



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-045

Application of the BOARD OF EDUCATION OF THE RYE CITY 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:

Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

The Law Offices of Gerry McMahon, LLC, attorneys for respondents, by Gerry McMahon, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the cost of their son's tuition at the Eagle Hill School (Eagle Hill) for the 2015-16 school year. The parents cross-appeal from those portions of the IHO's decision which determined that the district satisfied its child find obligation for the 2014-15 school and which denied their request to be reimbursed for their son's tuition costs at Eagle Hill for the 2016-17 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.¹

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

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 hearing record reflects that the student received a diagnosis of hypertonia at six months old and received occupational therapy (OT) and physical therapy (PT) through the Early Intervention Program (EIP) until he was three years old (Dist. Exs. 9 at p. 4; 10 at p. 2). As a preschooler, the student experienced problems with self-regulation, attending, peer interactions, and expanding his play repertoire; he was prone to temper tantrums (Tr. pp. 460-62). The parents attempted to refer the student to the CPSE in April 2014, but they were advised by the district to hold their referral until the student entered kindergarten in the fall (Tr. pp. 460-62, 571-73; see Tr. pp. 34-36; Dist. Ex. 5 at p. 1). Shortly thereafter, the student began seeing a private psychologist (Tr. pp. 463, 583-84).

The student attended a general education kindergarten class in the district for the 2014-15 school year (Dist. Ex. 17; see Tr. pp. 343-44). Through a series of emails beginning in October 2014 and continuing through the 2014-15 school year, the parents shared a number of concerns regarding the student's social and behavioral functioning, and possible need for OT services with the student's kindergarten teacher (Parent Exs. 6-11; 22-25). On February 25, 2015, the kindergarten teacher referred the student to the Child Study Team (CST) based on a number of social, behavioral, auditory/language, and visual/motor concerns (Dist. Ex. 4 at pp. 1-5). The student began attending a private play therapy group in spring 2015, where he worked on socialization, initiating play, and maintaining eye contact (Tr. pp. 531-32; Parent Ex. 28; Dist. Ex. 14 at p. 2).

The CST met on March 16, 2015, and discussed concerns raised by the student's kindergarten teacher and the district school psychologist, who also shared communications she had with the parents regarding their concerns about the student's social functioning (Dist. Ex. 5 at pp. 1-2). The CST recommended that the student be referred for a full evaluation, including OT and speech evaluations (id. at p. 2). On March 25, 2015, the district school psychologist referred the student the CSE (Dist. Ex. 6 at pp. 1-5).

The district requested consent to evaluate the student from the parents by prior written notice dated March 31, 2015, and the parents signed the consent on April 1, 2015 (Dist. Ex. 7 at pp. 1-5).

The CSE convened on June 1, 2015 to determine the student's eligibility for special education (Dist. Ex. 14 at p. 1). The CSE summarized that the student presented no academic needs but did demonstrate difficulties related to arousal, self-regulation, attention, pragmatic language weakness, and an overall lack of social engagement, and, therefore, found the student eligible for special education as a student with a speech or language impairment (id. at pp. 1, 6).² Based on a discussion of the student's academic, communication, physical, and social/emotional needs, the CSE developed an IEP for the 2015-16 school year, which recommended that the student receive one individual OT session for 30 minutes per week in the therapy room, one small group (3:1) OT session for 30 minutes per week in the therapy room, one small group (5:1) speech-

² The student's eligibility for special education as a student with a speech or language impairment during the 2015-16 and 2016-17 school years is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

language therapy session for 30 minutes per week in the classroom, and two small group (5:1) speech-language therapy sessions for 30 minutes per week in the therapy room, as well as a number of supplementary aids and services, program modifications, and accommodations for daily use throughout the school day (id. at p. 9-10). After a discussion regarding additional adult support, the CSE recommended that the student attend a general education classroom placement but that district staff would collect data during the first six weeks of the 2015-16 school year to determine if the student would benefit from additional support from an aide (id. at p. 3).

The parents signed a contract for the student to attend Eagle Hill for the 2015-16 school year in July 2015 (Parent Ex. 29 at p. 1). The student attended a summer program at Eagle Hill, which provided the student with structured academics in the morning and a camp-like environment in the afternoon (Tr. pp. 546-48).

In September 2015, the student began attending the Foundations program at Eagle Hill (Parent Exs. 2 at p. 10; 29 at p. 1).³ By letter dated December 30, 2015, the district notified the parents of an update to the student's IEP, changing the student's designation to "Classified PP Outside District" to clarify the student's enrollment status as parentally placed in a nonpublic school outside of the district (Dist. Ex. 19 at p. 1). On January 18, 2016, the parents signed an enrollment agreement for the student to attend Eagle Hill for the 2016-17 school year (Dist. Ex. 20).

By letter dated February 2, 2016 (and stamped received by the district on February 8, 2016), the parents provided the district with notice that they did not believe the district offered the student an appropriate educational program for the 2015-16 school year, that they had unilaterally placed the student at Eagle Hill, and that they would seek tuition reimbursement and related expenses for that school year from the district (Dist. Ex. 21 at p. 1). By letter dated February 3, 2016, the district informed the parents that their records reflected that the student was placed in a nonpublic school located outside of the district at the parents' expense, advised the parents of the rights and responsibilities of the school district of location in providing appropriate special education services to the student, and provided the parents with a copy of the procedural safeguards notice (Dist. Ex. 22 at pp. 1-2). On February 8, 2016, the district sent a letter responding to the parents' February 2, 2016 letter, informing the parents that it respectfully disagreed with the assertion that the district denied the student a free appropriate public education (FAPE), and offering to reconvene the CSE to address any specific ideas the parents had regarding changes to the student's IEP for the 2015-16 school year (Dist. Ex. 23).

On February 18, 2016, the parents signed an acknowledgement/consent form, in which they informed the district that they had not yet determined whether to place the student in a nonpublic school outside of the district at their own expense, and were interested in obtaining a FAPE for the student by participating in the CSE process for the 2016-17 school year (Dist. Ex. 22 at pp. 3-4).

³ The hearing record indicates that the Foundations program at Eagle Hill was an ungraded program designed for students ranging between kindergarten and second grade and was created for students who were having a difficult time learning the general rules of being a student (Tr. pp. 912-13; see Tr. pp. 747-48).

A CSE convened on May 3, 2016 for the student's annual review and to develop his IEP for the 2016-17 school year (Dist. Ex. 27 at p. 1). Finding that the student remained eligible as a student with a speech or language impairment, the May 2016 CSE recommended that the student receive the following related services on a weekly basis in the therapy room: two 30-minute small group (3:1) OT sessions, one 30-minute small group (3:1) speech-language therapy session, and one 30-minute small group (5:1) social skills session to address pragmatic skills (Dist. Ex. 27 at pp. 1-2, 8). The May 2016 CSE also recommended similar supplementary aids and services, program modifications, and accommodations for daily use throughout the school day as included on the June 2015 IEP, with the addition of a slant board for writing (compare Dist. Ex. 14 at pp. 9-10, with Dist. Ex. 27 at pp. 8-9).

By letter dated August 19, 2016, the parents notified the district that they did not believe that the May 2016 CSE recommended an appropriate program for the student, that they were privately placing the student at Eagle Hill for the 2016-17 school year, and that they were seeking tuition reimbursement and related expenses from the district (Parent Ex. 15 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated September 16, 2016, the parents alleged that the district failed to offer the student a FAPE for the 2014-15, 2015-16, and 2016-17 school years (Dist. Ex. 1).⁴

With respect to the 2014-15 school year, the parents alleged that the district violated its "Child Find Obligation" when it failed to promptly and comprehensively evaluate and identify the student as a student in need of special education (Dist. Ex. 1 at pp. 2-8, 20). The parents alleged that concerns about the student's ability to function in the classroom arose during his kindergarten year and that the student demonstrated difficulties with frustration (id. at p. 2). The parents further alleged that the student struggled to socialize with his peers, was unaware of social norms and boundaries, and frequently retreated into his imagination when he did not get appropriate social interaction (id.).

With respect to the 2015-16 school year, the parents alleged that the June 2015 CSE failed to recommend an appropriate program in the least restrictive environment (LRE) for the student to make educational progress, including in the area of social/emotional functioning (Dist. Ex. 1 at pp. 11, 20). The parents alleged that the CSE failed to offer any services in addition to OT and speech-language therapy, including any additional academic instruction, and that the CSE refused to recommend "additional support in the classroom" for the student (id. at pp. 9-10). The parents further alleged that the June 2015 CSE failed to address the parents' concerns regarding the student's functioning during unstructured time and did not provide necessary social skills

⁴ As the IHO noted, the exhibits entered by the parent followed a numerical order, as opposed to the typical alphabetical listing, and the exhibits were assigned the designations of "P" for parent exhibits and "D" for district exhibits (IHO Decision at p. 42). In lieu of redefining the parent's exhibits in an alphabetical structure, citations to the record will follow this office's existing format, which distinguishes between "Parent Ex." and "District Ex.," with the exhibits identified by number.

assistance during recess (id. at pp. 10-11). The parents also alleged that the CSE did not offer the student 12-month school year services (id. at p. 11).

With respect to the 2016-17 school year, the parents alleged that the district again failed to offer the student an appropriate program in the LRE (Dist. Ex. 1 at pp. 13-14, 20). The parents alleged that the May 2016 CSE failed to offer the student "any academic support," additional adult support in the classroom, or 12-month school year services (id. at pp. 13-14). The parents further alleged that the CSE acknowledged the student's speech-language and social needs, but ultimately reduced his speech-language therapy (id. at p. 14). The parents further alleged that the CSE failed to recommend "push-in" services (id.). In particular, the parents alleged the student needed speech-language therapy integrated into his instruction to help him apply his skills in different environments (id.).

Turning to the parents' unilateral placement, the parents alleged that the student's placement at Eagle Hill was appropriate, and allowed the student to substantially improve his academic functioning (Dist. Ex. 1 at p. 11). The parents alleged that Eagle Hill provided intensive remedial instruction and that the student made progress toward some of his goals in decoding, phonemic awareness, spelling, reading comprehension, and math (id. at pp. 11-13). The parents also described Eagle Hill's approach to writing instruction and how its curriculum was integrated with speech-language instruction (id. at p. 13). The parents further indicated that the student made progress identifying emotions and demonstrating emotions appropriately (id.). The parents alleged that Eagle Hill's summer program was appropriate for the student, that the student made meaningful educational progress during his time at that program, and described some of the areas the student worked on over the summer (id. at pp. 16-19).

As relief, the parents requested reimbursement of the costs of the tuition and related expenses of the student's attendance at Eagle Hill for the 2015-16 and 2016-17 school years (Dist. Ex. 1 at p. 20). In the alternative, the parents requested the costs of the student's tuition for the 2015-16 and 2016-17 school years, as well as continuing placement at Eagle Hill, as "Compensatory Education Services and Supports" based on the district's failure to provide an appropriate program during the 2014-15 school year (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, which convened on December 19, 2016, and concluded on March 24, 2017, after six days of proceedings (see Tr. pp. 1-1109). In a decision dated May 8, 2017, the IHO concluded that the district did not violate its child find obligation for the 2014-15 school year and offered the student a FAPE for the 2016-17 school year, but failed to offer the student a FAPE for the 2015-16 school year (IHO Decision at pp. 19-24, 26-28).

For the 2014-15 school year, the IHO found that the parents' purported first referral to the CPSE chairperson in spring 2014 was "a conversation and not a formal request" (IHO Decision at p. 19). The IHO further noted that the parents did not pursue an immediate referral for the student, but deferred action until he entered kindergarten (id. at p. 21). The IHO noted that the student's difficulties were "not in academic areas but rather in the nature and extent of his interactions with his peers" (id. at p. 20). The IHO also relied upon the testimony of the student's teacher that he allowed students an adjustment period and that the student's social issues were not unusual for

kindergarten students but were happening more frequently than expected (id.). The IHO further noted that the district did not ignore the possibility that the student needed services, but instead that a district occupational therapist and a school psychologist discussed and informally implemented some strategies for the student (id. at p. 21). The IHO also noted that the student received private therapy and showed improvement in his interactions in December 2014 (id.). The IHO acknowledged that the referral procedure "could have been processed more quickly" but concluded that any delay was "a matter of weeks" and that February "typically has a break period" (id.). Ultimately, the IHO concluded that "it was reasonable to give a young student until January to adjust to the school's routines and social expectations" and found the parents' claim that the district violated child find to be without merit (id.).

Turning to the 2015-16 school year, the IHO summarized the issues and found that the district failed to demonstrate the appropriateness of the placement recommended in the June 2015 IEP (IHO Decision at pp. 22-23).⁵ The IHO found the testimony of the student's kindergarten teacher "compelling," specifically relying on his testimony that the student struggled socially and emotionally and had an "extremely unsuccessful" 2014-15 school year (id. at p. 23). The IHO noted that, notwithstanding the kindergarten teacher's identification of the student's need for "eyes on the child" and recommendation for an aide, the June 2015 CSE did not include that support on the student's IEP (id.). The IHO further noted that a promise to revisit the issue of the student's need for an aide in the fall of 2015 did not constitute "a binding promise of an aide," and further stated that the possibility of another student having an aide in the class did not constitute "an enforceable guarantee" (id. at p. 24). Based on this, the IHO concluded that the IEP did not recommend sufficient support for the student and, therefore, that the district denied the student a FAPE for the 2015-16 school year (id. at pp. 24, 30).

Turning to the 2016-17 school year, the IHO again summarized the issues on review and noted that both of the parties presented less evidence regarding the 2016-17 school year, but that the district ultimately met its burden to establish that it offered the student a FAPE (IHO Decision at p. 26).⁶ Regarding the adequacy of the May 2016 IEP, the IHO stated that the Eagle Hill staff members who participated in the May 2016 CSE meeting reported significant progress for the student in all areas and, therefore, the CSE appropriately concluded that the student could make meaningful progress in a second grade general education classroom (id. at p. 27). The IHO noted the CSE's conclusion that the "conditions of urgency" which existed at the end of the student's 2014-15 school year no longer existed and that a return to general education setting with related services was, therefore, appropriate based on the information available to May 2016 CSE (id.). Turning to the student's related services, the IHO noted that the CSE essentially continued the

⁵ The IHO noted that the parents had not challenged the composition of the June 2015 CSE meeting, the classification of the student as a student with a speech or language impairment, or the adequacy of the evaluations (IHO Decision at p. 22). The IHO determined that the parents' challenges to the June 2015 IEP included challenges to the CSE's failure to recommend an aide for the student and the extent of speech-language therapy services and goals (id.).

⁶ The IHO noted that the parents did not raise issues regarding the composition of the May 2016 CSE or the evaluative information available to it (IHO Decision at p. 26). The IHO concluded that the parents' challenge to the May 2016 IEP was limited to three issues: that the recommendation of a general education classroom did not provide appropriate support; that the related services of OT and speech-language therapy were inadequate; and that the speech-language goals were deficient (id.).

levels of service being provided at Eagle Hill (*id.* at p. 28). Addressing the annual goals in the May 2016 IEP, the IHO concluded that the OT and speech-language goals reflected the student's needs and were based upon the information available (*id.*). The IHO acknowledged the testimony of an Eagle Hill consultant/speech-language pathologist (consultant)—who testified that the speech-language goals were "vague or overly broad and meaningless without specified sub-goals"—but ultimately concluded that the May 2016 IEP adequately provided guidance to the student's providers as to the proper direction of the student's services and how to measure the student's outcomes (*id.*).

Turning to the unilateral placement of the student during the 2015-16 school year, the IHO found that the parents met their burden to establish that the Foundations program at Eagle Hill provided instruction that addressed the student's individual needs, enabling him to make educational progress (IHO Decision at p. 24). The IHO found that the student's program at Eagle Hill "addressed his primary deficits of socialization and pragmatic language," emphasized "readiness to learn in a school setting," and provided sensory breaks and group OT and speech-language therapy services in the classroom (*id.* at p. 25). The IHO acknowledged the "restrictive[ness]" of the student's setting in a "4:1 staff ratio and no opportunity during the school day for interaction with typically developing peers," but found that the appropriateness of the parents' unilateral placement was "not as rigidly defined as that of the school district" (*id.*). The IHO further acknowledged that, while the Foundations program "deemphasized" academics, the student had "no cognitive impediments to learning and would be expected to easily advance to grade level in the subsequent year" (*id.*).

Although the IHO found that the district offered the student a FAPE for the 2016-17 school year, she alternatively addressed the appropriateness of the unilateral placement at Eagle Hill for that school year and found that the parents did not meet their burden (IHO Decision at pp. 26, 29). The IHO found that the information available in the hearing record was insufficiently specific regarding Eagle Hill's methods of instruction, the deficits and levels of the other students, and the overall structure and emphasis of the class (*id.* at p. 29).

With regard to equitable considerations, for the 2015-16 school year, the IHO found that the parents participated in the CSE process in good faith and decided to send the student to Eagle Hill and signed an enrollment contract after the June 2015 CSE meeting (IHO Decision at pp. 25-26). The IHO found that the parents did not provide a sufficient notice to the district of their intent to unilaterally place the student, but noted that "such failure [wa]s not an automatic bar to reimbursement" and held that the district was "aware of [the parents'] possible choice as it [wa]s included on the IEP (*id.* at p. 26). The IHO therefore concluded that the district "suffered no detriment from the lack of additional notice" (*id.*). Accordingly, the IHO found no basis to reduce or deny an award of tuition reimbursement for the 2015-16 school year (*id.*).

As another alternative basis for denying the parents' requested relief for the 2016-17 school year, the IHO also found that there was an "obstacle to reimbursement," specifically the parents' failure to share a privately obtained evaluation, conducted by a child psychologist, with the CSE that included recommendations and a diagnosis, which was later entered into evidence at the hearing (IHO Decision at p. 29). The IHO held that it was "unfair and a violation of the expectation of cooperation in the IEP process for the parents to withhold relevant information and then attempt to use it to bolster their position during litigation" (*id.*). The IHO further noted that the parents

signed an enrollment agreement with Eagle Hill prior to requesting a CSE meeting, but did not find this timing to be evidence of bad faith given the uncertainty of the CSE's future recommendations (id. at p. 30).

Based on the foregoing, the IHO granted the parents' request for reimbursement of the costs of the student's tuition at Eagle Hill for the 2015-16 school year (IHO Decision at p. 30).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that the parents were entitled to tuition reimbursement for the 2015-16 school year. The district argues that the IHO erred in determining that the June 2015 CSE should have recommended the support of a 1:1 aide, and alleges that the district properly planned to further evaluate the student by collecting data during the first six weeks of the 2015-16 school year prior to making a determination regarding the student's need for such additional adult support. The district further alleges that the student exhibited needs primarily in the social realm, not the academic realm, and that the student's cognitive and achievement testing demonstrated that he was capable of accessing the curriculum and acquiring skills without a 1:1 aide.

The district further appeals the IHO's determination that Eagle Hill was appropriate for the student during the 2015-16 school year. The district alleges that the student was capable of meeting the academic demands of a general education setting, and that Eagle Hill was too restrictive as it did not provide the student with access to nondisabled peers, including peers to model appropriate social/pragmatic skills. The district also asserts Eagle Hill did not understand the student's language deficits, did not provide the student with print reading instruction resulting in regression in the student's reading scores, was not a State-approved program, and did not adhere to any State approved curriculum or the common core. The district also argues that the IHO improperly determined that the student's academic skills could be made up in a subsequent school year.

The district also appeals the IHO's determination that equitable considerations did not warrant a reduction or denial of tuition reimbursement for the 2015-16 school year, alleging that the parents did not provide the district with timely notice of their intent to place the student at Eagle Hill at public expense. The district alleges that the IHO erred in finding that the district had notice of the parents' placement based on a notation in the updated December 2015 IEP identifying the student's status as being parentally placed in a nonpublic school. The district alleges that it was not aware of the parents' intention to seek reimbursement from the district until February 2016.

In an answer and cross appeal, the parents respond to the district's appeal, asserting that the IHO should be upheld with respect to the 2015-16 school year. In their cross-appeal, the parents seek reversal of the IHO's determinations relating to the student's 2014-15 and 2016-17 school years. Specifically, the parents allege that the district violated its child find obligations for the 2014-15 school year and that the IHO misapprehended the district's affirmative responsibilities in this respect. The parents assert two instances in which they contend the district became aware of the student's need for special education. First, the parents allege that, in April 2014, they contacted the CPSE chairperson about their concerns, and were told it was too late in the year to take action. Second, the parents allege that the district school psychologist was made aware of the parents'

concerns by the CPSE chairperson at the beginning of the 2014-15 school year. The parents allege that they did not know of their rights during this period because the district failed to provide them with documentation explaining their procedural safeguards. The parents further fault the district for not referring the student to the CSE until the end of March 2015, not completing its evaluations until mid-May 2015, and not convening the CSE until June 2015.⁷

The parents further allege that the IHO erred in determining that the district offered the student a FAPE for the 2016-17 school year. The parents assert that the May 2016 CSE inappropriately recommended reduced speech-language therapy services, decreased the "intensity" of OT services, and recommended no individual OT. The parents also allege that speech-language therapy services recommended by the CSE were of insufficient duration to allow the student to make progress on her speech-language goals. Furthermore, the parents allege that the CSE ignored the student's sensory deficits and failed to recommend sensory-based goals. Regarding the parents' unilateral placement of the student at Eagle Hill for the 2016-17 school year, the parents appeal the IHO's finding that the hearing record was insufficient with respect to information about the "lower school" at Eagle Hill. Similarly, the parents assert that the IHO's ruling that equitable considerations did not weigh in favor of an award of tuition reimbursement for the 2016-17 school year should be reversed. The parents allege that their choice to not share the student's diagnosis of ADHD did not materially harm the CSE's decision-making process.⁸

In an answer to the parents' cross-appeal, the district responds to the parents' allegations that the IHO erred. The district also alleges that any claims the parents raised regarding events that took place before the 2014-15 school year are not properly raised on appeal because they were not included in the parents' request for an impartial hearing and are beyond the statute of limitations.

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. of Hendrick Hudson Cent. Sch. Dist. 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.

⁷ The parents also allege, in their memorandum of law, that the district delayed the implementation of the student's educational program until fall 2015 (Parent Mem. of Law at p. 11).

⁸ The parents further allege, in their memorandum of law, that the IHO abused her discretion in the manner in which she conducted the hearing and limited the parents' right to fully develop their claims (Parent Mem. of Law at pp. 25-31).

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. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 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 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). 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]), 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]).⁹

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters—Scope of the Impartial Hearing and Review

As a preliminary matter, it is necessary to determine which issues were properly before the IHO and are properly the subject of review. The parents allege that the district failed to provide the parents with a procedural safeguards notice at the end of the 2013-14 school year or in the beginning of the 2014-15 school year, that the May 2016 CSE improperly decreased the intensity of the student's OT services, that the May 2016 CSE improperly failed to recommend individual OT services, and that the district ignored the student's sensory deficits and failed to recommend any sensory goals. The parents also appear to fault the district for the length of time it took to convene the CST, evaluate the student, and convene the CSE. The district asserts that the parents' cross-appeal asserts new facts and alleges violations of FAPE that occurred during the 2013-14 school year, and argues that such claims are outside of the scope of review because they were not raised in the due process complaint notice and are barred by the statute of limitations.

⁹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

A party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]).

Although the parents did allege that the district failed in its child find obligation for the 2014-15 school year (Dist. Ex. 1 at pp. 2-8, 20), which is addressed below, the parents' due process complaint notice does not include a claim that the district's evaluations were untimely once the student was referred or that the process by which the CST referred the student to the CSE was improper or produced undue delay in providing the student with special education (*see id.* at pp. 1-21).¹⁰ The parents' due process complaint notice also contains no mention of the district's failure to provide the parents with a copy of the procedural safeguards notice (*see id.*). This claim appears to relate to the alleged referral of the student to the CPSE during the 2013-14 school year (Answer at pp. 1-2); however, the parents' due process complaint notice did not question the referral process during the 2013-14 school year, only the district's child find obligations during the 2014-15 school year (*see* Dist. Ex. 1 at p. 20). Accordingly claims related to the district's response to the parents' alleged referral are outside the scope of review.

Furthermore, while the parents raised specific concerns regarding the May 2016 CSE's recommendations for speech-language therapy (Dist. Ex. 1 at pp. 13-14), the due process complaint notice did not include allegations that the amount or type of OT services recommended by the May 2016 CSE were inadequate (*see id.* at pp. 1-21). Similarly, the parents' due process complaint notice contains no allegations that the CSE ignored sensory deficits or denied the student a FAPE because it failed to include sensory goals in either IEP at issue (*see id.*).

Upon review of the hearing record, the district did not subsequently agree to an expansion of the scope of the impartial hearing to include these issues and the parents did not attempt to amend the due process complaint notice to include these issues. Accordingly, these issues raised for the first time on appeal are outside the scope of the impartial hearing (*see B.P. v. New York City Dep't of Educ.*, 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; *M.R. v. S. Orangetown Cent. Sch. Dist.*, 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of *M.H. v. New York City Department of Education*, (685

¹⁰ The parents also argue, in their memorandum of law, that the June 2015 CSE further delayed the provision of special education services by developing an IEP to be implemented in the 2015-16 school year, rather than one to be implemented immediately (Parent Mem. of Law at pp. 11-12). Even if this did not constitute a new claim raised for the first time on appeal, it has long been held that a memorandum of law is not a substitute for a request for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3], [d]; *see, e.g., Application of a Student with a Disability*, Appeal No. 15-070). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[b]). Thus, this claim and any other argument included solely within a memorandum of law has not been properly asserted and will not be further discussed (8 NYCRR 279.8[c][4]).

F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). The alleged referral to the CPSE first arose during direct examination of a district witness; however, the questions asked by the district counsel were directed at developing a background of the student's history (Tr. pp. 34-35). Similarly, the district's direct questioning regarding the referral process during the 2014-15 school year provided background information and established the date by which the district first identified the student for an evaluation (Tr. pp. 362-71). Accordingly, as these issues arose as a part of routine questioning developing general background information the district did not open the door to the parents' challenges (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Regarding OT and the student's sensory needs, however, the district called the occupational therapist who attended the June 2015 and May 2016 CSEs as a witness and elicited testimony regarding the student's needs and recommended services (Tr. pp. 234-61); accordingly, the district may have "opened the door" to the issue during the hearing (see P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 509 [S.D.N.Y.2013] [concluding that the district "opened the door" to an issue which the parents would have otherwise waived "when it raised the issue in its opening argument and elicited testimony about it from one of its witnesses on direct examination."]). Accordingly, the student's OT and sensory needs are addressed below.

Finally, to the extent the parents do not raise arguments on appeal regarding claims which were alleged in the due process complaint notice and were not reached by the IHO, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]). One such issue is the parents' allegation that the district failed to offer 12-month school year services for the 2016-17 school year (Dist. Ex. 1 at pp. 11, 13).¹¹ In addition, regarding the parents' allegations that the district failed to offer 12-month school year services for the 2015-16 school year, the parents do not appeal the IHO's finding that there was "no discussion of extended school year services since there was no need to minimize regression in academic areas" at the time of the June 2015 CSE meeting (IHO Decision at p. 4). Therefore, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. Child Find

In their cross appeal, the parents allege that the district violated its child find obligation for the 2014-15 school year. The parents allege that the IHO misapprehended the district's child find obligations, improperly focused on the parents' actions, and ignored evidence of the district's delay in the child find process.

¹¹ The parents raise a claim relating to the conduct of the impartial hearing in their memorandum of law, alleging that the IHO inappropriately limited the parents' attorney's lines of questioning and thereby deprived the parents their right to fully develop their claims (Parent Mem. of Law at pp. 25-31). Although this claim has not been properly raised because it was not included in the request for review (8 NYCRR 279.8 [c][3], [d]), based on an independent review of the hearing record, the hearing was conducted in a manner consistent with due process.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see also 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]). see also 8 NYCRR 100.2[ii]).

The parents contend that the district school psychologist should have referred the student to the CSE after she received notice of the parents' referral of the student to the CPSE from the 2013-14 school year. The record includes an incomplete and undated document titled "Referral

to: Committee on Preschool Education (CPSE)" (Parent Ex. 27).¹² The CPSE referral indicated that the student needed PT and OT evaluations and listed three areas of concern: core strength, "FM skills," and speech (*id.*). The school psychologist testified that, in spring 2014, she was "made aware" that the student was entering kindergarten the following school year and that "the parents had contacted [the CPSE chairperson] with some concerns" (Tr. p. 34). The school psychologist also testified that the CPSE chairperson alerted her to the fact that there had been contact between the CPSE chairperson and the parents but that no evaluations or assessments had been performed and no further action had been taken (Tr. p. 35). The school psychologist testified that she added a "reminder that there had been some concerns earlier on" to a file in the event that something should "come up" in the future (Tr. pp. 35-36). The student's kindergarten teacher also testified that he communicated with the CPSE chairperson about incoming students and that he and the CPSE chairperson were "really good at being on the same page" regarding the student at issue and other incoming kindergarten students (Tr. p. 394). When asked about the student's CPSE referral, the kindergarten teacher testified that he did not specifically recall if the CPSE chairperson had informed him that the student had an outstanding referral but that it was standard "practice that [the CPSE chairperson] would have had conversations with [him] about each student" with similar circumstances (Tr. p. 396). The teacher testified that he did not "remember the particulars of the conversation or if it happened," but indicated that it was "very likely that it did" (*id.*).

In addition to the CPSE referral, the hearing record indicates that the parents directly notified district staff of a variety of concerns during the 2014-15 school year. The parents informed the student's kindergarten teacher, by email dated October 13, 2014, that they had concerns about the student's social functioning and that, during preschool, the student had exhibited difficulties with impulsivity, not interacting with classmates, and engaged in tantrums (Parent Ex. 22). The kindergarten teacher responded the same day, informing the parents that he had noticed some of those behaviors, but stated that it "wasn't something that concerned [him] to the point of contacting [the parents] about it" (*id.*). The teacher indicated that, given the information provided by the parents about the previous year, "perhaps [they] should work together to figure out what the best course of action going forward [would be]" (*id.*). In another email to the kindergarten teacher, dated October 22, 2014, the parents referenced the student's "OT and hand eye coordination issues" (Parent Ex. 23). The parents also detailed "several eye/vision information processing issues," relaying information from the student's doctor, and inquired about the status of an OT evaluation (*id.*). In his response, the teacher discussed an informal OT evaluation for the student and a possible referral to the CST (*id.*). On October 28, 2014, the parents sent an e-mail to the kindergarten teacher and the student's private psychologist in an attempt to open a direct line of communication between the two (Parent Ex. 24).

¹² Although the CPSE referral is undated (Dist. Ex. 27), it stands to reason that it was generated during the period of the student's potential eligibility for preschool special education services, prior to the student's 2014-15 kindergarten year. The district challenges the parent's reliance on parent exhibit 27 as relating to the 2013-14 school year and characterizes its use as arising from an impermissible challenge to school years outside of the scope of this proceeding and outside the statute of limitations. However, the parents have consistently limited the school years at issue to the 2014-15, 2015-16, and 2016-17 school years, and the parents' list of issues presented for review in their request for review does not include a new claim for relief for the 2013-14 school year (Dist. Ex. 1 at p. 20; Answer & Cross-Appeal at pp. 7-10). Accordingly, reliance on the referral form is only for the purpose of determining whether the district had a reasonable suspicion that the student had a disability and required special education services at the beginning of the 2014-15 school year.

The school psychologist testified that she had a phone conversation with one of the parents in October 2014, regarding "OT and PT," as well as "the issue that there had been concerns back in preschool" (Tr. p. 36). As a result of the conversation with the parents, the school psychologist spoke with the student's kindergarten teacher and a district occupational therapist (*id.*). These conversations resulted in the occupational therapist conducting an "informal observation" of the student (Tr. p. 37). The occupational therapist testified that she informally observed the student in fall 2014 but did not do any assessments at that point (Tr. pp. 240-41). The occupational therapist further testified that she informed the teacher that, if he observed any sensory issues, he should "bring [the student] up for a child study team" (Tr. p. 267, *see* Tr. p. 37). On November 3, 2014, the parents emailed the kindergarten teacher to see if the occupational therapist had been in to observe the student yet (Parent Ex. 25). When asked if he believed referral of the student to the CST was warranted in September, October, or November 2014, the student's kindergarten teacher testified that he never thinks referral is warranted that early and that he does not consider "bringing anybody up to the Child Study Team until after the New Year" (Tr. pp. 355-56). The student's kindergarten teacher admitted that, even if a student came in with an outstanding referral, while he would "be aware of this at the beginning of the year, and would be monitoring them," he "would not begin the CST process until after the New Year" (Tr. pp. 394-95). The kindergarten teacher explained his practice was based on the "need to give a child time to enter the school, acclimate" (Tr. p. 355).¹³ When asked how the student performed in the beginning of the 2014-15 school year, the teacher testified that "the beginning of the year [wa]s chaotic for all the kids" and explained that the student's behaviors were not notable when he first arrived but that gradually the teacher noticed the student having difficulty with socialization, (Tr. pp. 345-46; *see* Tr. pp. 358-62; Dist. Ex. 17). The kindergarten teacher testified that he spoke with the school psychologist around November 2014 regarding the student and implemented interventions in the classroom (Tr. pp. 352-55). The kindergarten teacher further testified that, while the student was making progress academically throughout the year and the student had some successes, with respect to social interactions, as the year progressed and expectations rose, the student maintained the same level from the beginning of the year (Tr. pp. 361-62). The parents also testified that the student had some positive results during the first half of the school year, but "things just went spiraling out of control" when the student came back to school in January (Tr. pp. 470-71).

The parents reached out to the kindergarten teacher again on January 15, 2015, to get an update on the student's socialization, and detailed some social issues the student was having with playdates (Parent Ex. 6 at p. 2). The parents also voiced concerns about the student withdrawing further into himself and cited to the student talking about an imaginary friend (*id.*). In an email dated January 15, 2015, the student's kindergarten teacher responded that the student was reluctant to join in with his peers, spent a lot of time daydreaming, spent unstructured time speaking with the teacher or drawing independently instead of interacting with his peers, and that he tried to get the student involved with the other students but hadn't "seen him join a group in class independently in a long time" (*id.* at p. 1). However, the teacher also reported that the student was

¹³ Although the kindergarten teacher's practice of not making a referral of a student until after the new year may reflect a valid concern about unnecessary evaluation and over-identification of students (Los Angeles Unified Sch. Dist., 548 F. Supp. 2d at 819, citing 20 U.S.C. § 1400[c][5]), a blanket practice to never make a request for referral of a student before the halfway point of a student's kindergarten year could, in some circumstances, prevent students who have an immediate need for special education services from being identified, evaluated, and classified, and thereafter being provided with a FAPE.

able to pay attention and follow instructions in school and, although it seemed that the student spent a lot of time daydreaming, he was able to complete assignments in class and participate without a significant amount of redirection or repetition of instruction (*id.*). The teacher further noted that, at times, the student was reluctant to do his best work and could be difficult for adults to manage (*id.*). By email dated January 28, 2015, the kindergarten teacher informed the parents that the student "had a rough day" and shared specific social and behavioral incidents which occurred in the classroom, including a tantrum, purposely disrupting the class, and telling the classroom aide that he wanted to shoot and kill the teacher (Parent Ex. 7). The teacher also informed the parents that the student indicated his favorite game was "imagining" and that he preferred that activity to all others (*id.*). In a February 25, 2015 email, the kindergarten teacher indicated that the student was spending increasingly more time in his imagination, and asked the parents if they were seeing the same at home (Parent Ex. 9 at pp. 1-2). In an email in response, the parents informed the kindergarten teacher that they were very concerned about the student's ability to succeed in first grade (*id.* at p. 1).

The kindergarten teacher referred the student to the CST on February 25, 2015 (Dist. Ex. 4 at p. 1). In his referral, the kindergarten teacher noted that the student exhibited: word-finding difficulty, difficulty organizing his thoughts for verbal expression, and difficulty maintaining topic relevancy; awkward gross motor skills; difficulty with personal space and boundary issues; and inconsistent spacing, letter formation, letter size, and difficulty writing on a line (*id.* at p. 3). The kindergarten teacher also indicated that the student learned through a multisensory approach, worked best when time limits were introduced, and required frequent breaks (*id.* at p. 4). The teacher reported that the student had difficulty with peer relations, was usually disruptive in class, was attention seeking, and had difficulty with adult relations (*id.*). More specifically, the teacher reported that the student had no friends in class and claimed not to care, was rude and oppositional to peers and teachers at various points, and occasionally cried or threw tantrums (*id.* at p. 5). The teacher also reported that the student was seeing a private psychologist "to help with his social issues" and that he would produce "significantly better work in class if he were more focused and had greater stamina" (*id.*).

With respect to the CST referral form, the kindergarten teacher testified that, when he filled out "these forms" he tried "to make the child seem as troubled as possible because [he] want[ed] the Committee to get the child services. So [he] push[ed] for the most services possible" (Tr. p. 422). The kindergarten teacher testified that the language he used to describe the student on the CST referral form reflected the "worst case scenario" (*id.*). According to the teacher, he did not mention "the positives" in the CST referral because it was his intention "to alarm the CST" that there was a concern with the student (Tr. p. 423). The teacher reported that he only included "the alarming things" on the CST referral and that it was not a complete portrayal of the child" (*id.*).

The CST met on March 16, 2015, and recommended referral to the CSE for a full evaluation of the student, and specifically included notation that OT and speech-language evaluations should be completed (Dist. Ex. 5 at pp. 1-2). As part of that recommendation, the CST noted that the kindergarten teacher was "very concerned" about the student (*id.* at p. 1). Notes of the CST discussion show that the kindergarten teacher described the student as "never" being interested in his peers, but happier at the beginning of the school year (*id.*). The teacher further described the student as "living in an imaginary world" and having difficulty with transitions, following directions, and completing tasks (*id.*). The district school psychologist also informed

the CST that she had been in touch with the parents about the student's inability to socially engage, lack of participation, withdrawal into his imagination, and possible need for sensory feedback (id. at p. 2). The concerns shared with the CST by district staff mirrored the communications between the parents and the student's kindergarten teacher beginning in October 2014 (compare Dist. Ex. 5, with Parent Exs. 6-11; 22-25). The CPSE chairperson informed the CST that the parents had contacted her to "investigate CPSE options but that they did not follow through with evaluation" (Dist. Ex. 5 at p. 1).

The district school psychologist referred the student to the CSE on March 25, 2015 (Dist. Ex. 6 at p. 1; see Dist. Ex. 5 at p. 2). The CSE referral largely referenced social and behavioral concerns similar to those cited by the CST, specifically identifying concerns with attention, pragmatic language, fine motor skills, and sensory issues (compare Dist. Ex. 5 at pp. 1-2, with Dist. Ex. 6 at pp. 1-5). The March 2015 CSE referral noted that the parents contacted the CPSE chairperson in Spring 2014 but that someone "did not follow through" (Dist. Ex. 6 at p. 3). By letter dated May 16, 2015, the parents were notified that a CSE meeting was scheduled for June 1, 2015, and the CSE convened on that date and ultimately determined that the student was eligible for special education as a student with a speech or language impairment (see Dist. Exs. 12 at pp. 1-3; 14 at p. 1).

It is undisputed that the main areas of concern for the student leading up to his referral to the CSE included social and behavioral difficulties (Tr. pp. 118-19, 359, 363, 375-76, 380-81, 583). Given the CST's observation that the student was "never particularly interested in his peers" (Dist. Ex. 5 at p. 1), the kindergarten teacher's January 2015 observation that he hadn't "seen [the student] join a group in class independently in a long time" (Parent Ex. 6 at p. 1), the outstanding referral document (Parent Ex. 27; see Dist. Exs. 5 at p. 1; 6 at p. 3), communication between the CPSE chairperson and the student's kindergarten teacher and school psychologist (Tr. pp. 34-36, 394-96), and the series of communications between the parents and the kindergarten teacher relating to social difficulties that ultimately justified a referral to the CST and CSE (compare Dist. Ex. 5, with Parent Exs. 6-11; 22-25), the hearing record demonstrates that the district had sufficient reason to suspect the student had a disability and was in need of special education services in advance of the student's referral to the CST in February 2015, the CST meeting in March 2015, and the June 2015 CSE meeting (see Dist. Ex. 14 at p. 1).

In light of the foregoing, the evidence in the hearing record supports the parents' position that the district was in violation of its child find obligations at some point during the 2014-15 school year (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1]) However, because the parents have not requested a form of relief to remedy the district's failure to meet its child find obligations during the 2014-15 school year, the district's violation is ultimately academic and further analysis of the exact point at which the district should have referred the student is unnecessary.¹⁴

¹⁴ Although the parents originally sought in the in their due process complaint notice relief by way of compensatory education or prospective placement in the form of tuition or placement at Eagle Hill during the 2015-16, 2016-17, or some future year, to remedy the violation for the 2014-15 school year (Dist. Ex. 1 at p. 20), they did not continue to pursue such alternate relief in their closing brief to the IHO or on appeal.

C. June 2015 IEP

The district argues that the IHO erred in finding that the June 2015 IEP did not offer the student a FAPE because the district did not meet its burden of proving that a general education class without additional supports was appropriate. The district asserts that it was proper to further evaluate the student by collecting data during the first six weeks of the 2015-16 school year prior to making a determination regarding the need for additional support and, specifically, the student's need for a 1:1 aide. The district further alleges that the student's concerns were related primarily to social deficits, not academic needs, and that the student's cognitive and achievement testing demonstrated that the student was capable of accessing the curriculum and acquiring skills in a general education classroom without a 1:1 aide. Finally, the district argues that a recommendation for a 1:1 aide for the student would have been inconsistent with State guidance.

A CSE convened on June 1, 2015 to determine the student's eligibility for special education, with the CSE chairperson, the school psychologist, a special education teacher, a speech-language pathologist, an occupational therapist, the student's regular education teacher, a parent member, the student's private psychologist, and the parents in attendance (Dist. Ex. 14 at p. 1). During the June 2015 CSE meeting, CSE members reviewed results of a May 23, 2014 physical evaluation, an April 15, 2015 OT evaluation, an April 24, 2015 social history, an April 29, 2015 psychological evaluation, a May 6, 2015 classroom observation, a May 14, 2015 educational evaluation, and a May 18, 2015 speech-language evaluation, as well as information from the student's teachers, district related service providers, the student's private psychologist, and the parents (*id.* at pp. 1-7; *see* Tr. pp. 71-73, 166; Dist. Exs. 3; 8-11; 13).¹⁵ According to the CSE meeting minutes, the CSE chairperson summarized the information reviewed by the CSE, noting that the student presented with difficulties related to arousal, self-regulation, attention, pragmatic language, and social engagement (Dist. Ex. 14 at p. 2). The June 2015 CSE determined that the student was eligible for special education as a student with speech or language impairment (*id.* at p. 1).

With regard to the student's educational needs, the present levels of performance set forth in the June 2015 IEP indicated that the student's overall cognitive functioning was in the high average range, with relative weaknesses in the student's working memory and processing speed ability (Dist. Ex. 14 at p. 6; *see* Dist. Ex. 10 at pp. 4-5, 11). The student performed in the average to above average range on measures of academic achievement and was academically "capable and [able to] complete classroom tasks when focused" (Dist. Ex. 14 at p. 6; *see* Dist. Ex. 11). The June 2015 CSE determined that the student did not demonstrate any academic concerns that needed to be addressed through resource room services (Dist. Ex. 14 at p. 6). Although the parents had no concerns regarding the student's academics, they expressed concern that the student was "stuck in an imaginative world and ha[d] no friends" (*id.* at p. 6).

¹⁵ Results of the April 2015 psychological evaluation and the May 2015 classroom observation were included in the psychological evaluation report (*see* Dist. Ex. 10 at pp. 2-3). The psychological evaluation report does not include a date the report was completed (*see* Dist. Ex. 10). Consistent with exhibit list attached to the IHO's decision, for purposes of this decision, the psychological evaluation report is described by reference to the April 2015 date (Dist. Ex. 10; IHO Decision at p. 31).

In relation to the student's social development, the June 2015 IEP indicated that, according to the student's classroom teacher, the student consistently initiated conversations with adults, but rarely, if ever, initiated conversations with peers (Dist. Ex. 14 at p. 6). In addition, the student typically played alone during recess and free play times in the classroom (id.). The IEP noted that, according to the parents, the student expressed an interest in having friends but, at the time, did not have any close peer relationships (id.). The parents expressed concern regarding the student's ability to make and sustain friendships (id. at p. 7).

In terms of physical development, the present levels of performance of the June 2015 IEP indicated that the student demonstrated decreased sensory processing regulation and often became over stimulated, both in and out of the classroom (Dist. Ex. 14 at p. 7). The IEP noted that the student had difficulty with attention, body awareness, and graded control and that he became easily frustrated when overstimulated (id.). According to the IEP, the student required external support to self-regulate (id.). In addition, the student demonstrated difficulty with fine motor control and visual attention, which impacted his motor output for handwriting tasks (id.). The parents expressed concern regarding the student's sensory needs (id.).

With respect to the student's management needs, the June 2015 IEP indicated that the student required the additional support of special education services along with program modifications to be successful in the general education classroom (Dist. Ex. 14 at p. 7). Overall, the IEP indicated that the student required direct instruction in the form of speech-language therapy to address pragmatic language weaknesses, support/direct instruction to appropriately engage with peers and develop play and social language skills, and OT to address delays in sensory-motor integration, overall attention/body regulation, visual attention/focus, and visual-motor integration (id.).

The June 2015 CSE developed speech-language annual goals targeting the student's ability to employ problem solving strategies, make basic inferences, demonstrate appropriate turn-taking and conversational skills, identify feeling words and facial expressions and predict reasons for feelings, and taking the perspective of others (Dist. Ex. 14 at p. 8). The CSE also developed motor skills goals targeting the student's ability to improve body awareness, attend and self-regulate through use of a sensory diet, employ near-point copying skills, and develop visual memory and recall of information (id.). The CSE further recommended supplementary aids and services, program modifications, and/or accommodations for daily use throughout the school day (id. at pp. 9-10). These included: preferential seating arrangements; refocusing, redirection and frequent check-ins; directions repeated and rephrased; checks for understanding; additional time to complete assignments in the classroom; use of a sensory diet, including sensory breaks; and use of a positive reinforcement plan (id. at pp. 9-10).

Lastly, the June 2015 CSE recommended the student receive weekly related services in 30-minute increments, as follows: one session of individual OT in the therapy room; one session of small group (3:1) OT in the therapy room, one session of small group (5:1) speech-language therapy in the classroom, and two sessions of small group (5:1) speech-language therapy in the therapy room (Dist. Ex. 14 at p. 9). The June 2015 CSE recommended that the student attend a

general education class placement, noting "None" under the section titled "Special Education Program/Service" (id.).¹⁶

According to the school psychologist, the CSE's recommendations were based on assessment results and the way the student presented at the time the various evaluations were conducted (Tr. p. 81). The school psychologist testified that, as a result of the available information at the time of the June 2015 CSE meeting, "[the CSE] put everything in place that we thought was necessary for [the student] to be successful" (id.).

The focus of the IHO's decision and the parents' concerns regarding the appropriateness of the program recommended by the June 2015 CSE is on the level of adult support the student needed in the general education setting to address his social/emotional needs and attending weaknesses and whether the student could have obtained an educational benefit with the supports recommended by the June 2015 CSE.

In addition to the information contained in the present levels of performance, discussed above, the hearing record shows that the June 2015 CSE reviewed a significant amount of information regarding the student's social/emotional and attending needs (Dist. Ex. 14 at pp. 1-2). According to CSE meeting minutes, committee members reviewed the student's April 2015 social history, which indicated: that the student became easily frustrated and sometimes threw tantrums at home; that he could be easily excitable and irritable and demonstrated restless, inattentive behaviors; and that he did not socialize much with peers at school and had very few play dates (Dist. Ex. 14 at p. 1; see Dist. Ex. 9 at pp. 2, 5-6). The minutes further indicated that the student articulated the desire for friends, but that socialization was difficult for him and he believed others didn't like him (Dist. Ex. 14 at p. 1). The minutes described the student as being very engaged with adults but unaware of social norms and boundaries (id. at pp. 1-2).

Also, according to the meeting minutes, the district psychologist who evaluated the student in April 2015 reported that, based on the student's parents and teacher responses on behavior rating scales, the student had difficulty forming and maintaining social relationships and regulating his emotions (Dist. Ex. 14 at p. 2; see Dist. Ex. 10 at pp. 2-3, 7-13). She further reported that the student tended to display some atypical and eccentric behaviors (Dist. Ex. 14 at p. 2; see Dist. Ex. 10 at pp. 2-3, 7-13).

With respect to the student's sensory needs, the meeting minutes show that the occupational therapist who evaluated the student reported that the student made limited eye-contact, demonstrated variable attention while being evaluated, and that he became over-stimulated and could not be calmed down (Dist. Ex. 14 at p. 2; see Dist. Ex. 8 at p. 2). The occupational therapist suggested that the student needed to be taught how to self-regulate and noted that, in the classroom or on the playground, the environment may be overwhelming for the student, "which [could] be why he has difficulty regulating himself and how he approaches others" (Dist. Ex. 14 at p. 2).

¹⁶ The June 2015 IEP included a statement, using an incorrect first name, noting that the student would participate in all areas of general education, except when receiving related services of speech-language therapy and OT (Dist. Ex. 14 at p. 11). Except for the use of an incorrect first name, the statement is consistent with the CSE's recommendations (see id. at p. 9).

According to the CSE meeting minutes, the speech-language pathologist who evaluated the student reported that, throughout testing, the student's attention waivered and he required repetition on tasks that were presented orally (Dist. Ex. 14 at p. 2; see Dist. Ex. 13). She noted that the student had difficulty sitting upright in his chair and often faced away from the evaluator or lay down in the chair (Dist. Ex. 14 at p. 2). The speech-language pathologist reported that the student exhibited difficulty inferring information about other's thoughts and facial expressions, supporting peers in a positive way, and demonstrating flexible thinking (id.).

Next, the student's classroom teacher informed the CSE that the student was academically capable, but that his independent work did not reflect his ability (Dist. Ex. 14 at p. 2; see Dist. Ex. 5). According to the meeting minutes, the teacher reported that, when given assignments, the student did not typically start working until long after his peers and broke up work time with frequent trips to the pencil sharpener or bathroom (Dist. Ex. 14 at p. 2). The teacher further reported that the student was often fidgety and moving about and that he had yet to master classroom routines such as packing his folder or moving his name for attendance (id.). However, the teacher expressed that his primary concern was with the student's social interaction with peers (id.). He noted that the student did not have any close relationships with peers and that he often behaved in a way that peers found off-putting (id.). The teacher reported that the student did not appear to be interested in what his classmates were doing and enjoyed having conversations with adults (id.). He reported that the student had a vivid imagination and transitioned between imagination and reality in conversation, making it difficult to discern what was real (id.). Finally, the student's teacher reported that the student was often inattentive during class and, as a result, needed instructions clarified for him (id.).

The June 2015 CSE minutes show that the student's private psychologist informed the CSE that the student developed relationships easily with adults (Dist. Ex. 14 at p. 2). However, the psychologist also reported that the student presented with significant deficits in attention, pragmatics, and social relationships (id.). He noted that it was difficult to get the student to attend to a task and that, therefore, initiating or sustaining attention to complete something was difficult for the student (id.). The psychologist stated that the student's conversation included a lot of fantasy (id.). The parents reported that the student had a loud voice, was sensitive to light and noise, and demonstrated some tactile sensitivity (id.).

According to the meeting minutes, the parents expressed concern about supporting the student during recess (Dist. Ex. 14 at p. 3). With respect to recess, the student's parents explained that they were looking for "facilitated engagement," as much of the student's social engagement with other children was "failing" and the playground was an area of conflict for the student during school (Tr. pp. 534-35). They further explained that they thought that, if the student could receive facilitation during unstructured time with other children, from an OT or someone else, it would be beneficial to the student (Tr. p. 536).

In addition, the CSE meeting minutes reflect that the parents "questioned the impact of attention on [the student] throughout the day" (Dist. Ex. 14 at p. 3). The parents expressed concern that, with the student attending school for five full days, he would need additional support in the classroom to initiate and do his work (id.). In addition, the parents provided testimony demonstrating they wanted the student to have an aide; to wit, they testified that they talked to the kindergarten teacher about an aide since January or February 2015 and specifically asked for an

aide at the June 2015 CSE meeting (Tr. pp. 534-35, 599-600). The CSE meeting minutes indicate that the CSE chairperson decided the district would collect data during the first six weeks of school to determine if an aide was warranted for the student (Dist. Ex. 14 at p. 3). The parents testified that they expressed their dissatisfaction with that idea (Tr. pp. 600-01).

The school psychologist confirmed that, at the end of the June 2015 CSE meeting, the committee discussed the idea that the student might need an aide or some level of support throughout the school day, as well as during lunch and recess (Tr. pp. 82, 115-16). She testified that "it was suggested that we collect data" during the first six weeks that the student was in first grade and if the student needed an aide based on the data, the district would "implement that" (Tr. pp. 82, 117). According to the psychologist, the purpose of the aide would be to help the student remain on task, to refocus and redirect him throughout the day, and to facilitate the student's social interactions during unstructured times, such as lunch and recess (Tr. p. 82). The psychologist indicated that the discussion at the CSE meeting was that the district would collect data and there was nothing at that point that warranted that level of support (full time aide) (Tr. pp. 118-19). She opined that providing an aide for a student was quite restrictive and, before the district would "jump to do that for a child that is just getting classified," the CSE would want to see how the student would respond to the new supports in place (Tr. p. 119).

The hearing record shows that the student's kindergarten teacher believed that the student needed additional adult support in first grade to address his social/emotional needs. The teacher testified that there were approximately 20 students in the student's kindergarten class for the 2014-15 school year and, in addition to the teacher, there was a general education aide and a special education aide designated for a particular student (Tr. pp. 343-44). He noted that first grade classes did not have aides (Tr. p. 378). The teacher recalled telling the CST that the student needed an aide or an assistant for social/emotional reasons (Tr. p 368; Dist. Ex. 5 at p. 1). The teacher explained that he watched the student interact with his peers and, if he noticed an interaction that was not positive, he talked to the student about it, modeled appropriate behavior or read a book relevant to the situation, and had a conversation with the class or the student about it (Tr. p. 368). The teacher opined that this sort of intervention "required eyes on the child" (Tr. p. 369). He noted that his desk was right next to the block area where the student played (Tr. pp. 346, 358-59, 369) and that he happened to have both a special education and "a regular aide" in his classroom (Tr. 369). He testified that, with regard to the student's need for support in later grades, he thought the student "might need that second pair of eyes because he's not learning how to interact with others properly" (*id.*). The teacher continued that such additional adult might be needed "in case something goes wrong" (*id.*).

According to the March 2015 CST confidential report, the kindergarten teacher informed the CST that the student needed help (Dist. Ex. 5 at p. 1). The report indicated the teacher informed the CST that the student "struggle[ed] greatly to get through the day without adult assistance," and "very much require[d] an aide or assistant," (*id.*). The teacher testified that his class had an aide assigned to it "so [the student's struggles] w[ere] manageable at the time" (Tr. p. 425). He clarified, however, that going into first grade there were less adults in a typical classroom "[s]o [the district] either needed to get another adult in there specifically for [the student] or put him in a position where there [wa]s another adult in the room, so he's manageable, so that [staff] c[ould] intervene when he need[ed] it behaviorally" (*id.*). The teacher further testified that the student's need for additional adult support was "written in the [CST] referral" and that it was "the plan going forward,

that he would be in a room that had another adult" (Tr. p. 379). He noted the question was whether the district assigned the adult to the student specifically or whether it was done informally (id.). As discussed above, the kindergarten teacher later testified at the impartial hearing that he described the "worst case scenario" and "alarming things" in order to get a reaction and ensure that the student received services and that he did not give a "a complete portrayal of the child" on the CST forms (Tr. p. 422-23). However, there is no indication that he later tempered this description of the student in his communications with the CSE.

The kindergarten teacher confirmed that there was a further discussion at the June 2015 CSE meeting about whether or not the student would be provided with an aide (Tr. p. 380). He also confirmed that the CSE recommended that the student attend a general education program and indicated that the intent of recommending a six-week window of time to collect data on the student was because significant growth can take place in a student between September of kindergarten and September of first grade (Tr. pp. 380-81). The teacher opined that the student could have made progress on his own and been a completely different student returning to school in September, who didn't warrant an aide to himself (Tr. p. 381). The teacher testified that he thought it was "perfectly acceptable for [the student] to be on everyone's radar" and for the district to monitor the student in case he should continue to need it (id.).¹⁷

Based on the expressed concerns regarding the student's need for additional adult support in both the classroom and during unstructured time, the hearing record does not support the CSE's proposal to defer the decision regarding whether the student would receive additional support until six weeks after the beginning of the school year. The evidence in the hearing record does not reflect that the CSE considered any other options for the student aside from its recommendation for a general education classroom with related services and modifications and accommodations (see Dist. Exs. 14; 18). For example, the CSE might have considered a recommendation for a classroom aide for the student's first grade classroom, or a shared aide during the first six weeks of the 2015-16 school year when it planned to monitor the student's need for a 1:1 aide (see 8 NYCRR 200.4[d][3][vii]).¹⁸ Consideration of such an option would have been consistent with the kindergarten teacher's testimony about the need for a "second pair of eyes" in the classroom for

¹⁷ The kindergarten teacher testified that the purpose of the student's speech-language therapy sessions was for the student to sit in a group and have interactions with peers where a teacher is monitoring him, which was exactly what the student needed (Tr. p. 377). The teacher noted that it was the reason he possibly wanted an aide for the student in the future (id.). The teacher explained that this is what he was providing for the student in kindergarten (id.). It is not clear if the kindergarten teacher meant to suggest that the recommended speech-language therapy sessions would have addressed the student's social/emotional needs throughout the school day, but in any event, the hearing record does not support such a conclusion.

¹⁸ State regulations were amended, effective June 29, 2016, requiring CSEs to consider certain factors prior to determining that a student needs a one-to-one aide (see 8 NYCRR 200.4[d][3]). While these regulations were not in effect at the time of the June 2015 CSE, State guidance published in 2012 outlined similar considerations ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Mem. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). With regard to a 1:1 aide, to the extent the district argues that the provision of such support would have been unnecessarily restrictive for the student considering his academic abilities, the State guidance indicated that a 1:1 aide should only be considered based on the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at p. 2).

the student to learn how to interact with other students properly, and may have addressed the parents' concerns about the impact of the student's attention throughout the school day and need for additional support in the classroom to initiate and do his work (Tr. p. 369, Dist. Ex. 14 at p. 3).

Furthermore, the district's argument that the student would have received the benefit of additional adult support in the classroom, even though it was not included on the June 2015 IEP is comprised largely of impermissible retrospective testimony (see R.E., 694 F.3d at 188 ["an IEP must be evaluated prospectively as of the time it was created"]; see also E.M. v. N.Y. City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted]). The kindergarten teacher testified that there was another student in the student's kindergarten classroom who would also be moving up to first grade and had a special education aide assigned (Tr. pp. 377-78). The teacher testified that the other student's aide could have provided support for up to three students (Tr. p. 378). The teacher also testified that the district planned to promote the student to the same first grade class where the aide would be present (id.). In case it was deemed the student was not making progress in first grade after data was taken for the first six weeks, the district would have then assigned the aide to the student (Tr. pp. 379-80). However, this was never more than an "informal plan" (Tr. p. 379) and was not included as a part of the June 2015 IEP (see Dist. Ex. 14). Accordingly, any consideration of whether an aide would have been present in the student's classroom would be an impermissible attempt to rehabilitate an otherwise deficient IEP (R.E., 694 F.3d at 185 [2d Cir. 2012] [finding that "a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP"]; see Reyes v. New York City Dep't of Educ., 760 F.3d 211, 220 [2d Cir. 2014] [finding that "it [was] inappropriate . . . to take into account the possibility of mid-year amendments in determining whether an IEP as originally formulated was substantively adequate"]).

A final note about the outcome for this school year is warranted. The finding that the June 2015 CSE failed to offer the student a FAPE rests largely on the evidence in the hearing record, summarized above, regarding what the CSE had available to it. In particular, the student's abilities and deficits as characterized by the kindergarten teacher highlighted a need for additional adult support in the classroom and, although the kindergarten teacher later testified at the impartial hearing that he may have overstated the student's needs (see Tr. pp. 422-23), there is no evidence in the hearing record that this exaggeration was articulated to the CSE. Had the hearing record included evidence that the kindergarten teacher presented the June 2015 CSE with a more tempered picture of the student's needs, the result for this school year may have been different. Indeed, the May 2016 CSE's view of the student based on the characterizations of his then-current teacher and providers (among other reasons), including the student's strengths and progress, ultimately results in a different outcome for the 2016-17 school year. Here, however, based on the information available to the June 2015 CSE, including the strong position articulated by the kindergarten teacher, in combination with the parents' concerns expressed during the meeting, the district failed to establish that the June 2015 CSE's recommendation for a general education placement without additional adult support in the classroom offered the student a FAPE.

E. May 2016 IEP

A CSE convened on May 3, 2016 to conduct the student's annual review and to develop an IEP for the 2016-17 school year. In addition to the student's parents and the CSE chairperson, a district school psychologist, special education teacher, speech-language pathologist, occupational therapist, and general education teacher attended (Dist. Exs. 27 at p. 1; 28). The student's teacher and speech-language pathologist, as well as a lower school administrator from Eagle Hill, participated in the meeting via telephone (Dist. Exs. 27 at pp. 1-3; 28).

New information available to the May 2016 CSE included a December 2015 Eagle Hill Foundations program progress report and an April 2016 classroom observation of the student at Eagle Hill (Tr. p. 91; Dist. Exs. 24; 27 at pp. 4-5). The resultant IEP incorporated much of the information found in the December 2015 Eagle Hill progress report (compare Parent Ex. 1 with Dist. Ex. 27 at pp. 4-6).

According to the May 2016 CSE meeting minutes, the parents reported they were happy with the student's progress at Eagle Hill and with his emotional state (Dist. Ex. 27 at p. 1). Overall, the student was happier and his attitude toward school was better (id.). The parents indicated that, during the prior school year (2014-15), the student came home and said that other children did not like him, but during the then-current school year (2015-16) the student did not say that kind of thing; instead, the parents reported he liked school (id.). According to the parents' comments, the student enjoyed learning and he enjoyed the extra support he received in class at Eagle Hill (id.). The parents noted that he still needed a lot of direction and he responded to having multiple teachers in the smaller group setting (id.).

The May 2016 CSE meeting minutes indicated that the student's classroom teacher from the Foundations program reported she had seen the student grow since he arrived at Eagle Hill (Dist. Ex. 27 at p. 1; see Parent Ex. 1 at p. 1). The teacher informed the CSE that, in the beginning of the school year, it was hard for the student to be part of the group and that he was in his own world more often (Dist. Ex. 27 at p. 1). However, she shared that, at the time of the CSE meeting, the student was more a part of the class and demonstrated the ability to stay on topic and participate in class discussions (id.). The teacher reported to the CSE that the student had made improvements in academics, social skills, and his ability to play with others (id.). He was more flexible in thinking and playing with friends (id.). In addition, the teacher indicated that the student demonstrated the ability to play in made-up games and could make up rules to games (id.). According to the teacher, the student was included in play initiated by his classmates (id.).

With respect to the student's academic skills, the May 2016 IEP reflected information gleaned from the December 2015 Eagle Hill progress report, as well as verbal input from Eagle Hill staff who participated in the CSE meeting (Dist. Ex. 27 at p. 4). The present levels of performance included in the May 2016 IEP indicated that, in decoding, the student mastered all consonant sounds as well as the ability to decode CVC words with short vowels, but was not yet fluent (id.; see Parent Ex. 1 at p. 1).¹⁹ With regard to the student's phonemic awareness, the student was able to identify a rhyme, the number of syllables in a word, complete sound discrimination activities, and identify initial sounds in words independently (Dist. Ex. 27 at pp. 4-5; see Parent

¹⁹ "CVC words" refers to words comprised of a consonant-vowel-consonant (i.e., c-a-t/cat) (see Tr. p. 750).

Ex. 1 at pp. 1-2). With guidance, the student identified middle and ending sounds and blended words together (Dist. Ex. 27 at p. 5; see Parent Ex. 1 at p. 2). According to the IEP, the student was working on "Book C" of the structured reading program utilized by Eagle Hill, which focused on blends and digraphs (Dist. Ex. 27 at pp. 4-5).²⁰ Specific to reading comprehension, the student was able to answer the "5W" questions and some simple inferential questions (id. at pp. 2, 5).

In writing, the present levels of performance of the May 2016 IEP noted that the student was learning to use the writing process of brainstorming, drafting, editing, and final drafting to support composition (Parent Ex. 1 at p. 5; Dist. Ex. 27 at p. 5). At the time of the May 2016 CSE meeting, the student could independently spell CVC and sight words that he had been taught (Dist. Ex. 27 at p. 5). In addition, the present levels of performance indicated that the student could compose a single sentence on a topic but liked to go back to add details (id.). According to the IEP, the student applied the rules of proper punctuation and capitalization to his sentences (id.).

In math, the May 2016 IEP indicated the student used "Touch Math" and had good number sense (Dist. Ex. 27 at p. 5). He demonstrated knowledge of basic addition facts to ten, double digit addition without regrouping, and could use base 10 blocks to add manipulatives (id.). The May 2016 IEP indicated that, with multiple exposures and the use of manipulatives, the student was successful in understanding math concepts (id.). At the time of the CSE meeting the student was working on subtraction facts and coin identification (id.).

The May 2016 IEP indicated that, at Eagle Hill, the student received speech-language therapy support twice a week in the classroom setting (Dist. Ex. 27 at pp. 1-2, 5). According to the IEP, the focus of the speech-language therapy was on increasing the student's receptive, expressive, and pragmatic language skills (id. at p. 5). The IEP noted that Eagle Hill used a social thinking curriculum to target the student's social language skills (id.).²¹ The May 2016 IEP further indicated that the student "had concepts" but that his use of them was labored and he had word retrieval difficulties (id.). In addition, the student's syntax could be disorganized and his narratives did not always have a beginning, middle, or end (id.). The IEP indicated that, with regard to language pragmatics, the student demonstrated decreased flexibility in his attempts to apply concepts to a variety of situations (id.). The student did well when provided with direct instruction of how to use language appropriately (id.). According to the IEP, the student's ability to use emotional vocabulary and identify his own emotional state had improved (id.). The student would ask basic "wh" questions when conversing with peers but this was limited if the student was not interested in the topic (id.). In addition, the IEP noted that the student's eye contact had improved, specifically when engaging in a highly desirable topic (id.). The IEP stated that the student continued to need support in taking the perspective of others, inferring, and problem solving social scenarios (id.). The parents noted that the student expressed emotions but not always at the

²⁰ The May 2016 CSE meeting minutes indicate that, at the beginning of the 2015-16 school year, the student was working on "book A" of the structured reading program (Dist. Ex. 27 at p. 2).

²¹ The CSE meeting minutes indicated that the student's speech-language pathologist at Eagle Hill worked on articulation skills; however, it appears this may have been a general statement of the type of service the speech-language pathologist provided in the Foundations classroom (see Dist. Ex. 27 at p. 2). The May 2015 speech-language evaluation report indicated the student presented with age appropriate speech production skills, with intelligibility judged to be 100 percent, and the hearing record does not otherwise indicate that the student was in need of articulation therapy (Dist. Ex. 13 at p. 7; see Tr. p. 212).

moment they were happening; instead he talked about them after a delay (id. at p. 2). The parents reported the student attended a private play therapy group to work on this (id.).

Physically, with regard to OT, the May 2016 CSE meeting minutes indicated that the student received OT from a private provider one time per week outside of school and his occupational therapist also consulted in his classroom one time per week (Dist. Ex. 27 at p. 2). The May 2016 IEP present levels of performance indicated that the student continued to demonstrate difficulty with sensory processing, attention, fine motor control, and motor planning skills that impacted the student's ability to independently sustain attention, stay on task, self-regulate, and complete graphomotor skills (id. at p. 6). According to the IEP, the student required frequent "brain breaks" and used "[z]ones of [r]egulation" to help him "stay in [a] ready or calm body" (id.).

A description of the student's basic cognitive and daily living skills in the present levels of performance was unchanged from the June 2015 IEP (compare Dist. Ex. 14 at p. 6 and Dist. Ex. 27 at p. 5).

Socially, the May 2016 IEP indicated that the student's classroom teacher reported the student presented with poor flexible use of language (Dist. Ex. 27 at p. 5). The student had difficulty maintaining conversations with peers, especially when he was not interested in the topic (id. at pp. 5-6). According to the present levels of performance, the student asked basic questions to attempt to stay in a conversation and would produce off-topic comments (id. at p. 6).

The May 2016 IEP went on to identify the student's educational strengths (Dist. Ex. 27 at pp. 5-6). The IEP indicated that, according to Eagle Hill staff, the student followed class routines and was beginning to participate in group discussions more (id. at p. 5). Academically, the student was capable and completed classroom tasks when redirected and focused (id.). With respect to the student's social development, the May 2016 IEP indicated that the student's ability to identify emotions had improved (id. at p. 6). The IEP noted that the student had made gains socially, specifically that he was sharing more "on-topic" thoughts, was more flexible, and included others (id.). Regarding the student's strengths related to physical development, the May 2016 IEP indicated that in OT the student enjoyed pretend play and described the student as creative (id.). The IEP reflected that, as per the parents and Eagle Hill staff, the student appeared emotionally happy, liked following routines, and demonstrated increased flexibility throughout the school day (id.). In addition, he enjoyed sensory-motor breaks, which improved his ability to participate in tabletop work and transitions at Eagle Hill (id.).

Regarding the student's needs, the May 2016 IEP indicated the parents had no concerns regarding the student's academics; however, the parents stated during the CSE meeting that the student did well because of the smaller class size at Eagle Hill (Dist. Ex. 27 at pp. 5-6). The IEP noted that the student continued to need language support to address his organization of language, as well as pragmatic support to address his social skills (id.). Physically, as per the parents and Eagle Hill staff, the student required OT to address delays in self-regulation, motor planning, fine motor control, and overall attention/focus (id. at p. 6). With respect to management needs, the May 2016 IEP indicated that the student required the additional support of special education services such as speech-language therapy, OT, and program modifications to be successful in the general education classroom (id.). Lastly, the IEP indicated the student needed a setting with

limited distractions, preferential seating, refocusing, assistance with sensory regulation, and positive reinforcement (id.).

The IEP further stated that the student presented with delays in his speech-language abilities, specifically with pragmatic language, as well as weaknesses in self-regulation and attending (Dist. Ex. 27 at p. 6). According to the May 2016 IEP, these delays had a negative impact on the student's behaviors in the general education setting (id.). The IEP stated that direct instruction in these areas, along with modifications in the classroom setting, would aid in the student's ability to be successful in the general education environment (id.).

The May 2016 IEP included approximately eight annual goals that addressed the student's speech-language weaknesses (i.e., topic maintenance; the ability to describe his own and another's perspective, intentions, and feelings during depicted social conflicts; ability to identify and describe his own emotional reaction when frustrated; sharing of personal narratives with a beginning, middle, and end; retelling of a story with syntactically correct sentences and inclusion of details) (Dist. Ex. 27 at p. 7). Additional annual goals addressed the student's motor skills needs (i.e., demonstration of improved sensory processing and self-regulation skills by selecting an activity to reduce arousal/calm body; negotiation of a four-to-five step obstacle course to increase motor planning and bilateral coordination skills in school; completion of a variety of fine motor activities across school settings) (id.).

For the 2016-17 school year, the May 2016 CSE recommended the same supplementary aids and services, program modifications, and/or accommodations for daily use throughout the school day as the prior CSE in the student's June 2015 IEP, with the additional of the provision of a slant board for the student for writing (Tr. pp. 95, 259; compare Dist. Ex. 14 at pp. 9-10 with Dist. Ex. 27 at pp. 8-9). The May 2016 CSE also provided for support for school personnel on behalf of the student by recommending OT consultation one time each quarter for 30 minutes in school (Dist. Ex. 27 at p. 9).

For the 2016-17 school year, the May 2016 CSE recommended continuing the student's eligibility for special education services as a student with a speech or language impairment and also recommended the following related services on a weekly basis in 30-minute increments, all to be delivered in the therapy room: two small group (3:1) OT sessions, one small group (3:1) speech-language therapy session, and one small group (5:1) social skills group (Dist. Ex. 27 at pp. 1,8).

In their answer and cross-appeal, the parents claim that the decrease in the frequency of the student's speech-language therapy sessions and the change in type of delivery of the related service (e.g.; push-in to pull out and no individual sessions) was inappropriate for the student for the 2016-17 school year (Answer & Cross-Appeal at p. 5). Upon review, the hearing record supports finding that the recommended speech-language therapy services, including the social skills group, were appropriate to address the student's needs.

First, the hearing record does not reflect that the student demonstrated the same intensity of self-regulation and pragmatic language concerns that he did when he was in kindergarten during the 2014-15 school year (compare Dist. Ex. 4 at pp. 3-5 with Dist. Ex. 24). The April 2016 classroom observation of the student at Eagle Hill, conducted by the district school psychologist

reflected that the student participated in class and generally responded to teacher-provided verbal and physical cues to refocus, redirect attention, and complete work assignments (Dist. Ex. 24). The student followed numerous directions (id.). He also sat patiently during an activity where the other boys in the class were highly restless, loud, talkative, and "even inappropriate at times" (id. at p. 2).

A review of the speech-language annual goals in the May 2016 IEP shows that they stemmed directly from the weaknesses identified in the present levels of performance, which in turn reflected the student's performance as described in the December 2015 Eagle Hill progress report and by the student's Eagle Hill teacher and speech-language pathologist at the May 2016 CSE meeting (compare Dist. Ex. 27 at pp. 7-8, with Parent Ex. 1, and Dist. Ex. 27 pp 1-2, 4-6). For example, the present levels of performance stated that the student had difficulty maintaining conversations with peers, especially when he was uninterested in the topic; an annual goal targeted the student's ability to maintain a topic of conversation of a peer's choosing for at least three conversational turns (Dist. Ex. 27 at pp. 1, 5-7). Also, the present levels of performance stated that the student's syntax could be disorganized and he produced non-specific references; an annual goal targeted the student's ability to retell a short story with syntactically intact sentences and include details (id. at pp. 2, 5, 7). Similarly, the goals targeted the student's sensory needs as described by the Eagle Hill staff and memorialized in the present levels of performance. The present levels of performance indicated that the student continued to have difficulty with sensory processing and the ability to self-regulate; the IEP included a goal that targeted the student's ability to demonstrate improved sensory processing and self-regulation by selecting an activity to reduce arousal level (id. at pp. 2, 6-7). The IEP also recommended the use of a sensory diet/sensory break through the day to facilitate attention (id. at p. 9).

The Eagle Hill consultant testified that the services recommended by the May 2016 to address the student's speech-language needs were insufficient (Tr. pp. 1072-73, 1076). Upon reviewing the goals, the consultant characterized them as "nuanced" and complex" and opined that they required "a great deal of foundation to be accomplished in 30 minutes once a week in a small group and then again 30 minutes in a social skills group" (Tr. p. 1076). She further stated that social skills are different than social communication skills and that the intent of the social skills group was not clear (id.). On cross examination, the consultant acknowledged that she did not review the student's report card that discussed his language functioning at the time of the May 2016 CSE meeting, that she had not spoken with Eagle Hill staff regarding what they had reported to the CSE, and that she had not seen any session notes or reports on the student's speech-language therapy services at Eagle Hill (Tr. pp. 1102-13).

In contrast, the district speech-language pathologist, who participated in the May 2016 CSE meeting, opined that the program and services recommended in the May 2016 IEP would have enabled the student to make meaningful progress in speech-language because the recommendations targeted the areas in which the student needed continued growth and development (Tr. p. 219). She testified that, based on the student's needs, the CSE recommended that the student receive one social skills group dedicated to working on the student's pragmatic language needs and one pull-out session to focus on the organizational language goals on the IEP (Tr. pp. 217-18, 232; see Dist. Ex. 27 at p. 7). The speech-language pathologist described the social skills group, stating that the group was based on the students' needs and noting that she drew from a social thinking curriculum, the dynamic of the group, and social situations that might arise

in the classroom that group members were dealing with (Tr. pp. 217-18). The speech-language pathologist indicated that she was able to teach social skills to students in a group setting because they needed to practice the skills with other peers and not just her (Tr. p. 219). The speech-language pathologist stated that the Eagle Hill CSE participants did not request additional speech-language therapy services on the IEP and that, at Eagle Hill, the student received two push-in speech-language therapy sessions per week (Tr. p. 217). In addition, she indicated that the goals could be met via pull-out services (Tr. p. 221).

Turning to the recommended OT services, the district occupational therapist confirmed that the May 2016 CSE discussed the student's motor skills and sensory processing, with focus on emotional regulation, keeping a calm body, and brain breaks, as described above (Tr. p. 255). The occupational therapist testified that she considered the comments made by participants from Eagle Hill and incorporated information that they provided into the development of the student's OT goals for the 2016-17 IEP (Tr. pp. 255-57; Dist. Ex. 27 at pp. 7-8). Additional testimony demonstrated that the OT goals addressed the student's motor planning and bilateral coordination needs and that, in conjunction with the OT goals, the recommendations for a sensory diet and use of a slant board were consistent with information about the student provided by Eagle Hill staff during the May 2016 CSE meeting (Tr. pp. 256-57, 259). In addition, the CSE changed the student's OT sessions to group sessions based on a discussion with Eagle Hill staff and recommended a quarterly OT consult with staff on behalf of the student, to which there was no disagreement (Tr. pp. 258-59). The occupational therapist explained that she did not recommend individual OT for the student because Eagle Hill staff suggested that it would be better to provide the student therapy in a group setting, where he could work on his social skills (Tr. pp. 280-81).

As for the recommended class placement, as determined by the IHO, given the student's social/emotional growth during the 2015-16 school year, the information available to the May 2016 CSE supported the CSE's determination that the student could have been successful in a general education class without additional adult support beyond that which would be available through the recommended related services and modifications/accommodations (see IHO Decision at p. 27). As discussed below, some of the student's progress during the 2015-16 school year is surely attributable to the supports the student received at Eagle Hill and, because the student was attending class in a nonpublic school, it is difficult to determine how successful the student may have been if he returned to a general education class in the district. However, the fact that the student benefited from the nonpublic school does not mean that he would not also have benefited from the CSE's proposed IEP (cf. J.R. v. New York City Dep't of Educ., 2017 WL 3446783, at *22 [E.D.N.Y. Aug. 10, 2017]). Further, the correct inquiry must focus on the IEP itself and on whether or not Eagle Hill could meet the student's needs better than the district (P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 419 [S.D.N.Y. 2017]).

As for the student's progress leading up to the May 2016 IEP compared to the year prior, whereas as of January 2015, the student was reluctant to join in with his peers and had not independently joined a group in a long time, the December 2015 Eagle Hill progress report indicated that the student transitioned in and out of groups appropriately (compare Parent Ex. 6, with Parent Ex. 1 at p. 7). The Eagle Hill progress report also indicated that, although the student was still working on his social/emotional skills, he had become "more successful at identifying different emotions," greeted his classmates in the morning, did well with taking turns and sharing,

and had become more flexible in response to unexpected changes (Parent Ex. 1 at pp. 6-7). The district school psychologist opined that the recommended program and supports included in the May 2016 IEP would have enabled the student to make meaningful progress because the IEP was generated based on the discussion of how the student presented at Eagle Hill (Tr. pp. 95-96). The school psychologist noted that the May 2016 CSE "put everything in place" based on "what it seemed that [the student] needed" (Tr. p. 96). Likewise, the district occupational therapist opined that, given "all of the services and the sensory diet," the student would be successful in the [district] school environment (Tr. p. 260). She noted that the student was bright, doing well academically and that students similar to him had been very successful in the district (Tr. p. 260).²² Moreover, the May 2016 CSE had available to it the above summarized information about the student's abilities from the student's then-current teacher and providers that did not mirror the more extreme view of the student's needs as articulated by the student's kindergarten teacher leading up to and during the June 2015 CSE meeting.

Accordingly, due to the progress the student had made and the largely evidentiary basis for the above determination regarding the insufficiency of the adult support recommended in the June 2015 IEP, there is sufficient basis to distinguish the outcomes and the IHO's decision that the May 2016 IEP was appropriate to meet the student's needs and was reasonably calculated to provide the student educational benefit for the 2016-17 school year is upheld. Moreover, the related services recommended in the student's May 2016 IEP aligned with the student's needs as described in the IEP, as well as by documentation regarding the services the student received at Eagle Hill. Based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2016-17 school year.

F. Unilateral Placement

Having concluded that the district failed to offer the student a FAPE for the 2015-16 school year, the next inquiry is whether the parents met their burden to establish that Eagle Hill was an appropriate unilateral placement. The district asserts that the IHO erred in determining that it was acceptable for Eagle Hill not to teach print reading skills to the student, based upon Eagle Hill's erroneous understanding of the student's language deficits. The district asserts that Eagle Hill's approach resulted in the student exhibiting substantial regression in his reading scores. The district further contends the IHO erred in finding that the student's academic skills could be made up in subsequent school years. The district also asserts that Eagle Hill was too restrictive, in that it offered the student no access to nondisabled peers.

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

²² The speech-language pathologist also testified that the student did not need to be educated in a school solely with students with disabilities because he had strong language abilities (Tr. p. 221). She indicated that students with pragmatic difficulties benefit from having peer models with typical language development (Tr. p. 221).

appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

By way of background, the hearing record shows that, for the 2015-16 school year, the student attended the Foundations program at Eagle Hill (Parent Ex. 29 at p. 1). The student's Foundations teacher testified that she held New York certifications for "childhood education and literacy" (Tr. p. 909). She reported that she, along with another teacher, worked with the school's speech and language department and psychological services to create the Foundations program (Tr. pp. 910-11, 930-93).

According to the teacher, the Foundations program at Eagle Hill was created for students who were having a difficult time learning the general rules of being a student (Tr. p. 912). The class focused on student skills and "hidden curriculum" ideas, such as how to be part of a group, how to sit like a listener, what it looks like to have a conversation, and other social skills that may

not come naturally to some students (Tr. pp. 912-13, 986).²³ The teacher testified that Eagle Hill staff spent time explicitly teaching these skills through a school-created curriculum and then had students implement the skills throughout the day (Tr. pp. 913-14). Although the class was ungraded, the Foundations program was designed for students ranging between kindergarten and second grade (Tr. p. 913; see Tr. pp. 747-48). According to the teacher, students in the Foundations class were grouped according to similarity of need (Tr. pp. 913-14). For the 2015-16 school year, the class was comprised of eight students, two teachers, and one teaching assistant (8:2+1) (Tr. pp. 549, 825, 914; Parent Ex. 1 at p. 1). The teacher confirmed that the cognitive abilities of the students in the group were primarily in the average range (Tr. p. 945).

The students in the Foundations program stayed together throughout the day and had a flexible visual schedule (Tr. pp. 918-20; see Parent Ex. 33). The daily schedule included: arrival/structured recess; morning meeting/oral language; tutorial/individualized work/snack; recess; oral language/writing (small group work); math (small group work); lunch/recess; special; quiet time (rest and read); content/oral literature—science/social studies; and choice time (Parent Ex. 33).

The teacher explained that, during tutorial/individualized work/snack, students would break into smaller groups based on their reading skills and reading needs and work on word family skills and following directions (Tr. pp. 927-29, 983-85). In addition, according to the December 2015 and June 2016 progress reports, the tutorial program emphasized reading comprehension, oral and written expression, and vocabulary, and students received instruction in phonemic awareness, beginning decoding skills, and spelling (Parent Exs. 1 at p. 1; 2 at p. 1). According to the teacher, during the second oral language period of the day, the students focused on categorizing and certain topic areas and then related them to writing (Tr. p. 932). Students were grouped based on their writing skills and ability to generate ideas (Tr. p. 933). The progress reports elaborated that, in the writing program, students practiced formation of manuscript letters, fine motor skills, as well as sentence structure and mechanics, and completed pre-writing, writing, and post-writing activities (Parent Exs. 1 at p. 5; 2 at p. 5). In math, the teacher employed "touch points" and movement to help teach beginning math skills (Tr. pp 936-38). The progress reports described the math program as providing small group instruction and individualization, with an emphasis on concepts and operations, developing number sense, and units in practical application areas (Parent Exs. 1 at p. 3; 2 at p. 3). According to the teacher, during the oral content and literature period, the class would read literature about chosen topics (Tr. p. 942). For example, if the class was learning about communities, the students would start with a story on the rug and then they would get up and act out different members of the community (Tr. p. 943). Next, the students would have a sheet or make something related to a particular community member and then do another movement activity (id.). Consistent with this, the Eagle Hill progress reports described the "integrated curriculum approach" for the students to access oral language and literature, with an emphasis on concept development, categorization, vocabulary, comprehension, oral expressive language, and listening skills (Parent Exs. 1 at p. 6; 2 at p. 6). The progress reports also reflected

²³ The Foundations teacher described "hidden curriculum" as the teaching, through formal instruction, of subtle environmental cues that most children learn from peers (e.g., what it is like to sit and listen, staying/rejoining the group, staying on topic, following directions, awareness of surroundings) (Tr. pp. 915-16). The teacher testified that, during the first six weeks of the 2015-16 school year, most of the class's content time and the "oral language" part of the school day involved direct instruction of hidden language skills (Tr. p. 986).

that the teachers worked with the speech-language "specialists" to develop concept formation, concept organization, appropriate listening skills, and pragmatic language skills (Parent Exs. 1 at p. 6; 2 at p. 6). The progress reports further reflected that "core content class" in social studies or general science also constituted part of the "integrated curriculum approach" (Parent Exs. 1 at p. 8; 2 at p. 8).

As for the other parts of the school day, the teacher reported that students were assigned classroom jobs during morning meeting and that the group would do calendar skills, morning message, a "brain break," and "check-in time" during this period (Tr. pp. 925-26). Specials included physical education, music, and art (Tr. p. 938). The teacher reported that quiet time was used to help students develop their self-regulation and problem-solving skills (Tr. p. 940). During quiet time, each student would be given one thing to play with and the teachers would go around to the students and model how they (the teachers) would think about a task, organize it, and problem solve (Tr. pp. 940-42). According to the teacher, choice time consisted of structured play (Tr. p. 943). In addition to the above schedule, the teacher testified that both a speech-language pathologist and a psychologist would push in to the class for two 40-minute sessions per week each (Tr. pp. 948-50, 986-89, 1002-04, 1015-17).

The Foundations teacher testified that, at various points during the school year, the class would break into tutorial reading groups and students would meet other lower school tutorial groups, play reading games, and share strategies (Tr. pp. 920, 979-81). Other times, lower and upper school students would come into the Foundations classroom to model different strategies for being a student, to build students' confidence, to meet other students in the building and to build relationships (Tr. pp. 920-21).

The Foundations teacher testified that she first met the student in summer 2015, when he was attending the summer program at Eagle Hill and she was asked to screen the student for possible enrollment in the fall (Tr. p. 952). As part of the screening she had the student (along with another student) play a game to get a sense of his social interactions and pragmatic language skills (Tr. p. 951). She also had the student do a phonemic awareness activity, write the alphabet, read a little, and do some one-to-one correspondence (*id.*; *see* Tr. pp. 990-91). The teacher reported that, based on the screening and the student's social and pragmatic needs, staff felt that the student would be a good match for the Foundations program (Tr. p. 951). The parent advocate from Eagle Hill testified that she was not involved in the student's admission to Eagle Hill, but that she had spoken with school staff (Tr. pp. 720-21).²⁴ When asked why the student was placed in the Foundations program, the advocate from Eagle Hill explained that all of the students at Eagle Hill had language-based learning needs and that placement was a matter of deciding where the student's

²⁴ According to her resume, the advocate's title at Eagle Hill was "parent advocate and admissions assistant" and her role consisted of assisting parents with the special education process, as well as conferring with other staff, observing students, and helping to determine appropriate Eagle Hill candidates (Parent Ex. 32 at p. 1). The advocate testified that she was first contacted by the parents in December 2016, as they anticipated their son's case going to an impartial hearing (Tr. pp. 719, 822). In order to familiarize herself with the student, the advocate observed the student and reviewed his file, which contained a psychoeducational evaluation and reports from Eagle Hill (Tr. pp. 718-19). She also spoke with the student's advisors, speech-language pathologist, and teachers from the prior school year (Tr. p. 719).

needs were on that continuum, and where those needs would be best met (Tr. p. 722). According to the advocate, the student:

still needed a tremendous amount of daily, intensive support that would be integrated throughout the day to help him be able to really get the language that he needed to be able to recognize and really understand and to ultimately regulate his emotional kind of state of being, and particularly in that social, that pragmatic realm.

(Tr. p. 722). She stated that, because the student's needs were "foundational," the Foundations program was "more appropriate" for him than the other programs at Eagle Hill or a "typical first grade classroom" (Tr. pp. 721-23).

1. Social/Pragmatic Needs

The district argues that Eagle Hill did not address the student's pragmatic language as a consequence of the restrictiveness of the school—i.e., that the student was not exposed to appropriate peer models from whom he could learn pragmatic language skills. While the district's argument relating to the restrictiveness of the Eagle Hill is discussed further below, given the parents' concerns about the appropriateness of the district placement with respect to the student's social/pragmatic needs and the IHO's finding that the instruction at Eagle Hill addressed the student's "primary deficits of socialization and pragmatic language" (IHO Decision at pp. 24-25), it shall be examined first. As discussed below, review of the hearing record demonstrates that Eagle Hill addressed the student's social/pragmatic needs in the classroom, as well as in less structured social situations such as lunch and recess, situations in which the student struggled the previous school year.

According to the Foundations teacher, at the beginning of the school year the student had a difficult time with transitions, including getting out of the car in the morning and getting into the classroom after recess (Tr. p. 952). The student also had a difficult time staying with the group as he wanted to stay with his own plan, which included thinking about the games he wanted to play and his imagination (*id.*). She noted, however, that the student also wanted to please his teachers (Tr. p. 953). With respect to the student's oral language, the teacher reported that the student was able to provide a lot of information about his favorite topics but, when prompted to move on, the student had difficulty (Tr. p. 954). She noted that the student was very distracted internally with his games and imagination (Tr. p. 953).

The Foundations teacher testified that the student made progress with his social skills and pragmatic language during the 2015-16 school year (Tr. p. 969). She reported that, at the beginning of the school year, the student would respond when someone asked him a question about a topic in which he was interested (*id.*). The student was by himself most of the time and preferred to play in his imaginary world (Tr. p. 970). However, by the middle of the school year the student was making friends and playing with them (*id.*). By the end of the year, the student was beginning to ask questions about his peers' topics of interest, even if he was not primarily interested in those topics (Tr. p. 969). According to the teacher, approximately six weeks into the school year, the student began wanting to make friends (Tr. p. 954). He became more interested in peers and began to learn that his friends wanted to play with him (Tr. pp. 954-55). The teacher described how

Eagle Hill staff would teach the student strategies for compromising to enhance his ability to engage in play with peers (Tr. pp. 955-56). The teacher explained that, at the beginning of the school year, it was hard for the student to have conversations with peers, although he wanted to, and that was why staff spent so much time explicitly teaching the student how to be a peer and how to be part of the group (Tr. p. 956). According to the teacher, the student was engaging with the teacher in more of a fun way and he was able to follow directions better and to remain part of the group (Tr. p. 970). The teacher indicated that, overall, the student demonstrated more flexibility and was better able to follow the teacher's plan and be part of the group (Tr. pp. 971-73). The teacher opined that, although the student might continue to exhibit distractibility, he was able to be pulled back into the group, participate in conversation, and tell others what was real and what was a pretend story (Tr. pp. 972-73). The teacher reported that, at the beginning of the school year, the student had difficulty following the teacher's plan multiple times per week and could take 20-30 minutes to settle in (Tr. pp. 1013-14). By the end of the school year student had difficulty approximately once a week and required only five minutes to process the situation (Tr. pp. 1010-12).

The December 2015 and June 2016 Eagle Hill progress reports also offer insight into the student's progress with social/emotional and pragmatic skills (Parent Exs. 1; 2). For example, in the area of "emotion concepts," the December 2015 report indicated that the student had become "more successful at identifying different emotions," demonstrated several emotions in isolation, and had become a role model to other students with regard to this skill (Parent Ex. 1 at p. 6). The report also indicated that the student was still learning how to react when others' interests were different than his (*id.*). By June 2016, the progress report noted that the student had improved in the appropriateness of his reaction to emotions and in his ability to respond in an expected manner (Parent Ex. 2 at p. 6). In addition, in June 2016, the student had become better able to share likes and dislikes with his friends even when they did not agree on the same interest (*id.*). With regard to "group skills," the December 2015 progress report also detailed that the student would greet his classmates in the morning, did well with taking turns and sharing, was able to transition in and out of a group, and had become more flexible in response to unexpected changes (Parent Ex. 1 at p. 7). According to the report, the student continued to work on eye contact and listening to others, accepting suggestions from others, and asking for help (*id.*). By June 2016, the student had improved in his abilities to maintain eye contact, listen to others, accept suggestions from others, and advocate, for himself and had become quick to offer compliments to peers and adults (Parent Ex. 2 at p. 7). In the area of "conversation skills," the December 2015 progress report noted that the student was able to imitate a topic of high interest to him and would continue working on demonstrating conversation skills when the topic was not as interesting to him (Parent Ex. 1 at p. 9). The June 2016 progress report noted that the student had developed his abilities to initiate conversations, take turns in and maintain a conversation in a topic of interest to him, and formulate related questions and comments for any topic (Parent Ex. 2 at p. 7). The June 2016 report indicated that the student continued working on interrupting conversations and ending conversations appropriately, as well as using appropriate voice volume (*id.*).

With respect to lunch, the hearing record shows that the Foundations students ate at their own table with their teachers in a lunch room with approximately 80 students from the lower school (Tr. pp. 742, 755-56, 921-22). For the first half of the school year, Foundations students sat in assigned seats at two separate tables in groups of four with one teacher per table (Tr. p. 922). The teachers sat with the students in order to support them in the less structured setting (Tr. p. 742).

The students practiced table manners, table skills, and eating appropriately (Tr. p. 922). During the second half of the school year, Foundations students separated into other tables with other lower school students, usually with one of the three adults from the Foundations class at the lunch table as well (Tr. pp. 921-23).

The student's teacher indicated that Foundations students generally had three different recess opportunities per day (Tr. p. 923). The three adults from the Foundations class were always outside during recess, providing scaffolding and support through social situations, and helping navigate the Foundation students through play situations, requiring them to compromise or figure out a solution to a problem (Tr. pp. 923-24). If students were unsure how to join a group, the two teachers and teacher assistant provided them with verbal cues or some language on how to approach another student to help join in the game (Tr. pp. 924-25).

In light of the above, the evidence in the hearing record supports the IHO's finding that the instruction at Eagle Hill addressed the student's deficits of socialization and pragmatic language. While the district's point about the restrictiveness of Eagle Hill is addressed further below, the student's lack of exposure to nondisabled peer models does not, in this instance, overcome the evidence that Eagle Hill offered specially designed instruction in these areas of need.

2. Print Reading Skills Instruction

The district alleges on appeal that Eagle Hill failed to provide the student with adequate reading instruction during the 2015-16 school year and, as a result, the student's reading skills regressed.

With regard to reading, the advocate indicated that, while the Foundations class did have some print-based instruction, students in the Foundations class entered the program with no print skills, and such instruction was not the focus of the program (Tr. pp. 724, 751). The advocate testified that the "real focus" of the Foundations program was the language and social/emotional piece, getting students to think about their thinking (metacognition), and think about their language (meta linguistics) so that they could learn how to express themselves and "how to use that in interactions" (Tr. p. 724; see Tr. pp. 741-42). The advocate further stated, in part, that the Foundations program was tailored for students with a significant language need that affected them globally, and she indicated she would have liked to have seen a comprehensive speech-language evaluation conducted for the student (Tr. pp. 759, 864). The advocate also noted that there was a "finite amount of time in the day" and, when students needed more "foundational things" than the actual "print based" part of reading, "something ha[d] to give" (Tr. pp. 743-44). With respect to such literacy readiness skills, the advocate elaborated that students with language-related needs (such as the student's "pragmatic need" and ability to "infer based on . . . subtle sort of cues") required support in those areas before introducing reading in order for them to successfully "construct meaning from text" (Tr. pp. 723-24). She reported that, while there was an academic component to the Foundations program, it was not like the program in the lower school because the Foundations students needed so much support in language and social/emotional regulation that the time had to be allocated to meet these needs (Tr. p. 744; see Tr. pp. 720, 724). The advocate further explained that there was some typical academic instruction in the Foundations program, including print instruction and mathematics, but that it was at a lower level than in the lower school (Tr. p. 745).

Although the advocate testified that the students who attend the Foundations program exhibit "significant language need[s]" (Tr. p. 759; see Tr. pp. 722, 864), the hearing record does not show that the student had significant delays in language development; rather the hearing record indicates that he had pragmatic language needs (see Dist. Ex. 13 at pp. 5-8).²⁵ The advocate indicated that, based on the student's language deficits when he first got to Eagle Hill, the teacher did not focus a lot on print or teaching print because staff was working on the student's language skills (Tr. pp. 864-65). However, contrary to the advocate's assumption regarding the student's language deficits, the May 2015 speech-language evaluation conducted by the district as part of the student's initial CSE evaluation showed that the student performed in the average range on formal measures of expressive and receptive language (Dist. Ex. 13 at pp. 1-2). When shown the May 2015 speech-language evaluation report during the impartial hearing, the advocate indicated she had not seen the report prior to her testimony (Tr. p. 865). Upon review of the report, the advocate acknowledged that the student's core language score as measured by the CELF was in the "high-average range, possibly more," and she affirmed his language content score was in the average range, and his expressive and receptive language scores were strong (Tr. pp. 865-66). The advocate testified that the student's language scores were "sometimes" consistent with the profiles of Eagle Hill students and she could not say if they were consistent with the profiles of the students in the Foundations program (Tr. p. 867).

The advocate indicated she reviewed the student's Eagle Hill file, which included the April 2015 psychological evaluation report and the May 2015 educational evaluation report from the district (Tr. pp. 719, 800; Dist. Exs. 10; 11). Contrary to her blanket statement about Foundations students' lack of print reading skills when they enter the program, information that the advocate stated she reviewed also offered a different picture of the student's needs. For example, the May 2015 educational evaluation of the student showed that formal administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) yielded an Early Reading subtest standard score of 102 (55th percentile), a score in the average range (Dist. Exs. 11 at pp. 1-2).²⁶ The May 2015 educational evaluation report included information that the student could identify and generate rhymes, correctly name 11 letters when presented in isolation, correctly name 4 letter sounds and beginning letter group sounds such as /sh/, /st/, and /dr/, and join word parts together to make words (id. at p. 2). The student had difficult naming /fr/ and /cl/ sounds, as well as /ip/ and /ck/ sounds (id.).

Notwithstanding the foregoing, while the advocate's broad description of the student's performance levels appears to be without direct support in the evaluative information, the advocate did not become familiar with the student until she was contacted by the parents in

²⁵ The May 2015 speech-language evaluation report indicated the student's pragmatic language abilities were assessed using the Social Language Development Test-Elementary (SLDT-E) (Dist. Ex. 13 at pp. 1, 5-7). Assessment results revealed the student exhibited weaknesses in the areas of making inferences, interpersonal negotiations, multiple interpretations, and supporting peers (id. at pp. 5-7). Although the student's standard score on the supporting peers subtest was in the average range, when answering questions about supporting peers, the student's answers were often negative or of no support (id. at p. 6).

²⁶ The advocate testified that she preferred to administer tests other than the WIAT because, based on her own observations rather than on any scientific data, she felt the WIAT tended to result in "inflated" scores for younger students (Tr. pp. 803, 807, 858-62).

December 2016 to help them prepare for the impartial hearing, and she did not work directly with the student (Tr. pp. 719, 822). In contrast, testimony from the student's Foundations teacher presents a more informed understanding of the student's needs. The student's Foundations teacher testified that, in fall 2015, the student presented as an emergent reader (Tr. pp. 957-58). The teacher noted that the student's phonemic skills were "pretty good . . . but he was very, very slow at learning new patterns in words and his fluency rate was extremely slow" (Tr. p. 958). At the beginning of the 2015-16 school year, the student participated in a screening developed at Eagle Hill that included five phonemic awareness activities, a list of words to be read, and a reading passage (Tr. p. 958).²⁷ As a result of the screening, Eagle Hill determined that beginning level "A" of a structured reading program was best for the student based on his decoding skills, fluency rate, and reading comprehension (*id.*).²⁸ With respect to the student's performance on the screening, the student's Foundations teacher explained that, while the student's sight words were there, the student exhibited limited fluency (Tr. pp. 963-64).

Moreover, while the evidence in the hearing record supports the district's allegation that Eagle Hill focused instruction in the areas of social/emotional and language skills, as summarized above in the general description of the student's schedule at Eagle Hill, the student also received instruction in the areas of print reading. In addition, the student's Foundations teacher testified that Eagle Hill addressed the student's reading using a variety of modalities and different multi-sensory techniques (Tr. pp. 960-61). The structured reading program began with the "at" family, which was introduced using different cues (i.e., different papers, different letters) (Tr. p. 961). Students would make patterns and build different words using the word family (i.e.; fat, cat) (*id.*). They would read phrases containing the word family and read phrases with sight words and the word family (i.e.; Nat the fat cat) (*id.*). The word family phrases would be made into stories of three to four lines each and the students would act out the stories (*id.*).

To support its assertion that the student's reading skills regressed during the 2015-16 school year, the district points to a fall 2016 administration of the Gray Oral Reading Test-Fifth Edition (GORT-5) Form A—an oral reading test that assesses accuracy and fluency of a student's reading as well as literal and interpretive comprehension of the material—in which the student performed at the fifth or ninth percentile rates—below the first-grade level—with respect to reading rate, accuracy, fluency, and comprehension (Dist. Ex. 30). In addition to the GORT, Eagle Hill also administered the Slosson Oral Reading Test (SORT) to the student in fall 2016 to assess the student's ability to read sight words in isolation (*id.*). As measured by the SORT, the

²⁷ Eagle Hill conducted testing three times per year using the structured reading program with modifications allowed by Eagle Hill (Tr. pp. 958, 963, 990-94; see Parent Exs. 35-39). As the district emphasizes, the screenings conducted by Eagle Hill were based on a published structured reading program but were not necessarily administered in the manner the publisher intended (Tr. pp. 991-92). The student's Foundation teacher testified that Eagle Hill permitted the teacher to provide the student with prompts and allow a student to reread or reference a text in order to answer a question about it (Tr. pp. 993-94, 1009). The hearing record does not include the publisher's standards for administration of the screenings so it is unclear whether or not the modifications described by the teacher were unique to Eagle Hill.

²⁸ The teacher testified that, while the December 2015 Eagle Hill progress report indicated the student's class was working on level A of the structured reading program, the class was actually broken down into "different tutorial groups," but that the student was working on level A (Tr. p. 960; Parent Ex. 1 at p. 1).

student's received a standard score of 91 (grade equivalent 1.1) (id.). However, despite the student's scores on these measures, the advocate testified that the fall 2016 test would have been the first administration of such measures to the student (Tr. p. 764) and, therefore, the hearing record does not offer a result against which to compare the scores and evaluate the student's progress or lack thereof during the 2015-16 school year.²⁹

Moreover, the hearing record contains other information regarding the student's reading performance during the 2015-16 school year that leads to the conclusion that the student benefitted from the program provided by Eagle Hill. The Foundations teacher indicated the student made progress in literacy during the 2015-16 school year (Tr. p. 968). She noted that, although the student's progress was slow, she believed that he was learning at a rate where Eagle Hill staff felt he was making progress (Tr. p. 968). By the end of the 2015-16 school year, the student was in level "C" of the structured reading program (Tr. pp. 1008-09). In describing the student's performance on the structured reading program screening, the teacher testified that, while the student still needed to work on his reading stamina, his fluency and sight words had improved compared to the beginning of the school year (Tr. pp. 955-56).

In addition, a comparison of the December 2105 Eagle Hill progress report and the June 2016 Eagle Hill progress report reveals that, the student exhibited progress (compare Parent Ex. 1, with Parent Ex. 2). For decoding, by December 2015, the student independently applied six skills involving short vowels and CVC words with short vowels (Parent Ex. 1 at p. 1). By June 2016, the student independently applied ten target decoding skills (Parent Ex. 2 at p. 1). Further, by June 2016 the student independently applied all phonemic awareness skills—identifying rhyme words and initial, middle, and end sounds in words, blending sounds into words, identifying the number of syllables in a word presented orally, and completing sound discrimination and sound substitution or deletion activities—as opposed to four of eight skills independently applied in December 2015 (compare Parent Ex. 1 at pp. 1-2, with Parent Ex. 2 at pp. 1-2).³⁰ In spelling, by June 2016, the student independently applied ten spelling skills—spelling short /a/, /e/, /i/, /o/, and /u/ vowel sounds and spelling instructed CVC words with the short vowel sounds—a gain compared to the six skills he independently applied in December 2015 (compare Parent Ex. 1 at p. 2, with Parent Ex. 2 at p. 2). In reading comprehension, by June 2016, the student independently applied seven reading comprehension skills, a gain compared to the three skills he independently applied in December 2015 (compare Parent Ex. 1 at p. 2, with Parent Ex. 2 at p. 2).

In consideration of the above, while perhaps Eagle Hill provided the student with a program more intensive in certain areas and less focused in other areas than an ideal program for the student may have offered, the parents sufficiently demonstrated that Eagle Hill provided

²⁹ The advocate indicated that students entering the Foundations program typically did not have the reading skills that would allow administration of the GORT-5 (Tr. p. 764).

³⁰ The eight phonemic awareness skills included identifying rhyme words and initial, middle, and end sounds in words, blending sounds into words, identifying the number of syllables in a word presented orally, and completing sound discrimination and sound substitution or deletion activities (Parent Ex. 2 at pp. 1-2).

reading instruction that was specially designed to meet the student's unique needs and from which the student benefitted.

3. Least Restrictive Environment

Finally, the district argues that Eagle Hill was not an appropriate unilateral placement for the student because Eagle Hill did not represent the student's LRE. Generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105), parents are not held as strictly to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 837 [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

In this case, the hearing record does not indicate that the student had access to typically developing peers during his academic classes (see Tr. pp. 827-28, 912, 945). Even though Eagle Hill did not provide the student with access to nondisabled peers, in consideration of the totality of the circumstances, including that Eagle Hill provided a program that provided additional adult support and addressed the student's social/pragmatic and reading needs as described above, LRE considerations alone provide an insufficient basis to reverse the IHO's finding that the parents' unilateral placement of the student at Eagle Hill for the 2015-16 school year was appropriate (C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; Berger, 348 F.3d at 523).

G. Equitable Considerations

Having concluded that Eagle Hill was an appropriate unilateral placement for the student for the 2015-16 school year, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. The district alleges that the IHO improperly determined that there was no basis to reduce an award of reimbursement for the student's tuition at Eagle Hill for the 2015-16 school year due to equitable considerations. Specifically, the district alleges that the parents did not provide it with timely notice of their intent to unilaterally place the student and seek reimbursement from the district until February 2016. The district also asserts that the IHO erred in finding that it was on notice of the parents' unilateral placement of the student because an updated December 2015 IEP referenced that the student was parentally placed.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents

(20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"])).

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

Here, the district school psychologist testified that the parents did not object to any aspect of the June 2015 CSE's recommendations (Tr. p. 81). The June 2015 CSE meeting minutes also recorded that the parents both agreed with the CSE's educational recommendations (Dist. Ex. 14 at p. 3). However, the meeting minutes also noted that the parents expressed concern that the student would need additional support in the classroom to initiate and do his work, as well as during recess (id.). Despite evidence that the parents expressed concerns at the CSE meeting, the hearing record does not indicate that the parents rejected the IEP at the meeting or otherwise informed the CSE that they intended to unilaterally place the student at Eagle Hill. The district notified the parents of the June 2015 CSE's ultimate recommendations by prior written notice dated July 24, 2015 (Dist. Ex. 18 at p. 1).

The parents testified that they discussed with the kindergarten teacher their concerns about what to do for the student for summer 2015 and the 2015-16 school year (Tr. pp. 491-92). The parents testified that the kindergarten teacher shared his belief that there "didn't seem to be a lot of options" for the student in the district (Tr. p. 493). The parents further testified that the teacher stated that "if it was [his] son, [he'd] be looking for other options," and that one of the options they discussed was Eagle Hill (Tr. p. 294). The student's kindergarten teacher testified that he did not remember this conversation (Tr. p. 434). Even assuming that the conversation took place, it is not a written notice as required by the district and the content of the conversation does not detail the parents' concerns with the June 2015 IEP or state the parents' intent to unilaterally place the student at Eagle Hill.

As summarized above, the parents signed a contract for the student to attend Eagle Hill in July 2015 and the student attended the nonpublic school for the 2015-16 school year (Parent Exs. 2 at p. 10; 29 at p. 1). The parents did not provide the district with written notice that they rejected the June 2015 IEP and intended to unilaterally place the student until letter dated February 2, 2016 (Dist. Ex. 21 at p. 1).

The IHO found that the student's updated IEP demonstrated that the district was on notice of the parents' choice to place the student in a nonpublic school and, therefore, "suffered no detriment from the lack of additional notice" (IHO Decision at p. 26). The updated IEP to which the IHO referred was the December 2015 IEP, on which the district changed the student's designation to reflect that he was parentally placed in a nonpublic school outside of the district (Dist. Ex. 19 at p. 1). However, the notation in the December 2015 IEP speaks only to the issue of whether the district was on notice of the student's enrollment in a nonpublic school and not whether it was on notice that the parents were dissatisfied with the student's IEP or would be seeking tuition reimbursement for a unilateral placement.

Following its receipt of the parents' notice of unilateral placement, the district immediately offered the parents an opportunity to reconvene the CSE to address their concerns with the student's IEP for the 2015-16 school year (Dist. Ex. 23). The district director of pupil personnel services and special education testified that the parents never responded to this offer (Tr. p. 299).

Based on the foregoing, the equitable considerations do not weigh in favor of full tuition reimbursement. Had the parents notified the district of their rejection of the IEP and intent to unilaterally place the student in a timely manner, the district's offer to reconvene the CSE may have come at a time when the student's program could have been effectively amended to address the parents' concerns before the commencement or at some point earlier in the 2015-16 school year. By failing to communicate with the district in the manner contemplated by the IDEA, the parents deprived the district of the opportunity, before the student was removed "to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). This is particularly unfortunate in this instance, given the facts in the hearing record surrounding the denial of a FAPE for the 2015-16 school year. That is, although the evidence in the hearing record supports the determination that the May 2015 IEP was ultimately inappropriate, the district members of the CSE were at least of the mind that student's program could be modified if the student's needs warranted it after the beginning of the school year (i.e., by adding an aide after the collection of data, as discussed above). Such a modification may very well have resulted had the parents communicated with the district earlier.

Having considered the evidence in the hearing record regarding the parents' failure to comply with the notice requirements of the statute until February 2016—more than half way through the 2015-16 school year—and as a matter within in my discretion, the parents are entitled to reimbursement for 50 percent of the costs of the student's tuition at Eagle Hill for the 2015-16 school year.

VII. Conclusion

In summary, the evidence in the hearing record reflects that the district failed to meet its child find obligation for the 2014-15 school year. In addition, the district failed to meet its burden to establish that it offered the student a FAPE for the 2015-16 school year, the parents met their burden to establish that the student's unilateral placement at Eagle Hill was appropriate for the 2015-16 school year, and equitable considerations support a reduced award of the costs of 50 percent of the student's tuition at Eagle Hill. Regarding the 2016-17 school year, the evidence in the hearing record supports a finding that the district offered the student a FAPE and, therefore, the inquiry for that school year is at an end, and it is not necessary to consider the appropriateness of the unilateral placement for the 2016-17 school year or whether equitable considerations support the parents' requested relief.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision, dated May 8, 2017, is modified by reversing those portions which found that the district did not violate its child find obligations during the 2014-15 school year; and

IT IS FURTHER ORDERED that the IHO decision, dated May 8, 2017, is modified to the extent it ordered the district to reimburse the parents for the total costs of the student's tuition at Eagle Hill for the 2015-16 school year; and

IT IS FURTHER ORDERED that the district is directed to reimburse the parents for 50 percent of the total costs of the student's tuition at Eagle Hill for the 2015-16 school year.

Dated: **Albany, New York**
 September 25, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER