

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Ridgefield Board of Education

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Appearing before: Melinda A. Powell, Esq.

**ISSUES:**

1. Are the Parents entitled to reimbursement for the neuropsychological evaluation performed by Dr. O’Leary?
2. Did the Board provide FAPE for the 2015-16 school year and ESY 2016?<sup>1</sup>
3. If not, are the Parents entitled to reimbursement for Eagle Hill?
4. Did the Board provide FAPE for the 2016-17 school year and ESY 2017?
5. If not, are the Parents entitled to reimbursement for Eagle Hill?
6. Did the Board offer FAPE for the 2017-18 school year?
7. If not, are the Parents entitled to reimbursement for Eagle Hill?
8. Is the Student entitled to compensatory education as a remedy for the violations alleged as to ESY 2017?<sup>2</sup>

**PROCEDURAL HISTORY**

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<sup>1</sup> At the November 6, 2017 hearing on the Board’s motion to dismiss, the Parents represented that the starting date for the reimbursement claim for the 2015-2016 school year was September 1, 2015, since the Due Process complaint was filed on August 31, 2017, and there was a settlement agreement covering the time period before that date. In their post hearing brief, the Parents withdrew their claim regarding ESY 2016. Parents’ Brief, p. 1. Therefore, the complaint is dismissed as to that issue.

<sup>2</sup> The Parents did not withdraw their claim regarding ESY 2017, but do not seek a remedy of compensatory education. Parents’ Brief, p. 1. Therefore, the complaint is dismissed as to this issue.

On August 31, 2017, the Parents filed their due process hearing request. (HO-1). The Hearing Officer was appointed on September 7, 2017. A prehearing conference was held on September 12, 2017 and the parties agreed to the statement of issues. The due process hearing took place over the course of fourteen days on the following dates: November 6, December 11 and 15, 2017; and January 10, 25, and 26; February 5 and 6; April 3, 5, 16 and 25; May 31; and June 19, 2018. The November 6, 2018 hearing date was dedicated to procedural and evidentiary matters. Testimony from witnesses began on December 11, 2018. Parents' exhibits 15,16, 18- 25 27-29, 31-38, 40-51 were admitted in full. Parents' exhibits 1, 8, 9, 10 and 11 were admitted for historical/ background purposes only. Parents' exhibits 2 through 7 and 12 through 14 were withdrawn. Parents' exhibits 17, 26 and 30 were audio recordings and admitted to be used for impeachment purposes only during live testimony. Parents' exhibit 39, which was an evaluation completed in November 2017, was admitted solely for the issue of remedy (compensatory education). Board exhibits 1-33 were admitted as full exhibits.

The following witnesses were called by the Parents:<sup>3</sup> the Ridgefield High School Psychologist, the High School Special Education Teacher; the independent neuropsychologist, the Eagle Hill Head of School, the Parent and the Student.

The Board also called several witnesses: the East Ridge Middle School psychologist, the special education teacher, the Assistant Superintendent for Special Services, the High School Special Education English teacher for the co-taught English class, the Transition Coordinator, and the High School Physical Education teacher.

On July 2, 2018, the Parties filed their post hearing briefs. On July 14, the Parties filed their reply briefs.

The Parents argue that the 2015-2016 IEPs are deficient in the following respects: (1) the Student required small, structured classroom environments in all academic areas due to the Student's auditory processing challenges, academic deficits, inattention and anxiety. Specifically, it is argued that the Student requires direct teacher instruction and scaffolding; previewing of instruction material, and consistent breaks in the classroom; (2) there was no Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) to address interfering behaviors; (3) the Student needed greater direct speech language services which were also integrated during the school day; (4) the Student needed greater amounts of social skills intervention and training throughout the school day; (5) the IEP failed to assess auditory processing deficits.

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<sup>3</sup> The testimony of the witnesses will be cited as follows: Ridgefield High School Psychologist ("RHS Psych."), High School Special Education Teacher ("HS Sped. Teacher"); Eagle Hill Head of School ("Head of School"); Parents' Neuropsychologist (Neuropsych.); Ridgefield High School Transition Coordinator ("Trans. Coord."); East Ridge Middle School psychologist ("MS Psych."); East Ridge Middle School Special Education teacher ("MS Sped. Teacher"), Ridgefield Assistant Superintendent for Special Services ("Asst. Supt."); High School Special Education English teacher ("HS Eng. Teacher"); High School Physical Education teacher ("PE Teacher").

For the 2016-2017 school year, when the Student would have attended 8<sup>th</sup> grade, the Parents argue that a general education program, with the Student reading below grade level, was inappropriate and the IEP again lacked a recommendation for an FBA. They also argue that the speech/language and social skills services offered were not appropriate because the Board failed to collect any data during the Student's visit, schedule an additional PPT meeting or develop transition planning prior to the 2016-2017 school year.

For the 2017-2018 school year, the Student would have attended 9<sup>th</sup> grade. The Parents argue that the proposed program was inadequate because the team recommended a co-taught general education class in English and Social Studies, a general education Science class, insufficient direct speech/ language services and a lack of integrated social skills instruction. Furthermore, the IEP did not address any transition into Ridgefield schools to ease the Student's entry into the public school setting. Lastly, the Parents argue that Eagle Hill was an appropriate unilateral placement because it provides the small, language based structured setting the student required.

The Parents did not brief Issue #1 nor explain or cite evidence from the Record to support their reimbursement claim for Dr. O'Leary's evaluation.

The Board defended its IEPs as providing an opportunity for meaningful progress in both small, self-contained language and math classes, but also by providing other academics in a mainstream, least restrictive environment, with appropriate supports, highly trained personnel, access to adult support, social skills instruction, access to a BCBA consultant, and monthly parent meetings, in the Ridgefield Intensive Special Education ("RISE") program.

All motions and objections not previously ruled upon, if any, are hereby denied and/ or overruled. To the extent there was conflicting testimony, the Hearing Officer finds the testimony of the witnesses cited herein more credible than witness testimony not relied upon.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F. Supp. 340 (S.D. Tex. 1993); *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F. Supp. 816 (M.D. Tenn. 1985).

### **STATEMENT OF JURISDICTION:**

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 *et seq.* and related regulations, Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

### **FINDINGS OF FACT**

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

1. The Student is a fourteen-year-old student, eligible for special education services under the category of autism. (B-8). Prior to summer 2017, the Student had never attended a public school. (Head of School Test). The Student attended the Eagle Hill School during the 2015-2016, 2016-2017 and 2017-2018 school years. (Id.) The Parents have not challenged the Student's disability category of autism in this proceeding.
2. The Parents and the Board entered into a settlement agreement concerning the Student's education prior to the time period relevant to this proceeding. (B-1). Under the terms of the settlement agreement, the Parents and the Board settled all issues relating to the 2014-2015 school year, through August 24, 2015. (B-1). The Parents did not waive any claims relating to the 2015-2016 school year. (Id.)

### 2015-2016 School Year

3. The 2015-2016 IEP was developed on March 30, 2015, after the Board had completed evaluations. (B-4, B-5, B-6, B-8).
4. An educational evaluation was completed by the Board (by the special education teacher) dated February 27, 2015, which assessed the Student's then-current levels of academic performance in the areas of reading, writing and mathematics. (B-6). The evaluator reviewed reports from the Student's school where she was privately placed, Eagle Hill. The Student attended testing at East Ridge Middle School on two dates in February 2015. The Student was fearful of the school bells, so the evaluator warned her in advance. The reading evaluations demonstrated both strengths and weaknesses. Strengths were in decoding; weaknesses were in reading comprehension. If the book was available during testing for comprehension, she would perform better. Math scores were below average, impacted by deficits in reading comprehension and fact knowledge. Multiple recommendations were provided to enhance the Student's learning including books on tape, calculator, providing models and examples to follow, extended time, use of a computer, provide explicit expectations and directions, graphic organizers to plan writing and posting of routines and schedules. (Id.)
5. Observations of the Student were also conducted by a Board Certified Behavioral Analyst ("BCBA") and a school psychologist during spring 2015. (B-7). During these observations, she engaged in behaviors such as "biting her cuticles, fingers in mouth, making noises that were out of context (e.g., squeaking, "wah wah wah" and "raspberry" sounds), giggling, and making silly faces)." The Student was redirected by the teacher, who stated "I expect appropriate behavior." (B-7).
6. The IEP of March 30, 2015 recommended the following:

Language Arts Instruction: 1x daily for 80 minutes in a small group pull-out.

Math Instruction: 1x daily for 55 minutes in a small group pull-out.

Speech Language Therapy: 2x weekly for 40 minutes in a small group pull-out.

Occupational Therapy: 1x weekly for 40 minutes, individual pull-out; 1x monthly consult to the team

Social Skills: 2x weekly for 20 minutes group pull-out; 1x weekly for 30 minutes individual pull-out.

BCBA consult to the team.

Full time paraprofessional.

Monthly team meeting with the family.

ESY (6/30/15-7/23/15): Social Skills: 3x weekly for 30 minutes; Language Arts/ Math: 3x weekly for 3 hours

The site of the special education services was identified as the Resource/ Related Services Room.

7. The following accommodations were also provided for the 2015-2016 school year:

Materials/Books/Equipment:	Access to Computer, Audio versions of books, Calculator, checklist for written work, graphic organizer, manipulatives, math formula card, multiplication chart
Assistive Technology:	Access to Word Processor
Test/ Quizzes/ Assessments:	Advance notice of tests, alternative tests, check for understanding, chunk multiple choice questions, content specific study guides, extra time-Tests, projects/ written work. Grade level homework not required, highlight key words, one testing page at a time, prior notice of tests, reduced reading, reduced writing, rephrase Test Questions/ directions, separate location, word bank. Extra time projects, Extra time written work, Pace Long Term Projects
Grading:	Grade based on work with modifications.
Organization:	Break down assignments/ projects, check student homework planner, checklist of items put in backpack, homework folder, visual or picture schedule
Environment:	Preferential seating, Reduction of auditory or visual stimulation, Seat away from distractions/ noise source, Seat with proximity to teacher
Behavioral Interventions and Support:	Cue expected behavior, cue for refocusing, review clear expectations

Instructional Strategies: Breakdown directions, check for understanding, check work in progress, cue attention when speaking, sentence starters for written work, visuals to support instruction, word banks.

Other: Post daily routines and schedules. Outside prior to a planned fire drills, access to sensory strategies.

8. On May 5, 2015, the Parents sent the Board a letter (B-9) rejecting the program in East Ridge Middle School for the 2015-2016 school year, and advised that they would be placing the Student at Eagle Hill School and would seek reimbursement from the Board. The letter states that the Director of Special Education had invited them to visit the special education program including the RISE program at East Ridge, but instead, the Parents were told by staff that they could meet to discuss the program in lieu of observing the current students in the program.

#### Eagle Hill Programming

1. The Parents also called as a witness, the Head of School for Eagle Hill, the Student's school during the years in question. (Head of School Test.) She also participated at PPT meetings for the Student and provided input into the program that was developed. (P-50, B-20)
2. Eagle Hill is a school designed for language-based learning disabled students. The school serves students aged 5 through 14 years of age. Students usually stay at Eagle Hill for three to four years before returning to a more "traditional" setting. The Student has attended Eagle Hill since the third grade. The School staff do not believe in pulling students out of class for individual services. Students rotate every period and usually have six teachers per day. Some of the Student's classes include up to 12 students; The Student's homeroom class had 20 students in it in small groupings. (Head of School Test.)
3. Eagle Hill does not provide certain related services, such as occupational therapy or behavioral support services. The Student does not receive occupational therapy at Eagle Hill. The Student also did not receive any direct instruction in social skills., rather, the social skills are reinforced by the teachers, or as referred to by the Head of School, infused into the curriculum. (Head of School Test.)
4. Eagle Hill is a "hybrid" program in which only select slots are approved by the Connecticut Department of Education, in part because the school employs non-certified teachers. (Id.) Students who have IEPs which call for services that Eagle Hill does not offer either cannot be placed there with an IEP or would need to have the service not offered removed from their IEP. If, for example, a student occupies one of the state-approved seats at Eagle Hill, that child cannot have occupational therapy in his or her IEP, and it would have to be removed. ((Head of School Test.)

5. Eagle Hill does not offer the services of a BCBA. Though Eagle Hill has two psychologists on staff with experience in behavioral interventions, these two psychologists were new to the school at the time of the due process hearing. The Student has not been offered a written behavior plan while at Eagle Hill. Though Eagle Hill is aware of some long-running behaviors of the Student they have never recommended that a functional behavioral assessment be conducted. (Id.)
6. At Eagle Hill, there were approx. six to eight students in the writing and math classes. This school year (2017-2018), the Student's science class was twelve students. The purpose of the larger grouping is to get the students ready for a transition to larger classes, in anticipation of the students returning to public school. Social skills instruction is integrated throughout the day, including during lunch periods. (Id.)
7. The Student has been involved in sports classes and teams at Eagle Hill, including softball, soccer, field hockey, cross country, running, hip-hop, basketball, and hockey. (Student Test.). She is also an avid equestrian and loves animals. (Id.)(Parent Test.)

#### 2016-2017 School Year

8. The Parents received a letter dated December 3, 2015 from the Board to schedule a PPT meeting to plan for the next school year. (B-10)
9. The middle school psychologist observed the Student at Eagle Hill on February 29, 2016 during her communications class. (B-11). She observed the Student biting her nails, and being given a pencil with a manipulative to fidget with. The Student later initiated using the manipulative without prompting. (Id.) However, she later required redirection, and the teacher told her to sit on her hands. During the observation, when the class giggled at a sound, the Student giggled longer than the others, but was compliant with a teacher prompt to stop. (Id.) The Student did not initiate conversation during an activity to practice conversational skills, but did answer questions when asked.
10. On March 2, 2016, the middle school special education teacher also observed the Student at Eagle Hill. (B-12). The Student participated in the lesson, appeared to check her work for accuracy by comparing to the board and her classmates, and stayed on task. At the end of class, the Student independently packed her materials, put on her coat and transitioned to the next class. (Id.)
11. The PPT for the 2016-2017 school year was held on March 17, 2016. (B-14). In the IEP, language arts instruction was increased to 100 minutes daily, and math instruction was decreased by five minutes, to 50 minutes per day. Total special education hours were increased to 12.50 weekly. An occupational therapist was also present and recommended weekly, individual therapy for 40 minutes with a monthly consult to the team. She also recommended various strategies for the classroom and at home to address the Student's fidgeting and nail biting. The remainder of the recommendations were maintained from the prior IEP. The staff who had observed the Student in her private placement attended the

meeting and reported on their observations. The PPT recommended placement at East Ridge Middle School. (Id.)

12. By letter dated August 16, 2016, the Parents rejected the IEP. The letter stated that at the end of the school year, the Student visited the recommended RISE program at the middle school. However, the Parents did not believe the IEP was appropriate, and stated they would be placing the Student at Eagle Hill. (B-15).
13. Thereafter, another PPT meeting was held on September 16, 2016. (B-16) The Parties dispute whether the Parents stated their intent to transition the Student to the middle school that year. (Parent Test.)(B-16). The PPT meeting summary states, “[Parent] stated that [the Student] lives in a nonfiction world and she finds it very difficult to interpret literature and use abstract reasoning. [The Parent] asked the team to consider placing [the Student] in 7<sup>th</sup> grade. After much discussion the team agreed to gather more information from Eagle Hill before making a decision as to the grade placement upon transition back to ERMS. The team discussed implementing a transition plan in order to insure that the transition back to ERMS will be success for [the Student.] Further discussion about the transition plan will occur when the school team can discuss a transition plan with Eagle Hill. The team agreed to allow [Parent] time to meet with staff at Eagle Hill to inform them of [the] placement decision...The goal would be to begin the transition in October.” The notes also state that the Parent signed a release for Eagle Hill. (B-16).
14. However, the Parent testified it was not the Parents’ intent to transition the Student mid-year. (Parent Test.)<sup>4</sup>
15. Later in the 2016-2017 school year, the Student visited Ridgefield High School and attended four classes and a lunch period on February 15, 2017. (B-17). She attended special education social skills and a special education, self-contained math class, as well as general education Earth Science and Health. She was accompanied by a paraprofessional throughout her visit at the school. (Id.) The summary report states that she showed an interest in science and also shared a personal interest in social skills class and participated in the other classes. (Id.)

#### 2017 ESY Program

16. The Student attended the Board’s Extended School Year (“ESY”) program during summer 2017. The Parent testified that she felt that the Student would have difficulty with general

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<sup>4</sup> In order for the Hearing Officer to credit the Parent’s testimony over the evidence contained in the PPT meeting minutes, she would have to make an inference that the lengthy recitation of the team members’ discussion was fabricated by the Board’s staff. Having assessed the witnesses’ credibility during the hearing, the Hearing Officer finds that it is unlikely the detailed summary was created out of whole cloth. Therefore, the Hearing Officer finds that it was more likely the discussion did occur, but there was a change of heart sometime thereafter.



education classes as proposed by the PPT, given her difficulties with concentrating and staying focused. However, she thought that the Student should try the ESY program, and the PPT could reconvene after ESY to review the IEP. (Parent Test.; P-27).

17. The Board recorded performance data during the 2017 ESY period. The Student was happy and comfortable in the ESY program, and she interacted appropriately with her peers and the staff. (MS Sped. Teacher). She also participated appropriately in her social skills group. (MS School Psych.) She made progress in social skills, increasing her eye contact, her ability to ask others questions, and participating in conversations. (Id.) She did not engage in anxious behaviors such as picking her lip or biting her nails. (MS Sped. Teacher). She had no issues or conflicts during the ESY program. (MS Sped. Teacher). The Parents had a very positive view of the Student's experience in the ESY period. (Parent Test.) The Parents acknowledge that the Student liked going to ESY, and that she interacted well with her peers. (Id.) The Student was also excited to ride a bus to school for the first time. (Id.) Board staff contacted the Parents during the ESY program to update them on how well the Student was doing. (Id.) Board staff also met with the Parents to discuss the ESY program. (MS Sped. Teacher). Staff observations of the Student during the ESY program reinforced their belief that she would fit in and be successful at the high school. (MS School Psych.).
18. The Board's behavioral consultant observed the Student during ESY and wrote summaries of her observations. The initial observation showed little self-initiated participation by the Student. However, during a subsequent observation n the Student interacted with the teacher and her peers. (B-24)
19. Many of the students with whom the Student interacted with had similar interests or enjoyed discussing similar topics. (MS School Psych.)
20. However, the ESY program was deficient in a number of respects. Objective 4.3 (Given a mathematics problem including mathematics vocabulary, the Student will correctly identify the vocabulary to solve the problem) was not introduced at all to the Student. (High School Sped. Teacher Test., P-29) No data was collected for Objective 1.3 (The Student will identify and use a preferred study strategy to prepare for a content area assessment). (Id.) The witness testified that, as the Student's special education teacher for ESY, she was responsible for Objectives 1.1, 1.2 (she did not take data on 1.3 during ESY); 2.1 – 2.4; 3.1-3.3; 4.1, 4.2, 4.4, and 4.5 (she did not take data on 4.3 during ESY, testifying that she did not get to that objective). The Student was taught using materials at the 8<sup>th</sup> to 9<sup>th</sup> grade reading level. However, her reading level ranged between the 4<sup>th</sup> and 5<sup>th</sup> grade level. (P-29, MS Sped. Teacher Test.; Head of School Test.)

#### 2017-2018 School Year

21. The Parties did not disagree on the goals and objectives of the 2017-2018 IEP. (P-50, P-51) The Parents introduced the transcript of the meeting into evidence. (P-50) The transcript shows agreement among all the PPT members, including the Parent that was present, on the Student's needs, current levels of performance and program modifications and

accommodations. (Id.) There was a collaborative discussion and adjustment of the program based on input by the Head of School. Several accommodations were removed or adjusted as being not currently necessary, including having the Student outside the building during fire drills and not requiring testing in an alternate location. (Id.)(B-20, B-21)

22. The 2017-2018 IEP addressed the Student's needs in the area of social skills. The IEP provided direct social skills instruction and intervention, and the general education classes would provide an opportunity to practice those skills in the natural environment with typical peers. (B-20, B-21, Asst. Supt. Test.)
23. There were also opportunities for social interaction through the RPS Friends program, an after school club. The School Psychologist and social worker are co-advisors. The group facilitates interactions between students with disabilities and neuro typical peers. The club meets every week to play games and give social opportunities for the students. The group have interactions with the kids and they also plan special events and activities. Such as "Friendsgiving", a holiday shopping trip to the mall and other fun activities.
24. While there was evidence in the record that the Student had been fearful of loud noises and used headphones to quell them, there was no evidence that there was a current concern in that regard. The evidence did not show that it was likely that loud noise, such as the school bell signaling classroom transitions, would negatively impact the Student should she attend RHS. The Student testified that headphones were not currently used for that purpose. (Student Test.) She enjoyed a visit to Disney World, but was disappointed that Space Mountain was closed. (Id.) She attended a Lady Gaga concert. (Neuropsych. Test.) There was also no evidence that the bell system negatively impacted the Student during her school visits. (B-17)
25. The PE teacher taught both regular and adaptive PE and was familiar with teaching students with disabilities in that environment. (PE Teacher Test.) The Student has participated in sports and enjoys them. (Id.)
26. None of the challenged IEPs contain the acronym RISE.
27. The Parents' real concerns were focused on the inclusion components of the IEPs, the size of the public schools and the number of students in the regular education classes. The Parent testified that the Student was operating on about a fourth to fifth grade level. The Parent envisioned that in a general education social studies classroom, the material would be at a middle school level, above the Student's level of understanding. She was concerned that the class would move too quickly or if the Student did not understand the material, she would disappear into her internal thoughts and bite her nails. She did not feel that the Board was really explaining how she would access her education at a middle school level; she could not understand how that would happen. (Parent Test.)
28. The Student's independent neuropsychologist testified on January 26, 2018. She is a New York State-licensed Psychologist. She and her clinical partner conduct neuropsychological evaluations for children, teens and young adults on behalf of families and school districts in Connecticut and New York. (P-42). She completed neuropsychological testing in September

2016 and completed a follow up in 2017. (B-18, Neuropsych. Test.) She personally met the Student in a clinical setting for approximately 1/2 hour on two occasions to complete an evaluation. Her clinical partner completed the rest of the testing. The Student presented as polite and cooperative, with challenges in impulse control, attention, and executive functioning; very specific challenges in mathematics; an immature interpersonal style; and challenges with pragmatic language. (Neuropsych. Test.) She explained the Student's performance on the various assessments, and how that translates into every day performance. The Parents' evaluator did not believe the Student met the medical definition for autism due to a lack of repetitive behaviors. Rather, she opined the student had a social pragmatic disorder and Attention Deficit Disorder profile. She described the Student as neurotypical because of she did not diagnose the Student with autism. The Student's performance on this testing was comparable with the Board's testing completed the prior year to inform the IEP development. (B-18)(B-6). Among her recommendations was a small, structured setting in a school serving students with language based disabilities, as distinguished from a larger setting where the Student would have assistance from a paraprofessional. The witness believed that if the Student was assisted by a paraprofessional or a teacher's aide, there would be a negative response directed toward the Student from other students in the class. She may also be bullied without the ability to recognize she was being bullied. (Neuropsych. Test.)

29. However, many of the neuropsychologist's recommendations were contained in the Student's IEP, including, but not limited to access to a calculator, structured social skills instruction, testing accommodations, language therapy differentiated math instruction. (Neuropsych. Test., B-18, B-20, B-21).
30. The Head of School for Eagle Hill testified. She has been the Student's advisor during her entire time at Eagle Hill. (Head of School Test.) This past year, the Student was in the Upper School. Upper School students change classes and have many different teachers. Some classes have up to twelve students. The increase in class size is introduced in the Upper School to prepare the students for potential transition to public schools. The Student has made some growth in self-advocacy such as asking for help with work, and benefits from cueing, repeating instructions, and sitting near the teacher. (P-18, P-19, Id.)
31. The Student has no difficulties with organizational skills and is diligent in completing any homework that is assigned. (Head of School Test.) Despite these gains, the Head of School also believed that public school was not appropriate for the Student due to the larger class sizes and environment. She was concerned that the Student would withdraw in larger groups and not interact, as she has seen in some of the larger group activities at Eagle Hill. She was similarly concerned that the Student would be ostracized if she was supported by a paraprofessional, that Ridgefield staff would not properly support the Student and the Student would not receive support in a mainstream classroom setting due to larger class sizes (even though the IEPs provided classroom supports). (Id.) Such speculation is insufficient to support the Parents' claim that the IEPs did not provide FAPE.
32. The Assistant Superintendent for Special Services is a certified speech-language pathologist and a member of the American Speech-Language and Hearing Association. The Association

has guidelines and standards which inform the decision as to when a child should be evaluated for a central auditory processing disorder (CAPD). CAPD is a disorder of the central nervous system. The guidelines require a rule out of other disabilities, such as neurodevelopmental disabilities, prior to evaluating for central auditory processing disorder. The witness has experience in evaluations of CAPD. She testified that a CAPD evaluation was not appropriate for this Student, because of the Student's other disabilities. (Asst. Supt. Test.)

33. The Parents did not any present or develop any argument in their brief on Issue #1, regarding their claim for reimbursement for the evaluation by Dr. Stephanie O'Leary, the neuropsychologist. Therefore, the Parents have waived this claim.

### **CONCLUSIONS OF LAW**

1. The overriding goal of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 et. seq (IDEA) is to open the door of public education to students with disabilities by requiring school systems to offer them a free appropriate public education (FAPE). *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982) (Rowley).
2. In *Rowley*, the United States Supreme Court held that FAPE "consists of educational instruction specially designed to meet the unique needs of the . . . child, supported by such services as are necessary to permit the child 'to benefit' from instruction." *Rowley* at 188-89. See also *Andrew F. v. Douglas City School District*, 580 U.S. , 137 S. Ct. 988, 999
3. (2017); *Oberti v Board of Education*, 995 F.2d 1204 (3d Cir. 1993).
4. Boards of Education must provide an individualized educational program (IEP) for each disabled student. *Winkelman v. Parma City School District*, 550 U.S. 516, 524 (2007). Although the viewpoint of parents must be considered in the process of developing the IEP, final decisions regarding the selection of personnel, location of the school and the appropriate educational method rests with the school system. *Rowley* at 207; *Kevin G. v. Cranston School Committee*, 130 F.3d 481 (1st Cir. 1997); *Flour Bluff Independent School District v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996); Letter to Richards, 55 I.D.E.L.R. 107 (January 7, 2010).
5. In order to determine whether parents of a disabled child are entitled to reimbursement of expenses incurred at a private school in an IDEA challenge to a proposed IEP, the three-step *Burlington/Carter* test is applied: "(1) the [Board] must establish that the student's IEP actually provided a FAPE; should the [Board] fail to meet that burden, the parents are entitled to reimbursement if (2) they establish that their unilateral placement was appropriate and (3) the equities favor them." *M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ.*, 725 F.3d 131, 135 (2d Cir. 2013); see also *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).

6. In *Rowley*, the United States Supreme Court set out a two-part test for determining whether a local board of education has offered FAPE in compliance with IDEA. The first part of the test is whether there has been compliance with the procedural requirements of IDEA, and the second part is whether the student's IEP is reasonably calculated to enable the student to receive educational benefit. 458 U.S. at 206-207. See also, *Fry v. Napoleon Community Schools*, 580 U.S. (2017). An IEP is reasonably calculated to enable the student to receive educational benefit if it is likely to produce progress rather than regression. *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005); *M.S. v. Board of Education of the City School District of the City of Yonkers*, 231 F3d 96, 103 (2d Cir. 2000).
7. The Board here had the burden to prove by a preponderance of the evidence that the IEPs it offered were both substantively appropriate and in compliance with IDEA's procedural requirements. Regulations of Connecticut State Agencies ("R.S.C.A.") Section 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998).
8. The first prong of the *Rowley* inquiry, whether the Board complied with IDEA's procedural mandates, is critical. As the Supreme Court said in *Rowley*, Congress based IDEA on the "conviction that adequate 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." *Rowley* at 206. The procedural requirements of IDEA are designed to guarantee that the education of each student with a disability is individually tailored to meet the student's unique needs and abilities and to safeguard against arbitrary or erroneous decision-making. 20 U.S.C. Sections 1412(1) and 1415(a)-(e); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, and 1041 (5th Cir. 1989).
9. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied FAPE. Mere technical violations will not render an IEP invalid. *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001). In matters alleging a procedural violation a due process hearing officer may find that a student did not receive a FAPE only if the procedural violation did one of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).
10. *School District*, 556 F.3d 900, 909 (9th Cir. 2008).
11. Each IEP must include: (a) a statement of the student's present level of performance in each area of disability as determined through periodic assessments; (b) a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the student's educational needs resulting from the disability; (c) a statement of the special education and related services to be provided in order to enable the student to attain his or her goals and to progress in the general education curriculum; and (d) a statement of the special education and related services and supplementary aids and

services, to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; and to be involved in and make progress in the general education curriculum; and (e) an explanation of the extent, if any, to which the child will not participate with nondisabled children; and (f) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the student on state and district-wide assessments. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320 (emphasis added).

12. Significantly, IDEA also demands that each student's program be implemented in the least restrictive environment, so that children with disabilities are educated in integrated settings with non-disabled peers "[t]o the maximum extent appropriate." 34 C.F.R. Section 300.550(b); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998).
13. The sufficiency of an IEP under IDEA is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). "An IEP is a snapshot, not a retrospective." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). It must be viewed in terms of what was objectively reasonable when the IEP was developed. *Id.*
14. Accommodations for assessment of a student's progress should be designed to ensure that the student's skills, abilities and mastery of the curriculum are assessed, rather than the impact of his or her disability. *Yorktown Cent. Sch. Dist.*, 16 IDELR 771 (SEA NY 1990).
15. An IEP must also satisfy IDEA's substantive requirement that it be reasonably calculated to allow the student to "make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas City School District*, 137 S. Ct. 988, 999; 580 U.S. \_\_\_ (2017).
16. Substantive inadequacy of an IEP automatically entitles the parents to reimbursement. Procedural violations, however, only do so if they "impeded the child's right to a [FAPE]," "significantly impeded the parents' opportunity to participate in the decisionmaking process," or "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *A.C.*, 553 F.3d at 172. Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not. *See Werner v. Clarkstown Cent. Sch. Dist.*, 363 F. Supp. 2d 656, 659 (S.D.N.Y. 2005); *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012) cert. denied, 569 U.S. 1030 (2013).
17. The IEP itself is the cornerstone of the child's program. However, the "Second Circuit has rejected the 'rigid 'four comers' rule prohibiting testimony that goes beyond the face of the IEP." *D.C. ex rel. E.B. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494, 513 (S.D.N.Y. March 26, 2013). Although, the Hearing Officer may not rely on "testimony that materially alters the written plan" she may consider testimony "that explains or justifies the services listed in the IEP." *R.E.*, 694 F.3d at 185-86; see also, *F.L. ex rel.*

*F.L. v. New York City Dep't of Educ.*, 553 F. App'x 2, 5 (2d Cir. 2014).

This rule recognizes the critical nature of the IEP as the centerpiece of the system, ensures that parents will have sufficient information on which to base a decision about unilateral placement, and puts school districts on notice that they must include all of the services they intend to provide in the written plan. If a school district makes a good faith error and omits a necessary provision, they have thirty days after the parents' complaint to remedy the error without penalty.

18. The Parents' arguments in this matter are similar to arguments made in *R.E.* Both in *R.E.* and this matter, the parents challenged a lack of specificity in the IEP and a lack of an FBA. Here, the Parents primarily rely on the fact that the term "RISE" was lacking in the challenged IEPs. The Second Circuit has held that the term "educational placement" refers "only to the general type of educational program in which a child is placed." *Id.* The Hearing Officer rejects the Parents' claim that omission of the term RISE was a fatal flaw in the IEPs. The Parents' argument that they were provided insufficient information and detail about the program in order to decide whether to accept the program is not supported by the IEPs or the record as a whole. The May 5, 2015 letter (B-9) makes clear that the Parents were at least aware of the term in conjunction with the Student's proposed program based on their communications with the Board. Likewise, the August 16, 2016 letter states that the Parents were rejecting the "recommended RISE program at ERMS." (B-15). The Student actually visited the recommended program at the middle school. (*Id.*) Most of the special education services are identified as being provided in the resource or related services room. (B-8, B-20) Since an IEP does not even need to identify a particular school, *R.E.*, *supra* at 192, the Student's IEP did not need the term RISE. The Hearing Officer finds that the omission of the term "RISE" in the IEPs was not a procedural or substantive flaw, and the Student was not denied FAPE.
19. It is undisputed that an FBA was not conducted and did not inform the PPTs decisions. "The failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but when an FBA is not conducted, the [hearing officer] must take particular care to ensure that the IEP adequately addresses the child's problem behaviors. See *A.C.*, 553 F.3d at 172 (finding that IEP provided appropriate strategies for student's problem behaviors when it (1) addressed student's attention problem by providing a personal aide to keep child focused and (2) addressed child's "minimal" tangential and fantasy speech with psychiatric and psychological services)." *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190-1 (2d Cir. 2012) cert. denied, 569 U.S. 1030 (2013).<sup>5</sup> The IEPs all contain accommodations and social skills training to assist the student in the classroom. The IEPs also provide for weekly consulting services including a BCBA. Further, the nail-biting, anxious behaviors were not observed when the Student visited or attended ESY.
20. The Board adequately addressed the Student's potential transition to the public schools under the factual circumstances presented, and included elements of the Guidelines, cited

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<sup>5</sup> The Hearing Officer is cognizant that *RE* involved New York's regulations (not Connecticut) which *require* an FBA if the student's behavior impeded her learning or the learning of others.

by the Parents.<sup>6</sup> The Student completed testing in the middle school environment prior to the planning for the 2015-2016 school year. Board staff, and the consulting BCBA observed the student in her classroom environment at Eagle Hill. The Student attended the middle school while classes were in session, attended ESY and visited the High School. The Student excitedly rode the bus to ESY. The school team stood at the ready to implement a transition program in the fall of 2016, pending the Parent's request to initiate the process with Eagle Hill. None of the witnesses testified to any anxious behavior which interfered with the Student's experience on her visits. The PPT team, through the transition coordinator, extensively outlined the recommended schedule to get the Student ready for attending the High School.

21. Speculative arguments cannot give rise to a reimbursement claim. *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012) cert. denied, 569 U.S. 1030 (2013). The Parents' challenge to an IEP should be denied where parents "object to a placement based solely on their speculation about what would have occurred at the designated school ... [and they] can point to no hard evidence that the school would not or could not deliver a FAPE." *N.S. v. New York City Dep't of Educ.*, No. 13-CV-7819 VEC, 2014 WL 2722967, at \*13 (S.D.N.Y. June 16, 2014); See also, *Y.F. v. N.Y.C. Dep't of Educ.*, 659 F.App'x. 3, 5 (2d Cir. 2016) (summary order) (quoting *M.O.*, 793 F.3d at 244); see also *G.S.*, 2016 WL 5107039, at \*15 (S.D.N.Y. September 19, 2016) (parents' statements that the school would be unable to fulfill the IEP's service mandates and could not meet the student's sensory needs, among other challenges, were "precisely the types of speculative arguments rejected in *M.O.*"); *N.J.f v. N. Y.C. Dep 't of Educ.*, No. 15-CV-1781 (JMF), 2016 WL 796857, at \*8 (S.D.N.Y. Feb. 24, 2016) ("[A] claim based on what a school 'would not have' done-as opposed to a claim based on what the school could not do-is speculative and barred under *R.E.* and *M.O.*"). Taken as a whole, the Parents evidence from the independent neuropsychologist and the Head of School from Eagle Hill amounted to concerns that lacked a substantive basis. While the evaluator opined that the Student needed a small, structured school, her reasoning was based on certain perceptions and hypothetical concerns. She did not review the Student's educational records and had no knowledge of the educational services that were being offered by the IEPs at issue or the Ridgefield High School environment. The neuropsychologist opined that the Student would be perceived negatively by others or may be unknowingly bullied, or may be stigmatized by using paraprofessional support. Accommodations suggested by both of these witnesses were contained in the IEPs. However, their opinions assumed that the regular education teachers would be ineffective at keeping the Student engaged in learning.
22. The IEPs for the 2015-2016, 2016-2017 and 2017-2018 school years provided FAPE. The Board met its burden of proof. The Board's programming was designed by appropriately certified and experienced educational experts, teachers with expertise in literacy skills, psychologists, occupational therapists, and speech and language

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<sup>6</sup> *Guidelines For Identification and Education of Children and Youth with Autism*, (rev. ed. 2011), at [https://portal.ct.gov/-/media/SDE/Special-Education/Guidelines\\_Autism.pdf](https://portal.ct.gov/-/media/SDE/Special-Education/Guidelines_Autism.pdf).



pathologists. The IEPs complied with the LRE requirements of the IDEA by giving the Student time with non-disabled peers, such as in a co-taught English class, Science and P.E., but also providing modifications and accommodations appropriate to the Student's needs. The team was also supported by outside consultants with substantial expertise in programming for students with autism as well as consulting BCBAs. Thus, the Board had the ability to implement the IEPs it offered.

23. Given the appropriate program offered by the Board, the Hearing Officer need not evaluate the appropriateness of the Parents' preferred placement at Eagle Hill. See *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Florence Cty. Sch. Dist. v. Carter*, 114 S.Ct 361 (1993). See also *In the Matter of Student with Disability*, 33 IDELR 263 (SEA CT 2000) ("it is well established that if it is determined that a local school district can provide a FAPE for a student, it is not relevant that the private placement's program is appropriate, better than, different from that proposed by the district or preferred by the parent.")
24. However, for ESY 2017, the Student was denied FAPE. Despite the positive social experience, the academic programming during ESY 2017 was not appropriate for the Student. Most importantly, the reading materials were not presented at the Student's reading level. The materials were at two grade levels above the Student's instructional level. One of the summer program goals was not introduced at all; data was not collected on another. Contrary to the school staff's reports of the Student's success in ESY 2017, the data in some areas painted a different picture. The outcome is not surprising given the mismatch of the reading material (which was at an 8<sup>th</sup>/9<sup>th</sup> grade level) and the Student's ability at that time (which was at a 4<sup>th</sup>/ 5<sup>th</sup> grade level).
25. Finally, because the Parents did not raise or argue their claim for entitlement to reimbursement for Dr. O'Leary's evaluation in their post-hearing brief, the Hearing Officer finds they have waived that claim. See, *M.G. v. New York City Dept. of Education*, 15 F. Sup. 3d 296, 306 (S.D.N.Y. 2014)(arguments not presented at due process hearing are waived).

## **ORDERS**

1. The Due Process Complaint is DISMISSED as to Issue # 1.
2. The Due Process Complaint is DISMISSED as to Issue #2 for ESY 2016.
3. The 2015-2016 IEP provided FAPE. Therefore, the Parents request for reimbursement for Eagle Hill for that school year is DENIED.
4. The 2016-2017 IEP for the school year provided FAPE. Therefore, the Parents request for reimbursement for Eagle Hill for that school year is DENIED.
5. The 2017 ESY program did not provide FAPE to the student. However, no remedy is ordered because the request for compensatory education has been withdrawn. The request for compensatory education on this issue is DISMISSED.
6. The 2017-2018 IEP provided FAPE. Therefore, the request for reimbursement for Eagle Hill for that school year is DENIED.