



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-061

Application of the BOARD OF EDUCATION OF THE MAMARONECK UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May, & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Law Office of Neal H. Rosenberg, attorneys for respondents, Lakshmi Singh Mergeche, 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 their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2014-15 and 2015-16 school years. The parents cross-appeal from the IHO's determinations that dismissed certain of their claims. 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 student has a history of anxiety and verbal and motor tics, as well as difficulties with executive functions, working memory, academics, attention, social skills, language processing, and sleepiness/level of arousal (Tr. pp. 45-48, 68-69, 71-72, 141-42, 484, 654-55, 688; Dist. Exs. 11 at pp. 2-5; 12 at pp 2-5; 62 at pp. 2-4). He has received diagnoses of Tourette's disorder, an obsessive-compulsive disorder (OCD), and an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 55). With respect to his educational history, the evidence in the hearing record indicates

that the student received services through the early intervention program and the committee on preschool special education and, subsequently, pursuant to CSEs' recommendations, attended a district general education class placement and received, among other supports, consultant teacher services for the 2007-08 through 2010-11 school years (Tr. pp. 639-43; Dist. Exs. 3-6). For the 2011-12 school year, the parents placed the student in an out-of-State general education nonpublic school where the student repeated third grade (Tr. pp. 26-27, 641-42, Dist. Exs. 7 at p. 2; 31). For the 2012-13 (fourth grade) school year, a CSE recommended the student for placement in a State-approved nonpublic school; however, in fall 2012 the parents decided to register the student at Eagle Hill, an out-of-State nonpublic school, and the student has remained there since that time (Dist. Ex. 36 at p.1; see Dist. Exs. 33; 38; 40; Parent Exs. I; K; O).¹ In spring 2013, the district conducted a reevaluation in contemplation of developing the student's IEP for the 2013-14 school year (see Dist. Ex. 9 at p. 3). A CSE convened on May 28, 2013, and again recommended the student for placement in a State-approved nonpublic school, along with related services of a social skills group and psychological counseling (id. at pp. 7, 9). As noted above, the student remained at Eagle Hill for the 2013-14 school year (see Tr. p. 56). In March 2014, the district conducted a classroom observation of the student at Eagle Hill (Dist. Ex. 34).

On June 1, 2014, the parents signed an enrollment contract with Eagle Hill for the student's attendance during the 2014-15 school year (Parent Ex. F at p. 4).

On June 12, 2014, the CSE convened to develop the student's IEP for the 2014-15 school year (Dist. Ex. 10). Unlike the previous years, the CSE did not recommend the student for placement in a State-approved nonpublic school; rather, the June 2014 CSE recommended the student for placement in a general education class with integrated co-teaching (ICT) services in English language arts (ELA) and math, a daily 40-minute resource room program, one weekly 30-minute social skills group, and one weekly 30-minute individual psychological counseling session (Dist. Ex. 62 at pp. 1, 6-7). The June 2014 CSE also recommended that the student be provided with a 3:1 teaching assistant in academic classes and enhanced staffing in science, social studies, lunch, and recess (id. at pp. 1, 7). The June 2014 IEP recommended numerous accommodations and modifications for the student, including an assistive technology consultation, as well as nine annual goals in the areas of reading, writing, math, study skills, and social/emotional/behavioral functioning (id. at pp. 5-7). The CSE also recommended supports for school personnel including a psychological consultation (id. at pp. 7-8). During the June 2014 CSE meeting, the district speech-language pathologist, upon review of a June 2014 Eagle Hill progress report, recommended that the district conduct a speech-language evaluation of the student (see Tr. pp. 326-28; Dist. Exs. 39; 62 at p. 1). The June 2014 CSE determined that the CSE would reconvene during the first two weeks of school to review the results of the speech-language evaluation (Dist. Exs. 39; 62 at p. 1). Pursuant to the June CSE meeting, the district conducted a speech-language reevaluation of the student on June 19, 2014 (see Dist. Ex. 29).

By letter dated August 10, 2014, the parents informed the district that the June 2014 IEP contained some "errors and omissions" (Dist. Ex. 45 at pp. 2). In particular, the parents identified several recommendations decided upon at the CSE meeting that were not reflected in the IEP (id.

¹ Eagle Hill has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7; see also Tr. p. 1266).

at pp. 2-3). The parents also indicated that the program and placement recommended by the June 2014 CSE did not address the student's educational, social/emotional, and medical needs (*id.* at pp. 3-4). The parents indicated that, based on the inappropriate IEP, they intended to place the student at Eagle Hill for the 2014-15 school year and seek reimbursement from the district for the costs of the student's tuition (*id.* at p. 4). By letter dated August 22, 2014, the district responded to the parents and created a revised IEP that corrected many of the errors identified by the parents (Dist. Exs. 61 at pp. 1-2; 62 at pp. 1-9).² The district also indicated that the June 2014 IEP was appropriate based on the evaluative information before the June 2014 CSE and that a CSE meeting would be scheduled in September 2014 to review the recent speech-language evaluation of the student (Dist. Ex. 61 at p. 1).

On September 16, 2014, the CSE reconvened to address the results of the June 2014 speech-language evaluation and, if needed, make modifications to the student's IEP (*see* Dist. Ex. 11). The September 2014 CSE continued the placement and services set forth in the June 2014 IEP and added to the IEP one weekly 42-minute individual speech-language therapy session, one weekly 42-minute group speech-language therapy session, one weekly 50-minute speech-language therapy consultation, a psychiatric consultation, and provision for the student's receipt of copies of class notes (*compare* Dist. Ex. 11 at pp. 1, 8-9, *with* Dist. Ex. 62 at pp. 1, 6-8). The September 2014 CSE also developed five additional annual goals for the student in the areas of speaking/listening and speech/language (*compare* Dist. Ex. 11 at pp. 6-7, *with* Dist. Ex. 62 at pp. 5-6). The hearing record reflects the student continued at Eagle Hill for the 2014-15 school year (*see* Parent Exs. F; K).

On April 20, 2015, the CSE convened to conduct the student's annual review and to develop the student's IEP for the 2015-16 school year (*see* Dist. Ex. 12). The CSE recommended that the student be placed in a general education classroom setting and receive: ICT services for math and ELA; direct consultant teacher services in science and social studies; resource room each day for 55 minutes in a group of five; social skills group once a week for 30 minutes; individual psychological counseling once a week for 30 minutes; individual speech-language therapy once a week for 44 minutes; small group speech-language therapy once a week for 44 minutes; and small group speech-language therapy once a week for 50 minutes within the classroom (*id.* at pp. 1, 8-9). Most conspicuously, compared to the September 2014 IEP, these recommendations represented the addition of direct consultant teacher services for science and social studies and the removal of enhanced staffing for science, social studies, lunch, and recess, and the 3:1 teaching assistant for academic classes (*compare* Dist. Ex. 11 at pp. 8-9, *with* Dist. Ex. 12 at p. 1). Further, the April 2015 CSE discontinued the provision for the psychiatric consultations between the district's psychiatrist and the student's treating psychiatrist (*compare* Dist. Ex. 12 at p. 10, *with* Dist. Ex. 11 at p. 9). Rather than the assistive technology consultation included in the September 2014 IEP, the April 2015 CSE recommended that the student be provided access to a laptop at school and at home (*compare* Dist. Ex. 12 at p. 12, *with* Dist. Ex. 11 at p. 9).

² The parents assert that the IEP included with the district's letter was identical to the version they had previously received and that they did not receive the corrected copy until September 4, 2014 (Parent Mem. of Law at pp. 5-6). The hearing record is unclear on this point but the timing of the parents' receipt of the corrected IEP does not affect the outcome in this case.

On June 1, 2015, the parents signed an enrollment contract with Eagle Hill for the student's attendance during the 2015-16 school year (Parent Ex. G at p. 4).

In a letter dated July 16, 2015, the parents notified the district of their concerns with the April 2015 CSE meeting and resultant IEP (Dist. Ex. 56 at pp. 1-2). The parents further notified the district of their plan to continue to unilaterally place the student at Eagle Hill for the 2015-16 school year at public expense (*id.* at p. 2). In a letter to the parents, dated July 21, 2015, the district stated its position that the April 2015 IEP was appropriate but indicated that the parents could request that the CSE convene to review their concerns (Dist. Ex. 57).

A. Due Process Complaint Notice

By amended due process complaint notice dated September 17, 2015, the parents requested an impartial hearing, alleging that the district failed to offer the student an appropriate program for the 2014-15 and 2015-16 school years (Dist. Ex. 1).³ With respect to the 2014-15 school year, the parents alleged that the IEPs were not developed in accordance with the IDEA's procedural requirements and were substantively inadequate (*id.* at pp. 3-10). The parents contended that the June 2014 CSE considered no new evaluative information and that the only new evaluative information considered by the September 2014 CSE was the June 2014 speech-language evaluation (*id.* at pp. 3, 7). Accordingly, the parents asserted that it was inappropriate for the CSE to make "drastic changes" to the student's recommended program compared to the recommendations made for the 2013-14 school year (*id.* at p. 7). The parents also alleged that the development of the September 2014 IEP—which included additional recommendations for speech-language therapy, goals, psychiatric consultation, and accommodations—constituted evidence that the June 2014 IEP was not appropriate, which amounted to a denial of a FAPE for the 2014-15 school year because an appropriate IEP was not in place at the beginning of the school year (*id.* at pp. 8-9). The parents argued that they were unable to participate in the development of the IEPs and that the district predetermined its recommendations based on available programming options (*id.* at p. 10).

The parents next asserted that the annual goals in the IEPs did not address all of the student's needs, did not include "specific levels," and were not "individualized, specific, [or] measurable" (Dist. Ex. 1 at p. 9). The parents also contended that the use of goals adopted from Eagle Hill progress reports was inappropriate because those goals were "idiomatic to small classroom instruction, specific techniques and methodologies and to their programmatic implementation" (*id.*). Furthermore, the parents contended that the recommended placement was not supported by the evaluative information available to the CSE, and that the recommended ICT and general education placement were too large and would not provide sufficient support to meet the student's needs (*id.* at p. 8). In particular, the parents argued that the IEP failed to address the student's need for small classes, individualized attention, multisensory techniques, and "specialized teaching strategies" (*id.* at p. 10). The parents also challenged the CSE's failure to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP)

³ The parents originally filed a due process complaint notice dated April 30, 2015, which asserted claims related to the 2014-15 school year only (IHO Ex. I).

to address the student's impulsive behaviors and tics (*id.*). Finally, the parents asserted that the student would not be appropriately functionally grouped in the district public school (*id.*).

Turning to the April 2015 IEP, the parents realleged many of the claims raised with respect to the IEPs developed for the 2014-15 school year, asserting that: the district predetermined the program recommendation and the parents were unable to participate in the development of the IEP; the recommendations were not supported by the evaluative information available to the CSE; the goals did not address the student's needs and contained no methods of measurement; the goals were improperly adopted from those used at Eagle Hill; the recommended placement was too large and would not provide sufficient support; the IEP did not provide the small classes, individualized attention, multisensory instruction, and specialized teaching strategies the student required; the CSE did not address the student's behavioral needs; and the student would not be appropriately functionally grouped in the district public school (Dist. Ex. 1 at pp. 11-13). In addition, the parents asserted that the April 2015 IEP did not accurately reflect the evaluative information available to the CSE and did not identify the student's needs (*id.* at p. 11). Furthermore, in addition to the challenges to the goals referenced above, the parents alleged that the IEP failed to "discuss any appropriate methodologies for the implementation of the recommended goals" (*id.*). For relief, the parents requested reimbursement for the costs of the student's tuition at Eagle Hill (*id.* at p. 14).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 3, 2015 and concluded on April 27, 2016 after six days of proceedings (Tr. pp. 1-1359). By decision dated August 1, 2016, the IHO determined that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years, that Eagle Hill was an appropriate placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 21-36). With respect to the parents' claims of procedural defect in the development of the June and September 2014 IEPs, the IHO determined that none rose to the level of a denial of a FAPE because the CSE had "substantial evaluative material," the CSE did not predetermine the recommended program, the annual goals were not objected to by the parents or Eagle Hill staff, and an IEP was in place at the beginning of the 2014-15 school year (*id.* at p. 26).⁴

The IHO determined that the parents' claims regarding the timeliness of the September 2014 IEP were without merit because the June 2014 CSE resolved to conduct a speech-language evaluation and reconvene after the beginning of the school year to amend the student's IEP as necessary, which was referenced in the June 2014 IEP, and the parents did not object to the timing of the reconvene (IHO Decision at pp. 21-22). The IHO found that that the September 2014 IEP was the relevant IEP for purposes of determining whether the district offered the student a FAPE for the 2014-15 school year and held that, while "the district developed a very comprehensive [IEP] which addressed all areas of student deficit," the district failed to establish that the "program was reasonably calculated to enable this student to make meaningful educational gains" (*id.* at p. 22). The IHO determined that the CSE failed to address the possibility that the student would experience anxiety and exacerbation of his tics and OCD behaviors, and their concomitant fatigue and inattention, as a result of the transition from the small special education school environment

⁴ The IHO found that claims of procedural defects not raised in the parents' closing brief were abandoned and, in any event, not supported by the evidence in the hearing record (IHO Decision at p. 21 n.8).

of Eagle Hill to the general education class placement with ICT services in the larger public school setting (*id.* at pp. 23-24). The IHO found that district relied on information regarding the student's performance at Eagle Hill and conducted an observation of the student at Eagle Hill, which was inadequate to support the "the degree of change of academic environment proposed" (*id.* at pp. 24-25). The IHO concluded that any lack of knowledge by the district of the student's fatigue and inattention "even in the very supportive small school" environment of Eagle Hill was the result of the district's failure to seek information regarding the student's current functioning from Eagle Hill (*id.* at pp. 25-26).

With respect to the parents' claims of procedural defect in the development of the April 2015 IEP, the IHO determined that none rose to the level of a denial of a FAPE because the CSE had "substantial evaluative material," the CSE did not predetermine the recommended program, the parents and Eagle Hill staff had the opportunity to participate in the development of the IEP, which addressed specific parent concerns, the parents did not challenge the annual goals, and Eagle Hill staff provided input into the goals and considered them to be appropriate (IHO Decision at p. 29). The IHO found that the district again failed to establish the appropriateness of its recommendation for the student, on the basis that the district did not obtain information from Eagle Hill regarding the student's presentation with respect to his tics and interfering behaviors, despite that further evaluation was necessary "to consider the impact of the very different program and environment proposed" in light of the student's known difficulties including his medical conditions and emotional fragility (*id.* at pp. 27-28).

The IHO then addressed whether Eagle Hill was an appropriate placement to address the student's needs and found that Eagle Hill provided the student with the supports he required to receive educational benefit and the hearing record demonstrated that the student made academic progress (IHO Decision at pp. 30-35). The IHO found that the structure of the Eagle Hill program accommodated the student's anxiety, emotional fragility, interfering behaviors, and inattention (*id.* at p. 35). Accordingly, because the hearing record did not provide a basis for denying or limiting reimbursement on equitable grounds, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2014-15 and 2015-16 school years (*id.* at pp. 35-36).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision, asserting that the IHO erred in determining that it failed to offer the student a FAPE for the 2014-15 and 2015-16 school years and that Eagle Hill was an appropriate placement for the student for both school years. Initially, the district asserts that the IHO erred in finding that the CSE based its recommendation for the 2014-15 school year on a single observation of the student at Eagle Hill and argues instead that the totality of the evaluative information available to the CSE supported its recommendation. The district argues that, although the IHO determined that the student was experiencing high levels of tic behavior, the evidence in the hearing record indicated that they were well-controlled at the time of the June 2014 and September 2014 CSE meetings and did not impact on his ability to receive educational benefits. The district further contends that the IHO erred in relying on information not provided to the CSE, and that neither the parents nor Eagle Hill staff objected to the description of the student in the IEP during the June 2014 CSE meeting. The district also argues that the April 2015 IEP was appropriate, and that there was no information in the hearing record indicating that the

student's medical needs would interfere with his ability to receive educational benefits from the recommended program.

With respect to the IHO's determination that Eagle Hill was an appropriate placement, the district asserts that the hearing record is "devoid of any evidence" that Eagle Hill provided the student with instruction specifically designed to meet his unique needs. Further, the district asserts that the evidence in the hearing record does not demonstrate that the student made progress at Eagle Hill during the 2014-15 and 2015-16 school years. Accordingly, the district asserts that the parents were not entitled to reimbursement for the costs of the student's tuition at Eagle Hill.

In an answer to the district's appeal, the parents assert admissions and denials, generally requesting that the IHO's decision be upheld. The parents cross-appeal from the IHO's determination that the June 2014 and September 2014 IEPs were "very comprehensive" and addressed the student's areas of need, as well as from her determinations that the procedural inadequacies alleged by the parents for both school years did not rise to the level of a denial of a FAPE.⁵

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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]). 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

⁵ The parents do not specify in their answer and cross-appeal which procedural violations they believe rose to the level of a denial of a FAPE.

the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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]). 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).

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]).

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 Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]).

VI. Discussion

A. Scope of Review

As noted above, the parents do not specify in their answer and cross-appeal which procedural violations they consider to have risen to the level of a denial of a FAPE and, while their memorandum of law specifically mentions a number of claims not set forth in their answer and cross-appeal,⁶ a memorandum of law is not a substitute for a request for review set forth in a petition or cross-appeal, which is required to set forth the allegations of error with appropriate citation to the record on appeal (see 8 NYCRR 279.4; 279.6; 279.8[a][3], [b]; Application of a Student with a Disability, Appeal No. 14-070). Accordingly, these claims will not be further addressed.

With this in mind, a review of the petition and cross-appeal shows that neither party appealed from the IHO's determinations regarding parental participation and predetermination; the timeliness of the September 2014 IEP; the adequacy and appropriateness of the goals found in the IEPs for both the 2014-15 and 2015-16 school years; and whether equitable factors weighed in favor of an award of tuition reimbursement. As these determinations from the IHO's decision were not appealed, they have become final and binding upon the parties and will not be further reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

⁶ In particular, in their memorandum of law the parents asserted that: the CSE failed to adequately consider the recommendations of the student's Eagle Hill providers and the private evaluator; the student's IEPs were developed without meaningful parental participation and were predetermined; the district did not develop an appropriate IEP before the beginning of the 2014-15 school year; and the goals in the April 2015 IEP were generic, not appropriate to meet the student's needs, did not include a methodology for implementation, and were idiomatic to the methodology and small classroom instruction used at Eagle Hill. However, a review of the entire hearing record reveals that, even if properly appealed, the evidence would not warrant reversal of the IHO's ultimate determinations on these points. Some of these claims, which overlap with those addressed herein, are alluded to below.

B. 2014-15 School Year

1. Evaluative Information and Present Levels of Performance

The district asserts that the IHO erred in finding that the CSE based its recommendation for the 2014-15 school year on a single observation of the student at Eagle Hill and that a lack of additional information was inappropriate given the change in academic program proposed relative to the previous school years. The district asserts that the totality of the evaluative information available to the CSE supported its recommendation.⁷

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]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

A review of the hearing record shows that both the May 2013 CSE, which developed the student's IEP for the school year immediately preceding the one at issue and the September 2014 CSE relied on an April 2013 psychological evaluation and a May 2013 educational evaluation as a basis for determining the student's needs and recommending an educational program for the student (see Dist. Exs. 9 at pp. 2, 3; 11 at pp. 2-3; 36; 37; 44 at p. 1; 48 at p. 1).

⁷ As noted above, given the IHO's final and binding determination regarding the timeliness of the September 2014 IEP (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]), the September 2014 IEP will be examined as the operative IEP for the purposes of this administrative proceeding (see M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [finding that treating the later developed IEP as the operative IEP did not prejudice the parent because the parent rejected both versions]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]). However, as the recommendations were developed at both the June and September 2014 CSE meetings, the happenings of both meetings are relevant to the analysis of the September 2014 IEP.

The April 2013 psychological evaluation, completed by a district school psychologist, provided both CSEs with information regarding the student's cognitive functioning, perceptual-motor skills, behavior, and social/emotional functioning (Dist. Ex. 36 at pp. 1-6). The school psychologist reported that during the testing process the student was alert, engaged in spontaneous conversation, and was motivated to complete the tasks (id. at pp. 2-3). However, the student also fidgeted in his chair, repeatedly touched his chest in apparent self-stimulation, rocked slightly, and periodically squinted his eyes (id. at p. 2). The school psychologist noted that none of the student's movements were exaggerated and they would have been missed under more casual observation (id. at pp. 2-3). He further noted that this was an improvement over his previous observations of the student's tics (id. at p. 3).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded standard scores (percentile rank) of 100 (50) in verbal comprehension, 88 (21) in perceptual reasoning, 83 (13) in working memory, 94 (34) in processing speed, and a full-scale IQ of 90 (25) (Dist. Ex. 36 at p. 3). The school psychologist opined that the student was of at least average intelligence and that his high average performance on a task of verbal reasoning suggested a higher potential for scholastic and reasoning areas (id. at p. 6). According to the school psychologist, the student appeared more anxious during tasks that measured working memory, in which he achieved low average scaled scores (id. at pp. 3, 5). The school psychologist noted that during testing the student's performance anxiety interfered with tasks that required him to "produce" and suggested that this was "likely true in school as well" (id. at p. 6). With respect to perceptual-motor skills, the student exhibited an awkward right-handed grip when writing but demonstrated adequate perceptual-motor skills as shown by the accuracy of his drawings (id. at p. 3). The school psychologist indicated the student appeared to demonstrate difficulties with motor planning based on his immature, expansive, and impulsive drawings (id.). According to the school psychologist, the results of projective testing and observations indicated that the student exhibited an unusual level of politeness, emotional innocence, fragility, and social deficits, but also showed that the student was capable of nuanced and broad-ranging awareness of social/emotional workings (id. at p. 5). The school psychologist explained that "this paradox [wa]s possible because much of" the student's social/emotional awareness was intellectualized, lacking affect, and used defensively (id.).

In addition to the April 2013 psychological evaluation, the May 2013 and September 2014 CSEs also considered a May 2013 educational evaluation, completed by the school psychologist, that described the student's academic abilities (Dist. Exs. 9 at p. 3; 11 at pp. 2-3; 37 at pp. 1-4). According to the school psychologist, the student presented as cheerful, polite, and cooperative, and he "worked with energy and humor" on many subtests (Dist. Ex. 37 at p. 2). However, near completion of the assessment the student indicated that he was tired and he began to fall asleep several times during the last sections of some of the subtests (id.). The psychologist stated that the student's inability to "keep his eyes open" also occurred during school and within the student's normal routine (id.). Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-2) to the student yielded standard scores of 112 (high average) in word reading, 121 (superior) in spelling, 90 (average) in reading comprehension, 106 (average) in essay composition, 99 (average) in numerical operations, and 92 (average) in math problem solving (id.). Testing revealed that the student demonstrated strong phonics knowledge and vocabulary, as well as excellent spelling skills, but that he had some difficulty determining which spelling to use for similar sounding parts of words ("tious" and "cious") and discriminating between vowel sounds

in unfamiliar words (id. at p. 3). According to the school psychologist, the student read at grade level but his silent reading was relatively slow and he preferred questions that required reasoning, generalization, and summarizing rather than looking back to the text for answers to fact questions (id.). The school psychologist indicated that while the student was relatively comfortable and enthusiastic about the essay composition tasks; he was less enthusiastic about the math portion of the assessment but still engaged in the tasks (id.). The school psychologist concluded that the student's performance on the math problem solving subtest was slightly lower than his performance on the numerical operations subtest possibly due to difficulties with working memory (id. at p. 4).

However, contrary to the parents' claim, the September 2014 CSE also relied on new, additional information that was not available at the time of the May 2013 CSE meeting. This new information included a December 2013 Eagle Hill progress report, a March 2014 classroom observation, a June 2014 Eagle Hill progress report, and a June 2014 speech/language evaluation, as well as input from the parents and Eagle Hill staff (see Tr. pp. 156-60; Dist. Exs. 11 at pp. 1-5; 34; 38-39; Parent Ex. I).⁸

Firstly, the December 2013 Eagle Hill report described the student's social skills, learning style and metacognitive abilities, and classroom performance (Dist. Ex. 38). The student's educational advisor indicated that the student enjoyed interacting with his peers and worked hard to learn many of the social skills needed for successful peer interaction (id. at p. 2). The advisor further indicated that the student's interactions had matured since the previous year but that his impulsivity sometimes interfered with his ability to manage group social situations (id.). According to the advisor, the student had a hard time regulating his utterances, as well as his body movements, and also had difficulty with social problem solving skills (id.). The advisor stated that the student benefited from a highly structured and predictable classroom routine (id.). The advisor noted the student was an active participant in class and had become more eager to share his ideas (id.). The advisor indicated the student required a very structured and explicit approach to acquire academic skills and learned best in settings where visuals, games, multisensory, and hands-on activities were offered (id.). The advisor also noted that directions needed to be explicitly explained to the student, as they could confuse him if the language was not clear and precise (id.). According to the advisor, the student continued to require a significant amount of support to manage the challenges of fatigue, processing, attention, and impulsivity (id.).

Next, the December 2013 Eagle Hill report described the student's performance in ELA (decoding, spelling, vocabulary, comprehension, written expression, and study skills), math (problem solving, place value and number sense, computation, and practical applications), writing (spelling, grammar and mechanics, and sentence structure/composition), general science (scientific concepts, comprehension, and active learning skills), and literature (vocabulary, literary concepts, and comprehension) (Dist. Ex. 38 at pp. 3-16). Although the Eagle Hill report indicated that the student was independently able to apply many reading skills at a third/fourth-grade level, he required direct instruction in making inferences and identifying cause and effect relationships, and required guidance with respect to understanding literary and figurative concepts and comprehending texts (id. at pp. 3-6, 15-16). With respect to mathematics, the Eagle Hill report

⁸ The date of the report and the IHO's evidence list indicate that the classroom observation was conducted in March 2013; however, testimony shows that the observation was conducted in 2014 (see Tr. p. 147; Dist. Ex. 34).

showed that the student was independently able to compute many multiplication and division problems, but required direct instruction on how to solve multi-step problems and in the practical application of math concepts such as discriminating between the hour and minute hand and recognizing elapsed time (id. at pp. 7-9). In writing, the student was able to create a two to four paragraph composition, but required guidance with paragraph organization and writing complex sentences (id. at p. 11). The December 2013 Eagle Hill report indicated that in science the student required guidance to apply many skills related to scientific concepts, comprehension, and active learning (id. at pp. 13-14). In addition to describing the student's academic performance, the report also detailed classroom modifications that were helpful to the student (id. at pp. 6, 9, 11-12, 14, 16).

Lastly, the December 2013 Eagle Hill progress report also included a speech-language report that indicated the student received one 2:1 speech-language session per week along with collaborative speech-language services (Dist. Ex. 38 at p. 17).⁹ The student's long-term goals included improving skills related to word knowledge, summarization abilities, and inferential reasoning abilities (id.).

In addition to the December 2013 Eagle Hill report, the September 2014 CSE also considered a March 2014 observation of the student in his writing class at Eagle Hill, conducted by a district school psychologist (Dist. Ex. 34). At the time of the observation, there were five students in the class (id.). The school psychologist noted that overall the student presented as diligent, hardworking, and engaged, and that he understood the expectations of the classroom and followed classroom routines (id.). The school psychologist further reflected that the student worked well independently and assisted peers when needed (id.). The school psychologist observed that the student engaged in spontaneous body movements, particularly shoulder shrugs, while listening to his peers (id.). The psychologist noted that, according to teacher report, the student produced written work independently (id.).

The September 2014 CSE also considered a second Eagle Hill report completed in June 2014 (Parent Ex. I). With respect to interpersonal skills, the student's educational advisor indicated that student was polite and caring but benefitted from reminders to be flexible and mature (id. at p. 2). The advisor also reported that the student responded to the direct instruction of social skills and was dependent on small classes and cueing from his teachers to maintain appropriate behavior within his classes (id.). With respect to learning style and metacognition, the advisor stated that the student continued to benefit from a small sized, highly structured class and that with clear, consistent expectations was able to produce quality work (id.). Regarding the student's classroom performance, the advisor reported that the student continued to require support to manage his difficulties with fatigue, processing, and attention, and that his active learning skills were "tremendously impacted by these factors and their effect on his alertness" (id.). The advisor stated that, when the student was available to learn, he was an active participant, interested in learning new material, willing to complete all tasks, and exhibited a desire to perform well in all of his

⁹ The Eagle Hill report indicated that the school's speech-language program was designed to provide pull-out sessions in addition to collaborative services through communication with classroom teachers and, when appropriate, the presence of a speech-language pathologist in class (Dist. Ex. 38 at p. 17).

classes (id.). According to the advisor, active learning, such as working with manipulatives and the "activboard" assisted the student with retention of information (id.).

Similar to the December 2013 Eagle Hill report, the June 2014 report detailed the student's performance with respect to specific academic skills (Parent Ex. I at pp. 3-15). Notably, in reading, the student was working with materials at a fourth to fifth grade level and had made some progress in his ability to independently apply vocabulary and comprehension skills (compare Dist. Ex. 38 at pp. 3-6, 15-16, with Parent Ex. I at pp. 3-6, 13-14). In math, the student continued to require guidance to apply or direct instruction in problem solving skills, place value and number sense, computation, and the practical application of math skills (Parent Ex. I at pp. 7-9). In writing, the student was able to independently apply skills related to spelling, grammar and mechanics, and sentence structure and composition; however, he continued to require guidance with paragraph organization and writing complex sentences (id. at p. 11). As in December 2013, the student continued to require guidance to apply almost all skills in general science (id. at p. 12). The June 2014 report detailed classroom modifications that were helpful to the student (id. at pp. 6, 9, 11, 13, 15).

The June 2014 Eagle Hill report described the student's speech-language goals and progress in speech-language therapy (Parent Ex. I at p. 16). The report showed that the student had gone from receiving one speech-language session per week in a 2:1 group setting to receiving one speech-language session per week in an individual (1:1 setting) (compare Dist. Ex. 38 at p. 17, with Parent Ex. I at p. 16). The student continued to receive collaborative speech-language services (id.). The speech-language pathologist noted that the student had demonstrated improvement toward his speech-language goals, specifically in generating a main idea statement, and showed significant improvement in making inferences in comparison to his performance the previous year (id. at pp. 16-17). The speech-language pathologist indicated that the student continued to have difficulty with word associations and recalling facts from text (id.).

The June 2014 Eagle Hill progress report also contained the results of several standardized evaluations that assessed the student's reading and writing abilities (Parent Ex. I at pp. 20-22). Results from the Group Reading Assessment and Diagnostic Evaluation (GRADE) indicated the student's comprehension composite score was at the 37th percentile, his vocabulary subtest score was at the 34th percentile, and his total test score was at the 37th percentile (id. at p. 20). The assessment identified listening comprehension as an area of weakness for the student (see id. at p. 20). Administration of the Gray Oral Reading Test-Fifth Edition (GORT-5) to the student in spring 2013 yielded percentile ranks of 63 in rate, 50 in accuracy, 50 in fluency, and 9 in comprehension (id. at p. 21). A subsequent administration in spring 2014 revealed a decrease in the student's reading rate (37th percentile), while his percentile rankings for accuracy, fluency, and comprehension remained the same (id.). With respect to the Slosson Oral Reading Test (SORT), the student achieved a standard score of 109 on both spring 2013 and spring 2014 administrations of the assessment (id.). In the ERB Writing Assessment Program, the student performed at a percentile rank of 6 based on suburban norms and a percentile rank of 10 based on independent norms (id. at p. 22).

Finally, the September 2014 CSE considered the results of a speech-language reevaluation conducted by the district in June 2014 (see Dist. Ex. 11 at p. 3). The reevaluation provided information regarding the student's receptive and expressive language, language content and

memory, and speech parameters (Dist. Ex. 39 at pp. 1-5). Administration of the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) to the student yielded standard scores (percentile rank) of 77 (6) in core language, 72 (3) in receptive language index, 87 (19) in expressive language, 74 (4) in language content, and 78 (7) in language memory (id. at p. 2). The report indicated the student's expressive language skills were relatively stronger than his receptive language, content, and memory skills (id. at p. 4). The report further indicated the student demonstrated difficulties with recall and comprehension of verbally presented materials (id.). According to the report, without supports such as repetition, visuals, and scaffolding, the student exhibited difficulties with remembering salient verbal information, and therefore could not generate statements about main idea, inferences, and predictions when presented with short passages (id. at pp. 4-5). The report indicated that the student's knowledge of semantic relationships including comparative, spatial, sequential and passive concepts was reduced and suggested that this would possibly impact his ability to follow oral directions and interpret both written and verbal information in an academic setting (id. at p. 5). Overall testing revealed the student's language skills were "reduced" for age-level expectations (id.).

Additionally, the hearing record shows that the parents and the Eagle Hill representatives who attended the June and September 2014 CSE meetings provided information about the student's availability for learning, the effects of his tics, and his sleepiness (see, e.g., Tr. pp. 282, 722-24, 982-83). Based on the above and contrary to the parents' assertion, the hearing record shows that the September 2014 CSE considered new evaluative and anecdotal information when determining the student's educational needs and developing a program for the student for the 2014-15 school year.

The student's present levels of performance as described in the September 2014 IEP summarized and incorporated the foregoing information about the student (see Dist. Exs. 11; 34; 36-39; Parent Ex. I). For example, the September 2014 IEP included information from the standardized assessment of the student's cognitive skills indicating that he demonstrated at least average intelligence with high average verbal reasoning and mildly constricted working memory (see Dist. Exs. 11 at p. 3; 36 at p. 6). In the area of academic achievement, the student's reading, writing, and math skills were within the average to superior range on standardized testing, and the September 2014 IEP reflected these results by providing the standard scores in each of the academic areas (compare Dist. Ex. 11 at pp. 2-3, with Dist. Ex. 37 at pp. 2-4). The September 2014 IEP described the student's academic abilities based upon the December 2013 and June 2014 Eagle Hill progress reports indicating the student: independently incorporated new vocabulary into written exercises, decoded multisyllabic words, and computed one-step problems; with guidance, computed multi-step problems and composed a two to four paragraph composition using capitalization and punctuation rules; and was working on improving word knowledge, summarization abilities, and inferential reasoning abilities (Dist. Exs. 11 at pp. 3-4; 38 at pp. 3-4, 6, 17; Parent Ex. I at pp. 3, 5, 7, 16-17).

In the area of social development, consistent with the evaluative information available to the September 2014 CSE, particularly the Eagle Hill progress reports, the IEP indicated the student enjoyed social interactions, was friendly and social, and worked hard to learn the social skills needed to interact with peers (compare Dist. Ex. 38 at p. 2; Parent Ex. I at p. 2, with Dist. Ex. 11 at pp. 4-5). The IEP described the student as impulsive in group social situations including having difficulty with social problem-solving skills and noted that the student benefited from the use of

social scripts to initiate conversations with adults and peers (Dist. Ex. 11 at p. 5). With respect to physical development, the IEP indicated the student's physical development was within age expectations (id.).

The IHO concluded the student's medical and psychological needs were overlooked by the September 2014 CSE and that the district should have obtained further information about the student—such as additional information about the student's tics and sleepiness—given the variability of the student's behaviors and the recommended change in placement (IHO Decision at pp. 22, 24-26).¹⁰ In particular, the IHO observed that the September 2014 CSE did not obtain the data tracking sheets for the 2013-14 school year completed by the Eagle Hill staff (id. at pp. 24-25).

Eagle Hill data tracking sheets from the 2013-14 school year, as well as a communications from the student's private psychiatrist and neurologist, were included in the hearing record but were not listed on the September 2014 IEP as having been considered by the September 2014 CSE (Dist. Exs. 11 at pp. 1-5; 45 at p. 5; 64; Parent Ex. E). During the 2013-14 school year, the Eagle Hill staff tracked the student's engagement, movements, and tiredness between approximately September 16, 2013 through November 15, 2013 (Dist. Ex. 64 at pp. 1-21). The data tracking sheets indicated the student's engagement was observed as "good" approximately 105 times and "poor" approximately 15 times (id.). The staff assessed the student's movements and tiredness by noting whether the conditions were observed "none," "some" or "lots" during the day (id.). According to the data tracking sheets, the student's tiredness was observed as "none" approximately 87 times, "some" in approximately 24 instances, and "lots" five times (id.). The tracking sheets also indicated the student's movements were observed as "none" approximately 47 times, "some" approximately 54 times, and "lots" 12 times (id.). A May 2014 letter from the neurologist noted the need for daily teacher reporting regarding the student's "level of alertness, sleepiness and tics" (Dist. Ex. 45 at p. 5).^{11, 12} Additionally, in a "To Whom it May Concern" letter, dated September 15, 2014, the student's psychiatrist stated that the student's vocal and motor tics occurred frequently and caused significant distraction for the student and those around him (Parent Ex. E at p. 2).¹³ Although the September 2014 IEP does not reflect that the CSEs considered these sources of information, a review of the hearing record reveals the September

¹¹ The parents included a copy of the May 2014 letter from the neurologist with her August 10, 2014 letter to the district (Dist. Ex. 45).

¹² According to the testimony of the psychiatrist, the student's sleepiness/fatigue was a side effect of a medication he took related to one of his diagnoses (Tr. p. 1107). In an October 21, 2013 email, the parents informed the Eagle Hill educational adviser of the neurologist's input regarding the student's sleepiness/arousal level based upon a recent appointment (Dist. Ex. 64 at pp. 32-33). The email indicated the parents and neurologist spent much time talking about the student's medications and sleepiness/side effects and that the medications could be causing the sleepiness (id. at pp. 33).

¹³ On September 16, 2014, the parents sent the district assistant superintendent an email that included a letter from the student's psychiatrist, along with a related video (Parent Ex. E; see Tr. p. 2). The student's mother testified that she showed the video to the members of the September 2014 CSE; however, the district special education teacher could not recall a video being shown (Tr. pp. 281, 736-47).

2014 CSE was aware of the student's medical and psychological needs and referenced some of this information within the September 2014 IEP (see Dist. Ex. 11 at p. 1).

Specifically, the September 2014 IEP noted in the special alert section that the student exhibited tics and involuntary movements as a result of his Tourette's disorder and was prescribed medication to address attending needs (Dist. Ex. 11 at p. 1). The IEP also noted that the student tended to have a hard time regulating what he said as well as his body movements (id. at p. 5).¹⁴ Although the December 2013 Eagle Hill report indicated that the student required "a significant amount of support to manage the challenges of fatigue, processing, attention and impulsivity," and the June 2014 Eagle Hill report noted that student's active learning skills were "tremendously impacted" by his challenges with fatigue, processing, and attention, and their effect on the student's alertness, the student's fatigue was not noted in the September 2014 IEP except for a reference to fatigue in the testing accommodations section (Dist. Exs. 11 at p. 10; 38 at p. 2; Parent Ex. I at p. 2).

The district special education teacher testified that the June 2014 CSE discussed the student's fatigue and her recollection was that the fatigue had improved for the student, although the student had "a great deal of fatigue in the evenings" (Tr. p. 282). The district special education teacher further testified that the improvement may have been due to maturation and that, at the time of the June 2014 CSE meeting, the student's fatigue mainly affected his homework completion (id.). In any event, while not explicitly described, review of the September 2014 IEP as a whole reveals that the CSE recommended supports and accommodations to address the student's fatigue, as described below.

In conclusion, the data tracking sheets and correspondences from the student's private psychiatrist and neurologist, described above, while offering more detail about the students' tics and fatigue, reinforced information about the student the CSE already had and/or discussed; however, the hearing record does not support a finding that these sources of information would have warranted different recommendations for the student's program and placement. Further, contrary to the IHO's finding, the district was not required to seek out additional information from Eagle Hill or elsewhere where the existing evaluative data available to it was sufficient to develop an appropriate IEP for the student. Additional assessments of a student need only be conducted or obtained if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 966 F.Supp.2d 315, 330 [S.D.N.Y. 2013]). Accordingly, based on the foregoing and as further described below, the evidence does not support the IHO's conclusion that the June and September 2014 CSEs had insufficient information about the student's needs to justify the program recommendation.

2. Educational Placement and Program

Based upon the evidence in the hearing record, the IHO erred in finding that the special education program recommended for the student for the 2014-15 school year by the September 2014 CSE failed to offer the student a FAPE (see IHO Decision at p. 26). Moreover, the hearing record does not support the IHO's conclusion that, although the district developed a comprehensive

¹⁴ The Eagle Hill progress reports before the CSE did not focus on the student's symptoms of Tourette's disorder and OCD (see Dist. Ex. 38; Parent Ex. I).

IEP for the student that addressed all areas of deficit, it failed to establish that the recommended program was reasonably calculated to enable the student to make meaningful educational gains (id. at p. 22).

As described in detail above, at the time of the September 2014 CSE meeting, the student struggled with anxiety, exhibited verbal and motor tics, and had difficulty with working memory and attention, academics, social skills, language processing, and his level of arousal/sleepiness (Tr. pp. 45-48, 68-69, 71-72, 141-42, 484, 654-55, 688; Dist. Exs. 11 at pp. 2-5; 12 at pp. 2-5; 62 at pp. 2-4).

To address the student's academic and social/emotional needs, the CSE recommended that for the 2014-15 school year the student attend general education classes and receive ICT services in ELA and math, a daily 40-minute resource room program, and weekly related services of one 30-minute social skills group and one 30-minute individual psychological counseling session (Dist. Ex. 11 at p. 1). In addition, based on the student's receptive language deficits, the September 2014 CSE recommended that the student receive one 42-minute session of individual speech-language therapy, one 42-minute session of speech-language therapy session in a group, and one 50-minute speech-language therapy classroom consultation per week (id. at p. 7). The September 2014 CSE also recommended supplementary aids and services/program modifications/accommodations that would provide the student with study guide outlines, clarification of directions, graphic organizers, breaks when needed, a home-school communication system, and a copy of class notes (id. at p. 8). The CSE also recommended that the student be provided with a 3:1 teaching assistant for support in academic classes and to assist in data collection (id.). With respect to supports for school personnel on behalf of the student, the CSE also recommended a 40-minute weekly psychological consultation to monitor the student's progress in the general education setting and communicate with outside providers (id. at p. 9). In addition, the CSE recommended that the district psychiatrist consult with the student's outside provider on an as needed basis (id.). Lastly, the CSE recommended enhanced staffing to support the student in science and social studies as well as lunch and recess (id.). With respect to testing accommodations, the CSE recommended the student for extended time, that the language of test directions be simplified as needed, the use of breaks on lengthy tests creating fatigue, and the use of a word processor to respond (id. at p. 10). The CSE also developed annual goals which targeted the student's: study skills (attention), weaknesses in reading, writing, and math, speaking and listening skills, use of precise wording, ability to express emotions in an acceptable manner, and conflict resolution skills (id. at pp. 6-7). Finally, the IEP indicated that, in contemplation of the student returning to the public school, a draft transition plan had been developed which included the a tour of the school and the assistance of a peer mentor, in addition to the services detailed above (Dist. Ex. 11 at p. 5; see Dist. Ex. 42).

The district special education teacher and school psychologist described the rationale for the services recommended by the September 2014 CSE. The special education teacher characterized the program recommended by the CSE as a "hybrid model" designed to address both the student's academic and social/emotional needs (Tr. pp. 155, 188).¹⁵ She reported that the CSE

¹⁵ The district special education teacher attended the June and September 2014 CSE meetings (Dist. Exs. 11 at p. 1; 62 at p. 1).

was "very thoughtful" in planning for the student and the recommended program "wasn't your typical program" (Tr. p. 155).

State regulation defines ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving [ICT] services in a class shall not exceed 12 students" and school personnel assigned to such a classroom shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][1]-[2]). Consistent with State regulation, according to the special education teacher, the ICT class for English was staffed by a special education teacher and a general education teacher, who employed a variety of different teaching models and worked collaboratively to individualize instruction for the students in the class (Tr. pp. 161-62). The special education teacher stated that the special education teacher in the ICT class could address the student's working memory difficulties by previewing and reviewing material, as well as providing prompting (Tr. pp. 166-67). She reported that all of the components of the sixth-grade English curriculum would have been supported by the special education teacher in the class (Tr. p. 166). The special education teacher opined that placement in an ICT class for math would offer a "great deal of support" for a student who has a relative weakness with working memory but was able to do grade level work (Tr. p. 164). She further opined that a special education teacher aware of the content being delivered, working collaboratively with a regular education math teacher to plan for delivery, would be very important for the student (Tr. pp. 164-65). The special education teacher noted that, if the student needed a visual [cue] to help him recall a formula or needed to work in a small group, these supports could be put in place on a daily basis (Tr. p. 165). The special education teacher testified that the student had the foundation skills to be successful in the sixth-grade curriculum, given additional supports (Tr. pp. 165-66).

Likewise, the school psychologist testified that the September 2014 CSE recommended a "very customized program" for the student, rather than a standard program in the district (Tr. p. 63). She stated that an ICT setting was a "excellent model" for the student based upon his "cognitive potential" (Tr. p. 68).¹⁶ Further, the school psychologist suggested that a special class setting would not offer the student an appropriate academic pace or peer models (Tr. p. 69). The school psychologist testified that an ICT setting offered the student access to typical peers but also provided the supports needed to address his working memory deficits (*id.*).

The special education teacher testified that, rather than recommend the student for a skills class, which was typically done, the CSE recommended the student for resource room (Tr. pp. 167-69). State regulation defines resource room program as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]; *see* 8 NYCRR 200.6[f]). According to the special education teacher, given the student's anxiety and his need to have processes explained, the CSE felt the student would benefit from participating in "a smaller class daily like a resource room" (Tr. p. 169). While the skills class usually included 10 to 15 students, the resource room sometimes

¹⁶ The school psychologist attended the September 2014 CSE meeting and conducted an April 2013 classroom observation of the student at Eagle Hill (Dist. Exs. 11 at p. 1; 35).

consisted of less than five students (Tr. pp. 168-69). The special education teacher testified that the resource room teacher was part of the team working with the student and had a daily opportunity to communicate with the other teachers (Tr. pp. 169-70). The school psychologist testified that in resource room the student would work on his goals for building compensatory skills (Tr. p. 70). She stated that resource room was "a very intensive program" and that it could also be used to work on planning and organization (id.).

According to the special education teacher, the social skills group recommended by the September 2014 CSE was run by a school psychologist (Tr. p. 172). The special education teacher explained that the group worked on developing social skills, which the student needed, and participation in the group would provide the student with the opportunity to create friendships (Tr. p. 172). Based on her observations, the school psychologist reported that the student could be tangential at times and one of the skills typically worked on in the social skills group was taking the perspective of the other person and learning conversational skills (Tr. p. 71). She noted that, with respect to the student's transition back to the public school, if there were things that he needed to work on, it would be part of that training (id.).

The special education teacher reported that the CSE recommended weekly psychological counseling for the student to address his anxiety and testified that the additional recommended psychological consultation would allow the psychologist to function as a case manager who collaborated with the student's private therapists (Tr. pp. 173-75). The school psychologist explained that the individual psychological counseling provided the student with the opportunity to develop a relationship with someone who was in a position to support him if he felt stress or anxiety during the school day (Tr. p. 72). She further explained that the recommended psychological consultation would allow the school psychologist to communicate information gathered by school staff regarding the student's tics and anxiety to his outside providers (Tr. pp. 81-82). The school psychologist also testified that a psychiatric consultation was recommended as an additional support to provide additional medical knowledge and feedback (Tr. pp. 82-83).

Supplementary aids and services may also be recommended for students in general education classes in the form of "aids, services and other supports . . . to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in accordance with the [LRE]" and may include the assignment of supplementary school personnel (8 NYCRR 200.1[bbb]; "Continuum of Special Education Services for School-Age Students with Disabilities," at 5, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).¹⁷ With respect to the CSE's recommendation for enhanced staff, the special education teacher explained that an aide or teaching assistant would be present in the student's general education

¹⁷ Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20).

social studies and science classes (Tr. pp. 176-78). She indicated that the enhanced staffers worked with the special education teachers and provided students with redirection and additional support (Tr. pp. 177-78). The special education teacher explained that the student asked a lot of clarifying questions and the enhanced staffers, rather than the teacher, would be able to assist the student if he had "too many" questions (Tr. p. 178). The special education teacher explained that, due to parent concerns that the student would be bullied, the student was also recommended for enhanced staffing during lunch to monitor peer interactions and support generalization of the social skills learned in the social skills group (Tr. pp. 179-80). The school psychologist confirmed that the enhanced staffers would be able to help break down the curriculum if necessary and provide support to the student in his science and social studies classes (Tr. p. 73). She testified that the student was also recommended for enhanced staffing during lunch and recess (Tr. p. 76). According to the school psychologist, unstructured times such as lunch and recess could be difficult for students with social skill deficits to navigate (Tr. pp. 76-77). She noted the student's transition back to the public school and opined that enhanced staffing "put somebody in place to help provide feedback" (*id.*).

With respect to the recommendation for a 3:1 aide, the special education teacher testified that the role of the aide would be filled by a teaching assistant who would provide the student with support, carry over plans from the resource room to general education classes and collect data as requested by the school psychologist (Tr. pp. 179-80). The school psychologist testified that the teaching assistant would modify the curriculum under the teacher's direction and collect data for an FBA or to monitor the student's tics (Tr. p. 74).

With respect to the supplemental aides and services recommended for the student, the school psychologist testified that: the study guide outline was an organizational tool that would help the student structure what he needed to study; clarification of instructions would help make sure the student understood what was being asked of him; and graphic organizers would serve as an organizational tool for the student and reduce the anxiety of "where to begin," (Tr. pp. 77-79). She noted that the suggestion for breaks came from Eagle Hill staff who indicated that sometimes the student became overwhelmed and they allowed him time to have a break to regroup (Tr. p. 79).¹⁸ The school psychologist reported that the home-school communication system was especially important for the student because school staff would be reporting back to the parents regarding medication management to make sure his medical providers were aware of what was going on with the student in terms of tics or his level of arousal (Tr. p. 79-80). With respect to class notes, the school psychologist reported that sometimes it was hard for students to attend and write at the same time and that providing a copy of class notes was a great strategy to use with a student with attending issues (Tr. p. 80). She indicated that it would also address the student's difficulty with working memory (Tr. p. 80-81).

The special education teacher reported that there was "a good deal of discussion" regarding transitioning the student from Eagle Hill back to the public school and that the CSE created a transition plan for that purpose (Tr. pp. 183-84). She testified that the recommendation that the student be met at the door everyday by an adult was added at the request of the parent (Tr. pp. 185-

¹⁸ According to the school psychologist Eagle Hill referred to these as "brain breaks" (Tr. p. 79).

86). The school psychologist testified that the purpose of the transition plan developed by the September 2014 CSE was to support the student's reintegration to the district (Tr. p. 83).¹⁹ Moreover, the school psychologist testified that the September 2014 CSE's recommendations took into account that the student's overall profile that showed the student had weaknesses as well as many strengths (Tr. pp. 68-69).

As noted above, the IHO found that the CSE failed to address the possibility that, as the student transitioned from Eagle Hill to the public school setting he would experience anxiety and the exacerbation of his tics and OCD behaviors, and their concomitant fatigue and inattention. However, the hearing record shows that the September 2014 CSE gave careful consideration to the student's social/emotional and medical needs and recommended services throughout the school day—such as daily resource room, counseling, the support of a 3:1 teaching assistant, enhanced staffing, and consultations between school staff and the student's private providers—that were designed to reduce the student's anxiety, manage his medical needs, and enhance his ability to participate in instruction (Tr. pp. 72, 74, 79-83, 169, 173-75, 180-81, 183-86; Dist. Ex. 11 at p. 10). Moreover, the hearing record shows that the placement recommended by the September 2014 CSE for the student for the 2014-15 school year was reasonably calculated to enable the student to make meaningful educational gains.

The IHO also concluded that the recommendation that the student attend a large public school in general education classes with ICT services was not appropriate for the student, especially considering the degree of the proposed change in the academic environment relative to IEPs developed for the student in years prior (IHO Decision at pp. 22-24). A CSE is required to meet annually and to develop an IEP to address a student's documented needs at that particular point in time (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Therefore, the fact that a subsequent CSE recommends a different program or placement than what was recommended in a previous year does not, ipso facto, mean that the recommendation in the current IEP does not meet the student's needs (e.g., M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [noting that the adequacy an IEP is to be judged on its own terms and not by reference to the adequacy of a prior year's IEP]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [determining that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is particularly so in the present case where the parents disagreed with the CSEs' recommendations in the preceding school years and, therefore, the student never attended the placements recommended by the CSEs.

Here, the hearing record shows that, although the student attended general education class placements in a district public school with, among other supports, consultant teacher services for the 2007-08 through 2010-11 school years, for two and a half years immediately preceding the school year at issue, CSEs recommended the student for a therapeutic day program (see Dist. Exs. 3-9). Initially, a December 2011 CSE recommended a State-approved day program for the student for the remainder of the 2011-12 school year (Dist. Ex. 7 at p. 1). The December 2011 IEP

¹⁹ The IDEA does not require "transition plans" as a general matter whenever a student moves from a private school to public school environment (R.E., 694 F.3d at 195).

indicated that the student's medical and emotional needs warranted a placement in a setting that offered close monitoring of the student's behavior (*id.* at p. 2).²⁰ Subsequently, the May 2012 CSE also recommended a State-approved therapeutic day program for the student for the 2012-13 school year (Dist. Ex. 8 at pp. 1-2). The May 2012 IEP indicated the student often fell asleep in class and, even when awake, his level of arousal was low and he had difficulty maintaining attention (*id.* at p. 2). Further, the IEP reflected that the student's tics and OCD behaviors were off-putting to other students and he lacked awareness of the impact of his behaviors on others (*id.*). The May 2012 IEP indicated the student's academic performance and pace were negatively affected by his anxiety, lack of attention, and low level of arousal (*id.* at p. 5).

The hearing record reflects that the student attended Eagle Hill during the 2012-13 school year and the classroom observation conducted by the district school psychologist in April 2013 indicated that the student's functioning had improved (Tr. p. 798). Based on his observation of the student in a tutorial class, the school psychologist reported that the student was "very attentive and enthusiastic throughout the lesson" (Dist. Ex. 35). However, despite the student's improved classroom performance, the school psychologist testified that she did not believe that transitioning the student back to the district for the 2013-14 school year was the right choice because the student would have to transition two years in a row, first back to the elementary school and next up to the middle school the following year (Tr. pp. 54-56). The school psychologist further testified that transitioning the student back to the middle school with a departmentalized model would work better for the student regarding his special education programming rather than to an elementary school with a non-departmentalized model (*id.*). Consequently, the May 2013 CSE recommended a State-approved day program for the 2013-14 year (Dist. Ex. 9 at p. 1). The student attended Eagle Hill for the 2013-14 school year (Tr. p. 798).

Subsequently, the September 2014 CSE recommend the student for placement in a less restrictive general education setting for the 2014-15 school year. The special education teacher testified that when she observed the student in an Eagle Hill class in spring 2014 she did not observe the student's tics interfering with his ability to learn (Tr. pp. 142, 145). The school psychologist also stated that the student's tics had decreased as compared to previous years (Tr. pp. 58-59). The special education teacher further testified she did not observe any behaviors that concerned her in terms of recommending a district special education program addressing the student's needs (Tr. p. 147).

Notwithstanding the earlier recommendations for the student's placement in a special class in a State-approved therapeutic day program, the information available to the June and September 2014 CSEs established that the student could receive educational benefit in the general education class setting with the use of supplementary aids and services and, therefore, removing the student from the general education environment would have been inconsistent with LRE principles (see 20 U.S.C. § 1412[a][5][A]; see also 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). Rather, the hearing record reflects that the June and September 2014 CSEs developed an IEP for the student for the 2014-15 school year that was designed to support the student's anxiety, working memory and attention, academics, social skills,

²⁰ The December 2011 IEP indicated the student's lack of focus and distractibility negatively affected all areas of functioning (Dist. Ex. 7 at p. 7).

language processing, and his level of arousal/sleepiness, while providing him with appropriate access to his nondisabled peers. In light of the multiple supports, modifications, and individualized aspects of the placement and program recommendation, the IHO's conclusion that the IEP was inappropriate for the student is unsupported by the hearing record.

C. 2015-16 School Year

1. Evaluative Information and Present Levels of Performance

As with the September 2014 IEP, the IHO concluded that the evaluative information before the April 2015 CSE was not sufficient to support the CSE's recommendation (IHO Decision at p. 29). A review of the evaluative information which was available to the April 2015 CSE reveals that it was sufficient to describe the student's needs and to develop recommendations (Dist. Exs. 12 at pp. 2-5; 40-41; 63). The April 2015 CSE considered recent evaluative reports, including a December 2014 Eagle Hill progress report and two March 2015 classroom observations, together with the evaluative reports described in detail above: the April 2013 psychological evaluation, May 2013 educational evaluation, and June 2014 speech-language evaluation (Dist. Exs. 12 at pp. 2-5; 36-37; 39-41; see Tr. pp. 193-94). District staff also communicated with Eagle Hill staff to obtain more current information about the student (Tr. pp. 194-95). Additionally, the hearing record reflects the parents and Eagle Hill staff participated in the April 2015 CSE meeting. (Tr. pp. 197-200).

In the December 2014 Eagle Hill progress report, the student's teachers provided information regarding the student's needs related to social skills, learning style and metacognitive abilities, and classroom performance (Dist. Ex. 40). The student's educational advisor indicated the student had transitioned to the upper school well and managed the increased challenges while teachers continued to provide support and accommodations (id. at p. 2).²¹ According to the advisor, the student engaged in conversations with his peers and teachers and was very social in the classroom and during recess (id.). The advisor indicated the student was beginning to develop self-advocacy skills, would ask clarifying questions in class, and was demonstrating active learning skills, but that sometimes the demands of the school were strenuous for the student and he needed teacher assistance (id.). The advisor also indicated the student struggled to maintain attention during class and that he benefited from breaks, time to get up and move, collaborative learning experiences, and shifting from sitting to standing (id.).

The December 2014 Eagle Hill progress report also provided descriptions of the student's functioning in his tutorial (reading), literature, writing, math, world history, and study skills classes, along with a statement of classroom modifications used with the student (Dist. Ex. 40 at pp. 3-18). The report indicated that while the student demonstrated a few reading skills independently, he required direct instruction or guidance to demonstrate skills in most areas, including vocabulary, reading comprehension, and written expression (id. at 3-6). However, in his literature class, the student independently exhibited most skills, including those related to vocabulary, reading comprehension, identifying concepts, making predictions, sequencing stories,

²¹ The hearing record reflects that the upper school designation at Eagle Hill was not based solely on grade level but that the school made individual determinations regarding when a student was ready to move to the upper school (Tr. pp. 460-62, 572-73).

and comparing and contrasting, and, with guidance could discriminate between relevant and irrelevant details and identify cause and effect relationships, but required direct instruction to summarize a story (id. at pp. 15-16). In his writing class, the student required direct instruction to proofread and to write longer and more developed compositions, but independently or with guidance could generate ideas and write simple and compound sentences and single paragraphs (id. at pp. 10-11). In math, the student required direct instruction to complete multi-step problems, compare fractions, and understand the concept of decimals, but applied skills either independently or with guidance in all other areas (id. at pp. 7-9). The student's world history teacher reported that he required guidance to generalize previously learned materials, identify the impact of historical events, and compare and contrast concepts, and direct instruction to prepare for tests, take complete notes, turn his notes into a rough draft, and edit a rough draft into a final draft (id. at pp. 12-14). With respect to his study skills class, the student completed most tasks independently or with guidance, but required direct instruction to take complete notes and use his notes to summarize what he had read (id. at pp. 17-18).

Lastly, the December 2014 Eagle Hill progress report included a speech-language report that indicated the student received one 2:1 pull-out session of speech-language services per week along with collaborative speech-language services (Dist. Ex. 40 at p. 19). The report indicated the student's long-term goals were to improve semantic language, inferential reading skills, and auditory memory skills (id.).

In March 2015, a district psychologist and a district special education teacher conducted classroom observations of the student at Eagle Hill during a literature class that consisted of seven students (Dist. Ex. 41). The special education teacher indicated the student set up materials and asked clarifying questions (id. at p. 1). The teacher reported that the student was prepared, participated in the classroom lesson, and provided input into the discussions (id.). At the end of class, the student completed the task, copied the homework assignment, requested clarification of the assignment, and independently packed his materials (id.). The report indicated the student repeatedly touched his hand to his chin on two occasions during the observational period (id.). The school psychologist also indicated the student engaged in spontaneous movements, including shoulder shrugging and touching his hand to his chin, but that they did not appear to interfere with his learning or distract others (id. at p. 2). The psychologist also noted that the student appeared to maintain good focus throughout the class period and was an active participant in the lesson but did fidget at times and required scaffolding support from the teacher during the lesson (id.). The report indicated the student was an enthusiastic learner with good skills and appeared organized and advocated well for himself when he needed additional assistance (id.). Although both observers noted that the student called out on several occasions, the school psychologist opined that this "was appropriate given the nature of the discussion and structure of the class" (id. at pp. 1-2).

In addition to the written evaluations and reports, the parent also testified that she and the Eagle Hill representatives who attended the April 2015 CSE meeting described the student's academic, medical, and attention needs to the CSE, including the student's fatigue and anxiety (Tr. pp. 760-62, 1062). In summary, the April 2015 CSE considered information that identified the student's needs in the areas of academics, attention, cognitive skills, behavior, speech-language, and social/emotional functioning. Based on the above, the evidence in the hearing record demonstrates that the evaluative information available to and considered by the April 2015 CSE—

as well as input provided by the parents and the Eagle Hill staff at the CSE meeting—was sufficient to develop an appropriate IEP for the student.

The hearing record demonstrates that the April 2015 IEP described the student's present levels of academic achievement, social development, and physical development consistent with the information available to the CSE (Tr. pp. 198-200; compare Dist. Ex. 12 at pp. 1-5, with Dist. Exs. 36-37; 39-41; 63). For example, the IEP indicated that, when the student used fifth and sixth grade reading materials, he applied many critical reading skills independently and, in math, the student understood math vocabulary and with guidance solved and checked math problems (compare Dist. Ex. 12 at p. 4, with Dist. Ex. 40 at pp. 7, 15). Furthermore, as identified in the evaluative information, the April 2015 IEP present levels of social/emotional development reflected that the student was social and engaged well in conversations with his peers and teachers (see Dist. Ex. 12 at p. 5). The April 2015 IEP indicated the student's physical development was within normal limits (id.). The student's mother testified that she and the Eagle Hill staff did not disagree at the CSE meeting with the presentation of the student's needs, as reflected in the April 2015 IEP (Tr. pp. 1013-16).

The IHO found that the district failed to review relevant information related to the student's tics and fatigue (IHO Decision at pp. 27-28). The IHO noted that the September 2014 CSE did not consider input from the student's psychiatrist or obtain data tracking sheets completed by Eagle Hill staff for the 2014-15 school year (id. at p. 27). Again, Eagle Hill data tracking sheets from the 2014-15 school year, as well as a letter from the student's psychiatrist, were included in the hearing record but were not listed on the April 2015 IEP as having been considered by the April 2015 CSE (Dist. Exs. 12 at pp. 1-5; Parent Ex. L).

From September 11, 2014 through September 30, 2014, the Eagle Hill staff tracked the student's movements and tiredness (Parent Ex. L at pp. 1-3). The student's movements were observed approximately as "none" 8 times, "some" 38 times, and "lots" 9 times (id.). The staff observed the student's tiredness 18 times as "none," 16 times as "some," and 12 times as "lots" (id.). In addition, the hearing record contains data tracking sheets completed by Eagle Hill staff related to the student's movements, sounds, and sleepiness for discontinuous portions of the 2014-15 school year from approximately October 8, 2014 through December 10, 2014, January 5, 2015 through January 16, 2015, and February 2, 2015 through June 3, 2015 (id. at pp. 1-18, 22-25, 29-37). According to the data tracking sheets, the student's movements were observed approximately as "none" 306 times, "little" 85 times, "some" 38 times, "lots" 5 times, and "lots and lots" 1 time (id.). The tracking sheets also indicated the student's sounds were observed approximately as "none" 290 times, "little" 21 times, "some" 23 times, "lots" 3 times, and "lots and lots" 0 times (id.). The tracking sheets indicated the student's sleepiness was observed approximately as "none" 222 times, "little" 146 times, "some" 40 times, "lots" 9 times, and "lots and lots" 2 times (id.).

Additionally, in a handwritten letter "To Whom It May Concern," dated April 20, 2015, the student's psychiatrist discussed the student's diagnoses and related needs (Dist. Ex. 55 at pp. 1-2).²² The psychiatrist indicated that the student's clinical symptoms currently affected his school

²² While the parent thought that the psychiatrist provided a letter to the district in 2015, the hearing record is unclear as to whether or not the district ever received the April 2015 letter from the psychiatrist (see Tr. pp. 936, 1135).

performance and social interactions (*id.* at p. 2). The psychiatrist further indicated the student experienced ongoing residual verbal and motor tics which distracted him from learning and made him a "potential target" for teasing and bullying by peers (*id.* at p. 1). The psychiatrist noted that the student could act impulsively, which could interfere with his learning and cause difficulty with peer interactions (*id.*).²³ The psychiatrist further emphasized that the student experienced fatigue and sleepiness as a result of his medication regimen, which demanded more than one-to-one attention from school staff (*id.* at pp. 1-2). Based on her assessment, the psychiatrist recommended the student attend a small highly structured class setting including a small student-to-teacher ratio, specifically noting that a 6:1 student-to-teacher ratio class would be ideal, together with flexibility in academic grouping and one-to-one support as needed to monitor his attention and comprehension (*id.* at p. 2).²⁴ Notwithstanding that the evidence is unclear as to whether the April 2015 CSE considered this information, the April 2015 IEP included information regarding the student's medical and psychological needs.

The April 2015 IEP reflected information that the student exhibited tics and involuntary movements as a result of Tourette's disorder and was prescribed medication for his attentional needs (Dist. Ex. 12 at p. 1). The IEP also indicated that performance anxiety related to work production may occur in school and that the student's attentional difficulties and anxiety affected his ability to participate in the general education curriculum (*id.* at pp. 4-5). The IEP reflected that the student needed to improve his self-monitoring when he was not maintaining attention in class (*id.* at p. 5). The April 2015 IEP noted in the meeting information section that the parents believed the student was making progress but that continued work was needed with respect to the student's medication management related to tics (*id.* at p. 1). As with the 2014-15 school year, while the student's fatigue was not specifically described outside of a reference in the testing accommodations section of the IEP, the recommended program in the IEP, described below, offered support that would address this area of need (see Dist. Ex. 12 at p. 11).

In the same manner as described above, the data tracking sheets and correspondence from the student's private psychiatrist offered additional detail about the students' tics and fatigue but, again, did not contradict information considered by the CSE about the student's needs. The totality of the evaluative information considered by the CSE was sufficient to develop an appropriate IEP for the student for the 2015-16 school year and the district was not required to seek out additional information from Eagle Hill or elsewhere (see *D.B.*, 966 F.Supp.2d at 330). Accordingly, the failure to provide greater specificity regarding the student's medical needs on the IEP did not rise to the level of a denial of a FAPE (see *G.B. v. New York City Dep't of Educ.*, 145 F. Supp. 3d 230, 249-50 [S.D.N.Y. 2015]).

2. Educational Placement and Program

A review of the evidence in the hearing record shows that the IHO erred in finding that the special education program recommended by the April 2015 CSE for the 2015-16 school year failed to offer the student a FAPE (see IHO Decision at p. 28). Based upon the hearing record, the April

²³ The psychiatrist testified that, in April 2015, the student was still exhibiting "attentional and distractible symptoms" but "that his impulsivity was under better control" (Tr. pp. 1135-36).

²⁴ According to the psychiatrist's letter, the student's tics could not be fully addressed through use of pharmacological and neurofeedback treatment (Dist. Ex. 55 at p. 1).

2015 CSE's recommendations were appropriate to meet the student's needs, for similar reasons to those discussed above with respect to the 2014-15 school year. The primary issue in contention is whether a general education classroom with special education supports and services was appropriate for the student, or as the parents contend, whether a small class with greater individual support was required for the student to receive educational benefit.

The April 2015 CSE recommended a general education placement with daily ICT services in ELA and math, twice weekly direct consultant teacher services in science and social studies, a 55-minute daily resource room program, and weekly related services of one 30-minute social skills group, one 30-minute individual psychological counseling session, one 44-minute session each of pull-out individual and group speech-language therapy, and one 50-minute session of speech-language therapy in the classroom (Dist. Ex. 12 at pp. 1, 8-9). Compared to the recommendations made in the September 2014 IEP, the April 2015 CSE added direct consultant teacher services for science and social studies but did not provided enhanced staffing in those classes or lunch and recess or a 3:1 teaching assistant for academic classes (compare Dist. Ex. 11 at pp. 8-9, with Dist. Ex. 12 at p. 1). State regulation defines direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]).

The district special education teacher opined that ICT services in English and math continued to be appropriate for similar reasons as for the 2014-15 school year (Tr. p. 201). The special education teacher testified that the April 2015 CSE recommended direct consultant teacher services for science and social studies because the content was more rigorous and complex in the seventh grade and a consultant teacher could break down the information so that the student better understood the content (Tr. pp. 201-02). The teacher explained that the recommended resource room program could preview and review instruction and offered the student the supports of skills instruction, organization, and planning for homework (Tr. pp. 203, 205-06). According to the special education teacher, the special education teachers, including the resource room and consultant teachers, and the psychologist would work as a team to coordinate skills instruction and monitor the student's tics, anxiety, fatigue, and attention (Tr. pp. 203-07). Additionally, the special education teacher testified that it was explained that the recommended counseling services would have supported the student's transition to the public school setting (Tr. pp. 304-05, 313-14). The special education teacher testified that she believed the supplementary aids/services, accommodations, and modifications were appropriate for the student and the CSE members did not voice disagreement (Tr. p. 208).

Although the psychiatrist believed the student required a small class such as a class with a 6:1 student to teacher ratio (Dist. Ex. 55 at p. 2), she admitted that she could not speak to the student's ability to receive educational benefit from the program recommended by the April 2015 CSE (Tr. p. 1175).²⁵ The student's mother testified that she provided input to the April 2015 CSE

²⁵ Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x

that the student required a small class and that the parents expressed their concerns to the CSE that the recommended program would not provide enough individual attention and supports for the student (Tr. pp. 761-62, 1062). Additionally, the December 2014 Eagle Hill progress report summarized above provided information that the student required individualized attention and supports (Dist. Ex. 40 at p. 2). Eagle Hill staff indicated that, due to the student's difficulties with attention, which was his biggest academic obstacle in the classroom, he benefited from "brain breaks," time to get up and move in a lesson, collaborative learning activities, and shifting in position from sitting to standing, as well as social supports such as teacher intervention regarding conflict resolution with peers (*see id.*). While the April 2015 CSE did not recommend a small special class, the IEP provided for similar supports and accommodations through the recommended program, including the provision for the smaller setting of the resource room on a daily basis. In addition to the ICT, consultant teacher, and resource room services, to address the student's needs related to attention, the April 2015 CSE recommended supplementary aids and services/program modifications/accommodations of refocusing and redirection, preferential seating, refocusing breaks, a copy of class notes, study guide outlines, adult guidance for organization in the form of checklists/agenda/checking in, a graphic organizer for writing and math assignments, as well as an annual goal that focused on improving the student's attention to task and assignments across all academic settings (Dist. Ex. 12 at pp. 7, 9-10). To address the student's needs for small group and individualized supports related to social/emotional functioning and language skills, the April 2015 CSE recommended a combination of individual and small group related services consisting of weekly 44-minute sessions of both individual and group speech-language therapy, one 30-minute session per week of a social skills group, and one 30-minute session per week of individual psychological counseling (*id.*). With respect to testing accommodations, the CSE recommended the student for extended time, the use of breaks on lengthy tests creating fatigue and the use of a word processor for all tests requiring lengthy written responses (*id.* at p. 11). The April 2015 CSE also recommended an assistive technology device of access to computer (*id.* at p. 10).

To the extent the IHO determined that the April 2015 CSE educational program recommendations were not sufficiently supportive considering the change in placement which entailed moving the student from a small private school to a larger general education district program, a review of the hearing record supports a contrary conclusion (IHO Decision at pp. 27-28). The evidence in the hearing record shows the student could experience an increase in symptoms related to Tourette's disorder and OCD during transitions and stressful events (Dist. Ex. 55 at pp. 1-2). A transition plan developed by the CSE provided several strategies to support the student in his transition from Eagle Hill to the district public school during the 2015-16 school year (Dist. Ex. 63). The transition plan included strategies to support the student's academic and social/emotional needs, referencing the supports provided by his IEP together with the services of a teaching assistant for the first six weeks of school (*id.*). The transition plan indicated that an FBA would be completed to determine if interventions were required to address the student's behaviors relating to his Tourette's disorder and fatigue, as well as if a teaching assistant continued to be an appropriate support (*id.*). The transition plan also indicated that counseling would be provided to support the student's transition to the district public school (*id.*). The transition plan further provided for a tour of the public school, a peer mentor to support the development of social

9 [2d Cir. July 25, 2005]).

relationships, an assistive technology consultation to support the student's use of the assistive technology recommended on his IEP, and a team meeting to develop a communication plan between home and school (*id.*). The transition plan noted that the student's transition to the district would be "evaluated through a program review after the first progress report" and the success of the student's transition would be determined based upon "academic performance and acclimation to the integrated school setting" (*id.*). The transition plan and the April 2015 IEP accommodations and modifications provided numerous supports to address the student's stress and anxiety relating to the transition to the district public schools (Dist. Exs. 12 at pp. 9-10; 63). The district special education teacher testified that the April 2015 CSE considered the student's academic and social/emotional needs as identified in the evaluative reports and provided "a great deal of support" to address these needs and ensure a smooth transition from Eagle Hill to the district, and that none of the CSE members objected to the plan during the meeting (Tr. pp. 211-12).

The documentary evidence in the hearing record and the testimony of the district special education teacher reflects that the April 2015 CSE discussed the student's needs and recommended a program that addressed his needs through the numerous individualized supports contained in the April 2015 IEP. As with the September 2014 IEP, the CSE's obligation to develop an appropriate program in the LRE further supports the recommendation for a general education classroom placement with the ICT, consultant teacher, and resource room services, along with the related services and accommodations/modifications described above (*J.S. v New York City Dept. of Educ.*, 104 F. Supp. 3d 392, 409-11 [S.D.N.Y. 2015] [finding that a general education placement with ICT and other services was appropriate for a student with average intelligence but needs related to Tourette's disorder, lethargy, depression, and anxiety, and that LRE considerations "plac[ed] a thumb on the scale" for the placement with nondisabled students], *aff'd*, 648 Fed. App'x 96 [2d Cir. May 4, 2016]). While the student may have experienced a difficult transition to the public school setting, the CSE prepared for this and, as a whole, the recommendation constellation of supports and services was reasonably calculated to enable the student to make meaningful educational gains.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the CSEs had sufficient evaluative data to determine the student's strengths and deficits for both the 2014-15 and 2015-16 school years and that the programs and placements recommended by the district for both school years were reasonably calculated to enable the student to receive educational benefit (*Gagliardo*, 489 F.3d at 112; *Frank G. v. Board of Educ.*, 459 F.3d 356, 364-65 [2d Cir. 2006]). Having determined that the district offered the student a FAPE in the LRE for the 2014-15 and 2015-16 school years, 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 appropriate for the student (*Voluntown*, 226 F.3d at 66; *Walczak*, 142 F.3d at 134).

I have reviewed the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated August 1, 2016, is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years and ordered the district to fund the costs of the student's tuition at Eagle Hill for the 2014-15 and 2015-16 school years.

Dated: **Albany, New York**
 November 2, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER