The University of the State of New York

The State Education Department
State Review Officer
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No. 14-088

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

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

Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2010-11, 2011-12, and 2012-13 school years. Respondent (the district) cross-appeals from the impartial hearing officer's determination that the parents provided sufficient notice to the district concerning unilateral placement for the 2010-11 school year. The appeal must be dismissed. 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 student was initially classified as a student with a disability on January 15, 2009 when he was in the first grade and had a plan pursuant to Section 504 of the Rehabilitation Act of 1973 (504 plan) in place related to his diagnoses of an attention deficit hyperactivity disorder (ADHD), a developmental coordination disorder, and sensory integration dysfunction (Dist. Ex. 3 at p. 1). The student attended a community school and received related services in a general education setting for his first and second grade years in the 2008-09 and 2009-10 school years (Dist. Exs. 3, 4).

For the 2009-10 school year, the student's second grade year, the student attended a general education program in a community school with related services of occupational therapy,

psychological consultation and speech/language consultation (Dist. Ex. 4). The student was described as highly anxious and distractible, with sensory issues, delays in motor skills and pragmatic skills, and difficulties navigating his environment, staying on task, and with interpersonal skills (id. at p. 3). The student's second grade special education teacher noted that the student's nonverbal learning disability resulted in the student's weaknesses in nonverbal reasoning, abstract reasoning, and interpersonal relationships (Tr. pp. 857-58).

On May 3, 2010, the CSE subcommittee convened to conduct the student's annual review and develop his IEP for the 2010-11 school year (Dist. Ex. 5 at p. 1). The CSE subcommittee found the student eligible for special education programs and related services as a student classified with an other health impairment and recommended that the student be placed in a community school for his third grade year (Dist. Ex. 5 at p. 1). It was recommended that the student receive a one to one resource consultant teacher five times a week for 45 minutes, and a one to one teaching assistant daily for 5 hours and 45 minutes (id. at pp. 1-2). The CSE subcommittee recommended related services of two 30 minute sessions of counseling in a group of three, two 30 minute sessions of individual occupational therapy, a one hour occupational therapy consult per month, two 30 minute sessions of speech language therapy in a group of five, and a one hour speech language consult per month (id. at p. 2).

On June 7, 2010, the district was advised that the student would be attending Eagle Hill for the 2010-11 school year (Dist. Ex. 5 at p. 1).

For the 2010-11 school year, the student attended Eagle Hill (Dist. Ex. 6 at pp. 1-2). On May 13, 2011, the CSE subcommittee convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 6 at p. 1). The CSE subcommittee found the student eligible for special education programs and related services as a student classified with an other health impairment and recommended a placement in a community school for the student for his fourth grade year (Dist. Ex. 6 at p. 1). The student was recommended to have a one to one special class (one to one resource consultant teacher five times a week for 45 minutes), and a one to one teaching assistant daily for 5 hours and 45 minutes (id. at p. 2). The CSE subcommittee recommended related services of two 30 minute sessions of counseling in a group of three, two 30 minute sessions of individual occupational therapy, a one hour occupational therapy consult per month, two 30 minute sessions of speech language therapy in a group of five, and a one hour speech language consult per month (id.)

For the 2011-12 school year, the student attended Eagle Hill (Dist. Ex. 7). On May 21, 2012, the CSE subcommittee convened to conduct a reevaluation and the student's annual review (id. at p. 1). The CSE subcommittee found that the student was eligible for extended school year services as a student with a learning disability, commencing in July 2012 through August 2012 (id. at pp. 1, 3). The extended school year program recommended for the student consisted of a 15:1 special class twice a week for 60 minutes and individual OT for 30 minutes twice a week (id.). The CSE subcommittee also discussed the student's recommended program for the 2012-13 school year and determined that the student would benefit from a 12:1+1 special class and that other district-based programs, BOCES programs, and the Summit School should be explored and that the CSE would then reconvene (id.).

On July 12, 2012, the CSE subcommittee reconvened to conduct a reevaluation and the student's annual review for the 2012-13 school year (Dist. Ex. 8 at p. 1). The CSE subcommittee found the student eligible for special education programs and related services as a student with a learning disability and recommended a BOCES placement in a public school for the student for his fifth grade year (id. at p. 2, 21). The recommendations for the student included a 12:1+1 special class and related services of two 30 minute sessions of individual occupational therapy, a one hour occupational therapy consult per month, two 30 minute sessions of speech language therapy in a group of five, a one hour speech language consult per month, one 30 minute session of individual counseling per week and one 30 minute session of 5:1 counseling per week (id. at pp. 1-2).

The district's July 12, 2012 IEP for the student had omitted goals for speech and language and counseling due to a technical error (Tr. pp. 1462-63). The goals were discussed at the May 21, 2012 CSE meeting, and a corrected version of the 2012-13 IEP was forwarded to the parents by letter dated October 12, 2012 (id. at pp. 1464-65, 1475, 1482-83).

A. Due Process Complaint Notice

In a due process complaint notice dated January 17, 2013, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) on substantive grounds for the 2010-11, 2011-12, and 2012-13 school years (Dist. Ex. 1 at pp. 9-10).

Regarding the 2010-11 school year, the parents asserted that the IEP proposed was inappropriate to address the student's anxiety, his need for a smaller class, and his need to practice pragmatic and social skills throughout the school day (Dist. Ex. 1 at p. 9). The parents also asserted that the district failed to offer an appropriate placement by failing to offer an alternative district-based program or Board of Cooperative Educational Services (BOCES) program to meet the student's needs (id.).

Regarding the 2011-12 school year, the parents argued that the district's proposed placement was inappropriate because the student had emotional and behavioral problems in that placement in the past (Dist. Ex. 1 at p. 9). The parents also asserted that the only alternative offered was a school for autistic students and that it was not an appropriate placement for the student, who does not have autism (id.).

Regarding the 2012-13 school year, the parents asserted that the only placement offered by the district was inappropriate because the other students were not similar to the student in terms of their ages, grade levels and abilities and classifications (Dist. Ex. 1 at p. 10). The parents also argued that the student's IEP was not appropriate to meet his needs (id.).

As relief, the parents seek compensatory education in the form of tuition reimbursement and related expenses for the 2010-11, 2011-12, and 2012-13 school years (Dist. Ex. 1 at p. 10).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 24, 2013 and concluded on February 12, 2014 after 17 nonconsecutive hearing days (Tr. pp. 1-2736). In a decision dated May 5, 2014, the IHO denied the parents' request for tuition reimbursement for private school placements for the 2010-11, 2011-12, and 2012-13 school years (IHO Decision at p. 119).

Regarding the 2010-11 school year, the IHO noted that the district increased the services in the May 3, 2010 IEP (Dist. Ex. 5) and considered the student's documented progress during the 2009-10 school year (IHO Decision at pp. 96-100). He concluded that the student was offered a FAPE for the 2010-11 school year (id. at p. 100). Regarding the parents' unilateral placement, the IHO found that the private school failed to provide appropriate occupational therapy (OT) services and therefore was not an appropriate placement for the student (id. at pp. 100-01). Considering the equities, the IHO noted that the parents did not inform the district of their intent to seek reimbursement from the district for private school tuition for the 2010-11 school year prior to placing the student at the private school (id. at p. 102). The IHO considered a transportation request from the parents (Dist. Ex. 34), noting that while the district may have been on notice of the student's placement by the parents at a private school, it was not on notice of the parents' intention to seek reimbursement for tuition (IHO Decision at pp. 102-03).

Regarding the 2011-12 school year, the IHO found that the district's recommended program for the student remained substantially the same as the prior school year (IHO Decision at p. 103). The IHO analyzed the student's prior year at the private placement, finding that there was no OT provided, that the student had no access to nondisabled peers in the private placement, and that the student did not make academic progress based upon objective evidence (id. at pp. 105-06). Considering the equities, the IHO concluded that the district was on notice of the parents' intention to seek reimbursement for private school tuition based upon a letter from the parents dated August 14, 2011 (id. at p. 108).

Regarding the 2012-13 school year, the IHO noted that the district performed full evaluations of the student and determined that the student's skill levels had decreased in math, writing, visual perception, fine motor, executive functioning and organization (IHO Decision at pp. 108-14). The district's recommendations for the student included a 12:1+1 special class and consideration of an out of district placement (id. at p. 114). The IHO noted that the same letter that applied to deem the district on notice of the parents' intention to seek reimbursement for private school tuition for the 2011-12 school year applied to the 2012-13 school year (id. at pp. 116-17).

The IHO noted that to the extent the parents sought compensatory education, the request was denied because the district did not deny the student a FAPE (IHO Decision at p. 117). The IHO denied the parents' request to deem the private school the student's pendency placement (id.).

The IHO's findings note that the district's proposed program offered the student a FAPE in the least restrictive environment (LRE) for the 2010-11, 2011-12, and 2012-13 school years (IHO Decision at p. 118). The IHO noted that the private placement allowed the student to progress in areas of strength, but he did not progress in areas of deficit, which were not addressed at Eagle Hill (id. at p. 119). The IHO ordered that the parents' hearing request was denied (id.).

IV. Appeal for State-Level Review

The parents appeal the IHO's findings of fact and decision and argue that the district is properly ordered to reimburse the parents for tuition paid to Eagle Hill for the 2010-11, 2011-12, and 2012-13 school years.

Regarding the 2010-11 school year, first, the parents assert that the IHO erred in concluding that the student showed progress during the 2008-09 and 2009-10 school years. The parents argue that the improper conclusion that the student progressed in prior school years necessarily affected the IHO's determination that the program offered to the student for the 2010-11 school year was appropriate to meet the student's needs and offered the student a FAPE in the LRE. Second, the parents argue that the private parental placement was appropriate and that the IHO made various findings in error relating to the parental placement, including that the IHO misinterpreted the reason why the student was privately placed for the 2010-11 school year as issues at home and not the district's program, improperly found the parental placement inappropriate due to the lack of OT services, improperly concluded that Eagle Hill did not address the student's areas of deficit, and improperly found that the parents did not present proof in support of the appropriateness of the unilateral placement. Lastly, the parents argue that the IHO erred in failing to find that the equities were in their favor, including his finding that the parents failed to timely request reimbursement.

Regarding the 2011-12 school year, first, the parents argue that the fact that the district's recommended program offered additional support for the student was not sufficient for the IHO to find that it offered the student a FAPE because the in-district program would have failed to address the student's anxiety needs. Second, regarding the parent's placement, the parents argued that the IHO erred in concluding that Eagle Hill failed to provide sufficient related services to allow a finding that the private placement was appropriate, improperly concluded that the parents did not show progress at Eagle Hill during the 2011-12 school year, and erred when finding that Eagle Hill only addressed the student's areas of strength but failed to address the student's deficits. Lastly, the parents note that they do not dispute the IHO's finding that they provided sufficient notice to the district of their intent to unilaterally place the student at Eagle Hill. The parents note that the IHO's reliance on the letter provided for the 2011-12 school year when he found proper notice also for other school years was in error, although they submit that proper notice was provided for all school years in question.

Regarding the 2012-13 school year, first, the parents assert that the IHO erred in finding the district's offered program similar to the program offered at Eagle Hill, that references to recommendations of a psychiatrist and a neuropsychologist in the decision are confusing due to the IHO's use of their identical initials as identifiers, and that the student's difficulty with transitions is not evidence of Eagle Hill's failure to address his anxiety. Second, regarding the parents' placement, the parents argue that Eagle Hill appropriately addressed the student's OT needs and difficulties with anxiety and transitions, and that the IHO's findings to the contrary are in error, and that the district's proposed BOCES program was not established to be a therapeutic setting. Lastly, the parents assert that the IHO erred in finding that they were not entitled to compensatory education in the form of tuition reimbursement and that certain conclusions by the IHO regarding the law as it related to the continuum of services misconstrued when the district would have a duty to provide more restrictive programs to a student, which would not include any time a student is exhibiting a lack of progress.

For relief, the parents request that the IHO's decision be reversed in its entirety, and that the parents be reimbursed for their tuition payments for the 2010-11, 2011-12 and 2012-13 school years.

In its answer, the district denies that the district failed to offer the student a FAPE for the school years in question, denies that Eagle Hill was an appropriate placement for the student, and denies that equitable considerations favored the parents. The district sets forth affirmative defenses, including that the IHO properly found that the 2009-10 IEP Progress report establishes the student's progress, that the two year statute of limitations bars claims for tuition reimbursement prior to January 25, 2011, two years prior to the due process complaint notice, and that the parents' allegations contained solely in their memorandum of law submitted on appeal are not properly considered.

In a cross-appeal, the district asserts that the IHO erred in finding that the parents' letter dated August 14, 2011 (Dist. Ex. 36) constituted sufficient notice to the district concerning the 2010-11 school year in compliance with 20 U.S.C. §1412(a)(10)(C). The parents did not answer the cross-appeal.

V. Applicable Standards

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

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

caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. May 2010 IEP—2010-11 School Year (Third Grade)

Regarding the 2010-11 school year, the IHO noted that the CSE increased the services in the May 3, 2010 IEP (Dist. Ex. 5) and considered the student's progress during the 2009-10 school year (IHO Decision at pp. 96-100). He concluded that the student was offered a FAPE for the 2010-11 school year (id. at p. 100).

The parents assert that the IHO erred in concluding that the student showed progress during the 2008-09 and 2009-10 school years. The parents argue that the improper conclusion that the student progressed in prior school years necessarily affected the IHO's determination that the program offered to the student for the 2010-11 school year was appropriate to meet the student's needs and offered the student a FAPE in the LRE. The district argues that the IHO properly found evidence that the student had progressed during the 2009-10 school year, including based upon a 2009-10 IEP Progress Report, and that the district offered the student a FAPE for the 2010-11 school year.

The May 3, 2010 IEP contained a recommendation for placement in a community school for the student for his third grade year (Dist. Ex. 5 at p. 1). The CSE subcommittee recommended a 1:1 resource consultant teacher five times a week for 45 minutes, and a 1:1 teaching assistant daily for 5 hours and 45 minutes (id. at pp. 1-2). The CSE subcommittee also recommended related services of two 30 minute sessions of counseling in a group of three, two 30 minute sessions of individual occupational therapy, a one hour occupational therapy consult per month, two 30 minute sessions of speech language therapy in a group of five, and a one hour speech language consult per month (id. at p. 2).

Regarding the parents' claim that the student had failed to progress in the district's school prior to the 2010-11 school year, and that the IHO erred by finding to the contrary, I conclude that this claim lacks merit. The IHO addressed and considered the student's progress leading up to the 2010-11 school year in detail (IHO Decision, pp. 97-100). The IHO also considered the increase

in services from the 2009-10 school year that the 2010-11 IEP provided for, including the increase from a 3:1 shadow aide to a 1:1 teacher assistant, along with increased resource consultant teacher services and increased counseling from the prior school year (id. at p. 97; Dist. Exs. 4, 5). Regarding the information considered by the IHO, the IHO considered the documents in the record that included academic testing and progress reports from the student's teachers and providers (IHO Decision at pp. 98-100; Dist. Exs. 5, 19, 20, 22, 42, 43). The IHO considered a progress report for IEP goals for the 2009-10 school year sent by the district on June 24, 2010 to the parents (Dist. Ex. 22). It reported the student's progress on his IEP goals during the 2009-10 school year and evidenced that he had achieved or was progressing towards the majority of the annual goals (id.). While a student may or may not achieve every annual goal or short-term objective included on an IEP, the IDEA does not guarantee that a student will achieve a specific level of benefit and focus must instead be placed on the extent to which the student progressed toward achieving the annual goals, rather than on the number of IEP goals the student "achieved" (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]). In light of the documented progress towards annual goals, the fact that the student did not achieve all the annual goals does not evidence a lack of progress as the parents appear to argue. In addition, the IHO's conclusion that the 2010-11 school year's IEP was appropriate to offer the student a FAPE in the LRE was supported by evidence in the record as detailed below.

The evidence in the record as a whole supports the conclusion that the district offered the student a FAPE for the 2010-11 school year. The May 3, 2010 IEP noted that the student had more difficulty completing tasks as the difficulty of the academic work increased and that he struggled to stay on task without adult assistance (Dist. Ex. 5 at p. 4). It was also noted that the student's area of greatest academic challenge was math, but that he also found language arts and written expression challenging in certain respects (id). The provision for 1:1 resource consultant teacher services, in addition to the support of a teaching assistant, was to address the student's need for assistance to stay on task and also assistance to manage the increasingly difficult curriculum (id). The additional assistance allowed the student remain in a mainstream setting, which, according to many of the district's witnesses, was important for the student so that he could have interactions with nondisabled peers for his social and emotional development needs (Tr. pp. 191, 973-74, 1115-17, 1214-15).

The school psychologist from the district's middle school testified at the impartial hearing that the program recommended for the student was very individualized and designed to meet the student's unique needs (Tr. pp. 51, 182-83). She noted that it was not typical to provide one on one special education teacher support and one on one teaching assistant support (id. at p. 183). She classified the program as highly structured which permitted the student's goals to be addressed in a one to one setting to focus on his needs (id.). She testified that the student's individual OT services, which addressed handwriting which was difficult for the student, would be able to be generalized into the classroom with the student's one to one teaching assistant (id. at pp. 184-85). She testified that she was in agreement and excited for the program, and that the parent was in agreement with the proposed program at the end of the meeting (id. at pp. 187). She noted that the program was designed to reduce the student's anxiety by its individualized nature, where he would be working at his own speed and at his level (id. at pp. 189-90). The student would have been in a mainstream setting with access to typical peers and only pulled out of that setting for his support

services (id. at p. 190). She felt that being surrounded by typical peers was very important for the student and that to the extent it could be a source of frustration, that overall it was important for the student to have role models to observe how they respond to situations (id. at p. 191). When the parent told her that the student would be attending the private placement, the parent did not say it was because the parents thought the CSE's program was not appropriate (id. at pp. 192-93). She was not aware of any notice to the district that the parents would be seeking tuition reimbursement for the 2010-11 school year (id. at pp. 195-96). The school psychologist understood that the parents were placing the student in the private placement due to the parent's illness and medical treatment so that the student could receive emotional support (id. at pp. 194-95).

The student's second grade special education teacher was present at the May 3, 2010 CSE meeting and testified at the impartial hearing that she gave her input regarding the student's levels and abilities, recommended program, modifications and academic goals (Tr. pp. 924-27). She testified that the recommended program and modifications were intended to address the student's areas of challenge from second grade (id. at p. 924). She noted that certain goals were prepared to specifically address the student's needs relating to reading and comprehension, writing mechanics, and math skills (id. at pp. 927-32). She testified that while a one to one teaching assistant was not a typical recommendation, she felt it was appropriate for the student to offer him the teaching and attention that he needed throughout the school day (id. at pp. 940-41). She noted that the parents along with the rest of the team, agreed to the proposed recommendations for the student for the next school year (id. at p. 942). While the mother indicated to her that she was placing the student at Eagle Hill, the mother also indicated that she believed the district's proposed third grade program was a good program but that the Eagle Hill placement would be less stressful (id. at pp. 944-46).

The student's second grade general education teacher was present at the May 3, 2010 CSE meeting and she noted that the one to one resource consultant teacher recommendation was so that the teacher could motivate the student by focusing on his interests and the things that motivated him (Tr. pp. 1108-09). The recommendation for the one to one teaching assistant was so that the student could have both instruction and modification of his work when he had difficulty with a concept in the classroom, and would have assistance with his organizational skills (id. at pp. 1109-11). The increase in services for the student for his third grade school year was to address his anxiety and in anticipation of the more difficult academic content in third grade (id. at pp. 1110-11). She agreed with the recommendation for the student for the 2010-11 school year, as did the parents (id. at pp. 1111-12). The parent later informed her that while she felt the team had prepared a good plan, Eagle Hill would be better for their family (id. at pp. 1113-14).

In addition, considering the student's needs and the supports put in place for the student, I find that the district offered the student a FAPE for the 2010-11 school in the LRE, as detailed below.

The IDEA requires that a student's recommended program must 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the

nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[1]

The student's second grade special education and general education teachers, as well as the district's speech language pathologist, testified to their view that the least restrictive environment

[1] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

for the student would include being in an environment that included nondisabled peers so that he could have modeling for peer relationships, social behaviors and pragmatic language (Tr. pp. 973-74, 1115-17, 1214-15). The student's second grade special education teacher testified to her view that Eagle Hill was not an appropriate program for the student for the 2010-11 school year (Tr. p. 976). She believed that the district program was appropriate and was less restrictive (id. at pp. 976-77).

Based upon the foregoing, I concur with the IHO's finding that the district offered the student a FAPE for the 2010-11 school year and that the May 2010 recommendation of 1:1 resource consultant teacher and 1:1 teaching assistant along with related services would appropriately address the student's need for 1:1 support for academic, social and emotional progress and, as such, was reasonably calculated to enable the student to receive educational benefits.

B. May 2011 IEP—2011-12 School Year (Fourth Grade)

Regarding the 2011-12 school year, the parents argue that the IHO erred in finding that the district offered the student a FAPE and that the district's recommended program would have failed to address the student's anxiety needs.

Regarding the 2011-12 school year, the IHO found that the district's recommended program for the student remained substantially the same as the prior school year (IHO Decision at p. 103). The IHO analyzed the student's prior year at the private placement, finding that there was no OT provided, that the student had no access to nondisabled peers in the private placement, and that the student did not make academic progress based upon objective evidence (id. at pp. 105-06). I find that the hearing record supports the IHO's conclusion that the district offered the student a FAPE for the 2011-12 school year.

On May 13, 2011, the CSE subcommittee convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 6 at p. 1). The CSE subcommittee found the student eligible for special education programs and related services as a student classified with an other health impairment and recommended a placement in a community school for the student for his fourth grade year (Dist. Ex. 6 at p. 1). The student was recommended to have a one to one special class (one to one resource consultant teacher five times a week for 45 minutes), and a one to one teaching assistant daily for 5 hours and 45 minutes (id. at p. 2). The CSE subcommittee recommended related services of two 30 minute sessions of counseling in a group of three, two 30 minute sessions of individual occupational therapy, a one hour occupational therapy consult per month, two 30 minute sessions of speech language therapy in a group of five, and a one hour speech language consult per month (id.).

The May 2011 IEP reflects that the CSE discussed the mother's concerns regarding the student's anxiety, and the program recommended was in recognition of those concerns and based upon the reports of the student's performance at Eagle Hill during the course of the 2010-11 school year (Dist. Ex. 6 at p. 2). Strategies discussed included having a teaching assistant with the student during lunch and recess to assist him with social situations (id. at pp. 2, 13). There was discussion at the CSE of the student's initial difficult transition to Eagle Hill but his anxiety then decreased and he was reported to be an active participant in a small classroom setting (id. at p. 2). The resulting IEP noted that counseling services were required to address the student's anxiety and

feelings of being overwhelmed (id. at p. 6). It was reported that the student's anxiety was reduced because of Eagle Hill's policy of having homework completed at school (id. at p. 5). The IEP also provided for modified homework assignments as needed in terms of both quantity and content (id. at p. 12).

The school psychologist attended the CSE subcommittee meeting and recalled that the private school representatives who participated in the meeting did not provide any objective testing results and no formal state assessments had been performed during the 2010-11 school year while the student attended Eagle Hill (Tr. pp. 249-50). The school, located in Connecticut, did not follow the New York State curriculum (id. at p. 249). The goals on the May 2011 IEP were adjusted based on where the student had made some progress and if a goal was repeated it meant he had not mastered that goal (id. at pp. 251, 254). She noted that the goals overall had only minor changes because the student had not mastered the goals and needed to continue working on them (id. at p. 269). The modifications and accommodations recommended also did not have significant changes (id. at p. 272). The program recommended was similar to the one recommended for the prior school year, although the terminology for "resource consultant teacher" had changed to "special class" (id. at pp. 273-74). She noted that the parents indicated at the CSE meeting that they intended for the student to continue at Eagle Hill for the 2011-12 school year, and a transportation form was filled out at the meeting (id. at p. 278). She never saw a document that indicated that the parents would seek tuition reimbursement from the district for their placement of the student at Eagle Hill for the 2011-12 school year (id. at p. 302).

The student's second grade special education teacher was also present for the CSE subcommittee meeting for the student's fourth grade year and she noted that the recommendations for third grade were maintained for the fourth grade year (Tr. pp. 951-52). She was in agreement with the recommendation of the committee, which she testified was proposed because they felt it was the most effective program to meet the student's needs (id. at p. 952). She noted that the team considered reports from Eagle Hill and their knowledge of the student (id. at p. 969). She recalled that the parent was in agreement with the recommendations (id. at pp. 969-70).

The district's occupational therapist testified at the impartial hearing that the recommendation for the student's OT services for the 2011-12 school year remained the same as the prior year (Tr. pp. 1437-38). She noted that this was because the student had not received OT services at Eagle Hill (id. at p. 1438).

Subsequent to the CSE subcommittee meeting, an informal meeting was held with the parent to discuss her request for the district to consider Eagle Hill as the student's recommended placement (Tr. pp. 279-83). The district's director of pupil personnel services and special education, along with the school psychologist, met with the parent in the informal meeting (id. at pp. 679-80). The district's school psychologist testified that Eagle Hill could not be recommended by the district because it was not a State-approved school (id. at pp. 282-83). The parent wanted the CSE to examine self-contained, out-of-district programs although the CSE had not recommended pursuing such a program and the district was not looking for an out-of-district placement for the student (id. at pp. 284-88, 549, 687-88). According to the district's director of pupil personnel services and special education, the parent wanted to see if any public programs were similar to Eagle Hill (id. at pp. 680-81). The school psychologist and the parent visited a BOCES program, although there was no recommendation from the CSE for an out-of-district

placement, and the school psychologist testified to her view that the program was being visited to look at potential placements if the CSE determined such a placement was necessary (id. at pp. 288-93). According to the evidence in this case, this type of visit, which was not precipitated by a CSE recommendation, was not typical (id. at pp. 681-82). The process of the parent visiting the program was essentially the same as if the visit had been initiated at the recommendation of a CSE (id. at p. 617). The CSE did not consider or recommend the BOCES placement and the parents indicated they felt it was inappropriate because the school was for autistic students (id. at pp. 292-93, 297), although a letter from BOCES was received by the parents and the district indicating that the student had been accepted by the program (id. at pp. 551-53). Since the parents were unwilling to accept a BOCES recommendation at the time, the CSE was not convened to consider recommending the BOCES program as the student's placement (id. at pp. 552-53).

State regulations provide that a special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with State regulations regarding students with intensive needs, for the 2011-12 school year, the May 2011 IEP recommended placement of the student in a 1:1 special class, combined with a 1:1 teaching assistant and related services (Dist. Ex. 6). A review of the hearing record leads me to conclude that the student required intensive adult support and teaching assistance in order to benefit from instruction, which would have been provided in the district's recommended program for the student for the 2011-12 school year (Dist. Ex. 6). The hearing record demonstrates that the recommended program with related services was appropriate to address the student's needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefit in the LRE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Based upon the foregoing, I find that the parents' claims that the student was not offered a FAPE for the 2011-12 school year are without merit and the IHO's conclusion that the district offered the student a FAPE for the 2011-12 school year will not be disturbed.

C. May and July 2012 IEPs—2012-13 School Year (Fifth Grade)

Regarding the 2012-13 school year, the parents assert that the IHO erred in finding the district's offered program similar to the program offered at Eagle Hill, and that references to recommendations of a psychiatrist and a neuropsychologist in the decision are confusing due to the IHO's use of their identical initials as identifiers.

Regarding the 2012-13 school year, the IHO noted that the district performed full evaluations of the student and determined that the student's skill levels had decreased in math, writing, visual perception, fine motor, executive functioning and organization (IHO Decision at pp. 108-14). The district's recommendations for the student included a 12:1+1 special class and consideration of an out of district placement (id. at p. 114). The IHO concluded that the district offered the student a FAPE for the 2012-13 school year and as set forth below, I concur with that conclusion.

On May 21, 2012, the CSE subcommittee convened to conduct a reevaluation and the student's annual review (Dist. Ex. 7 at p. 1). The CSE subcommittee found that the student was eligible for extended school year services as a student with a learning disability, commencing in July 2012 through August 2012 (id. at pp. 1, 3). The extended school year program recommended

for the student consisted of a 15:1 special class twice a week for 60 minutes and individual OT for 30 minutes twice a week (id.). The CSE subcommittee also discussed the student's recommended program for the 2012-13 school year and determined that the student would benefit from a 12:1+1 special class and that other district-based programs, BOCES programs, and the Summit School should be explored and that the CSE would then reconvene (id.).

On July 12, 2012, the CSE subcommittee reconvened to conduct a reevaluation and the student's annual review for the 2012-13 school year (Dist. Ex. 8 at p. 1). The CSE subcommittee found the student eligible for special education programs and related services as a student with a learning disability and recommended a BOCES placement in a public school for the student for his fifth grade year (id. at p. 2, 21). The recommendations for the student included a 12:1+1 special class and related services of two 30 minute sessions of individual occupational therapy, a one hour occupational therapy consult per month, two 30 minute sessions of speech language therapy in a group of five, a one hour speech language consult per month, one 30 minute session of individual counseling per week and one 30 minute session of 5:1 counseling per week (id. at pp. 1-2).

The district's July 12, 2012 IEP for the student had omitted goals for speech and language and counseling due to a technical error (Tr. pp. 1462-63). The goals were in fact discussed at the May 21, 2012 CSE meeting, and the corrected version of the 2012-13 IEP was forwarded to the parents by letter dated October 12, 2012 (id. at pp. 1464-65, 1475, 1482-83).

The school psychologist's 2012 testing of the student in preparation for the student's annual review for the 2012-13 school year revealed numerous statistically significant declines in the student's scores as compared with the prior 2009 testing, with the only apparent explanation being that the student was not receiving instruction or remediation in his areas of deficit (Tr. pp. 320-21, 353-54). Specifically, the student was not receiving OT services at Eagle Hill and therefore was not working on perceptual reasoning or processing speed (id. at pp. 322-23). Between the two testing periods, the student had spent the first year and a half at the district's middle school and the most recent year and a half at Eagle Hill (id. at p. 321).

The district's school psychologist testified that at the IEP meeting for the 2012-13 school year held in May 2012, the team reviewed the student's test results and then changed in the student's classification to learning disabled from other health impaired (Tr. pp. 343-44). The team also spoke about the smaller class size that the student could benefit from and decided to explore out-of-district programs (id. at p. 344). At the end of the 2011-12 school year, there was nothing that indicated that the student required a self-contained school without opportunities to be with nondisabled students (id. at pp. 350-51). The team felt that the student's significant weaknesses in math, visual perceptual skills, executive functioning and organization made it appropriate to consider smaller class settings within a public school environment at an out-of-district placement, which was a more restrictive recommendation (id. at pp. 352-53).

The school psychologist testified at the impartial hearing that the Eagle Hill program failed to permit the student to be with nondisabled peers, in addition to not being State-approved or following State curriculum (Tr. p. 367). She also noted that the student's ability to engage in conversation with other peers like himself was important because he was bright, verbal and interacted in a mature way (id. at pp. 367-68). She characterized the student's level of progress as some progress in some areas, but that he was not at grade level with the possible exception of

reading, and that his areas of weaknesses in math, social skills, executive functioning, organization and motor skills continued to be weaknesses (id. at pp. 378-79). She testified that the student's motor needs and visual perceptual needs were not being addressed at Eagle Hill and were best addressed by an occupational therapist (id. at p. 380).

At the July 2012 CSE meeting, a BOCES placement was recommended for the student (Tr. p. 363). The parents disagreed with the recommended placement for multiple reasons according to the district's school psychologist: their concern about the student's transition from one school to another and then to middle school in one year, given his difficulty with transitions; the age difference in the classroom with the other students who were two years younger; the other students' IQs were significantly higher; the other students' disabilities were different; and the distance of the school from the student's house (id. at pp. 364-65). The district school psychologist noted that the student was presently travelling 45 minutes to Eagle Hill; that the student's IQ was an underestimate of his ability which she estimated to be in the high average to superior range; that the different classifications of the students did not affect the program and the student's nonverbal learning disability presented similar to high-functioning autism; that any transitions would be hard for the student and the school would be prepared to handle that (id. at pp. 364-66). The mother testified that the bus ride to Eagle Hill took the student 20-25 minutes (Tr. p. 2443). After considering the parents' objections, the district's director of pupil personnel services and special education testified that the class profile of the students would have been appropriate for the student considering his strong verbal ability (id. at pp. 711-20). She noted that the program offered would provide the student with opportunities for appropriate role models and exchanges with other children, along with a therapeutic setting for managing anxiety and difficulties with attention and sensory motor issues (id. at pp. 712-13). She also testified that the fact that students in the class would have different classifications was not a reason to find the placement inappropriate because many of the same characteristics and behaviors present across different classifications (id. at pp. 714-16). She found the age range appropriate for the student, noting that a special class setting often includes multiple grades and focuses on each student's individual needs and the age range can be up to 36 months, with the ability to exceed that range as well (id. at p. 716). She concluded that the difference in IQ levels, with the student's IQ level lower than other students, did not make the program inappropriate because of the student's high verbal ability, the benefits of being with higher functioning students, and also the fact that his assessments may have underestimated his ability (id. at pp. 717-18). She summarized her view that the offered program would have provided the student with an appropriate program where he could have mainstreaming opportunities with nondisabled peers but have appropriate academic and clinical support (id. at pp. 717-20).

A school psychologist for BOCES who was familiar with the BOCES gifted special education program recommended for the student for the 2012-13 school year testified at the impartial hearing regarding the program and the participating students for that school year (Tr. pp. 1647-95). The program consisted of one 12:1+1 classroom and for the 2012-13 school year there were only four students in the class, along with one teacher and one teacher's assistant (id. pp. 1648-49). The students in the program have one area where they are cognitively in the gifted range, which could be in a verbal or nonverbal area, and then also have learning disabilities and emotional issues (id. at pp. 1653, 1686). The students in the class have excellent verbal skills but some difficulty with social interactions (id. at pp. 1654-55). They have the ability to participate in special classes and events in the general education building with mainstream peers, and if appropriate in mainstream academic classes (id. at pp. 1656-57, 1693). The class includes a

therapeutic component with individual and group counseling to address social skills development, conflict resolution and each student's needs (id. at pp. 1658-60). Regarding the ages of the students, the students in the class appeared to be within the three year age range for the student and if there was a small discrepancy, a variance could be requested (id. at pp. 1666-68). The student would have been placed with other fifth graders in any mainstream settings (id. at pp. 1668-69). Regarding the classifications of the other students, she testified that she ensured each student accepted into the program was an appropriate fit for the program and she noted that the students, despite having different classifications, had classifications with shared emotional, social, and cognitive characteristics (id. at pp. 1669-72). Regarding the student's IQ as compared to the other students, she was not involved in the acceptance of the student but she testified that sometimes students do not test well if they have anxiety and she always based decisions on whether to accept a student based on clinical impressions (id. at pp. 1672-73).

The BOCES school psychologist who accepted the student into the BOCES gifted special education program testified at the impartial hearing regarding the reasons why he believed the student was an appropriate candidate for the program (Tr. pp. 1697-1707, 1711-13, 1718-19). He acknowledged that when he first saw the information packet for the student, he did not know if the student would be appropriate for the program based on his IQ (id. at pp. 1703-04). He acknowledged that the student's IQ was previously noted to be an underestimate of the student's potential and he also testified that the student presented when he met him during the intake process (id. at pp. 1706-07). He noted that the student had high verbal scores, was social and acted very differently in person than what his scores would indicate (id. at pp. 1711-13). He also noted that although the class included a student with the classification of autism, it appeared that that student may be appropriately classified differently and not under the classification of autism (id. at pp. 1717-18). He believed the student was behind the other students in the class in math, but similar in other academic areas, and the small class would allow individual work with the student for math (id. at p. 1731).

Based upon the foregoing, the hearing record supports the IHO's finding that the recommended program with related services was appropriate to address the student's needs as identified in the evaluative information before the CSE and was reasonably calculated to enable him to receive educational benefit in the LRE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Based upon the foregoing, I find that the parents' claims that the student was not offered a FAPE for the 2012-13 school year are without merit and the IHO properly concluded that the district offered the student a FAPE for the 2012-13 school year.

In summary, I note that the district appropriately considered the student's needs for each school year in question and adjusted the student's recommended program, services and accommodations accordingly. The record evidences the district's review of the student's needs and attempt to address concerns raised by the parents. The district developed a program intended to address the student's needs and the parents' concerns, and offered the student the ability to meaningfully benefit from educational instruction and in the least restrictive environment that was appropriate for his needs.

D. Compensatory Education

The parents appeal the IHO's determination that they are not entitled to compensatory relief in the form of tuition reimbursement. The parents assert that they requested tuition reimbursement under the theory of tuition reimbursement, and also under the theory of compensatory education in the form of tuition reimbursement. The parents' due process complaint notice requests compensatory education in the form of tuition reimbursement (Dist. Ex. 1). The IHO considered both claims in his decision (IHO Decision, p. 117). I concur with the IHO's determination as set forth below.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[2] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist., 2008 WL 9731053, at *12-*13 [S.D.N.Y. March 6, 2008] report and recommendation adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend

[2] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The IHO found that in light of his determination that the student was not denied a FAPE for the school years in question, that the parents' request for compensatory education in the form of tuition reimbursement was properly denied. I concur. As the IHO noted, the record does not support a finding that there was a gross denial of a FAPE and, additionally, because the parents' claims that the student was a denied a FAPE for the 2010-11, 2011-12, and 2012-13 school years are without merit, there is no basis to consider providing compensatory or additional educational services to the student (see Newington, 546 F.3d at 123).[3]

[3] Furthermore, to the extent that the parents argue that the IHO misapprehended a distinction between tuition reimbursement and compensatory education in the form of tuition reimbursement, the case law in this Circuit is unequivocally clear that if parents seek retroactive tuition reimbursement for a unilateral placement of their child, then the analysis must be conducted under the Burlington/Carter test. The parents in this case have indeed sought retroactive reimbursement and may not sidestep the Burlington/Carter analysis merely by identifying their requested relief as compensatory education "in the form" of tuition reimbursement.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2010-11, 2011-12 and 2012-13 school years, the necessary inquiry is at an end and it is not necessary to reach the issue of whether Eagle Hill constituted an appropriate unilateral placement for the student or whether equitable considerations support the parents' claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S., 2011 WL 3919040, at *13). As there is no need to resolve the district's cross-appeal, it is dismissed.[4]

I have considered the parties' remaining contentions and find that I need not address them in light of my findings herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 30, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

[4] There appears to be some disagreement between the parties as to whether the IHO found sufficient notice for all three school years or whether he found notice for either the 2010-11 or 2011-12 school year deficient. The IHO's order is less than clear on this point, but he appears to have found that there was deficient notice of unilateral placement seeking reimbursement for Eagle Hill for the 2010-11 school and rejected the parents' argument that this deficiency should be excused (IHO Decision at pp. 102-03); however, an argument may be made that there was a conflicting statement later in the Decision (IHO decision118 at ¶¶ 5-9). I note only that the parent's request for transportation to Eagle Hill made to the district for the 2010-11 school year did not constitute compliance with the requirement that the parents provide timely notice to the district of their disagreement with the IEP and their intention to seek the costs of Eagle Hill at public expense for the 2010-11 school year (Dist. Exs. 5 at p. 1; 34); however, in the absence of clarity regarding the IHO's findings, I express no opinion as to the degree to which mitigating circumstances cited by the parents may excuse inadequate notice.