The University of the State of New York

The State Education Department
State Review Officer
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No. 12-155

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Susan Luger Associates, Special Education Advocates for respondents, Lawrence D. Weinberg, Esq., of counsel, and Caroline E. Kravath, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Eagle Hill School (Eagle Hill) for the 2011-12 school year. The parents cross-appeal the IHO's decision denying their request for special education transportation services, and the IHO's failure to address issues raised in the due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The CSE met on March 3, 2011 to conduct the student's annual review and to develop his

IEP for the 2011-12 school year (Dist. Ex. 3 at pp. 1-2).[1] Finding that the student remained eligible for special education and related services as a student with an other health-impairment, the CSE recommended a 10-month school year program in a 12:1+1 special class placement in a community school (id. at pp. 1, 12-13).[2] The CSE also recommended the following related services: two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), two 30-minute sessions per week of speech-language therapy in a small group, and one 30-minute session per week of individual speech-language therapy (id. at pp. 1-2, 14). The IEP included annual goals and short-term objectives addressing the student's needs in the areas of mathematics computation and problem solving, fine motor skills, core and upper-body strength, reading comprehension and decoding, pragmatic and receptive language skills, and written expression skills (id. at pp. 7-11).[3]

In a final notice of recommendation (FNR) to the parents, dated July 12, 2011, the district summarized the special education programs and related services recommended for the student by the March 2011 CSE for the 2011-12 school year, and further notified the parents of the particular school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 12). The FNR also identified an individual and a telephone number to contact if the parents wished to "discuss the final recommendation further" (id.).[4]

By letter dated July 22, 2011, the parents advised the district that although they could not contact anyone at the assigned school to schedule a visit, they "followed the school's directive"

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[1] On February 11, 2011, the parents executed an enrollment contract for the student's attendance at Eagle Hill for the 2011-12 school year (Parent Ex. K at pp. 1-2). In a notice dated February 16, 2011, the district invited the parents to attend the student's annual review scheduled for March 3, 2011 (Dist. Ex. 11). By letter dated February 19, 2011, the parents requested that the CSE "schedule" the student's annual review "as soon as possible," because Eagle Hill required the parents' execution of a contract to ensure a place for the student for the 2011-12 school year (Dist. Ex. 9 at p. 1). In the February 19, 2011 letter the parents indicated that they "plan[ned] to sign the contract," and requested that an individual from the "CSE Placement Office" take part in the review (id.). The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.1[c][9]; 8 NYCRR 200.1[zz][10]).

[3] In a "Notice of Deferred Placement: Annual Review or Reevaluation," dated March 29, 2011, the district advised the parents that although the student was entitled to an immediate placement in the program set forth in the notice, "it may be in the [student's] best interest" to "defer placement" in the program until September 2011 so that he could complete the 2010-11 school year at Eagle Hill (Dist. Ex. 13). The notice indicated that if the parents "wish[ed] to visit a sample of the type of program recommended" for the student, they could contact the individual listed at the telephone number in the notice (id.). In addition, the notice indicated that the parents would receive a final notice of recommendation (FNR) identifying the "specific site" for the student before August 15, 2011 (id.).

[4] The FNR did not advise the parents that they had a right to visit the assigned school identified in the FNR or otherwise identify any specific individuals at the assigned school to contact to schedule a visit (see Dist. Ex. 12). The contact person identified in the FNR was a "special education evaluation placement and program officer" employed by the district (compare Dist. Ex. 12, with Tr. pp. 156-58). The contact person identified in the FNR was the same contact person—with the same telephone number—identified in the notice of deferred placement sent to the parents in March 2011 (compare Dist. Ex. 12, with Dist. Ex. 13). Upon receipt of the FNR, the parents located the assigned school's telephone number in the "phone book," and attempted to contact the assigned school directly in order to schedule a tour (see Tr. pp. 356-57).

and accessed the assigned school's internet website to schedule a "tour" (Dist. Ex. 14).[5] At that time, however, the listed tour dates occurred in October, November, and December, 2011 (id.).[6] The parents indicated that because they were not able to "see the actual program/placement, or at least hav[e] [their] questions or concerns addressed," they could not accept or decline the assigned school (id.). Noting the importance of being "fully involved in all aspects of the CSE process including the placement process," the parents indicated that they would "gladly visit the school in the fall" if the district "advise[d]" them (id.). However, unless the district timely offered an "appropriate program/placement," the parents had "no choice" but to unilaterally place the student at Eagle Hill for the 2011-12 school year (id.). The parents also indicated that they would seek tuition reimbursement, and requested that the district arrange "busing" (id.).

On September 28, 2011, the district received an undated letter from the parents, which indicated that they were unable to reach anyone at the assigned school, they were unable to take a "personalized tour of the school," and therefore, the student would remain at Eagle Hill for the 2011-12 school year (Dist. Ex. 15; see Tr. p. 314).

A. Due Process Complaint Notice

By due process complaint notice dated October 13, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1 at pp. 2-4). To support their allegation, the parents asserted the following violations: the annual goals and short-term objectives in the IEP did not reflect "all" of the student's educational and social/emotional needs; the CSE did not develop the annual goals and short-term objectives at the March 2011 meeting, which deprived the parents of an opportunity to meaningfully participate in the "development of the IEP;" the timing of the annual review "precluded" the CSE from considering the student's needs "as reflected by his progress or lack there of in the second half of the school year;" the CSE failed to evaluate the student prior to recommending a "more restrictive setting;" the CSE failed to conduct a classroom observation; the CSE denied the parents' request for special education transportation services; the CSE was not properly composed because the special education teacher did not meet the "necessary criteria;" the CSE ignored the parents' concerns expressed at the CSE meeting, which deprived the parents of an opportunity to meaningfully participate in the "review;" and the CSE failed to recommend an appropriate program due to the size of the "proposed classroom," the student-to-teacher ratio, and the teaching methodology used at the assigned school (id. at pp. 2-3). In addition, the parents noted that on July 12, 2011, they received notification of the student's assigned public school site, but due to their inability to contact anyone at the assigned school, they could not visit the assigned school or either "accept or decline the placement" (id. at p. 3). Finally, the parents asserted that because the CSE did not advise them "how to proceed," "no placement" had been made for the student (id.).

In addition, the parents indicated that Eagle Hill was an appropriate placement for the student because he received the "therapeutic educational interventions and individualized attention" he required, and equitable considerations did not preclude an award of tuition

[5] The parents addressed the July 22, 2011 letter directly to the individual identified as the contact person in the FNR (compare Dist. Ex. 14, with Dist. Ex. 12).

[6] The parents did not indicate in the July 22, 2011 letter why, at that time, they did not schedule a tour of the assigned school on one of the available tour dates (see Dist. Ex. 14).

reimbursement (Dist. Ex. 1 at pp. 3-4). As relief, the parents requested a pendency (stay-put) order directing the student's continued placement at Eagle Hill, as well as the continued payment of his tuition costs under pendency (id.). The parents also requested that an IHO find that the district failed to offer the student a FAPE, that Eagle Hill was an appropriate placement, that equitable considerations did not bar reimbursement of the student's tuition costs, that the student was entitled to special education transportation services as a related service in his IEP, payment of costs and fees and evaluations, and other relief deemed appropriate (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

On November 28, 2011, the parties proceeded to an impartial hearing, and on the first day, conducted a pendency hearing (see Tr. pp. 1-6; IHO Interim Decision on Pendency at pp. 1-4).[7] On January 23, 2012, the parties returned to an impartial hearing, which concluded on April 25, 2012 (see Tr. pp. 7-422).[8] In a decision dated June 28, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, Eagle Hill was an appropriate placement, and equitable considerations favored the parents' request for an award of tuition reimbursement (see IHO Decision at pp. 14-16).

According to the IHO, the district failed to offer the student a FAPE because the "placement procedures" used by the district to recommend an assigned school deprived the parents of an opportunity to meaningfully participate in the "IEP process," and did not allow the parents the "'privilege' to visit" the assigned school (IHO Decision at pp. 14-15). The IHO explained that the parents' "decision to place" the student in the district's "recommended placement" was an "inherent" part of the "IEP process," and therefore, it was "unreasonable" for the district to "wait almost four months" to send an FNR to the parents and then not have an individual at the assigned school available to meet with the parents (id.). The IHO concluded that "it was incumbent upon the [d]istrict to openly avail itself" to the parents to provide them with an "opportunity to at least walk through the school building prior to the first day of school" and that the parents' concern about the student's "motor skills, such as developmental coordination disorder necessitated such visit" (id. at p. 15).

Next, the IHO concluded that the annual goals in the IEP were not specific to the student's "updated educational needs," and did not reflect "updated information" from Eagle Hill (IHO Decision at p. 15). The IHO noted that the CSE meeting minutes were "void" of interaction with Eagle Hill representatives and that the district social worker's testimony was not specific about "any meaningful conversations amongst [the student's] present educators and the team" (id.). The IHO noted that it was "unclear" whether the CSE reviewed the student's most recent information

[7] On December 7, 2011, the parents visited the assigned public school site, and by letter dated December 8, 2011, the parents indicated that the assigned school was not appropriate because the special education classrooms followed the "same curriculum as the general education," the grade levels within the classrooms spanned three years, and the mathematics class they observed was far above the student's third-grade ability (Parent Ex. B at p. 1). In addition, the parents observed approximately 90 students in the gymnasium without any "individualized instruction," which the student required, and further noted that the student would not be able to participate in the "'organized chaos'" and that the gymnasium environment provided "way too much stimulation" for the student (id. at pp. 1-2).

[8] The parents submitted the December 8, 2011 letter into evidence on March 6, 2012, after the district concluded the presentation of its case-in-chief, but just before presenting their own case-in-chief (see Tr. pp. 17-191, 194-422).

from Eagle Hill, dated "December 2011" (id.). Therefore, the IHO was also not persuaded that the recommended 12:1+1 special class placement was reasonably calculated to enable the student to receive "meaningful educational benefit" (id.).

Addressing the unilateral placement, the IHO found that the evidence "overwhelmingly" supported the conclusion that Eagle Hill was an "appropriate placement" for the student during the "2010-2011 school year" (IHO Decision at pp. 15-16).[9] The IHO also noted that the student made progress at Eagle Hill, and she found no evidence that the parents' actions prevented the district from offering the student a FAPE (id. at p. 16). As a result, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2011-12 school year (id.). The IHO declined, however, to award the parents' request for special education transportation services (id.).

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in finding that the district denied the student a FAPE, that Eagle Hill was an appropriate placement, and that equitable considerations favored the parents. The district asserts that the IHO exceeded her jurisdiction in addressing whether the district's "placement offer" was timely, as the parents did not include this as an allegation in the due process complaint notice as a basis upon which to conclude that the district failed to offer the student a FAPE. The district also asserts that the IHO erred in finding that the parents' inability to visit the assigned school constituted a failure to offer the student a FAPE or deprived the parents of an opportunity to meaningfully participate in the IEP process. Next, the district alleges that the IHO erred in finding that the annual goals in the March 2011 IEP did not address the student's "updated educational needs" since the CSE did not rely on the student's present levels of functioning to develop the annual goals. The district also asserts that the IHO erred in finding that the CSE did not review the student's most recent levels of performance described in an "December 2011" Eagle Hill progress report, which was not available at the time of the March 2011 CSE meeting. Finally, the district asserts that the CSE's recommendation of a 12:1+1 special class placement in a community school was appropriate, that it represented the student's least restrictive environment (LRE), and the recommended student-to-teacher ratio was similar to staffing ratios in the classes the student attended at Eagle Hill.

Next, the district argues that the IHO erred in concluding that Eagle Hill was an appropriate placement. Specifically, the district asserts that Eagle Hill was overly restrictive and did not provide the student with the proper related services. The district also argues that the parents did not meet their burden to establish that Eagle Hill was reasonably calculated to enable the student to receive educational benefits. Finally, the district asserts that even if the parents were entitled to relief, the IHO erred in concluding that equitable considerations favored the parents' requested relief. As such, the district seeks to vacate the IHO's decision in its entirety.

In an answer, the parents respond to the district's allegations in the petition, and generally assert that the petition is not properly verified, that the district's obligations under the pendency provisions and the IHO's Interim Order on Pendency continue, and that they did not "waive any issues at [the] hearing" and do not "waive any issues on appeal." The parents also assert additional

[9] It appears that the IHO mistakenly referred to the 2010-11 school year in this portion of the decision (compare Dist. Ex. 1 at p. 4, with IHO Decision at pp. 15-16).

allegations and arguments to support the IHO's conclusion that the district failed to offer the student a FAPE.

In a cross-appeal, the parents contend that the IHO erred in denying their request for special education transportation services, as well as the IHO's failure to address the following issues raised in the due process complaint notice: the timing of the March 2011 CSE meeting precluded the CSE from considering the student's needs during the "second half of the year;" the CSE failed to evaluate the student to support its recommendations; the CSE failed to conduct a classroom observation; the CSE was not properly composed; the teaching methodology at the assigned school was not appropriate; the parents were entitled to payment of costs and fees; and the parents are entitled to payment of evaluations. The parents also attach additional documentary evidence to their pleadings for consideration on appeal. As relief, the parents seek to uphold the IHO's decision in its entirety.

Responding to the parents' answer, the district initially objects to the consideration of three of the exhibits submitted as additional documentary evidence with the parents' pleadings, and otherwise asserts that the petition was properly verified, and the district met its continued responsibilities under pendency. The district further asserts that the parents' "blanket statement" attempting to preserve issues for review on appeal is not sufficient, and thus, the issues raised in the due process complaint notice but not specifically identified by the parents at the impartial hearing or in a cross-appeal must be deemed waived.

The district answers the allegations in the parents' cross-appeal, and argues that the hearing record does not support the parents' request for special education transportation services, and fails to contain any evidence that the student required special education transportation services in his IEP. In addition, although the parents "cursorily identified seven claims" raised in the due process complaint notice that the IHO failed to address as part of their cross-appeal, the district argues that the IHO properly did not address them since the parents waived the issues at the impartial hearing and further particularized the issues for resolution within their written "Closing Argument" submitted for the IHO's consideration at the conclusion of the impartial hearing. Alternatively, if the issues identified in the cross-appeal are properly preserved for appeal, the district contends that the parents do not cite to any evidence in the hearing record to support these issues, and the hearing record does not contain sufficient evidence upon which to render determinations on the issues identified in the cross-appeal. Moreover, if these issues are reviewed, the district argues that the parents would not prevail, and ultimately, the conclusion reached would be that the district offered the student a FAPE for the 2011-12 school year. Finally, the district alleges that Eagle Hill was not appropriate and equitable considerations do not favor the parents' request for tuition reimbursement.

The parents submitted a reply to the district's answer, asserting that the district's verified reply and answer to the cross-appeal exceed the scope of pleadings allowed under regulations. The parents also argue that they have not waived any of the issues the IHO failed to address since these issues were properly preserved for review on appeal by virtue of being raised in the due process complaint notice.

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 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; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d

at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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, 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. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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; 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. Additional Documentary Evidence

In the present matter, the parents attached four exhibits as additional documentary evidence with their pleadings for consideration on appeal (see Answer & Cr. Appeal Exs. A-D). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

In this case, the district does not object to the consideration of Exhibit A, which provides a complete version of the March 2011 CSE meeting minutes—an exhibit already included in the hearing record as evidence—therefore, Exhibit A will be accepted into evidence as part of the hearing record.[10] However, the district does object to the consideration of Exhibits B through D, and argues that these exhibits should not be considered on appeal since the exhibits were available at the time of the impartial hearing, but the parents did not submit them as evidence, and the exhibits are not now necessary in order to render a decision in this matter. Having reviewed Exhibits B through D, and in light of the determinations explained more fully below, the district's arguments are persuasive and I decline to consider Exhibits B through D submitted by the parents with their answer and cross-appeal as additional evidence in this appeal.

B. Scope of Impartial Hearing and Review

Before reaching the merits in this case, I must determine which issues are properly preserved for review on appeal. First, a review of the entire hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing and relying upon issues that the parents did not raise in their due process complaint notice, in order to conclude, in part, that the district failed to offer the student a FAPE for the 2011-12 school year (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A; compare Dist. Ex. 1 at pp. 1-5, with IHO Decision at pp. 14-15). Specifically, the IHO concluded that the district's "placement procedures" used to recommend an assigned school—and in particular, the four month delay in sending the FNR after the March 2011 CSE meeting—deprived the parents of an opportunity to meaningfully participate in the "IEP process," and did not allow the parents the "'privilege' to visit" the assigned school (IHO Decision at pp. 14-15).

Second, a review of the entire hearing record also reveals that the parents raise the following issues in their answer for the first time on appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year that were not raised in their due process complaint notice: (1) the CSE deprived the parents of the opportunity to participate at the March 2011 CSE meeting because the CSE meeting minutes did not reflect

[10] For the purpose of clarity, the complete copy of the March 2011 CSE meeting minutes will be cited to as "Answer Ex. A."

participation by the Eagle Hill teachers; (2) the IEP's failure to reference specific evaluation reports provided by the parents indicated that the CSE failed to consider the evaluations; (3) the IEP did not indicate the student's diagnosed disabilities and failed to accurately describe the student's present levels of academic and functional performance; (4) the CSE ignored the parents' objections expressed at the CSE meeting regarding the OT and PT recommendations; (5) the parents were deprived of the opportunity to participate in the "educational placement" of the student and the IEP failed to include information about the "program;" (6) the four-month delay in offering a "placement" deprived the parents of the opportunity to visit the assigned school; and (7) the assigned school was not appropriate because the mathematics class followed the general education curriculum, and the student would not be functionally grouped due to the "wide range" of cognitive abilities among the students in the classroom (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A; compare Answer ¶¶ 2-4, 6-10, 12-13, with Dist. Ex. 1 at pp. 1-5).

With respect to the issues sua sponte addressed and relied upon by the IHO and the contentions now raised in the parents' answer for the first time on appeal, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include issues related to the timing of the issuance of the FNR—as argued by the district—as a basis upon which the IHO could determine that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1 at pp. 1-5). Moreover, I also find that the parents' due process complaint notice cannot be reasonably read to include any of the issues raised for the first time on appeal in the parents' answer as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2011-12 school year (id.). The hearing record demonstrates that the issues for resolution before the IHO generally included challenges to whether the annual

goals in the IEP were developed at the March 2011 CSE meeting and met all of the student's unique educational, social, and emotional needs; the effect, if any, of the timing of the annual review; the composition of the CSE; the lack of evaluative information and a classroom observation; the failure to recommend special education transportation; the CSE's failure to consider the parents' concerns expressed at the March 2011 CSE meeting; general assertions regarding the recommended program, including the class size, the student-to-teacher ratio, and the teaching methodology; and the parents' inability to visit the assigned public school site (see Dist. Ex. 1 at pp. 1-5). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case—and in fact, voiced clear objections to the parents' submission of subpoenas to compel the appearance and testimony of particular district employees at the impartial hearing and voiced further objections to testimony the parents' counsel attempted to elicit upon cross-examination regarding issues outside the scope of the due process complaint notice—nor did the parents attempt to amend their due process complaint notice (see Tr. pp. 21-30, 131-36, 179-80; see also Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A).[11]

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction in finding that the district denied the student a FAPE based, in part, upon the timing of the issuance of the FNR that she sua sponte addressed, and relied upon in the decision, and that part of the IHO's determination must therefore be annulled. In addition, the contentions in the parents' answer raised for the first time on appeal are outside the scope of my review, and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application

[11] Notably, the parents' counsel affirmatively asserted during the impartial hearing that the district was "entitled" to send the FNR to the parents no later than August 15, 2011—and therefore, the timing of the issuance of the FNR was not procedurally defective (see Tr. pp. 131-36; see also Dist. Ex. 12).

of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).[12]

C. 2011-12 IEP

Turning first to the parents' cross-appeal of the issues raised in the due process complaint notice that the IHO failed to address, I remind the parties that it is not this SRO's role to research and construct the parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments] Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [noting that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).[13] It is only out of an abundance of caution and for the purpose of judicial economy that I undertake a review of the issues identified—without explanation, legal argument, or factual arguments in the cross-appeal—as a potential basis upon which to alternatively conclude that the district failed to offer the student a FAPE for the 2011-12 school year. In the future, cross-appeals presented in this manner may, in my discretion, be dismissed as insufficiently pleaded or remanded to the IHO for further findings.

1. Annual Review

In the cross-appeal, the parents allege that the IHO failed to address their assertion that holding the student's annual review in March 2011 effectively precluded the CSE from considering the student's needs in the "second half of the year." The district asserts that neither the IDEA nor State regulations proscribe when a CSE must convene to conduct a student's annual review, other

[12] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51), I note that the issues sua sponte addressed and relied upon by the IHO and the contentions raised in the parents' answer were first raised—if at all during the impartial hearing—by the parents or by counsel for the parents during opening statements, upon cross-examination of a district witness, upon direct examination of the parents' district employee witnesses who appeared pursuant to subpoenas, or in the parents' closing brief (see, e.g., Tr. pp. 21-30, 33-36, 90-93, 128-36, 102, 104, 106, 109-11, 118, 135-42, 145-46, 187-90, 289-91; IHO Ex. AA at pp. 1-6). Accordingly, I find that the district did not "open the door" to this issue under the holding of M.H.

[13] Recent district court decisions have reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *14 [S.D.N.Y. Feb. 14, 2013] [acknowledging the lack of uniformity within the district courts as to whether a respondent must cross-appeal, but remanding to the SRO issues not addressed by the IHO]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012] [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). However, these decisions do not suggest that such bald assertions—as set forth in the parents' cross-appeal—provide a basis upon which the SRO is required to construct legal or factual arguments on a party's behalf when the party has not elected to do so in order to resolve issues that the IHO did not address (see Application of the Dep't of Educ., Appeal No. 12-177).

than annually, and in this case, the timing of the student's annual review in March 2011 did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194) and no indication in the hearing record that the timing of the CSE meeting to conduct the student's annual review in the instant case resulted in a loss of educational opportunity for the student (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A). I also note that the hearing record does not reflect that at the time of the CSE meeting the parents objected to the timing of the CSE meeting, requested to meet later in the school year, that the district thereafter denied a request by the parents for another CSE meeting, or that the parents subsequently requested another CSE meeting to update the student's performance levels or to otherwise update the student's IEP or the annual goals (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A). In fact, the hearing record specifically indicates that in February 2011, the parents requested that a CSE meeting be scheduled "as soon as possible," because Eagle Hill required their signature on an enrollment contract to ensure a place for the student for the 2011-12 school year (see Dist. Ex. 9 at p. 1). Accordingly, I decline to find under the circumstances of this case that the timing of the March 2011 CSE meeting constituted a violation upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year.

2. Evaluative Information and Classroom Observation

In the cross-appeal, the parents allege that the IHO failed to address their assertion that the district failed to evaluate the student to support the March 2011 CSE's recommendations—including the recommendation for a "more restrictive setting"—and failed to conduct a classroom observation of the student. The district asserts that the parents fail to cite to any evidence in the hearing record in support of these assertions, or alternatively, that the hearing record fails to contain sufficient evidence upon which to render conclusions on these issues.

With respect to the March 2011 CSE's alleged failure to conduct a classroom observation of the student, State regulations only require the completion of a classroom observation as part of an initial evaluation (8 NYCRR 200.4[b][iv]). According to State regulations, the purpose of observing the student in his or her learning environment is to "document the student's academic performance and behavior in the areas of difficulty" (8 NYCRR 200.4[b][iv]). The hearing record does not indicate that in this case the March 2011 CSE was required to conduct a classroom observation of the student, since this was not an initial evaluation of the student (see Tr. p. 99); furthermore, the hearing record indicates, as more fully explained below, that the March 2011 CSE had sufficient, current evaluative information—including information provided through the participation and input of the student's then-current Eagle Hills teachers—to otherwise inform the March 2011 CSE about the student's academic performance and behavior within his learning environment such that a formal classroom observation was not required (see Dist. Ex. 3 at pp. 2-6; Answer Ex. A at pp. 1-3).

With respect to the March 2011 CSE's alleged failure to evaluate the student in order to support its recommendations in the 2011-12 IEP—including the recommendation for a "more restrictive setting"—generally, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Initially, a review of the hearing record does not demonstrate that the March 2011 CSE's recommendation to place the student in a 12:1+1 special class in a community school for the 2011-12 school year constituted a "more restrictive setting" (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A). According to the district social worker's testimony, the CSE—for the 2010-11 school year—recommended, in part, a 12:1 special class placement in a community school for the student (see Tr. pp. 99-104). However, for the 2011-12 school year, the March 2011 CSE recommended a 12:1+1 special class placement in a community school for the student based upon information gleaned at the March 2011 CSE meeting, which indicated that he required "more support" and that he "did well in a smaller group and more attention" (Tr. pp. 103-04; see Dist. Exs. 3 at pp. 1, 12-13; Answer Ex. A at p. 2). The district social worker also testified that based upon this rationale, the March 2011 CSE "went more restrictive" placement for the 2011-12 school year (see Tr. pp. 103-04). Thus, to the extent that the parents based their allegation upon the district social worker's testimony regarding the "more restrictive" nature of the 12:1+1 special class placement due to the increased student-to-teacher ratio when compared to the 12:1 special class placement for the 2010-11 school year, both the parents and the district's social worker misapply the LRE principle. In these circumstances, LRE is not defined by the particular special education student-to-adult staff ratio present in the placement recommendations. Instead, as described by the Second Circuit, LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers, that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120 [emphasis added]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 639 [S.D.N.Y. 2011]). Here, while the March 2011 CSE altered the student-to-teacher ratio in the special class placement recommended for the 2011-12 school year, I note that the March 2011 CSE also recommended that the student's special class placement continue to be located within a community school—similar to the recommendation for the location for the student's special class placement for the 2010-11 school year (see Dist. Ex. 3

at p. 14 [noting the recommendation for the student's participation in school activities with non-disabled peers]; compare Answer Ex. A. at p. 2, with Tr. pp. 99-104). Thus, together with the LRE principle explained above, the hearing record does not support a finding that the recommendation to place the student in a 12:1+1 special class in a community school for the 2011-12 school year constituted a "more restrictive setting," and the parents' allegation that the March 2011 CSE was required to evaluate the student prior to recommending a "more restrictive setting" is without merit.

Next, a review of the hearing record does not support the parents' allegation that the district failed to evaluate the student to support the March 2011 CSE's recommendations. The district social worker, who is also a special education teacher, testified that she participated in the student's March 2011 CSE meeting (Tr. pp. 37-40; see Dist. Ex. 3 at p. 2). The hearing record reflects that the March 2011 CSE reviewed information about the student to better understand him and how he functioned, including a February 2008 speech-language evaluation report, a March 2008 educational evaluation report, an April 2009 neuropsychological consultation report, an April 2009 psychotherapeutic and pharmacological report, and December 2010 Eagle Hill progress reports (Tr. pp. 41-44, 57-60; Dist. Exs. 5-8; Answer Ex. A at pp. 1-3). According to the district social worker, the student's neuropsychological evaluation had been conducted within approximately two years of the March 2011 CSE meeting and was therefore judged to be "reliable and relevant" (Tr. p. 43). She indicated that the December 2010 Eagle Hill progress reports and the input from Eagle Hill staff provided the "main source" of information about the student at the March 2011 CSE meeting (Tr. pp. 42-43). The district social worker further testified that the neuropsychological report—in conjunction with the December 2010 Eagle Hill reports and input from Eagle Hill participants at the meeting—provided the March 2011 CSE with sufficient information, and therefore, the March 2011 CSE did not require additional evaluations in order to make its recommendations for the student's 2011-12 IEP (Tr. pp. 42-44, 52; Dist. Ex. 3 at p. 2). The district social worker testified that no one at the March 2011 CSE meeting objected to the use of the evaluation reports, nor did anyone request additional evaluations of the student (Tr. p. 44).

The February 2008 speech-language evaluation report indicated that the student exhibited mild to moderate receptive language deficits, "fair" auditory comprehension skills, below age level auditory short-term memory skills, and "weak" phonological awareness skills (Dist. Ex. 8 at p. 5). According to the evaluator, the student demonstrated mild to moderate expressive language skill deficits (id. at p. 6). Expressively, the student spoke in phrases and sentences using a fair range of syntactic forms; however, the evaluator reported that the student's spoken productions were lengthy as he required longer utterances to convey his intent (id. at p. 5). The student also demonstrated weak expressive vocabulary skills, and exhibited difficulty with word knowledge and word finding tasks (id.). The evaluator characterized the student's conversational skills as "superficially adequate," and reported that the student demonstrated "fair" topic maintenance skills; however, his narrative production and verbal reasoning skills were below age level expectancy (id. at pp. 5-6). Additionally, the student exhibited difficulty expanding on ideas when completing a writing task, and his writing sample suggested the presence of severe graphomotor deficits (id. at p. 6). The evaluator recommended that the student be considered for placement in a "small, self-contained classroom where the focus of instruction center[ed] around language development" and that the student be provided with several sessions of speech-language therapy per week in both individual and small group settings (id. at p. 8).

Both the 2008 educational evaluation and the 2009 neuropsychological evaluation assessed the student's cognitive, academic, visual and auditory perceptual, and memory skills, and the 2009

neuropsychological evaluation also assessed the student's skills in the areas of attention, executive functioning, language processing, perceptual reasoning and spatial processing, processing speed and sensorimotor, social perception, and behavioral and emotional functioning (see Dist. Exs. 5 at pp. 4-18; 6 at pp. 7-16). Results of the 2009 neuropsychological evaluation indicated that the student's cognitive abilities fell within the borderline to low average range, and both evaluation reports showed that he possessed significantly stronger verbal skills when compared to nonverbal abilities (Dist. Exs. 5 at pp. 9-10, 19; 6 at p. 16). Evaluation results identified the student's deficits in spatial analysis, reasoning, and construction; visual perceptual, motor, and processing speed; working memory; academic fluency; attention and concentration; executive functions, organization and cognitive flexibility; mathematics; receptive language; word retrieval; and social-information processing (Dist. Exs. 5 at pp. 4, 10-14, 17, 20; 6 at pp. 7-17). Additionally, ratings obtained from the parents and the student's teachers reflected the student's significant difficulties with anxiety, withdrawal, attention, and meta-cognition, and highlighted concerns with respect to depression and somatization (Dist. Ex. 6 at p. 18). The 2009 neuropsychological evaluation report indicated the student as having received diagnoses of an attention deficit hyperactivity disorder (ADHD), combined type; a mixed receptive-expressive language disorder; a developmental coordination disorder; a learning disorder, not otherwise specified (NOS) (nonverbal learning disorder); and a generalized anxiety disorder (id.). Evaluators conducting both the 2008 educational evaluation and the 2009 neuropsychological evaluation recommended that, among other supports, the student be placed in a small, self-contained special education class that was highly structured and provided alternate teaching strategies and individualized instruction (Dist. Exs. 5 at p. 20; 6 at p. 18).

In an April 27, 2009 psychotherapeutic services and pharmacologic management report, the physician described the medications administered to the student and his response to the treatment plan that included weekly psychotherapy and pharmacotherapy (Dist. Ex. 8 at pp. 1-3). According to the report, the goals of psychotherapy were to strengthen the student's awareness of his emotional states and the impact on his behavior, to develop more mature social and coping skills, to develop strategies to control maladaptive impulses, to encourage more age-appropriate interests and conversational skills, to decrease obsessional worrying and perseverative conversation, and to further his self-esteem (id. at pp. 2-3). The report noted that the student received "supportive emotional services" at Eagle Hill, and attended a private social skills group (id. at p. 3).

The December 2010 Eagle Hill progress reports indicated that during the 2010-11 school year, the student received instruction in motor training, American history, writing, mathematics, language arts, and communication skills (see Dist. Ex. 7 at pp. 1-20). Within each area of instruction, the report reflected the skills the student worked on, the student's current skill level, his progression toward mastery of goals enumerated for the particular class, and the classroom modifications used specifically with the student (id.).[14] The December 2010 progress reports indicated that in most academic areas, the student benefitted from the use of classroom modifications, including previewing and reviewing new material; providing repeated exposure to

[14] During the impartial hearing, a former Eagle Hill teacher explained that regarding all students in a particular class worked toward the same goals, but that the classroom modifications were individualized to each student in the class, and it was reasonable to infer that Eagle Hill utilized the same process when preparing the student's December 2010 progress reports (Tr. pp. 282, 289-90; compare Dist. Ex. 7 at pp. 1-20, with Parent Ex. D at pp. 1-24).

and repetition of new concepts; limiting the amount of questions or material to be covered; providing teacher cues, prompts and models; using graphic organizers, calculators, outlines, study guides, dictionaries, and charts; and providing role-play opportunities (id. at pp. 4, 7, 11, 15-16, 19).

Based upon the foregoing, the hearing record supports a finding that the March 2011 CSE's consideration and reliance upon a variety of evaluative reports—as well as the participation and input from the student's then-current Eagle Hills teachers—adequately supported the recommendations made by the March 2011 CSE in the 2011-12 IEP, such that additional evaluative information was not required.

3. CSE Composition

In the cross-appeal, the parents allege that the IHO failed to address their assertion that the March 2011 CSE was not validly composed. The district contends that while the parents' cross-appeal fails to articulate or explain how the March 2011 CSE was not validly composed, the parents' alleged in the due process complaint notice that the special education teacher attending the March 2011 CSE meeting did not meet the "necessary criteria" to fulfill this role (see Dist. Ex. 1 at p. 3).

In this case, the following individuals attended the March 2011 CSE meeting: the parent, the parent's educational advocate, the student's then-current "Tutorial Teacher" from Eagle Hill, the student's then-current "Educational Advisor" from Eagle Hill, a district school psychologist, a district social worker, an additional parent member, and a district special education teacher who also served as the district representative (Dist. Ex. 3 at p. 2; Answer Ex. A at p. 1). With regard to CSE composition, the IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).[15]

A review of the hearing record does not support a finding that the district individual who dually served as the special education teacher and district representative at the March 2011 CSE meeting, or alternatively, the district social worker who was also a certified special education teacher, was either a special education teacher of the student or would be responsible for implementing the student's IEP; as such, this individual did not meet the necessary criteria to serve in the role of the special education teacher at the March 2011 CSE meeting (see Tr. pp. 37-38, 49).

[15] The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

Similarly, however, the hearing record fails to contain any evidence regarding the specific qualifications of the Eagle Hill participants—namely, the student's then-current "Tutorial Teacher" or the "Educational Advisor"—at the March 2011 CSE meeting (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A).[16] Consequently, I am constrained by the evidence in the hearing record to conclude that neither the attendance of the district special education teacher or the district social worker, nor the Eagle Hill participants at the March 2011 CSE meeting, in this circumstance, comported with the requirements of federal and State regulations (see Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137; see 20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). Notwithstanding this finding, however, the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits, especially when the parents' cross-appeal does not assert any arguments as to how or why this procedural violation rose to the level of a denial of a FAPE (see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[2]; 8 NYCRR 200.5[j][4][ii]).

4. Annual Goals

On appeal, the district argues that the IHO erred in finding that the annual goals in the student's 2011-12 IEP did not address his "updated educational needs" and that the March 2011 CSE based the student's goals on the "previous year's goals without due regard or, at a minim[um], updated information from the Eagle Hill School" (see IHO Decision at p. 15). In response to the district's contention, the parents assert that the IHO correctly found that the annual goals were not "specific" to the student's educational needs because they were based on the prior year's IEP and the parents further assert that the annual goals were not measurable.

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

[16] The hearing record does reflect that at Eagle Hill during the 2010-11 school year, the "Tutorial Teacher" provided "intensive remedial instruction" to the student in language arts, which included the following: development of his reading skills by providing instruction in decoding, phonemic awareness, and word analysis strategies; development of his reading comprehension, oral and written expression, spelling, vocabulary, spatial and temporal concepts, and study skills; and writing instruction (compare Dist. Ex. 3 at p. 2 and Answer Ex. A. at p. 1, with Dist. Ex. 7 at pp. 12-16). The evidence further indicates that the "Tutorial Teacher" used a variety of classroom modifications for the student in the areas of vocabulary, comprehension, written expression, and study skills (see Dist. Ex. 7 at pp. 15-16). In addition, the student's 2011-12 IEP reflected information reported about his present levels of academic and social/emotional performance through "teacher reports" (see Dist. Ex. 3 at pp. 3-5; Answer Ex. A at p. 2). However, the hearing record does not sufficiently establish that the "Tutorial Teacher" was a certified special education teacher, as defined under State regulations, or that she would be responsible for implementing the student's 2011-12 IEP developed by the CSE at Eagle Hill to otherwise render her as qualified to fulfill the role of the special education teacher serving on the March 2011 CSE.

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]). Determinations about the individual needs of a student shall provide the basis for the written annual goals (8 NYCRR 200.1[ww][3][i]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

An independent review of the hearing record demonstrates that contrary to the IHO's finding, the March 2011 CSE developed approximately nine annual goals with corresponding short-term objectives to address the student's unique special education needs, as set forth in the present levels of performance in the IEP and as identified in the December 2010 Eagle Hill progress reports (compare Dist. Ex. 3 at pp. 7-11, with Dist. Ex. 3 at pp. 3, 5, and Dist. Ex. 7 at pp. 1, 5-12, 14, 18).

A review of the student's 2011-12 IEP academic present levels of performance indicates that the student was described as "hardworking" and "eager to learn" (Dist. Ex. 3 at p. 3). Teacher reports reflected in the IEP indicated that reading and language arts were areas of strength, the student exhibited a good word vocabulary and strong literal comprehension skills, and that he listened to directions (id.). According to the IEP, the student exhibited weaknesses in oral expression, fluency, inferential comprehension, and study skills, as well as higher-order thinking skills such as inferencing and predicting (id.). The IEP indicated that the student's mathematics computation and problem solving skills were delayed, and that he exhibited a "weak sense of numbers and their relation[n]ships," which affected his problem solving skills (id.). The student demonstrated weak written expression skills, and the IEP noted that although he could write a complex sentence in isolation when provided with direct instruction, he did not exhibit the ability to do so successfully in written assignments (id.). Additionally, the IEP indicated that the student's pencil grasp was weak, as were his letter formation, structure, and grammar skills (id.). The IEP provided the following grade equivalent instructional levels: reading decoding (6.5), reading comprehension (4.5), written expression (4.0), mathematics computation (3.0), and mathematics problem solving (3.0) (id.).

The 2011-12 IEP social/emotional present levels of performance reflect teacher reports that the student got along well with adults and peers and had a large group of friends (Dist. Ex. 3 at p. 5). According to the IEP, the student was also described as "a little immature" and indicated that he needed to "stand back before getting involved in his friend's issues" (id.). The student was working to overcome his difficulty expressing his wants and needs, and "reading his social environment" (id.). The March 2011 CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher without the need to develop a behavior intervention plan (id.). Regarding the student's health and development, the IEP reflected the parent's report that the student was in overall good health, and that at home he was administered medication to address focusing and attention (Dist. Ex. 3 at p. 6).

According to the district social worker, during the approximately two hour March 2011 CSE meeting, she contemporaneously prepared the CSE meeting minutes on her laptop computer, and she testified that the minutes reflected an accurate description of the March 2011 CSE meeting (Tr. pp. 56-57, 150; see Answer Ex. A at pp. 1-3). The CSE meeting minutes describe the March 2011 CSE's discussion of the student's present levels of performance and further reflect that such information was included in the 2011-12 IEP (compare Dist. Ex. 3 at pp. 3, 5-6, with Answer Ex. A at pp. 2-3). The district social worker further testified that the student's IEP accurately reflected

what the March 2011 CSE learned from the student's teachers at Eagle Hill and the reports provided by Eagle Hill (Tr. p. 66).

According to the district social worker, the "team" worked together to draft the annual goals included in the 2011-12 IEP, which were formulated in conjunction with the student's teacher and the educational advisor at Eagle Hill (Tr. pp. 67, 69-76, 83; see Dist. Ex. 3 at p. 2). The district social worker indicated that the CSE had the student's 2009-10 IEP at the March 2011 CSE meeting and used it as a "draft," reviewing the goals and "extended from there what was still appropriate and made amendments as appropriate," asking Eagle Hill staff whether the annual goals included in the 2009-10 IEP continued to be appropriate for the student and what was an appropriate manner of instruction for the student (Tr. pp. 126-27).[17] The district social worker further testified that Eagle Hill provided the student reports that were reviewed and discussed by the March 2011 CSE; that the annual goals were created and read back to Eagle Hill staff; and that the annual goals were subsequently agreed upon at the March 2011 CSE meeting (Tr. pp. 83-85). The district social worker described Eagle Hill staff's input into the development of the annual goals as "very important" (Tr. p. 67). The student's mother also testified that the CSE discussed the annual goals during the March 2011 CSE meeting (Tr. p. 395). Based on the foregoing, the hearing record does not support the IHO's finding that the March 2011 CSE developed the student's goals without updated input from Eagle Hill.

Moreover, a review of the annual goals and short-term objectives included in the 2011-12 IEP demonstrates that they addressed the student's needs as identified in the present levels of performance contained in the IEP. The student's 2011-12 IEP contained annual goals and corresponding short-term objectives to improve the student's mathematics computation, mathematics problem solving, fine motor, core/upper body strength, reading comprehension, reading decoding, and pragmatic, receptive and written language skills; needs identified in the December 2010 Eagle Hill progress reports and/or the IEP present levels of performance (Dist. Ex. 3 at pp. 7-11). In mathematics, short-term objectives indicate that while using multiple specific strategies, the student would perform calculations using the appropriate operation and solve word problems (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 3 at p. 7, and Dist. Ex. 7 at pp. 8-10). To address the student's need to improve higher level thinking and reading skills, the IEP provided short-term objectives, that in conjunction with the use of a number of specific strategies, improved the student's ability to respond to reading passages by answering inferential questions and to decode a variety of multisyllabic words (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 3 at p. 8, and Dist. Ex. 7 at pp. 12, 14). To improve the student's social and communication skills, short-term objectives addressed the student's need to use appropriate voice volume, greet adults and classmates, ask appropriate and topic related questions, use appropriate amounts of detail when offering compliments, maintaining and terminating conversations, interrupting and changing the topic appropriately, and shifting social skills to match social conversations (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 3 at p. 8, and Dist. Ex. 7 at p. 18-19). The IEP also provided short-term objectives to improve the student's ability to answer questions presented orally and to follow multistep directions (compare Dist. Ex. 3 at p. 8, with Dist. Ex. 7 at p. 18). Areas of need identified in the December 2010 Eagle Hill progress reports related to the student's core/upper body strength

[17] I note that the hearing record does not contain the student's 2009-10 IEP, and the student's mother testified that she had "no way of knowing" how much the March 2011 CSE used the prior IEP in developing the annual goals for the 2011-12 IEP (Tr. p. 396).

and ball skills were also addressed as annual goals and short-term objectives in the IEP (compare Dist. Ex. 3 at p. 7, with Dist. Ex. 7 at p. 1).

Lastly, regarding the parents' contention that the annual goals and short-term objectives were not measurable, upon review, I find that they included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 3 at pp. 7-11; see 8 NYCRR 200.4[d][2][iii][b]). The majority of the student's 2011-12 IEP annual goals and short-term objectives, when read together, provided criteria for measurement to determine if a goal has been achieved (e.g., 80 percent accuracy, 90 percent accuracy), the method of how progress will be measured (e.g., teacher made materials, teacher/provider observations, performance assessment tasks), and a schedule of when progress toward the goals will be measured (e.g., five consecutive weekly quizzes, five consecutive trials over a two-week period) (Dist. Ex. 3 at pp. 7-11). The IEP further noted that three progress reports regarding the student's progress toward the annual goals would be provided during the school year (id.). Accordingly, the hearing record does not support the parents' contention.

Thus, I find that overall the annual goals and short-term objectives contained in the student's 2011-12 IEP, when read together, target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring his progress (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). Accordingly, the IHO's determination that the district denied the student a FAPE for the 2011-12 school year based upon a finding that the annual goals in the student's 2011-12 IEP were insufficient must be reversed.

5. 12:1+1 Special Class Placement

The district asserts in its appeal that contrary to the IHO's finding, the March 2011 CSE's recommendation to place the student in a 12:1+1 special class placement was reasonably calculated to provide him with meaningful educational benefit. The parents dispute the district's contention, and argue that the recommended 12:1+1 special class placement was not supported by evaluative information or a classroom observation and that the March 2011 CSE ignored the parents' concerns expressed at the meeting regarding the staffing ratio of the recommended placement.[18]

State regulations provide that the "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 in 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]).

According to the district social worker, the March 2011 CSE considered and rejected the 12:1 special class placement option that had been recommended for the 2010-11 school year

[18] Given the findings rendered under subparagraph two above, "Evaluative Information and Classroom Observation," the parents' contention here is duplicative and will not be addressed further.

because the student required more direct support in order for him to meet the annual goals in his IEP (Tr. pp. 99-104; see Dist. Ex. 3 at p. 13). For the 2011-12 school year, the March 2011 CSE recommended a 12:1+1 special class placement, which added a classroom paraprofessional, since it was reported that the student "works best in a smaller group with a little more attention" (Tr. pp. 82-83).

The district social worker also testified that a 12:1+1 special class placement was recommended to "model" the type of class the student currently attended at Eagle Hill in which he had been successful because it afforded him with more teacher support and attention, and opportunities for small group instruction (Tr. pp. 47, 104). In conjunction with the supports inherent in a 12:1+1 special class placement, the March 2011 IEP identified the student's academic management needs and provided him with teacher modeling and role-playing opportunities; color coding; mnemonic devices; manipulatives; sequentially increased language complexity; graphic organizers; rubrics for checking and rechecking; brainstorming, comparing and contrasting opportunities; specific teaching of visualization and questioning techniques; outlines; picture cues; transition word/phrases "pick list;" and guided and independent practice opportunities (Dist. Ex. 3 at pp. 3-4). To support the student's social/emotional management needs, the IEP provided guided questioning and cuing; frequent review; role playing; prompts to listen; repeated directions; teacher modeling; and opportunities to use social language and routines (id. at p. 5). In addition, the hearing record indicates that many of the student's management needs identified in the IEP were also classroom modifications Eagle Hill identified as useful for the student (compare Dist. Ex. 7 at pp. 4, 7, 11, 15-16, 19, with Dist. Ex. 3 at pp. 3-5).

The March 2011 CSE also recommended that the student receive two individual sessions per week of both PT and OT, and one individual session per week of speech-language therapy (Dist. Ex. 3 at p. 14). The March 2011 CSE modified the student's group speech-language therapy recommendation by increasing the number of group sessions to two per week to "help promote pragmatic and expressive language skills," areas of need identified in the present levels of performance (Tr. p. 82; Dist. Ex. 3 at pp. 5, 8, 14; Answer Ex. A at p. 2). The district social worker testified that the related service recommendations were determined at the March 2011 CSE meeting after discussing the student's areas of deficit and how best to address them (Tr. pp. 81-82).

Thus, the hearing record shows that the March 2011 CSE considered the information before it and modified its recommendations for the 2011-12 school years accordingly by increasing the amount of adult support within the recommended special class placement, and adding one session of group speech-language therapy to further the student's progression toward achieving his IEP goals. Although it is understandable that the parent might prefer placing the student in a special class with staffing ratios similar to those provided at Eagle Hill, I find that the hearing record supports the March 2011 CSE's determination that a 12:1+1 special class placement with the identified related services and management strategies sufficiently addressed the student's identified needs—including the need for small group instruction—such that it was reasonably calculated to enable him to receive educational benefits in the LRE, and therefore, the district's recommendations in the 2011-12 IEP offered the student a FAPE.

6. Special Education Transportation Services

In the cross-appeal, the parents assert that the IHO erred in declining to find that the student required special education transportation services as a related service in the 2011-12 IEP, and

further assert that the student was entitled to transportation as a related service pursuant to the IDEA, or alternatively, pursuant to State law. The district disagrees, and argues that the hearing record contains no evidence that the student had any physical issues or mobility issues that would necessitate the provision of transportation as a related service.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Transportation as a related service can include travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). The nature of the specialized transportation required for a particular student depends upon the student's unique needs, and it must be provided in the LRE (34 CFR 300.107; 300.305). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). Safety procedures for transporting students are primarily determined by state law and local policy (see Letter to McKaig, 211 IDELR 161 [OSEP 1980]).

As noted above, transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Tatro, 468 U.S. at 891, 894; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

According to a guidance document, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist.,

987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question "is whether the transportation arrangements [the district] made for [the student] were appropriate to his needs" (Application of a Child with a Disability, Appeal No. 03-054).

Upon careful review, I agree with the district's argument that the hearing record does not contain evidence that the student required special education transportation services as a related service (see Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A). Based upon the March 2011 CSE meeting minutes, it appears that the parents asked about "bussing for the upcoming school year," and in response, the parents were told that if the student attended a public school site "beyond a one-half-mile radius from his home bussing would be available" (Answer Ex. A at p. 2). The CSE meeting minutes do not document further discussions on this topic (see id. at pp. 1-3). At the impartial hearing, the district social worker testified that the March 2011 CSE did not recommend special education transportation for the student because he would have access to the same bussing available for regular education students had he attended a public school site (see Tr. pp. 87-88).

According to the December 2010 Eagle Hills progress reports, the student received motor training, which targeted his upper body and core strength, aerobic endurance, ball throwing and ball kicking skills, and his participation in games and leisure activities (see Dist. Ex. 7 at p. 1). Neither the motor training report, specifically, nor the hearing record, generally, indicate that the student had mobility, behavior, communication, physical, or health needs that required the provision of special education transportation as a related service for the student to receive a FAPE (see id.; see also Tr. pp. 1-422; Dist. Exs. 1-15; Parent Exs. A-K; IHO Exs. AA-BB; Answer Ex. A). Moreover, the hearing record does not contain evidence that the student would not be able to access his special education services, notwithstanding the absence an ambulatory impairment directly causing a unique need for some specialized form of transport. As such, I find no reason to disturb the IHO's determination denying the parents' request for special education transportation services.

7. Assigned School

Finally, the district contends on appeal that the IHO erred in finding that the district failed to offer the student a FAPE based upon the parents' inability to visit the assigned school or that the inability to visit the assigned school deprived the parents of the opportunity to meaningfully participate in the IEP process. The parents disagree, and argue that they had no opportunity to speak to anyone at the assigned school and no one from the district responded to their telephone calls or letters regarding the assigned school.

While the IDEA requires "that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child" (20 U.S.C. § 1414[e]; 34 CFR 300.501[c][1]), neither the IDEA nor State regulations confer upon parents the right to visit a recommended school and classroom. The United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 12-047; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application

of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013).[19]

Moreover, the Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d at 191-92; see S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *5 [N.D.N.Y. Feb. 28, 2013]; J.L. v. City Sch. Dist. of City of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013];F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *12 [S.D.N.Y. Oct. 16, 2012]); K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F., 2011 WL 5419847, at *12, *14; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L, 812 F. Supp. 2d at 504).

In this case, the hearing record demonstrates that the FNR did not indicate that the parents had the right to visit the assigned public school site or otherwise offer the parents the opportunity to visit the assigned public school site (see Dist. Ex. 12). Instead, the FNR indicated that if the parents wished to "discuss the final recommendation further," they could contact the individual identified at the noted telephone number (see id.). Here, the parents chose to contact the assigned public school site directly by locating the telephone number in the phone book, and they were not successful in their attempts to speak to anyone at the assigned public school. However, as noted above, since the parents do not have a right to visit the assigned public school site, their inability to visit—and their inability to speak to anyone at the assigned public school site—cannot provide a basis upon which to conclude that the district failed to offer the student a FAPE. In addition, the hearing record demonstrates that the parents had the opportunity to meaningfully participate—with the support of their educational advocate—in the "IEP process" through their attendance and active participation at the student's March 2011 CSE meeting convened to develop the student's 2011-12 IEP (see Tr. pp. 52-56, 353-55; Dist. Ex. 3 at p. 2; Answer Ex. A at pp. 1-3).

Accordingly, the IHO erred in finding that the parents' participation in the development of an educational program for the student was impeded based upon their inability to visit the assigned public school site or to speak to anyone at the assigned public school site at which the IEP would

[19] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and, at that point, have new concerns, the IDEA and the Education Law contemplate that the collaborative process for revising the IEP will continue—that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

be implemented (see T.Y., 584 F.3d at 416, 419-20; J.L., 2013 WL 625064, at *10; S.F., 2011 WL 5419847, at *12; C.F., 2011 WL 5130101, at *8-*9).[20]

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Eagle Hill was an appropriate placement (Burlington, 471 U.S. at 370).[21]

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 28, 2012 is modified by reversing the determination that the district failed to offer the student a FAPE for the 2011-12 school year and the IHO's order directing the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2011-12 school year.

Dated: **Albany, New York**
July 26, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER

[20] The Second Circuit has also made clear that just because a school district is not required to place details such as the particular school site or classroom location on a student's IEP, a school district is not free to choose any random classroom and services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d 412, 420 [2d Cir. 2009] [explaining that a school district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). Thus, in reaffirming T.Y., the Court held that, a school district "may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d 167, 191-92). In addition, the IDEA does not require districts to maintain classroom openings for students enrolled in nonpublic schools (see Application of the Dep't of Educ., Appeal No. 12-070; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 11-008; see also S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]).

[21] With respect to the parents' allegations in the cross-appeal that the IHO erred in failing to address issues regarding the teaching methodology at the assigned public school site and payment of their costs, fees, and evaluations, neither the hearing record nor the pleadings in this case contain evidence to construct either legal or factual arguments on the parents' behalf, and therefore, I decline to review these issues.