



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 18-042

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Katonah-Lewisboro Union Free School District**

### **Appearances:**

Law Office of Peter D. Hoffman, PC, attorney for petitioners, by Peter D. Hoffman, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by James P. Drohan, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2015-16, 2016-17, and 2017-18 school years. Respondent (the district) cross-appeals from the IHO's determination that Eagle Hill was an appropriate placement and that equitable considerations favor the parents. The appeal must be dismissed. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

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

### **III. Facts and Procedural History**

The student had received occupational therapy (OT), physical therapy (PT), and speech-language services through the Early Intervention Program and through the Committee on Preschool Special Education (CPSE) (Tr. p. 514; Parent Exs. D at p. 1; E at p. 1; Dist. Ex. 12 at p. 1). At that time, the student presented with severe delays in articulation, verbal motor-planning, and receptive and expressive language skills (Dist. Ex. 12 at p. 1). The parents reported that the student received a diagnosis of apraxia during his preschool years, reached all of his developmental

milestones late, and upon entering kindergarten the student was difficult to understand (Dist. Ex. 13 at p. 3).

For kindergarten and first grade (2009-10 and 2011-10 school years) the student was enrolled in a district elementary school in a program where in the morning he received instruction in a kindergarten-first grade (K-1) special class for basic skills and most of his related services, and in the afternoon, he went into a general education classroom accompanied by his special education teacher on alternate days (Parent Ex. D at p. 2). For second grade (2011-12), the K-1 class was extended to a kindergarten-second grade (K-2) 12:1+2 special class (*id.*).<sup>1</sup> Reportedly during this time, the parents were concerned about the student's progress, his significant disability in multiple areas (e.g., motor, speech and language, learning, and social/emotional development), and his placement for the following year (*id.*).

At the beginning of the 2012-13 (third grade) school year, the district placed the student in a general education class; however, the district changed the student's placement mid-year and the student began attending a special class for students in third through fifth grade due to his significant struggles in the general education setting (Tr. p. 22; Parent Ex. D at p. 2). Reportedly the parents believed that the special class was too restrictive and not appropriate for the student due to the level of disability of the other children; however, while they reluctantly agreed to the move, they also insisted that the student be provided with opportunities for "mainstreaming" (Parent Ex. D at p. 2).

The CSE convened on May 28, 2013 for the student's annual review and to develop an IEP for the 2013-14 school year (fourth grade) (Dist. Ex. 3). Finding the student eligible for special education and related services as a student with a speech or language impairment, the CSE recommended a 12:1+2 special class daily for English language arts (ELA) and math, and alternate days for social studies and science, with related services including speech-language therapy, OT, and counseling (*id.* at pp. 9-10).<sup>2</sup> The CSE also recommended that the student receive 12-month services including a 12:1+2 special class for reading and math, speech-language therapy, and OT (*id.* at pp. 10-11). Meeting information attached to the IEP indicated that the parents were concerned about opportunities for the student to be integrated and indicated that the student's teacher would look for opportunities to integrate the student (*id.* at p. 2). During the 2013-14 school year the student was provided with various mainstreaming opportunities in science, social studies, and "specials" (Parent Ex. D at p. 2).

The CSE convened on May 28, 2014 for the student's annual review to develop an IEP for the 2014-15 school year (fifth grade) (Dist. Ex. 4 at p. 1). The CSE recommended that the student attend a 12:1+2 special class daily for ELA and math, and alternating days for social studies (*id.* at p. 9). Also, the CSE recommended that the student receive the related services of speech-

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<sup>1</sup> The hearing record does not provide more information regarding the K-1 and K-2 special classes. This information was provided as part of the history given to the private psychologist in 2015 (Parent Ex. D at pp. 1-2).

<sup>2</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute in this appeal (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

language therapy, OT, and counseling services (id. at p. 9). The CSE also recommended that the student receive 12-month services including a 12:1+2 special class for reading and math, and speech-language therapy and OT (id. at p. 10).<sup>3</sup> The student's teacher reported that the student was making "good progress" in the reading program, was also making progress in the writing program, and had achieved all his IEP annual goals during the 2013-14 school year (id. at p. 1). For the upcoming school year, the student was recommended to integrate for science instruction based on his progress (id. at p. 2).<sup>4</sup>

In October 2014 the parents arranged to have a tutor work with the student for one hour each week outside of school focusing on reading and utilizing the Preventing Academic Failure (PAF) multisensory reading program, the same reading program that the district used with the student in school (Tr. pp. 67-68, 525-26, 552, 554, 1164, 1168; Parent Ex. TTTT at p. 46; Dist. Ex. 13 at p. 3). In February 2015, the parents wanted the student to discontinue counseling sessions in favor of using that time for 1:1 reading instruction (Parent Ex. TTTT at p. 49).

The district conducted evaluations in winter and spring 2015 as part of the student's triennial review (see Parent Exs. R at pp. 1-3; S; UUUU at pp. 38-39; Dist. Exs. 6 at pp. 1-11; 12 at pp. 1-5; 28 at pp. 1-3). In addition, the parent obtained private psychological, audiological, and central auditory processing evaluations of the student (see Parent Ex. D at pp. 1-42; Dist. Ex. 13 at pp. 1-13).

A CSE convened on June 5, 2015 and June 12, 2015 to conduct the student's annual review and develop an IEP for the 2015-16 school year (sixth grade) (Parent Exs. A; A-1 June 5, 2015 CSE Meeting Audio Part 2). The June 2015 CSE recommended that the student be placed in a 12:1+2 special class for language arts, math, and social studies, and related services of three 40-minute sessions per week of speech-language therapy in a group of five and one 40-minute session per week of OT in a group of five (Parent Ex. A at p. 15). The CSE also recommended 12-month services of a 12:1+2 special class for reading and math, and related services of two 30-minute sessions per week of speech-language therapy in a group of five and one 30-minute session per week of OT in a group of five (id. at p. 16).<sup>5</sup> Meeting information attached to the IEP indicated that the CSE discussed the recent evaluation results, the parents' concerns about the student's rate of progress, the student's embarrassment about the special class placement, and opportunities for integration into the general education environment; also, the parents requested information about how the district measured progress in academics (id. at pp. 1-4). At the end of the meeting the parents informed the district that they rejected the recommended program and placement and "reserve their right to tuition reimbursement" (id. at p. 4).

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<sup>3</sup> The student attended the district summer program in summer 2014 (Parent. Ex. D at p. 2).

<sup>4</sup> In September 2014, parent emails to district staff expressed her concerns about the student's special education class placement and schedule, the lack of opportunities for integration, and the negative impact on the student emotionally/socially (Dist. Ex. 24 at pp. 1-4).

<sup>5</sup> The student did not attend the 2015 summer program offered by the district yet worked with his private tutor for "over an hour" once per week (Tr. pp. 583-85).

In a letter dated July 25, 2015 to the CSE chairperson, the parents informed the district that they rejected the IEP and that they reserved the right to seek tuition reimbursement for Eagle Hill (Parent Ex. H at pp. 1, 4). The student attended Eagle Hill during the 2015-16 school year (Tr. p. 586; see Parent Exs. F at pp. 1-37; W at pp. 1-2; WW at p. 4; Dist. Ex. B at p. 1).

On May 19, 2016, the CSE convened to conduct an annual review and develop the student's IEP for the 2016-17 school year (seventh grade) (Parent Ex. B at p. 1). Meeting information attached to the IEP indicated that the CSE discussed the results of a private psychological reevaluation that had been recently conducted and the student's performance at Eagle Hill over the 2015-16 school year (Parent Ex. B at pp. 1-3; see Parent Ex. E). The May 2016 CSE recommended that the student be placed in a 12:1+2 special class for language arts, math, social studies, and science, and related services of three 40-minute sessions per week of speech-language therapy in a group of five and one 40-minute session per week of OT in a group of five (Parent Ex. B at p. 12). The May 2016 CSE also recommended 12-month services of a 12:1+2 special class for reading and math, and related services of two 30-minute sessions per week of speech-language therapy in a group of five and one 30-minute session per week of OT in a group of five (id. at pp. 13-14).<sup>6</sup> At the end of the CSE meeting, the parents informed the district that they rejected the IEP "as proposed" and reserved "the right to tuition reimbursement at Eagle Hill" (id. at p. 3).

In a letter dated August 22, 2016 the parents informed the district that they rejected the May 2016 IEP and reserved the right to seek tuition reimbursement for Eagle Hill (Parent Ex. I). The student attended Eagle Hill for the 2016-17 school year (Tr. p. 611; Parent Ex. C at p. 1; see Parent Exs. G at pp. 1-36; WW at pp. 2-3; HHH).

On April 20, 2017 the CSE convened for the student's annual review and to develop an IEP for the 2017-18 school year (eighth grade) (Parent Ex. C). Meeting information attached to the IEP indicated that the CSE discussed the student's performance at Eagle Hill over the school year, and the students in the special class (id. at pp. 1-3). The CSE recommended that the student be placed in a 12:1+2 special class for language arts, math, social studies, and science (id. at p. 15). In addition, the April 2017 CSE recommended that the student attend one period per day of a 12:1+2 "[s]upport and [s]kills" special class (id.).<sup>7</sup> The April 2017 CSE recommended that the student receive related services of one 40-minute session per week of individual speech-language therapy, two 40-minute sessions per week of speech-language therapy in a group of five (one in a flexible location, one in a separate location), one 40-minute session per week of OT in a group of five, and added one 40-minute session per month of teacher for the hearing impaired consultation (id. at pp. 1, 15, 16). The April 2017 CSE also recommended 12-month services of a 12:1+2 special class for reading and math, and related services of two 30-minute sessions per week of speech-language therapy in a group of five and one 30-minute session per week of OT in a group of five (id. at pp. 1, 16-17). At the end of the CSE meeting the parents informed the district that they wanted to "see" the recommended special education program (id. at p. 4).

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<sup>6</sup> The student did not attend the 2016 summer program offered by the district and continued to receive support from his tutor (Tr. p. 610).

<sup>7</sup> The support and skills special class is also referred to in the hearing record as the "learning lab" (see Tr. pp. 355-56, 369; Parent Ex. C at pp. 3, 15).

In a letter dated August 4, 2017, the parents informed the district that they had visited the recommended program, explained their reasons why it was not an appropriate setting for the student, and reiterated their belief that it was the same program as prior years in which the student did not progress (Parent Ex. J at pp. 1-2). The parents rejected the April 2017 IEP and indicated that they would seek tuition reimbursement from the district for Eagle Hill (id. at pp. 1, 3).

### **A. Due Process Complaint Notice**

By due process complaint notice dated June 12, 2017, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17 and 2017-18 school years (IHO Ex. I at pp. 6, 8).<sup>8</sup> The parents asserted that the district IEPs for these school years were not appropriate (id. at p. 8). As relief, the parents sought reimbursement from the district for the tuition costs of the student's unilateral placement at Eagle Hill for the 2015-16, 2016-17 and 2017-18 school years (id. at p. 8).

With respect to each school year, the parents asserted that the district "historically failed to provide [the student] with an appropriate education to meet his learning needs or to provide any meaningful progress from year to year;" that the district "failed to maintain [the student's] ability to move from grade to grade with grade level skills and abilities;" ignored the input and reports of parents' consultant, the reports from Eagle Hill, and their comments and suggestions (IHO Ex. I at p. 9). The parents alleged that the IEPs for the 2015-16, 2016-17, and 2017-18 failed to offer the student a chance to make meaningful progress (id.). The parents contended that the district failed to provide the appropriate speech services, reading instruction, writing instruction, and math instruction for the years in dispute (id. at p. 11, 21, 23-24, 25-26). Further, the parents asserted that the district failed to provide an appropriate classroom setting without distraction and an appropriate classroom profile with students who could provide learning examples for the years in question (id.). The parents argued that the district failed to provide appropriate goals and failed to accurately report progress on annual goals (id.).<sup>9</sup> For each of the school years in question, the parents also contended that the CSE failed to consider the parent's input, the input of the student's private psychologist, or other placement options such as a Board of Cooperative Educational Services (BOCES) class (id. at pp. 21, 23-26).

In regard to the 2015-16 school year in particular, the parents asserted that the district program was the same program with the same teacher, which the student had been in for the previous two and a half years (IHO Ex. I at p. 21).

For the 2016-17 school year specifically, the parents alleged that the district again recommended the same program as the previous years, which would not allow the student to make

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<sup>8</sup> The pagination in IHO Exhibit I restarts multiple times because it is a collection of multiple documents and exhibits. In this decision, I will refer to the exhibit pages in consecutive order. The first page of the document is page number 1 and the last page of the document is page number 219. It is noted that the blank pages in the document are also numbered.

<sup>9</sup> The parent's allegations for each school year, including some typographical errors, were copied nearly verbatim for each of the three school years in paragraphs 84, 114 and 133 of their due process complaint notice (IHO Ex. I at pp. 21, 23-24, 25-26).

meaningful progress (IHO Ex. I at pp. 23-24). The parents argued that the district failed to consider the input of their private evaluator and failed to consider other programs for the student (id. at p. 24).

In regard to the 2017-18 school year, the parents challenged that the proposed IEP was not appropriate because the district "fail[ed] to appreciate and/or ignored the meaningful progress that [the student] made at" Eagle Hill during the prior two school years (IHO Ex. I at p. 25). Again, the parents asserted that the district recommended the same program as the previous IEPs and failed to consider the input of their private evaluator or other programs (id. at pp. 25-26).

The parents asserted that Eagle Hill was an appropriate program in the least restrictive environment for the student (IHO Ex. I at p. 22, 24, 26). Further, the parents contended that they cooperated with the district and equitable considerations weighed in their favor (id. at p. 26). As noted above, the parents sought tuition reimbursement for the student's attendance at Eagle Hill for the 2015-16, 2016-17, and 2017-18 school years (id. at p. 27).

## **B. Impartial Hearing Officer Decision**

The parties proceeded to impartial hearing on September 18, 2017, which concluded on December 7, 2017 after ten days of proceedings (see Tr. pp. 1-1414). I note that during the impartial hearing some evidence was removed from the hearing record for reasons unknown.<sup>10</sup> In a decision dated March 1, 2018, the IHO found that the IEPs for the 2015-16, 2016-17, and 2017-18 school years were appropriate (IHO Decision at pp. 23, 35, 39). Further, the IHO found that the parent's unilateral placement of the student at Eagle Hill for those three school years was appropriate and that equitable considerations favored reimbursement (id. at pp. 25-26, 35-36, 39). However, the IHO denied the parents' request for tuition reimbursement based on his finding that the IEPs in dispute were appropriate (id. at pp. 23-26, 35-36, 39, 40).

For the 2015-16 school year, the IHO determined that the parties agreed that the program recommended for the student was "essentially the same program" that the student was in the prior school year (IHO Decision at p. 11).<sup>11</sup> The IHO concluded that the district "met its burden of showing that the 2015-2016 IEP recommendations were reasonably calculated to enable [the student] to make progress in light of his circumstances" (id. at p. 23). The IHO found that "virtually

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<sup>10</sup> The hearing record reflects that during the November 7, 2017 hearing, the parents moved to have two pages removed from Parent Exhibit UUUU (Tr. pp. 1320-21). After discussion regarding the exhibit, which occurred mostly off the record, the IHO granted the request as the district did not object (Tr. pp. 1324-27). However, testimony regarding these pages remained part of the transcript (Tr. pp. 1312-20). I note that this incident muddled the record and was not an appropriate action by the IHO. This information may have been relative and probative to the matter in dispute. Despite this, the information was removed from the record without sufficient context due to the off-the-record discussions. Although the parties were in agreement, the removal of these pages prevents the SRO from examining the entire hearing record (34 CFR 300.514[b][2][i]). Further, without a full explanation of what evidence was being removed, it is unclear whether this evidence fell within the IHO's authority to exclude evidence that is deemed "irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

<sup>11</sup> The IHO described in detail the evidence in the record related to each school year to support his findings (see IHO Decision at pp. 5-20; 27-35; 36-38).

all" of the parents' contentions were based on the premise that the district underestimated the student's intelligence, and therefore, the parents concluded that the CSE could not have made appropriate recommendations (id. at p. 24). However, the IHO noted that there was nothing in the record to suggest that the student's progress in the district's "recommended program would have been held back by someone at the [d]istrict thinking [the student] was less intelligent than he might be" (id.). Further, the evidence showed that the student would be grouped "with students of similar needs and abilities, that his program and services would be appropriate, and that he reasonably could be expected to continue to make progress" (id. at pp. 24-25). The IHO concluded that the parents did not challenge "any specific aspect" of the goals for the 2015-16 IEP, only alleged generally that the goals would not promote the student's progress (id. at p. 25). Additionally, the IHO acknowledged that presumably the efforts of the outside tutor contributed to the student's progress, but found that "it doesn't follow that the teaching [the student] received at school fell somewhere short of being effective" (id.). Based on these findings, the IHO determined that the district offered the student a FAPE for the 2015-16 school year and denied the parents' request for tuition reimbursement (id.).

Although ruling the district offered the student a FAPE for the 2015-16 school year, the IHO made alternative findings regarding whether the unilateral placement of the student at Eagle Hill was appropriate and whether equitable considerations favor the parents request for tuition reimbursement, in the event that the decision was appealed (id.). With regard to the unilateral placement, the IHO found that the parents met their burden to show that Eagle Hill "offered an educational program which met [the student's] special education needs" and that the student made overall progress at Eagle Hill (id. at pp. 25-26). The IHO also concluded that equitable considerations supported the parent's request for reimbursement for Eagle Hill for the 2015-16 school year (id. at p. 26).

Next the IHO turned to the 2016-17 school year (see IHO Decision at pp. 27-36). For the 2016-17 school year, the IHO found that the district met its burden to show that the IEP recommendations were reasonably calculated to enable the student to make progress appropriate in light of his circumstances (id. at p. 35). Given the results of the new assessment of the student by the private evaluator, the IHO indicated that he believed "that the case might be even stronger than was the case for the previous IEP that [the student] would have been grouped with students of similar needs and abilities and that his program and services would have been appropriate" (id.). Similar to the 2015-16 school year, the IHO made findings in the alternative that Eagle Hill was appropriate for the 2016-17 school year and that equitable considerations weighed in favor of granting the parents' request for reimbursement (id. at pp. 35-36).

For the 2017-18 school year, the IHO found that the district met its burden of showing that the IEP recommendations were reasonably calculated to enable the student to make progress appropriate in light of his circumstances (IHO Decision at p. 39). The IHO credited the testimony of the district special education teacher regarding the class composition and determined that the additions to the IEP would have contributed to the student receiving a FAPE (id.). Once more, the IHO concluded in the alternative that Eagle Hill was appropriate and that equitable considerations supported the parents' request for reimbursement for the 2017-18 school year (id.).



#### **IV. Appeal for State-Level Review**

The parents appeal. The parents assert that the IEPs for the 2015-16, 2016-17, and 2017-18 school years were inappropriate and that tuition reimbursement for these school years should have been awarded. The parents assert that they are not seeking review of the IHO's findings that the unilateral placement at Eagle Hill for these school years was appropriate or that equitable considerations favor reimbursement.

The parents argue that the IHO relied on "anecdotal information from the district's special education teacher that could not be confirmed by the data she collected and presented at the hearing." The parents assert that the hearing record demonstrated that the student did not show meaningful progress, but "actual regression."<sup>12</sup> The IHO's failure to "take this information into account when making a decision on the appropriateness of the district program does not demonstrate a cogent and responsive analysis."

Specifically, for the 2015-16 school year, the parents argue that the IHO erred in finding the IEP appropriate because the program was the same from year to year which resulted in regression. The parents argue that there was no progress in the previous three years in the same program that would allow the IHO to conclude that the same program was appropriate. The parents assert that the IHO erroneously accepted the testimony of the district's special education teacher that the student made progress without pointing to any data that reflected progress. Further, the parents argue that the data collected by the district special education teacher "was kept in a haphazard way that would not allow anyone to conclude there was progress" and that the testimony supporting the student's progress in reading contrasted with the student's standardized testing results which demonstrated regression overall, particularly in reading and writing. Moreover, the parents assert that they were told the student would have been placed with the same group of students in his class.

For the 2016-17 school year, the parents argue that the district ignored evidence of how Eagle Hill addressed the student's needs. The parents assert "[w]hat was proven to work for [the student at Eagle Hill] was vastly different than the program offered by" the district; again, noting that the district offered the same program as in previous years.

In regard to the 2017-18 school year, the parents again argue that the recommended program was the same program as the previous years.<sup>13</sup> The parents request that the IHO finding that the IEPs for the 2015-16, 2016-17, and 2017-18 school years were appropriate be reversed and the parents granted tuition reimbursement for the unilateral placement at Eagle Hill for the school years in dispute.

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<sup>12</sup> In the request for review, the parents described the student as being of at least average intelligence.

<sup>13</sup> For both the 2016-17 and 2017-18 school years, the parents assert that they visited the proposed district placement and had concerns regarding the placement following those visits.

In an answer with cross-appeal, the district denies most of the material allegations made in the request for review.<sup>14</sup> The district asserts that the IHO correctly found that the IEPs for the 2015-16, 2016-17, and 2017-18 school years were appropriate. In its cross-appeal, the district argues that the IHO erred by finding that the student's unilateral placement at Eagle Hill was appropriate. The district argues that there is no objective evidence in the record that the student experienced academic improvement at Eagle Hill and alleges that the parents failed to meet their burden to prove Eagle Hill was appropriate. Further, the district argues that the IHO erred in finding that equitable considerations favor reimbursement as the parents unreasonably withheld consent for the district to conduct a psychological evaluation.<sup>15</sup>

## 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. 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

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<sup>14</sup> In the answer with cross appeal the district denies the parents' assertion that the student was of at least average intelligence.

<sup>15</sup> The parents also filed a reply to the answer with cross appeal.

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" (Andrew 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 Andrew 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]).<sup>16</sup>

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

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<sup>16</sup> 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" (Andrew F., 137 S. Ct. at 1000).

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. Scope of Review**

I will first determine which issues are before me at this juncture as a number of issues were not addressed by the IHO or further advanced in this appeal. In the due process complaint notice the parents asserted that the district ignored the input and reports of their consultant, ignored the reports from Eagle Hill, and ignored the comments and suggestions of the parents (IHO Ex. I at pp. 9, 21, 24-25). The IHO did not address these claims; however, he cited to the consultant's report and testimony, the parents' concerns that were expressed to the district, and the reports and testimony from Eagle Hill staff (IHO Decision at pp. 8-9, 11-20, 27-34). The parents also argued that the annual goals in the IEPs for all three school years in question were inappropriate and that for each school year there was a lack of goals geared toward meaningful progress (IHO Ex. I at pp. 11, 21, 24-25). Moreover, the parents asserted that for the 2015-16 school year, the progress reports for the goals and the benchmark testing for the goals were inaccurate (id. at pp. 19).<sup>17</sup> The IHO found that for the 2015-16 school year, the parents did not challenge any specific aspect of the goals (IHO Decision at p. 25). The IHO found that the goals for the 2016-17 school year were appropriate but did not address the issue of goals for the 2017-18 school year (id. at pp. 36, 40).

Further, the parents also contended in their due process complaint notice that the district failed to offer appropriate speech services, reading instruction, writing instruction, and math instruction (IHO Ex. I at pp. 11, 21, 23, 25). The parents argued that the district failed to provide cogent and plausible reasons for why the IEPs were appropriate and did not consider any other programs such as BOCES or other alternatives (id. at pp. 11, 21, 24, 26). The IHO did not focus on any of these claims in his decision.<sup>18</sup>

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<sup>17</sup> For the 2016-17 and 2017-18 school years, the parents argued that there was a past lack of accurate reporting on the student's goals in the progress reports (IHO Ex. I at pp. 24-25).

<sup>18</sup> The IHO did find for the 2016-17 school year that he would not reduce the amount of tuition reimbursement for the parents, even though they did not permit the Eagle Hill staff to assist the CSE with writing the student's annual goals (IHO Decision at p. 36). The IHO determined that he would not reduce tuition reimbursement "in

To the extent that the IHO did not address all of the parents' claims raised in the due process complaint notice, the parents also did not, in their request for review, argue that the IHO failed to address the issues described above or attempt to advance these issues as set forth in their due process complaint in their request for review and, consequently, they have been abandoned. Pursuant to State regulations, a party is required to identify in their request for review an IHO's failure or refusal to make a finding (8 NYCRR 279.4[a]), and "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]). To the extent that the IHO addressed the parents claims and they are unappealed, those determinations have also 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. Progress Under Prior IEPs and the June 2015 IEP**

Turning next to the merits of the parties' continuing disputes, the parents argue that the IHO erred in finding that the special education program recommended for the 2015-16 school year was appropriate because the same program was provided in previous years and resulted in a lack of progress and regression. The parents also assert that the IHO improperly relied on the data collected, reports that the parents characterize as conclusory, and testimony from the special education teacher in order to determine that the June 2015 IEP was appropriate. The district denies the parents' allegations and contends that the special education teacher's uncontroverted responses and documentation established the progress the student made, despite his demonstrable disabilities.

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concerns with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Therefore, while the IEPs in school years prior to June 2015 are not contested in this case,<sup>19</sup> a review of the student's progress prior to the proposal of the June 2015 CSE provides the necessary context for the discussion of the parents' claim with respect to the student's progress and the appropriateness of the June 2015 IEP.

At the beginning of the 2012-13 (third grade) school year, the student attended a general education class; however, due to significant struggles, he began attending a special class setting mid-year (Tr. p. 22; Parent Ex. D at p. 2). The May 2013 IEP included a statement that cognitive testing results were "consistent" with the results of the student's prior evaluation, which described the student's overall cognitive ability as being "at the lower extreme when compared to children

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view of the annual goals on the IEP having been appropriate."

<sup>19</sup> As they are undisputed issues in this case, I express no opinion regarding the appropriateness of the IEPs in the hearing record that preceded the June 2015 IEP as of the time those IEPs were developed.

his age" (Dist. Ex. 3 at p. 6).<sup>20</sup> In describing the student's progress during the 2012-13 school year, the May 2013 IEP's present levels of performance stated that the student had increased his ability to attend to and complete tasks, was very motivated doing tasks that were familiar, had demonstrated improved speech intelligibility within known and unknown context, had increased motor planning for sounds, and demonstrated significant improvement in formulating sentences, sentence structure, and expressive vocabulary (*id.* at p. 5). Regarding reading skills, the May 2013 IEP noted that classroom data and observation indicated the student presented with an increased knowledge of letters and sounds in words and had increased fluency for letter/sound recall from 10 (in the fall) to 50 (in the spring) letters and sounds per minute (*id.*). The student had increased his ability to read consonant vowel consonant (CVC) words and nonsense words from 7 words in the fall to 15 in the spring, increased his sight vocabulary knowledge from 10 words in the fall to 45 in the spring, and the student's "DRA" reading level had increased from a level 2 (fall) to a level 6 (spring) (Dist. Ex. 3 at p. 5; see also Dist. Ex. 23 at p. 3).<sup>21</sup> The May 2013 IEP also noted the student's comprehension for events and retelling in sequence skills were improving (Dist. Ex. 3 at p. 5). With respect to writing, the May 2013 IEP noted that the student had increased his ability to more fluently recall letters and sounds (short vowels), create sentences with structured words and ideas, and had progressed from writing two to three word sentences phonetically to five to eight words while using spacing and some punctuation (*id.*). In addition, the student's encoding skills were reportedly improving, and the student was able to spell 20 sight words correctly (*id.*). The May 2013 IEP noted that while progress was seen, the student presented with below average writing, decoding, word identification, and spelling skills (*id.*). Regarding mathematics, the May 2013 IEP stated that the student presented with average skills in computation when using concrete materials and had improved fluency for number identification and understanding the place value of three-digit numbers (*id.*). As detailed above, the May 2013 IEP offered a number of specific examples of the progress the student made during the 2012-13 school year, part of which the student received special class instruction.

Turning next to the 2013-14 (fourth grade) school year, according to the May 2013 IEP the student received instruction in a 12:1+2 special class daily for English Language arts (ELA) and math, and alternate days for social studies and science, with related services including speech-language therapy, OT, and counseling (Dist. Ex. 3 at pp. 9-10). The student's first term report card stated that the student was responding "so nicely" to the reading program and that he had continued to build his reading fluency and comprehension (Dist. Ex. 16 at p. 2). The report noted that the student's written expression was also improving steadily as the student learned and applied new rules, and that the student continued to do well with basic math procedures in addition and subtraction and was beginning to understand harder mathematical concepts (*id.*). The student was reportedly working diligently each day with a positive attitude and was often saying how much he loved class and school (*id.*). The year's second term report card characterized the student as having an "amazing" trimester, noting that he was making steady gains in decoding and reading comprehension, had advanced from book A to book D in the PAF reading program, was becoming

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<sup>20</sup> Within the district's May 2015 psychological evaluation report the district psychologist made a similar conclusion in which he compared and referenced cognitive testing conducted at age 7-4 (fall 2011) with testing conducted at age 4-9 as the student transitioned to elementary school (Dist. Ex. 6 at p. 2).

<sup>21</sup> The acronym "DRA" is presumed to represent the Developmental Reading Assessment.

more fluent, and his articulation was less labored (id.). The report also indicated that the student was making progress in written expression as evident in his daily reports and his PAF dictations, he had made consistent progress in math, had solid number sense into the hundreds, was beginning to demonstrate problem solving strategies, and that most of the time he enjoyed integration in the fourth grade science class (id.).

According to a discussion at the May 2014 CSE meeting, the student exhibited progress during the 2013-14 school year. Meeting information attached to the May 2014 IEP regarding the discussion reflected the special education teacher's report that the student was making good progress in the reading and writing program, and at that time was writing paragraphs on specific topics (Dist. Ex. 4 at p. 2). She further indicated that the student was "more independent and less prompt dependent" (id.). At the CSE meeting the speech therapist reported that the student's speech intelligibility was "great," and updated testing showed progress in following directions and sentence recall (id.). Additionally, the occupational therapist reported the student's writing contained fewer reversals and that the student corrected his mistakes (id.). The meeting information also reflected that the parents shared concerns at the May 2014 CSE meeting regarding the student's incorrect grammar and motor fatigue, but that they also stated the student was more self-confident at home, stood up for himself, and they had seen generalization of social conversational skills (id.).<sup>22</sup> The parents also stated at the meeting that the student was "finally really getting it" and "understands with better math sense" (id. at p. 1). Also, during the May 2014 CSE meeting the science teacher recommended, based on the student's progress, that he integrate for science instruction in the upcoming year (id. at p. 2).

The student's fourth grade report card for the final term of the 2013-14 school year stated the student had made steady progress in reading, had literal comprehension, and that he went from an end of the kindergarten level to a beginning of second grade level (Dist. Ex. 16 at p. 2). The report card also noted the student continued to make progress in written expression and had made progress in mathematical procedures including adding and subtracting with regrouping, multiplication using arrays, and understanding place value up to the thousands place (id.). The report card identified student needs in the areas of reading fluency, inferencing, identifying the main idea, and applying mathematical reasoning and problem solving (id.).

The student's final progress report for the IEP annual goals dated June 30, 2014 indicated that during the 2013-14 school year the student achieved the majority of his annual goals including goals involving decoding, sight word reading, answering questions in content areas (e.g. story line, key ideas, details), spelling, representing multiplication using arrays, place value into the hundreds, adding and subtracting to 1000 with and without regrouping, correctly producing [th, r, w] sounds in connected speech, and recognizing differences and/or similarities in pictures to assist visual memory and recall (Dist. Ex. 14 at pp. 1-4). The June 2014 progress report noted the student was progressing satisfactorily toward achieving annual goals involving writing a narrative, recalling and comprehending a sequence of events presented orally, recognizing how personal qualities impact interactions with others, identifying emotions and strategies to deal with them, identifying

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<sup>22</sup> In her testimony the parent questioned whether these comments were accurately attributed to her and testified that she would never use the term "generalization of social conversational skills " (Tr. pp. 826-27).

responses and outcomes in social situations, and printing with attention to size, spacing and orientation (id. at pp. 2-4).

Next, for the 2014-15 school year (fifth grade), the May 2014 IEP indicated that the student received instruction in a 12:1+2 special class daily for ELA and math, and on alternating days for social studies, and also received speech-language therapy, OT, and counseling (Dist. Ex. 4 at p. 9). The student's first term report card stated that the student continued to make progress in reading and writing as evidenced in his PAF proficiency tests and work samples, was currently in book E, and was learning patterns and suffixes (Dist. Ex. 17 at p. 3). The 2014-15 first term report card stated that the student was enjoying the read aloud time each morning, was working on improving his participation in group discussion, was raising his hand more frequently, and was able to answer most literal questions (id.). In math the student was reportedly "strengthening his facts" and demonstrated fluency and accuracy (id.). The report card identified continued needs in the areas of reading fluency and comprehension, understanding the text at a deeper level, identifying cause and effect, utilizing vocabulary to enhance meaning, problem solving in math, understanding the relationship between multiplication and division, and organizing, reducing information to note form, and categorizing information when researching (id.). The student's second term report card included the comments that the student continued to make progress and was in book F of the PAF reading program (id.). The student was reportedly doing "wonderfully" in the new math program, was understanding the computations taught, and was strengthening his problem-solving skills (id.). The report card noted that the student would continue to practice word lists to build fluency to improve his overall comprehension, strengthen his spelling and written expression, work on understanding when to add and subtract, and improve his multiplication fluency and estimation skills (id.).

Within the January 2015 social history update, the parents reported that the student's progress in speech and with the PAF program was "amazing," and even though the student was still three years behind they had seen "some great progress" and felt that the "gap" was closing more so that year (Dist. Ex. 28 at p. 2). The parents also stated that the student's math skills had been slowly progressing and that although school was difficult for the student, his progress in reading was assisting his academic progress (id.).

For the final term, the student's 2014-15 report card stated that the student continued to make progress in reading and was in book G of the PAF reading program, had passed all proficiency tests associated with the levels completed, and was currently at a DRA instructional level 28 (Dist. Ex. 17 at p. 3). The report card stated that the student also made progress in math; learning place value, writing numbers in expanded form, rounding to the nearest ten, telling time, multiplying, dividing, problem solving, subtracting with larger numbers, and learning even and odd numbers (id.). The student's needs included building multiplication fluency and building reading fluency by practicing word lists of "multi-syllabics" (id.). The report indicated staff were "proud of [the student's] steady growth and progress" (id.).

The student's IEP annual goal progress report dated June 26, 2015 indicated that during the 2014-15 school year the student achieved two math annual goals which involved using place value to round to the nearest 10 or 100 and telling and writing time to the nearest minute (Dist. Ex. 15 at pp. 1, 3). In addition, the June 2015 progress report indicated that the student was making satisfactory progress and was expected to achieve annual goals which involved decoding words,



defining words and phrases and using them in sentences, answering wh- questions, writing an opinion piece with supporting reasons and a closing statement, writing a narrative using details, counting mixed coins up to one dollar, correctly producing /th/ and /sk/ blends in conversational speech,<sup>23</sup> formulating grammatically correct sentences while maintaining appropriate verb tense in conversation, printing with correct size, spacing, and orientation, and recognizing differences and similarities in pictures (id. at pp. 2-4). The June 2015 progress report identified two annual goals in which the student was making less than anticipated progress (id. at pp. 3-4). Although the parents point to the fact that the student only achieved two of his annual goals to buttress their argument that the student made no meaningful progress during the 2014-15 school year, and while this may not be the amount of progress desired by the parents, the progress detailed above reveals the student was making academic skill progress, and had achieved or was making satisfactory progress toward the majority of his annual goals (see Dist. Exs. 15; 17 at p. 3; 28 at p. 2).

In addition, the evidence in the hearing record reflects that the tutor hired by the parents met with the special education teacher to coordinate instruction, used the same reading program (PAF) as the district, and that during the 2014-15 school year the tutor saw similar progress if not some additional progress to what was cited by the special education teacher (Tr. pp. 67-68, 526-27, 551-53; Parent Ex. TTTT at pp. 26, 46, 48). The special education teacher testified that at the start of the 2014-15 school year the student started at book E and at the end of the year the student was reading out of book G (Tr. pp. 44-45). The special education teacher further testified that the student "absolutely was making a years growth" which she noted was "amazing" for someone who had "a lot of compounding difficulties" (Tr. pp. 45-46). The special education teacher also noted that the student was "absolutely" making steady progress on his decoding and comprehension goals (Tr. p. 47). The parents argue that the IHO accepted the special education teacher's conclusory statements about the student's reading progress without pointing to any PAF data reflecting that progress. While I agree with the parents that the PAF testing data sheets in evidence (even with the benefit of the special education teacher's explanation) could be considered difficult to read and do not clearly identify the student's growth over time, other information in the hearing record—which is detailed above and uncontested by the parents—provides ample evidence of the student's steady, albeit slow, growth and progress during the prior years (see Tr. pp. 48-50; Dist. Ex. 23 at pp. 1-46).

Additionally, a review of the evaluations conducted in preparation for the June 2015 CSE meeting reveals additional information detailing the student's progress. Within the March 2015 speech and language triennial evaluation report, the speech-language pathologist reported that while results of the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5) revealed overall language index scores in the below average range and indicated an overall weak expressive and receptive language profile, the student's overall speech intelligibility was good for conversational speech and he had demonstrated "significant growth" since his last evaluation in October 2011 (Dist. Ex. 12 at pp. 4, 5). The May 2015 OT triennial evaluation report stated that the student had improved his legibility "significantly," and had developed "nice" organizational skills (Parent Ex. UUUU at pp. 38-39). Within the May 2015 psychological evaluation report the

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<sup>23</sup> The June 2015 progress report indicated that during the first and second marking periods the student was progressing satisfactorily toward this annual goal and in the final marking period the June 2015 progress report included the comment "[t]his student can produce [th] and [sk] blends most of the time during conversational speech." (Dist. Ex. 15 at p. 3).

evaluator found the student's speech to be intelligible at all times and noted improvement in the student's speech articulation from his prior evaluation (Dist. Ex. 6 at p. 9). The evaluator also found the student demonstrated significant improvement with visual processing skills as compared to prior school-based evaluation results and fell within the low average range, which according to the examiner was consistent with findings from recent private evaluations (Dist. Ex. 6 at pp. 10-11).

The parent-obtained evaluations of the student from spring 2015 included testing results and recommendations, yet are mostly silent on student progress or lack thereof (see Parent Ex. D at pp. 1-42; Dist. Ex. 13 at pp. 1-13). These reports did include the following parental input regarding progress; the parents were "very concerned" about the student's lack of progress, felt the student was capable of better academic performance, and noted that the student had made limited progress with his reading since the beginning of the academic year (Parent Ex. D at p. 2; Dist. Ex. 13 at p. 3).<sup>24</sup>

The private psychologist, who conducted the April 2015 psychological evaluation, determined that based on current evaluation results the student's verbal comprehension index and perceptual reasoning index were within the average range (Parent Ex. D at p. 18).<sup>25</sup> The private psychologist noted the significant disparity between the student's intelligence and his academic skills, which were found to be at about the first to second grade level, and stated that "ALL academic skills [we]re lower than the level predicted by his [v]erbal IQ" (id.). Therefore, due to the results of the April 2015 private psychological evaluation and the work of the student's tutor, the parents revised the January 2015 social history update in a June 2015 email and stated that over the last three years the student had matured and learned but at a much slower pace than he was capable of progressing (Parent Ex. S).

However, the district psychologist stated that from discussions with the teacher, informal observations, and looking at achievement testing results he concluded that the student's academic performance in school was "either commensurate to or in some areas outperforming what some of his ability areas would suggest" (Tr. p. 232).<sup>26</sup> The district psychologist further stated that the private psychologist's test results in the areas of verbal abilities, visual processing abilities, and reasoning abilities were "very significantly higher" than his findings (Tr. p. 210). He also testified that it was unclear how and why the private psychologist's test results were so different from the

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<sup>24</sup> These comments are at odds with the progress noted in the district reports and previous parental input from the January 2015 social history update (see Dist. Exs. 15; 17 at p. 3; 28 at p. 2).

<sup>25</sup> The private psychologist testified that although "[i]ntelligence is a complicated construct to assess," her statement in the report that the student had "at least average intelligence" was based upon test result data, including the student's average scores for perceptual reasoning and verbal comprehension (Tr. pp. 1224-25; Parent Ex. D at pp. 4, 28).

<sup>26</sup> While clearly the parties disagree as to the student's level of cognitive functioning and therefore perceived potential, as noted by the IHO, "nothing in the evidence suggests that [the student's] progress in the CSE's recommended program would have been held back by someone at the [d]istrict thinking [the student] was less intelligent than he might be" (IHO Decision p. 24).

student's functioning in school and in the group settings in which the district psychologist had observed and worked with the student (Tr. p. 213).

According to her testimony, the special education teacher did not share the private psychologist's view that the student was not making progress. Regarding the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) administration she conducted in spring 2015, the special education teacher stated that the student performed "low" compared to his typical peers, but results showed that the student was "making progress in comparison to himself from year to year" (Tr. pp. 62-63; see Parent Ex. R at pp. 1-3). She further testified that her findings showed "growth," that she was "impressed" with the student's performance in the area of word attack, and that his letter-word score showed improvement from prior years (Tr. p. 117). The special education teacher also cautioned that the testing was one measure or a "snapshot of a day" and she stressed the importance of using multiple measures (proficiency testing, performance in class, anecdotal information) "to really get a sense of where kids are functioning" (Tr. p. 63). She stated testing was a small piece, yet it did show growth which was "pretty consistent" (Tr. p. 63).<sup>27</sup>

The parents further argue that the progress the special education teacher testified to was not matched by standardized testing results, which the parents contend showed a lack of meaningful progress and regression. On appeal, the parents allege that the IHO "completely ignored" a comparison of the February 2012 and April 2015 WJ-III ACH scores in the form of percentile ranks, which the parents assert shows the student had "regressed in many areas" including but not limited to applied problems, calculations, math fluency, letter word identification, reading fluency, spelling, and writing fluency (Req. for Rev. ¶ 10; see Parent Ex. R at p. 1; Dist. Ex. 3 at pp. 3-4).<sup>28</sup>

However, the hearing record provides little information explaining how to conduct an analysis of test scores over time. The district psychologist testified that using percentiles to compare results among testing was "not an even metric" and that between different percentiles could be differing numbers of questions (Tr. pp. 288-89). He further stated that looking at a raw score would actually tell the number of items the student answered correctly and so to measure progress one could look at raw performance over time (id.). The district psychologist suggested it was better to look at the student's relative performance "under himself" over time and not compare him to a national group of peers (Tr. p. 289). When discussing testing results from the 2016-17 school year, the Eagle Hill advocate testified that the student actually exhibited progress although his standard scores were lower, because while the student made gains against his own earlier performance, he was still being compared to his peers who "had outpaced him" (Tr. pp. 965-66).

Turning to the testing results referenced in the parents' WJ-III ACH comparison chart, while it appears that in some areas the student was "outpaced" by his peers, it does not support a finding that the student failed to make progress or regressed (see Parent Ex. R at p. 1; Dist. Ex. 3 at pp. 3-4). In the subtest for letter word identification the student's score went from the 10th

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<sup>27</sup> I note that the parent testified that the private psychologist explained to her that progress was not linear and that "you're not always going to see progress across the board all the time" (Tr. p. 818).

<sup>28</sup> Additionally, the parent testified that a comparison of the standard scores between the two achievement test administrations demonstrated that the student had "regressed" (see Tr. pp. 539-44).

percentile (low average) to the 5th percentile (low), in reading fluency from the 2nd percentile (low) to the 1st percentile (very low), in calculations from the 27th percentile (average) to the 8th percentile (low), in spelling from the 10th percentile (low average) to the 6th percentile (low), and in writing fluency from the 11th percentile (low average) to the 4th percentile (low) (see Parent Ex. R at p. 1; Dist. Ex. 3 at pp. 3-4). However, without looking at raw scores—which are not included in the hearing record and without further explanation of how to conduct an analysis of a raw or standard score comparison—as explained above, it is not clear from these results that the student "regressed" or did not make gains against his own earlier performance in these areas.<sup>29</sup> Although the parents urge the SRO to interpret a comparison of the student's performance on selected subtests of the WJ-III ACH in 2012 and 2015 as evidence of lack of progress and regression in the district's special class program, the evidence in the hearing record does not support this interpretation. Significantly, the parents do not point to any evidence in the hearing record—other than the parent's observation that the "scores went down"—to support their argument that the student's test scores reflect regression or a lack of progress (Tr. pp. 539-44; see Req. for Rev. ¶ 10). Moreover, when the special education teacher testified about the student's performance on the WJ-III ACH in 2015 that she administered to the student, the parents' attorney did not question the witness at all about the purported decline in subtest scores or what the purported decline in subtest scores meant with respect to the student's progress (see Tr. pp. 62-63). Rather than offering evidence to support their interpretation of the student's scores, the parents ask the SRO to reach their preferred conclusion simply because some of the student's testing scores on the WJ-III ACH declined between administrations of these particular assessments' subtests over a period of time (see Parent Ex. R at p. 1; Dist. Ex. 3 at pp. 3-4). Without evidence speaking directly in support of the parents' interpretation of the subtest scores, these testing results, at best, reflect the student's performance on a given day, and most likely, without the benefits of testing accommodations afforded to him under his IEP; therefore, the results, standing alone, cannot provide as complete a picture of the student's abilities or progress over a given school year with the supports and services provided to him in the district's special class program. Absent such evidence, the district's evidence reflecting the student's progress during the school years leading up to the development of the June 2015 IEP remains unrebutted and the parents' arguments must be dismissed.

Turning to the 2015-16 school year, as discussed earlier, in June 2015 a CSE convened and developed the student's IEP for the 2015-16 school year. The June 2015 IEP included 16 annual goals (Parent Ex. A at pp. 13-15). Two of the annual goals, which involved solving multiplication and division problems within 100, were carried over from the previous IEP (compare Parent Ex. A at p. 14, with Dist. Ex. 4 at p. 8). Some of the annual goals were modified from annual goals included in the previous IEP, for example, with more specific language ("multi-sensory reading

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<sup>29</sup> Furthermore, in some areas cited by the parents as areas of regression, the change in percentile rank did not result in a change in the scores' "classification" and therefore would suggest that the student was progressing in light of his circumstances. For example, in math fluency the student went from the 3rd percentile to the 2nd percentile (both classified as low) and in applied problems the student went from the 11th percentile to the 10th percentile (both low average) (see Parent Ex. R at p. 1; Dist. Ex. 3 at pp. 3-4). Additionally, the student's classifications remained the same for passage comprehension (low), word attack (low average), and improved for writing samples (from low to average) (see Parent Ex. R at p. 1; Dist. Ex. 3 at pp. 3-4).

program," "sixth grade") or with an increase in the achievement criteria (70 percent to an 80 percent success rate) (compare Parent Ex. A at pp. 13-15, with Dist. Ex. 4 at pp. 7-8). Also, the June 2015 IEP included new annual goals involving test taking strategies, determining main idea, writing informational/explanatory text of up to two paragraphs, using the writing process of planning and revising, solving two-step addition and subtraction word problems, identifying arithmetic patterns, responding to "WH" questions to demonstrate comprehension of verbally presented material, sequencing events verbally, printing and exploring cursive writing, and performing common word processing functions (compare Parent Ex. A at pp. 13-15, with Dist. Ex. 4 at pp. 7-8).

In some ways the special education program and services the June 2015 IEP provided were similar to the student's 2014-15 IEP (compare Parent Ex. A at p. 15, with Dist. Ex. 4 at p. 9). The June 2015 IEP continued the recommendation of a daily 12:1+2 special class for ELA and math, 12:1+2 special class for social studies on alternate days, and related services of three 40-minute sessions per week of speech-language therapy in a group of five (compare Parent Ex. A at p. 15, with Dist. Ex. 4 at p. 9). The June 2015 IEP provided one session per week of group OT, rather than two sessions per week (compare Parent Ex. A at p. 15, with Dist. Ex. 4 at p. 9). The June 2015 IEP also recommended continuing the 12-month services of a 12:1+2 special class for reading and math and related services of two 30-minute sessions per week of speech-language therapy in a group of five and one 30-minute session per week of OT in a group of five (compare Parent Ex. A at p. 16, with Dist. Ex. 4 at p. 10). In addition, the June 2015 IEP continued prior program accommodations of cueing the student to stay on task, breaking directions and tasks into smaller components, and pairing visual and auditory supports (compare Parent Ex. A at p. 15, with Dist. Ex. 4 at p. 9).

The June 2015 IEP also included additional supports for the 2015-16 school year. In response to the recent recommendations within the March 2015 audiological and central auditory processing evaluation report, which found the student met the criteria for a diagnosis of a central auditory processing disorder, the June 2015 CSE discussed the specific kind of FM system that should be incorporated and recommended the student have access to a personal auditory trainer (FM system) during all core academics (Parent Ex. A at pp. 3, 16; see Dist. Ex. 13 at pp. 3, 9-11, 13). The June 2015 IEP also added the accommodation of allowing reasonable movement breaks after 10 minutes of hand writing activities (Parent Ex. A at p. 15).

Given the progress the student exhibited during the 2014-15 school year, as described in the June 2015 IEP, the hearing record shows it was reasonable for the district to offer a similar program for the 2015-16 school year. The hearing record also shows that the June 2015 IEP provided additional supports to the student based on evaluative information and modified/added new annual goals based upon the student's progress. Therefore, the evidence in the hearing record shows that the June 2015 IEP was reasonably calculated to enable the student to make progress appropriate in light of his circumstances. Although the parents accuse the IHO of ignoring evidence, I find that it is the parents who have focused too narrowly on one set of scores (expert interpretations of which differ significantly). Nor do the parents successfully point to evidence that refutes the other reports of the student's progress in the in the hearing record and, consequently, their arguments that the IHO's decision should be reversed because the student was not progressing must be rejected.

### C. May 2016 IEP

The parents argue that the IHO erred in finding the proposed 2016-17 IEP was appropriate. Specifically, the parents argue that the IHO erred by ignoring evidence of how the Eagle Hill program worked for the student, which according to the parents, was vastly different from what the district offered. The parents also assert that the program recommended was "largely the same as previous years."

In developing the student's IEP for the 2016-17 school year the evidence shows that the May 2016 CSE considered the December 2015 Eagle Hill advisor report, the May 2016 psychological reevaluation report, and input from Eagle Hill staff, the private evaluator, and the parents (Parent Ex. B at pp. 1-4; see Parent Exs. E; F at pp. 1-16).

The December 2015 Eagle Hill advisor report (the most recent prior to the May 2016 CSE meeting) indicated that the student benefitted from the structured, predictable and supportive nature of his classes and from a "success-oriented" classroom which incorporated multisensory activities (Parent Ex. F at p. 1). The student reportedly engaged in spontaneous conversation with peers and adults yet at times struggled to express his ideas clearly (id.). The December 2015 report stated that the student benefitted from visual and verbal prompts, "brain break" activities, and indicated that it was essential to provide the student with continual review and repetition to build skills and maintain mastery (id.). The report also stated it was important to minimize external distractions, simplify language, and use manipulatives when solving word problems (id.). The report indicated that the student was engaged for longer periods of time, consistently completed his independent reading, enjoyed sharing information about the books, and used a computer for some of his written work (id.). The December 2015 report stated that in the tutorial class<sup>30</sup> the controlled reading materials used were on a third-grade level, in social studies the materials used were at a third-grade reading level, and in literature the materials used were on approximately a third-grade reading level (id. at pp. 2, 11, 14). Regarding math, the report indicated that the student independently exhibited the majority of addition and subtraction skills measured, and was not yet provided with instruction in multiplication and division (id. at pp. 7-8).

According to meeting information attached to the May 2016 IEP, at the May 2016 CSE meeting Eagle Hill staff added that the student had grown academically, socially and emotionally (Parent Ex. B at p. 1). They also reported that the student continued to require a significant amount of support and accommodation, and that his language processing skills continued to adversely impact his progress (id.). Eagle Hill staff stated that the student worked well with 1:1 support, but became easily confused and overwhelmed by language in the classroom and in social interactions and could become quite frustrated (id. at pp. 1-2). The staff noted that the student was able to attend for a maximum of ten minutes, and that varied interactive activities, use of repetition, and an FM sound system all supported the student's progress (id. at p. 2). The CSE meeting information also noted that the student was working at the second grade level in reading instruction and that his reading fluency and comprehension were compromised by his decoding weaknesses (id.). Staff reported that in math the student was not fluent in addition or subtraction facts and had

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<sup>30</sup> The December 2015 report explained that the tutorial class was designed to provide intensive remedial instruction in the areas encompassed by the language arts (Parent Ex. F at p. 2).

difficulty comprehending word problems (id.). With respect to speech and language development, the staff stated that receptively the student had demonstrated good progress, but that his expressive language skills remained delayed (id.).

In March and April 2016, the parents obtained a private psychological reevaluation for the student as a routine update to aid in educational and therapeutic planning (Parent Ex. E at p. 1). In a May 2016 report, the private psychologist stated that the student was "very verbal" but tended to digress, noting internal distractibility (id. at pp. 1, 3). The private psychologist stated the student had improved significantly in reading comprehension, had improved his word reading and pseudoword reading, and had made excellent progress, but that significant needs remained (id. at pp. 10, 13). The private psychologist noted assessment results showed that the student's word finding issues continued to be significant, that his executive functioning difficulties could take a substantial toll on the student's mental stamina, and that his spatial planning and ability to juggle multiple rules was weak (id. at pp. 11, 12). The private psychologist found that the student's very low scores on tasks involving rapid naming and word-finding coupled with weak reading decoding and weak oral reading fluency were consistent with dyslexia (id. at pp. 13-14). The private psychologist also found that the student continued to present with a math disability (id. at p. 14). In addition to the previously received diagnoses, the examiner determined the student met the criteria for a diagnosis of an attention deficit disorder, combined type (id. at p. 15). She indicated that although the student had made "significant gains in writing and in reading," he continued to "present with significant learning disability" (id.). The private psychologist found that the student was "stable and improving," but felt that a change in his program at the time could be "catastrophic" and result in significant behavioral and academic regression, and recommended that the student remain in his current program at Eagle Hill (id.). The private psychologist's recommendations included a self-contained class with a small student to teacher ratio within a special education school, a multisensory educational program, intensive remedial intervention, and a long list of accommodations such as preferential seating, use of an FM system, refocusing and redirection, explicit instruction, frequent breaks, a private cueing system, and a reduction of ambient noise (id. at pp. 15-18).<sup>31</sup>

The May 2016 CSE meeting comments reflect that the private psychologist noted that she did not consult with the staff at Eagle Hill or observe the student in class, rather she relied on information provided by the parents and the student's performance on assessments conducted by Eagle Hill to inform her opinions (Parent Ex. B at p. 2).<sup>32</sup> The private psychologist reported that

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<sup>31</sup> The parents contend that the district underestimated the student's intelligence and that he was of "at least average intelligence" (Req. for Rev. ¶ 9; Parent Mem. of Law at p. 8). However, the private psychologist testified that following the 2016 testing, the student's cognitive composite scores were in the low average (verbal comprehension, visual spatial and fluid reasoning) and very low (working memory, processing speed and full scale IQ) ranges, indicating low average intelligence (Tr. pp. 1278-79). She further testified that the 2016 Weschler Intelligence Scale for Children-Fifth Edition and the Weschler Individual Achievement Test-Third Edition results did not indicate that there was a statistically significant difference between the student's full scale IQ of 74 and his composite scores in the achievement areas of total reading, basic reading, reading comprehension and fluency, written expression, and mathematics (Tr. pp. 1281-84; see Parent Ex. E at p. 9).

<sup>32</sup> The private psychologist acknowledged that she did not observe the student before the May 2016 CSE meeting; however, she testified that she did speak with the student's teacher and advisor and reviewed the reports from Eagle Hill (Tr. p. 1290).

assessment results reflected a dramatic increase in the student's word reading skills and his ability to comprehend what he reads, although his decoding and spelling skills remained "very compromised," and he had significant deficits in word finding skills and the skills needed to read (id.). She further indicated that the student's writing and sentence comprehension assessment results reflected that the student had benefitted from the writing program at Eagle Hill; however, those skills were not reflected in his overall essay writing as those skills remained unchanged (id.). The private psychologist also stated that she found no change in the student's math or spelling skills, which were "very compromised" (id.).

The May 2016 IEP included 17 annual goals (Parent Ex. B at pp. 10-12). Some of the annual goals were carried over from the previous IEP and included goals that addressed utilizing test taking strategies, applying phonics and word analysis skills to correctly decode words within content area subjects and the multisensory reading program, defining words and phrases, determining main idea, using the writing process of planning and revising, solving problems involving multiplication and division within 100, solving two-step addition and subtraction word problems, identifying arithmetic patterns, responding to "WH" questions to demonstrate comprehension of verbally presented material, sequencing events verbally, printing and exploring cursive writing, and performing common word processing functions (compare Parent Ex. B at pp. 10-12, with Parent Ex. A at pp. 13-14). The May 2016 IEP modified one previous annual goal regarding writing informational/explanatory text of up to one paragraph (a reduction from the previous IEP's language of "up to 2 paragraphs") and added two new speech-language annual goals which involved recognizing relationships between the meaning of words to form word associations and working on sound processing skills as they relate to phoneme discrimination, pattern recognition, phonological blending, phonological segmentation, and accurate processing of sound signals in the presence of background noise (compare Parent Ex. B at p. 12, with Parent Ex. A at p. 14).

To address the student's identified needs, the May 2016 CSE recommended a daily 12:1+2 special class for language arts, math, social studies, and science, and related services of three 40-minute sessions per week of speech-language therapy in a group of five in a flexible location and one 40-minute session per week of OT in a group of five in a flexible location (Parent Ex. B at p. 12). The May 2016 CSE also recommended 12-month services of a 12:1+2 special class for reading and math, and related services of two 30-minute sessions per week of speech-language therapy in a group of five in a special location and one 30-minute session per week of OT in a group of five in a special location (id. at pp. 13-14). In addition, the May 2016 CSE recommended program accommodations of cueing the student to stay on task, breaking directions and tasks into smaller components, pairing visual and auditory supports, and allowing reasonable movement breaks after ten minutes of handwriting and also that the student have access to a personal auditory trainer (FM system) during all core academics (id. at p. 13).

The May 2016 CSE meeting comments stated that all CSE members, with the exception of the parents, agreed with the recommendations (Parent Ex. B at p. 3). The special education teacher testified that the 12:1+2 special class "absolutely" continued to be appropriate for the student (Tr. p. 71). The district psychologist stated that the recommended programming, related services and annual goals were all developed at the May 2016 CSE meeting and that the program and annual goals were developed based on the student's functional needs from assessments and classroom performance (Tr. pp. 292-94). The district psychologist stated further that based on his findings



from the data that was presented the level of instruction recommended seemed appropriate (Tr. pp. 293-94).

As noted previously, in their request for review and accompanying memorandum of law, the parents assert that the IHO ignored evidence of how the "small class" and 2:1 tutorial Eagle Hill program "worked" for the student, which was "vastly different" than the program offered by the district.<sup>33</sup> While the parents may have preferred, and the student may have benefited, from the smaller class sizes at Eagle Hill, review of the evaluative information available to the May 2016 CSE did not indicate the student required a class student-to-teacher ratio smaller than 12 students to one teacher and two teacher aides in order to receive a FAPE; rather, he required specially designed instruction to remediate his academic and language deficits, which the district provided with its 12:1+2 special classes, related services, and program modification recommendations (see Parent Ex. B at pp. 1-4, 12-13; E; F at pp. 1-16). One flaw in the parents' arguments is that comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE;<sup>34</sup> rather, an IHO must determine whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at \*15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011] [finding that "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at \*9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at \*8 [S.D. Cal. Feb. 14, 2013] [noting that "[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably

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<sup>33</sup> The December 2015 Eagle Hill report reflected that the student received instruction in student to teacher ratios that ranged from 3:1 to 7:1 (Parent Ex. F at pp. 1-15), and the district recommended 12:1+2 special classes (Parent Ex. B at p. 12), illustrating a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"]), and is not relevant to whether a placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

<sup>34</sup> However, where as in this case, the student is attending a unilateral private placement, some reference to a student's performance at a nonpublic school may be necessary if preparing a new or revised IEP while the student is attending the nonpublic school. That is clearly why the May 2016 CSE incorporated a discussion of the student's performance at Eagle Hill into the May 2016 meeting information.

calculated to provide the student with educational benefits"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at \*5 [S.D. Cal. Mar. 14, 2011]).

To the parents' assertion that the May 2016 IEP was "largely the same" as prior IEPs, review of the information available to the May 2016 CSE shows that while the student made some progress at Eagle Hill during the 2015-16 school year, he continued to exhibit significant academic and language deficits similar to those exhibited during the previous school years (compare Parent Ex. E at pp. 13-15 and Parent Ex. F at pp. 1-16, with Parent Ex. D at pp. 1, 12, 22-25 and Dist. Ex. 12), such that offering the student a special education program similar to the 2015-16 program was reasonable and as I have determined above, it was appropriate to enable the student to receive educational benefits in light of his circumstances.<sup>35</sup> I find no reason to disturb the IHO's conclusion that the district offered the student a FAPE for the 2016-17 school year.

#### **D. April 2017 IEP**

Turning next to the parents' argument that the IHO erred in finding the proposed 2017-18 IEP was appropriate because the program was largely the same as the previous years, although the April 2017 IEP was similar to the May 2016 IEP, as discussed below, the April 2017 CSE made some changes to the IEP in response to the student's needs as detailed in the student's recent Eagle Hill assessment reports and input from Eagle Hill staff. According to the April 2017 IEP, new information available to the CSE since the May 2016 CSE meeting included Eagle Hill test results from spring 2016 that were included in a June 2016 Eagle Hill advisor report, a December 2016 Eagle Hill advisor report, April 2017 Eagle Hill teacher progress reports, and input from Eagle Hill staff and the parents during the meeting (Parent Ex. C at pp. 1-5, 8, 10; see Parent Exs. F at pp. 17-38; G at pp. 1-16; NNNN at pp. 1-4).

According to the June 2016 Eagle Hill advisor report, administration of the Gray Oral Reading Test to the student in fall 2015 and spring 2016 yielded scores in the 1st percentile (Parent Ex. F at p. 38).<sup>36</sup> Administration of the Slosson Oral Reading Test—a measure of a student's ability to read sight words in isolation—yielded a standard score of 74 in fall 2015, and a standard score of 80 in spring 2016 (id.).

The December 2016 Eagle Hill advisor report stated that the student generally enjoyed interacting with his peers and got along well with his teachers, but that the student had a difficult time moving on from a conflict, which affected his interactions with peers later on and his overall mood (Parent Ex. G at p. 1). When upset, the report indicated that the student was more likely to disengage and exhibit more rigid behavior (id.). However, teachers had found that the student was more open to problem solving strategies and that he began to initiate spontaneous interactions,

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<sup>35</sup> To the extent the parents assert on appeal for the 2016-17 school year that during their visit to the proposed class—which occurred on the last day of school—they "only saw students playing games," it is hardly unusual or inappropriate to find students engaged in festive events or learning through fun activities on the last day of school. Recognition of student achievement and hard work is entirely appropriate. If intended as criticism of the district classroom, it is unjustified quibbling that would not, in itself, lead to a denial of a FAPE, and it will not be addressed further in this decision (Req. for Rev. ¶ 40).

<sup>36</sup> According to the report, the student's comprehension score in fall 2015 was below the 1st percentile (Parent Ex. F at p. 38).

picked up on jokes and "read[] the environment well" (id.). The student reportedly had difficulty with transitions and in sustaining attention (id.). The December 2016 report stated that the student benefitted from reminders and prompts, cueing and redirection, opportunities to move, breaks, planned short activities within longer lessons, and a structured class with a posted agenda and clear goals (id.). When working with peers in a small group, the student also benefitted from "a very structured setting in which an adult is nearby to help problem solve" (id.). According to the December 2016 report, teachers broke directions and material down into smaller, more manageable components before the student was expected to follow through independently and that a goal for the student was to expand his written responses (id.). The December 2016 report indicated that in tutorial class the materials used were at a second to third grade reading level, in general science the materials used were on approximately a fifth to sixth grade reading level, and in literature the materials used were at a fourth grade reading level (id. at pp. 2, 12, 14).

Within an April 2017 math progress report from Eagle Hill, the math teacher reported that the student was good at adding and subtracting whole numbers, could tell time up to five-minute intervals (but not fluently), could add and subtract fractions and mixed numbers, and could divide with grids (Parent Ex. NNNN at p. 1). The April 2017 report also stated that the student was working on number sense, rounding and estimating, used a calculator for computations, and that areas of need included math language and concepts, number sense, and recall of facts (id.). An April 20, 2017 tutorial report from Eagle Hill noted academic weaknesses such as decoding multisyllabic words, spelling, and comprehension (id. at pp. 3-4). The report also included recent testing which showed the student performing at the third (independent) to fifth (instructional/frustration) grade levels in decoding and comprehension (id. at p. 3).

In addition to the information shared in the Eagle Hill reports detailed above, the April 2017 CSE meeting comments included parent input that they had seen many significant improvements in the areas of self-esteem, reading comprehension, and overall confidence, and felt the student made "awesome" progress at Eagle Hill (Parent Ex. C at p. 2). According to Eagle Hill staff, the student was working with the Wilson decoding program, was a more active reader, and had improved in comprehension (id.). Eagle Hill staff had not seen auditory processing as an issue and felt that this was due to the very small class sizes (tutorial class was a 2:1 ratio) (id.). The student had also made gains in math; his basic operation skills were "coming along" and he had difficulty multiplying/dividing multi-digits and with the language of math (id.). In writing the student could independently write about four sentences, was generating supporting details as phrases but needed support, and needed help to develop clear topic sentences (id.). Eagle Hill staff noted that science was the student's largest class (nine students) and that it was a bit more challenging since the vocabulary and new concepts could be difficult (id.). With respect to speech-language development, the therapist stated that she saw the student one time per week in a pull out session with one other student and one time per week in a content area class, and noted that the student had become more confident and more positive about his learning (id.). The therapist noted areas of focus had been auditory processing, vocabulary development and language organization, and she stated that these areas would continue to be addressed in the new school year (id.). The therapist also cited specific areas being addressed included; working on attending to longer chunks of information, improving word retrieval, listening to how changes in vocal intonations can change meanings of words and what is being said, improving word associations, and summarizing fictional and non-fictional work (id.). Eagle Hill staff noted that the student only used the FM system in his two largest classes and that OT, while listed on his IEP, was not provided at Eagle Hill (id.).

The April 2017 CSE meeting comments indicated that the student's educational goals were reviewed and updated based upon information presented at the CSE meeting (Parent Ex. C at pp. 2, 3). Some of the annual goals were carried over from the previous IEP and addressed utilizing test taking strategies, applying phonics and word analysis skills to correctly decode words within content area subjects and the multisensory reading program, determining main idea, writing informational/explanatory text of up to one paragraph, using the writing process of planning and revising, solving problems involving multiplication and division within 100, solving two-step addition and subtraction word problems, identifying arithmetic patterns, responding to "WH" questions to demonstrate comprehension of verbally presented material, recognizing relationships between the meaning of words to form word associations, working on sound processing skills (as they relate to phoneme discrimination, pattern recognition, phonological blending, phonological segmentation, and accurate processing of sound signals in the presence of background noise), sequencing events verbally, printing and exploring cursive writing, and performing common word processing functions (compare Parent Ex. C at pp. 13-15, with Parent Ex. B at pp. 10-12). One annual goal included in the April 2017 IEP was modified from the previous IEP to include defining words and phrases from eighth grade literature (up from sixth grade) and the April 2017 IEP also included new annual goals which involved creating multi-paragraph responses using supporting details, developing clear topic sentences, comparing fractions, and adding and subtracting mixed numbers with like denominators (Parent Ex. C at pp. 13-14).

Similar to the student's previous IEP, the April 2017 CSE recommended a 12:1+2 special class for language arts, math, social studies, and science, and the related service of one 40-minute session per week of OT in a group of five in a flexible location (compare Parent Ex. B at p. 12, with Parent Ex. C at p. 15). The April 2017 CSE also continued the recommendation of 12-month services of a 12:1+2 special class for reading and math and related services of two 30-minute sessions per week of speech-language therapy in a group of five in a special location and one 30-minute session per week of OT in a group of five in a special location (compare Parent Ex. B at pp. 13-14, with Parent Ex. C at pp. 16-17). In addition, the April 2017 CSE continued to recommend the program accommodations of cueing the student to stay on task, breaking directions and tasks into smaller components, pairing visual and auditory supports, and allowing reasonable movement breaks after ten minutes of handwriting and that the student have access to a personal auditory trainer (FM system) during all core academics (compare Parent Ex. B at p. 13, with Parent Ex. C at pp. 15-16). The special education teacher present at the CSE meeting testified that she was in charge of hearing services and that when a student had an FM unit she oversaw and helped the team with ongoing monthly consults, wherein she met with teachers to make sure that the student's auditory needs were being met in the classroom (Parent Ex. C at p. 3).

The CSE also recommended a new addition to the April 2017 IEP, a daily 12:1+2 "supports and skills" special class, an additional accommodation to check for understanding, and a monthly consultation with a teacher for the hearing impaired (Parent Ex. C at pp. 15-16). The middle school special education teacher who attended the CSE meeting described the supports and skills class or learning lab as a separate class in which students receive additional support with their special education teacher and teaching assistant, and she said it was similar to what she understood was the "Call Back" period at Eagle Hill (e.g. the teacher would re-teach and review lessons the student was having difficulty with) (Parent Ex. C at pp. 1, 3).

The April 2017 IEP also modified the student's speech-language services to include one individual 40-minute session per week in a flexible location, one 40-minute session per week in a group of five in a flexible location, and one 40-minute session per week in a group of five in a special location (id. at p. 15). The middle school special education teacher stated that based upon the information presented at the meeting, the eighth-grade special education placement for all academic classes would be most appropriate for the student (Parent Ex. C at p. 2).

Although the parents assert that the April 2017 IEP was "largely the same" as prior IEPs, the hearing record shows that the district considered information about the student from Eagle Hill, and modified the May 2016 IEP annual goals and program by adding a daily support and skills special class, individual speech-language therapy, math and ELA goals, and checks for understanding (compare Parent Ex. B at pp. 10-12, with Parent Ex. C at pp. 13-16). Additionally, as with the 2016-17 school year, review of the information available to the April 2017 CSE shows that while the student made some progress at Eagle Hill during the 2016-17 school year, he continued to exhibit significant academic and language deficits similar to those exhibited during the previous school years (compare Parent Exs. F at pp. 17-38; G at pp. 1-16; NNNN at pp. 1-4, with Parent Exs. E at pp. 13-15; F at pp. 1-16). The evidence shows that the CSE considered the student's progress and continuing needs, and offered the student a special education program that was similar to but not the same as the 2016-17 program and it was reasonably calculated to enable the student to receive educational benefits in light of the student's circumstances.<sup>37</sup> Once again, there is no reason to disturb the IHO's conclusion that the district offered the student a FAPE for the 2017-18 school year.

### **E. Functional Grouping**

The parents argued in the due process complaint notice that the student would not have been appropriately grouped in the proposed district program for any of the years in dispute (IHO Ex. I at p. 11). The IHO found that the student would have been appropriately grouped in the district classroom (IHO Decision at pp. 24-25, 35). The parents did not clearly raise the issue of appropriate functional grouping in their request for review, but rather stated under allegations regarding the 2015-16 school year that they were told the student would be with "the same group of students" (Req. for Rev. ¶ 24). The hearing record does not support disturbing the IHO's finding on the issue of grouping; however, I will discuss the state policy regarding grouping in cases like this.

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. State regulations require that in special classes, students must

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<sup>37</sup> To the extent the parents assert on appeal for the 2017-18 school year that during their visit to the proposed class they were "concerned by the level of distraction caused by the learning areas only being separated by a divider, the lack of visuals and the use of a reading program on the computer," these claims are not otherwise developed and will not be addressed further in this decision (Req. for Rev. ¶ 52).

be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). It is in State regulation that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

Although the district's teacher testified that the student would have been appropriately grouped in the class for sixth and seventh grade; as did the proposed eighth grade teacher; the student never actually attended these classes (Tr. pp. 67, 69, 80, 346-47, 355).<sup>38</sup> Therefore, with the record before me, any alleged grouping claim is impermissibly speculative.<sup>39</sup>

The Second Circuit has held that "our precedent bars us from considering such retrospective evidence" ... (J.C. v New York City Dep't of Educ., 643 Fed.Appx. 31, 33 [2d Cir. March 16, 2016]; [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP" (quoting R.E., 694 F.3d

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<sup>38</sup> The hearing record contains little information regarding the profile of the proposed classrooms or how the district would ensure compliance with the State regulations regarding age and functional grouping if the student had attended public school. The special education teacher stated that the group of students in her 2015-16 special class were a different group of students than the group from her 2014-15 special class (Tr. p. 65). She noted that three students "came with her" from the elementary school, and that she had hoped the student would have made if four students, and that the other students came from across the district (Tr. p. 65). The special education teacher further explained that these students in the 2015-16 special class were not New York State alternatively assessed students, which was a change from the make-up of students in her elementary program (2014-15) (Tr. pp. 65-66).

<sup>39</sup> As discussed at length in Application of the Board of Educ., Appeal No. 18-033, the state modified how grouping is conducted in special classes when it modified its policies regarding the process in which IEPs are created in preparation for the 1991-92 school year. These changes left intact the requirements in Section 200.6 that school districts must group students together by similarity of needs when they entered the public program (8 NYCRR 200.6 [a][3], [f]), but the automatic right that parents once enjoyed to review that placement in a second mandated CSE meeting known as "phase II" that provided the opportunity for parents to examine the actual grouping of the student with his or her peers after a student begins attending the public program was explicitly discontinued under State regulation. The State has never promulgated a policy allowing parents to challenge grouping when the child did not attend a public program either prospectively or retrospectively.

at 195)]. Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016] same; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at \*4 [S.D.N.Y. Sept. 6, 2016]["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement" (citing M.O., 793 F.3d at 245)]. I have also further discussed numerous district court authorities on this subject of speculative grouping challenges since M.O. was decided in Application of the Board of Educ., Appeal No. 18-033.

As any claim in this case under these facts regarding the student's grouping would be impermissibly speculative it must fail. This is the most significant point on which the IHO's approach differed from mine; however, since the parents did not squarely appeal the issue, I decline to disturb the IHO's finding regarding the appropriateness of the district's program on the issue of functional grouping.

## **VII. Conclusion**

Having found that the district's recommended programs for the 2015-16, 2016-17, and 2017-18 school years were appropriate, it is not necessary to determine whether Eagle Hill was an appropriate unilateral placement or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see T.P., 554 F.3d at 254; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
July 5, 2018**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**