



The University of the State of New York

The State Education Department State Review Officer

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No. 10-033

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 [REDACTED] School District

Appearances:

Law Offices of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Emily J. Lucas, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Kildonan School (Kildonan) for the 2006-07, 2007-08, and 2008-09 school years and denied their request for an independent educational evaluation (IEE). The appeal must be dismissed.

At the time the impartial hearing convened in November 2008, the student was attending Kildonan (Tr. p. 1568). The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (Dist. Exs. 1 at p. 1; 2 at p. 1; 3 at p. 1; see 34 C.F.R. § 300.8 [c][10]; 8 NYCRR 200.1[zz][6]).

With regard to the student's educational history, the parents' concerns regarding the student's development date back to early childhood when the student demonstrated difficulty with language acquisition and frequent, intense temper tantrums (Dist. Ex. 30 at p. 3; Parent Ex. C at p. 2). The student performed poorly on kindergarten screenings and in first grade, he was referred to the Committee on Special Education (CSE) due to academic and social concerns (Tr.

pp. 1116-17, 1684-85; Dist. Ex. 30 at p. 1; Parent Exs. D at p. 1; E at p. 1).¹ Based on the results of district evaluations, as well as a private evaluation obtained by the student's parents, the student was classified as having an other health impairment and was recommended for resource room services and speech-language therapy (Dist. Exs. 28 at p. 1; 30; Parent Exs. C; D; E).² The parents' private evaluator offered the following diagnoses for the student: a pervasive developmental disorder not otherwise specified (PDD-NOS); an attention deficit hyperactivity disorder (ADHD), combined type; and a reading disorder (Parent Ex. C at pp. 8, 10, 11). The evaluator noted that the student appeared to have "a [l]earning [d]isability affecting his expressive language, consistent with a diagnosis of [d]yslexia and [e]xpressive dysphasia" (*id.* at p. 10).

At the end of the student's first grade year, the CSE reconvened and determined that the student's classification should be changed from a student with an other health impairment to a student with a learning disability (Tr. pp. 1732-34; Dist. Ex. 29 at pp. 1, 3). The June 2002 CSE recommended that for the 2003-03 school year (second grade) the student receive resource room services along with occupational therapy (OT), speech-language therapy, and a behavior consultation (Dist. Ex. 29 at p. 1). During second grade, the student received multisensory reading instruction from a special education teacher using PAF (Tr. pp. 1711-13; see Parent Ex. L).

The CSE convened on June 4, 2003 for the student's annual review and to develop an individualized education program (IEP) for the student for the 2003-04 school year (third grade) (Dist. Ex. 32). The resultant IEP indicated that the student demonstrated limited decoding skills, that his reading fluency was poor, and that he had a great deal of difficulty with writing tasks (*id.* at p. 2). The June 2003 IEP described the student as socially disconnected and highly sensitive (*id.* at p. 3). The student was noted to have weaknesses in expressive and receptive language skills, social pragmatics, and fine and visual motor skills (*id.*). The June 2003 CSE recommended that the student be placed in a 12:1+1 collaborative special class in a different district elementary school and receive related services of counseling, OT, and speech-language therapy (*id.* at p. 1).³ The June 2003 IEP further indicated that a behavioral intervention plan (BIP) would be developed for the student in September 2003 and that a behavior consultant would consult with the student's classroom teacher (*id.* at pp. 1, 4). The CSE subsequently developed and reviewed a BIP in November 2003 (Dist. Exs. 33A; 33B; Parent Ex. M at p. 5).

¹ The student began taking medication for ADHD in January 2002 (Dist. Exs. 28 at p. 2; 30 at p. 3; see Tr. p. 1604-05).

² The student's mother reported that during first grade the student received remedial reading from a special education teacher using the Preventing Academic Failure (PAF) program (Tr. pp. 1125, 1705, 2150-51). PAF is a multisensory systematic phonics-based methodology for reading instruction (see Tr. p. 2235). It is not clear from the hearing record whether the reading instruction was provided to the student as his part of his recommended special education services or whether it was provided in addition to the resource room services recommended on his IEP (see Dist. Ex. 28 at p. 3).

³ The June 2003 CSE recommended that the student be placed in a 12:1+1 special class for three 45 minute periods per day (Dist. Ex. 32 at p. 1).

In February 2004, the CSE recommended that for the 2004-05 school year (fourth grade) the student continue his placement in 12:1+1 collaborative special class for three 45-minute periods per day and receive related services of counseling, OT, and speech-language therapy (Parent Ex. N at p. 1).⁴ As in the previous year, the February 2004 IEP indicated that the student required a BIP and that a behavior consultant would consult with the student's classroom teacher (id. at pp. 1, 2, 4). During the 2004-05 school year, the student received multisensory reading instruction from his special education teacher using the Wilson Reading System (Wilson) (Tr. pp. 2492-93).⁵

In November 2004, the district conducted a psychoeducational evaluation of the student as part of a triennial evaluation (Dist. Ex. 5 at p. 1). The school psychologist noted that the student's pattern of cognitive strengths and weaknesses had remained consistent over time with the student demonstrating relative strengths in non-language reasoning, memory, and processing speed while demonstrating "definitive" weaknesses in expressive language, attention and concentration, and social pragmatics (id. at p. 6). The school psychologist reported that the student's profile was consistent with previous diagnoses of "expressive dysphasia, PDD-NOS and ADHD combined type" (id.). The school psychologist indicated that the student continued to require extensive academic remedial intervention across the curriculum and noted specifically that reading and spelling were an "exercise in frustration" for the student that he did not tolerate well (id.).

Progress reports from fourth grade indicated that the student demonstrated many classroom skills on an inconsistent basis (Parent Exs. P; Q; R). According to the student's teacher, the student began the year motivated but by mid year he began to have more difficulty staying on task, and district staff noted a change in the student's behavior (Tr. pp. 2511-12).⁶ In April 2005, a token reinforcement system was developed for the student (Dist. Ex. 41).

A subcommittee of the CSE met on May 26, 2005 for the student's reevaluation and annual review (Parent Ex. A). The resultant IEP identified creativity and math reasoning as areas of strengths for the student, while indicating that the student demonstrated weaknesses in maintaining focus, productivity, word decoding and encoding, written expression, reading comprehension, peer interactions, and sensitivity to work load (id. at p. 4). With respect to language development, the May 2005 IEP indicated that the student demonstrated relative strengths in the understanding and use of vocabulary, and relative weaknesses in auditory memory and processing (id. at p. 5). The May 2005 IEP indicated that the student's fine motor, visual motor, visual motor integration and visual perception skills were all in the average range

⁴ The hearing record indicates that the student spent half of his day in a small class setting where he received individualized instruction for "primary academics," and the other half of his day integrated into a fourth grade general education classroom with support from his special education teacher (Dist. Ex. 5 at p. 1).

⁵ Wilson is described in the record as a research-based, multisensory reading program (Tr. pp. 222, 276).

⁶ The student's medication for ADHD was discontinued in or around December 2004 (Tr. p. 1791; Parent Ex. B at p. 5).

and that the student no longer qualified for direct OT services (id.). According to the May 2005 IEP, in order to stay focused and engaged the student required "a lot" of adult intervention and a strict behavioral program (id. at p. 4). For the 2005-06 school year (fifth grade), the May 2005 CSE recommended that the student be placed in a 12:1+1 collaborative special class for four 45-minute periods per day and that he receive individual counseling once weekly and group speech-language therapy twice weekly (id. at p. 1). The May 2005 CSE recommended the continuance of a BIP and an increase in the amount of time the student spent in the special class from three periods to four periods per day (id. at pp. 1, 5).

During the 2005-06 school year, the student received reading instruction from his special education teacher using Wilson (Tr. pp. 2492-93). On September 22, 2005, a functional behavioral assessment (FBA) was conducted by the district's behavior consultant who identified the following behaviors as interfering with the student's classroom functioning: difficulty initiating and completing tasks and activities, exhibiting behaviors that were disruptive to other students, difficulty appropriately expressing his needs and wants, difficulty maintaining attention to a task or activity, limited positive interactions with peers, immaturity, and becoming overwhelmed by activities done within the regular fifth grade class (Dist. Ex. 6A at p. 1). The behavior consultant hypothesized that the student's behavior served the following functions: avoidance and attention (id.). The consultant developed a BIP for the student, highlighting the following behavioral goals and objectives: increase productivity and participation, improve the student's ability to express his feelings and frustrations, decrease avoidance behaviors, decrease disruptive behaviors, complete homework, and decrease inappropriate self-stimulation behaviors (id. at p. 2; see Dist. Ex. 42). The BIP outlined a series of strategies to address the goals identified in the plan and indicated that the BIP would be monitored by classroom staff and reviewed by the behavior consultant at least monthly (Dist. Ex. 6A at p. 3).

The student's BIP was revised in January 2006 (Dist. Ex. 6B). According to the behavior consultant, many of the strategies used by the student's teacher had been successful and the student had made good progress in several targeted areas (id. at p. 1). The consultant commented that the student seemed less overwhelmed by his school work; that overall his productivity was higher; that he was better at appropriately expressing himself and was beginning to ask for help from his teachers; that he at times seemed better able to maintain his attention to an independent task; that his homework completion had increased significantly, in part, due to a change in his after school situation; that he no longer complained of being tired and hungry every morning; and that he had begun to self-initiate short breaks (id.). However, the behavior consultant also noted that the student continued to have difficulty in several areas which affected his learning and that of classmates, such as following directions and initiating a new task without repeated prompting, and behaving appropriately in group situations (id.). The consultant indicated that the student's behavior deteriorated around 11:30 A.M. each day, at which point he would have "meltdowns" and refuse to do work or cooperate (id.). The consultant indicated that if ignored, the student's behavior escalated and if redirected the student refused to comply (id.). According to the behavior consultant, the school team significantly revised the student's program and behavior plan (id.). The revised plan indicated that the student would begin each day with 1:1 instruction in an alcove in the classroom and that all of the student's instructional time would take place in this setting (id. at p. 3). The plan further indicated that as the student's behavior and

cooperation improved, he would be slowly reintegrated into small group lessons (id.). If the student's behavior in the group became uncooperative or disruptive the student would be given a warning and if he did not comply, he would be removed from the group (id.). The plan indicated that the student would be provided with a schedule and that he would not be able to go on to the next activity until his work was completed (id.).

At the request of the CSE, the district conducted a speech-language evaluation of the student in February 2006 as part of his triennial reevaluation (Dist. Ex. 7 at p. 1). Based on the results of the evaluation, the evaluating therapist reported that the student displayed overall language skills primarily within the average range (id.). The evaluator noted that the student demonstrated some difficulty with auditory memory tasks, which could adversely affect the student's ability to follow oral directions and participate in class discussions (id. at p. 2). She concluded that the student no longer required direct language intervention but did require modifications to academic curriculum and tests, and recommended that the student receive consultant speech-language services for one year (id.). District achievement testing of the student, also conducted in February 2006, yielded below average scores in word reading, pseudoword decoding, and spelling (Dist. Ex. 40). The student's teachers reported that academically the student was performing well below grade level (Parent Ex. V). They noted that although the student could comprehend information presented orally, he had weaknesses in decoding and encoding and was reading several years below grade level (id.). According to the student's teachers, the student demonstrated his academic knowledge on an inconsistent basis, had difficulty staying on task or completing a task, was not able to organize himself without adult intervention, and was not able to consistently follow classroom routines (id.). The teachers reported that the student did not independently seek out others or try to engage with peers (id.).

The CSE reconvened on February 15, 2006 to conduct a review of the student's program (Parent Ex. B at p. 8). The February 2006 CSE recommended that the student be provided with a 1:1 teaching assistant to assist him with skill development and management needs (id. at pp. 1, 5). In addition, the February 2006 CSE recommended that a psychiatric consultation, an assistive technology screening and a behavioral observation of the student be conducted (id. at p. 5). Meeting minutes indicated that following the completion of the evaluations the CSE would reconvene to conduct a program and annual review meeting (id.).

In March 2006, the parents sought a private psychiatric evaluation of the student (Parent Ex. X).⁷ After examining the student, the psychiatrist concluded that the student had struggled with school since first grade, despite receiving assistance (id. at p. 2). The psychiatrist opined that the student's struggles initially resulted from learning and attending difficulties but had since been compounded by the student's frustration with his lack of progress (id.). The psychiatrist found evidence of anxiety and dysthymia, which he believed to be secondary to the student's frustration (id.). The psychiatrist noted that he felt very strongly that all school resources had been exhausted and that an alternative program should be sought for the student (id.). The

⁷ The student's mother testified that the student was seen by the private psychiatrist for "an evaluation and to reintroduce the topic of medication" (Tr. p. 1594).

psychiatrist opined that the student would be best served in a special school more suited to the student's needs, such as Kildonan or a similar setting (id.).

On March 28, 2006 the student was suspended from school for two days for striking a staff member (Parent Ex. Y). The student returned to school on March 30, 2006 and met with the district's psychiatrist who conducted an assessment of the student (Tr. pp. 1892-93). In his written report, the psychiatrist stated that when the student discontinued medication in January 2005 the student's behaviors resurfaced in the form of defiance and increased "shutting down" (Dist. Ex. 9 at p. 2). The psychiatrist reported that the student had significantly deteriorated in the last several months (id.). He indicated that the student was oppositional and defiant, highly distractible, had difficulty working with others, and might demonstrate immature behavior (id.). The psychiatrist noted that the student's angry outbursts could include kicking chairs, throwing things, banging his head on the wall, and verbal outbursts (id.). Based on a mental status examination, the psychiatrist reported that the student's affect was anxious and depressed (id.). The psychiatrist opined that the student's defenses included avoidance and shutting down and that the student's insight was poor (id. at p. 3). The student acknowledged that he felt "quite" unhappy (id.). The psychiatrist concluded that the student appeared to be responding to anxiety, which he protected himself against by being oppositional and defiant (id.). He noted that when asked to do work, the student was "almost on the verge of a panic attack" (id. at p. 2). He indicated that more recently, the student appeared to be becoming depressed (id. at p. 3). In addition to the student's previous diagnoses the psychiatrist offered the student a diagnosis of an anxiety disorder, NOS and a depressive disorder NOS (id. at p. 2). The psychiatrist concluded that at that time, the student was not able to function effectively in his present setting and that changes were necessary either in the setting or the student's mental condition (id.). The psychiatrist recommended consideration of an abbreviated school day, which would allow the student to experience less stress in the school setting (id. at p. 4). He indicated that if the student's condition did not improve over the next several weeks, a more restrictive setting, which included a therapeutic component, should be considered (id.).

Following the student's suspension, the district placed him on an "abbreviated schedule" with the agreement of his parents (Tr. pp. 1267-69, 1848). The student attended school from approximately 9:00 A.M. until 11:30 A.M. each day (Tr. pp. 1114, 1313). The student's special education teacher reported that while the student was on the abbreviated schedule he received 1:1 instruction from either the teacher or a teaching assistant, which included Wilson reading instruction three to four times per week for 30 to 45 minutes per session (Tr. pp. 2504-05, 2671-72; see Dist. Ex. 34). The student also reportedly received individual counseling; however, the frequency was not known (Tr. pp. 1987-88, 2152-54, 2691; see Dist. Ex. 34).

The CSE convened on May 3, 2006 to conduct a progress review of the student (Dist. Ex. 1 at p. 5). According to meeting notes, based on the student's longstanding difficulties, the May 2006 CSE recommended that a search of possible therapeutic programs for the 2006-07 school year be conducted (id.).

In a letter to the CSE dated May 10, 2006, the student's mother requested a list of alternative placement options by May 15, 2006 (Dist. Ex. 13 at p. 2). The following day, the

district's assistant director of special services responded with a list of programs where the student's referral packets would be sent (Dist. Ex. 14).

The parents submitted an undated application on behalf of the student to Kildonan for the 2006-07 school year (Dist. Ex. 35).⁸

According to the student's fourth and fifth grade special education teacher, the student was on step five of Wilson by the end of the 2005-06 school year (Tr. p. 2595).⁹ The student's fifth grade report card indicated that the student's work skills were mostly inconsistent; that his reading skills were primarily "not demonstrated," "beginning," or "developing;" that the student's writing skills were primarily "developing;" and that his math skills were "developing" or "approaching secure" (Parent Ex. GG). Third trimester teacher comments indicated that the student's modified schedule meant that he was more likely to be productive during the school day (id. at p. 16). The teachers noted that the student's behavior had become more consistent and that he had gained some self-control (id.). A June 2006 IEP progress report indicated that the student had achieved zero of three study skills objectives, seven of eight reading objectives, one of five writing objectives, two of five mathematics objectives, three of four speech-language objectives, and zero of five social/emotional/behavioral objectives (Dist. Ex. 10).¹⁰ The student scored a level "1" on the New York State Testing Program (NYSTP) fifth grade English language arts (ELA) and mathematics examinations (Parent Exs. U; V-1).¹¹

On June 16, 2006, the CSE reconvened and determined that the student was eligible for extended school year (ESY) services (Dist. Ex. 1 at p. 5).

In a letter dated June 22, 2006, the Kildonan director of admissions indicated that the student had been accepted to the school for the 2006-07 school year (Dist. Ex. 36).

The parents sought a private reading evaluation of the student that was conducted over two days in June and July 2006 (Dist. Ex. 11). Administration of the Gray Oral Reading Tests-Fourth Edition (GORT-4) yielded the following percentile ranks and grade equivalents: rate <1st percentile (1.4), accuracy 9th percentile (3.4), fluency <1st percentile (2.4) and comprehension 63rd percentile (6.7) (id. at p. 1). The student attained an oral reading quotient of 79 (8th

⁸ The student's mother testified that she could not recall when she submitted the application to Kildonan, but that it was between March 31, 2006 and August 2006 (Tr. pp. 1895-96). However, the application contains a reference to a May 9th meeting, which suggests the application was submitted after May 9, 2006, but before the acceptance letter was issued in June 2006 (Dist. Ex. 35 at p. 3).

⁹ Wilson is described in the record as having 12 steps (Tr. pp. 224-25). According to the student's fifth grade special education teacher step five of Wilson included reading multisyllabic words (Tr. p. 2595).

¹⁰ The student's mother reported that the student resumed taking medication for ADHD in May or June 2006 (Tr. p. 1606).

¹¹ The hearing record indicates that with respect to understanding ELA knowledge and skills, and understanding mathematics content, a score of "1" was equivalent to "does not demonstrate an understanding;" the a score of "2" meant "demonstrates a partial understanding;" a score of "3" meant "demonstrates an understanding;" and a score of "4" meant " demonstrates a thorough understanding " (Parent Exs. U; V-1).

percentile) (id. at p. 2). In addition, administration of the Comprehensive Test of Phonological Processing (CTOPP) yielded the following quotients and percentile ranks: phonological awareness 85 (16th percentile), phonological memory 103 (58th percentile) and rapid naming 79 (8th percentile) (id.). The evaluator stated that the student's performance on the tests and his difficulty with particular sounds suggested that his difficulty with reading may be due to "dyslexia" (id.). The evaluator opined that the student needed to be "totally immersed" in the reading and writing process following an Orton-Gillingham approach in school and that 1:1 support was highly recommended (id.). The evaluator noted that the student had attentional problems which overlapped with his reading difficulties and that it was not possible to identify with certainty which was the dominant concern (id.).

On July 21, 2006, the CSE met for the student's annual review for the 2006-07 school year (Dist. Ex. 1 at p. 5). Meeting participants included the CSE chairperson, the school psychologist,¹² the student's special education teacher, a regular education teacher, an additional parent member, and the parents (id.). CSE meeting notes indicated that referral packets were sent to several therapeutic programs and that the district had received two acceptance letters for the student (id.). According to meeting notes, the student's mother expressed concerns that the programs might not be able to address the student's learning difficulties and that the student's emotional needs were a result of his learning difficulties (id.). After discussing in-district programs, the July 2006 CSE recommended that the student be placed in the district's "bright-fragile" 12:1+2 special class for six, 40-minute periods per day (id. at pp. 1, 5).¹³ In addition, the July 2006 CSE recommended that the student receive related services of individual counseling once per week for 30 minutes and a speech-language consultation twice per month for 40 minutes (id. at p. 1). A notation on the July 2006 IEP indicated that a behavior consultant would consult with the student's classroom teacher and that the recommended bright-fragile program included group counseling in the class setting and crisis intervention as necessary (id.). The recommended July 2006 IEP included ESY services of 1:1 special education instruction three times per week for one hour (id. at pp. 1-2). The July 2006 CSE recommended the following program modifications and support for the student: pre-teaching of concepts, provide advance notice for transition, cue student to stay on task (by maintaining eye contact), modify length of assignments, allow frequent movement breaks, development of a BIP, and additional time to complete assignments (id. at p. 2). In addition, the July 2006 CSE recommended the following testing accommodations for the student: extended time (1.5), special location, directions clarified, proctor cueing, questions read, and modification when extensive writing is required (id.). The recommended July 2006 IEP included goals related to study skills, reading, writing, mathematics, speech-language development, and social/emotional/behavioral development (id. at p. 9). The July 2006 CSE further recommended a central auditory processing evaluation of the

¹² For each of the years in question the student's CSE meetings were chaired by different individuals (Dist. Exs. 1 at pp. 4-5; 2 at p. 4; 3 at p. 5). The same individual who participated in the student's July 21, 2006 CSE meeting as the school psychologist also functioned as the CSE chairperson for the student's June 5, 2008 and August 13, 2008 CSE meetings (Tr. p. 32; Dist. Exs. 1 at p. 5; 3 at p. 5). This individual testified at the impartial hearing and, unless otherwise noted, I will refer to her as the "CSE chairperson."

¹³ The hearing record contains descriptions of the bright-fragile special class as both a 12:1+2 student, teacher, and teacher assistant ratio and a 12:1+1 ratio (see, e.g. Tr. pp. 44; Dist. Ex. 1 at p. 1).

student and indicated that the CSE would reconvene after a speech-language evaluation and auditory processing evaluation were completed (id. at p. 5).

On July 31, 2006, the parents signed a contract enrolling their son in Kildonan for the 2006-07 school year (Dist. Ex. 37).

On August 3, 2006, the student was seen for an auditory processing evaluation (Dist. Ex. 12). The examiner reported that the student's pattern of errors on the administered auditory processing test battery was consistent with an auditory processing disorder classified as an interhemispheric transfer deficit (id. at p. 3). However, the examiner noted that it was unclear whether the student's deficit "ha[d] other influences" or was part of a greater condition (id.).

In October 2006, the district conducted a speech-language evaluation of the student (Dist. Ex. 26). On the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) the student received a core language score of 94 (34th percentile), which placed him in the average range of functioning (id. at p. 2). The student's scores on the receptive language index, expressive language index, language content index, and language memory index were also all within the average range (id. at pp. 2-3). The evaluating therapist noted relative strengths in the student's expressive vocabulary and ability to formulate compound and complex sentences, along with weaknesses in the student linguistic flexibility (id. at p. 5). The evaluator reported that as measured by the Peabody Picture Vocabulary Test – Third Edition (PPVT-III) the student's receptive vocabulary skills were solidly in the average range (id.). She recommended that the student receive speech-language therapy on a consultant basis, based on the results of standardized testing and information obtained from the audiological evaluation (id.).

The student entered Kildonan in September 2006, where he was placed in a fourth grade class (Tr. p. 1566). Progress reports from November 2006 indicated that the student was an active participant in math and that he quickly completed his assignment, which was usually done to the best of his ability (Parent Ex. HH-3). According to the student's math teacher, the student's subtraction skills were inconsistent and he became frustrated when asked to redo problems or correct errors (id.). The math teacher reported that the student enjoyed learning about money (id.). The student's literature teacher reported that the curriculum for the literature class was an integrated program of literature, history, geography, science, and "outdoor adventure" (Parent Ex. HH-4 at p. 1). According to the literature teacher, the student had been enthusiastic with respect to social studies and science and that he listened carefully to directions and was able to follow through on projects with one or two other students with minimal teacher assistance (id. at p. 2).

The student's language training tutor characterized the student as inquisitive and creative and noted that the student learned at a quick pace (Parent Ex. HH-2). However, she reported that in tutoring the student was "often surprisingly tired and disinterested in working in his reading and writing skills" (id.). She indicated that in tutoring and study hall the student required short, varied drills and frequent reminders to stay focused (id.). According to the tutor, it had been difficult to establish a routine and foundation of skills (id.). The tutor reported that she had introduced the cursive alphabet to the student and although the student learned the lowercase

cursive alphabet quickly, he was not comfortable using it in context and often reverted to printing (id.). The student's tutor further reported that during language training she worked on phonics skills for reading and spelling and common non-phonetic sight words (id.). According to the tutor, when working on language skills the student often whined, would breathe irregularly, would grow physically restless, and required continual redirection (id.). She characterized the student's willingness to work on phonics skills without becoming frustrated or upset as a "step in the right direction" (id.). With respect to writing, the language tutor reported that the student had been working to increase the length and sophistication of his written work by expanding simple sentences and that he had also studied the subject and predicate of a sentence, punctuation, and capitalization (id.). The student's language tutor reported that the student read an "impressive" number of books during the fall term (id.). She opined that the student's accomplishment was a "testament to his love of reading and his desire to become an independent reader" (id.). The tutor noted that while the student enjoyed reading books at home and in study hall, he disliked reading aloud in tutoring (id.).

Subsequent Kildonan interim progress reports were complete in March 2007 (Parent Exs. HH-9; 12; 13). The student's math teacher reported that the student quickly learned newly introduced skills, but then wandered and distracted himself and others in the room (Parent Ex. HH-13). According to the teacher, working with fractions was the most challenging unit for the student; although he understood the concept and procedure for the addition and subtraction of like fractions, he sometimes made errors while reducing a fraction to its lowest terms or failing to do so (id.). The teacher reported that the student's lowest weekly quiz score was a 94 (id.). The student's literature/social studies/science teacher reported that the student was consistently attentive and engaged in learning (Parent Ex. HH-12).¹⁴ She indicated that he demonstrated a good understanding of the material on quizzes, that he retained information and that he was able to describe an event (id.). According to the teacher, the student's written responses needed to include more detail (id.). The teacher stated that the student was a "strong" student in social studies, but less attentive in science (id.).

On March 21, 2007 the CSE convened for the student's annual review for the 2007-08 school year (Dist. Ex. 2). Meeting participants included the CSE chairperson, a psychologist, a special education teacher, a regular education teacher, a guidance counselor, an additional parent member, and the student's mother (id. at p. 4). The student's mother reported that the student was happy and doing well at Kildonan (id.). Meeting notes indicated that the March 2007 CSE reviewed the results of the parents' private reading evaluation and of the student's auditory processing evaluation (id. at p. 5; see Dist. Exs. 11; 12). Meeting notes further indicated that no reports from Kildonan were available to the March 2007 CSE (Dist. Ex. 2 at p. 5). The March 2007 CSE recommended that the student be placed in a 12:1+1 special class in the district's middle school for six 40-minute sessions per day (id. at p. 1).¹⁵ In addition, the March 2007

¹⁴ The student's literature teacher reported that the class was made up of seven boys in grades three, four, and five (Parent Ex. HH-12).

¹⁵ Although the March 2007 IEP listed the special class ratio as 12:1+2, district staff testified that the actual ratio of the class was 12:1+1 (Tr. pp. 925, 1010, 1015-16, 1027). For consistency, I will refer to the special class ratio as a 12:1+1 in this decision.

CSE recommended that the student receive group multisensory reading instruction on alternate days for 40 minutes per session, individual transitional counseling once weekly for 40 minutes, and a speech-language consultation twice monthly for 40 minutes (id. at pp. 1, 5). The March 2007 CSE recommended the following program modifications and support: pre-teaching of concepts, provide advance notice for transition, cue student to stay on task (by maintaining eye contact), modify length of assignments, allow frequent movement breaks, additional time to complete assignments, supplement oral presentations with visual cues, and preferential seating assignments (id. at p. 2). In addition, the March 2007 CSE recommended the following testing accommodations for the student: extended time (1.5), special location, directions clarified, proctor cueing, questions read, and modification when extensive writing is required (id.). The recommended March 2007 IEP goals were revised from the previous year with several study skills and social/emotional/behavioral goals being removed from the IEP and a speech-language goal being added (compare Dist. Ex. 1 at pp. 6-10, with Dist. Ex. 2 at pp. 5-9).

In a due process complaint notice dated June 15, 2007, the parents, through an attorney, asserted that the July 2006 IEP was inappropriate because it "betrayed a punitive approach" toward the student, offered little information regarding how the student could make progress and gain confidence in reading, lacked 1:1 reading instruction, contained inappropriate goals that failed to place sufficient emphasis on remediating the student's severe reading deficits, and lacked an explanation of how the student would achieve his social/emotional/behavioral goals (IHO Ex. 1 at pp. 4-5). The parents contended that Kildonan was an appropriate placement for the student (id. at pp. 5-6). According to the parents, the student had begun to make significant academic progress at Kildonan helped by the intensive daily 1:1 reading instruction provided to him at the school (id. at p. 6). For relief, the parents requested reimbursement for the cost of the student's tuition at Kildonan for the 2006-07 school year (id. at p. 7).

The student returned to Kildonan for the 2007-08 school year, where he was placed in a fifth grade class (Tr. p. 1567). Standardized testing conducted by Kildonan in October 2006 and again in October 2007, revealed improvement in the student's vocabulary and comprehension as measured by the Gates-MacGinitie Silent Reading Test-Fourth Edition (GMRT-4) (Dist. Ex. 19 at pp. 3, 4). The student's spelling skills, as measured by the Test of Written Spelling- Fourth Edition (TWS-4), also improved (id.). In addition, the student's math skills as measured by the Stanford Diagnostic Mathematics Test, Fourth Edition (SDMT-4) improved (id.). Administration of the GORT-4 in October 2006 and again in October 2007 indicated that the student's reading fluency remained the same, below the first percentile (id.). The student's word identification skills and word attack skills, as measured by the Woodcock Reading Mastery Tests-Revised/Normative Update also remained at approximately the same level (id.).

Kildonan progress reports from November 2007 indicated that the student was taking an interest in his literature class and that his creative and imaginative thinking was evident in classroom activities and projects (Dist. Ex. 19 at p. 22). The student's literature teacher reported that the student completed his journal entries using neat, legible handwriting and that the student listened attentively while the teacher read and he was active in learning his vocabulary words (id. at p. 23). The student's math teacher reported that the student demonstrated understanding of addition, subtraction and multiplication, but that initially division was difficult for the student

(id.). He noted that with perseverance the student was now able to find quotients using two-digit divisors (id.). The student's history teacher reported that the student was conscientious and thorough in his work (id. at p. 24). She stated that the student was attentive and actively participated by answering questions and sharing the information he knew (Dist. Ex. 19 at p. 24). According to the teacher, the student applied the writing skills he had developed in tutoring to his writing for history class (id.). The student's science teacher reported that the student was doing an "outstanding" job in his class (id. at p. 25). He noted that the student had "the vision" to imagine the goal he was working toward and the perseverance to work through challenges (id.). The science teacher stated that a quiz on the digestive system demonstrated the student's ability to both learn and use information (id.). The student's language tutor reported that the student started his sessions for the year in a relaxed and positive mood (id. at p. 29). With respect to handwriting, the tutor reported that the student had a comfortable pencil grip and that his lowercase letters were well formed and easily done (id.). He noted that because uppercase letters were used less frequently, some of them took a little more effort but that they were also well formed (id.). The tutor reported that the student practiced touch typing every day and that he was confident in his typing skills (id.). According to the tutor, the student worked daily to learn his spelling skills but felt awkward using finger spelling (id.). The tutor reported that with more multisyllabic words in his vocabulary, the student was seeing the need to use simultaneous oral spelling (SOS) to help pronounce and spell words correctly (id.). The tutor indicated that during language training the student had studied digraphs, blends, the three sounds of the suffix "ed," and three of the six syllable types (id.). The student also reviewed contractions, plurals, and possessives (id.). According to the language tutor, the student took pride in his choice of books and selected a high level of reading material and kept a record of what he completed (id.). The tutor reported that the student read aloud during reading sessions and with only a little practice was able to write complete sentences in response to questions about each chapter of the books (id.). The tutor reported using the student's creative writing skills to illustrate how he could expand on his work with more adjectives and adverbs (id.).

Subsequent Kildonan interim progress reports were completed in March 2008 (Dist. Ex. 25). The student's literature teacher reported that the student was bright, attentive, independent and happy (id. at p. 3). According to the teacher, when asked a question the student was able to respond with an articulate answer (id.). The teacher reported that the student enjoyed writing and drawing in his journal and always wrote appropriate sentences and drew illustrations that were well thought out (id.). The teacher indicated that the student understood literary terms and performed well on tests and quizzes (id.). The student's math teacher reported that the student demonstrated an understanding of working with fractions (id. at p. 2). He noted that the student was able perform basic math operations using fractions and that he had demonstrated the ability to find the least common multiple and compare fractions (id.). The student also demonstrated the ability to change fractions to decimals (id. at p. 3). The math teacher described the student as being careful and diligent about his work (id. at p. 2). According to the student's history teacher, the student was consistently attentive and followed directions carefully (id. at p. 4). The teacher noted that the student had a strong knowledge of geography and did well on quizzes (id.). According to the history teacher the student's homework was accurate and thorough (id.). The teacher reported that the student had difficulty on a unit quiz that had several new vocabulary words, as well as difficulty paraphrasing ideas from a chapter, but that he was able to complete

the notes successfully and independently (id.). The student's science teacher characterized the student as "outstanding" noting that the student was helpful and respectful (id. at p. 5). The teacher described the student's work as "meticulous" (id.). He noted that the student's test scores reflected "not only his attentive engagement during class but also his ability to study difficult vocabulary and complex information independently" (id.). Between May 2007 and May 2008, the student's scores on standardized measures of word identification, word attack, vocabulary, comprehension, and spelling improved (Dist. Ex. 38).

In May 2008, the district completed a social history with the student's mother serving as informant (Dist. Ex. 15 at p. 2). The social history indicated that the student was attending Kildonan where he was doing well in all of his classes and where he was well liked by his teachers and peers (id.). According to the student's mother, the elementary administrators at Kildonan were so pleased with the student's progress that he would be "skipping" a grade level and advancing to the upper school program in September (id.). As reflected in the social history, the parents believed that his placement at Kildonan was meeting the student's academic needs as a result of small class sizes and a multisensory approach (id.). The social history indicated that the student had gained great confidence in his reading ability (id.). After the student's use of medication for ADHD had been discontinued in December 2004 or January 2005, the student's mother reported that the student had resumed taking medication for ADHD in May or June 2006 (Tr. p. 1606; Dist. Ex. 15 at p. 2; see Tr. p. 1791; Dist. Ex. 9 at p. 2).

The CSE convened on June 5, 2008 to review the student's program for the 2008-09 school year (Dist. Ex. 3 at p. 5). Meeting participants included the CSE chairperson, a psychologist, a special education teacher, a regular education teacher, a guidance counselor, a speech-language therapist, and the student's mother (id.).¹⁶ According to meeting notes the student's mother described his program at Kildonan and indicated that he was happy and had made progress in reading (id.). The June 2008 CSE did not have information from Kildonan available for review, but the student's mother agreed to bring the information to the next CSE meeting (id.). Meeting notes indicated that the student was due for his triennial reevaluation and that consent to evaluate had been received from the parents (id.). The student's mother reported that the student would be available for testing during the summer months (id.). For the 2008-09 school year, the June 2008 CSE recommended that the student be placed in a 12:1+1 special class at the district's middle school and receive transitional counseling, speech-language therapy, and multisensory reading (id.).¹⁷ The June 2008 CSE found the student eligible for ESY services (id.). Notes further indicated that updated assessments would be conducted, the CSE would reconvene after the updated evaluations had been completed, and that the CSE's recommendations for the 2008-09 school year were subject to change based on the results of the updated testing (id.).

¹⁶ Although an additional parent member is listed as being in attendance at the June 2008 CSE meeting, the IEP includes a notation that the parent requested that the meeting be held without the additional parent member (Dist. Ex. 3 at p. 5).

¹⁷ Although the June 2008 IEP listed the special class ratio as 12:1+2, district staff testified at the impartial hearing that the actual ratio of the class was 12:1+1 (Tr. pp. 1060-61).

As recommended by the CSE, in June 2008 the district conducted a psychoeducational evaluation, an educational evaluation, a speech-language evaluation, and a social history of the student (Dist. Exs. 15; 16; 17; 18). The psychologist who evaluated the student reported that the student demonstrated some difficulty sustaining attention during the assessment (Dist. Ex. 16 at p. 2). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 96, which the psychologist reported was in the average range (id.). The student's perceptual reasoning (standard score 106), working memory (standard score 99), and processing speed (standard score 97) were all in the average range while the student's verbal comprehension (standard score 87) was in the low average range (id. at pp. 3, 4, 5). The psychologist reported that verbal comprehension was a relative weakness for the student but that he had made gains in that area (id. at p. 4). The student's academic skills were assessed using the Wechsler Individual Achievement Test – Second Edition (WIAT-II) (Dist. Ex. 17). According to the evaluator, the student attained the following subtest standard scores (and percentile ranks): word reading 90 (25th percentile), reading comprehension 98 (45th percentile), numerical operations 88 (21st percentile), math reasoning 96 (39th percentile), spelling 72 (3rd percentile), and written expression 79 (8th percentile) (id. at p. 1).

The student's language skills were assessed using the Comprehensive Assessment of Spoken Language (CASL) (Dist. Ex. 18 at p. 1). According to the evaluating therapist, the student's overall spoken language skills were at the lower end of the average range (standard score 89, 23rd percentile) (id. at pp. 2, 3). The therapist reported that the student presented with solidly average skills in the areas of word knowledge, grammatical knowledge, and his ability to determine meaning from context (id. at p. 3). The therapist noted delays in the student's pragmatic judgment and weaknesses in his ability to make inferences and comprehend non-literal language (id. at p. 3). Weaknesses were also noted in the student's word retrieval skills (id.).

The CSE reconvened on August 13, 2008, for the student's annual review for the 2008-09 school year (Dist. Ex. 3 at pp. 1, 5). Meeting participants included the CSE chairperson, a psychologist, a special education teacher, a regular education teacher, and the student's mother (id. at p. 5).¹⁸ Meeting comments indicated that the August 2008 CSE reviewed the student's March 2008 progress reports from Kildonan, as well as the results of district testing (Dist. Ex. 3 at p. 6). In addition, the student's mother discussed her observation of the recommended district special class program (id. at p. 6). Based on the results of the triennial reevaluation process the August 2008 CSE determined that the student continued to qualify for special education services as a student with a learning disability (id.). The August 2008 CSE recommended that for the 2008-09 school year, the student be placed in a 12:1+1 special class for five 40-minute periods daily and receive related services of group reading instruction for one 40 minute session on alternate days, group speech-language therapy once weekly for 30 minutes and individual counseling once weekly for 40 minutes (id. at p. 1).¹⁹ The August 2008 IEP recommended that

¹⁸ The August 2008 IEP included a notation indicating that the parent declined the participation of the additional parent member at the CSE meeting (Dist. Ex. 3 at p. 5).

¹⁹ Although the August 2008 IEP listed the special class ratio as 12:1+2, district staff testified at the impartial hearing that the actual ratio of the class was 12:1+1 (Tr. pp. 1060-61).

the student receive special class instruction for ELA, social studies, science, math, and an academic support period (id. at p. 2). It further recommended that the student receive reading instruction from a reading teacher in a general education setting (id.). According to meeting comments, the August 2008 CSE discussed opportunities for the student to attend special area classes in the general education setting and also the appropriateness of the student being included in a general education class with modified instruction as part of the student's schedule (id. at p. 6). The August 2008 CSE recommended that the student's special education teacher look for appropriate opportunities to integrate the student into a general education academic course (id. at p. 5). The August 2008 CSE recommended the following program modifications and support: pre-teaching of concepts, provide advance notice for transition, cue student to stay on task (by maintaining eye contact), modify length of assignments, allow frequent movement breaks, additional time to complete assignments, supplement oral presentations with visual cues, preferential seating, clarification of directions, use of a calculator, and access to a word processor or computer for writing assignments (id. at p. 2). In addition, the August 2008 CSE recommended the following testing accommodations for the student: spelling requirements waived, use of a calculator, flexible scheduling, extended time (1.5), special location, directions clarified, proctor cueing, questions read, access to a word processor/computer, and testing modification when extensive writing is required (id.). The August 2008 IEP included revised goals related to study skills, reading, writing, mathematics, speech-language development, and social/emotional/behavioral development (id. at pp. 8-10). The August 2008 CSE recommended that the student receive ESY services consisting of placement in a 12:1+2 special class daily for three hours and individual reading instruction twice weekly for 40 minutes (id. at p. 2). The August 2008 IEP reflected that a team meeting with the student's parents, school counselor, special education teacher, team of teachers, and related service providers would be held in September 2008 to facilitate the student's transition to the district's middle school (id.).

The student returned to Kildonan for the 2008-09 school year, where he was placed in a seventh grade class (Tr. p. 1568).

In November 2008, the parents brought the student to a private licensed psychologist for the stated purpose of determining the most appropriate educational setting for the student (Parent Ex. NN). The psychologist concluded that it would be difficult for the student to learn in a standard classroom setting and suggested that the student's progress would be slow (id. at p. 7). She opined that the student was currently in an ideal classroom milieu because of the small size of the classroom and the daily individual tutorial to preview, review and reinforce new learning (id.). She recommended in the strongest possible terms that the student remain in his current placement at Kildonan (id. at p. 8).

In a letter to the district dated September 25, 2008, the parents identified a private psychologist and requested that the district allow her to conduct an IEE of the student at district expense (IHO Ex. 5). The parents noted that the district's latest triennial reevaluation did not "examine" the student's listening comprehension or memory functions (id. at p. 5).

In a second due process complaint notice dated October 3, 2008, the parents, through an attorney, contended that the student's March 2007 IEP was inappropriate because reading

instruction was set forth on the IEP but failed to set forth the reading group size, methodology, or the credentials of the reading instructor (IHO Ex. 2 at pp. 2-3). The parents' indicated that the March 2007 IEP failed to state that the student was offered a diagnosis of dyslexia (id. at p. 3). The parents asserted that the March 2007 IEP failed to provide sufficient direct reading instruction and that the reading goals were inadequate (id. at pp. 3-4). The parents also challenged the August 2008 IEP stating that it was largely identical to the previous year's IEP and that it was inappropriate for the student for the many of the same reasons elaborated above (id. at pp. 5-6). The parents further asserted that Kildonan was an appropriate placement for the student for the 2007-08 and 2008-09 school years and that the student progressed there during both years (id. at pp. 4-5, 6-7). As relief, the parents requested tuition reimbursement for Kildonan for both the 2007-08 and 2008-09 school years (id. at p. 7).

In a response to the parents' June 2007 and October 2008 due process complaint notices dated October 10, 2008, the district denied the parents allegations and asserted that the July 2006, March 2007, and August 2008 IEPs developed by the CSE were appropriate and reasonably calculated to provide the student with "meaningful educational progress in the least restrictive environment" (LRE) (IHO Ex. 3 at p. 1).

In a due process complaint notice dated October 17, 2008, filed by the district, the district denied the parents' September 2008 request for an IEE, and further requested that the matter be consolidated into the impartial hearing regarding the parents' tuition reimbursement claims for Kildonan (IHO Ex. 6). The district asserted that "appropriate and competent" evaluations of the student had been conducted and were referenced in the August 2008 IEP (id.).

An impartial hearing was convened on November 24, 2008 and concluded after 14 days of testimony (Tr. pp. 1-2791). In a decision dated March 10, 2010, the impartial hearing officer determined that the district offered the student a free appropriate public education (FAPE) for the 2006-07 school year because the July 2006 IEP offered the student "a reasonable opportunity for educational progress" (IHO Decision at p. 15). Specifically, the impartial hearing officer determined that that the July 2006 IEP identified the student's needs and that the CSE had recommended a 12:1+2 special class for students in need of academic skill remediation and therapeutic support (id. at pp. 3-4). The impartial hearing officer noted that the student's receipt of reading instruction was not formally set forth on the July 2006 IEP and depended on an informal procedure of communication among district staff (id. at p. 5). According to the impartial hearing officer, the district was not legally required to set forth specific special reading instruction on the July 2006 IEP "as long as the IEP identifie[d] the needs of the student and provide[d] specific goals and measurable objectives to address the [student's] disability, along with appropriate educational programs and services" (id. at p. 6). The impartial hearing officer discussed the evidence in the hearing record regarding the student's previous IEPs, needs, reading goals and objectives, and reading services and concluded that the July 2006 IEP, together with the building-level multisensory reading services that were available to students generally as a primary educational tool, formed a sufficiently developed program to provide a meaningful educational opportunity for the student (id. at pp. 9-15).

With regard to the district's recommended program for the 2007-08 school year, the impartial hearing officer found that the March 2007 CSE was properly constituted and it recommended modifications to the student's special education services (IHO Decision at p. 16). The impartial hearing officer noted that reading instruction was specified on the March 2007 IEP (id.). The impartial hearing officer determined that the March 2007 CSE had several reports containing recommendations with respect to the student's reading needs and academics and that the expert witness who testified for the parents and had conducted an evaluation of the student did not complete her report until November 2008, long after the March 2007 CSE meeting (id. at p. 17). The impartial hearing officer concluded that the student's March 2007 IEP and recommended placement offered "a reasonable expectation of educational progress for the student during the [2007-08] academic year" (id.).

The impartial hearing officer noted that a greater quantity of information was available when the district developed the student's IEP and recommended placement for the 2008-09 school year, including reports from Kildonan, and recent evaluations (IHO Decision at pp. 17-18). The impartial hearing officer also considered the testimony of the private psychologist and concluded that her recommendation that the student receive 90 minutes of systematic language instruction per day was "ideal," but that the student could make educational progress with the special education program and services recommended by the district (id. at pp. 18-19). The impartial hearing officer concluded that the district offered the student a FAPE for the 2008-09 school year (id. at p. 19). Having determined that the district offered the student a FAPE for the 2006-07, 2007-08, and 2008-09 school years, the impartial hearing officer denied the parents' claims for tuition reimbursement at Kildonan (id. at p. 20).

With respect to the parents' request for reimbursement for the November 2008 evaluation of the student conducted by the private psychologist, the impartial hearing officer found that the parents did not articulate any disagreement or dissatisfaction with an evaluation conducted by the district (IHO Decision at p. 20). Therefore, the impartial hearing officer denied the parents' claim for reimbursement for the private evaluation as an IEE (id.).

The parents appeal,²⁰ contending that for the 2006-07 school year, the district should not have recommended a therapeutic program for the student because the student was severely dyslexic. The parents also contend that reading services were improperly excluded from the July 2006 IEP. For the 2007-08 school year, the parents argue that the district failed to conduct updated achievement testing and failed to recommend individual reading instruction by a certified reading specialist on the March 2007 IEP. The parents also allege that the reading goals on the March 2007 IEP were copied verbatim from the July 2006 IEP. The parents challenge the August 2008 IEP as inappropriate because the annual goals did not reflect the student's improvements at Kildonan. The parents further contend that the district treated the student's behaviors as his "primary disability" and that the impartial hearing officer ignored this evidence. The parents assert that that Kildonan was an appropriate placement for the student and that he progressed in that placement. According to the parents, the impartial hearing officer erred in

²⁰ The parents' attorney on appeal is not the same attorney who represented them at the impartial hearing below.

concluding that the district offered a FAPE for the 2006-07, 2007-08, and 2008-09 school years and they further allege that the impartial hearing officer should have limited his analysis to the IEPs at issue. The parents contend that the impartial hearing officer used the wrong burden of proof. The parents also contend that the impartial hearing officer erred in failing to find that the equities favored tuition reimbursement for the parents. The parents further argue that the impartial hearing officer erred in denying reimbursement for the private psychologist's November 2008 evaluation. For relief, the parents seek the relief requested in their due process complaint notices.

In its answer, the district denies the parents' contentions that it failed to offer the student a FAPE and asserts that the student was offered appropriate IEPs for the 2006-07, 2007-08, and 2008-09 school years.²¹ The district also argues that the parents failed to establish that Kildonan was an appropriate placement for the student and that equitable considerations do not support the parents' claims for tuition reimbursement. The district also contends that the parents are not entitled to reimbursement for an IEE.

Two purposes of the Individuals with Disabilities Education Act (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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

²¹ The district also asserts that the petition for review raises matters outside the school years at issue in this proceeding and that such matters should not be considered on appeal. I have reviewed the evidence in the hearing record and have considered the evidence as background information that is relevant to the parents' tuition reimbursement claims for the 2006-07, 2007-08, and 2008-09 school years.

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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]). 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; 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 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning first to the parties' dispute with regard to the July 2006 IEP, the student's mother testified that she disagreed with the district's recommended placement for the student for the 2006-07 school year, in part because it reflected a shift in emphasis from an academic to a therapeutic program (see Tr. pp. 1367-69, 1907-08, 1913-14, 1919-20, 1999, 2182-83). The student's mother maintained that the student's emotional difficulties were secondary to his learning disabilities and the result of the student's frustration with academics (Dist. Ex. 1 at p. 5). However, the hearing record also shows that the student's emotional difficulties were present from the time he was a young child and predated his entry into the district's school (Dist. Ex. 30 at p. 3; Parent Ex. C at p. 2). Once the student entered school, he also experienced significant frustration related to academics (Dist. Ex. 5 at p. 6; Parent Exs. K at p. 2; X at p. 1).

The hearing record shows that the student's behavior deteriorated, despite having received multisensory reading instruction throughout most of elementary school (Tr. pp. 1711-13, 2150, 2492-93). During elementary school, the district took numerous steps to address the student's attending difficulties and interfering behaviors (Dist. Exs. 33A; 33B; 39-A; 41-44). In September 2005, the district conducted an FBA of the student (Dist. Ex. 6A). The district's behavior consultant developed a BIP based on the FBA (Dist. Ex. 6B). In January 2006, the student's BIP was reviewed and revised (id.). Among other things, the revised plan called for the student to receive all of his academic instruction in a 1:1 setting within the classroom (id. at p. 3). In February 2006, the CSE met and recommended that the student be assigned a 1:1 teaching assistant and that he continue to participate in a social skills group that was part of the program (Parent Ex. B at p. 1). The CSE also recommended a psychiatric evaluation of the student, which was subsequently conducted in March 2006 (Parent Ex. B at pp. 1, 5).

The CSE chairperson testified that based on information from the student's teachers in his collaborative class, the district's psychiatric evaluation, and the FBAs that were conducted twice during the 2005-06 school year; the student's social/emotional/behavioral weaknesses were affecting the student's availability for learning and making it very difficult for the student to benefit from skill remediation (Tr. pp. 107-08). The hearing record shows that at the time of the July 2006 CSE meeting, the student was demonstrating academic deficits in reading, spelling,

and written expression; that he had difficulty attending and poor study skills; that he was socially disconnected and could be oppositional and defiant; and that he was showing signs of anxiety and depression (Dist. Exs. 1 at pp. 3-5; 9; Parent Ex. X).

To address the student's special education needs, the July 2006 CSE recommended that for the 2006-07 school year the student be placed in the district's 12:1+2 bright-fragile special class and receive individual counseling and a speech-language consultation (Dist. Ex. 1 at p. 1). The July 2006 IEP included academic goals related to reading, writing, and mathematics as well as study skill goals (id. at pp. 6-9). The goals were developed by the student's fifth grade special education teacher and were related to the student's difficulty attending, following class routines and completing assignments; deficits in decoding and reading comprehension; and difficulty writing complete sentences (Tr. p. 2552; Dist. Ex. 1 at pp. 6-8). The school psychologist testified that the academic goals contained in the student's IEP were similar to goals worked on by the special education teacher within the recommended bright-fragile special class (Tr. p. 844).

During the 2006-07 school year, the bright-fragile special class was composed of 12 students who ranged from sixth to eighth grade (Tr. p. 818). As described by district witnesses, the bright-fragile special class provided academic instruction to classified students who were in need of both academic skill remediation and therapeutic support (Tr. pp. 37, 818). Students assigned to the class spent first, second, and third periods in the classroom where they participated in two periods of academic instruction and a support period (Tr. p. 822).²² For periods four through six, students attended remedial reading or engaged in non-academic activities such as lunch, art, or physical education (id.). Periods seven through nine were comprised of two more academic periods and another support period (Tr. p. 823). According to the school psychologist, one support period was similar to a resource room and the other was an academic extension period, which might be used to extend an academic lesson (id.). The psychologist reported that students' IEP goals could be addressed in both types of support periods (Tr. p. 824).

The bright-fragile special class was staffed by a special education teacher and two teaching assistants (Tr. pp. 37-38, 817). The teaching assistants performed a variety of duties such as refocusing students, working with students on a lesson plan modified by the teacher, or providing support to students by accompanying them to a mainstream class (Tr. pp. 830-31). The classroom included a large open area for whole class instruction and two smaller rooms; one where students could go if they needed a quieter place to work or a place to regroup, and a second room for small group instruction (Tr. p. 820). Historically the class included students with ADHD, autism spectrum disorders, anxiety, depression and/or "OCD" (Tr. p. 889). Students placed in the class typically had difficulty with transitions, heightened anxiety, or difficulty navigating social situations (Tr. pp. 672-73). The school psychologist reported that the description of the student in his 2006-07 IEP was consistent with a "typical student" in the bright-fragile special class (Tr. pp. 832-33). In making her determination, the psychologist cited

²² According to the school psychologist, the bright-fragile special class provided students with the opportunity to be mainstreamed in a general education class if they had "an area of strength," and all students in the class were mainstreamed for music, physical education, lunch/recess, and unified arts (Tr. p. 819).

the student's attending difficulties, his PDD diagnosis, and the fact that he had become overwhelmed by school (Tr. p. 833).

In addition to recommending that the student receive his academic instruction in a 12:1+2 special class, the July 2006 CSE recommended that the student be afforded numerous program modifications and testing accommodations (Dist. Ex. 1 at p. 2). District staff testified as to how the program modifications and testing accommodations were designed to address the student's academic and attending needs, and also provided details as to how they might be implemented (Tr. pp. 120-23, 836-39, 2547-50).

To address the student's social/emotional/behavioral needs, the July 2006 CSE recommended that the student receive individual counseling and that a BIP be developed for the student (Dist. Ex. 1 at pp. 1, 2). The July 2006 IEP noted that group counseling and crisis intervention services would also be part of the student's recommended program (*id.* at p. 1). The hearing record shows that the bright-fragile special class included a behavior consultant who met regularly with both the classroom teacher and the school psychologist (Tr. pp. 38, 811-12). The school psychologist was designated as the clinical member of the bright-fragile team and provided students with individual and group counseling, conducted a once weekly group counseling session in the classroom, and provided crisis intervention as needed (Tr. pp. 811-12). According to the psychologist, topics for the group counseling sessions might include self-esteem building or how to manage frustration, or the development of social and casual conversation skills (Tr. p. 813). For individual counseling, the psychologist reported that she would work on a students' social/emotional IEP goals (Tr. p. 815). She noted that things such as anxiety, depression, or self awareness would be worked on in an individual setting, where it was "safer" for students if they were sensitive (Tr. p. 816). In terms of crisis counseling, the psychologist reported that if the student had a difficult week or a tough day at school that she would try to see the student individually or in the classroom, if that was preferable (Tr. pp. 813-14, 879). The school psychologist described a point system used in the bright-fragile special class and noted that behavior management was a big part of the class (Tr. p. 834). The student's July 2006 IEP contained six social/emotional/behavioral/goals, which included goals that required him to identify feelings of frustration and strategies to deal with it, and to seek help when feeling stressed (Dist. Ex. 1 at pp. 9-10). The school psychologist testified as to how she would address each one of the student's social/emotional/behavioral goals (Tr. pp. 840-43).

To address the student's speech-language needs, the July 2006 CSE recommended that the student be monitored by a speech-language therapist (Dist. Ex. 1 at p. 1). The speech-language therapist assigned to the bright-fragile special class reported that she collaborated with the teacher to plan instruction (Tr. pp. 612-14). According to the speech-language therapist, she would push-in during ELA instruction because the students would be working on the core skills that she would be looking for including language comprehension, vocabulary development, and expressive language (verbal or written) (Tr. p. 695). In addition to the twice monthly speech-language consultation, the CSE recommended the student for an auditory processing evaluation and noted that it was waiting for the results of a speech-language evaluation recommended by the June 16, 2006 CSE (Dist. Ex. 1 at p. 5). The student's July 2006 IEP included one speech-language goal related to the use of curriculum related vocabulary (*id.* at p. 9).

I find that as a whole, the program recommended by the July 2006 IEP was designed to confer educational benefits upon the student. The July 2006 IEP identified his academic, social, physical, and management needs; the CSE developed goals to address the student's identified needs; and further, the CSE recommended that the student receive instruction in a therapeutic special class setting with both academic and therapeutic components, as well as related services, program modifications and testing modifications to address the student's needs.

With regard to the parents' contentions about the sufficiency of the reading instruction recommended in the July 2006 IEP, the IEP contained reading goals to be addressed by the student's special education teacher, but it did not indicate that the student would be provided specialized reading instruction using a multisensory reading methodology (see Dist. Ex. 1). While the hearing record shows that the student had previously benefited from receiving multisensory reading instruction, I cannot conclude, given the totality of the student's needs and the programming offered by the district, that the district's decision not to identify additional multisensory reading instruction on the student's July 2006 IEP resulted in a denial of a FAPE (see T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [holding that the inadequacies present in the student's IEP did not render it substantively deficient as a whole and could be corrected]; Karl v. Bd. of Educ. of the Geneseo Central Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]). Moreover, the district's reading teacher testified that it was not unusual for an IEP to not include direct reading instruction because often the special class teacher delivered reading instruction for the students in those classes and it would not be listed as a separate entity (Tr. pp. 288, 357-58; see Casey K. v. St. Anne Cmty High Sch. Dist. No. 302, 2006 WL 2361881, at *9 n13 [C.D.Ill. Aug. 14, 2006] [explaining that there is little precedent for finding an IEP inappropriate because it does not set forth a research based reading program]; Robert B. v. West Chester Area Sch. Dist., 2005 WL 2396968, at *8 [E.D.Pa. Sept. 27, 2005]). The hearing record shows that at a minimum, the student would have received reading instruction from a special education teacher (see Tr. pp. 468, 777-78, 826) in a 12:1+2 classroom, which addressed the reading goals developed for the student by his fifth grade special education teacher who had taught the student for two years using Wilson (Tr. pp. 2492-93, 2677-78).

Although it is not necessary to reach the issue in light of my decision that the district offered the student a FAPE for the 2006-07 school year, I note, as did the impartial hearing officer, that the evidence in the hearing record also supports the conclusion that the student would have likely participated in the daily Wilson remedial program had he attended the placement recommended by the CSE (IHO Decision at p. 15). The CSE chairperson testified

that there were three certified reading teachers at the district's middle school who provide either remedial reading services or multisensory reading instruction using Wilson (Tr. p. 41). She described the reading services as building level services available to students with and without IEPs (Tr. pp. 41, 419). The hearing record indicates that students could be referred to remedial reading by their elementary school teacher, classroom teacher, or their parents (Tr. pp. 262, 275, 827). Students were then screened by the reading department to determine whether they were eligible for remedial reading services (Tr. pp. 232-33, 262). In addition, there was an "articulation" process that took place in which fifth grade teachers met with the sixth grade teachers and reviewed students' needs, including the need for remedial reading (Tr. pp. 299, 422, 462-62, 2536-37, 2555). District staff testified that based on the student's profile, he would have been eligible for Wilson reading instruction during the 2006-07 school year (Tr. pp. 273-74, 422-23, 461).

Next, addressing the parties' contentions with regard to the student's March 2007 IEP, evidence in the hearing record shows that the CSE considered additional, relevant information about the student when planning its recommendations for the 2007-08 school year. The CSE chairperson testified that the March 2007 CSE reviewed the results of the private reading evaluation obtained by the parents in July 2006, along with the results of the central auditory processing evaluation (Tr. p. 134). In addition, minutes from the March 2007 CSE meeting indicated that the student's mother provided an update on the student's status (Dist. Ex. 2 at pp. 4-5). According to the CSE chairperson, information available to the March 2007 CSE indicated that the student continued to demonstrate academic weaknesses in reading and writing, but that the behavioral weaknesses the student had presented with at the end of fifth grade were no longer present to the extent that they affected the student's learning (Tr. pp. 108-09; Dist. Ex. 2 at pp. 4-5). As a result, the CSE recommended that the student be placed in a 12:1+1 special class for the 2007-08 school year and receive related services of group reading instruction 40 minutes per day on alternate days, a speech-language consultation two times per month for 40 minutes, and transitional counseling once weekly for 40 minutes (Tr. pp. 43-44, 47; Dist. Ex. 2 at p. 1).^{23, 24}

The hearing record shows that the recommended 12:1+1 special class was for students with significant learning needs who required academic skill instruction in a small class setting (Tr. pp. 40, 43). According to the special education teacher of the proposed class, there was a range in both cognitive and skill ability within the classroom, and instruction was differentiated to meet students' needs (Tr. p. 898). The class included whole group, small group and individual instruction, and "hand[s]-on" activities were incorporated into the classroom curriculum (Tr. pp. 898, 899-902). The special education teacher testified that she employed numerous behavior management strategies in the classroom including the use of a behavior log, checks for negative behavior, and the use of physical cues (pom-poms) to alert students to inappropriate behavior (Tr. pp. 912, 913). The special education teacher reported that her classroom curriculum was

²³ The March 2007 IEP indicated that the student would have received transitional counseling from September 5, 2007 until November 2, 2007 (Dist. Ex. 2).

²⁴ As noted above, although described in the March 2007 IEP as a 12:1+2 special class setting, the actual ratio of students, teachers, and teacher assistants for the recommended class was 12:1+1 (Tr. pp. 925, 1010, 1015-16, 1027; Dist. Ex. 2 at p. 1).

aligned with New York State standards (Tr. pp. 963-64). She testified that the class had a modified curriculum and that the students were capable of attaining "essentially" grade level content, but that it had to be presented in a way that was accessible (Tr. p. 924).

The special education teacher testified that the first period of each day in the 12:1+1 class consisted of reading instruction, which included spelling, independent reading, and the study of different genres of literature (Tr. pp. 914-15). Students were assigned different novels within the same genre based on their reading ability and reading groups were supervised by the teacher or by the teacher assistant under the supervision of the teacher (Tr. pp. 915-16). Following reading, there was a second period ELA class that focused primarily on writing, and a third period math class (Tr. p. 916). The special education teacher reported that for periods four through six, the students participated in lunch, "unified arts," art, music, and physical education (Tr. p. 918). For seventh period, the students returned to the 12:1+1 class for science (*id.*). According to the special education teacher, in science she employed texts geared toward lower reading levels and students often worked in small groups (*id.*). In addition, class material was presented in smaller "chunks" with more reinforcement of key information (*id.*). The special education teacher reported that during social studies, which took place during eighth period, she used various supplemental materials geared toward students with learning disabilities (Tr. p. 919). The special education teacher noted that, especially toward the end of the day, some students had difficulty attending, and that as needed, they would be broken up into smaller groups with a teacher to help them stay on task (*id.*). The special education teacher testified that ninth period consisted of a leaning center, which provided students with the opportunity to catch up on work or make corrections to something that they did not understand (*id.*). She noted that if students did not have a pressing assignment, they could work on their individual skills box, which contained work related to their IEP goals (Tr. pp. 919-20).

After reviewing the student's March 2007 IEP, the special education teacher testified at the impartial hearing that the description of the student in the IEP was consistent with the profile of students in her special class (Tr. p. 923). Specifically, she noted that the students in her class were typically functioning at a lower level or were functioning in the average range with areas of profound weakness (*id.*). The teacher opined that her class would have been an appropriate placement for the student for the 2007-08 school year (Tr. p. 965). In addition, the special education teacher characterized the related services recommended for the student in the March 2007 IEP as a "a good starting point" (Tr. p. 966). She opined that the related services were appropriate for the student and if she thought that they were not appropriate or that the student needed additional services, she would consult with her colleagues and they would reassess the student's needs (Tr. pp. 966-67). The March 2007 IEP included numerous program modifications that the special education teacher indicated would have addressed the student's attentional issues and language processing needs (Tr. p. 967). The special education teacher testified that based on the student's abilities, consideration would have been given as to whether he could be mainstreamed for certain classes (Tr. p. 965).

To address the student's reading deficits, the March 2007 IEP included a recommendation that the student receive 40 minutes of multisensory reading instruction on alternate days (Dist. Ex. 2 at pp. 1, 5). The CSE chairperson testified that the proposed 12:1+1 special class also

provided supplemental reading instruction and ELA instruction (Tr. p. 455). As detailed above, the hearing record indicates that there were three certified reading teachers at the district's middle school who provided either comprehension-based remedial reading services or multisensory remedial reading services using Wilson (Tr. pp. 41, 232). The hearing record indicates that the teachers who provided Wilson instruction had completed level two Wilson training, which covered steps 1-12 of the program (Tr. pp. 222-25, 234-35, 260). According to the reading teacher, students assigned to the "every-other-day" Wilson reading instruction typically presented with severe decoding concerns and some spelling needs (Tr. pp. 264-65).²⁵ The recommended Wilson class that met on alternate days included groups of 3-10 students (Tr. pp. 238-39). The district's reading teacher described how decoding, encoding, and fluency were addressed through Wilson and also how a student's progress was charted using the system (Tr. pp. 227-31). In addition, she described some of the multisensory strategies employed during Wilson reading instruction (Tr. p. 250). With respect to reading, the hearing record further shows that there was collaboration between students' reading teachers and their classroom teachers (Tr. pp. 244-45, 962).

To address the student's speech-language and social/emotional weaknesses, the March 2007 IEP included a 40-minute speech-language consultation two times per month and individual transitional counseling once weekly for 40 minutes (Dist. Ex. 2 at p. 1). The hearing record shows that the student's speech-language and social/emotional/behavioral goals were revised for the 2007-08 school year (compare Dist. Ex. 1 at pp. 9-10, with Dist. Ex. 2 at pp. 8-9). The special education teacher testified that for a speech-language consultation, the therapist would meet with the student and also discuss the student's goals with the classroom teacher (Tr. p. 926). According to the special education teacher, transitional counseling was usually provided by the social worker who would meet with the student to try to smooth his transition (Tr. p. 927). The special education teacher indicated that students were evaluated during transitional counseling to determine whether or not they continued to require counseling (id.).

Upon comparing the student's July 2006 and March 2007 IEPs, the CSE chairperson noted that the recommended programs were different and the recommendation for individual counseling was changed to transitional counseling in the 2007-08 IEP (Tr. pp. 127-28). The CSE chairperson opined that the counseling change seemed appropriate given the change in the student's social/emotional needs (id.). The CSE chairperson further noted that the behavior plan recommended in the July 2006 IEP had been removed from the March 2007 IEP, and that new accommodations were added including "supplementing oral presentations with visual cues" and "preferential seating" (Tr. pp. 130-31). According to the CSE chairperson, the added modifications reflected recommendations made in the student's central auditory processing evaluation (Tr. p. 131).

²⁵ The reading teacher testified that seventh grade students who attended a regular education classroom received Wilson every other day; while typically seventh grade students who attended a special class received Wilson every day (Tr. pp. 234, 255-57). There were two to three students in the Wilson class that met every day (Tr. p. 257). According to the reading teacher, based on the student's profile, during the 2007-08 school year the student would have been eligible for the Wilson class that met every day (Tr. p. 272).

With regard to the parties' dispute over the goals proposed by the March 2007 CSE, the March 2007 IEP included goals related to study skills, reading, writing, mathematics, speech-language development, and social/emotional/behavioral needs (Dist. Ex. 2 at pp. 6-9). The student's academic goals remained the same as in the student's previous IEP (compare Dist. Ex. 1 at pp. 7-9, with Dist. Ex. 2 at pp. 6-8). The special education teacher opined that the goals were appropriate for the 2007-08 school year because they addressed the student's weaknesses in decoding, fluency, written expression, and numerical operations (Tr. pp. 943-44, 967). The teacher testified as to how she would implement the student's reading and writing goals and opined that the student's writing goals were very important for a student with expressive language difficulties (Tr. pp. 936-39, 945, 1018-21, 1022-26). The special education teacher reported that at the beginning of the year, she evaluated all of her students to see how they were doing on their goals and to develop a baseline (Tr. p. 933). With respect to reading, the teacher indicated that she assessed students using the Developmental Reading Assessment (DRA) to determine a grade level (Tr. p. 1025). The teacher testified that students' IEP goals that were not addressed through the curriculum would be worked on during the daily learning center (Tr. pp. 1021-22). While the private psychologist testified that the student's reading goals could be more "systematic" (Tr. p. 2306), I find that the goals, as written, adequately targeted decoding and fluency, which were both areas of weakness for the student (RR v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *9 [SDNY May 15, 2009]; W.S., 454 F. Supp. 2d at 145-47). In view of the forgoing evidence, I find that the hearing record supports the conclusion that the March 2007 IEP was appropriately modified by the CSE, reflected the student's needs, and offered special educational services that would have provided the student with an opportunity to make educational progress during the 2007-08 school year.

I will next address the parents' challenge to the August 2008 IEP. As discussed above, the CSE met on June 5, 2008 to review the student's program, and once again on August 13, 2008 to review the results of the district's reevaluation, as well as the student's progress reports from Kildonan (Tr. pp. 140-47, 149; Dist. Ex. 3 at pp. 4, 5-6). According to the CSE chairperson, the results of the reevaluation, along with reports from the student's mother and teachers, indicated that the student required academic skill remediation and academic instruction in a small class setting (Tr. p. 152). The CSE meeting notes indicated that after discussing a continuum of special education services, the CSE again recommended the student for a 12:1+1 special class with related services of group reading instruction 40 minutes per day on alternate days, and individual transitional counseling one time per week for 40 minutes (Tr. pp. 48-44; Dist. Ex. 3 at p. 1). In addition, the recommendation for twice monthly speech-language consultations was replaced with a recommendation for direct speech-language therapy, once weekly in a group (Dist. Ex. 3 at p. 1).²⁶ The CSE also discussed the possibility of the student receiving general education instruction for one or more of his classes, but did not make a determination on that issue at the CSE meeting (Tr. pp. 149-51; Dist. Ex. 3 at p. 6). The hearing record indicates that the August 2008 CSE recommended that the student should be placed in the same 12:1+1 special class as in the prior school year and recommended the same reading

²⁶ The CSE further found the student eligible for ESY services and recommended that during the summer, the student attend a 12:1+2 special class daily for three hours and receive individual reading instruction twice weekly for 40 minutes (Dist. Ex. 3 at p. 2).

instruction that the March 2007 CSE had recommended for the 2007-08 school year (Tr. pp. 472, 897, 949). The special education teacher of the recommended 12:1+1 class testified that the student's language needs were similar to those of students in her class, as were his deficits in spelling and written expression (Tr. pp. 948-49).

According to the district's speech-language therapist, the August 2008 CSE's recommendation to provide the student with direct speech-language therapy services was based on the student's performance on standardized testing and the results of the auditory processing evaluation (Tr. pp. 596-97). The speech-language therapist reported that she would have provided the student with direct therapy in the 12:1+1 special class using the student's curriculum to elicit the language skills that the student needed to develop (Tr. pp. 603, 667-69, 695). The speech-language therapist indicated that she had worked with many students with "dyslexia" and was currently receiving level one Wilson training (Tr. pp. 549-50, 628-31, 656-57). The speech-language therapist also described how she would implement the student's speech-language goals (Tr. pp. 603-07). The special education teacher confirmed that the speech-language therapist pushed into the classroom during ELA and assisted her with rephrasing things, highlighting vocabulary, and checking for understanding (Tr. p. 950).

In addition to recommending an increase in the student's speech-language therapy, the August 2008 CSE updated the student's program modifications and testing accommodations and discussed and updated the student's IEP goals (Tr. p. 151). The August 2008 CSE recommended that the following new modifications be added to the student's IEP: clarification of directions (rephrase and restate directions), use of a calculator, and access to a word processor/computer for writing assignments (Dist. Ex. 3 at p. 2). The CSE chairperson testified that although the student's IEP provided for a testing accommodation that allowed for clarification of directions, it did not reflect a corresponding program modification (Tr. p. 154). She indicated that based on results of updated evaluations, clarification of directions was also added to the August 2008 IEP as a program modification (id.). The CSE chairperson testified that use of calculator was added to the student's IEP based on assessment results which indicated that the student's math calculation skills were within the upper end of the low average range (id.).

The August 2008 IEP also reflected the addition of four new testing accommodations (Dist. Ex. 3 at pp. 2-3). According to the CSE chairperson, the August 2008 CSE determined that spelling requirements should be waived for the student because he continued to have significant weaknesses in spelling and the CSE did not want him to be penalized for spelling in content area assessments (Tr. p. 155). The CSE chairperson reported that based on the student's continuing challenge with written expression, the August 2008 CSE recommended that he have access to a word processor or computer (Tr. pp. 155-56). The August 2008 CSE further recommended that the student be provided with flexible scheduling to allow for breaks during testing and that the student be allowed use of a calculator (Tr. pp. 156-57).

The evidence in the hearing record shows that the proposed goals recommended in the August 2008 IEP for the 2008-09 school year were revised from the student's previous IEP (compare Dist. Ex. 3 at pp. 7-10, with Dist. Ex. 2 at pp. 6-9). The CSE chairperson testified that the August 2008 CSE did not keep the prior goals related to turning in homework assignments on

time or handing in completed assignments because there was no longer an indication that these were areas of need for the student (Tr. pp. 159-60). However, the CSE chairperson reported that the student still had needs in the area of study skills, and a goal was added to monitor the student's ability to check his work for completeness, accuracy, and writing errors (Tr. p. 159). The CSE chairperson reported that a reading goal targeting the use of contextual clues in classroom reading materials was added to the student's IEP based on the results of the educational evaluation, which indicated that use of vocabulary was a challenge for the student (Tr. p. 160). According to the CSE chairperson, the student's writing goals were amended in terms of the type of writing output that the student would be expected to perform (*id.*). The CSE chairperson stated that math was an area of strength for the student and that the number of goals related to math was therefore reduced on the student's IEP (Tr. pp. 160-61). However, the August 2008 IEP included a math goal related to solving word problems, which the CSE chairperson noted involved a reading component (Tr. p. 161; Dist. Ex. 3 at p. 9). She further noted that the CSE wanted to monitor the student's performance in that area (Tr. p. 161). The August 2008 IEP included additional speech-language goals that the CSE chairperson testified reflected information gleaned from the new assessments (*id.*; Dist. Ex. 3 at p. 9). The CSE chairperson further testified that a goal related to identifying feelings of frustration was deleted from the student's IEP based on the information from Kildonan that the student did not appear to require a specific IEP goal in this area (Tr. p. 161).

The special education teacher of the proposed 12:1+1 special class described how she would have implemented the new program modifications and testing accommodations contained in the student's August 2008 IEP (Tr. pp. 951-54). She also testified as to how she would have implemented the student's study skills and academic goals (Tr. pp. 955-62). The special education teacher also described the process by which she identified the students' present level of functioning (baseline) at the beginning of the year that so that she could assess progress during the course of the year (Tr. p. 955). I also note that the student's August 2008 IEP included a proposal that a team meeting with the student's parents and district staff would be held in September 2008 to facilitate the student's transition back to the district's middle school (Dist. Ex. 3 at p. 2).

In light of the evidence in the hearing record described above, I find that the program recommended for the student in the August 13, 2008 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits.²⁷

Based on the above, I find that the hearing record supports the impartial hearing officer's determination that the district offered the student a FAPE for the 2006-07, 2007-08, and 2008-09 school years.

²⁷ Although the results of the private psychological evaluation of the student obtained by the parents in November 2008 do not affect my conclusion that the district offered a the student FAPE for the 2008-09 school year, I have reviewed the document and note that the psychologist's recommendations for a small class, pre-teaching of new material, and preferential seating are consistent with the district's recommended program (Parent Ex. NN at p. 9).

Turning next to the impartial hearing officer's denial of the parents' request for reimbursement for the costs of the private psychologist's evaluation, Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). The procedure for a reevaluation requires that a group that includes the CSE and other qualified professionals, as appropriate, conduct an initial review of the existing evaluation data including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Such review may take place without a meeting (8 NYCRR 200.4[b][5][i]). Based on that review, and based on input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional data is needed, the school district shall administer tests and obtain other evaluation materials as may be needed to produce the needed data (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]). However, subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

Federal and State regulations also provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 C.F.R. § 300.502[b][5]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the

student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clark, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the impartial hearing officer determined that the parents did not state their disagreement with an evaluation conducted by the district (IHO Decision at p. 20). The hearing record shows that the parents did not express disagreement with an evaluation of the district; however, in September 2008 the parents expressed dissatisfaction with the adequacy of the district's reevaluation of the student with regard to two specific points; namely an alleged failure to examine the student's "listening comprehension" and "memory functions" (IHO Ex. 5). Here, the district conducted a triennial reevaluation of the student in June 2008, which included cognitive and achievement testing, a speech language evaluation, and a social history (Dist. Exs. 15; 16; 17; 18), and this information was reflected in the August 2008 IEP (Dist. Ex. 3 at pp. 4, 6). During the June 2008 psychoeducational evaluation, the school psychologist, who was duly certified in New York, specifically tested the student's working memory abilities, conducting both the digit span and letter-number sequencing subtests on the WISC-IV (Tr. pp. 717-18; Dist. Ex. 16 at p. 3). The student's standard score of 99 was within the average range (Tr. pp. 731-32; Dist. Ex. 16 at p. 3). According to the school psychologist, the student did not present a profile that suggested that supplemental subtests were required and she described the student's working memory as "completely intact" (Tr. pp. 733, 736. see Tr. pp. 760).

With regard to the parents' concern about the district's failure to examine listening comprehension, the district's speech-language therapist testified that the student had been assessed with the CELF-4 multiple times and had performed overall in the average range, and therefore, she decided to use the CASL in June 2008 to assess the student's expressive and receptive language skills (Tr. pp. 518-19; Dist. Exs. 18; 26).²⁸ The evidence also shows that the August 2008 CSE had the results from the October 2006 administration of the CELF-4 before it (Dist. Ex. 3 at p. 4). In the October 2006 evaluation, the student's receptive language skills were tested by many subtests, including the following: concepts and following directions; recalling sentences; and understanding spoken paragraphs, as well as the supplementary subtest semantic relationships (Dist. Ex. 26 at pp. 4-6). During the updated testing conducted in June 2008, the student was administered the non-literal language subtest of the CASL, to assess the student's

²⁸ The same speech-language therapist administered the October 2006 and June 2008 speech-language assessments of the student and participated in the June 2008 CSE meeting (Dist. Exs. 18; 26).

ability to comprehend figurative speech, indirect requests, and sarcasm, in which the student's score was in the low average range (Dist. Ex. 18 at p. 2). The school psychologist also set forth the verbal comprehension testing, and noted in her evaluation report, the meeting notes in the August 2008 IEP, and in her testimony at the impartial hearing, that the student's performance was in the low average range (Tr. pp. 730-31; Dist. Exs. 3 at p. 6; 16 at p. 3). The private psychologist testified regarding the supplemental memory and listening comprehension testing of the student that she conducted in November 2008 (Tr. pp. 2325, 2327; Parent Ex. NN). Although the private psychologist testified that she conducted additional testing so she could understand "how [the student was] progressing as a learner" (Tr. p. 2325), the evidence in the hearing record does not support the conclusion that the district failed to assess the student's listening comprehension or memory functions or otherwise failed to conduct an appropriate reevaluation of the student and identify his needs (see Holmes v. Millcreek Tp. Sch. Dist., 205 F.3d 583, 590-92 [3d Cir. 2000] [holding that reimbursement for a privately obtained IEE is not necessary if a school district's reevaluation is appropriate, even where the privately obtained IEE is considered by the district]; see also Application of a Student with a Disability, Appeal No. 09-121). Consequently, it is not necessary to modify the impartial hearing officer's order denying the parents' request for reimbursement for the November 2008 private evaluation of the student.²⁹

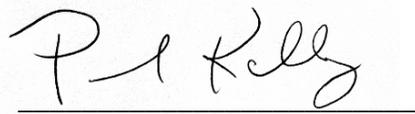
Lastly, although the parents have alleged that the impartial hearing officer misapplied the burden the burden of proof in this case for all three school years (Pet. ¶ 95), they do not point to any instances in which the impartial hearing officer improperly placed the burden of persuasion upon them. Nevertheless, I have independently examined the hearing record and find that evidence the evidence in the hearing record amply supports my determinations herein.

Having determined that the district offered the student a FAPE in the LRE, I need not reach the issue of whether Kildonan was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 10-026; Application of a Student with Disability, Appeal No. 08-158; Application of the Dept. of Educ., Appeal No. 08-095; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 24, 2010**


**PAUL F. KELLY
STATE REVIEW OFFICER**

²⁹ I also note that the November 2008 private evaluation was not available at the time of the August 2008 CSE meeting when the August 2008 IEP was formulated; however, nothing in this decision precludes the parties from considering the IEE at future CSE meetings (see 34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][v]).