The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 18-021

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

Appearances:
Barger & Gaines, attorneys for petitioners, by Paul N. Barger, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Neelanjan Choudhury, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Eagle Hill School (Eagle Hill) for the 2014-15 and 2015-16 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student for the 2014-15 and 2015-16 school years. The appeal must be dismissed. The cross-appeal must be dismissed.[1]

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and is applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the underlying events prompting this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student attended language-based special class placements at the district for second grade (2011-12 school year) and third grade (2012-13 school year) (see Tr. pp. 1412-16; Dist. Exs. 60 at pp. 1-2; 82; 84; see generally Parent Exs. A-D; U-V; JJ-KK).[2,3] The evidence in the hearing record established that the language-based special class placements were "designed for students with particular learning disabilities, specifically in writing and language processing," and with "specific reading disabilities" (Tr. pp. 151, 155-56). The language-based special class program was "based on a multisensory reading program and speech therapy was also embedded into the program as part of it" as a service that pushed into the program and classes (Tr. pp. 155-56). Generally, the language-based special classes consisted of either 12 or 15 students, with one special education teacher and one teaching assistant (i.e., 12:1+1 or 15:1+1) (see Tr. pp. 155, 572, 578). The student's second grade special education teacher—who had been trained in "Wilson" ("certification for level one") and "Preventing Academic Failure" (PAF)—testified that, in second grade, the student received multisensory instruction using the following programs: PAF, "Explode the Code, the Merrill readers, [and] Sky Writing" (Tr. pp. 1292, 1294, 1296-97, 1308-09). She also testified that the student made "slow progress" as a result of these programs (Tr. pp. 1309-10). Similarly, the student's third grade special education teacher—who had also been trained in Wilson (certification level one)—testified that, in third grade, the student received multisensory instruction primarily using the Wilson program (see Tr. pp. 1190, 1192-95, 1198, 1214-15;

[2] Prior to attending second grade at the district, the student was parentally placed in a parochial school physically located within the boundaries of another school district (district of location) for kindergarten and first grade (see Dist. Exs. 65 at p. 1; 68 at p. 1; 73; 75 at p. 1; 76 at p. 2). As a kindergarten student in the 2009-10 school year, the student was initially referred to the district of location's CSE; at that time, that CSE determined that the student was not eligible to receive special education and related services (see Dist. Ex. 68 at p. 1). At the impartial hearing, the parents testified, however, that the student received resource room services during kindergarten (see Tr. pp. 1408-09; see also Dist. Exs. 62 at pp. 2-4; 65 at p. 1). According to the evidence in the hearing record, the student—as a first-grade student during the 2010-11 school year—was re-referred to the district of location's CSE by her parents (see Dist. Ex. 68 at p. 1; see generally Dist. Ex. 67). As a result of the re-referral, the student was found eligible to receive special education and related services as a student with a learning disability, and a subcommittee of special education (CSE subcommittee) recommended that the student receive one 2.5 hour session per week of resource room services in a group of five students for the 2011-12 school year, as well as supplementary aids and services, program modifications, and accommodations (see Dist. Ex. 65 at pp. 1-5, 7-8; see also Tr. pp. 1409-10). The parents testified that at the student's annual review held in spring 2011, the district of location's CSE recommended retaining the student for first grade, and further indicated that it would not "be able to provide [] an intensive reading specialist" for the student at the parochial school (Tr. pp. 1410-12). The parents further testified that the district of location's "administrator . . . recommended that [they] pursue" services through their "home district" (i.e., district of residence) (Tr. p. 1412). As a result, the parents contacted the district of residence (district) and observed a second grade, language-based classroom in June 2011 (see Tr. pp. 1412-16). On or about June 29, 2011, the parents enrolled the student in the district (see Dist. Ex. 63).

[3] Near the conclusion of third grade in May 2013, the district conducted an intensive reading evaluation of the student, as recommended by the student's then-current third grade teacher (see Parent Ex. LL; Dist. Ex. 37 at p. 1). The parents testified that they received a copy of the May 2013 intensive reading evaluation report, which they described as "pretty self-explanatory" (Tr. pp. 1431-36).

compare Tr. pp. 1194-95, with Tr. pp. 1296-97).[4] The third grade teacher also noted, however, that because she "had been exposed to different programs along the way"—such as "PAF"—she would, at times, use components from different programs with the students (Tr. pp. 1216-20). The third-grade teacher also described the student's progress in the Wilson program (see Tr. pp. 1262-69, 1275, 1282-83).

During summer 2013, the parents enrolled the student in Eagle Hill's "Summer Academic Program," where she was—according to the parents—"immersed in the Merrill Linguistic Program" and "had positive results with growth" (Parent Ex. GG at p. 1; see Parent Exs. P at p. 1; II at p. 1; KK at p. 1; see generally Parent Ex. R). In August 2013, the parents contacted the district assistant director of special education (assistant director) and expressed their desire for the student to "continue with this program" (Parent Ex. GG at p. 1; compare Parent Ex. GG at p. 1, with Tr. pp. 150-52). In response, the assistant director indicated that she "agree[d] that [the student] need[ed] instruction in phonological development" and had "heard about Merrill Linguistic Program" (Parent Ex. GG at p. 1). The parents also contacted the student's fourth grade special education teacher prior to the start of the 2013-14 school year (see Tr. pp. 570, 572, 578, 593-94). Based upon that conversation, the teacher agreed to "try to use Merrill within the language-based program" (Tr. pp. 648-49). When the student began attending the language-based special class for fourth grade, the special education teacher initially worked with the student "in the first half hour of school" using Merrill readers already available in her classroom, and subsequently, the student continued her work using Merrill readers with the teaching assistant instead of the teacher (Tr. pp. 649-50, 683-86).[5] In addition to using the Merrill readers with the student, the student also received two 60-minute sessions per six-day cycle of small group reading instruction (no more than five students per group) using the Wilson program (see Tr. pp. 583-85, 703-05).[6] The

[4] The student's third grade special education teacher described "Wilson" as a multisensory program that was "sequential" and used the "auditory, the visual and the kinesthetic approach to learning" (Tr. p. 1214). She also noted that Wilson offered a "very structured lesson" with an "evaluation component" to assess a student's ongoing progress (Tr. pp. 12-14-15).

[5] At the impartial hearing, the student's fourth grade special education teacher testified that for the 2013-14 school year, the classroom consisted of 15 third-grade and fourth-grade students, together with herself, two teaching assistants, and an additional teacher for the deaf (see Tr. pp. 570, 578-79, 583-84).

[6] On September 16, 2013, the parents sent an email to Eagle Hill staff thanking them for an "amazing summer program" (Dist. Ex. 14 at p. 21). The parents indicated that they "had [the student] on the wait list just for the simple reason of not being sure if [the] school district would incorporate the Merrill Linguistic program into [the student's] current IEP," noting, however, that the district "was accommodating" (id.). On November 21, 2013, the parents sent another email to the Eagle Hill staff (see Dist. Ex. 14 at p. 22). In the November 2013 email, the parents indicated that, after attending a "parent teacher conference," the district "just [was not] able to provide services the way [the student] need[ed] it to be provided," that the "teacher concur[red]," and that they requested a "program review," which the parents anticipated would "probably get a little ugly" (id.). Consequently, the parents inquired about whether the student could "be placed in her program at Eagle Hill in January" (id.). In an email dated December 2, 2013, Eagle Hill staff informed the parents that Eagle Hill was "still at full capacity and d[id] not expect anything to change come January 1st" (id. at p. 23). However, Eagle Hill staff advised the parents that another Eagle Hill campus not affiliated with the school had "spots available" (id.). Because the second Eagle Hill facility "exceed[ed] the 50 mile limit" for transportation, the parents opted to begin the application and admissions process for Eagle Hill (id. at pp. 23-24). In February 2014, Eagle Hill sent the parents a list of "advocates/attorneys" to consider (id. at p. 25). It appears that the parents completed the Eagle Hill application by March 13, 2014 (id. at pp. 19-20).

student's fourth-grade teacher was dually certified as a regular education and special education teacher, she earned a master's degree in literacy, and had achieved a "level two certification" in the Wilson program (Tr. pp. 570, 573-75).

Due to concerns about the student's inconsistent progress in reading, a CSE subcommittee convened on December 19, 2013 (see Tr. pp. 591-96, 714-15; Dist. Ex. 31 at pp. 1-2). At that time, the CSE subcommittee recommended that, in addition to the "Wilson small group instruction" the student already received in the classroom, the student would also receive the following services: additional 1:1 review with a "specialized multisensory program to supplement her learning daily for 30 minutes," and additional 1:1 reading instruction by a certified reading teacher to be delivered two times per six-day cycle for 30 minutes per session (Dist. Ex. 31 at pp. 2, 12; see Tr. pp. 583-85, 593-94, 630-31).

On March 17, 2014, a CSE subcommittee initially convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (fifth grade) (see Dist. Exs. 20 at p. 2; 28). At that meeting, the CSE subcommittee agreed to reconvene "pending further possible testing and review of [the student's] program" (Dist. Ex. 20 at p. 2). By prior written notice dated March 19, 2014, the district requested the parents' consent to reevaluate the student and included a description of the testing to be completed (see Dist. Exs. 26 at p. 1; 27 at pp. 1-2). On March 24, 2014, the parents refused the testing recommended by the district (see Dist. Exs. 25; 26 at p. 1; see also Dist. Ex. 17 at pp. 1-2). In a meeting notice dated March 24, 2014, the district rescheduled the student's annual review for April 3, 2014, which the parents cancelled (see Dist. Ex. 24 at p. 1; see also Dist. Ex. 23 at p. 1).

In a letter to the district dated April 1, 2014, the parents informed the assistant director of special education and the assistant director of "Out of District Private School Placements" that the student had been accepted at Eagle Hill for the 2014-15 school year beginning in September 2014 (Dist. Ex. 22 at p. 1). The parents requested that the district provide the student with transportation to Eagle Hill pursuant to State law (id.). The parents also noted in the letter that they had "spoke[n] about having [the student] attend Eagle Hill" at the March 17, 2014 CSE subcommittee meeting (id.).

Ultimately, a CSE subcommittee reconvened on April 9, 2014 to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Dist. Ex. 20 at p. 1; see also Dist. Ex. 18).[7] The April 2014 CSE subcommittee recommended a 12-month school year program, which for July and August 2014 consisted of three 90-minute sessions per week in a 15:1 special class placement for both reading and mathematics; for the September 2014 through June 2015 portion of the school year, the CSE subcommittee recommended a 15:1+1 language-based special class placement together with supplementary aids and services, program modifications and accommodations (see Dist. Ex. 20 at pp. 1-2, 10-12). In particular, the April 2014 CSE subcommittee recommended daily, 30-minute sessions of 1:1 reading instruction using "Merrill as part of the intensive reading program" (id. at pp. 1, 11). The April 2014 IEP also noted that the student would continue to receive "small group speech as a classroom support" (id. at p. 1). In

[7] The parents attended the April 2014 CSE subcommittee meeting with a "Parent Advocate" (parent advocate or advocate hereinafter) (see Dist. Ex. 20 at p. 1).

addition, the April 2014 IEP indicated that although the student made progress, "her skills [were] inconsistent," and further indicated that the parents "refused any further evaluations and refused CSE recommendations" (id.). At that time, the parents and their advocate requested that the CSE subcommittee place the student at Eagle Hill, the parents informed the CSE subcommittee that the student would attend Eagle Hill beginning in July 2014, the district agreed to provide transportation, and the parents were provided with their "Due Process rights" (id. at pp. 1-2).

The student attended Eagle Hill for the 2014-15 school year (see generally Dist. Exs. 8; 13).

By letter dated January 14, 2015, the parents received an enrollment contract for the student's attendance at Eagle Hill for the 2015-16 school year (see Dist. Ex. 10 at p. 5). On February 19, 2015, the parents executed the enrollment contract with Eagle Hill for the student's attendance beginning September 2015 and concluding June 2016 (id. at p. 1).

On May 7, 2015, a CSE subcommittee convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (sixth grade) (see Dist. Ex. 9 at p. 1).[8] The May 2015 CSE subcommittee recommended a 12-month school year program, which for July and August 2015 consisted of daily 90-minute sessions in a 12:1+1 special class placement for both reading and mathematics; for the September 2015 through June 2016 portion of the school year, the CSE subcommittee recommended a 15:1 language-based special class placement (reading, mathematics, social studies, and science) together with supplementary aids and services, program modifications, and accommodations (id. at pp. 1, 9-11). Significantly, the May 2015 CSE subcommittee recommended one 40-minute session per day of reading instruction in a small group, as well as daily 40-minute sessions of 1:1 intensive reading instruction and 40 sessions of speech-language therapy services in a small group (id. at pp. 1, 9-10).[9] The May 2015 IEP indicated that the student's 1:1 intensive reading teacher would use "Merrill as part of the intensive reading instruction" and that the CSE requested an "updated progress report" from Eagle Hill (id. at p. 1). According to the IEP, the parents and their advocate asked the CSE subcommittee to place the student at Eagle Hill, the parents indicated that the student would attend Eagle Hill for the 2015-16 school year, the district would provide transportation to Eagle Hill, and the parents were provided with their "Due Process rights" (id.).

The student attended Eagle Hill for the 2015-16 school year (see generally Parent Ex. OO).

A. Due Process Complaint Notice

In a due process complaint notice dated August 17, 2015, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) (see IHO Ex. I at p. 1). After briefly reciting the student's educational history, the parents contended that the district

[8] The parents attended the May 2015 CSE subcommittee meeting with the same parent advocate who attended the April 2014 CSE subcommittee meeting (compare Dist. Ex. 9 at p. 1, with Dist. Ex. 20 at p. 1). In addition, at least two Eagle Hill staff attended the meeting via telephone (see Dist. Ex. 9 at p. 1).

[9] In early June 2015, it appears that the parents sought a tutor to work with the student during summer 2015 (see Dist. Ex. 14 at p. 34).

failed to remediate the student's learning disability during her three years attending the district (id. at pp. 1-2). In addition, the parents asserted that, due to the student's "lack of academic progress," they "parentally place[d]" the student at Eagle Hill for the 2014-15 school year to address her "academic deficiencies" (id.). The parents further asserted that the student made progress at Eagle Hill, and they believed Eagle Hill was appropriate for the student (id. at pp. 2-3). As relief, the parents sought reimbursement for the costs of the student's tuition at Eagle Hill for the 2014-15 and 2015-16 school years, as well as prospective placement and/or tuition costs for the student's seventh grade (2016-17) and eighth grade (2017-18) school years (id. at p. 3).

B. Impartial Hearing Officer Decision

On April 29, 2016, the parties proceeded to an impartial hearing, which concluded on August 17, 2016 after nine days of proceedings (see Tr. pp. 1, 1367).[10,11] By decision dated December 12, 2016 (December 2016 decision), the IHO concluded that the evidence in the hearing record demonstrated that the student's progress while attending the district's language-based special classes was "non-existent to minimal" (see IHO Decision at pp. 27-37). As a result, the IHO found no basis upon which to conclude that the "CSE had a reasonable basis for a conclusion that changes [to the frequency of the recommended intensive reading teacher support] would result in meaningful educational gains," and concluded that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2014-15 school year (id. at p. 37). With regard to the 2015-16 school year, the IHO found that the information provided by Eagle Hill about the student did not "amplify the information the CSE had concerning the nature of the student's difficulties or provide support for the appropriateness of the program proposed for the reasons discussed above with regard to the prior year program" (id. at p. 38). The IHO therefore concluded that the district also failed to establish that it offered the student a FAPE for the 2015-16 school year (id.).

Turning to the question of whether the parents' unilateral placement of the student at Eagle Hill for the 2014-15 and 2015-16 school years was appropriate, the IHO concluded that the parents failed to sustain their burden of proof (see IHO Decision at p. 38). Here, the IHO noted that, while credible, the Eagle Hill witness and "Advisor Reports" relied upon by the parents to support their case failed to provide sufficient evidence concerning "how this student's individual needs were addressed or how she responded to instruction" (id. at pp. 38-39). The IHO also noted that the district "addressed the student's disability principally with Wilson supplemented at various times with PAF/Merrill elements from [third] grade on with minimal success," Eagle Hill "considered several systems and decided that Merrill was appropriate"—together with "incorporated parts of

[10] On the first day of the impartial hearing, the IHO explained that the parties had engaged in several prehearing conferences beginning on October 14, 2015, and other "various delays" resulted in the postponement of the impartial hearing until April 2016 (see Tr. pp. 3-7). For example, the IHO noted on the hearing record that the parties agreed to delay the impartial hearing until the district completed the student's mandatory three-year reevaluation (see Tr. pp. 5-6; see generally Dist. Exs. 2; 4-7). On March 8, 2016, a CSE subcommittee convened to review the student's psychoeducational reevaluation (see Dist. Ex. 1 at p. 1).

[11] Throughout the impartial hearing, the parent advocate who attended the student's April 2014 and May 2015 CSE subcommittee meetings presented the parents' case-in-chief (compare Tr. pp. 1-1543, with Dist. Ex. 9 at p. 1, and Dist. Ex. 20 at p. 1).

PAF"—yet the hearing record lacked any evidence "about the reasons for the [Eagle Hill] determination" to use Merrill (id. at p. 39). Thus, the IHO indicated that "there [was] therefore no way to evaluate that decision other than by results" and turned, next, to analyze the student's progress at Eagle Hill (id. at pp. 39-41).

Initially, the IHO noted that progress was a "factor which may be considered in determining whether a unilateral program [was] appropriate" (IHO Decision at p. 40). The IHO found that, although the parents asserted that the student made progress in reading and academically at Eagle Hill, the unrebutted testimonial evidence provided by a district school psychologist comparing "standardized testing results" did not support this claim (id.). Rather, the evidence demonstrated that the consecutive administration of standardized tests revealed that the "student's only statistically significant changes were declines in certain categories" after the student had attended Eagle Hill for one year (id.). Noting the parents' reliance upon standardized tests used at Eagle Hill to assess the student's progress—namely, the Gray Oral Reading Test (GORT) and the Slosson Oral Reading Test the IHO found that these tests did not "measure spelling, vocabulary, comprehension and written expression" (id.). Moreover, the IHO, relying upon the unrebutted testimonial evidence provided by the district's executive director of special education (director), found that the "GORT results did not indicate statistically significant gains in 2014-2015 when reviewed in accordance with GORT recommendations" (id.). Here, the IHO also noted that the director testified that the "reported grade level equivalent increases in that year [were] unreliable in view of the degree of deviation from typically developing same age peers as [was] confirmed by GORT protocols" (id.). Furthermore, while the parents presented evidence that Eagle Hill administered the GORT to the student in June 2016, Eagle Hill failed to administer the GORT to the student in September 2015 for "pre testing," which precluded the ability to compare the results (id.). Finally, the IHO noted that any change in the student's scores on the Slosson Oral Reading Test "between years [was] statistically insignificant" (id. at pp. 40-41).

In addition to the foregoing, the IHO indicated that the hearing record lacked any evidence concerning the student's "skill level" during the 2015-16 school year at Eagle Hill to support a finding that the student made progress (IHO Decision at p. 41). While finding that "anecdotal" evidence of the student's progress in reading was "persuasive," the IHO ultimately found that such evidence was similar to the evidence describing the student while she attended the district's programs (id.). Consequently, the IHO concluded that the parents failed to sustain their burden to establish the appropriateness of Eagle Hill for the 2014-15 and 2015-16 school years (id.).

Turning to equitable considerations, the IHO found that while unnecessary in light of the determinations already made, the evidence demonstrated that the parents' "subjective intent, or preference for a nonpublic educational setting" was not relevant to a "determination of the equities" (IHO Decision at pp. 41-42). The IHO further noted that the district did not continue to press claims about equitable considerations in its closing memorandum it had raised during its opening statement; as such, the IHO deemed those claims "abandoned" (id. at p. 42). However, the IHO also noted that the parents' testimony with regard to any issues raised by the district was "credible," and therefore, equitable considerations would not constitute a basis upon which to deny or limit an award of tuition reimbursement if otherwise warranted (id.).

IV. Appeal for State-Level Review

The parents appeal from the IHO's December 2016 Decision, arguing initially for an SRO to exercise discretion to excuse the late filing of the request for review for good cause shown. Next, the parents assert that the IHO erred in concluding that they failed to meet their burden to establish that the student's unilateral placement at Eagle Hill was appropriate. As relief, the parents seek determinations allowing them to pursue the instant appeal, finding that the district's proposed programs for the 2014-15 and 2015-16 school years were not appropriate, finding that Eagle Hill was an appropriate unilateral placement, and finding that equitable considerations weigh in favor of awarding reimbursement for the costs of the student's tuition at Eagle Hill.

In an answer, the district responds to the parents' allegations. As affirmative defenses, the district contends that the parents failed to properly serve the request for review, the parents failed to timely initiate the instant appeal from the IHO's decision, and urge the SRO to reject the appeal as untimely because the parents failed to establish good cause shown for the failure to timely appeal the IHO's decision. In a cross-appeal, the district argues that if an SRO finds that the parents proffered good cause to excuse the 13-month delay in filing their appeal, then the district's cross-appeal challenging the IHO's findings with regard to the 2014-15 and 2015-16 school years must also be deemed timely. As relief, the district seeks to dismiss the parents' request for review in its entirety and to grant the district's affirmative defenses and cross-appeal.

In reply to the district's answer, the parents respond to the affirmative defenses asserted by the district. The parents argue that they served district's counsel with the request for review on February 21, 2018 and then personally and properly served the request for review on the district clerk on March 5, 2018. In addition, the parents argue for the SRO to exercise discretion to accept the failure to timely serve the request for review. In an answer to the district's cross-appeal, the parents respond to the district's allegations.

V. Discussion—Initiation of Appeal and Improper Service

Based on the reasons set forth below, the parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service of the petition in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for

failure to timely effectuate personal service of the petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service of the petition upon the district]).

In this case, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision was dated December 12, 2016 (see IHO Decision at p. 42; Req. for Rev. ¶ 31). The parents were, therefore, required under the amended regulations—which applied to all pleadings served on or after January 1, 2017—to personally serve the request for review upon the district no later than January 23, 2017 (8 NYCRR 279.4[a]-[b]; 279.11[b] [allowing for service on the following Monday when the last day for service of "any paper under this Part falls on a Saturday or Sunday"]).

On the last day to timely serve the request for review, the Office of State Review received a letter from the parents' advocate, dated January 20, 2017, requesting an extension of time within which to prepare the appeal in this matter. At that time, the parents' advocate cited "change[s] in the appeal process effective January 1, 2017 as well as parent illness during [the] Christmas [through] New Year Holiday and personal illness affecting [herself] the week of January 9, 2017" as the basis for the extension request. The advocate's letter was properly addressed to the Office of State Review, it included a notation indicating that the parents had been provided with a copy of the advocate's letter (i.e., "Cc: [the student's mother]"), and it enclosed copies of the following: the Notice of Intention to Seek Review and Case Information Statement (dated January 16, 2017 and signed by the parents), an Affidavit of Service, and a Notice of Request for Review. According to the Affidavit of Service, the parents served the district with the Notice of Intention to Seek Review on January 18, 2017.[12]

In a letter dated January 23, 2017, the Office of State Review responded to the advocate's letter.[13] The letter explained that, pursuant to State regulation, a "determination whether to excuse the late service and filing of a request for review c[ould] be made only after a request for review [was] received by the Office of State Review." Additionally, the letter indicated that if a request for review was "not timely, good cause for the failure to timely serve and file must be stated in the request for review." The letter further instructed that a decision regarding "[w]hether or not the failure to timely serve or file a request for review [was] excused" was within the "sole discretion of the State Review Officer." Consequently, an SRO was not able to grant the advocate's request for an extension of time within which to serve and file the request for review in contravention of State regulations as it would work in contravention of the pleading process set forth in State regulations.

After another three months elapsed with no further contact from the advocate or the parents following the January 23, 2017 letter to the parent's advocate—and absent the receipt of any request for review filed on the parents' behalf—the Office of State Review treated the matter as an

[12] Upon receipt of the Notice of Intention to Seek Review and pursuant to State regulation, the district filed a copy of the administrative hearing record with the Office of State Review by letter dated January 27, 2017, together with its Notice of Intention to Cross-Appeal served upon the parents on January 26, 2017 (see 8 NYCRR 279.2[a], [d]).

[13] This letter was transmitted to the parent advocate via facsimile and regular mail on January 23, 2017.

unappealed IHO decision and accordingly returned the administrative hearing record to the district together with a transmittal letter dated May 5, 2017.

Over seven months later, on January 22, 2018, the Office of State Review received a letter from the parents sent with a transmittal letter via facsimile. The parents requested an opportunity to "submit and present an appeal" from the IHO's December 2016 decision. The parents explained in the letter that they had "retained and paid [the advocate] to proceed with the compilation of an appeal," and a "letter of intent to appeal was filed" with the Office of State Review in January 2017. The parents acknowledged that the "advocate wrote an appeal, which [they] only saw a rough draft of, and assured [them] it was sent to the [O]ffice of [S]tate [R]eview in February of 2017." The parents indicated that when they did not receive a decision from an SRO within the "45 day time frame," they questioned the advocate, who again assured them that the appeal had been filed and indicated that she would "file an inquiry . . . to uncover its whereabouts." According to the parents' letter, the advocate informed them that she was "plugging away at this" during the summer months. However, when the parents asked the advocate to "produce the return mail receipt, the advocate didn't reply and refused to answer [their] phone calls and e-mails." Thereafter, upon their "own investigation" and with additional help, the parents learned that the Office of State Review had "no record of an appeal ever being submitted," but noted that the advocate had requested an extension of time to submit the appeal in a letter dated January 20, 2017 and the deadline for filing the appeal expired on "May 5, 2017." The parents expressed that they were "grossly insulted by the negligent behavior of this advocate," and looked "forward to a favorable reply" to their request to submit an appeal.

By letter dated January 23, 2018, the Office of State Review responded to the parents' letter. Notably, the letter to the parents described the limited contact between the Office of State Review—as well as the nature and substance of that contact—and the parents' advocate in January 2017, the absence of contact with the parent's advocate after January 2017, and the return of the administrative hearing record to the district in May 2017 since no appeal of the IHO's decision had been filed on the parents' behalf. The letter then explained, at length, the procedures to follow should the parents continue to pursue an appeal of the IHO's December 2016 decision, which included instructing the parents to state "good cause for the failure to timely serve and file in [their] request for review" notwithstanding that the parents had already included a "number of reasons for the delay" in their letter to the Office of State Review. Finally, the letter indicated that an SRO could not "grant a letter request to file a late appeal because that procedure [was] in contravention of the regulations."

On February 21, 2018, the parents—now represented by an attorney—served the request for review, an accompanying memorandum of law, and affidavits of verification upon counsel for the district (see Feb. 23, 2018 Parent Aff. of Service).[14] On February 28, 2018, the district served its answer and cross-appeal—which included an affirmative defense alleging that the service upon the district was improper—and a memorandum of law on the parents (see Reply & Answer to Cr. App.; Dist. Aff. of Service). On March 1, 2018, the parents' attorney filed the request for review

[14] For clarity, the dates referenced in the citations with respect to the parents' affidavits of service reflect the separate dates when each affidavit of service was notarized.

(dated February 20, 2018), a memorandum of law, an affidavit of verification, and an affidavit of personal service upon the district's counsel with the Office of State Review.[15] Shortly thereafter on March 5, 2018, the parents' attorney re-served the district by personally re-serving the pleadings upon an individual identified as a district clerk (see Mar. 5, 2018 Parent Aff. of Service).[16, 17]

While it is undisputed that the parents failed to timely serve the request for review upon the district, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown (see 8 NYCRR 279.13). State regulation requires that the reasons for the failure must be set forth in the request for review (see 8 NYCRR 279.13). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012] [finding that "attorney error or computer difficulties do not comprise good cause"]).

In attempting to establish good cause shown to excuse the failure to timely initiate the appeal in the request for review, the parents allege that, after receiving the IHO's decision, they "quickly decided to appeal" and "made payments to their advocate for the drafting and filing of the appeal" (Req. for Rev. ¶ 33). Additionally, the parents indicate that they "approved a draft of the appeal prepared by [their advocate]," and were informed that the appeal had been "timely filed" (id.).[18] Next, the parents assert that the advocate did not "do any of the things that she was hired to do, yet she promised [them] that the work had been done and that the appeal had been filed"

[15] State regulation requires a petitioning party to file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review "within two days after service of the request for review is complete" and explicitly prohibits filing by "facsimile or electronic mail" (8 NYCRR 279.4[e]).

[16] The district filed its answer and cross-appeal, together with its memorandum of law, with the Office of State Review on March 1, 2018 (8 NYCRR 279.5[b]-[c]).

[17] State regulation requires that when a school district is the named respondent, "personal service of the request for review upon such school district shall be made by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). By personally serving the district's counsel—who was not designated by the board of education to accept service—the parents failed to properly serve the request for review on February 21, 2018 (see Feb. 23, 2018 Parent Aff. of Service). Given that the district immediately raised improper service as an affirmative defense in its answer and cross-appeal and that the time within which to timely serve the request for review on the district had expired, the parents' attempt to re-serve the district in a "'proper manner d[id] not transform an otherwise improper service into proper service'" (Fontrick Door, Inc. v. Ferguson, 2012 WL 268242, *3 [W.D.N.Y. Jan. 10, 2012], quoting Espaillat v. Rite Aid Corp., 2003 WL 721566, at *3 [S.D.N.Y. Mar. 3, 2003]). Thus, their initiation of this appeal is defective on two grounds, both timeliness as further described below as well as defective service.

[18] This statement in the request for review is not consistent with the information explained to the Office of State Review in the parents' January 19, 2018 letter, which noted the following: "The parents acknowledged that the "advocate wrote an appeal, which [they] only saw a rough draft of, and assured [them] it was sent to the [O]ffice of [S]tate [R]eview in February of 2017."

(id.). The parents also assert that they "anxiously awaited a decision on their appeal" for "almost a year," making "frequent contact" with the advocate to solicit "any additional information" (id. at ¶ 34). The advocate continued to assure the parents that "she was following up . . . , but then she stopped responding to their correspondence" (id.). Seeking and receiving outside assistance, the parents allege that they then discovered that the Office of State Review "had not received an appeal" and that the advocate "had not made any inquiries regarding the status of the appeal" after sending the January 20, 2017 letter seeking an extension of time to file the appeal (id. at ¶ 35). The parents then allege that they "were not aware that [the advocate] had requested an extension of time to file their appeal and believed that the appeal had been timely filed" (id.).[19]

Next, the parents indicate that they wrote to the Office of State Review on January 10, 2018 to request an opportunity to appeal and explained in that letter "how [the advocate] had swindled them" (Req. for Rev. ¶ 36). The parents allege that they "made several substantial payments" to the advocate for her work, and while the advocate took their money she continued to make "ongoing misrepresentations about the filing of the appeal" and "robbed them of the ability to timely appeal" the IHO's December 2016 decision (id.). Based upon the foregoing as good cause shown, the parents ask the undersigned SRO to exercise discretion to excuse their failure to timely file the request for review.

Upon review and consideration, the reasons set forth in the request for review do not constitute good cause shown for the parents' failure to timely initiate this appeal. Significantly, while the parents allege various misrepresentations made to them by their advocate after the time within which to timely initiate the appeal had passed, the parents fail to address—in any meaningful or relevant manner—the more relevant period of time: namely, why the request for review was not timely served on the district either prior to, or on, January 23, 2017 (see generally Req. for Rev. ¶¶ 33-38).[20] Rather, the parent advocate—in the January 20, 2017 letter to the Office of State Review seeking an extension of time—provides the only source of information relevant to this period of time.

As noted, the advocate cited the parents' illnesses, as well as her own illness, and regulatory changes as the basis for requesting an unspecified extension of time to prepare and file the appeal. In the request for review, the parents do not acknowledge these reasons, asserting that they were unaware that the parent advocate sought an extension of time to initiate the appeal in January 2017

[19] As noted above, the advocate's January 20, 2017 letter to the Office of State Review included a notation—"Cc: [the student's mother]"—indicating that the parents had been provided with a copy of the letter seeking an extension of time to file the appeal.

[20] The parents filed a memorandum of law with their reply and answer to the district's cross-appeal (see generally Parent Mem. of Law). In this memorandum of law, the parents appear to include additional facts and circumstances to support their request for an SRO to exercise discretion for the failure to timely serve the appeal that the parents did not include in the request for review (compare Req. for Rev. ¶¶ 33-38, with Parent Mem. of Law at pp. 2-4). For example, the parents allege in the memorandum of law that the advocate "re-submitted their appeal" in July 2017, and in "August 2017," the parents began to "do their own research" and made "phone calls and wrote letters" about the status of the appeal (Parent Mem. of Law at p. 3). However, the parents do not identify to whom the letters and telephone calls were directed (id.). Moreover, the parents' memorandum of law reveals facts indicating that, by July 2017 when the advocate "re-submitted their appeal," they were on notice of possible problems with the appeal (id.).

despite the advocate's letter which noted that the parents were copied. By their own admission, the parents had approved a draft of the appeal prepared by the advocate and that the advocate informed them it had been timely filed (Req. for Rev. at ¶ 33). A significant inconsistency left unexplained in the parents' argument that an appeal should be accepted over a year late is why the advocate would, after diligently assisting the parents at CSE meetings and throughout the impartial hearing that secured substantial rulings in favor of the parent (constituting a denial of a FAPE to the student), draft an appeal, present it to the parents and secure their approval on a timely basis—and then on the verge of filing the appeal—radically change course and start to "swindle" the parents, seek timeline extensions, and neglect to file anything further, especially after the advocate had pursued matters to the point of virtually completing the most time-intensive elements of preparing an appeal. However, even if the advocate completed the request for review and served it on the district in or around February 2017 (as set forth in the parents' January 2018 letter to the Office of State Review)—or even on January 24, 2017—and had included these reasons in the request for review as good cause shown, the parents' appeal would almost certainly have been dismissed for the failure to comply with the regulations governing practice before the Office of State Review and for failing to state good cause shown to excuse the untimely initiation of the appeal (see, e.g., New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41 [informing counsel for the parents that "an examination of pertinent SRO decisions would have informed her that delays due to scheduling difficulties or lack of availability on the part of parties or counsel are not typically found to be 'good cause' for untimely petitions"]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Application of a Student with a Disability, Appeal No. 16-030 [finding that the student's medical needs and the parent's travel abroad did not constitute good cause to excuse the failure to timely serve an appeal]; Application of a Student with a Disability, Appeal No. 13-039 [finding that travel and temporary illness of one of the parents were not sufficient to establish good cause excusing the parents' failure to timely serve the district]; Application of a Student with a Disability, Appeal No. 08-143 [finding that the reason given for the parent's delay in initiating the appeal, the parent's hospitalization abroad, was too vaguely stated to establish good cause]). Consequently, the parents' appeal must be dismissed because the parents' failed to establish good cause shown in the request for review for the failure to timely initiate this appeal on or before January 23, 2017.

Next, even assuming for the sake of argument that the reasons set forth in the request for review had greater relevance to an analysis of whether the parents established good cause shown for the failure to timely initiate this appeal, these reasons may be essentially categorized as law office failure, which, standing alone, will not suffice to excuse the delay. Generally, courts are unwilling to accept law office failure as a reasonable excuse absent a "detailed and credible explanation of the default at issue" (Scholem v. Acadia Realty Ltd. Partnership, 144 A.D.3d 1012, 1013 [2d Dep't 2016], citing Sarcona v. J & J Air Container Station, Inc., 111 A.D.3d 914, 915 [2d Dep't 2013]). In Scholem, the defendant "submitted affidavits, which, taken together, set forth a detailed and credible explanation for the failure to produce the witnesses for deposition . . ., based on acts of misconduct and deception on the part of the associate attorney handling the matter for the defendant's attorneys" (Scholem, 144 A.D.3d at 1013, citing Swensen v. MV Transp., Inc. 89 A.D.3d 924, 925 [2d Dep't 2011] [internal citations omitted]). Conversely, law office failure "should not be excused where allegations of law office failure are conclusory and unsubstantiated"

(Blake v. U.S., 109 A.D.3d 504, 505 [2d Dep't 2013], citing Wells Fargo Bank, N.A. v. Cervini, 84 A.D.3d 789, 789-90 [2d Dep't 2011]).

Here, the reasons alleged by the parents in the request for review do not set forth a detailed and credible explanation for the failure to timely serve the request for review, especially in light of the inconsistencies already noted. And even if the parents' individual verification of the request for review is considered as an affidavit, the reasons alleged in the request for review are nothing more than conclusory and unsubstantiated claims. Although the appeal is over a year late, the parents did not produce a single piece of evidence implicating the advocate's alleged misdeeds. For example, the parents indicate that they approved a draft of the appeal yet fail to produce a copy of the drafted appeal or otherwise provide any details surrounding the method of transmission, date of circulation, or the fate of the draft document. There are no dated letters or e-mails from the parents to the advocate showing that they questioned the advocate. It is also unclear if counsel for the parents, in attempting to craft the good cause argument in the request for review, made any effort to secure information from directly from the advocate herself regarding her actions or inactions in the period of time after the IHO's decision was rendered and the completion and submission of the request for review in February 2018. The parents also indicate that they made payments for the advocate's work on their appeal yet fail to produce evidence of these payments. The length of the delay in this case is nothing short of extraordinary and the showing of good cause to excuse such a lengthy delay should be equally exceptional. Without more than conclusions based solely on the parents' own assertions, the parents have not established good cause shown to excuse the failure to timely initiate this appeal (see Scholem, 144 A.D.3d at 1013; Blake, 109 A.D.3d at 505; see also Application of a Student with a Disability, Appeal No. 10-081 [finding that a computer malfunction and "irretrievable loss to much of the petition" did not constitute good cause to excuse the untimely service of the petition]; Application of a Student with a Disability, Appeal No. 09-099 [finding that an attorney's miscalculation of the time within which to timely serve a petition failed to constitute good cause]; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 07-085 [delays in obtaining appeal forms and computer problems do not constitute good cause]; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 06-117; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 05-106 [dismissing petitioners' appeal as untimely and finding that petitioners' reasons for untimely service, including that 'they proceeded without counsel [although one of the petitioners was an attorney], that the hearing record was "dense," and that petitioners' available time to pursue the appeal was constrained by, including among other things, commitments to professional obligations, did not constitute good cause]; Application of a Child with a Disability, Appeal No. 05-098; Application of a Child with a Disability, Appeal No. 05-048 [dismissing petitioner's appeal as untimely and finding that uncertainty as to whether or not to file appeal and attorney unavailability do not constitute good cause]; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-067; Application of a Child with a Disability, Appeal No. 03-007 [accepting overnight mail delivery service error as good cause shown when detailed facts were presented via an affidavit to explain untimely service]; Application of a Child with a Disability, Appeal No. 02-065 [finding mistake of inadvertence does not constitute good cause]).

In light of the above, the parents' appeal must be dismissed as untimely, and therefore, the district's cross-appeal must also be dismissed as untimely.

VI. Progress

While not addressing the merits of the parents' appeal or the district's cross-appeal, one additional point is mentioned in light of the fact that the parents sought relief related to Eagle Hill as far out as the 2017-18 school year (IHO Ex. I at p. 3).[21] In this case, the parents' primary contention in the due process complaint notice—and, in large part, as the sole basis for unilaterally placing the student at Eagle Hill—was that the student, after three years in the district's language-based special class placements, did not make sufficient progress in reading (see generally IHO Ex. I). However, going forward the parties may wish to keep in mind the point that progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]).

Most recently, the Supreme Court 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, 580 U.S. __, 137 S. Ct. 988, 999 [2017]).[22] 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). Moreover, the IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]; 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]). "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 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192).

Further, even assuming that the student did not make progress during the previous school years in the district's language-based special class placements, an IEP must be evaluated prospectively as of the time it is created and the parents may not rely on evidence that the student did not make progress to establish that the IEP was not appropriate (R.E., 694 F.3d at 186-88; see C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *18-*27 [S.D.N.Y. Mar. 30, 2018]).[23]

[21] It is unclear if there are any other proceedings pending involving the student.

[22] The IHO's decision—dated December 12, 2016—preceded the Supreme Court's decision in Endrew F. issued in March 2017.

[23] At least one Circuit Court of Appeals has held that "[w]hile a student's lack of progress [was] an equitable consideration the district court ha[d] discretion to weigh, it [was] not a suitable basis for determining whether a placement was proper" (J.T. v. Dept. of Educ., State of Hawaii, 2017 WL 3475084, at *1 [9th Cir. Aug. 14, 2017]).

As part of the collaborative process envisioned by the IDEA in developing the student's IEP, it is, going forward, incumbent upon the parents to identify to the school district staff during the CSE meetings what they believe the student requires in order to make progress in reading (see Schaffer, 546 U.S. at 53 [noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]).[24] Based upon a review of the entire hearing record, although the parents testified at the impartial hearing they asked the district to "abandon the Wilson program" and to "replace it" with the Merrill program at the December 2013 CSE subcommittee meeting, no other evidence in the hearing record corroborates this testimony (Tr. pp. 1460-71).[25] To the contrary, other evidence in the hearing record demonstrates that throughout the student's attendance in the district's language-based special class placements, the parents were pleased with the student's progress and with the program, in general. For example, in a May 2012 email to the assistant director, the parents expressed "how wonderful the language based learning class" was and that the student had a "successful school year" (Parent Ex. JJ). In January 2013, the parents sent another email to the assistant director, which noted that the "Langue Based Learning Class [was] such a great program" (Parent Ex. II). In an August 2013 email to the assistant director, the parents indicated that the student "has acquired some excellent learning strategies" while attending the district's language-based special class placements (Parent Ex. GG at p. 1). In a September 2013 email from the parents to Eagle Hill, the parents noted that the

[24] This is especially true when, as here, the hearing record lacks sufficient evidence that the parents complied with the 10-day notice provision. 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]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]). Here, the parents did notify the April 2014 and May 2015 CSE subcommittees of their intentions to place the student at Eagle Hill; however, the hearing record lacks evidence that the parents stated what they believed was deficient with the respective IEPs or expressed their desire for the district to pay for the student's attendance at Eagle Hill for either the 2014-15 or 2015-16 school year (see generally Tr. pp. 1-1564; Parent Exs. A-E; G-M; O; R-V; X-Y; AA-EE; GG-LL; OO-ZZ; AAA-OOO; Dist. Exs. 1-2; 4-18; 20-45; 47-88; IHO Exs. I-VII).

[25] A notation on the December 2013 IEP identified that particular meeting as a "Requested Review" (Dist. Ex. 31 at p. 1). At the impartial hearing, the student's fourth grade special education teacher testified that she believed that she requested the meeting as a result of the parent-teacher conference held in November 2013 (see Tr. pp. 591-92); similarly, the parents testified that they requested the December 2013 meeting as a result of the parent-teacher conference held in November 2013 (see Tr. pp. 1460-61). In a November 2013 email to Eagle Hill staff, the parents reported that they requested a "program review" (Dist. Ex. 14 at p. 22). Regardless, the December 2013 IEP does not reflect any request by the parents to abandon the Wilson reading program and to replace it with the Merrill program (see generally Dist. Ex. 31). Moreover, other than the parents' testimony, the hearing record lacks any evidence of such a request by the parents (see generally Tr. pp. 1-1460; 1471-1564; Parent Exs. A-E; G-M; O; R-V; X-Y; AA-EE; GG-LL; OO-ZZ; AAA-OOO; Dist. Exs. 1-2; 4-18; 20-45; 47-88; IHO Exs. I-VII).

district was accommodating their request to incorporate the Merrill program into the student's current IEP (see Dist. Ex. 14 at p. 21). There is nothing to suggest that the parents want anything other than the best educational opportunities possible for their daughter and I certainly find no fault with such a laudable goal; however, it appears to me that the district was also making genuine efforts to reach a similar objective with the student's interests at heart. In light of what has already transpired, it may help the parents and the district, if they have not done so already, to discuss in detail what particular prospective changes in the public school programming the parents believe would most likely lead to improvements in the student's rate of progress.

VII. Conclusion

Having found that the parents failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 18, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER