by an SRO, suggested that the IEP was sufficient to provide reasonable progress for the 2016-17 school year (id.). Having determined that the district offered the student a FAPE, the IHO did not consider the appropriateness of Eagle Hill or whether equitable considerations favored either party (id.).

IV. Appeal for State-Level Review

The parent appeals alleging the IHO made numerous errors, including relying on retrospective testimony and applying an incorrect FAPE standard. The parent claims that the district's response to due process was untimely and referenced an amended IEP that was not provided to the parents. The parent also alleges that the resolution session did not comply with regulatory requirements and that the district unilaterally amended the June 2016 IEP after the resolution period ended. The parent contends that the IHO erred by considering the amended IEP rather than the IEP in place at the start of the school year. The parent challenges the IHO's finding that the student's program was not predetermined and further alleges that the IHO failed to address several issues raised by the parent, including that the CSE failed to appropriately evaluate the student in assistive technology and OT, discuss the student's OT and counseling goals, provide prior written notice, arrange a classroom observation, recommend transitional support services, and timely provide the parent with a copy of the IEP. With regard to the June 2016 IEP, the parent claims the district failed to include the student's present levels of educational performance, failed to develop goals based on the student's needs, failed to recommend a program based on peer-reviewed research, recommended a 15:1 classroom that was too large, and did not provide sufficient reading intervention. The parent also alleges that the IHO's reliance on the appropriateness of the 2015-16 IEP when determining the appropriateness of the 2016-17 IEP was improper. The parent argues that Eagle Hill was an appropriate unilateral placement for the 2016-17 school year and that equitable considerations favor the parent. As relief, the parent requests direct funding of the cost of the student's tuition at Eagle Hill for the 2016-17 school year.

In an answer, the district responds with admissions and denials and argues that the IHO's decision should be upheld. The district further argues that the student did not receive OT at Eagle Hill and that the student did not meet her OT goals when last in a district school. The district contends that the student's OT goals were continued in the 2016-17 IEP for that reason, and that contrary to the parent's claims, assistive technology was provided. The district also claims that the parent's concerns were reflected in the June 2016 IEP because the concerns were the same as in the prior school year. The district also argues that the parent was provided with prior written notice, and with information about the proposed placement including an attempt to arrange visitation. The district further alleges that a copy of the IEP was provided to the parent before the start of the school year and that the corrected IEP included the class size (ratio) identified during the CSE meeting.

With regard to the unilateral placement of the student, the district contends that the parent failed to meet her burden of demonstrating that Eagle Hill was an appropriate placement for the student. The district argues that Eagle Hill did not address the student's language needs and that the student did not make any progress in math or writing during the 2015-16 school year and demonstrated minimal progress in reading. The district contends that it offered a FAPE for the 2016-17 school year and the parent's appeal should be dismissed.

In a reply, the parent argues that Eagle Hill addressed the student's speech and language needs and that Eagle Hill was an appropriate unilateral placement for the student. The district responded to the parent's reply arguing that it did not comply with the practice regulations and should not be considered in this appeal.

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]). The Supreme Court recently indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 [2017]). 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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created (Endrew F., 137 S. Ct. at 1001). The IEP must be "reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (Endrew F., 137 S. Ct. at 1002; see Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997] [stating that an IEP must be "reasonably calculated to provide some meaningful benefit"]; 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).[5]

[5] The Supreme Court recently stated that if it is unreasonable to expect a child to attend a regular education setting, the "educational program in a student's IEP must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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. Procedural Safeguard Matters

1. Response to Due Process

The parent raised several issues about the hearing process and the procedural protections called for by the IDEA. The parent argues that the district's response to the due process complaint notice was untimely and included an amended IEP that was not provided to the parent, and further that the parent did not have access to the IEP that the district intended to defend during the impartial hearing. The IHO determined that the district's response was untimely but did not result in any prejudice to the parent.

State and federal regulation provides that if the school district has not sent a prior written notice to the parent regarding the subject matter of the parent's due process complaint notice, the district shall provide a response to the parent within 10 days of receiving the complaint (8 NYCRR 200.5[i][4][i] see 34 CFR § 300.508[e]). The hearing record reflects that along with a copy of the June 2016 IEP, the district issued a prior written notice to the parents after the June 2016 CSE meeting, which included a recommendation of a 12:1+1 special class for English, social studies, science, and math (Parent Ex. C at p. 1; see Tr. pp. 10-11, 57).[6] The parent contends that the district's prior written notice did provide the parent with notice of the district's refusal to provide the student with summer math services or to place the student in a smaller class (Parent Ex. A at p. 8). While the district's prior written notice explained the CSE's rationale for deciding not to provide the student with OT services during the summer, it did not address the parent's concerns regarding summer math services or include a description of other placement options that the CSE considered or the reasons why those options were rejected (Parent Ex. C at p. 1).

[6] The parent testified that she received the June 2016 IEP at the end of August 2016 (Tr. pp. 1290-91).

The district responded to the parent's September 26, 2016 due process complaint notice by letter dated October 21, 2016 (Dist. Ex. 3). The district's response to the September 26, 2016 due process complaint notice does not comply with the 10-day timeline called for by the IDEA (20 USC 1415[c][2][B]; 34 CFR § 300.508[e]; 8 NYCRR 200.5[i][4][i]). Additionally, although the district's response indicates that the district generally considered "all of the parents' concerns" and "considered and appropriately rejected other class sizes," once faced with the parents due process complaint, the district should have realized that it did not provide a description of other options that the CSE considered and the reasons why those options were rejected and timely file a response to the due process complaint that covered those topics (District Ex. 3 at pp. 2-3).[7] However, despite the irregularities in the district's prior written notice and in its response to the due process complaint notice, considering the limited issues that went unaddressed, the procedural irregularities did not result in a violation of the student's substantive rights or a deprivation of the parent's ability to participate in due process.

2. Resolution Session

As noted above, a resolution session took place on October 7, 2016 (Parent Ex. HH). According to the district, corrections were made to the June 2016 IEP to reflect the actual 15:1+1 special class ratio recommendation discussed at the CSE meeting and to reflect that the student was taking medication (Tr. pp. 72, 74-81; Parent Ex. HH; Dist. Ex. 1). The parent alleges that the district used the resolution session as a means to improperly amend the June 2016 IEP and change the recommendation for a 12:1+1 special class, which the district knew could not be implemented at the proposed school site, to a recommendation for a 15:1+1 special class, which was available (Parent Ex. LL at pp. 9-11). The IHO determined that a resolution session was held on October 7, 2016, and considered the IEP recommending a 15:1+1 special class as the relevant IEP (IHO Decision at pp. 18-19, 23).[8]

State and federal regulations provide that within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint, and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (8 NYCRR 200.5[j][2][i]; 34 CFR 300.510[a]).

The parent's due process complaint notice was filed on September 26, 2016 (Parent Exs. A at p. 1; EE at p. 2).[9] The resolution session was timely held on October 7, 2016 (see Parent Ex. HH). The resolution period provision allots 30 days from the receipt of the due process complaint

[7] Given that school districts and parents sometimes perceive a CSE meeting and the respective concerns differently, it is not surprising that a prior written notice may not cover all of the details needed under the circumstances.

[8] The PPS director testified that the corrected IEP and prior written notice documents were dated June 9, 2016, because they resulted from the student's annual review held on June 9, 2016 and related back to that date because no subsequent CSE was convened (Tr. pp. 77-80, 353).

[9] In the request for review the parents allege that the due process complaint notice was filed on September 26, 2016; the district admits this allegation in its answer (Req. for Rev. ¶34; Answer ¶10).

notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B]; 8 NYCRR [200.5[j][2][v]). The PPS director testified that the corrected IEP and prior written notice were sent to the parents sometime after October 7, 2016 (Tr. pp. 80-81). The cover letter that accompanied the IEP and prior written notice was dated October 27, 2016 (Parent Ex. HH). The district did not reduce the corrections to the June 2016 IEP to writing and provide a new prior written notice until after the end of the resolution period on October 26, 2016 (Parent Ex. HH; see Dist. Exs. 1; 2).

The Second Circuit has described the resolution period as the timeframe within which the district has to remedy any deficiencies in a challenged IEP without penalty (R.E., 694 F.3d at 187). When, as in this case, the parent "feel[s] [her] concerns have not been adequately addressed and the amended IEP still fails to provide a FAPE, [she] can continue with the due process proceeding and seek reimbursement. The adequacy of the IEP will then be judged by its content at the close of the resolution period" (id., at 188 [emphasis added]). The resolution period allows a "district that inadvertently or in good faith omits a required service from the IEP [to] cure that deficiency during the resolution period without penalty once it receives a due process complaint" (id.). Nevertheless, the failure to "rehabilitate an inadequate IEP within the resolution period," precludes the district from benefitting "from the use of retrospective evidence… that the student's program would have been materially different than what was offered in the IEP" (id. [emphasis added]).

The district offered testimony explaining that the student's IEP for the 2015-16 school year, which recommended a 12:1+1 special class, was projected on a screen during the June 2016 CSE meeting, but a 15:1+1 special class was discussed at the meeting because the district's middle school did not offer a 12:1+1 special class (Tr. pp. 400-01, 466-67, 538-40). The parent testified that a 15:1+1 special class was discussed at the June 2016 CSE meeting and she believed that was the recommendation of the CSE; however, she was unsure of the final recommendation when she received the IEP in August 2016 recommending a 12:1+1 special class (Tr. pp. 1198, 1230-31, 1286-88, 1297-98, 1300-01). The hearing record reflects that the district attempted to correct the June 2016 IEP during the resolution session, but the evidence is far from clear that the district actually provided the corrected IEP to the parent within the resolution period. While district personnel may have had every intention of carrying out its plan to fix the student's IEP as discussed at the resolution session, R.E. is very clear that "[i]f a school district makes a good faith error and omits a necessary provision, they have thirty days after the parents' complaint to remedy the error without penalty" (R.E., 694 F.3d at 188). Therefore, according to the Second Circuit's holding in R.E., the district is precluded from relying on a corrected IEP that recommended a 15:1+1 special class that appears to have been rehabilitated after the close of the thirty-day resolution period, and the penalty that the Second Circuit spoke of is that the district is required to defend the June 2016 IEP that recommended a 12:1+1 special class (see id.).[10]

Inasmuch as the district has offered no proof that a 12:1+1 special class was available at the proposed school site, I am constrained to find that the district was not able to implement the student's program at the start of the 2016-17 school year (M.O. v. New York City Dep't. of Educ.,

[10] In this case, it appears that the rehabilitated IEP was completed a day after the resolution period ended and it was mailed to the parents. If the rule in R.E. was not intended to be strictly applied, the parties must be prepared to argue and the IHO must decide how many days after the resolution period must elapse before it is proper to apply the rule prohibiting retrospective evidence to rehabilitate IEPs.

793 F.3d 236, 244 [2d Cir. 2015] [holding it is not speculative to find that an IEP cannot be implemented at a proposed school that lacks the services required by the IEP]; R.E., 694 F.3d at 187, 188 [holding testimony that materially alters the written plan is not permitted]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [school districts do not have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements][quotations omitted]); and therefore, the district failed to offer the student a FAPE.

Having determined that the district failed to offer the student a FAPE, it is unnecessary to consider the parent's remaining claims. However, because there has been virtually no state administrative or reported court cases applying R.E. that address to the outer boundaries of a district's ability to modify an IEP using the resolution process in the manner described above, out of an abundance of caution, I will address the parent's claims relative to the CSE process and to the appropriateness of the CSE's recommendations in the form of alternative findings below.

B. June 9, 2016 IEP Claims

1. Predetermination

The parent alleges that the district predetermined the student's program by basing its recommendations on the class sizes it had available, rather than on the student's needs. The parent also claims that district employees testified to meeting with the district's PPS director in advance of the June 9, 2016 CSE meeting. The IHO found that the district did not predetermine the student's program.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco v. Bd. of Educ. Of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The hearing record supports the IHO's determination. The district special education teacher, who participated in the June 2016 CSE meeting, described in detail how the CSE reviewed the student's present levels of educational performance (PLEPs), annual goals, accommodations, and modifications during the CSE meeting (Tr. pp. 416-66). The special education teacher testified that the program offered was appropriate based on the discussion during the June 2016 CSE meeting, the information reviewed and considered, and the input received from the parent (Tr. pp. 476-77). The parent testified that she objected to a class ratio of 12:1, believing that 12 students did not represent a small class (Tr. p. 1228).

The parents claim that a 15:1+1 was predetermined because it was the program that was available more squarely confronts the issue of selecting a placement based on available resources, addressed more fully below in the special class placement analysis. Labeling the special class placement decision by the CSE as predetermination would require a finding that the CSE was unwilling to engage with the parent during the CSE meeting. The evidence shows that there were a number of topics that the CSE did not happen to discuss, but that it did try to engage the parent's concern about class size.[11] According to the parent, she requested a smaller class, and was advised by the PPS director that there was a class with a maximum of eight students available, but the PPS director also explained that it would not be socially appropriate for the student (id.).[12] The PPS director explained that the continuum of services available in the district's middle school included the recommended 15:1+1 special class, an 8:1+2 special class, integrated co-taught classes, a resource room, and consultant teacher (Tr. p. 207-08). The PPS director testified that the 8:1+2 special class was not discussed as a possibility for the student at the June 2016 CSE meeting, because it was not deemed academically or socially appropriate for the student (Tr. p. 206-08). The PPS director stated that looking at the student's profile academically and socially the classes of 15 were more appropriate than a class of eight and that the smallest class available that could meet the student's academic and social needs was the 15:1+1 special class (Tr. pp. 207-08). He testified that part of the rationale behind the district's recommendation for a 15:1+1 special class was that the student to teacher ratio in the 15:1+1 special class was similar to the student to teacher ratio in the student's classes at Eagle Hill (Tr. pp. 367-68). Further, the PPS director stated that there was no discussion of the student attending any other middle school because the assigned middle school with the program recommendations was deemed to be the most appropriate program in the least restrictive environment (Tr. p. 407; see Tr. pp. 114-15).

Moreover, the district's recommendation did not consist solely of placement in a 15:1+1 special class. To the extent that the parent argues the student was placed in a 15:1+1 special class because it was the only class the district had available, a review of the June 2016 IEP shows that in addition to the 15:1+1 special class for academic subjects, the CSE recommended the student for a 12:1 special class for skills instruction and a 5:1 special class for reading (Dist. Ex. 2 at p. 1). The PPS director indicated that not all students in the 15:1+1 class were recommended for the skills class or reading class (Tr. pp. 111-12; see Tr. pp. 232-33, 471).

Although the June 2016 IEP included the same parent concerns as those included on the student's IEP for the prior school year (compare Parent Ex. B at pp. 10-12, with Parent Ex. M at pp. 7-9), the hearing record indicates that the CSE took other steps to address some of the parent's concerns. For example, the CSE added a session of individual counseling per week to address the parent's concerns regarding the student's social/emotional needs (Tr. pp. 174-75, 208-09, 767-69, 1232-33). The PPS director also testified that the district created the 5:1 reading program for 6th and 7th grade because the district saw a need for it with several student's, including the student, "in

[11] While district staff testified that the CSE relied on information provided by Eagle Hill to develop the student's June 2016 IEP, the PPS director testified that there were portions of the student's IEP and the CSE recommendations that were not discussed at the CSE meeting (Tr. pp. 121-23, 184, 170, 172-73, 204, 226, 320).

[12] State regulations regarding class size state that "[t]he maximum class size for special classes containing students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention, shall not exceed eight students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][ii][b]).

mind," but the relevance of that particular statement is of lesser weight because while connected to the student's needs, it is not clearly connected to the CSE's decision making for the 2016-17 school year (Tr. pp. 233-34).

Regarding the "briefing" meeting, district staff explained that prior to the June 2016 CSE meeting the district members of the CSE participated in a "very brief" five to ten minute meeting during which the PPS director gave a short summary of the student's case; discussed her current needs, and that she may return to the school after being parentally placed during the 2015-16 school year (Tr. pp. 484-86, 633-34, 761-63). The special education teacher noted that the group did not prepare any documents at the "briefing" meeting (Tr. p. 487). A premeeting of school district personnel as a preparatory activity in order to discuss educational programs does not itself violate the IDEA even when the parents and school district later disagree about the appropriate educational programming (T.P., 554 F.3d 247, 253). Although, the evidence in the hearing record revealed that the parent disagreed with the district's ultimate recommendations of the CSE in terms of the special class size available in the district, it does not demonstrate evidence of predetermination in the sense that the district was unwilling to engage the parent's concerns at the CSE meeting or that the district's activities interfered with the parent's participation in the CSE process. Accordingly, I find insufficient basis to disturb the IHO's decision in favor of the district on this ground.

2. Sufficiency of Evaluative Information

The parent also argues that the district did not conduct any of its own evaluations prior to the June 2016 CSE meeting. New York State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

While the district itself did not conduct any new evaluations of the student during the 2015-16 school year, the June 2016 CSE had available the following private evaluations and updated information before it: a June 2016 teacher report (from Eagle Hill) which included information

regarding social interaction, learning style, metacognition, classroom performance, and levels of support needed in academic areas of study (Parent Ex. L); a March 2016 neuropsychological evaluation report which included neurobehavioral observations and mental status, neurocognitive findings (language, visuo-spatial and visuo-motor, executive control), academic status, and social-emotional functioning (Parent Ex. K); a March 2015 social history update which reviewed the student's family, social, and medical history (Parent Ex. I); a January 2015 OT reevaluation report which included information regarding visual-motor integration, visual perception, and motor coordination (Parent Ex. H); a May 2014 speech-language evaluation report which included information in the areas of oral-peripheral mechanism, voice and fluency, articulation, and language (receptive, expressive, content, and memory) (Parent Ex. F); and a March 2014 auditory-language processing evaluation report which included information regarding receptive vocabulary, expressive vocabulary, word discrimination, phonological segmentation and blending, number/word/sentence memory, auditory comprehension and reasoning, content memory, and following directions (Parent Ex. E; see Dist. Ex. 2 at p. 3;). Also available to the June 2016 CSE were an April 2016 Huntington Learning Center report and a December 2014 psychoeducational reevaluation; however, these reports were not included in the hearing record (Dist. Ex. 2 at p. 3).

In response to the allegation that the district failed to appropriately evaluate the student, the PPS director stated that it was not a reevaluation year for the student, so a full evaluation was not required (Tr. p. 116). The PPS director explained that the CSE relied on Eagle Hill staff to take the committee through the reports the private school had submitted and that a lot of the discussion at the June 2016 CSE meeting was from staff that had worked with the student during the 2015-16 school year (Tr. pp. 82-83). The PPS director further noted that the June 2016 CSE discussed "a lot of information" about the student including the two private neuropsychological evaluations and information from Eagle Hill (Tr. p. 116; see Parent Exs. J at pp. 1-13; K at pp. 1-10; L at pp. 1-20). In addition, the PPS director reported that the CSE worked off of a draft of the student's 2015-16 IEP (Tr. pp. 87-88).

The parent argues that the district failed to appropriately evaluate the student in the areas of OT and assistive technology and failed to discuss the student's assistive technology service recommendations at the CSE meeting. With respect to OT, the hearing record shows that the student's visual perception and motor coordination, as well as her visual motor integration, were assessed formally by a district occupational therapist in January 2015 (Parent Ex. H). The resultant report indicated that the student had some difficulty organizing written material, continued to have slight difficulties with visual perception, worked slower than her peers, did not stabilize her paper automatically, often slumped down in her chair, and was often distracted by her surroundings and had difficulty maintaining her focus (Parent Ex. H at p. 2). The PPS director testified that the CSE resolved to continue the student's goals from the previous IEP, because the student did not receive OT services from Eagle Hill during the 2015-16 school year and without any documentation to warrant a change, the CSE and district staff familiar with the student believed it was "a good place to start" (Tr. pp. 100-01, 196). The district OT, who had previously worked with the student, noted that she was able to glean some information with respect to the student's writing and keyboard abilities, as well as her need for adult assistance from the report generated by Eagle Hill (Tr. p. 614). The PPS director testified that he did not recall much input from the Eagle Hill staff regarding OT (Tr. p. 102). The PPS director added that the committee did not feel it needed additional information to justify continuing OT as a related service and that when the student

returned to the middle school the district could reassess the student's needs "based on the day-to-day in the classroom" to see if the student continued to require the services (Tr. pp. 190, 195).

Regarding assistive technology, the parent testified that the district never conducted an assistive technology evaluation and never informed her of what services were going to be recommended for assistive technology (Tr. pp. 1247-48). In addition, the PPS director testified that technology used in the home or at Eagle Hill was not discussed at the June 2016 CSE meeting (Tr. p. 173). As noted above the June 2016 CSE had available a March 2014 auditory-language processing evaluation which among other things recommended use of an FM system and preferential seating for the student (Dist. Ex. 2 at p. 3; Parent Ex. E at pp. 15, 16). The PPS director testified that the June 2016 CSE discussed the student's use of an FM system recommended by an audiologist in March 2014, but the parent reported that an FM system had not been necessary at Eagle Hill due to the way the student's environment was set up (Tr. pp. 105, 205, 1255-56; see Parent Ex. E at p. 15). However, according to the parent, the PPS director stated that the student would have access to an FM system when she returned to the district, because the set up was not the same (Tr. p. 1256). The PPS director noted that adaptive seating in the form of a standup desk was also recommended by the CSE, but acknowledged that there was not "a lot of conversation at the meeting regarding these two specifics" (FM system and adaptive seating) (Tr. p. 105). The special education teacher recalled that at the June 2016 CSE meeting the committee discussed the student's use of a Chromebook, while in the district, to help her with her writing (Tr. p. 506). The special education teacher further recalled that the CSE discussed the student's use of technology at Eagle Hill as a way of recording her responses in writing and helping her to "get her thoughts across" (Tr. pp. 506-08). Moreover, the parent acknowledged that assistive technology was discussed and she confirmed that the student would receive a Chromebook and that she was able to share her concerns about supportive (software) programs for the student during the CSE meeting (Tr. p. 1247). She testified that the PPS director stated that the district could conduct an assistive technology evaluation to evaluate which programs would help the student (id.).[13] According to the PPS director, the CSE discussed conducting an assistive technology evaluation when the student returned to the middle school (Tr. pp. 105-06). He opined that it was best to assess the student in the setting where the assistive technology would be utilized as there was "a lot of trial and error that goes into the assistive tech to see what works" (id.). Based on the foregoing, the hearing record does not support the parent's claim that the CSE relied on insufficient evaluative information when developing the student's IEP for the 2016-17 school year.

3. Present Levels of Performance

Next the parent argues that the PLEPs included in the June 2016 IEP were taken from the 2015 IEP and failed to reflect the parent's concerns raised at the June 2016 CSE meeting. Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR

[13] Although not convinced of how it would leads to a denial of a FAPE, within their response to the parent's initial DPCN, the district states that the failure to conduct an evaluation or recommend AT services in the home was addressed during the resolution session and was set forth in the June 2016 IEP, which was issued as a result of the resolution session in October 2016; however, a review of this June 2016 IEP, as revised, does not reveal any new information relating to AT evaluations or home services (Dist. Ex. 3 at p. 3; see Dist. Ex. 2).

200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The PPS director testified that the PLEPs listed in the June 2016 IEP were inclusive of some information that carried forward from when the student was in a district school, but also "clearly" took into consideration information from the Eagle Hill staff and the report that was provided (Tr. p. 118; see Dist. Ex. 2 at pp. 6-10). The PPS director explained that, because the student was not in a district building, the June 2016 CSE "really relied on the Eagle Hill team" to report on the student in the areas of reading, writing, math and speech-language and the CSE focused on information provided by the staff working with the student during the 2015-16 school year (Tr. p. 82). The special education teacher that participated in the June 2016 CSE meeting, testified that the entire CSE contributed to the development of the PLEPs section of the IEP, including the staff from Eagle Hill and the parent (Tr. p. 417-19). Notably, the special education teacher who had worked with the student in the 2016 summer reading camp indicated that the student's reading abilities were accurately reported in the PLEPs section of the June 2016 IEP (Tr. p. 683).

While the parent argues that her concerns listed in the June 2016 IEP were carried over from the May 2015 IEP, the reason for carrying them over is apparent the PPS director testified that the parent's concerns were the same at the June 2016 meeting as they were the prior year (compare Dist. Ex 2 at p. 10, with Parent Ex. M at p. 8; Tr. p. 185). The parent also correctly noted that the student's expected grade had not been changed from the 2015 IEP, which the PPS director admitted was an error that was later corrected (Tr. p. 186; see Dist. Ex. 2 at p. 10).

4. Annual Goals

With respect to annual goals, the parent claims that the district failed to develop goals based on the student's needs and failed to discuss OT and counseling goals at the CSE meeting. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The PPS director testified that Eagle Hill had not implemented the 2015-16 IEP and as a result progress reporting was not specific to the student's 2015-16 annual goals (Tr. p. 85). As such, the June 2016 CSE discussed each goal relative to the student's needs and current performance levels and determined goal by goal, whether it needed to continue, be fine-tuned, be changed, or if any goals should be added (Tr. pp. 85-86).

As evidence that the district failed to develop annual goals based on the student's needs, the parent points to the district occupational therapist's testimony that she could not really tell if the goals were appropriate (see Tr. p. 628). However, a closer review of the district occupational therapist's testimony reveals that she had previously noted that Eagle Hill had not provided OT during the 2015-16 school year, that there was not any information in the Eagle Hill reports that indicated that the student had achieved the OT annual goals, and that she did not recall either the parent or Eagle Hill staff having any input regarding the OT annual goals (Tr. pp. 613-14, 624-27). Furthermore, according to the district occupational therapist, during the course of the CSE meeting, Eagle Hill staff commented on skills that the student was unable to perform that were reflected in the student's OT goals, for example the student's ability to copy from the board and her need for assistance to complete various tasks (Tr. p. 654). As indicated above, the PPS director testified that because OT services were not provided during the 2015-16 school year and without any documentation to warrant a change the CSE decided to continue the student's OT goals from the prior school year (Tr. pp. 100-01, 196).

Moreover, a comparison of the annual goals included in the June 2016 IEP with the needs identified by Eagle Hill and included in the PLEPs reveals that the annual goals, often quite specifically, addressed the student's identified needs. For example, to meet the student's needs related to study skills the June 2016 IEP included goals which addressed improving her participation in class discussions, assignment completion, and attention to task during class lessons (compare Dist. Ex. 2 at p. 9, with Dist. Ex. 2 at pp. 11, 12). To address the student's identified needs in reading and writing the June 2016 IEP included annual goals which targeted decoding and encoding multi-syllabic words; reading fluency; comprehension; spelling, as well as writing, revising and editing with attention to capitalization, spelling, and punctuation (compare Dist. Ex. 2 at pp. 6, 7, with Dist. Ex. 2 at pp. 12, 13). Also the June 2016 IEP included annual goals to address the student's identified needs in the area of speech-language, such as, using categorization and association to comprehend and define vocabulary, using auditory comprehension strategies, and using context clues to identify and explain figurative language (compare Dist. Ex. 2 at p. 8, with Dist. Ex. 2 at p. 13). In this case, while there is insufficient information contained within the hearing record to determine if the annual goals related to OT were appropriate for the student to work on during the 2016-17 school year, a review of all of the June 2016 IEP's annual goals shows that, as a whole, they addressed the student's areas of need and did not contribute to a denial of FAPE for the 2016-17 school year (see J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013][finding that the failure to address each of a student's needs by way of an annual goal did not necessarily constitute a failure to offer the student a FAPE]; Tarlowe, 2008 WL 2736027, at *9; see also P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] 526 Fed. App'x 135 [2d Cir. May 21, 2013][noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

5. Transitional Support Services

The parent argues that the district failed to recommend transitional support services for the student. Transitional support services are defined by State regulation as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). In this case the PPS director explained providing transitional support services was not a part of the conversation at the June 2016 CSE meeting (Tr. p. 235). The PPS director surmised that students in the district

would receive transitional support services if they were moving from smaller to a larger recommended class size, however, opined that moving from a 12:1+1 special class to a 15:1+1 special class did not constitute moving to a substantially larger class size (Tr. p. 138). The PPS director also noted that when a student returned or was new to the middle school they would have opportunities to meet with guidance counselors and the school psychologist and receive a tour of the building before they commenced classes (Tr. pp. 137, 235). The PPS director's belief that the student was not transferring to a less restrictive environment is understandable given that the IDEA's principal of restrictiveness is usually focused on whether a student is justifiably removed from the general education setting at all and, if so, the degree to which a student will be otherwise be educated with non-disabled peers in a regular classroom (see Newington, 546 F.3d at 120). This case is not similar to the facts of the A.M. case in which the Second Circuit concluded under State regulation that the CSE was automatically required by operation of New York law to place transition support services on the IEP of a student with autism when transferring from a private to a public school (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 540 [2d Cir. 2017]). The parent argues that the classes in Eagle Hill were smaller, but there is no general educational policy that has been established in New York thus far supporting a position that interprets smaller special class ratios as more restrictive than larger special class ratios (i.e. 4:1 versus 15:1). Even if the district may have been required to include transitional support services on the student's IEP under such a policy, the parent does not prevail on this issue as the hearing record presents no justification why the absence of such services in the IEP was so significant as to deny the student a FAPE in this case (R.E., 694 F.3d at 195).

6. Reading Program, Methodology

The parent argues that the district's proposed program failed to provide the level of reading intervention the student required. Specifically, the parent contends that the district failed to recommend a program based on peer-reviewed research including Orton-Gillingham-based approaches and failed to include those recommendations on the June 2016 IEP. The parent further argues that the district did not present any evidence that its multi-sensory programs were based on peer-reviewed research.

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]). The parents point to a recent Second Circuit case in which the Court ruled in favor of a parent who challenged lack of methodology in an IEP. The Court stated in that case that "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, and the CSE did not sufficiently explain why the

recommended program would be appropriate absent the designation of that methodology on the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017]).

Again, this case is unlike A.M. as there is no evidence in the hearing record suggesting that there was a clear consensus that the student's reading instruction should be limited to one particular methodology to the exclusion of other approaches, and the district explained how it reached its decision.

The parent testified that she asked for an explanation of the recommended reading program at the June 2016 CSE meeting, wanting to know "if it would be [an] Orton-Gillingham-based…systematic program like… Eagle Hill" (Tr. p. 1237). The parent testified that she was told the reading program was an eclectic mix of reading programs, which she understood to mean that it did not have to be an Orton-Gillingham program that was systematic and sequential (Tr. pp. 1237-38). The parent described the student's reading program at Eagle Hill as intense not only because of methodology, but because it was separated into two different blocks and the student needed more reading instruction than the district had recommended for the 2016-17 school year (Tr. pp. 1239-40, 1269). The parent stated that she asked for Orton-Gillingham methodology at the June 2016 CSE meeting because the student was making progress and she knew the program worked (Tr. pp. 1237, 1261). However, the parent's private evaluator did not recommend a specific reading methodology in either the March 2015 or April 2016 neuropsychological evaluation reports (see Parent Exs. J; K). The parent advocate from Eagle Hill indicated that the Eagle Hill program is Orton-Gillingham-based because it follows the tenets of effective teaching promoted by the International Dyslexia Association (IDA) (Tr. pp. 843-50, 1003-08; Parent Ex. Z). She stated that the Eagle Hill program, "addresse[d] all of the modes, right from phonology all the way up to semantics,…and the big part is…structured literacy…making sure that you have that explicit and sequential and cumulative nature of the program" (Tr. pp. 843-850, 1003-08; Parent Ex. Z). However, she also indicated that Eagle Hill does not use one methodology exclusively (Tr. pp. 1103-06; see Tr. pp. 944-45; Parent Ex. L at p. 2).

There was no evidence of any information before the CSE that the student's IEP should be limited to a specific methodology in order to receive educational benefit. The PPS director agreed that the parent had continually asked for a specific methodology to be placed on the IEP; however, he opined "there is not one methodology that would work for her, so we haven't always said this is the be all and end all" (Tr. pp. 176-77). According to the PPS director, the June 2016 CSE discussed the recommended 5:1 multi-sensory reading program which utilized principles of different methodologies in an eclectic approach, "pulling from all that work, the principles of Orton-Gillingham approaches, Wilson, that's what's being done in the middle school" (Tr. pp. 132-33, 176-77, 231-34). A district special education teacher described her understanding of how the 5:1 reading class operated in the middle school, stating that it is "kind of an eclectic mix of multi-sensory teaching techniques. It is individualized so each student based on need works in a multi-sensory way to learn their phonics" (Tr. pp. 469-70). The special education teacher testified that the reading teacher communicates with the student's special class academic teachers and reading goals are applied in content area classes as well (Tr. pp. 471-73). The special education teacher and district speech-language therapist did not recall any specific methodologies being discussed at the June 2016 CSE meeting, other than a multi-sensory approach (Tr. pp. 494-95, 547-48, 802-04).

The district's reading teacher described the small multi-sensory phonemic awareness reading class of no more than five students recommended by the June 2016 CSE (Tr. pp. 662-63). The reading teacher testified that the proposed program was individualized for each student, with frequent assessment to guide instruction, such as an oral reading fluency test, Wilson-controlled text, and a running record (Tr. pp. 663-63). The focus of the class was on encoding and decoding, sight word recognition, and "a little bit of reading" comprehension and fluency (Tr. pp. 662, 674-78). The reading teacher testified that she incorporated multisensory instruction, and utilized methodology from the Wilson, Preventing Academic Failure, and Orton-Gillingham programs (Tr. pp. 665-66, 670-73, 678-81). The parent advocate form Eagle Hill agreed that Wilson and Preventing Academic Failure were Orton-Gillingham based programs that followed the Orton-Gillingham methodology (Tr. pp. 944-45).

In this case, the evidence shows that the recommended reading program incorporated elements of several methodologies and was tailored to address the student's particular needs. The student's IEP indicated that she "benefitted from a multisensory approach to phonics" and "should continue her advanced phonics study integrating multi-sensory approach utilizing all modalities" (Dist. Ex. 2 at p. 6). The IEP also included a program modification/accommodation recommendation for a "multi-sensory approach" and noted that "to aid in understanding of lessons and concepts" the student required additional modalities to comprehend material (Dist. Ex. 2 at p. 16).

C. 15:1 Special Class Placement

The parent argues that the district's recommended placement was inappropriate and specifically that the 15:1+1 special class for English, social studies, science, and math was too large for the student to make progress.

Initially, the hearing record is not clear as to why the CSE recommended a 15:1+1 special class, a special class placement that is not specifically listed on the continuum of services identified in State regulations (8 NYCRR 200.6).[14] The PPS director testified that the 12:1+1 class size ratio was an error and the correct student to teacher ratio was 15:1+1 because going from sixth to seventh grade "the classes are going to be 15:1:1" (Tr. pp. 76, 109-10). When asked why the district recommended a 15:1+1 special class for the student, which had a larger overall number of students than the classes that the student had been attending during the 2015-16 school year at Eagle Hill; he stated that information from Eagle Hill reports indicated that the student to teacher ratio for their classes in science were 9:1, 8:1, 10:1; and that he felt that the district 15:1+1 was similar (Tr. pp. 367-68, 379-80). The June 2016 Eagle Hill progress report reveals that the student was in a math class with five students, a writing class of six students, a science class of 11 students, and a literature class of seven (Parent Ex. L at pp. 6, 10, 13, 15). The PPS director noted that within a district 15:1+1 special class there is a special education teacher and a certified teaching

[14] Under certain circumstances, including "parental notification and written notice to the commissioner which sufficiently demonstrates educational justification and consistency with continuing an appropriate education for all children affected," school districts may exceed class size standards by 20 percent for the remainder of the school year (8 NYCRR 200.6[h][6][i]). According to State guidance, the maximum class size using a variance by notification of a 12:1+1 special class would be a 15:1+1 special class ("Special Class Size Variance by Notification for Middle and Secondary Students," [Oct. 2001], available at http://www.p12.nysed.gov/specialed/publications/qa/classvariance.pdf).

assistant and so the CSE looked at the ratio as being "really 7.5:1", and that when he looked at some of the Eagle Hill ratios he did not feel the district was "that far off" the ratios that were in place at Eagle Hill at the time of the June 2016 CSE meeting (Tr. p. 120). The special education teacher testified that she explained at the June 2016 CSE meeting that the 15:1+1 class is often broken down into smaller groups because there is a teacher and a certified teaching assistant in the classroom (Tr. p. 467).

The evidence in hearing record does not clarify whether the CSE, in recommending a 15:1+1 special class for the student for academics, believed the student's management needs interfered with the instructional process to the extent an additional adult was needed in the classroom, or whether the additional staff was not needed for management need purposes and was merely added by the district in order to enhance the learning experience for all of the students within the class. The significance of that distinction is found in State regulation, which provides that "[t]he maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist with the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).[15] However, according to State regulation, a 15:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school" (8 NYCRR 200.6[h][4]). At the very least, the district has not established compliance with the regulations governing special class ratios, however, having already determined that the district denied the student a FAPE because it could not implement a 12:1+1 special class for academics, the class listed on the student's IEP, rather than delving into the unanswerable questions concerning the district's unclear reasoning behind the change from a 12:1+1 class size ratio to a 15:1+1 class size ratio and whether it was permissible under State regulations, I will offer an analysis of the I will turn to the remaining substantive question of whether a 15:1+1 special class for academics viewed as a whole with the supports available in the class and throughout the rest of the IEP, was reasonably calculated to enable the child to make progress appropriate in light of her circumstances (Endrew F., 137 S. Ct. 988, 1002).

The June 2016 IEP identified the student's needs, as detailed within the June 2016 Eagle Hill progress report and the April 2016 neuropsychological evaluation report, in the areas of reading (decoding, comprehension, cause and effect), writing (expanding production, spelling, grammar), math (multi-step problems, operations), executive functioning (attention, higher order thinking, abstract language skills, working memory, organizational skills), speech and language (expressive vocabulary, auditory memory, language processing), social development (communicative and social skills), and physical development (visual/perceptual skills, motor coordination, graphomotor skills, endurance for task completion) (Dist. Ex. 2 at pp. 6-10 ; see

[15] State regulation defines "management needs" as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's "management needs" shall be determined by factors which related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (see 8 NYCRR 200.1[ww][3][i][a]-[d]).

Parent Ex. K at pp. 2-4; L at pp. 2-18). In addition, the June 2016 IEP indicated that, according to Eagle Hill staff, the student benefitted from a highly structured academic setting with prompting, repetition, language broken down, encouragement to be more internally motivated, and strategies for task completion (Dist. Ex. 2 at p. 9).

The proposed revision to the June 2016 IEP, that was made after the close of the resolution period,[16] recommended that the student be placed in a 15:1+1 special class for English, social studies, science, and math (Dist. Ex. 2 at p. 1). The PPS director stated that the 15:1+1 special class had a certified teaching assistant who could provide instruction to the students under the supervision of a special education teacher (Tr. p. 121). The special education teacher added that at the June 2016 CSE meeting she described how the 15:1+1 special class operated, and that because the class had a certified teaching assistant, the class was often broken down in smaller groups and that there could be different stations or parallel teaching (Tr. p. 467). The special education teacher also noted that she and the certified teaching assistant would switch back and forth based on the needs and based on the day (Tr. 468).

In addition to the 15:1+1 special class, the June 2016 IEP also recommended the student for a 12:1 special class for skills instruction for three 42-minute sessions per six-day cycle (Dist. Ex. 2 at p. 1). According to the PPS director this class was appropriate for the student because it provided her opportunities for the pre-teaching and reviewing of information with one of her special education teachers (Tr. pp. 111-12). The PPS director also noted that although the group could be as large as 12, it was usually smaller because not every student was recommended to have the skills class (Tr. p. 112). The special education teacher further elaborated and explained that the skills class was a time when a teacher could individualize teaching (Tr. p. 473). The special education teacher noted that for the student it would mean preview and review of content material which would build confidence and help keep skills intact (Tr. pp. 473-74). The special education teacher explained that the skills class included planned lessons, a review of skills, and could include lessons to address "struggles" that arose in math that day (Tr. p. 474). The special education teacher stated that the purpose of the skills class was to make sure that IEP goals were being met and to help the student with any of her needs (Tr. p. 474).

In addition, the June 2016 IEP provided a daily 5:1 special class for reading (Dist. Ex. 2 at p. 1). The PPS director noted that he shared, at the June 2016 CSE meeting, that the reading class was a multi-sensory approach which pulled principles from Wilson and Orton-Gillingham (Tr. p. 177). The special education teacher added that the 5:1 special class reading was "kind of an eclectic mix of multi-sensory teaching techniques" and was individualized for each student to learn phonics, in a multi-sensory way (Tr. p. 470). The district reading teacher stated that the multi-sensory instruction included use of letter, syllable, and word cards which students used to create words; use of a SMART board to "tactically kind of move parts of words around syllables to create a whole word"; and use of a magnetic board (Tr. p. 670). The reading teacher noted that the reading class included instruction in decoding, encoding, fluency, and comprehension (Tr. pp. 674-77). According to the reading teacher, instruction included working one-on-one, together as a group, and independently once there was a level of success (Tr. p. 675). The district speech-language

[16] For purposes of the remainder of this section of the analysis, I continue to refer to the June IEP, but as modified after the resolution session concluded.

pathologist stated that she, the reading class instructor, and the skills class instructor were members of the same teaching team and were in constant communication (Tr. pp. 754-55).

The PPS director acknowledged that the two 40-minute sessions in reading the student was receiving at Eagle Hill "worked for her;" however, he noted that in addition to the one session the student would have received at the district, she would have also had intensive special education reading support in English class and social studies (Tr. p. 368). The PPS director further opined that there was "a lot more reading that goes on in the day" and that what might be twice a day at Eagle Hill was going on throughout the day at the middle school (Tr. pp. 368-69). According to the special education teacher reading was expected in social studies, math, and science; and annual goals for reading were also applied in the content areas since reading was a part of every class (Tr. p. 473). The special education teacher further explained that in literature class the students would be reading a novel, working on vocabulary, and writing; and that typically the class was broken down into smaller groups so that instruction would happen in a small group setting (Tr. p. 472).

In addition to the above classes the June 2016 IEP included two 42-minute sessions of OT per week in a group of five and four motor skills annual goals to address her needs regarding visual/perceptual skills, motor coordination, graphomotor skills, and endurance for task completion (Dist. 2 at pp. 1, 14). To address the student's speech and language needs the June 2016 IEP included, two 42-minute sessions of speech-language therapy per week in a group of five, one 42-minute session of speech-language therapy per week in a group of two, and five annual goals to address the student's needs in expressive vocabulary, auditory memory, and language processing (id. at pp. 1, 13, 14). The June 2016 IEP also included the recommendation of one 42-minute session of counseling per week in a group of five and one 42-minute session of individual counseling per week along with two social/emotional/behavioral annual goals to address the student's attentional and social needs (Parent Ex. B at p. 2).

The June 2016 IEP also included a number of accommodations and environmental and human or material resources to support the student, including: additional processing time, special seating, refocusing and redirection, checks for understanding, assignments broken into smaller components, organizational and visual support, multi-sensory approach, graphic organizers, positive reinforcement, cues for expected behavior, multiplication table, access to computer, copy of class notes, reteaching of materials, highlighted work, adaptive seating, and an FM system (Dist. Ex. 2 at pp. 15-16).

A review of the he June 2016 Eagle Hill progress report provides information regarding the level of support the student required during the 2015-16 school year (Parent Ex. L at pp. 2-16). The progress report lists specific skills in the academic areas of reading, writing, study skills, math, technology, general science, and literature and includes three levels to rate the student's need for support; "independently applies skills", "guidance needed to apply skills", and "direct instruction required" (Parent Ex. L at pp. 2-16). The 2016 progress report identifies approximately 80 individual skills in which the student independently applied the skill, approximately 100 individual skills in which the student needed guidance to apply the skill, and only 16 individual skills in which the student required direct instruction (id.). The level of direct instruction the student required appears to be related to the academic skill being taught, (see Parent Ex. L at pp. 2-16). For example, the progress report indicated that the student required direct instruction in 9 skills related to reading and spelling (Tutorial – class ratio 4:1) but only two skills related to active learning (Science – class ratio 11:1) (Parent Ex. L at pp. 2-5, 13). Accordingly, the student's need

for a smaller class ratio relates more to the student's needs within a particular subject area, with reading being the area in which the student required the most support.

The April 2016 neuropsychological evaluation report included recommendations such as; continued language therapy, a number of specific academic learning strategies, as well as continuation at Eagle Hill; but the April 2016 neuropsychological evaluation report does not make any recommendations regarding class size or additional adult support (Parent Ex. K at pp. 6-7). In addition, the Eagle Hill June 2016 progress report does not include a class size recommendation and reveals that during the 2015-16 school year the student was in academic classes with ratios from 5:1 to 11:1 (Parent Ex. L at pp. 1-20). The special education teacher stated that she did not remember Eagle Hill staff bringing up that the student needed small group class instruction, yet she noted that she was sure it was discussed since the district was recommending a small class and the student had been in small classes during the current year (Tr. p. 603). Based on the evidence above, I find that the recommendation of a 15:1+1 special class, along with the 12:1 skills class and 5:1 reading class, along with the related services of speech-language therapy, occupational therapy and counseling, provided support that was less than what the parent perceived as ideal, but it was reasonably calculated to enable the student to make progress appropriate in light of her circumstances.

To be clear however, notwithstanding that there were no defects in the June 2016 IEP that would lead to a denial of a FAPE as it stood when revised after the resolution period, these are merely alternative findings, because, as described above, the district failed to provide the parent with a revised IEP recommending the 15:1+1 special class, as well as prior written notice within the resolution period as required by R.E. Consequently, the district failed to offer the student a FAPE for the 2016-17 school year and I will turn next to Eagle Hill.

D. Appropriateness of the Unilateral Placement

Having concluded that the district failed to offer the student a FAPE for the 2016-17 school year, the next inquiry is whether the parents met their burden to establish that Eagle Hill was an appropriate unilateral placement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether

the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "[e]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

According to information provided by the parent, Eagle Hill enrolls 255 students, ages five to fifteen, with teacher to student ratios ranging from 1:1 to 1:12 (Parent Ex. O at pp. 3-4). A parent advocate/admissions assistant from Eagle Hill described the school as "an independent school for children with significant language-based difficulties," with the mission of remediating the language-based difficulties and helping students "develop the self-awareness and self-advocacy skills that they need to navigate the world given those language-based learning difficulties" (Tr. p. 858; see Parent Ex. O).

The student attended Eagle Hill during the 2015-16 school year (Parent Ex. L at p. 19). The parent contends that the student's progress at Eagle Hill during the 2015-16 school year is an indication that the decision to continue the student's placement at Eagle Hill for the 2016-17 school year was appropriate. The district states that the student made "absolutely no progress in math or in writing and made minimal progress in reading during the 2015-16 school year."

Initially, I note that until now parties have, more often disputed the amount of progress a student has made during the particular school year in dispute, which in this case would be the 2016-17 school year. In this regard, the student's progress at Eagle Hill is certainly a factor to be considered, but a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C. 2013 WL 563377, at 9-10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

As noted above, " 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364). Past progress is a relevant area of inquiry, regardless of whether one is assessing the substantive adequacy of a district's or a parent's placement of a student. When assessing past progress of a district placement it has been said that "[a]lthough past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H., 2011 WL 6108523, at *10, citing Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]). Similarly, if a student is in a unilateral placement during one school year (i.e. the 2015-16 school year), and fails to make progress, the parent should be prepared to explain at an impartial hearing how the special education programming was modified or why it would be otherwise reasonable to continue such programing in a subsequent school year (i.e. the 2016-17 school year). Consequently, the assessment of the student's past progress and Eagle Hill's reaction to the student's progress is relevant area of inquiry in this case, due to her multi-year placement there.

With regard to the school year preceding the one currently in dispute, a June 2016 report completed by the student's educational advisor at Eagle Hill indicated that the student had made steady progress both academically and socially during the 2015-16 school year (Parent Ex. L at p. 1). According to the report, the student had adjusted well to Eagle Hill, made friendships, and displayed increased confidence (id.). It was noted that the student tended to be passive and unsure of how to problem-solve conflict situations in class and that she benefitted from time to process and problem-solve with a trusted adult (id.). The June 2016 Eagle Hill progress report indicated

the level of support the student required during the 2015-16 school year; however, it did not include any measures of academic progress (id. at pp. 2-16). Academically, the report indicated that the student benefitted from the highly structured classes, predictable routines, language scaffolding, and consistent repetition of information at Eagle Hill (id. at p. 1). The student required frequent questioning and regular checks for understanding from teachers to ensure she was comprehending directions and material (id.). According to the progress report, the student also benefitted when language was broken down into manageable parts and visuals were provided to assist in comprehension of material (id.).

The parent testified that the Eagle Hill speech-language pathologist reported on the student's progress at the June 2016 CSE meeting (Tr. pp. 1257-58). The parent advocate stated that she had spoken to the student's teachers and speech-language pathologist during the 2016-17 school year and they reported that the student had become more comfortable at Eagle Hill and had made gains (Tr. pp. 921-26). The parent indicated that when she attended parent-teacher conferences in December 2016, she was given the overall impression that the student was making progress (Tr. pp. 1449-51).

The hearing record also includes some objective measures of the student's progress at Eagle Hill during the 2015-16 school year, such as pre and post testing using the Gray Oral Reading Test-Fifth Edition(GORT-5) and the Slosson Oral Reading Test (SORT) (Parent Ex. L at p. 20; Tr. pp. 954-56). According to the GORT-5 test results compiled by Eagle Hill, the student's reading rate was at the 16th percentile when assessed in fall 2015 and remained at the 16th percentile in spring 2016; reading accuracy was at the 37th percentile in fall 2015 and increased to the 50th percentile in spring 2016; reading fluency was at the 25th percentile in fall 2015 and remained at the 25th percentile in spring 2016 and reading comprehension was at the 5th percentile in fall 2016 and increased to the 25th percentile in spring 2016 (Parent Ex. L at p. 20). As measured by the SORT, the student's ability to read sight words in isolation moved from a standard score of 95 to a standard score of 97 between fall 2015 and spring 2016 (Parent Ex. L at p. 20). In comparing the student's progress between the time of the March 2015 and April 2016 neuropsychological evaluations, the private neuropsychologist noted some improvement in the student's word finding, reading comprehension, and decoding, but no improvement in her writing or mathematical skills (Tr. pp. 1139-41, 1146, 1404-05; Parent Ex. K at p. 5). The parent testified that she was seeing progress in the student's reading and language skills, such as picking up on nuances and understanding idioms (Tr. pp. 1201-02). The parent also stated that Eagle Hill staff reported on the student's reading progress during the June 2016 CSE meeting (Tr. pp. 1224-25). Overall, the evidence presented above shows that, contrary to the district's view, the student was making progress during the 2015-16 school year. Additionally, the evidence does not suggest that continuing the student's programming in a similar fashion at Eagle Hill for the 2016-17 school year would be an unreasonable approach for the parents and Eagle Hill staff to adopt.

To this end, with respect to the program at Eagle Hill, the parent advocate testified that the school carefully determines where a child is functioning academically in terms of reading, writing, math, and language, and then tailors the program to instruct the student at that level (Tr. p. 869). The parent advocate gave examples of support provided to students throughout the day at Eagle Hill, including a homeroom period where students meet with an advisor who checks in with them and gets them ready for the day, staff being present during lunch and nonacademic periods to assist students' with language pragmatics, and a study hall at the end of the day during which students' homework is monitored and any difficulties are reported to advisors and classroom teachers (Tr.

pp. 870-72, 877-79, 916-19). The parent advocate also described a "callback" period at Eagle Hill as "an open period that allows for even further individualization of the program," when teachers can call the student back to provide additional instruction in an area where she is having trouble (Tr. pp. 916-17). According to the parent advocate, Eagle Hill has an OT consultant that meets with staff to determine how to integrate OT support into the program, but the OT does not work directly with students (Tr. p. 865). The Eagle Hill progress report indicates that the school provided the student with pull-out services in addition to collaborative services through communication with classroom teachers and the presence of a speech-language pathologist in classes when appropriate (Parent Ex. L at p. 17; Tr. p. 919).

As noted previously, according to the March 2015 and April 2016 private neuropsychological evaluations, the student exhibited needs in the following areas: overall cognitive functioning, primary language and higher order skills (i.e. reduced vocabulary, difficulty with abstraction of language), processing speed, retention, attention, reading, decoding and comprehension, mathematical skills, spelling and writing skills, and social skills (Tr. pp. 1091-93; 1098; Parent Exs. J at pp. 5-7; K at p. 5). The parent advocate, who was familiar with the student from meeting with her, observing her in class, and through discussions with her teacher and advisor, stated that the student needed remediation in language, reading, writing, and math (Tr. pp. 888, 901-04).

To address the student's language needs at Eagle Hill during the 2016-17 school year, the parent and parent advocate stated that the student received speech-language services in a small group (2:1) once a week and the speech-language therapist pushed-into her literature class once a week (Tr. pp. 919-21, 1257; Parent Ex. L at p. 17). The parent advocate explained the Eagle Hill program is language-based, meaning "it's recognized that these are children who have difficulty with language, so everything is meant to really support a child who has a challenge with that" (Tr. p. 869). In addition, the parent advocate stated that there is "attention in every moment of the day to a child's language needs", such as providing scaffolding and modeling to help support the child in the classroom, as well as support in non-academic periods of the day, such as having a teacher at every table in the dining hall to monitor and facilitate conversation as needed (Tr. p. 870). Speech-language goals listed on the June 2016 Eagle Hill speech and language report addressed the student's expressive and receptive language skills (i.e. improving expressive vocabulary and language organization, improving auditory memory and recall, improving comprehension and language processing) (Parent Ex. L at pp. 17-18; Tr. p. 921). The speech-language therapist noted that the student's ability to follow multi-step directions was enhanced by repetition and breaking down pieces of information into smaller chunks (Parent Ex. L at p. 17). Additionally, she indicated that the student required adult intervention to use auditory memory strategies to retain information, such as paraphrasing and identifying key information in written and orally presented material (Parent Ex. L at p. 18). The parent opined that the student received auditory training across the entire day at Eagle Hill, with staff available to say, "did you hear that right, remember you need to do this", and suggested that this was why the student did not use an FM system at Eagle Hill (Tr. pp. 1499-1500). The parent advocate provided an example of how Eagle Hill met the student's language and self-advocacy needs (Tr. pp. 926-27). She explained that the student's tutorial teacher wanted the student to take the initiative and ask for help, but at the same time did not want to leave the student, who was unsure of what to do, stranded, so the tutorial teacher would prompt the student by saying, "I will wait unless you let me know that you need a hint" (Tr. pp. 926-27).

Regarding the student's needs in reading and writing, the parent advocate testified that the core of the Eagle Hill program is a tutorial class, which she described as "a very small class which really uses the structured language approach to help remediate a child at their current level of reading and writing skills" and the program is based on the tenets of the Orton-Gillingham program (Tr. pp. 858-59). She further explained that the student had two tutorial classes each day that focus on reading and writing (Tr. pp. 905-06; see Parent Ex. P;). The first period tutorial focused on basic skills and the second period involved higher level skills and reading connected text (Tr. pp. 906-07, 1239-40). A description of the student's tutorial class at Eagle Hill indicates that vocabulary development and enrichment, reading comprehension strategies (pre-reading, during reading, and post-reading), independent reading, digital citizenship, and decoding and encoding using the Wilson reading program are all emphasized (Parent Ex. NN). According to the parent, everything is individualized because all of the students placed in a group with the student are working on the same skills the student is working on (Tr. p. 1240). The parent stated that the student's writing was broken down into small pieces because of her difficulties with working memory (Tr. p. 1245). According to the student's schedule, she is taken out of her tutorial class one period per week to attend an art class (Tr. pp. 913-15; Parent Ex. P). When questioned about having the student removed from the tutorial class period to attend art, the parent advocate testified that the teacher goes with the student to art class to support her language development, but the schedule is also due to "logistics" (Tr. pp. 913-15; 994-95).

To support the student's needs in mathematics, the parent advocate testified that the student's math class has visual supports in place for her and is multisensory—"having her do, write, observe a teacher writing, things like that" to support the student's math needs (Tr. p. 1015). According to the Eagle Hill math program description, a typical class involved warm up, checking homework, an activity/guided practice, and previewing homework (Parent Ex. MM). Topic areas listed in the program description included problem solving, concepts and operations, number sense and estimation, and practical applications (id.). The parent advocate explained that one day per week the student attends music class instead of math class; however, the music class emphasizes mathematical underpinnings of music (Tr. pp. 915-16, 995-96; see Parent Ex. P;). When questioned about taking the student out of math class to attend music class, the parent advocate stated the reason was "logistical" (Tr. pp. 995-97).

While the district's concern about the sufficiency of this evidence—namely, that Eagle Hill did not provide individualized instruction to address the student's language-based needs—is understandable, the totality of the circumstances presented in this case, including the speech-language therapy provided along with the academic supports addressing the student's needs in the areas of reading, writing, and math, the tutorial class, and the reports of the student's progress during the 2015-16 school year, lead to the conclusion that the supports provided by Eagle Hill sufficiently addressed the student's needs such that it was appropriate for the student for the 2016-17 school year. Based on the foregoing, the evidence in the hearing record leads me to conclude that the parent met her burden to establish that the Eagle Hill provided the student with instruction and services specially designed to meet her unique needs.

E. Equitable Considerations

Having concluded that Eagle Hill was an appropriate unilateral placement for the student for the 2016-17 school year was appropriate, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are

relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The hearing record reflects that the parent cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). The parent notified the district in writing that she rejected the IEP, visited the assigned school, and was unilaterally enrolling the student at Eagle Hill on August 17, 2016 (Parent Ex. N). Based on the foregoing, there are no equitable factors that weigh against awarding tuition reimbursement.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE during the 2016-17 school year, that the parent's unilateral placement of the student at Eagle Hill was reasonably calculated to meet her educational needs, and that equitable considerations favored an award of reimbursement to the parent the student's total tuition costs at Eagle Hill for the 2016-17 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated April 23, 2017, is reversed to the extent that it found the district offered the student a FAPE for the 2016-17 school year and denied the parent's request for public funding of the total costs of the student's tuition at Eagle Hill for the 2016-17 school year; and,

IT IS FURTHER ORDERED that the district is directed to provide direct funding of and/or reimbursement of any portion of tuition costs paid by the parent for the total costs of the student's tuition at Eagle Hill for the 2016-17 school year.

Dated: **Albany, New York**
July 5, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER