The University of the State of New York

The State Education Department
State Review Officer
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No. 11-092 & 11-094

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the [redacted] School District

Appearances:
Law Office of Peter D. Hoffman, P.C., attorneys for petitioners, Peter D. Hoffman, Esq., of counsel

Keane & Beane, P.C., attorneys for respondent, Stephanie M. Roebuck, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which denied in part their request to be reimbursed for their daughter's tuition costs at The Kildonan School (Kildonan) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determinations that it violated the child find provisions of the Individuals with Disabilities Education Act (IDEA) and that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2008-09 and 2009-10 school years and awarded full tuition reimbursement to the parents for their daughter's attendance at Kildonan for the 2008-09 school year and partial tuition reimbursement to the parents for the daughter's attendance at Kildonan for the 2009-10 school year.[1] The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending Kildonan. Kildonan has not been approved by the Commissioner of Education as a school with which districts may

[1] Although the parents timely served the district with a notice of intention to seek review (see 8 NYCRR 279.2(a), the parties initiated separate appeals from the same impartial hearing decision. As a matter of discretion, the two appeals are consolidated for purposes of this decision, the parents' request for review will be treated as the initiating appeal and the district's request for review shall be deemed a cross-appeal. The parties' answers denying the respective appeals were also received and considered.

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 either a student with a learning disability or an other health impairment during the 2008-09 and 2009-10 school years is in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][9], [10]; 8 NYCRR 200.1[zz][6], [10]).

Background

According to the hearing record, the student attended second through fourth grade in a private school in a foreign country,[2] which according to the student's mother, followed the "American system," and the curriculum "as it is here in the states" (Tr. p. 1013).[3] Upon moving to the district during summer 2006 before the beginning of the student's fifth grade school year, the student's mother met with the district's elementary school principal and reviewed the student's educational background (Tr. pp. 1020, 1022-24). The student's educational background reflects that during second grade, due to concerns about the student's writing, reading fluency, and attention skills, the private school enrolled the student in a "one-on-one reading and math program during the school day" (Tr. p. 1013). In May of the student's second grade year, the private school psychologist conducted a psychoeducational evaluation of the student (Joint Ex. 2A). The resultant report indicated that the student's cognitive skills "place[d] her solidly in the average range in the verbal and nonverbal reasoning measures," although the report noted difficulty with tasks involving auditory sequential memory and working memory (id. at p. 13). The private school psychologist reported that the student exhibited difficulty with phonological processing, orthographic processing, aspects of rapid naming, and graphomotor processing for lengthy texts (id.). He concluded that "[g]iven such a profile, it would appear that [the student] evinces problems that involve both [d]yslexia and [d]ysgraphia," noting difficulty with math calculations to a lesser degree (id.). Despite the supports provided by the private school, the student continued to exhibit "noticeable problems in reading fluency and word reading," and demonstrated problems at school consistent with an attention deficit hyperactivity disorder (ADHD), combined type (id.). Because at that time the student was not exhibiting ADHD symptoms at home, the private school psychologist opined it would be best to describe her as "at risk for this problem" (id.). The private school psychologist reported that the student exhibited avoidant types of behaviors and emotional reactions when faced with challenging or difficult material in school (id.). He recommended enrollment of the student in the "SLD [Specific Learning Differences] program for continued work in the areas of reading and writing," and math computation (Tr. p. 1015; Joint Ex. 2A at pp. 13-14).[4]

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[2] The hearing record does not reflect whether or not the student was being educated under the auspices of a public agency subject to the jurisdiction of the IDEA.

[3] The hearing record indicated that the student received speech-language therapy in elementary school due to difficulty with articulation, expressive language, and pragmatic language skills (Joint Ex. 2F at pp. 1-2; Parent Ex. 32 at pp. 116, 120).

[4] The private school psychologist reported that it was "likely [the student] will need this support for a while given the fact that her ability scores are at a level that fall solidly in the average range, which are well below the average found in the average [private school] student" (Joint Ex. 2A at p. 14).

During third and fourth grades, the student continued to attend the private school and received "instructional one-on-one or one-on-two with a learning specialist for one hour every day" focusing on improving reading comprehension, vocabulary development, word decoding, and editing skills pursuant to an individualized education program (IEP)[5] developed by the private school (Tr. pp. 1015-18; Joint Ex. 2B at p. 2).[6] According to the student's mother, the student also received "time and a half" to complete standardized testing (Tr. p. 1019).

In June 2006 at the conclusion of the student's fourth grade year, and in preparation for the student's move to the district, a different private school psychologist conducted an updated psychoeducational evaluation of the student (Joint Ex. 2B). An administration of an abbreviated cognitive assessment yielded verbal, performance, and full scale IQ scores in the average range, commensurate with results obtained during second grade (id. at pp. 3-4). The administration of selected subtests of the Wechsler Individual Achievement Test (WIAT-II) yielded the following standard scores (percentile): word reading, 96 (39); reading comprehension, 95 (37); pseudoword decoding, 106 (66); numerical operations, 108 (70); math reasoning, 116 (86); spelling, 93 (32); written expression, 104 (61) (Joint Ex. 2B at p. 4). The student achieved the following WIAT-II composite standard scores (percentile): reading, 96 (39); mathematics, 115 (84); and written language, 97 (42) (id. at p. 4). The resultant report, dated June 2006, indicated that based upon the student's then-current progress, "her educational plan ha[d] addressed the needs that were designated, and she ha[d] made solid progress in these areas over the last two years, particularly in written expression" (id. at p. 5). In the report, the private school psychologist noted the student's "marked improvement in attention and focus," and the lack of significant social/emotional "issues" in her profile (id.). According to the private psychologist, the student had "applied diligent effort to her learning and has had the academic learning support to meet her AIEP goals and to participate in the mainstream academic program at [the private school]" (id.). The private school psychologist offered that due to the student's "measured rate of learning and relative achievement levels based on this assessment, [the student] may no longer qualify for SLD support under [the] IDEIA," although indicated that the student would continue to benefit from the "tutorial support" for reading and written expression she had been receiving, as she transitioned to a new learning environment (id.). Due to the student's diagnosis of an ADHD, according to the private school psychologist, "at a minimum" the student would continue to receive accommodations under section 504 of the Rehabilitation Act of 1973 (section 504), including additional time and separate location for tests (id.).

In August 2006, the parents privately obtained one session per week of private tutoring services for the student, which were continued into the 10-month 2006-07 school year (Tr. pp. 1026-27, 1029-30). At the commencement of the 2006-07 (fifth grade) school year, the student attended one of the district's elementary schools and received twice weekly instruction in the "learning resource room," preferential seating, and time and a half to complete state examinations (Tr. p. 1025). In October 2006, the student's pediatrician indicated that the student

[5] According to the hearing record, this document was also referred to as an "AIEP" (Joint Exs. 2B at p. 5; 2E at p. 2).

[6] Concurrent with this timeframe, the student began taking medication for her attention difficulties (Tr. p. 1017; Joint Ex. 2B at p. 1).

had received a diagnosis of an attention deficit disorder (ADD) that was being treated with medication (Parent Ex. 45).

On October 31, 2006 a section 504 committee convened for the student's initial review (Joint Ex. 6). Meeting information contained in the resultant October 2006 section 504 plan indicated that the student was administered medication to address her attention difficulties, but she could still be distracted and required extra time to complete work and tests (id. at p. 2). The section 504 plan also indicated that although she had received special education services at the private school, the student's "progress [was] such that she was functioning at least on grade level in all areas" (id.). The section 504 committee determined that the student's limited major life activity was that she was diagnosed as having an ADHD and was unable to complete work in a typical amount of time (Tr. p. 53; Joint Ex. 6 at p. 1). For the remainder of the 2006-07 school year, the section 504 committee recommended that the student receive program modifications of preferential seating, refocusing and redirection, and extended time for assignments at teacher discretion (Joint Ex. 6 at p. 1). Section 504 plan testing accommodations were extended time (1.5), special location, and refocusing by an adult (id. at p. 2). The section 504 committee also stated that new entrant screening and teacher assessments indicated that three sessions per week of "building-level" learning resource center (LRC) services would be beneficial to work on the student's written expression and reading comprehension skills (Tr. p. 51; Joint Ex. 6 at p. 2).[7]

The student's mother stated that she was in contact with both the fifth grade teacher and the LRC teacher during the 2006-07 school year, due to parental concerns about the student's written expression and organizational skills, her ability to complete homework, and social difficulties (Tr. pp. 1030-31, 1036-38, 1057-71; see e.g. Parent Exs. 24-31). At the conclusion of the 2006-07 school year, the student's mother met with her daughter's fifth grade teacher and LRC teacher, who according to the parent, opined that the student would benefit from continuing with the section 504 plan during the upcoming school year (Tr. pp. 1866-67).

The student attended sixth grade at the commencement of the 2007-08 school year at the district's middle school, at which time the student's mother began contacting both the English and social studies teachers, and the "house counselor"[8] about academic and social difficulties her daughter was having (Tr. pp. 1872-73, 1904-05; Parent Ex. 40).[9] The section 504 committee convened on October 30, 2007, and documentation resulting from that meeting entitled "Committee Meeting Information" indicated that the student's English, social studies, mathematics, and science teachers all reviewed her progress thus far into the school year (Joint

[7] The director of special education described building-level LRC services as an intervention provided to general education students to help develop "compensatory strategies needed to perform effectively in the regular classroom" (Tr. p. 51). The LRC services were not provided pursuant to the student's October 2006 section 504 plan (Tr. pp. 50-51).

[8] According to the hearing record, the district's middle school divides its students into four "houses" (Tr. p. 2994). A "house counselor" was described as "the person who represents the house and implements all the policies of the school and work[s] with parents[,] teachers and children to monitor and assist students in academic, social and emotional growth" (Tr. p. 2994).

[9] The hearing record is unclear whether the student received section 504 accommodations pursuant to the October 2006 section 504 plan at the commencement of the 2007-08 school year (see Tr. pp. 977, 1872, 2995-96).

Ex. 2C; see Tr. pp. 1912-14; Dist. Ex. 1). According to the document, all of the student's teachers reported that the student had a successful start to the school year, that she performed well on tests, quizzes, and homework assignments, and that she had not required any extra time on her tests or quizzes (Joint Ex. 2C). The document indicated that while the parents were pleased to hear that the student was doing well, they expressed concerns about her difficulty with reading comprehension, outlining, and organizational skills (Joint Ex. 2C; see Tr. pp. 1915-16). The section 504 committee determined that the student did not meet the eligibility requirements for continuation of a section 504 plan, and exited the student from the program (Joint Ex. 2C).

By letter to the section 504 chairperson later on October 30, 2007, the parents expressed their concern that the decision to exit their daughter from section 504 accommodations was made without reviewing the student's previous evaluation reports, and was "premature and arbitrary" (Parent Ex. 8; see Joint Ex. 2C). They requested a "meeting to discuss re-instating the 504 plan" (Parent Ex. 8).

Shortly thereafter the parents met with the director of special education (director) on November 13, 2007 (Tr. pp. 1930-31). According to the student's mother, the parents provided information to the director about the student's educational experiences at the private school, the section 504 plan she had at the district's elementary school, the academic difficulties that were still apparent to them during sixth grade, and their belief that she required additional help (Tr. pp. 1930-32). At the meeting and in a follow-up letter dated November 19, 2007, the parents requested an appeal of the October 30, 2007 section 504 committee's decision to discontinue the student's eligibility for section 504 accommodations, and review by the director of the status of reinstating the student's 504 plan (Tr. pp. 1931-32; Joint Ex. 2D). In the November 19, 2007 letter the parents also indicated that "[a]s we discussed, we believe that there is a substantial amount of information that supports our position that [the student] needs at a minimum a 504 Plan and, more likely, classification under IDEA" (Joint Ex. 2D).

Later in November 2007 and on January 5, 2008 the student's mother e-mailed the director and inquired about the status of the parents' appeal of the decision to remove section 504 accommodations from their daughter's educational program (Parent Exs. 5; 46). In the January 5, 2008 e-mail, the student's mother informed the director that the parents had initiated a private neuropsychological evaluation of their daughter, which would not be completed until the end of February (Parent Ex. 5; see Joint Ex. 2F at p. 1). The parents indicated that the student required extra time to complete tests and additional help in the resource room, and requested information about how to arrange for those services (Parent Ex. 5). The e-mail further inquired if the parents should "ask for another [Committee on Special Education] meeting," as the student in their opinion, "desperately need[ed] assistance" (id.).

In an e-mail to the director and house counselor dated January 13, 2008, the student's mother reiterated her concerns regarding the removal of the student's section 504 plan, the parents' appeal of that decision, and her expectation that because of the appeal, the student would be afforded extra time during the administration of upcoming state examinations and "any other tests going forward until this issue is resolved" (Parent Ex. 47). The student's mother informed the director that the parents were "proceeding with testing and plan to pursue services for [the student] pursuant to the IDEA" (id.).

In a February 4, 2008 e-mail to the director and house counselor, the student's mother informed them that a private neuropsychologist had almost completed her evaluation of the student, and a report was to be forthcoming by the second week in March 2008, in order to provide them with "sufficient time to plan a [Committee on Special Education] meeting after this date" (Parent Ex. 51; see Joint Ex. 2F at p. 19). The student's mother indicated that she would be asking the private neuropsychologist to attend that meeting (Parent Ex. 51).

By letter dated February 11, 2008, the director informed the parents of the result of his independent review of the October 2007 section 504 committee's determination regarding the student, the letter "serv[ing] to detail [the director's] findings and address [the parents'] appeal (Joint Ex. 2E). The director described the eligibility requirements for section 504 accommodations, and explained that to be eligible, the student's "learning (as determined by [her] performance on tests and other measures)" must be "significantly diminished by her disability as compared to the average student in the population" (id. at p. 1). The director indicated that in making his determination that the student was not eligible for section 504 accommodations, he reviewed the student's June 2006 private school psychological evaluation report, the current grades posted on the student's transcript, and spoke with her teachers, house counselor, and parents about the student's ability to meet the demands of the curriculum (id. at p. 2).[10] Regarding the results of the June 2006 private school psychoeducational evaluation, the director indicated that the student's academic performance levels as measured by the WIAT-II were all in the average range, with strengths in math reasoning (id.). The director quoted the private school psychologist's report that concluded the student "'may no longer qualify for SLD support under IDEIA . . . Her new school may wish to honor the existing AIEP as she transitions to a new learning environment,'" a recommendation that the district "gave weight to" by offering the student a section 504 plan upon her entrance to the district at the commencement of the 2006-07 school year (id.). The director noted that the section 504 plan "is reviewed annually and continued eligibility is based on the [student's] demonstrated need" (id.). According to the director, the student's then-current transcript reflected her overall performance to be in the "B" range, noting that despite her good math skills, she obtained a "C+" in the most recent quarter, which represented her lowest grade (id.). The director indicated that the teachers reported that the student had "not demonstrated a need for accommodations and seeme[d] to complete all assignments in a timely way" (id.). He further added that the teachers' description of the student's performance was consistent with her performance in fifth grade as reported by the district school psychologist (id.). The director acknowledged that the parents were in the process of obtaining a private evaluation of the student, and indicated

> [w]e will certainly review and consider any new information you care to bring forward, but the findings will be evaluated in relation to [the student's] school performance. In other words, should the

[10] The director testified that he participated in "a number" of telephone calls with the parents between their appeal letter of November 19, 2007, and the date of his appeal determination on February 11, 2008 (Tr. pp. 60-63). Additionally, the hearing record reflected that the parent and the student's teachers corresponded numerous times between October 2007 and June 2008 about the student's academic, homework and social performance (see e.g. Parent Exs. 1; 12; 13; 21; 23; 40; 48; 49; 53; 54; 60; 61; 82 at pp. 32, 34).

> evaluator state that [the student] has an area or areas of disability there will be a need to see evidence of the difficulty(ies) in her school performance. As previously stated, an identified condition such as ADHD, dyslexia, etc. must rise to the level of a disability as defined by the Act for an individual to receive accommodations

(id.).

The director indicated that based upon the information he had collected, he was unable to conclude that the student had a condition that substantially limited her learning or school performance, and determined that there was no basis for him to alter the determination made by the October 2007 section 504 committee (Joint Ex. 2E at p. 2).

Between January and April 2008, the parents obtained private neuropsychological, speech-language, "[brief]" psychiatric, and binocular/oculomotor evaluations of the student (Joint Exs. 2F; 2G; 2H; 2I).[11] In spring 2008 the parents also obtained one session per week of tutoring services for the student due to a "noticeable decline in her work" (Tr. p. 2001). In May 2008 the parents retained counsel, who by facsimile dated May 16, 2008 to the director, requested a section 504 committee meeting to determine the student's eligibility, and provided the director with the student's April 2008 private speech-language evaluation report (Joint Ex. 2G at p. 3).

The private speech-language evaluation of the student took place over two days in April 2008 (Joint Ex. 2G at pp. 1-2). According to the private speech-language pathologist, the student displayed a "seemingly flat and detached emotional affect with limited, and fragmented spontaneous speech" (id. at p. 1). The student exhibited errors in the place of articulation of "lingua-blade alveolar fricative phonemes, both voiced and voiceless" (id.).[12] An assessment of the student's speech mechanism revealed adequate structures and functions for speech and eating purposes, although the private speech-language pathologist reported that the student exhibited a "reverse swallow with a tongue thrust" (id. at pp. 1-2). The student's performance on subtests of the Detroit Test of Learning Aptitude (DTLA) informed the private speech-language pathologist that the student demonstrated auditory processing and sequencing difficulties, and word finding difficulty (id. at p. 2). Results of an assessment of the student's hearing acuity were within normal limits (id.). The private speech-language pathologist concluded that the student "seem[ed] to exhibit a speech and language dysfunction, affecting her phonemic and syntactic levels of language, including her auditory processing and sequencing of linguistic data, as outlined and described above," noting that these difficulties could affect the student emotionally and academically (id.). Speech-language therapy was recommended for the student, with a minimum of twice weekly sessions as "ideal" (id.).

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[11] The hearing record indicated that the parents first provided the district with the private neuropsychological evaluation and binocular/oculomotor evaluation reports in August 2008, and the student's psychiatric evaluation report during the impartial hearing process (Tr. pp. 2105-07, 2109-10, 2400).

[12] The hearing record shows that this articulation error type is also referred to as an interdental lisp, affecting speech sounds such as "s" and "z" (Tr. pp. 1199-1203, 1214-17).

In June 2008 the section 504 committee reconvened to review the private speech-language evaluation report and the parents' concerns that the student required accommodations (Joint Ex. 2K at p. 2).[13] Attendees included the house counselor, the director, the student's mother, counsel for the parents, and the district speech therapist (id.). Committee summary information prepared by the district reflected that the section 504 committee discussed that the student was receiving "A" and "B" grades, which her parents claimed she received due to the provision of extended time (id.). According to the house counselor, the student's teachers reported that the student had not demonstrated a need for additional time, to which the parents' counsel responded that on specific occasions the student allegedly requested extended time from her teachers to complete tests (Joint Ex. 2K at p. 2; see Parent Ex. 82 at p. 51). Meeting information indicated that the district speech therapist reviewed the private speech-language evaluation report, noting that the DTLA, which had been administered to the student, was not an assessment typically administered as part of a speech evaluation (Joint Ex. 2K at p. 2). The summary of the meeting indicated that "[a]ccording to the report, however, [the student] seems to have a mild articulation problem and some delays in language and [the private speech-language pathologist] recommended language therapy," adding "[n]o modifications in programming were recommended" (id.).[14]

According to the June 2008 section 504 committee summary, the director discussed the criteria for eligibility pursuant to section 504, and that based upon the student's current school performance, it did not appear that her speech and language condition as identified by the private speech-language pathologist was significantly impairing her ability to meet classroom demands (Joint Ex. 2K at p. 2). He further indicated that the student was not being denied access to any program or service based on the condition, and therefore it did not appear that the student required accommodations (id.). Meeting information reflected that the parents' attorney disagreed with the director's interpretation of section 504 regulations, and stated that she would like to have a "full evaluation" (id.). When the director asked if the parents' attorney was requesting an evaluation "under 504 or under IDEA" and requested that it be put in writing, the parents' attorney stated that she wanted time to speak to the parents (id. at p. 3). According to the committee summary, the meeting ended "with the understanding that [the parents' attorney] would inform the 504 [t]eam of how she wanted to proceed" (id.). District members of the section 504 team concluded that the student "was not eligible for a 504 Plan, as no disability could be identified that [was] significantly interfering with a life function (i.e., learning) or that was denying her access to any programs or services available at the Middle School" (Joint Ex. 2K at p. 3; see Tr. p. 2171).

In mid-July 2008, the parents discharged their attorney, and made an appointment to meet with the private speech-language pathologist and the director on August 19, 2008 (Parent Exs.

[13] The document pertaining to the June 2008 section 504 committee meeting was dated incorrectly (Tr. pp. 87-90, 2162-64; Joint Ex. 10).

[14] In a letter dated July 24, 2008, to the director, the private speech-language pathologist advised that upon her review of the June 2008 section 504 committee information summary, it appeared that the results of her testing were "misinterpreted" and that she was "misquoted" in her findings (Joint Ex. 2L at p. 1). She explained her rationale for using the DTLA during the student's evaluation, and reiterated that results showed the student's difficulty with auditorially presented linguistic data, and word finding skills (Joint Ex. 2L at p. 1).

70; 71).[15] At the meeting the private speech-language pathologist discussed her April 2008 evaluation report and her experience with the student (Tr. pp. 2173-74, 2622). The parents discussed the student's educational background, and receipt of services at the private school and section 504 accommodations during fifth grade (Tr. pp. 2174-75, 2621). They also discussed their observations that the student struggled during sixth grade with writing, reading comprehension, and organization due to the removal of the section 504 plan (Tr. pp. 2175, 2620-22). The parents informed the director that the student had been pulling out her eyebrow during spring 2008, and despite correspondence and phone calls with her teachers, the student was "floundering" (Tr. p. 2175). The student's father stated that he "wanted to see if the school would have [the student] evaluated" (Tr. pp. 2620, 2622). At the meeting, the parents provided the director with the February 2008 private neuropsychological evaluation report, the April 2008 private binocular/oculomotor evaluation report and a corresponding May 2008 letter, and a July 2008 letter from the student's private social skills group therapist (Tr. pp. 2105-10, 2175-76; Joint Exs. 2F; 2I; 2J; 2M). According to the parents, the director stated that the student would not qualify for a section 504 plan because the teachers all reported that the student had done "great" in sixth grade (Tr. pp. 2176, 2622). The student's mother stated that she informed the director that she would not allow her daughter to struggle through another year in the district, that the student needed an appropriate education, and that if she was "forced" to remove her daughter from the district, she would hold the district financially responsible (Tr. pp. 2176, 2623). She requested that the director review the evaluation reports with the Committee on Special Education (CSE) and indicated that she would contact him the following week (Tr. p. 2180).

The private neuropsychological evaluation report submitted to the district in August 2008 resulted from assessments of the student conducted over four days in January and February 2008 (Joint Ex. 2F). The report included background educational information about the student and behavioral observations (id. at pp. 1-3). According to the private neuropsychologist (evaluator), during the evaluation the student was cooperative, and "well-related," although her speech was often unintelligible and she was frequently required to repeat or clarify her responses (id. at p. 3). The student was observed to have difficulty waiting for instructions to be completed and following complex instructions, and worked "quickly and impulsively" (id.). The evaluator administered a battery of assessments measuring the student's intellectual abilities; academic achievement; executive functions; attention, memory, and language skills; visuomotor functioning; visuospatial/visuoconstructional abilities; and social/emotional skills (id. at pp. 20-25). The evaluator reported that the student "often seemed brighter than her scores indicated, and the considerable variability in her performance throughout the evaluation, raise[d] the possibility that, in some instances, present scores may underestimate her level of ability" (id. at p. 14).

An administration of the WISC-IV to the student yielded overall scores in the average range, consistent with the results of previous cognitive evaluations (Joint Ex. 2F at p. 14). There was no variability between the student's subscale (verbal comprehension, perceptual reasoning,

[15] The hearing record refers to the meeting between the director, the parents, and the private speech-language pathologist as occurring on August 8. August 18 and August 19, 2008 (see e.g. Tr. pp. 2105-10, 2172-73, 2180, 2620; Joint Ex. 2N; Parent Ex. 71). For consistency, this decision will refer to the meeting between the director, the parents, and the private speech-language pathologist as the August 2008 meeting.

working memory, and processing speed) scores, which were all in the average range (id.). However, according to the evaluator the student exhibited "notable attentional/executive disturbances," and fidgety, impulsive behaviors, and failed to monitor her performance (id.). Overall, the student's performance suggested to the evaluator "a clinical classification of an [ADD]" (id.). In the area of executive functioning, the student demonstrated weakness in working memory, and the ability to devise and implement effective strategies for organizing complex, unstructured information (id.). Additionally, the student exhibited "carelessness, inadequate monitoring, poor attention to detail, loss of instructional 'set,' retrieval difficulties as well as problems with linguistic formulation" (id. at p. 15).

Regarding language skills, the evaluator reported that the student exhibited language difficulties that in several instances, were secondary to her "attentional/executive disturbances" (Joint Ex. 2F at p. 15). The student's receptive language skills were "intact" for syntactic comprehension and comprehension of discourse, although at times she experienced difficulty following complex instructions and required repetition or an added explanation (id. at p. 15). As noted above, the student's speech was often difficult to understand, and formal testing revealed weaknesses in rapid word retrieval, sentence formulation, and expressive metalinguistic skills (id.). The evaluator reported that the student's "attentional/executive disturbances, as well as speech/language difficulties, impacted [the student's] performance in several areas of functioning, including memory/learning and academic achievement" (id.).

Assessments of the student's reading skills including rapid letter naming, word reading, pseudoword decoding, and reading rate yielded subtest scores in the average range (27th to 37th percentile), with reading comprehension subtest scores in the average to high average range (55th to 84th percentile) (Joint Ex. 2F at pp. 21-22). Subtests measuring the student's rapid digit and object naming (25th percentile), and reading accuracy and fluency (16th percentile) were in the low average range (id.). The student achieved contrived writing, spontaneous writing, and overall writing component scores in the low average range (10th to 25th percentile); spelling subtest scores in the average range; and a writing fluency subtest score in the high average range (id. at p. 22). According to the evaluator, the student's writing was "sloppy, with poorly formed letters and uneven spacing between letters and words . . . consistent with her poor performance on a test of visuomotor integration, which is indicative of poor visuomotor integration and/or motor control" (id. at p. 16). In mathematics, the student's automaticity of math facts and computational skills were in the average range (58th to 71st percentile) (id. at pp. 16, 22). The evaluator reported that the student's attentional/executive difficulties contributed to her low average performance on tasks of her ability to reason mathematically (23rd percentile) (id.).[16]

The evaluator concluded that the student's "considerable difficulties" with attention/executive functioning and language functioning were having a "significant impact" on her academic achievement and increasing effect on her social/emotional functioning (Joint Ex.

[16] Noting that social/emotional difficulties were not the focus of the parents' request for evaluation, the evaluator indicated that the parents reported the student was being bullied at school (Joint Ex. 2F at p. 17). The evaluator opined that the student's attentional and speech-language problems, along with her occasional lack of awareness of "social niceties," may have been contributing to her social difficulties (id.). The evaluator observed the student pulling out her eyebrows, which she indicated could be a "manifestation of anxiety" (id.).

2F at p. 17). Given the student's "long history of learning difficulties and [s]pecial [e]ducation [s]ervices," it was "clearly apparent from the results of this evaluation, that she continue[d] to require considerable support" (id.). The evaluator determined that the student met the criteria for diagnoses of an expressive language disorder, an ADHD - predominantly inattentive type, a reading disorder, a disorder of written expression, and a developmental coordination disorder (id.). The evaluation report included numerous medical/therapeutic and academic recommendations including medication to address attention difficulties; speech-language therapy, social skills training, and psychotherapy; various classroom accommodations; and strategies to improve decoding, written expression, and organizational skills (id. at pp. 17-19).

At the August 2008 meeting the parents also provided the district with a report from an April 2008 private binocular/oculomotor evaluation of the student, in which an optometrist offered diagnoses of convergence excess and oculomotor dysfunction (Joint Ex. 2I).[17] The optometrist recommended that the student receive orthoptic therapy, and that the student be "allowed to take all tests un-timed until [the] condition is resolved" (id. at p. 2). In a letter dated May 11, 2008, "To Whom It May Concern," the optometrist indicated that people who have received diagnoses of convergence excess and oculomotor dysfunction "usually report discomfort or distraction when they attempt to read for meaning . . . [t]his is especially true when they are under time-pressure" (Joint Ex. 2J). He further indicated that timed standardized tests would not reveal the student's "true academic potential," and that it would be "desirable to allow [the student] to take all such tests with double time and with rest breaks between sections" (id.).

The parents also submitted a letter dated July 14, 2008 from the student's private social skills group therapist to the director at the August 2008 meeting (Joint Ex. 2M). In the letter, the private therapist indicated that she had worked with the student for the past eight weeks in a social skills group setting, focusing on improving listening, communication, and conflict resolution skills, and also "[h]ow to [h]andle and [a]void [t]easing and [b]ullying" (id.). The private therapist reported that she was concerned about the student's communication skills because the student exhibited difficulty expressing herself verbally, and delayed auditory processing of instructions (id.). According to the private therapist, the student's skills in those areas were "well below the level of her peers" and of concern to the private therapist (id.).

After the August 2008 meeting with the director, the parents began investigating potential private school placements (Tr. pp. 2177-80). In the weeks between the August 2008 meeting and the commencement of the 2008-09 school year, the parents and the director communicated by telephone on three occasions to discuss the student, the parents' concerns about her difficulties, their request to have the student evaluated and receive services, and their interest in placing her in a private school if the district failed to offer services (Tr. pp. 2182-83, 2624-31). At the conclusion of the third discussion between the student's father and the director, at which time the student's father stated the director could give him "no guarantee" that services would be provided to the student, the parents decided to send their daughter to Kildonan for the 2008-09 school year (Tr. pp. 2631-32; see Tr. pp. 108-09; Parent Ex. 82 at p. 1).

[17] The optometrist defined "convergence excess" as "an excessive "'turning in of [the] eyes,'" and "oculomotor dysfunction" as "reduced eye movement skills" (Joint Ex. 2I). Subsequent to the April 2008 evaluation, the parents obtained orthoptic therapy for the student, until she went to camp in summer 2008 (Tr. pp. 2402-03).

The student attended Kildonan during the 2008-09 and 2009-10 school years for seventh and eighth grades as a boarding student for the five-day school week (Tr. pp. 290, 2191; Joint Exs. 2O; 13; Parent Ex. 3). Kildonan's academic dean described Kildonan as "an independent day and boarding school for students in grades 2 through 12 who are diagnosed with dyslexia or have similar language based learning differences" (Tr. pp. 284-85). All students at Kildonan receive one daily tutorial session of individual Orton-Gillingham instruction, and during her attendance at the school, the student received instruction in content areas such as mathematics, literature, history, and science (Tr. p. 285; see Parent Ex. 3). The parents also obtained private speech-language therapy sessions for their daughter provided by the speech-language pathologist who had conducted the April 2008 speech-language evaluation, which continued throughout the 2008-09 and 2009-10 school years (Tr. p. 1156-57, 1159; see Parent Ex. 32 at pp. 40-65).

Due Process Complaint Notice[18]

In a due process complaint notice dated February 4, 2010, the parents alleged a denial of a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years (Joint Ex. 2 at p. 4).[19] The parents specifically asserted that the district did not recognize the diagnoses offered by the professionals who treated and evaluated the student; failed to acknowledge, identify and remediate the student's reading and learning disabilities; failed to provide appropriate programs for learning to meet the student's needs; failed to evaluate the student to determine if she should be classified as a student with a disability under the IDEA; failed to provide the student with a section 504 accommodation plan and/or "building level" supports after February 2008; and did not credit the parents' concerns (id. at pp. 4-5, 32-34). As relief, the parents sought tuition reimbursement for the 2008-09 and 2009-10 school years; a declaratory finding that the program offered by the district was not appropriate; and a finding that equitable considerations favored an award of tuition reimbursement; and attorney fees (id.).[20]

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[18] I note that the relief sought by the parents in the February 4, 2010 due process complaint notice is evident from a reading of the due process complaint notice, but that inconsistent statements (which include erroneous factual information) regarding the proposed solution were included in the beginning and end of the due process complaint notice appear to be typographical errors (i.e. omitting the word "not") (see Joint Ex. 2 at pp. 3, 34-35).

[19] The parents' February 2010 due process complaint notice was entered into evidence without exhibits (see Joint Ex. 2). Attached to the parents' February 2010 due process complaint notice, among other exhibits, was a private psychological evaluation report of the student dated January 31, 2010 (Tr. pp. 110-11; Joint Exs. 2 at p. 26; 2P). The report was based on assessments conducted on four dates in November 2009 and one date in December 2009 (Joint Ex. 2P at p. 1).

[20] I note that the Individuals with Disabilities Education Act (IDEA) does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009] [holding that the possibility that parents may recoup attorneys fees does not salvage an appeal from being moot]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; Ivanlee J. v. Wilson Area Sch. Dist. 1997 WL 164272, at *1 [E.D.Pa. 1997] [noting that administrative hearing officers may not award attorneys fees under the fee shifting provisions of the IDEA]; Andalusia City Bd. of Educ. v. Andress, 916 F.Supp. 1179, 1183 [M.D.Ala. 1996]); see generally, Dell v. Bd. of Educ., Twp. High Sch. Dist., 32 F.3d 1053, 1055-56 [3d Cir.1994]; Moore v. District of Columbia, 907 F.2d 165, 166 [D.C. Cir. 1990]; Application of the Bd. of Educ., Appeal No. 09-081).

Impartial Hearing and Interim Decision

An impartial hearing convened on March 26, 2010[21] and concluded on October 8, 2010 after 19 days of proceedings (Tr. pp. 1-3,260).[22] In an interim decision dated January 24, 2011,[23] the impartial hearing officer addressed the parents' motion for negative inference and remedies and the allegations that the district destroyed or allowed to be destroyed school records including the student's State Assessment test booklets and answer sheets for the 2006-07 and 2007-08 school years and e-mails from the 2007-08 school year to the present, and further assertion that they were unable to present all relevant evidence to support their position because of the destruction of relevant and necessary evidence (see IHO Interim Decision; Parents' Nov. 5, 2010 Motion for Negative Inference and Remedies; see also District's Dec. 3, 2010 Memorandum of Law in Opposition). Findings contained in the interim decision include that an impartial hearing officer has the authority to impose sanctions for the destruction of evidence or the failure to produce evidence; that the district had a duty to preserve the State assessment materials and "non-transitory" e-mails, and that the destruction of the student's records was done with gross negligence, but that the district's conduct did not "'rise to the egregious level seen in cases where relevance is determined as a matter of law'" (IHO Interim Decision at pp. 12-26). The impartial hearing officer denied the parents' motion and concluded that the parents did not sufficiently demonstrate through circumstantial evidence that the test papers or potentially missing e-mails would have supported their claims to justify granting an adverse inference (id. at pp. 29-30).

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[21] In a letter dated April 11, 2010, the parents requested that the district conduct an evaluation of the student "for the purposes of granting her an IEP" (Parent Ex. 75). In June 2010, the district conducted speech-language and educational evaluations of the student, and the school psychologist prepared a psychological addendum to the student's January 2010 private psychological evaluation report (Parent Exs. 76-78; see Joint Ex. 2P). On June 22, 2010 the CSE convened for the student's initial review, and determined that she was eligible for special education and related services as a student with a learning disability (Parent Ex. 79). For the 2010-11 school year, the CSE recommended that the student attend a general education program at the district's high school, and receive four sessions per week of resource room services; one session each of group and individual counseling per week; program modifications of preferential seating, copy of class notes, refocusing and redirection, and repetition of directions; and testing accommodations of use of word processor, directions read and explained, special location, extended time, permission to write on tests/in test booklets, and a scribe (id. at pp. 1-2).

[22] I note that State regulations contain provisions stating that "[e]ach party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]). In this case, there were many instances where the impartial hearing officer allowed more time than reasonably necessary for the examination of witnesses. Unsurprisingly in the 3000-page plus transcript, there are occasions on which witnesses gave cumulative testimony. I remind the impartial hearing officer that she has the power to limit examination of witnesses whose testimony she determines to be irrelevant, immaterial, or unduly repetitious (8 NYCRR 200.5[j][3][xii][d]). The 19-day hearing in this case runs counter to the very purpose of the administrative due process provisions, which were designed to provide parties with a less formal, expeditious forum in which to resolve their claims.

[23] The date on the decision is January 24, 2010, but it is clear from the hearing record that the actual date of the decision is January 24, 2011 (see Parents' Nov. 5, 2010 Motion for Negative Inference and Remedies; District's December 3, 2010 Memorandum of Law in Opposition to Parents' Motion).

Impartial Hearing Officer Decision

In a decision dated July 1, 2011, the impartial hearing officer found that for the 2008-09 school year, the district failed to provide the student with a FAPE, based upon (1) the failure to identify the student as a student suspected of having a disability; (2) the failure to evaluate the student as a result of its obligation to identify the student as a student suspected of having a disability or as a result of the parents' request for an evaluation; and (3) the failure to classify the student as a student with a disability and develop an appropriate IEP (IHO Decision at pp. 58-59). Regarding the impartial hearing officer's finding that the district failed to evaluate the student at the request of the parents, the impartial hearing officer found that the district failed to evaluate the student despite "numerous" requests for evaluation made in writing and verbally (id. at p. 59). In support of this finding, the impartial hearing officer cited the November 19, 2007 letter sent by the parents to the district (Joint Ex. 2E), the January 5, 2008 e-mail from the parents to the district (Parent's Ex. 5), the January 13, 2008 e-mail from the parent to the district (Parent Ex. 47), the February 4, 2008 e-mail from the parent to the district (Parent Ex. 51); meetings on November 13, 2007, June 12, 2008 and August 19, 2008, and telephone conversations, specifically referencing phone calls on September 4, 2008, September 5, 2008, and January 10, 2008 (id. at pp. 59-61). The impartial hearing officer determined that the district had an obligation to have the student evaluated based upon the parents' "many requests" and that "[a]t a minimum it should have heeded the parents' numerous requests for help and investigated what their requests meant" (id. at p. 61). The impartial hearing officer concluded that the district denied the student a FAPE for the 2008-09 school year under the IDEA and section 504 by failing to evaluate the student (id.).

The impartial hearing officer next found that the district violated its child find obligations for the 2008-09 school year (IHO Decision at p. 61). The impartial hearing officer noted that the student entered the district with a history of special education services and evaluations documenting her disabilities (id.). The impartial hearing officer found that for sixth grade the record contrasted the district's position that the student was completing A and B work with the parents' position that the student struggled, required hours of home support, and was using extra time and revisions to get the grades (id. at pp. 61-62). In addition to the parents' concerns, the impartial hearing officer cited a speech evaluation, neuropsychological evaluation, vision therapy evaluation and a letter from a social worker regarding the student's communication skills, in support of a finding that the district had information that "should have given rise to a suspicion" that the student was a student with a disability, and that even if the district disputed clinical findings, they still had an obligation to conduct their own evaluations, convene a CSE and make a recommendation regarding the student's eligibility for special education services (id. at p. 62).

The impartial hearing officer next found that the district, as the district of residence had the duty to evaluate and provide services to the student for the 2008-09 school year (IHO Decision at p. 62). The impartial hearing officer noted that the student was not removed from the public school until after the start of the 2008-09 school year, that the district had the obligation to address the student's special education needs even after the student left the district (id.). The impartial hearing officer found that in order for the district to be absolved of its

obligation, it would have been necessary for the district of location to have determined that the student needed special education and related services and the parents would have had to make clear their intent to keep the student in the private school (id. at p.63).

Finding that for the 2008-09 school year the district failed to provide the student with a FAPE by failing to classify her or provide appropriate special education services, the impartial hearing officer concluded that the student met the criteria for "a number of classifications such as learning disability" (IHO Decision at p. 63).[24] In support of her finding, the impartial hearing officer found that the information available for the 2008-09 school year, including written evaluations, reports and letters documented the student's weaknesses, and that according to the evidence, the student presented with a language based disability, negatively impacting her ability to read, write, spell, listen or think (id. at pp. 63-64). In addition, the impartial hearing officer found that the student had attention and organization issues that negatively affected her ability to produce work (id. at p. 64).

Next, the impartial hearing officer found that Kildonan was an appropriate placement for the student based on the "totality of the circumstances reflected in the record" for the 2008-09 school year (IHO Decision at pp. 65-68). The impartial hearing officer noted that Kildonan provided an intensive Orton-Gillingham approach to teaching students with language based disabilities, including dyslexia, and that the student matched the profile of the students at Kildonan (id. at p. 66). The impartial hearing officer also noted that the student had a 1:1 '"Language Training Teacher'" every day to address her specific reading, spelling, writing and language deficits (id.). The impartial hearing officer also cited the reports of the language training teacher indicating how the student's individual strengths and weaknesses in writing, spelling and reading were identified and how they were addressed through writing assignments and readings (id.). The impartial hearing officer noted that the student's spelling weaknesses were addressed through spelling packs and a chart and practice by the student with writing the words and using them in sentences (id.). Other reports showed how assistive technology enabled the student to support her needs in writing and organization and how some of the teachers incorporated her use of specific programs (id.). Regarding core subjects, the impartial hearing officer noted class size and that the teachers were easily able to redirect or prompt her when she was not focused or on task, that the student was grouped with students with similar needs, and that an interactive and multisensory approach was used (id.). Although the impartial hearing officer noted that Kildonan did not offer speech therapy, she found that the student's pragmatic language needs were appropriately addressed; that the teachers encouraged her active participation in class; and that the student continually made gains in her ability to communicate in her classes. The impartial hearing officer's analysis included that Kildonan's '"foremost'" focus was '"remediation of language skills.'" Although the student did not receive counseling, the impartial hearing officer noted that the school had an emphasis on developing self-esteem through work and support provided in a small class size and that progress reports noted the

[24] Later in the decision the impartial hearing officer indicated that the student also met the criteria as a student with an other health impairment (IHO Decision at p. 64; see 8 NYCRR 200.1[zz][10]). However, I note that the decision does not include any analysis of the evidence that supported the impartial hearing officer's finding that the student meets the criteria as a student with an other health impairment or as a student with a learning disability (see IHO Decision). In light of my determination herein that the district failed to offer the student a FAPE, it is not necessary to further address the issue.

student's increased confidence (id.). Moreover, while the student's emotional state was consistently raised as an issue during the 2007-08 school year, the impartial hearing officer found that it was "closely tied" to her experience at the district school (id.). The impartial hearing officer concluded that the small class size, language based nature of the school, intensive one-on-one language tutorial, and support of the faculty and staff provided the student with the necessary support to receive educational benefit from Kildonan without receiving direct speech therapy or counseling, and moreover, that Kildonan provided the type of remediation and instruction recommended regarding the student's predominant disabilities (id.). The impartial hearing officer also found that the student improved over the course of the year in most areas, citing progress reports, standardized test results, and parent observation (id.).

In addition, the impartial hearing officer rejected the district's assertion that Kildonan did not provide the student with special education services in the LRE (least restrictive environment) (IHO Decision at pp. 66-67). The impartial hearing officer noted that the school was not out of state; that the student was able to go home on the weekends; that boarding was the only option based on the distance of the school from the home; that the parents had spent the entire previous school year up until the beginning of the 2008-09 school year trying to obtain supports and services for the student in the district and were unable to find other appropriate placements closer to home; and that the boarding component also met the need for homework support (id. at pp. 66-68).

As to equitable considerations, the impartial hearing officer found that the parents fully cooperated with the district, participated in all meetings, and offered the district many opportunities to evaluate the student (IHO Decision at pp. 68-69). The impartial hearing officer noted that, except for a psychiatrist's letter which the parents felt was too personal, they provided all evaluations and documentation to the district with enough time for the district to have taken action, and that they postponed turning over two evaluations in their possession based on an attorney's advice, and that once they discharged the attorney, the parents contacted the district to provide the evaluations and discuss keeping the student in the district (id. at p. 69). Moreover, the impartial hearing officer found that the parents repeatedly informed the district of their disagreement with the district's actions and that the district had notice that the parents intended to remove the student from the district (id.). The impartial hearing officer concluded that equitable considerations weighed "heavily" in favor of the parents and reimbursement for the 2008-09 school year (id.).

Regarding the 2009-10 school year, the impartial hearing officer found that the district failed to provide the student with a FAPE (IHO Decision at p. 69). The impartial hearing officer found that the district retained the child find obligation for the student because the district of location had not identified and evaluated the student, nor had the parent made clear their intent to keep her in the private school in the district of location prior to June 1, 2009 (id. at pp. 69-70). In addition, the impartial hearing officer found that the district failed to classify the student or provide her with an appropriate program for the 2009-10 school year, based upon findings as to the 2008-09 school year as well as additional testing done at Kildonan and a subsequent neuropsychological report (id. at p. 70). The impartial hearing officer concluded that the student's disabilities qualified her for classification as a student with a learning disability or an other health impairment (id. at p. 70). In addition, the impartial hearing officer found that

Kildonan was an appropriate placement for the 2009-10 school, citing reasons and analysis similar to her findings for the 2008-09 school year (id. at pp. 70-71). Regarding equitable considerations, the impartial hearing officer found that the parents did nothing to foster the cooperative process, nor did they provide the district with the student's evaluations or progress reports from Kildonan regarding the 2008-09 school year, or the subsequent private neuropsychological evaluation until the due process hearing (id. at p. 71). Also, there was nothing in the record to indicate that the parents tried to find an alternative placement closer to home and, accordingly, the impartial hearing officer granted tuition reimbursement at Kildonan for the 2009-10 school year but denied the portion of costs attributable to the boarding component (id. at p. 71).

Appeal for State-Level Review

The parents appeal, asserting that the impartial hearing officer erred in finding that the parents were not entitled to receive reimbursement for boarding costs for the student's 2009-10 school year at Kildonan. The parents specifically assert that (1) the parents were not obligated to notify or consult the district regarding the student's continued enrollment at Kildonan for the 2009-10 school year; (2) the parents' failure to consult with the district does not show lack of cooperation as the parents believed, based upon the district's actions, that they did not need to contact the district; (3) the district was not willing to work with the parents to develop an appropriate program for the student for the 2009-10 school year unless the student first returned to the district; (4) it was not feasible to find an alternative placement close to home; and (5) the district was at fault because it was obligated to reach out to the parents regarding an educational plan for the 2009-10 school year. In addition, the parents assert on appeal that the impartial hearing officer erred in deciding not to grant the parents' motion for an adverse inference as a result of spoliation. The parents assert that the impartial hearing officer improperly failed to address the impact of spoliation relative to the credibility of the district witnesses and/or whether spoliation should have caused the impartial hearing officer to hold an adverse inference against the district. As to the relevancy of state assessments, the parents assert that since the district largely based its defense on the student's state assessment performance, and it was established that the raw data from the state assessments was unlawfully destroyed by the district, such raw data would have been relevant to the parents' case. As to the relevancy of destroyed e-mails, the parents assert that it is inconceivable that where the district unlawfully destroyed at least a year of e-mails concerning the student, that none of the e-mails would have been relevant to the parents' case. As relief, the parents sought affirmance of the impartial hearing officer's decision concerning tuition and board reimbursement for the 2008-09 school year, and tuition reimbursement for the 2009-10 school year; reversal of the impartial hearing officer's decision concerning board for the 2009-10 school year; a finding that the district recklessly, intentionally and/or with gross negligence spoiled relevant documents pertaining to the student resulting in an adverse inference; leave to apply for an award of attorney fees and costs as prevailing party; and other relief.

In its cross-appeal, the district asserts that the impartial hearing officer ignored testimony that the student was not eligible for special education services; that the impartial hearing officer improperly found that the district violated its child find obligation by failing to evaluate and classify the student as a student with a disability under the IDEA; that the district demonstrated

that it had the appropriate child find procedures in place; that the district did not overlook any signs of a disability and therefore it did not have an obligation to use the child find procedures to identify the student during the 2008-09 school year; and that for the 2009-10 school year, the evaluation, identification and classification of the student was the responsibility of the public school district in which Kildonan was located. In addition, the district asserts that the parents never requested a referral to the CSE or sought the student's classification as a student with a disability. Contrary to the impartial hearing officer's findings, the district asserts that none of the communications from the parents throughout the 2007-08 school year requested an evaluation from the district or a referral to the CSE, but instead were related to the determination of the 504 committee regarding the student's accommodations and impending private evaluations. The district also asserts that the impartial hearing officer ignored evidence that the student functioned on or above grade level and that in objective standardized testing, the student received average to above average scores in reading, writing and math. The district further asserts that the impartial hearing officer erred in finding that Kildonan was appropriate for the student. The district asserts that the parents did not present sufficient evidence to demonstrate that Kildonan provided instruction specific to meet the student's individualized needs, and that the parents did not show that the student would be appropriately placed in a residential special education school, given the student's academic strengths, and the restrictiveness of the residential environment. The district further asserts that none of the evaluations recommended removing the student from a mainstream environment and that the evidence at the hearing demonstrated that a program with exposure to mainstream peers was appropriate. The district further asserts that Kildonan was not appropriate because the school does not offer the recommended speech-language therapy. Regarding equitable considerations, the district points to the failure to request an evaluation when the district asked if the parents wanted an evaluation under section 504 or the IDEA; the failure to provide reports to the district in a timely manner; the failure to provide the requisite notice to the district of their intention to place the student at Kildonan and their desire to seek reimbursement; and the failure to involve the district in planning for the 2009-10 school year. As relief, the district requests a finding that the district had no obligation to identify, evaluate and/or classify the student as a student with a disability for the 2008-09 and 2009-10 school years and that the impartial hearing officer's decision be set aside.

Discussion

Preliminary Matter—Spoliation

Initially, I will address the parents' assertion on appeal that the impartial hearing officer erred in deciding not to grant the parents' motion for an adverse inference as a result of spoliation.

First, I note that in New York State, the formal rules of evidence that are applicable in civil proceedings generally do not apply in impartial hearings (see Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006] [strict formal rules of evidence need not be observed at administrative hearings]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977] [Federal Rules of Civil Procedure do not apply to administrative proceedings]; Application of the Bd. of

Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child with a Disability, Appeal No. 99-5; Application of a Child with a Disability, Appeal No. 96-45); however, nothing precludes an impartial hearing officer from considering a motion by either party under appropriate circumstances (Application of the Bd. of Educ., Appeal No. 11-004; Application of the Bd. of Educ., Appeal No. 10-129; Application of a Child with a Disability, Appeal No. 96-45; see Application of the Bd. of Educ., Appeal No. 05-007 [motion for a directed verdict]; Application of a Child with a Disability, Appeal No. 04-061 [motion to identify the issues]; Application of a Child with a Disability, Appeal No. 04-046 [motion for recusal]; Application of a Child with a Disability, Appeal No. 04-018 [recognizing motion for summary judgment could be used in IDEA proceedings in certain circumstances if there is a lack of any genuine issue of material fact and both sides have had an opportunity to present evidence]).

I further note that the vast majority of the case law on the subject of spoliation is based on the violation of discovery provisions contained in the Federal Rules of Civil Procedure (Fed. R. Civ. Proc. 37) or the New York's Civil Practice Law and Rules (CPLR 3126) and the inherent power of the State and federal courts to regulate litigation and protect the integrity of the proceedings before them (see Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 [S.D.N.Y. 2003] ["Zubulake IV"]). Accordingly, as I have previously noted, I continue to have serious reservations regarding whether an administrative hearing officer has the authority to hear a claim or impose sanctions under the IDEA for spoliation of district records (see Application of a Student with a Disability, Appeal Nos. 11-059 & 11-061).[25] Moreover, although hearing officers are provided with the authority to order evaluations and issue subpoenas if necessary to ensure the development of an appropriate hearing record upon which to resolve claims over appropriate special education services for students with disabilities, the jurisdiction of an administrative hearing officer under the IDEA centers on matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i][1]; [j][1]).

Assuming for the sake of argument that spoliation disputes and the imposition of sanctions are the proper subject of a due process proceeding—a doubtful premise—in this case, I find that I need not address those issues in light of my determination below.

Applicable Standards

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

[25] I am especially wary of applying spoliation standards developed in the context of multimillion-dollar, multi-year litigation between national corporations with extensive resources (see, e.g., Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec., 685 F. Supp. 2d 456 [S.D.N.Y. 2010]; In re A&M Florida Props. II v. Am. Fed. Title Corp., 2010 WL 1418861 [Bankr. S.D.N.Y. Apr. 7, 2010]; see also Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 [S.D.N.Y. 2004] ["Zubulake V"]; Zubulake IV, 220 F.R.D. 212) to administrative proceedings under the IDEA, the regulations for which contemplate two days of hearing (8 NYCRR 200.5[j][3][xiii]), contain no express discovery provisions, and generally require a decision to be rendered within a 45-day timeline (8 NYCRR 200.5[j][5]).

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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]).

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]).

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).

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]).

Parent Referral For IDEA Evaluation

I will first address the impartial hearing officer's finding that the parents made a request for an evaluation pursuant to the IDEA (see IHO Decision at pp. 59-61). A student suspected of having a disability shall be referred in writing to the chairperson of the district's CSE or to the building administrator of the school which the student attends for an individual evaluation and determination of eligibility for special education programs and services (8 NYCRR 200.4[a]). A referral may be made by a student's parent or person in parental relationship (8 NYCRR 200.4[a][1]). The regulation does not prescribe the form that a referral by a parent must take, but it does require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).

Upon review of the hearing record, I find that the parent's assertion in the November 19, 2007 letter to the director of special education that the student needs "at a minimum a 504 Plan and, more likely, classification under IDEA" and attendant request that the matter be reviewed meets the requirements of a written referral under 8 NYCRR 200.4[a][1] (Joint Ex. 2D).[26] In addition, I find that the January 5, 2008 e-mail correspondence from the student's parent to the director of special education indicating that the student needs additional help, asking how to arrange for the help and inquiring as to whether they should ask for "another CSE meeting;" the January 13, 2008 letter to the director of special education indicating that "[w]e are proceeding with testing and plan to pursue services for [the student] pursuant to the IDEA;" a February 4, 2008 e-mail updating the district as to the student's psychological evaluation and indicating that the parent wants to give the district "sufficient time to plan a CSE meeting" add further support to a finding that the parents requested a determination of eligibility for special education programs and services (Parent Exs. 5; 47; 51).

[26] The hearing record shows that the director of special education accepts such referrals on behalf of the district (Tr. p.42).

When a student suspected of having a disability is referred to a CSE, the CSE, upon receipt of consent, must ensure that an individual evaluation of the referred student is performed (see Application of the Dep't of Educ., Appeal No. 09-136; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063; Application of a Child Suspected of Having a Disability, Appeal No. 04-059). A "full and individual initial evaluation" must be conducted (20 U.S.C. § 1414[a][1][A]; see 34 C.F.R. § 300.301[a]) and must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i-v]; Application of the Dep't of Educ., Appeal No. 09-136; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063). The student must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation, the CSE must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i]). As further described below, the evidence in the hearing record is also insufficient to show that the failure to convene the CSE to review evaluative information was otherwise inconsequential and did not result in a denial of a FAPE to the student.

Eligibility

The impartial hearing officer determined that the evidence showed that the student "met the criteria for a number of classifications such as learning disability . . ." (IHO Decision at p. 64). The district did not specifically appeal the finding that the student met the criteria as a student with a learning disability, rather, it generally appealed the impartial hearing officer's finding that that the district denied the student a FAPE in part by failing to classify her as a student with a disability under the IDEA. A careful review of the hearing record shows that the district did not prove that as of August 2008 the student did not meet the criteria for classification as a student with a learning disability under the IDEA.

Initially, a learning disability is defined as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The term

includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia (id.). The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage (id.).

State regulations provide procedures to be employed in identifying whether a student suspected of having a disability meets the criteria for classification under the IDEA as a student with a learning disability (see 8 NYCRR 200.4[j]).[27]

Upon review of the hearing record, I find that district's failure to convene a CSE to review the information available to the district and private evaluation results, determine if additional evaluations were necessary, and complete the procedures required to identify students with learning disabilities, resulted in a denial of a FAPE.

First, the failure to convene a CSE in this case limits the documentary information available in the hearing record to the private evaluations provided by the parents and the district's school reports, and does not include information from an observation of the student in routine classroom instruction, which is a specific requirement in determining whether a student suspected of having a disability meets the criteria for classification under the IDEA as a student with a learning disability (see 8 NYCRR 200.4[j][1][i]; see also 20 U.S.C. § 1414[a][1][A]; 34 C.F.R. § 300.301[a]; 8 NYCRR 200.4[b][1][iv]). The hearing record demonstrates that in August 2008, the district had available to it private evaluation reports including the February 2008 neuropsychological evaluation report, the April 2008 speech-language evaluation report, April 2008 binocular/oculomotor evaluation report, and the letter from the student's private social skills group therapist (Joint Exs. 2F; 2G; 2I; 2J; JM). Conclusions of the evaluators included concerns that the student exhibited difficulties that affected her academic achievement (Joint Exs. 2F at p. 17; 2J; 2M). Specifically, in the February 2008 private neuropsychological evaluation report the evaluator concluded that the student's "considerable difficulties" with attention/executive functioning and language functioning were having a "significant impact" on her academic achievement and increasing effect on her social/emotional functioning (Joint Ex. 2F at p. 17). Given the student's "long history of learning difficulties and [s]pecial [e]ducation [s]ervices," it was "clearly apparent from the results of this evaluation, that she continue[d] to require considerable support" (id.). The evaluator further indicated "[d]epriving [the student] of [s]ervices at this critical period in her life, when academic demands are increasing in their level of abstraction as well as volume, is bound to set her on a course of failure" (id.). As previously noted, the April 2008 private speech-language evaluation report concluded that the student's speech and language difficulties could affect the student emotionally and academically (Joint Ex. 2G at p. 2). The student's private social skills group therapist also noted the student's difficulty with verbal expression and auditory processing (Joint Ex. 2M). Both the private neuropsychologist and the private speech-language pathologist recommended that the student

[27] On December 3, 2004, the reauthorized IDEA was signed into law, with most provisions of the new law taking effect on July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). The State amended its laws and regulations thereafter to conform to the IDEA and the implementing federal regulations by emergency measures and amendments, and 8 NYCRR 200.4[j]) was promulgated to conform State regulations to federal requirements relating to eligibility determinations effective as an emergency measure and thereafter as an amendment.

receive speech-language therapy, a related service under the IDEA (Joint Exs. 2F at p. 17; 2G at p. 2; see 8 NYCRR 200.1 [qq]; 200.6[e]). In addition, the district acknowledged that the student "performed poorly on some of the diagnostic evaluations;" however, stated its position that teacher reports indicated the student had made "adequate progress," and notwithstanding what the private evaluators reported, that there was no "significant impact" on her learning (Tr. p. 483; Joint Ex. 2N at p. 2). While I note that the hearing record reflects that during fifth and sixth grades, the student's performance on the State English Language Arts and Mathematics examinations was at a Level 3, indicating that she was "meeting the learning standards" in those subjects, and during sixth grade the student consistently achieved grades in the A to B range (Dist. Exs. 3; 4; 5), under the circumstances of this case, a CSE meeting to discuss the results of the private evaluations in light of the student's in-school performance was required; and also to consider if additional evaluations were necessary; especially as in this instance, where the district did not conduct its own individual evaluation of the student, including an observation of the student in routine classroom instruction as required (see 8 NYCRR 200.4[j][1][i]). Accordingly, the hearing record does not show that the student was not eligible for special education services as a student with a learning disability.

In addition, the determination of eligibility for special education for a student suspected of having a learning disability must be made by a CSE, not an individual such as the director of special education (see 8 NYCRR 2004.[j][2]). Moreover, the hearing record shows that the director made the determination based upon reports by the student's teachers on how the student was achieving in the classroom and standardized test scores, not based upon a variety of assessment tools and strategies as required by state regulations (see 8 NYCRR 200.4[j][1]). I note that when the director reviewed the available information, he determined that "at best, there appear[ed] to be a marginal impact on [the student's] learning and school performance," and that his conclusion did not appear to reflect the variety of assessments available and could not reflect those which did not exist because of the failure of the CSE to convene and determine if additional evaluations were necessary (see Dist. Ex. 2N at p. 3; 8 NYCRR 200.4[j][1]). Moreover, had the CSE convened to consider whether the student met the requirements for classification as a student with a learning disability, the hearing record would include specific documentation required for the eligibility determination, including a written report containing a statement that would include, among other things, the relevant behavior, if any noted during the observation of the student and the relationship of that behavior to the student's academic functioning (see 8 NYCRR 200.4[j][5][i][c]).

I therefore find that the failure to evaluate the student upon parent request; combined with the failure to convene a CSE to review the relevant information and data, determine if additional evaluations were necessary, and complete the procedures to identify students with learning disabilities, resulted in a denial of a FAPE.[28]

Child Find

[28] Given my determination herein, I find that it is not necessary to consider whether the district demonstrated that the student did not meet the criteria of a student with an other health impairment (see 8 NYCRR 200.1[zz][10]).

I will next address the district's assertion that the evaluation, identification and classification of the student was the responsibility of the public school district in which Kildonan was located. I agree with the finding of the impartial hearing officer that the district, as the district of residence, had the duty to evaluate and provide services to the student for the 2008-09 and 2009-10 school (see IHO Decision at pp. 62-63).

In 2007, New York State amended Education Law § 3602-c to comply with the reauthorization of 20 U.S.C. § 1412(a)(10) ("Children in Private Schools") and its implementing regulations, 34 C.F.R. §§ 300.130-300.147 (see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007; Parent Ex. Q at p. 1). In September 2007, VESID published a guidance memorandum—"Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c"—to "inform school districts of their responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents" (Parent Ex. Q at p. 1). Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). The district of location's CSE must review the request for services and develop an individualized education service program (IESP) based upon the student's individual needs and "in the same manner and with the same contents" as an IEP (id. § 3602-c[2][b][1]). In addition, the district of location's CSE "shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).

Upon review of the hearing record, there is no evidence that the parents attempted to dually enroll the student in the district of location pursuant to Education Law § 3602-c. The hearing record does not include evidence that the district of location's CSE had reviewed a request for services by the parents or developed an IESP or that the parents had even filed a request for services in the district of location where the nonpublic school was located on or before June 1 of the preceding school year.

In this case, as discussed below, the parents requested that the district of residence review the student's eligibility for special education programs and related services and develop an IEP for the 2008-09 school year[29] and, accordingly, the district of residence was responsible for evaluating the student, determining the student's eligibility for special education programs and related services and if appropriate developing an IEP for the student for the 2008-09 and this obligation continued for the 2009-10 school year (see Application of a Student with a Disability;

[29] In addition, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that under child find duties, a district that is responsible for offering a student a FAPE must not decline a parent's request to conduct an eligibility evaluation of the student even if the student is attending a private school located in another district (Letter to Eig, 52 IDELR 136 [OSEP 2009]; see Application of the Bd. of Educ., Appeal No. 09-067; see also Application of a Student with a Disability, Appeal No. 10-049).

Appeal No. 11-020; Application of a Student with a Disability, Appeal No. 11-011; Application of the Bd. of Educ., Appeal No. 10-049).

I will now consider the district's assertion that the impartial hearing officer erred when she determined that the district violated its child find obligations by not referring the student to the district's CSE and thereby, denied the student a FAPE. The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446. F.3d 335, 347-48 [2d Cir. 2006]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008] aff'd 2010 WL 1049297 [2d Cir. March 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; Forest Grove, 129 S. Ct. at 2495; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400, n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; see 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (New Paltz, 307 F. Supp. 2d at 400, n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]; see Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child Suspected of Having a Disability, Appeal No. 04-087; Application of the Bd. of Educ., Appeal No. 04-037; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child with a Disability, Appeal No. 02-092; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]).

States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008] referencing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention programs (8 NYCRR 200.4[a]).

Regarding the finding by the impartial hearing officer that the district violated its child find obligations (see IHO Decision at pp. 61-62), and the district's assertion that it has the appropriate child find procedures in place (see Tr. pp. 40-43), I note that notwithstanding that the district may have had appropriate procedures in place for identifying students suspected of having a disability, the evidence shows in this case that the parents affirmatively requested that the district evaluate the student and determine whether she was eligible for special education under the IDEA, and the district still failed to follow procedures and either (1) evaluate the student and convene the CSE or (2) inform the parents that it was denying their request to evaluate the student for eligibility under the IDEA and provide prior written notice to the parents explaining why the district refused to conduct an initial evaluation and the information that was used as the basis for the decision (34 CFR § 300.503[a], [b]; 8 NYCRR 200.5[a]; Letter to Zirkel, 56 IDELR 140 [OSEP 2011]). Accordingly, I will not disturb the impartial hearing officer's conclusion that the district violated child find.

Applicable Standards – Unilateral Placement

Having found that the district failed to offer the student a FAPE, I must now consider whether the parents have met their burden of proving the appropriateness of their placement of the student at Kildonan for the 2008-09 and 2009-10 school year. 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP

for the student (Carter, 510 U.S. 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 Rowley, 458 U.S. at 207 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).

Parents' Unilateral Placement – 2008-09 and 2009-10 School Years

The impartial hearing officer found that the parents met their burden to show that Kildonan offered the student an appropriate program during the 2008-09 and 2009-10 school years (IHO Decision at pp. 65-68; 70-71). On appeal, the district argues that the parents did not present sufficient evidence to demonstrate that Kildonan provided instruction specific to the student's individual needs, and that the evidence in the record showed that the student "could be maintained in a program that provided her exposure to mainstream peers." A review of the hearing record supports the impartial hearing officer's finding that Kildonan provided instruction that was reasonably calculated to provide the student with educational benefits during the 2008-09 and 2009-10 school years.

Kildonan's academic dean described Kildonan as an "independent day and boarding school" for students in grades 2 through 12, diagnosed with dyslexia or similar language based learning differences," including difficulty with writing skills (Tr. pp. 284-85, 286). As described in detail above, according to the private neuropsychologist, the student exhibited difficulties in the areas of attention/executive functions, expressive language, contextual reading fluency, and written expression skills (Joint Ex. 2F at pp. 14-16). Commensurate with the findings of the private neuropsychologist, the academic dean testified that at the time the student began attending Kildonan, she had received diagnoses of a reading and writing disability, she experienced "challenges" with expressive language, and she struggled with attention difficulties; facts that support the impartial hearing officer's finding that the student matched the profile of students at Kildonan (Tr. p. 290; IHO Decision at p. 66).

According to the academic dean, instruction at Kildonan has a three prong approach (Tr. p. 285). The first prong focuses on remediation of language skills; primarily via an individual, daily, one-on-one tutorial using an Orton-Gillingham approach, which "filters over into the rest of the students' academic day" because all faculty at Kildonan are trained in Orton-Gillingham (Tr. pp. 285, 288-90). The second prong is the provision of "stimulating, challenging and appropriate subject matter curriculum that is designed for our students' learning style" (Tr. p. 285). The goal of the third prong is to "support and develop a student's sense of self-esteem and their self-concept as a student . . ." (Tr. pp. 285-86). While Kildonan does not require that its teachers are certified, all new teachers are provided with "an extensive 70-hour Orton-Gillingham course," which includes training and instruction in understanding reading disabilities, and the learning styles of students with reading and language based learning disabilities (Tr. pp. 287-88).

In addition, the academic dean testified that the "core area" where the Orton-Gillingham approach is used at Kildonan is during the daily one-on-one language tutorial session, which focused on the remediation of each student's areas of need, including reading, and written and oral language skills (Tr. pp. 288, 338). He described the Orton-Gillingham approach used by Kildonan as "diagnostic and prescriptive," and indicated that the training teachers receive allow them to make decisions on a daily basis regarding students' programs (Tr. pp. 288-89). Because

all of the content area teachers receive Orton-Gillingham training, they approach topics such as introducing new vocabulary and composing written documents the same way that the language tutorial instructors approach those tasks (Tr. pp. 289-90). Language training and assistive technology progress notes from the 2008-09 school year described the student's specific reading, written language, and spelling skills and needs, and strategies used to improve the student's abilities in those areas (Parent Ex. 3 at pp. 10-11, 17-18, 25-26). For example, the November 2008 language training progress report indicated that the student received instruction in keyboarding skills with simultaneous oral spelling; syllabication rules to improve reading decoding and spelling; non-phonetic sight words; and parts of speech, contractions and summarizing techniques to improve her written expression skills (Parent Ex. 3 at p. 10). The report stated that "in keeping with the Orton-Gillingham approach," the sounds the student learned for reading were applied to spelling; in that words the student misspelled were written on index cards for simultaneous oral and kinesthetic drills (id.). The student also used keyboarding to "break up words" to improve her ability to visualize the syllables (id.). The November 2008 assistive technology progress report described the student's instruction in using features of assistive technology designed to improve the organization of her essays, create vocabulary study guides, proofread, and make corrections to writing tasks (id. at p. 11). In June 2009, the student's language tutorial instructor reported that the student learned skills for textbook reading including pre-reading strategies, highlighting, note-taking, and summarizing (id. at p. 25). I note that instructional techniques Kildonan implemented with the student were consistent with the private neuropsychologist's recommendation that the student use systematic, sequential and multisensory strategies, and assistive technology to improve her areas of deficit (Joint Ex. 2F at pp. 18-19).

Regarding the district's assertion on appeal that both the private speech-language pathologist and the private neuropsychologist recommended that the student receive speech-language therapy, which Kildonan does not offer, I note the academic dean's testimony that the instruction that occurs during the one-on-one language tutorial "covers the aspects of speech and language outside of articulation or other physiological needs" (Tr. p. 338).[30] Upon review, the hearing record supports the impartial hearing officer's determination that the services provided by Kildonan, specifically the use of Orton-Gillingham approaches described above to remediate reading, written expression, spelling and language deficits, appropriately addressed the student's language needs (Tr. pp. 284-85; Parent Ex. 3; Joint Ex. 14).

During the 2008-09 school year, the academic dean described the student initially as "fairly shy, quiet, reserved, a bit tentative in terms of speaking up in class" (Tr. p. 293). According to the academic dean, at that time the student was "interested in working hard and doing well and taking her work seriously" (id.). Although according to the academic dean the student exhibited difficulty with attention and required medication adjustments during the 2008-09 school year, he also testified that the student did not have any significant difficulty in any of her courses, and that she responded well to the structure of the program (Tr. p. 293). Progress notes from the 2008-09 school year generally reflected the student's increasing ability to be

[30] The hearing record indicated that the student began receiving private speech-language therapy services shortly after her enrollment at Kildonan, focusing primarily on her articulation difficulties and pragmatic language skills (Tr. pp. 1156-57, 1159-60). The parents are not seeking reimbursement for the costs associated with the private speech-language therapy services.

redirected when distracted, and meaningfully participate in class discussions (Parent Ex. 3 at pp. 6-9, 12-15, 19-22, 27-30).

As to the 2009-10 school year, the hearing record indicated that the student's needs during the 2009-10 school year were similar to those identified prior to the 2008-09 school year, and that Kildonan's program remained essentially unchanged (Tr. pp. 1746-47; Parent Ex. 3; compare Joint Ex. 2F, with Joint Ex. 2P). The academic dean testified that during the 2009-10 school year the student exhibited "noticeable growth" in her language skills, evidenced by her improved performance in the areas of phonics, written language, and classroom participation (Tr. pp. 303-05). Language tutorial progress reports indicated that the student reviewed vowel teams via daily drills with the "Gillingham phonics deck," used finger spelling, syllabication and simultaneous oral spelling during spelling activities, studied Latin prefixes to improve decoding and vocabulary skills, wrote out complex and compound sentences, reviewed a spelling pack, and used a variety of assistive technology to improve her written products (Parent Ex. 3 at pp. 38, 42, 49).

The district correctly notes that evidence regarding the description of Kildonan that is merely a generalized description of strategies and which reflects an absence of evidence describing the services would not be sufficient to establish how Kildonan appropriately addressed the student's unique needs (see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009 [2d Cir. Jun. 3, 2011]; Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]). However, in addition to generalized assertions, the evidence above also contains the requisite showing that described how Kildonan provided instruction that was specially designed to meet her unique needs by "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 C.F.R. § 300.39[a][3]; see Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

In addition, I note that 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; Stevens, 2010 WL 1005165, at *8-*9; see also Application of the Dep't of Educ., Appeal No. 11-051) and the hearing record indicates that the student generally exhibited progress during the 2008-09 and 2009-10 school years (Tr. pp. 293-303; Parent Ex. 3). Accordingly, after a thorough review of the hearing record, I find that the impartial hearing officer properly found that Kildonan was appropriate. In assessing the propriety of the student's unilateral placement I have considered the "totality of the circumstances" and have determined that the placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the unique needs of the student (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[31]

[31] I do not agree however, with the impartial hearing officer's determination or the parents' assertions that the "small class size" in this case constituted specially designed instruction to address the student's unique needs (IHO Decision at p. 66). In one case, the Second Circuit declined to reach this issue (see Frank G., 459 F.3d at 365-66) and since then has urged caution where "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; see Stevens, 2010 WL 1005165, at *9; see also, D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *11 [S.D.N.Y. Oct. 12, 2011] [dismissing class size arguments due

LRE

The district also argues that Kildonan does not provide the student with special education services in the LRE. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

The impartial hearing officer held that the fact that Kildonan exclusively educated students with disabilities was not a bar to reimbursement as the program "squarely" met the student's specific special education needs and was reasonably calculated as an educational setting for the student by the parents (IHO Decision at pp. 70-71, 76). Based upon a review of the hearing record and contrary to the district's argument on appeal, the impartial hearing officer properly considered and weighed the restrictiveness of Kildonan when determining whether Kildonan was appropriate to meet the student's educational needs (IHO Decision at pp. 66-67; see S.H. v. New York City Dep't of Educ., et al, 2011 WL 609885, *9 [S.D.N.Y. Feb. 18, 2011] [noting that "'[b]ecause [the parent] chose a private school for [the student] that educated learning disabled students *only*, [the parent] bears the burden of proving that such a restrictive non-mainstream environment was needed to provide [the student] with an appropriate education"'] [emphasis in original]). In S.H., the court noted that while

> "'parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board," . . . , "'the IDEA's requirement that an appropriate education be in the mainstream to the extent possible remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate'"

(S.H., 2011 WL 609885, at *9 [internal citations omitted]).

Regarding the boarding school component, the impartial hearing officer found that it was appropriate and benefitted the student by providing study halls in the evenings and availability of teachers and other support staff to assist the student with homework and assignments (IHO Decision at pp. 71, 76). In addition, the impartial hearing officer found that the commute would be too long and negatively impact upon the student, and the "last and critical consideration," regarding the 2008-09 school year, was the fact that boarding as a five day student at Kildonan was the only option for the parents as they had spent the entire previous school year up until the beginning of the 2008-09 school year repeatedly trying to obtain support and services for the student in the district and there was no available placement for the student closer to home (id. at pp. 67, 71). Taking into consideration these factors as well as the entire hearing record, I will not disturb the impartial hearing officer's finding that LRE considerations do not preclude a

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to LRE principles]; Weaver, 2011 WL 3962512, at *7 [denying reimbursement at Kildonan notwithstanding its provision of small class sizes]).

determination that Kildonan was an appropriate placement for the student for the 2008-09 and 2009-10 school year.

Having found that the parents met their burden to prove that Kildonan was an appropriate placement, I will now consider the equitable factors.

Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

As to equitable considerations, I will first consider the IDEA 10-day notice requirement (see 20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). Regarding the 2008-09 school year, the hearing record supports a finding that the parents provided the district with notice of their dissatisfaction over the course of the 2007-08 school year and summer 2008 (see Joint Ex. 2D; Parents Exs. 5; 47; 51). In addition, testimony at the impartial hearing indicated that the student's mother informed the director at the August 2008 meeting that the district's refusal to evaluate the student or provide her with services would necessitate that the parents send her to another school and that the parents would seek reimbursement from the district, and this testimony was credited by the impartial hearing officer (see IHO Decision at p. 69; Tr. pp. 2176, 2623). The hearing record further indicates that, while still trying to get the director to agree to evaluate the student or provide services, the student's father advised the director in telephone conversations on September 4, 2008 and September 5, 2008 that the student would be attending Kildonan if the district continued to refuse to evaluate the student or provide her with services, and that the parents would seek to hold the district financially responsible (Tr. pp. 2625-31).

I also note that federal regulations provide that notwithstanding the 10-day notice requirement, the cost of reimbursement must not be reduced or denied for failure to provide the notice if the parents had not received the procedural safeguards notice (34 C.F.R. §§ 300.148[e], 300.504)

Upon review, I find that the hearing record supports a finding that the parents were not provided with a copy of the procedural safeguards notice. I note that the student's mother testified at the impartial hearing that the first time that she received the procedural safeguards notice was a week or two before her testimony (Tr. pp. 2477-78). She testified that when she had recently received an IEP from the district high school for the current school year, it included a cover letter indicating that enclosed was a copy of the procedural safeguard notice, that the notice was not enclosed, she sent it back to the director indicating that she had not received the notice, and the procedural safeguard notice was subsequently provided "for the first time" (id.). In addition, the student's father testified that he never received "procedural safeguards;" (Tr. p. 2639) and that "Once we proceeded with this suit and the proceedings here, it was the first time I had seen the procedural safeguards" (Tr. p. 2662). Accordingly, upon the basis that the district did not provide the procedural safeguards notice to the parents that covered the 2008-09 and 2009-10 school years, I decline to reduce or deny tuition reimbursement on the basis that the parents failed to provide adequate notice of the student's removal from the public school.

In considering the equitable considerations for the 2008-09 school year, I agree with the finding by the impartial hearing officer that the parents cooperated with the district, participated in all meetings and offered the district many opportunities to evaluate and consider the needs of the student (see IHO Decision at pp. 68-69). Regarding the 2009-10 school year, I find that the parents did not provide the district with the student's evaluations or progress reports from Kildonan from the 2008-09 school year or a later neuropsychoeducational evaluation report until the due process hearing. In addition, I find nothing in the hearing record to indicate that the student required a boarding component to her educational program. As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]). Furthermore the hearing record does not

show that the parents tried to find an alternative placement to Kildonan closer to home. Unlike the 2008-09 school year, the parents had ample opportunity to identify a day program for the student. Accordingly, I agree with the reduction by the impartial hearing officer of the parents' tuition award by the cost of the boarding component of the program (see IHO Decision at p. 71).[32]

Conclusion

In summary, I find that the district failed to offer the student a FAPE, that the parents' unilateral placement at Kildonan was appropriate for the 2008-09 and 2009-10 school years, that equitable considerations support the parents claim for the 2008-09 school year and partially support the parents' claim for the 2009-10 school year. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 25, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

[32] I do not agree with the impartial hearing officer's finding regarding the 2009-10 school year, that "removal," "not enrollment" established the regulatory benchmark when determining compliance with the parental notice provision and conclusion that parents who seek tuition reimbursement are not required to notify a district each year they plan to continue a student's private school enrollment after the student's initial removal from public school (see IHO Decision at p. 71). Absent the lack of the procedural safeguards, the parents would have been required to submit a 10-day notice each year they enrolled the student in a private school (see Wood v. Kingston City School Dist., 2010 WL 3907829, at *8 [N.D.N.Y. Sept. 29, 2010] [holding that the parent failed to provided appropriate notice of the unilateral placement when the student had previously been placed in a private school]).