



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-056

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 Harrison Central School District

Appearances:

Law Offices of Neal H. Rosenberg, attorneys for petitioners, by Michael Mastrangelo, Esq.

Bond, Schoeneck & King, PLLC, attorneys for respondent, by Sara M. Richmond, Esq. and Ayanna Y. Thomas, 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 2020-21 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student for that school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

According to the parents, the student achieved developmental milestones "late," but he did not receive Early Intervention or Committee on Preschool Special Education (CPSE) services (Dist. Ex. 7 at p. 1). He attended preschool and then a nonpublic school for kindergarten and first grade (id.). Reportedly, the student was privately evaluated in first grade, the results of which indicated that the student had a language-based learning disorder, attention deficit hyperactivity disorder (ADHD), dyslexia, a disorder of written language, dysgraphia, and a mixed receptive and expressive language disorder (Dist. Exs. 7 at p. 1; 13 at p. 7). The student began attending Eagle

Hill in second grade (2016-17 school year) and continued to attend there through the 2020-21 school year (sixth grade) (Parent Ex. E; Dist. Exs. 7 at p. 1; 10).¹

In connection with a reevaluation, the district conducted an educational evaluation on October 5, 2018; an occupational therapy (OT) reevaluation on October 29, 2018; a classroom observation on November 5, 2018; a speech-language reevaluation on November 30, 2018; a social history review on February 14, 2019; and a psychological evaluation on February 27, 2019 (see Dist. Exs. 3-8).

On May 13, 2019, the Subcommittee on Special Education convened for the purposes of reviewing the reevaluation, conducting an annual review, and developing the student's IEP for the 2019-20 school year (fifth grade) (Dist. Ex. 2).² The CSE determined that the student continued to be eligible for special education services as a student with an other health-impairment (OHI) (id. at pp. 1, 2).³ Based on the reevaluation results and the student's needs, the May 2019 CSE recommended a 10-month 12:1+2 special class placement that included a teaching assistant and a program aide to support the student in specials, lunch, and recess (id. at pp. 11, 13). The May 2019 CSE also recommended two 30-minute sessions per six-day cycle of speech-language therapy in a small group (one push-in group/one pull-out group); one 30-minute session per six-day cycle of speech-language therapy in a small group (push-in for pragmatic language); one 30-minute session per six-day cycle of OT in a small group; one 30-minute session per six-day cycle of individual counseling services; and one 30-minute session per six-day cycle of social skills counseling in a small group (id.). Additionally, the May 2019 CSE recommended the following supplementary aids and services: refocusing and redirection; cueing student to key points; allowing short breaks between assignments/classwork; checking for understanding; providing visual cues and manipulatives; clarifying directions; repeating, chunking or paraphrasing information as needed; allowing fidgeting and movement breaks; using a graphic organizer and word bank; providing special seating arrangements; previewing vocabulary and concepts; breaking down instructions and directions; priming the student before having him answer questions; and providing support for organizational skills, access to a word processor, and graph paper for math (id. at pp. 11-12). The May 2019 CSE also recommended a 30-minute monthly counseling consultation for the student's teachers to address the student's problem solving skills and social skills (id. at p. 13). Lastly, the May 2019 CSE recommended testing accommodations and special transportation for the student (id. at pp. 13-14).

On January 7, 2020, the parents completed a form entitled "Resident Student Parentally Placed in Non-Public Schools Outside of District – Planning for the 2020-21 School Year" (Dist. Ex. 11). At that time, the parents indicated that they had not decided on a program for the student

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

² Several of the meetings that took place were identified as Subcommittee on Special Education meetings rather than CSE meetings (see Dist. Exs. 2 at p. 1; 13 at p. 1), for ease of reference, this decision will refer to the subcommittee meetings as CSE meetings unless otherwise noted.

³ The student's eligibility for special education as a student with an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

for the 2020-21 school year and wanted to consider the CSE's recommendation before deciding on a placement (id.). Thereafter, on January 22, 2020 and January 24, 2020, the parents executed a re-enrollment contract with Eagle Hill for the enrollment of the student for the 2020-21 school year (see Parent Ex. B).

On May 1, 2020, the CSE convened for an annual review and to develop the student's IEP for the 2020-21 school year (sixth grade) (see Dist. Ex. 13). According to the May 2020 IEP, the student exhibited delays in reading comprehension, written expression, mathematics, language skills, and social skills which inhibited his progress in the general education curriculum (id. at p. 8). The May 2020 CSE determined that the student required "a small teacher-to-student ratio program with minimal distractions in order to academically progress" and recommended a 10-month 12:1+1 special class placement in reading, English, math, and social studies; a 12:1 special academic skills class; and integrated co-teaching (ICT) services for science (id. at pp. 8, 10-11). The May 2020 CSE also recommended two 39-minute sessions per six-day cycle of speech-language therapy in a small group; one 39-minute session per six-day cycle of speech-language therapy in a small group (push-in for pragmatic language); one 39-minute session per six-day cycle of individual counseling services; and one 39-minute session per six-day cycle of social skills counseling in a small group (id. at p. 11). The same supplementary aids and services recommended in the May 2019 IEP were included on the May 2020 IEP (compare Dist. Ex. 2 at pp. 11-12, with Dist. Ex. 13 at pp. 11-12). For assistive technology, the May 2020 CSE recommended daily access to a computer throughout the school day (Dist. Ex. 13 at p. 12). The May 2020 CSE also recommended one 30-minute session per month of speech-language consultation to support the student's teachers (id.). The May 2020 CSE continued to recommend testing accommodations and special transportation for the student (id. at pp. 13-14).

A. Due Process Complaint Notice

In a due process complaint notice dated April 28, 2022, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21 school year (see IHO Ex. I).

In connection with the May 2020 CSE meeting, the parents claimed that the district failed to take into consideration their concerns as well as concerns of the Eagle Hill staff that were raised during the meeting, all of which the parents asserted impeded their "opportunity to participate in the decision-making process" and caused "a deprivation of educational benefits" to the student (id. at p. 3). Further, the parents argued that the May 2020 IEP failed to accurately reflect the results of evaluations, failed to accurately identify the student's needs, and failed to develop annual goals related to the student's deficits and needs (id. at pp. 3, 6).

The parents argued that the recommended programming "would not provide the type of instruction tailored to address the [s]tudent's learning disabilities" because it was "not a primarily language-based instructional model that the [s]tudent require[d] to make progress" (IHO Ex. I at p. 3). The parents expressed concern about the peer grouping in the 12:1+1 special class (id. at pp. 3, 4, 5). In addition, the parents argued that the 12:1+1 special class was not appropriate for the student as it was too large and would not have peers at the student's functional level (id. at pp. 4, 5). The parents asserted that even with the "high level of support" and individual learning support at Eagle Hill, the student demonstrated areas of need (id. at p. 4). According to the parents,

the recommended program failed to offer "language-based instruction across content areas" (id. at p. 5). Next, the parents argued that the 12:1+1 special math class would not have provided the student with an appropriate curriculum, as math was an area of strength and the curriculum would not have been geared toward his ability (id.). The parents claimed that the ICT services recommendation in science was not appropriate because the student's "attentional, executive functioning and language challenges ma[d]e it extremely difficult for him to function in a general education class" (id.). They argued that the May 2020 CSE failed to explain why ICT services in science was appropriate for the student and there was no regular education teacher at the CSE meeting to discuss the recommendation for ICT services (id. at pp. 5-6). Furthermore, the parents argued that the school placement would not have been able to implement the student's IEP (id.).

The parents argued that Eagle Hill was appropriate for the student, as he benefitted from the "supportive, structured and remedial educational environment" which increased his attention and minimized distractions (IHO Ex. I at p. 7). Additionally, the parents asserted that Eagle Hill provided the student with the "necessary social skills and emotional support" to make social/emotional progress (id.). Lastly, the parents claimed that equitable considerations supported their claim for Eagle Hill tuition reimbursement for the 2020-21 school year (id.).

As relief the parents sought a finding that the district denied the student a FAPE for the 2020-21 school year, a finding that Eagle Hill was appropriate, and that equitable considerations weighed in favor of the parents, together with an order of direct payment/reimbursement for Eagle Hill tuition for the 2020-21 school year (IHO Ex. I at pp. 7-8).

B. Impartial Hearing Officer Decision

On June 9, 2022, the parties and the IHO participated in a prehearing conference (see IHO Decision at p. 3).⁴ The parties proceeded to an impartial hearing on September 21, 2022 which concluded on October 20, 2022 after four days of proceedings (see Tr. pp. 1-512). During the September 21, 2022 hearing date, the parents' attorney withdrew the request for transportation to and from Eagle Hill for the 2020-21 school year (Tr. pp. 11-12).

In a decision dated February 24, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that the parents failed to demonstrate the appropriateness of Eagle Hill for the 2020-21 school year, and that the parents' due process complaint notice must be dismissed (see IHO Decision at pp. 16-17, 21).

The IHO provided two reasons that the May 2020 IEP was not appropriate for the student (IHO Decision at p. 16). First, the IHO expressed "great concern" with respect to the recommendation for ICT services in a general education science class as the student's other subjects were in a 12:1+1 special class and the class "would not address the real possibility of [the] [s]tudent having negative interaction with other - and unfamiliar - students" (id.). The IHO reasoned that the student had "[v]ery [e]levated [s]cores in [h]yperactivity/[i]mpulsivity;

⁴ There is no transcript or written summary of the June 2022 prehearing conference provided as part of the hearing record. I remind the IHO that "[a] transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer" (8 NYCRR 200.5[3][xi]).

[d]efiance/[a]ggression; and [p]eer [r]elations" in the 2019 psychological evaluation (id.). Second, the IHO addressed the fact that there was no evidence that a regular education teacher was present at the May 2020 CSE meeting and, therefore, the resultant IEP was not appropriate (id.).

In connection with the appropriateness of Eagle Hill, the IHO reviewed the testimony of each of the parents' witnesses (IHO Decision at pp. 18-20). First, the IHO gave little weight to the testimony of the student's father concerning what Eagle Hill did to address the student's needs because the IHO found he only provided generalized statements with little basis other than what he had been told by school staff (id. at p. 18). Second, the IHO reviewed the testimony of the parents' private psychologist who provided therapy to the student beginning in September 2021, noting that "within months of the conclusion of the 2020-2021 school year, [the] [p]arents sou[ght] and obtained weekly therapy sessions to address what was the prime concern of [the] [p]arent[s]" during that school year (id.). The IHO found this testimony relevant to the parent's "estimation of the sufficiency of the services [] provided [by Eagle Hill]" (id. at pp. 18-19). Third, the IHO discussed the testimony of the Eagle Hill director of placement (director), who the IHO determined was not involved in the education of the student during the 2020-21 school year and the IHO further found her testimony was based solely upon the content written in the progress reports (id. at p. 19). According to the IHO, the director read the Eagle Hill reports before testifying and attempted to expand on the programs described in the reports of which she was familiar (id.). The IHO found that the testimony of the director did not establish the appropriateness of Eagle Hill and the lack of testimony from the student's teachers at Eagle Hill "deprived" the IHO from learning "what actually occurred" at Eagle Hill (id. at p. 20). The IHO further found that the December 2020 and June 2021 progress reports from Eagle Hill provided "little in the way of information" with respect to what benefit the student received from the program at Eagle Hill (id.). The IHO further found that the student was not educated with non-disabled peers at Eagle Hill (id. at pp. 20-21). The IHO ultimately found that the parents failed to establish the appropriateness of Eagle Hill for the 2020-21 school year and, therefore, found it unnecessary to consider equitable considerations, and denied the parents' request for relief (id.).

IV. Appeal for State-Level Review

The parents appeal from the IHO's findings that Eagle Hill was not an appropriate unilateral placement for the student and that denied reimbursement of the costs of the student's Eagle Hill tuition for the 2020-21 school year.

The parents contend that the IHO set forth the correct standard in evaluating a unilateral placement but "applied a more stringent standard to the [p]arents' burden which resulted in an improper finding." The parents argue that based on the "totality of circumstances" set forth in the hearing record the student derived an educational benefit from Eagle Hill. They further argue that the IHO failed to consider all of the evidence presented by the parents and was dismissive of the parents' evidence. The parents contend that the IHO failed to focus on the student's academic, attentional, and executive functioning needs and instead focused only on the student's social/emotional needs. The parents argue that the student made progress with organizational skills and became more independent with decoding, comprehension, writing, and solving mathematics problems. The parents argued that Eagle Hill "focused on explicit language instruction" and had small class sizes that allowed individual support to the student. Further, the parents contend that the student benefitted from individual psychological services which helped

the student work on social awareness, perspective taking skills, and emotional regulation, and helped manage his anxiety. Furthermore, the parents argue that the IHO's finding with respect to the student's least restrictive environment (LRE) was an improper application of the parents' responsibility and only one factor to consider with respect to the appropriateness of the unilateral placement. As relief, the parents seek reimbursement for the cost of the student's tuition at Eagle Hill for the 2020-21 school year.

The district interposed an answer generally denying the material allegations contained in the request for review. The district also cross-appeals from the IHO's finding that the district failed to offer the student a FAPE for the 2020-21 school year. The district argues in the alternative that if there is a finding that the district failed to offer the student a FAPE or that Eagle Hill was appropriate, equitable considerations do not support an award of tuition to the parents.

In an answer to the district's cross-appeal, the parents generally deny the allegations set forth in the cross-appeal. In response to consideration of equitable considerations, the parents allege that they cooperated with the district, attended the May 2020 CSE meeting, and expressed their concerns about the IEP, which supports an award of tuition reimbursement for the 2020-21 school year.

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. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the

Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; *see* Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).⁵

⁵ 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

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

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

VI. Discussion

A. Preliminary Matter

1. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "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][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In its three-page answer and cross-appeal, the district alleges that the IHO incorrectly found that it failed to offer the student a FAPE for the 2020-21 school year and that the "IHO failed to consider the totality of the program offered" to the student by the district for the 2020-21 school year (Answer at p. 2). Although the IHO made specific findings that the recommended ICT services in science were not appropriate and that the lack of a regular education teacher at the May 2020 CSE meeting rendered the May 2020 IEP inappropriate, these issues were not specifically raised in the district's answer or cross-appeal and were only raised in the district's memorandum of law (see IHO Decision at p. 16). As a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. New York

chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

City Dep't of Educ., 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). The district had ample room in its answer and cross-appeal to expand its arguments instead of placing all of its specific arguments in the memorandum of law.⁶

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Instead of specifically addressing the findings made by the IHO, the answer and cross-appeal includes a conclusory allegation that the IHO erred in finding that the district failed to offer the student a FAPE for the 2020-21 school year (Answer at p. 2). The use of broad and conclusory statements or allegations within an answer does not act to revive any and all violations the district believes the IHO erroneously addressed or failed to address without the district specifically identifying which violations meet this criterion (M.C., 2018 WL 4997516, at *23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]).

Consequently, any arguments included solely within the district's memorandum of law have not been properly raised and will not be considered or addressed in this decision. Moreover, in reviewing a conclusory challenge to the IHO's findings that the district failed to offer the student a FAPE, it is not this SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

Accordingly, the district has failed to properly plead that the IHO erred in determining that the district denied the student a FAPE and the IHO's finding on the district's failure to offer the student a FAPE for the 2020-21 school year has become final and binding (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

⁶ State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]).

Unfortunately, this is not the first time that the law firm for the district has failed to properly plead its arguments. In a recent SRO decision, a request for review was rejected because the arguments contained solely within the memorandum of law were not properly raised and were considered abandoned (see Application of the Bd. of Educ., Appeal No. 23-021). That matter went against a school district represented by the same law firm as the firm filing the cross-appeal on behalf of the district in this proceeding, albeit with representation by a different attorney within the firm. However, considering it was the same law firm, the attorney should have been aware of the outcome of that matter, especially as it related to the manner in which the firm prepares its pleadings. The Office of State Review has published appeal guidance on its web site for years that emphasizes the importance of complying with State regulations by describing and enumerating the specific IHO fact findings that are being challenged in a request for review or a cross-appeal and the web site provides specific samples of pleadings that model expectations that all parties are expected to follow (see "How to Prepare an Answer with Cross-Appeal" available at <https://www.sro.nysed.gov/book/c-how-prepare-answer-cross-appeal>; "Prepare the Appeal" available at <https://www.sro.nysed.gov/book/prepare-appeal#RequestReview>). On a final note, counsel for the district is cautioned to review the regulations governing practice before the Office of State Review and to comply with them in the future.

B. Unilateral Placement

Having concluded that the IHO's determination that the district failed to offer the student a FAPE for the 2020-21 school year will not be disturbed, the next inquiry is whether the parents met their burden to establish that Eagle Hill was an appropriate unilateral placement for the student.

The parents argue that the IHO's finding that Eagle Hill was not appropriate was erroneous and they argue that the IHO applied a more stringent standard to the parents' burden which resulted in an improper finding. The parents argue that the evidence in the hearing record makes it clear that they met their burden to show that Eagle Hill appropriately addressed the student's needs (Req. for Rev. ¶ 4).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see

Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]. A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

Before assessing whether Eagle Hill was an appropriate placement for the student for the 2020-21 school year, a review of the student's needs is in order. Academic testing, conducted with the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) as part of the October 2018 educational evaluation, yielded reading composite, math composite, and written language composite scores in the average range with relative outlier scores on subtests in the areas of reading comprehension (below average) and spelling (above average) (Dist. Ex. 4).

The October 2018 OT re-evaluation report reflected teacher concerns about the student's self-regulation such as attention and focus in the classroom and reported deficits with "following verbal directions and focusing out background" noise and sound (Dist. Ex. 5 at p. 1). The teacher also noted that the student's letter formation was "fairly accurate but his writing rate [wa]s too fast for accuracy and clarity" (id.). Reportedly, the student was not receiving OT services at Eagle Hill at the time of the evaluation (id.). The occupational therapist who conducted the re-evaluation found the student to be cooperative and friendly throughout testing and noted that in the 1:1 testing situation with few outside distractions, the student appeared to be internally distracted but was able to attend and sustain his focus to all presented tasks and did not require any redirection or verbal

prompts to stay on task (id.). The occupational therapist also noted that the student utilized an impulsive task approach as he moved quickly through presented tasks and did not exhibit any difficulty following verbal directions (id.).

As part of the OT re-evaluation the student's teacher completed a sensory profile as self-regulation was considered a main concern; however, overall, the profile results were not significant for sensory processing deficits (Dist. Ex. 5 at p. 3). It was reported that the student exhibited below grade level near point copying skills but produced a writing sample that was "fairly legible and somewhat organized" during testing (id.). Review of written work from the student's classroom and reports from the parent showed improved legibility of his written work and the student's teacher reported that the student's formation of letters was relatively accurate but that he continued to need clear expectations for sizing and spacing of letters and words for his work to be consistent and legible (id.). Additional testing found that the student demonstrated visual motor skills (design copying skills) "just in" the below average range and non-motor visual perceptual skills and motor coordination skills in the average range (id.). The occupational therapist stated that these results showed that the student was "developing good visual perception which enhance[d] his ability to utilize improved spatial relationships when organizing his writing on the paper" (id.). The student was observed to demonstrate functional gross motor abilities within his school environment and could negotiate around obstacles, safely moving around his school environment (id. at p. 1).

In November 2018, the student was observed in his oral literature class during a lesson on idioms (Dist. Ex. 3 at p. 1). The student reportedly was three minutes late for class, needed reminders to put his belongings away and to stop speaking with his neighbor, called out at times, required redirection, worked slowly, required additional reminders to clean and pack-up, and was the last one out of the room at the end of the class (id. at pp. 1-2). The student was also observed in math class, during which he reportedly failed to follow directions and worked too quickly, skipping problems; he needed scaffolding, problems to be broken down, and 1:1 support with classwork; he was not automatic with his multiplication facts; and he was able to work on homework independently (id. at pp. 2-3).

The November 2018 speech-language re-evaluation report stated that, during the testing session, the student presented with a flat affect and tone of voice, appeared sleepy as his head and body were often draped on the table, and moaned on a few occasions (Dist. Ex. 6 at p. 1). The report also stated that, "[t]oward the end of testing, the student's fading increased" and despite requests and suggestions from the clinician the student refused any type of break (id.). The clinician stated that, based on these attention difficulties and behaviors, the results of testing were a minimal estimate of his abilities (id. at pp. 1, 6). Formal assessment results indicated that the student's receptive language skills were within the average range, with noted weaknesses in understanding spoken paragraphs and auditory reasoning (id. at pp. 2-5, 8). The clinician suggested that the student's poorer performance on the auditory reasoning subtest could indicate that the student had the skills but struggled with attention of auditory information over long periods of time (id. at pp. 4-5). The student's expressive language skills were determined to be "solidly average" with a relative weakness in the area of sentence assembly (id. at pp. 5-6, 8). The student's ability to apply memory skills to language tasks was found to be within the average range and although his articulation skills were not formally assessed his intelligibility was "judged to be good" (id. at p. 6).

A February 2019 social history review reported that a neurologist who had seen the student twice, was "not sure clearly about his diagnosis" and was "focused more on his inability to read social cues and the rigidity of his thinking as opposed to his inattention" (Dist. Ex. 7 at p. 2). According to the social history review the student had been "in therapy" every other week for the last year with the physician who conducted the student's evaluation in first grade (*id.* at pp. 1, 2). Additionally, Eagle Hill reported that the student was "regressing socially" and twice weekly he stayed at Eagle Hill into the evening to "work on increasing his friendship and social skills" (*id.* at p. 2). The parent reported that the family was "very happy" with Eagle Hill, and that the student had made "significant" improvement in his reading, was a good speller, and enjoyed science (*id.* at p. 1).

Within the February 2019 psychological evaluation report the psychologist observed that the student maintained appropriate eye contact, was cooperative throughout the testing, and responded well to positive feedback; however, she also noted that the student needed encouragement, tended to give up easily, at times did not pay close attention to visual material, and seemed to lose stamina toward the end of the session (Dist. Ex. 8 at p. 1). The psychologist found that the student demonstrated good verbal comprehension and expression (*id.*). The student's visual attention to detail, stamina, and ability to follow directions were found to be more variable and the psychologist noted that this lack of engagement may have negatively impacted his performance on visual tasks (*id.*). Administration of a cognitive assessment to the student yielded a full-scale index in the average range with a relative weakness in the area of visual spatial skills with a score in the low average range (*id.* at pp. 2, 3, 5). The psychologist reported that the student displayed a strength in his auditory working memory skills, that his verbal skills had grown since the previous evaluation, and that difficulties with visual attention were noted (*id.* at pp. 2, 3-4). According to the February 2019 evaluation report, the Conners 3rd Edition (Conners 3) Rating Scales were completed to formally assess the student's attention (*id.* at p. 3). Parent ratings yielded a peer relations index in the very elevated range which indicated that the parent had concerns about the student's social connections and an inattention index in the elevated range indicating that the parent had some concerns about the student's inattention and distractibility (*id.* at pp. 3-4, 8-9). Teacher ratings yielded a peer relations index, a defiance/aggression index, and an inattention index all in the very elevated range, indicating that the teacher had significant concerns about the student's social skills, impulsivity, inattention, and defiance (*id.* at pp. 3-4, 6-7). In sum, the psychologist stated that more behavioral difficulties were reported at school than at home and that difficulties with social skills were consistent and reported both at school and home (*id.* at p. 4).

An April 2019 letter from a speech-language pathologist at Dramatic Pragmatics Speech and Language Center (Dramatic Pragmatics) stated that the student had been attending a social skills group at Dramatic Pragmatics since September 2018 and had previously attended therapy from 2015 to 2016 (Dist. Ex. 9 at p. 1).⁷ According to the speech-language pathologist, the student made notable gains in his self-awareness and cognitive flexibility, improved greatly in his ability to be reciprocal in his conversation, and was inherently socially motivated and incredibly

⁷ Within the February 2019 social history review the parent reported that the student attended Dramatic Pragmatics in the first grade, stopped in the second grade because of the length of the day at Eagle Hill, but then "this year" returned to Dramatic Pragmatics because Eagle Hill staff had reported that the student was regressing socially (Dist. Ex. 7 at p. 2). Dramatic Pragmatics was separate from Eagle Hill and was paid for by the parents (Tr. p. 503).

empathetic (id.). It was noted that the student continued to require in-the-moment support to consider the social nuances of presented situations, was "long-winded in nature" which caused the listener to have difficulty following his intended message, and still struggled with the initiation piece of social interactions (id.). The speech-language pathologist stated the student had "notable difficulty" with his executive function skills and presented with significant weakness in task initiation, attentional regulation, sequencing, and central coherence (id.). Reportedly while engaging in group activities the student consistently "'drift[ed] to the side and require[d] maximal verbal cueing to contribute to the group activity" (id.). It was further noted that these weaknesses were "consistent with his struggles in the areas of initiating social interactions and maintaining the 'big picture' of a conversation" (id.). The speech-language pathologist concluded that the student benefitted greatly from highly structured learning environments and that it was "crucial" that he continue to receive specialized intervention in the areas of social cognition and higher-order thinking skills to successfully navigate the increasingly abstract nature of the academic curriculum and peer-relationships (id. at p. 2).

The student's December 2019 Eagle Hill report stated that the student benefitted from visuals, frequent teacher cueing with structured expectations, prompts and support to stay on task, multiple opportunities to practice skills in isolation, repetition, the use of multiple reading strategies, extra and individualized attention in initiating work, a highly structured and predictable class, class discussions and guidance in using a prewriting tool for written work, and assistance in refraining from socializing with peers in class (see Dist. Ex. 10 at pp. 3, 6, 8, 10, 12). With respect to the tutorial class, reportedly the student needed direct support in the areas of persevering through new and/or demanding tasks, managing his time effectively, engaging in spontaneous and meaningful interactions, managing group interactions, and implementing social problem-solving strategies (id. at pp. 3-4).⁸ The December 2019 report stated that, in math and general science class, the student needed direct support in implementing social problem-solving strategies (id. at pp. 5, 6, 11). The report indicated that the student required specific prompting in several academic and interpersonal skill areas (see id. at pp. 3-4, 6-7, 9, 11, 13).

The May 2020 IEP present levels of performance included reporting from Eagle Hill staff and the parents regarding the student's academic, speech-language, and study skills (Dist. Ex. 13 at pp. 5-7). According to the IEP, the student needed to answer different types of questions about text presented orally, use memory strategies to improve story retelling skills, increase on task/attentive behavior and ability to assess a problem and possible solutions without acting impulsively, and improve his ability to: solve multi-step word problems, write multi-paragraph essays, use inferential and main idea skills, sequence plot events, and summarize a short story (id. at pp. 6-7). With respect to social development, Eagle Hill staff and the parents shared at the May 2020 CSE meeting that the student needed prompting and support to express his feelings, needed support in solving social problems, struggled with peer interactions and perspective taking, lacked coping strategies for dealing with frustration, could be rigid in his thinking, and needed to be able to read nonverbal cues and identify feelings of others (id. at p. 7).

⁸ The December 2019 report indicated that the main objective of the tutorial class was to provide intensive remedial instruction in the areas encompassed by the language arts (Dist. Ex. 10 at p. 2).

2. Appropriateness of Eagle Hill

The parents appeal the IHO's finding that they failed to sustain their burden to establish that Eagle Hill was an appropriate unilateral placement for the student, asserting that the IHO failed to consider and dismissed their evidence that Eagle Hill addressed the student's needs. In their request for review, the parents detailed the particular evidence that they believe the IHO overlooked or failed to consider in his factual findings and why he should have reached a different outcome. The IHO found that none of the testimony provided by the Eagle Hill director was sufficient to establish the appropriateness of the program provided by Eagle Hill for the 2020-21 school year (IHO Decision at p. 20). The IHO noted that the Eagle Hill director had no involvement with the student during the 2020-21 school year and had never spoken to any of the student's teachers regarding the student and the services he received and that her testimony was "simply" based on a review of the bi-annual reports prepared by Eagle Hill staff where she "basically" read the reports and "attempted" to expand on the described programs with which she was familiar (*id.* at p. 19). Additionally, the IHO found that the progress reports "provide[d] little in the way of information regarding [the] [s]tudent's benefit from such program" (*id.* at p. 20).

While the IHO may have correctly identified that some of the Eagle Hill director's testimony was based on her review of the December 2020 and June 2021 progress reports, as discussed below, her testimony also explained facets of the Eagle Hill programming and the information specific to the student contained in the progress reports provided evidence in support of the parents' position that Eagle Hill addressed the student's identified needs and was an appropriate placement for the student during the 2020-21 school year (*see* Parent Exs. C-D).⁹

Turning to the student's programming at Eagle Hill for the 2020-21 school year, an undated Eagle Hill program description stated that the school offered a language based, remedial program committed to educating children with learning disabilities (Parent Ex. A at p. 1). The Eagle Hill director described the nonpublic school as a small, coeducational kindergarten through eighth grade school that served students whose diagnoses could include ADHD, dyslexia, dysgraphia, processing disorders, executive functioning issues, social pragmatic issues, and language disorders (Tr. pp. 398-99). Eagle Hill functioned "in an ungraded fashion" wherein the students were "grouped according to function" "so that their instruction [wa]s directed to their range" (Tr. pp. 399, 408). According to the Eagle Hill director, special educators in conjunction with the school's speech-language department provided instruction "based on the language requirement of the students within the class" (Tr. p. 425).

The December 2020 student progress report indicated that the student attended a 40-minute tutorial class twice per day with a student to teacher ratio of 5:1 where the areas of emphasis included decoding and fluency, spelling, vocabulary, and comprehension (Parent Ex. C at pp. 3-5). Regarding the student's needs in reading comprehension, the December 2020 progress report stated that the student demonstrated independent skills in providing the main idea and identifying supporting details, and with support and direct instruction, he was working on skills including

⁹ Review of the transcript shows that the Eagle Hill director acknowledged that her testimony was not based on personal knowledge of the student's performance during the 2020-21 school year but was based on her review of the progress reports from that school year, and that she never spoke to any of his teachers or observed him in school during the 2020-21 school (Tr. pp. 400, 442-43; *see* Tr. p. 427).

summarizing text in oral and written format, making predictions, using comprehension moderating strategies such as rereading and note taking, and discriminating between relevant and nonrelevant information (id. at p. 4). The progress report indicated that the student was provided with and benefitted from supports and strategies such as clear consistent expectations, models that visually presented new information in order to increase self-regulation and confidence, stopping to think and discuss new information, and breaking reading materials down into manageable sections (id.). The Eagle Hill director testified that, while some students whose skills had improved received tutorial instruction for 40 minutes per day, for students who demonstrated "that level of need," the school offered tutorial instruction for 80 minutes per day to provide an "intensity of instruction" (Tr. pp. 404-05). Specific to the student, she testified that he "in particular . . . really benefitted from that consistent information from working with that same teacher, having strategies to think and discuss materials, simulating new information to utilize all the things that he learned in isolation and that is what the two periods of his day were being used for" (Tr. p. 405).

According to the December 2020 progress report, the student attended a 40-minute math class daily with a student to teacher ratio of 4:1 where the areas of emphasis included numeration/place value/number sense, word problems, computation, and practical applications (Parent Ex. C at pp. 6-9). With respect to the student's needs in solving word problems, the progress report stated that the student was demonstrating that he could independently determine the question asked in a word problem and with supports, was working toward skills such as demonstrating an understanding of math vocabulary, determining relevant information, identifying the correct operation to use, utilizing instructed strategies, checking the validity of an answer, and solving one-step and multi-step problems (id. at p. 6). Reportedly the student was provided with and benefitted from frequent review of "previously instructed concepts," cues to try a problem first before seeking teacher support, discussion of key words, and highlighting important information (id. at pp. 7-8).

In the area of writing, the December 2020 progress report stated that the student attended a daily 40-minute class with a student to teacher ratio of 7:1 that emphasized grammar, mechanics, and sentence structure/composition and which "support[ed] composition in all classes" (Parent Ex. C at pp. 10-12). To address the student's identified needs in sentence assembly and writing multi-paragraph essays, the progress report indicated that the student was engaged in activities such as writing compositions that included descriptive adjectives, focusing on paragraph organization and elaboration of ideas, and composing drafts, editing, and revising (id. at p. 10). Instructional strategies employed included the use of visuals, group brainstorming, guided questioning to help generate specific descriptive language, pre-writing organizers and prompts for their use, specific assignment requirements, repeating directions prior to initiating independent tasks, check-ins to ensure attention to topic and task, proofreading skills, and monitoring work for clarity (id. at pp. 10-11).

The student was a member of a social studies class for 40 minutes daily with a student to teacher ratio of 8:1 in which the areas of emphasis included geography skills and age of exploration (Parent Ex. C at pp. 13-15). Regarding the student's needs in the areas of social interactions in group activities, the student worked toward developing whole group discussion skills and flexible thinking skills and was provided and benefitted from increased time to process orally presented information, study guides, and visual examples of a final product before beginning to help the student understand how to complete long-term written work and projects (id.).

The December 2020 progress report indicated that the student attended a daily 40-minute literature class with a student to teacher ratio of 6:1 where the areas of emphasis included vocabulary, comprehension, and literary concepts (Parent Ex. C at pp. 16-18). Reportedly the student demonstrated skills such as the ability to independently recall facts and details, sequence plot events, make predictions, summarize texts with support, identify cause-effect relationships, make inferences, and identify instructed figurative language (id. at p. 16). Additionally, the student was provided with and benefitted from teacher guided questioning, modeling of detailed answers, frequent check-ins, review and repetition of previously instructed vocabulary and reading, small groups, opportunities to build self-regulation skills and self-monitoring of work for clarity and quality, and teacher support to turn take, listen to and understand the perspective of others, and stay on pace with his classmates (id. at p. 17).

According to the December 2020 progress report, the student attended a weekly pragmatic speech-language group, which provided explicit instruction and opportunities to practice concepts of language-based social thinking skills with emphasis on non-verbal language, conversation, and group skills (Parent Ex. C at p. 19). The progress report reflected the student's identified needs that included reading and sending non-verbal cues, participating in group conversations, maintaining a conversation with on-topic and appropriate comments, expressing feelings or opinions appropriately in a group setting, compromising and being flexible, and working with others on a group project (id.). The Eagle Hill director testified that not every student at Eagle Hill received pragmatic speech-language services, but that speech-language and learning services staff determined that the student's pragmatic language skill needs were interfering with his ability to learn and as such, he required social pragmatic support services (Tr. p. 434). The student initially worked 1:1 and then was "facilitated with another student" (Tr. p. 433).

In addition, the student received psychological services and reportedly the student was working toward long-term goals of improving social awareness and perspective taking, improving emotion regulation, and developing a better understanding of the role anxiety plays in personal interactions (Parent Ex. C at p. 20). The December 2020 progress report indicated that the student worked on activities and short-term goals including accurately identifying the problem in a social scenario/conflict, generating possible solutions, identifying the probable thoughts and feelings of each individual involved, independently choosing a coping strategy when frustrated or overwhelmed, identifying triggers to this reaction when upset or overwhelmed, demonstrating control over outwardly verbalizing negative thoughts, and expressing levels of anxiety within a problematic situation (id.). The Eagle Hill director testified that not all Eagle Hill students received psychological services, but that in the student's case, staff worked on developing the student's social awareness and perspective taking skills, improving his emotional regulation, and understanding the role anxiety played in his personal interactions (Tr. pp. 434-35).

A review of the June 2021 student progress report reveals the student continued to work on the same skill areas and was provided similar special education supports during the second half of the year as he did earlier in the year (compare Parent Ex. D at pp. 1-20, with Parent Ex. C at pp. 1-20).

The June 2021 student progress report stated that in tutorial class the student made "significant progress" in developing organizational skills in order to be more actively engaged throughout the class; developed a greater awareness and independence in using strategies that

increase his success when decoding, comprehending, and writing; and successfully wrote essays after reading articles by using a "very structured approach" to writing introductory, body, and concluding paragraphs (Parent Ex. D at p. 4).¹⁰ Reportedly the student's confidence in his math skills had grown throughout the year as did his ability in solving word problems, and he had become more independent with showing his work (*id.* at p. 7). In the area of writing, the June 2021 progress report stated that the student was demonstrating an understanding of the writing process by independently transferring ideas from his organizer into his compositions and that he had done a "nice job" composing a detailed story that contained all the story elements and followed a logical sequence (*id.* at p. 10). According to the progress report, the student had shown growth in social studies, had worked hard to challenge himself with the difficult concepts of history, and had demonstrated improved perseverance through challenging tasks (*id.* at p. 13). It was reported that in literature class, the student was able to recall specific words and definitions of newly acquired vocabulary (*id.* at p. 16). Lastly, the June 2021 progress report stated that the student had made improvements overall in managing his anxiety even though he continued to struggle with social interactions, that he had made excellent use of his time in counseling noting that as the year progressed he required less time in crisis management, and that over time he had responded better to redirection and assistance in "moving on" when he was feeling overwhelmed by emotions or academics (*id.* at p. 20).¹¹

With respect to the IHO's reliance on his findings that the Eagle Hill director's testimony was insufficient to establish the appropriateness of the student's program and that the 2020-21 progress reports provided little information regarding the student's benefit from the program in making the determination that the parents did not prove Eagle Hill was an appropriate placement for the student, as detailed above, the evidence in the hearing record, taken together, does not support the IHO's position (*see* IHO Decision at p. 20). No one factor is necessarily dispositive in determining whether a parent's unilateral placement is reasonably calculated to enable a student to receive educational benefits; grades, test scores, and regular advancement may constitute evidence that a child is receiving an educational benefit; however, in assessing the propriety of a unilateral placement, consideration of the totality of the circumstances must be used in determining whether the placement reasonably serves the student's individual needs (*see* Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The IHO appeared to question the validity of the Eagle Hill teachers' progress reporting in stating that the reports were based on "simple informal assessments" and, because the teacher was responsible for providing the student with an appropriate education, the teacher's "self-interest

¹⁰ While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

¹¹ Additionally, the parent testified that during the 2020-21 school year the student had shown progress because he was doing more complex academics, was able to do "a little more" complex problem solving and math work, was reading at a higher level, was "retaining a little better," and was able to "comprehend maybe a paragraph at the end of that year" where he had been able to comprehend only an individual sentence at the beginning of the year (Tr. pp. 486-87). In addition, he shared that academically the student was "more articulate and accurate in his language" and that he was becoming more self-reflective (Tr. p. 487).

would probably interfere with a true assessment" (IHO Decision at p. 20). Initially, the IHO is correct to the extent that objective evidence of progress is preferable to subjective statements made by the student's teachers (see R.H. v. Bd. of Educ. Saugerties C. Sch. Dist., 2018 WL 2304740, at *7 [N.D.N.Y. May 21, 2018], aff'd, 776 Fed. Appx. 719 [2d Cir. 2019] [finding insufficient evidence of a student's progress at a unilateral placement where the hearing record did not include objective evidence, such as report cards, progress notes, work samples, standardized assessments, or progress towards written goals]). However, as discussed in detail above, the progress reports are not entirely subjective as they identify the specific areas the student was working on and the progress that the student made in those areas. The mere fact that the reports were made by the student's teacher should not be used as a basis for disregarding them completely; without reports from the teachers educating the student, it is unclear from where the IHO expected to gather information regarding the program offered at Eagle Hill. Certainly, the fact that the teachers who completed the progress reports did not testify at the impartial hearing could be used as a reason for attributing less weight to the submitted and accepted evidence; however, the evidence presented is uncontroverted and should not be outright dismissed.¹²

The IHO further noted that although the student had obtained very elevated scores in the areas of peer relations and defiance/aggression on the Conners 3 Rating Scale, "there appeared not one report of even one instance of any inappropriate conduct" of the student (id.). While the IHO is correct that the 2020-21 progress reports do not describe instances of the student engaging in "inappropriate conduct," there is no evidence that is due to misreporting by Eagle Hill staff, rather, review of the evidence shows that the student received additional supports for his social skill needs following the February 2019 administration of the Conners 3 assessment to the student, which may have contributed to improved skills in this area (Dist. Ex. 13 at pp. 1, 7).

Review of the hearing record reveals that teacher rating from the Conners 3 Rating Scale yielded a peer relations index, a defiance/aggression index, and an inattention index all in the very elevated range indicating the teacher had significant concerns about social skills, impulsivity, inattention, and defiance (Dist. Ex. 8 at pp. 3-4, 6-7). The May 2019 CSE meeting information summary included parent reporting that the student was "really working on his peer relationships this year because she ha[d] seen more conflict in this area" and the parents added that social issues could really impact the student and that he struggled with nuance and engaged in binary thinking (Dist. Ex. 2 at p. 2). Within the May 2019 IEP the parents reported that there had been more peer difficulties that year which was why the student joined the Eagle Hill afterschool program to work on social skills and received private therapy and social skills group instruction (id. at p. 7). The May 2019 IEP included Eagle Hill staff reporting that the student struggled with flexibility,

¹² It should not be overlooked that the scheme set forth by Congress in the IDEA is one that favors the documentary approach. For example, public school IEPs are to include written descriptions of student needs, written goals and/or objectives, and a written description of the special education services to be provided. Congress also required that periodic written reports regarding the student's progress on annual goals be provided to parents each year at specified frequencies, which reports support and provides context for the next annual review process and revision of the IEP (see 20 U.S.C. § 1414 [d][1][A][i][III]). The Eagle Hill progress reports in evidence in this case accomplish similar objectives in that they describe the particular special education services being provided to the student during the relevant time period, describe how the student is performing, and provide this information to the parents. Unlike a public school IEP, the Eagle Hill reports are not prepared before the services are delivered; however meticulous compliance with the IEP procedures is not required of parents when seeking reimbursement for a private unilateral placement under Carter.

executive functioning, and peer relationships and that he could over-react to small events, misperceive social interactions, and tended to take things personally (*id.*). According to Eagle Hill staff the student could be long-winded when talking with peers and struggled to stop and think when faced with a challenging situation and that the school staff was working with the student in "keeping things small" and to stop and think before acting (*id.*).

The December 2019 progress report included reporting that the student needed direct support in the areas of engaging in spontaneous and meaningful interactions, managing group interactions, implementing social problem-solving strategies, compromising and being flexible with others, and respecting others' opinions (Dist. Ex. 10 at pp. 3-4, 6, 11, 15). The progress report also included reporting that the student was reliant on a highly structured and predictable class as well as the guidance and direction by the teacher to successfully follow class routines and needed assistance in refraining from his desire to socialize with peers (*id.* at pp. 6, 8).

The hearing record shows that during the 2018-19 school year and fall 2019, the student was exhibiting challenging behaviors in the areas of peer relations and defiance and aggression, and that Eagle Hill staff reported on this behavior. Here, the fact that the December 2020 and June 2021 progress reports lacked specific instances of the student engaging in "inappropriate conduct" appears more likely to be a result of improved/changed behavior and less likely the work of a "self-interested" teacher unwilling to report negative student behavior, as review of the progress reports shows that the student's teachers continued to report that the student required prompting or direct support to manage group interactions, implement social problem solving strategies, and take responsibility for his behavior (*see* Parent Exs. C at pp. 5, 9, 12, 15, 18; D at pp. 5, 8, 11, 14, 17). Additionally, the clinician who provided the student's psychological services did not hide her impression that the student continued to struggle with social interactions, would benefit from continued counseling, was not able to persevere and required "a great deal of assistance" to move on when feeling overwhelmed by emotions or academics (Parent Ex. D at p. 20).

Next the IHO raised concerns regarding the sufficiency of the services provided by Eagle Hill since "within months of the conclusion of the 2020-[21] school year" the parents sought and obtained weekly therapy sessions to address "what was the prime concern of [the] [parents] during the 2020-[21] school year" (IHO Decision at pp. 18-19). I note that the hearing record also reflects that, during the 2018-19 and 2019-20 school years, the student participated in afterschool programs (through both Eagle Hill and Dramatic Pragmatics) focusing on his social skills (*see* Dist. Exs. 7 at p. 2; 9 at pp. 1-2; 13 at p. 7). The IHO is correct that the student also began receiving private counseling services in September 2021 (Tr. pp. 357-58), but the fact that the parents may have obtained additional support for the student to develop social skills outside of his program at Eagle Hill, over the course of multiple school years, has little bearing on the appropriateness of Eagle Hill, as the hearing record supports finding that Eagle Hill provided special education to address the students identified needs as discussed above, such that Eagle Hill was an appropriate placement for the student.¹³ The fact that the parents obtained private assistance for the student from more

¹³ A parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (*see C.L.*, 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting *Frank G.*, 459 F.3d at 365).

than one source does not undermine the fact that the student received appropriate special education services when the totality of the circumstances is considered. I would be more concerned if there was evidence that student had needs that were going unmet, but that is not this case. Overall, the hearing record demonstrates that Eagle Hill identified the student's special education needs and provided the student with a program for the 2020-21 school year that was reasonably calculated to enable the student to receive educational benefits.

Lastly, the IHO found Eagle Hill was not appropriate due to LRE considerations, finding that "to the maximum extent possible" students with disabilities should be educated with their nondisabled peers (IHO Decision at pp. 20-21). The IHO found there were no nondisabled peers at Eagle Hill and therefore, the student had "no opportunity whatsoever to observe or model his conduct on that of [a] non-disabled peer" (*id.* at p. 21). The parents contend that although restrictiveness of a unilateral placement may be considered, it is the "totality of the circumstances" that must be considered in determining the appropriateness of the unilateral placement (Req. for Rev. ¶ 26).

It is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (*M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers*, 231 F.3d 96, 105 [2d Cir. 2000]; *Walczak*, 142 F.3d at 122; *see Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (*C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 830, 836-37 [2d Cir. 2014] [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in *Burlington*"]; *see Carter*, 510 U.S. at 14-15; *M.S.*, 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (*Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 [2d Cir. 2006]).

In this case, the hearing record does not indicate that the student had access to typically developing peers during his academic classes (*see* Tr. p. 450). However, it must also be noted that one of the reasons the IHO found the district's placement to be inappropriate was that it did not recommend a full-time special education program for the student, recommending ICT services in a general education classroom for one period per day instead—specifically noting his concern that the program did not "address the real possibility of [the s]tudent having negative interaction with other—and unfamiliar—students" (IHO Decision at p. 16). It would seem that the program at Eagle Hill, providing special education classes for the student, rectified the IHO's main concern about the public school placement; it appears contradictory for the IHO to have found the program at Eagle Hill inappropriate for this exact reason. Additionally, in consideration of the totality of the circumstances, including that Eagle Hill provided the student with specially designed instruction to address his identified needs, and the relevant factor of the student's reported progress at Eagle Hill, even if they were at issue, LRE considerations would not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at Eagle Hill for the 2020-21 school year was appropriate (*C.L.*, 744 F.3d at 837; *Gagliardo*, 489 F.3d at 112; *see Frank G.*, 459 F.3d at 364-65).

C. Equitable Considerations

Having found that Eagle Hill was an appropriate unilateral placement for the student for the 2020-21 school year, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

In his decision, the IHO did not address whether equitable considerations weighed in favor of the parents' request for reimbursement of the costs of the student's tuition at Eagle Hill because the IHO found Eagle Hill was not an appropriate unilateral placement (see IHO Decision at p. 21). The parents seek a finding that equitable considerations favor an award of tuition reimbursement (Req. for Rev. ¶ 28). The district argues that the IHO correctly found that an analysis of equitable

considerations was not necessary, however, the district argues that if the issue of equitable considerations was addressed it does not favor the parents.

The parents asserted that they attended CSE meetings, cooperated with the CSE to develop an IEP for the student, and considered the district's recommendations (Parent Br. at pp. 24-25). The evidence in the hearing record shows that the parents attended the May 2020 CSE meeting and there is no indication in the hearing record that they impeded the district's ability to meet its obligations under the IDEA (see generally Tr. pp. 460-506; see generally Parent Exs. C-D; see generally Dist. Ex. 13). In addition, the evidence in the hearing record demonstrates that the parents visited the middle school in which the student would have attended for the 2020-21 school year (Tr. pp. 481-82).

The district does not point to any evidence showing that the parents were uncooperative in the development of the student's program. Rather, the district contends that equitable considerations warrant a denial of relief because the parents agreed to enroll the student at Eagle Hill for the 2020-21 school year and paid a deposit prior to the CSE convening to develop the student's program for the 2020-21 school year. As a factual assertion, this chronology of events is correct, the parents agreed to enroll the student at Eagle Hill on or about January 24, 2020 and the CSE convened on May 1, 2020 (see Parent Ex. B; Dist. Ex. 13).¹⁴ However, contrary to the district's assertion, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). Accordingly, equitable considerations do not weigh against the parents' request for tuition reimbursement.

Although not raised by the district, a review of the hearing record demonstrates that the parents failed to submit to the district 10-business-day notice of the unilateral placement at Eagle Hill.¹⁵ The parent completed a "Resident Student Parentally Placed in Non-public Schools Outside of District Planning for the 2020-21 School Year" form on January 7, 2020 (Dist. Ex. 11).¹⁶ As of that date, the parents indicated that for the 2020-21 school year that they had "not decided on a

¹⁴ Additionally, to the extent that the district asserts the parents should not be allowed to seek a FAPE from the district because the parents never intended to place the student in a public school, this argument is factually incorrect as the parents explicitly requested that the district convene and develop a program for the student for their consideration (Dist. Ex. 11). There does not appear to be sufficient reason for finding that the parents' actions resulted in a situation where the district was relieved of its obligation to offer the student a FAPE such that equitable considerations would warrant a reduction in reimbursement (see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665 [S.D.N.Y. 2011] ["a district-of-residence's obligations do not simply end because a child has been privately placed elsewhere"]).

¹⁵ The 10-day notice "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

¹⁶ Several weeks later and on January 22, 2020 and January 24, 2020, the parents separately executed a 2020-21 re-enrollment contract for Eagle Hill (see Parent Ex. B).

program for the 2020-21 school year," and wanted to consider the district's recommendation before making a determination for the student's program (*id.*). Next, on the form the parents indicated and signed that they did not intend to place their son at a nonpublic school for the 2020-21 school year and intended to enroll the student in the district schools. However, the parents indicated in a handwritten note that such statement was "contingent on an appropriate program recommendation" (*id.*). Similarly, the evidence in the hearing record also fails to demonstrate that the parents informed the district during the most recent CSE meeting of the student's placement at Eagle Hill prior to the student's placement there for the 2020-21 school year (*see* Dist. Ex. 13).

Based on the foregoing, the equitable considerations do not weigh in favor of full tuition reimbursement. Had the parents notified the district of their rejection of the IEP and intent to unilaterally place the student in a timely manner, the district may have offered to reconvene the CSE at a time when the student's program could have been effectively amended to address the parents' concerns before the commencement of the 2020-21 school year. By failing to communicate with the district in the manner contemplated by the IDEA, the parents deprived the district of the opportunity, before the student was removed "to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (*Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 [1st Cir. 2004]).

Accordingly, considering the lack of notice 10 business days prior to the student's removal from the public school, I will exercise my discretion under the particular circumstances in this case to reduce reimbursement for the student's unilateral placement by 10 percent of the tuition at Eagle Hill.¹⁷ Accordingly, the parent's requested reimbursement for up to \$70,110.00 for the Eagle Hill tuition will be reduced by 10 percent (\$7,011).¹⁸

VII. Conclusion

As discussed above, there is insufficient basis to overturn the IHO's conclusions that the district failed to offer the student a FAPE for the 2020-21 school year. Having determined that there are sufficient reasons to overturn the IHO's finding that Eagle Hill was not an appropriate unilateral placement for the 2020-21 school year, and finding that equitable considerations support a reduced award, the parents are entitled to tuition reimbursement for the cost of the student's tuition at the Eagle Hill for the 2020-21 school year less 10 percent.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision, dated February 24, 2023, is modified reversing that portion of the decision that found Eagle Hill was not an appropriate unilateral placement; and

¹⁷ The father testified that he paid the full tuition owed (Tr. p. 484; *see* Parent Ex. B).

¹⁸ The amount of \$7,011 is equal to the tuition deposit made by the parents upon signing the 2020-21 re-enrollment contract for Eagle Hill (*see* Parent Ex. B at p. 1).

IT IS FURTHER ORDERED that the IHO decision, dated February 24, 2023, is modified by awarding the parents partial reimbursement for the cost of the student's tuition at Eagle Hill for the 2020-21 school year in the amount of \$63,099.

Dated: **Albany, New York**
 June 15, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER