



The University of the State of New York

The State Education Department
State Review Officer
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No. 11-078

Application of the BOARD OF EDUCATION OF THE
[REDACTED]
[REDACTED] SCHOOL DISTRICT for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability

Appearances:

Girvin and Ferlazzo, P.C., attorneys for petitioner, Christopher R. Langlois, Esq., of counsel

Sussman and Watkins, attorneys for respondent, Michael H. Sussman, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered it to reimburse respondent (the parent) for her son's tuition costs at the Kildonan School (Kildonan) for the 2010-11 school year. The appeal must be sustained.

Limited Issues on Appeal

Before turning to the merits of the appeal, during the impartial hearing, the district conceded that it did not offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Tr. p. 23).¹ In this case, neither party appeals the impartial hearing officer's determination that the district failed to meet its obligation to offer the student a FAPE for the 2010-11 school year. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR

¹ There is dispute over whether the district developed an individualized education program (IEP) or an individualized education services program (IESP) within the meaning of New York Education Law § 3602-c for the school year at issue (compare IHO Decision at p. 75, with Tr. pp. 677-78). Although the determination of whether a FAPE was offered is not at issue here, for purposes of this decision, I will refer to the district's planning document for the 2010-11 school year as the "proposed program."

200.5[j][5][v]), and accordingly, this determination is final and binding and will not be further addressed in this decision (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Although I have conducted a thorough, independent review of the hearing record, given the limited issues remaining in this appeal, the parties' familiarity with the student's educational history and the impartial hearing officer's decision will be presumed and only those facts necessary to render a decision will be recited.

Background

At the time of the impartial hearing, the student was attending a second grade class at Kildonan (Tr. pp. 126-27). The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (Tr. p. 205; see 8 NYCRR 200.1[d], 200.7). The student demonstrates difficulties with sensory regulation, executive functions, organization, anxiety, attention, and social skills as well as fine and gross motor skills (Joint Exs. 12 at p. 1; 13 at p.1; 18 at pp. 6-8, 19). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Due Process Complaint Notice

By due process complaint notice dated October 18, 2010, the parent requested an impartial hearing, seeking tuition reimbursement for Kildonan for the 2010-11 school year (Joint Ex. 1 at p. 1). According to the parent, she had placed the student at Kildonan due to what she described as dyslexia, which affected his ability to read and write (id.). The parent alleged that the September 2010 Committee on Special Education's (CSE's) recommendation that the student be placed in integrated co-teaching (ICT) settings for math and English was inappropriate (id.). The parent also alleged that the particular classroom to which the student had been assigned was not appropriate for the student because, among other things: (1) the class profile of the students in the recommended classroom was "discordant" with the student's educational profile and needs; (2) the student was too easily distracted and would not make gains in such a "busy environment;" (3) the classroom would not have provided the student with sufficient assistance in the areas of organization and spelling; (4) the classroom was too stationary for the student and did not incorporate movement into the daily routine; (5) the classroom featured bright lights that were not appropriate for the student; and (6) the classroom did not offer keyboarding to address the student's dysgraphia (id. at pp. 1-2). Conversely, the parent maintained in pertinent part, that Kildonan was appropriate for the student because it offered smaller classes and a multisensory approach to learning (id. at p. 2).

Impartial Hearing Officer Decision

On February 17, 2011, an impartial hearing convened and concluded on March 2, 2011, after three days of testimony, (Tr. pp. 1-734). By decision dated May 30, 2011, the impartial hearing officer awarded tuition reimbursement to the parent for Kildonan for the 2010-11 school year (IHO Decision at pp. 93-94). As an initial matter, the impartial hearing officer concluded that on August 30, 2010, the district developed an individualized education program (IEP) for the student, rather than an individualized education services program (IESP), based on the CSE's recommendation consisting of a specific ICT program located at a placement within the district

of residence (id. at pp. 75-76). Next, based on the district's concession that it could not establish that its placement recommendation was appropriate, the impartial hearing officer concluded that the district denied the student a FAPE during the 2010-11 school year (id. at p. 76). Although the impartial hearing officer did not make any findings regarding the district's contention that the student did not have a reading disorder, she noted that in developing the student's 2010-11 school year program, the district had included in the August 2010 IEP two reading goals and five writing goals to be addressed by a special education teacher (id. at p. 83). She also found that the student's classification as a student with a learning disability had not been in dispute at the August 2010 CSE meeting, and despite the district school psychologist's testimony that she had doubts regarding whether the student had a reading disorder, the school psychologist failed to share her concerns with other district employees (id. at p. 89).

Next, the impartial hearing officer found that Kildonan was appropriate to meet the student's unique special education needs (id. at p. 76). In pertinent part, she determined that Kildonan's "Language Training 1:1 tutorial" addressed the student's needs with respect to reading and writing (id. at p. 88). She further found that in light of his attention difficulties, the student benefitted from Kildonan's small, intensive environment because the student attended small classes with direct teacher involvement that helped redirect and focus him, and keep him focused during lessons (id.). In spelling, the impartial hearing officer determined that the student had progressed at Kildonan in his ability "to appropriately match symbol to sound" (id.). The impartial hearing officer also noted that the student could hear and identify different sounds in words, that he also understood the difference in short vowel sounds, and that he could accurately reproduce them (id.). With regard to writing, the impartial hearing officer concluded that the student was "very much in the beginning stages," on working toward organizing his thoughts and ideas in complete sentences (id.). Although the impartial hearing officer recognized that the student continued to exhibit difficulty with distractibility and continued to require redirection, she determined that he was better able to redirect himself than earlier in the school year (id.). Moreover, the impartial hearing officer noted that both the parent and Kildonan's academic dean testified that the student's anxiety had decreased since his admission to Kildonan, and that the parent had noticed a significant improvement in the student's self-esteem (id.).

The impartial hearing officer also considered the district's argument that Kildonan did not meet the student's related services needs; however, she did not find that a failure to furnish the student with related services was fatal to the parent's claim that Kildonan was appropriate for the student's special education needs (IHO Decision at pp. 85-88).² She noted that during the course of the school day, through an independent contract between the parent and service providers, counseling services were available and that the parent had privately obtained counseling for the student (id. at pp. 85-86).³ The impartial hearing officer further found that the Orton-Gillingham tutorial addressed the student's fine motor difficulties, and that he was working on developing fluid cursive writing (id. at p. 87). In addition, she noted that the student worked on touch typing

² In considering the district's claim regarding the provision of related services at Kildonan, the impartial hearing officer focused her analysis on the lack of discussion regarding the student's need for physical therapy (PT), occupational therapy (OT), and speech-language therapy, and the absence of related services providers at the August 2010 CSE meeting (IHO Decision at pp. 85-87).

³ The parent is not requesting reimbursement for the student's private twice monthly counseling sessions (Tr. pp. 243-44; see Tr. pp. 444-45).

at Kildonan (id.). Moreover, the impartial hearing officer determined that through Kildonan's equestrian program and his after-school physical activities, the student worked on coordination, muscle, and core body control (id.). Lastly, the impartial hearing officer found that Kildonan's equestrian program addressed, in part, the student's sensory integration deficits, which presented as gravitational, posture control, and movement through space in addition to some of the vestibular and proprioceptive difficulties that the student exhibited (id. at pp. 87-88).

Next, the impartial hearing officer found that equitable considerations favored the parent's claim for relief (IHO Decision at p. 91). Specifically, she determined that the parent's actions with respect to enrolling the student in Kildonan and the payment of his tuition were reasonable (id. at p. 90). The impartial hearing officer further concluded that regardless of the district's assertion that the parent had no intention of enrolling the student in a public placement, the hearing record reflected that the parent fully cooperated with the August 2010 CSE, and she did not engage in conduct that precluded the CSE from developing a program for the student (id. at pp. 90-91). Furthermore, the impartial hearing officer concluded that the parent complied with the Individuals with Disabilities Education Act's (IDEA's) notice of unilateral placement provisions and, accordingly, she ordered reimbursement to the parent (id. at p. 92).

Appeal for State-Level Review

The district appeals and requests that the impartial hearing officer's decision be annulled insofar as she found that Kildonan was an appropriate placement for the student for the 2010-11 school year and that equitable considerations supported tuition reimbursement relief to the parent. Specifically, the district alleges that the Kildonan was not appropriate to meet the student's special education needs, in part because the hearing record did not demonstrate that the student's deficits with respect to reading and writing were attributed to dyslexia, and that the Kildonan program was therefore not designed to address the student's needs. Furthermore, the district maintains that Kildonan did not constitute the student's least restrictive environment (LRE) because the school is comprised of only learning disabled students, thereby depriving the student of an opportunity to engage with nondisabled peers. Next, the district contends that the hearing record does not contain sufficient evidence to show that Kildonan provided the student with specially designed instruction designed to meet his needs with regard to his sensory processing disorder or his deficits in executive functioning, particularly in the areas of organization and sequencing. The district also asserts that Kildonan failed to address the student's counseling needs, particularly in the areas of anxiety, attention, and social/emotional difficulties. Next, the district argues that the student's OT needs that pertained to his sensory processing and fine motor deficits were not addressed at Kildonan. The district further maintains that Kildonan did not offer the student PT and therefore, failed to address the student's needs related to muscle weakness, static and dynamic balance, coordination, and difficulties with gross motor proficiency. Lastly, the district alleges that the hearing record lacks sufficient evidence to show that the student made progress at Kildonan in his primary areas of need during the 2010-11 school year.

The district also maintains that equitable considerations should bar an award of relief to the parent. Specific to this claim, the district asserts that the parent never seriously considered enrolling the student in a public placement for the 2010-11 school year. In addition, the district

contends that the parent failed to comply with the IDEA's 10-day notice of unilateral placement requirements.

The parent submitted an answer admitting and denying the allegations raised in the district's petition and requests that the impartial hearing officer's decision be affirmed. The parent maintains that Kildonan was appropriate to meet the student's educational needs because it addresses the student's dyslexia and dysgraphia, as well as his distractibility by providing the student with a highly structured and sequenced phonemic approach to reading, spelling, and writing in a setting with decreased stimulation that permitted the student to access the curriculum. The parent further claims that the hearing record illustrates that the student attained educational benefits at Kildonan during the 2010-11 school year, and that he made substantial progress in all areas. Next, contrary to the district's assertion that the student is not dyslexic, the parent argues that during the August 2010 CSE meeting, no one from the district challenged the student's difficulties with reading. With regard to the district's assertion that Kildonan was not appropriate for the student's needs because the school did not provide the student with the related services of OT, PT, and counseling, the parent argues that this claim is baseless because the parent has privately obtained counseling for the student and Kildonan's program otherwise addresses the student's needs through related services. In addition, the parent alleges that the student's placement in a setting like Kildonan is appropriate because it offers the student small class sizes, 1:1 instruction, and an integrated approach to the student's "complex" special education needs.

Next, the parent claims that equitable considerations support her request for reimbursement. She further maintains that her conduct was reasonable at all times; specifically, that it was reasonable to enroll the student in Kildonan in April 2010. Moreover, the parent alleges that she made every effort to work collaboratively with the district in developing a program for the student. The parent also asserts that she was genuinely interested in obtaining an appropriate program for the student from the district, and when she observed the recommended classroom, she promptly afforded the district notice of her rejection of the proposed program. She further notes that the district failed to respond to her request for a class profile, and alleges that it was the district's failure to cooperate with her requests that hindered the parent's ability to fully participate in the development of an appropriate program for the student. In addition, the parent argues that the district's failure to argue at the impartial hearing that it offered the student an appropriate program supports the parent's claim that she reasonably rejected the proposed program. Lastly, the parent contends that in July 2010, she advised the district that she had enrolled the student in Kildonan, but was still interested in learning about a public school placement for the student for the upcoming school year.

Applicable Standards—Unilateral Placement

As noted above, in light of the district's concession at the impartial hearing and in the petition that it failed to offer the student a FAPE for the 2010-11 school year, the remaining issues before me are whether the parent established the appropriateness of the student's unilateral placement at Kildonan and if so, whether equitable considerations favor the parent. 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own individualized education program (IEP) for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Appropriateness of Kildonan

Turning to the instant case, the district alleges that the evidence fails to illustrate that Kildonan addressed several of the student's areas of deficit; specifically, his sensory processing and executive functioning needs, his fine and gross motor difficulties, as well as his social/emotional needs. As set forth in greater detail below, the hearing record does not contain sufficient evidence to establish that Kildonan provided education instruction specially designed to meet the student's unique needs, supported by such services that were necessary to permit him to benefit from instruction.

The hearing record describes Kildonan as a private school that provides education for students with average to above average cognitive ability in addition to students who present with delays in the areas of reading, writing, and spelling (Tr. pp. 122-23). The Kildonan elementary school consists of twenty-five students in grades two through six (Tr. p. 117). Students enrolled in Kildonan receive 1:1 instruction using the Orton-Gillingham method (Tr. p. 120).⁴

⁴ The hearing record describes the Orton-Gillingham method as an approach to remediate the language skills of students with dyslexia or specific language-based reading disorders (Tr. p. 119). Kildonan's academic dean further described Orton-Gillingham as language-based 1:1 multisensory instruction presented in a direct and explicit fashion that was based on a student's individual needs (Tr. p. 120).

Cognitive Needs

In fall 2009, the parent obtained a private psychological evaluation of the student (Joint Ex. 18). Testing took place over 13 nonconsecutive days and the private psychologist also conducted a classroom observation of the student at the private school that he was attending at the time of the evaluation (*id.* at p. 1). The private psychologist noted that the student had a diagnosis of a sensory processing disorder, which affected his ability to coordinate smooth motor responses for a range of activities, his ability to make sense of "cause-and-effect," and his ability to understand the meaning of events in his life (*id.* at p. 10). According to the private psychologist, the student's sensory processing difficulties also affected his ability to regulate his inner states of emotion, attention and impulsivity, and to engage in social reciprocity (*id.*). Additionally, the private psychologist stated that the student had a diagnosis of an attention deficit hyperactivity disorder (ADHD) and noted that the student exhibited difficulty with executive functions (*id.* at p. 19). She further described the student's executive/regulatory functions as "significantly disrupted" (*id.*). The private psychologist referenced previous testing that she had conducted of the student in June 2007, which revealed that the student presented with "a disruption in the baseline of executive/regulatory functions to organize and modulate that impact a broad range of functions; including sensory processing, states of attention, emotional intensity, behavioral expression and motor coordination" (*id.* at p. 6). Consistent with his difficulties with executive functions, she reported that the student also had documented delays with regard to sequencing (*id.* at p. 14).

The private psychologist recommended that the student receive an academic program in which intervention for his "learning disabilities" and the support of his therapies (speech-language therapy and OT) were integrated into his school day (Joint Ex. 18 at p. 24). She further advised that it was important that the student's academic program not only remediate his "learning disabilities," but also teach to his intellectual strengths (*id.*). Although Kildonan's academic dean testified that the use of the individualized Orton-Gillingham program was crucial to the student's academic program because it was geared exclusively to the student's areas of weakness and strengths, and to remediate his skills, the hearing record offers no description with respect to what areas of weakness the Orton-Gillingham program targeted (Tr. p. 161). Moreover, there is no information in the hearing record that reflects how Kildonan addressed the student's deficits in executive functions, including sequencing, which impeded his ability to function in the classroom. I further note that the parent testified that the student continues to demonstrate organizational difficulties (Tr. p. 246). Accordingly, to the extent that there is only limited information in the hearing record regarding how the Kildonan program was designed to address the student's cognitive deficits, the evidence weighs against a finding that Kildonan was reasonably calculated to enable the student to receive educational benefits.

Social/Emotional Needs

Previous private psychological testing completed in March 2007 revealed that the student demonstrated significant needs related to emotional reactivity, anxiety, depression, somatic problems, withdrawn behavior, sleep problems, attention, and aggression (Joint Ex. 18 at p. 6). Likewise, in a June 2008 private psychiatric evaluation, the psychiatrist characterized the student as a student who "struggle[ed] massively with an array of anxieties and challenges" including phobic anxieties, fears of catastrophe, separation or loss, and anxiety negotiating the social world

(id. at p. 7). Similarly, the private psychologist who evaluated the student in fall 2009 reported that he presented with anxiety, and further characterized the student as "a little guy who carrie[d] an internal sense of the world as punitive for misunderstanding and transgressions that may be accidental" (id. at p. 22). The private psychologist further noted that the student carried a lot of anxiety as to the nature of the world beyond the range of everyday familiarity, perceiving it to be a scary place (id. at p. 23). She opined that the student could feel internally shaken up when he did not know how to interpret what he saw, or when he did not know what to make of his life experiences and social perception, and that "scary imagining" quickly "kicked in" to fill in the gaps of what the student did not understand (id.). According to the private psychologist, the student experienced "a lot of anxiety" and feelings of sadness, and she further noted that at times, when the student was experiencing worry, he spoke in a "high-pitched tinny voice" that manifested as excitement, but could be driven by anxiety (id.).

Given the student's difficulties reading social cues and difficulties interpreting the social world, the private psychologist recommended that the student would benefit from a social skills program; however, the hearing record reveals that Kildonan does not have a psychologist or counselor on staff who could work with the student on a regular basis as part of his educational program (Tr. pp. 177, 364). Further, the evidence does not show what strategies Kildonan employed with the student to address his difficulty with anxiety. Although the parent described the student as "much more confident" and also indicated that his anxiety seemed greatly reduced, the hearing record does not contain any objective evidence to support this conclusion (Tr. pp. 246, 249; see O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d. 692, 708 [10th Cir. 1998] [holding that a parent's account that a student was happier at a private placement does not compel a conclusion that a unilateral placement was appropriate under the IDEA]). Based on the foregoing, absent any evidence showing that Kildonan addressed the student's anxiety, the hearing record weighs against a conclusion that Kildonan was appropriate to meet the student's social/emotional needs.

Sensory Processing and Motor Needs

During the 2009-10 school year, the student received one hour of OT per week through a private agency with which his previous district of residence contracted (Joint Ex. 12 at p. 1). A December 2009 administration of the Bruininks-Oseretsky Test of Motor Proficiency - second edition, revealed that the student scored below average in the areas of fine motor precision and upper limb coordination (Joint Ex. 15 at p. 1). According to the evaluator, below average performance in both of those areas might affect the student's ability to successfully print or write letters and words with ease (id. at p. 2). According to an April 2010 OT annual update, the student's private OT emphasized sensory processing needs related to the student's performance, reactions to challenges, and situations reported from the family and school; and to a lesser degree, fine motor skills related to writing or using his hands (Joint Ex. 12 at p. 1). Similarly, the private psychologist, who evaluated the student in fall 2009, described pencil work as "painstaking and slow-going" for the student (Joint Ex. 18 at p. 19). Additionally, the student's private occupational therapist noted that the student experienced difficulty with sensory processing, motor planning, and vestibular skills (Joint Ex. 12 at pp. 1-2).

As further discussed below, the hearing record also reflects that the student exhibited significant gross motor needs requiring the intervention of a physical therapist (Joint Ex. 21 at p.

4). In a December 2008 PT report, the student's private physical therapist reported that he demonstrated significant delays in the area of postural skills, which affected his motor planning skills, bilateral coordination, decreased core strength, and overall physical endurance (id.). The private physical therapist further indicated that the student demonstrated "tactile defensiveness in protective tactile system and under registration in discriminative tactile system" (id. at p. 2). As a result, the physical therapist reported that the student demonstrated low muscle tone and poor endurance, which affected his ability to focus throughout the day on academic challenges (id. at p. 4). The report indicated that the student exhibited significant difficulties with sensory processing in the auditory, visual, vestibular, touch and proprioceptive systems, affecting his ability to develop his core strength, which then negatively affected his ability to maintain his attention (id.).

For the 2010-11 school year, the student's private occupational therapist recommended the continued provision of OT to the student at an increased frequency of two 45-minute sessions per week to address his sensory and fine motor needs (Joint Ex. 12 at p. 1). Likewise, the private psychologist who evaluated the student in fall 2009 recommended the continued provision of OT to the student (Joint Ex. 18 at p. 24). The student's private physical therapist also recommended that the student would benefit from continued PT, and further, that the student would benefit from classroom and home consultation to arrange a sensory diet within his home and school program to address his difficulties with sensory processing of tactile, vestibular, and proprioceptive systems (Joint Ex. 21 at p. 4). His private physical therapist also suggested that the student would benefit from pressure touch brushing and joint compressions treatment protocol for his sensory defensiveness (id.).

Despite the student's therapists' recommendations, the evidence does not establish that Kildonan addresses its students needs with regard to providing related services such as OT or PT (Tr. pp. 134, 187). Nor does the hearing record suggest that any of the student's therapists' recommendations have been incorporated into his program at Kildonan. While Kildonan's academic dean testified that the Orton-Gillingham program addressed the student's fine motor deficits because the student worked on developing fluid cursive writing skills, and the impartial hearing officer relied upon this testimony in rendering his decision, the hearing record fails to offer any specific details regarding how Kildonan's program met the student's individual fine motor needs (Tr. p. 135). Likewise, although the impartial hearing officer relied upon testimony in the hearing record suggesting that Kildonan's equestrian program was specially designed to address the student's gross motor deficits because learning how to ride required "a good amount of coordination, muscle control, core body control that students learn to develop through [Kildonan's] riding program," the hearing record is devoid of specific information detailing how the program addressed the student's individual OT needs, nor does it offer any information regarding the equestrian program's instructor or the instructor's background, credentials, or experience working with students who have OT needs (Tr. p. 136; see Joint Ex. 29 at p. 6). Rather, the hearing record reflects that through the equestrian program students learn to how to safely ride the horses, care for them, and complete barn chores (Tr. pp. 131-32; Joint Ex. 29 at p. 6). Although the student's horseback riding instructor noted that the student participated in the equestrian program with enthusiasm, the hearing record shows that with respect to the particular student in this case, the equestrian program was an enjoyable extracurricular activity, but it fails to describe what areas of motor deficit the program was designed to address (Joint Ex. 29 at p. 6). Lastly, the district correctly notes that all Kildonan students participate in the equestrian

program; therefore, I cannot conclude that the equestrian program was individualized to meet the student's unique special education needs (Tr. p. 188).

Based on the foregoing, and in light of the student's therapists' recommendations of continued OT and PT, the evidence once more weighs against a finding that Kildonan's program was reasonably calculated to enable the student to receive educational benefits.

Progress

Next, I will turn to the district's allegation that the hearing record contains insufficient evidence to determine whether and to what extent the student made progress at Kildonan with respect to his special education needs. While evidence of progress at Kildonan, or a lack thereof, would not by itself be sufficient to establish that Kildonan was appropriate; progress is nevertheless a relevant factor that may be considered (see Gagliardo, 489 F.3d at 115; see also Application of the Dep't of Educ., Appeal No. 11-051). Here, while the hearing record offers anecdotal information regarding the student's progress, there is scant objective evidence to support the parent's assertion that the student made "substantial progress in all areas" at Kildonan.

The hearing record contains three Kildonan progress reports dated October 18, 2010, November 22, 2010, and January 17, 2011 (Joint Exs. 27; 29; 31). A review of all three of the progress reports reveals that Kildonan staff evaluated the student's skills by describing the student's functioning level as "beginning," "developing," and "secure" (id.). The reports reflected that a "beginning" functioning level denoted that the student exhibited zero through 25 percent compliance, a "developing" functioning level denoted 25 percent to 75-80 percent compliance, and a "secure" functioning level indicated 80 percent or greater compliance (Joint Ex. 31 at p. 1). While the Kildonan reports provided narratives regarding the student's general functioning in school and the lessons on which he was working, the progress reports do not contain any objective data to support the teachers' statements contained in those reports (Joint Exs. 27; 29 at pp. 1-6; 31 at p. 3). The results from the October 2010 and February 2011 administrations of the word decoding and comprehension subtests of the Gates-MacGinitie Reading Tests-Fourth Edition (GMRT-4) are the sole objective data included in the hearing record regarding the student's functioning at Kildonan, and the hearing record further suggests that Kildonan staff retested the student in February 2010 in anticipation of the upcoming impartial hearing (Tr. pp. 139-40, 155-56; Joint Ex. 31 at p. 5). Furthermore, the hearing record does not contain any formal assessments regarding the student's abilities at Kildonan in social/emotional functioning, fine and gross motor, attention, and executive functions.

Rather than providing an assessment of the student in his specific areas of identified need, a review of the Kildonan reports shows that his teachers rated the student across general areas of performance such as "understands concepts," "engages in learning," and "demonstrates perseverance" (see Joint Exs. 27; 29; 31 at pp. 1-2). Kildonan's academic dean also testified that Kildonan's courses were ungraded, and that students did not actually receive grades that could be used to measure progress or a lack thereof (Tr. p. 190). In addition, none of the student's teachers were called as witnesses; therefore, there was no testimony to clarify any of the teachers' assessments or observations that could be related to the student's educational progress. Instead, while Kildonan's academic dean offered testimony regarding the student's progress in spelling,

the academic dean also admitted that he had never provided direct instruction to the student nor had he ever formally assessed the student in a classroom setting (Tr. pp. 169, 196). Under the circumstances presented, given the limited amount of objective information contained in the hearing record documenting the student's progress, the evidence does not support the conclusion that Kildonan should be determined to be appropriate due to the student's progress there during the 2010-11 school year. Consequently, the district's request that the impartial hearing officer's decision be overturned must be granted.

Conclusion

Having examined the evidence in the hearing record and the totality of the circumstances in determining whether the Kildonan program was appropriately designed to address the student's individual needs, I cannot conclude that the parent has met her burden of proof where the hearing record lacks evidence describing how Kildonan addressed the student's needs with respect to his cognitive deficiencies, his social/emotional needs, and gross and fine motor deficits; particularly in light of his therapists' recommendations for the continued provision of counseling, OT, and PT. Moreover, aside from the anecdotal information presented by the parent, the hearing record lacks sufficient objective information to demonstrate that the student progressed in significant areas of need.

Having determined that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at Kildonan for the 2010-11 school year, the necessary inquiry is at an end and it is not necessary to address the district's arguments regarding whether equitable considerations preclude relief in this circumstance (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).⁵

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of impartial hearing officer's decision, dated May 30, 2011, which determined that the Kildonan School was appropriate placement for the student for the 2010-11 school year and directed the district to reimburse the parents for the cost of tuition thereto are annulled.

Dated: **Albany, New York**
 July 29, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER

⁵ Although a full discussion of whether equitable considerations would preclude an award of relief to the parent is not warranted here, in this case, even if it was necessary to review the issue, the evidence suggests that equitable considerations would not support the parent's request for relief because she did not afford the district timely notice of her concerns with the proposed program, her intent to reject the district's proposed program, and her intention to seek tuition reimbursement from the district for Kildonan (Tr. pp. 451-52; Joint Ex. 8).