



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-120

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] School District

Appearances:

Law Offices of Neal Howard Rosenberg, attorneys for petitioners, Neal Howard Rosenberg, Esq. and Nathaniel Kuzma, Esq., of counsel

Kuntz, Spagnuolo, Murphy & Gronbach, PC, attorneys for respondent, Vanessa M. Gronbach, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request that respondent (the district) reimburse them for their son's tuition costs at the Kildonan School (Kildonan) for the 2010-11 school year. The appeal must be dismissed.

During the 2010-11 school year, the student was parentally placed at Kildonan and was in ninth grade (Tr. pp. 772-73). The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Background

The student has a history of early academic difficulties (Dist. Ex. 68 at p. 1). In second grade, he was referred to the Committee on Special Education (CSE) due to weak language skills that "severely impacted" his academic progress (Dist. Exs. 70; 71). Subsequent to an evaluation, the student was determined eligible for special education programs as a student with a speech or language impairment and recommended for an integrated special class, along with speech-

language therapy and occupational therapy (OT) (Dist. Exs. 10 at p. 4; 68; see Dist. Exs. 72; 73; see also 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The student continued to struggle academically and was transitioned to a Board of Cooperative Educational Services (BOCES) 8:1+1 special class in the middle of fourth grade (Tr. p. 24; Dist. Exs. 51 at p. 5; 59 at p. 5). When the student was in fifth grade, the parents requested an emergency CSE meeting due to a conflict between the student and the BOCES teacher (Tr. pp. 27-28; Dist. Ex. 45; see Dist. Ex. 42 at p. 5). A subcommittee of the CSE convened on April 20, 2007 and recommended that the student be placed in a district 12:1+1 special class with speech-language therapy for the remainder of the 2006-07 school year (fifth grade) (Dist. Ex. 43 at pp. 1, 5).

The student began the 2007-08 school year (sixth grade) in a district middle school where he attended nonintegrated 15:1 special classes for English, math, reading, and study skills (Dist. Ex. 42 at p. 1). He attended integrated classes for science and social studies (id.). He also received related services of speech-language therapy and counseling (id.). The student struggled academically with the sixth grade curriculum (Dist. Ex. 40 at p. 6; see Dist. Ex. 41). In November 2007, the CSE met and recommended that the student transfer to a different district middle school where he attended 15:1 nonintegrated special classes for English, math, and reading; attended 12:1+1 special classes for social studies and study skills; and received consultant teacher support for science (Dist. Exs. 10 at pp. 4-5; 40 at pp. 1, 6, 10).¹ The student continued to receive related services of speech-language therapy and counseling (Dist. Ex. 40 at p. 2).

In April 2008, a subcommittee of the CSE convened for the student's annual review and to develop an individualized education program (IEP) for 2008-09 school year (seventh grade) (Dist. Ex. 38). Meeting minutes indicated that the student had transitioned well to the second district middle school and made gains in academics and his confidence level (id. at p. 6). However, they also revealed that based on updated academic scores, the student continued to demonstrate delays (id.). According to the meeting minutes, at times the student engaged in task avoidance behaviors and drew attention to himself (id.). The meeting minutes noted that the student was reported to interact better with adults and younger peers, where he could be seen as a helper (id.). They reflected that the student was motivated by arts and theater (id.). The CSE subcommittee recommended that for seventh grade, the student attend a 15:1 special class for English, math, and reading; attend a 12:1+1 special class for study skills; and receive consultant teacher services for science and social studies (Dist. Exs. 10 at p. 3; 38 at p. 1). The CSE subcommittee also recommended that the student receive once monthly counseling and a weekly speech-language consultation (Dist. Ex. 38 at p. 2). The student attended the program recommended by the April 2008 CSE subcommittee for the 2008-09 school year (see Tr. p. 169).

On April 28, 2009, a subcommittee of the CSE convened for the student's annual review and to develop an IEP for the student for the 2009-10 school year (eighth grade) (Dist. Ex. 33). According to CSE subcommittee meeting minutes, the student was reported to have started seventh grade with some "silly" behavior; however, he had matured and his work ethic had improved (id. at p. 6). The CSE subcommittee minutes further noted that there had been a marked improvement in the student's "ownership" and participation in school work (id.). For the

¹ Although listed as consultant teacher services on the student's IEPs, in several instances during the impartial hearing, district staff described classes in which a consultant teacher is present as "co-taught" or "inclusion" classes (Tr. pp. 49-51, 137, 164, 191, 561-62, 578-79).

2009-10 school year, the CSE subcommittee recommended that the student be placed in a 15:1 special class for English, math, and reading; placed in a 12:1+1 special class for study skills; and receive consultant teacher services for social studies and science (id. at p. 1). The CSE subcommittee further recommended that the student receive a weekly speech-language consultation and a monthly counseling consultation (id. at p. 2). The CSE subcommittee recommended program modifications and accommodations of checks for understanding, copy of class notes, assignments broken down into smaller segments for math and inclusion classes, directions repeated, and extended time for assignments for math and inclusion classes (id.). The student's April 2009 IEP afforded the student testing accommodations of questions read and explained; a flexible setting; extended time (1.5); directions read and explained; special location for unit, final, and State exams; and additional paper for math tests only (id.). The proposed IEP included annual goals related to study skills, reading, writing, mathematics, speech-language, and social/emotional/behavioral development (id. at pp. 6-9). The student attended the program recommended by the April 2009 CSE subcommittee for the 2009-10 school year (see Tr. pp. 28, 174, 722-23, 725).

During the 2009-10 school year, the CSE conducted a reevaluation of the student in preparation for its annual review (Dist. Exs. 23; 27). The school psychologist assessed the student's cognitive ability using the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), which yielded the following standard scores and percentile ranks: verbal comprehension 83 (13th percentile), perceptual reasoning 92 (30th percentile), working memory 71 (3rd percentile), processing speed 73 (4th percentile), and full scale IQ 75 (5th percentile) (Dist. Ex. 23 at p. 10). Based on the WISC-IV results, the school psychologist reported that the student's general thinking and reasoning skills were in the "[b]orderline range" (id. at pp. 10-11). The school psychologist also assessed the student's behavior by having the student complete the Self-Report of Personality (SRP) form of the Behavior Assessment System for Children, Second Edition (BASC-2) (id. at pp. 19-22). According to the school psychologist, the student's responses yielded a score on the inattention/hyperactivity composite that fell in the "[a]t [r]isk" classification range (id. at p. 22). The school psychologist reported that the student's relationships with peers were inconsistent and noted that in general, the student had a positive self-concept; however, he frequently doubted his educational abilities (id. at p. 7). The school psychologist commented that the student's social/emotional development was an "issue" and that it was being addressed through IEP mandated counseling (id.). With respect to management needs, the school psychologist opined that the student required "moderate" special education academic support to progress within the general education curriculum (id.).

In March 2010, the district's speech-language pathologist conducted a speech-language reevaluation of the student using the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) (Dist. Ex. 27). The student attained the following composite standard scores and percentile ranks: core language score 76 (5th percentile), receptive language index 79 (8th percentile), and expressive language index 77 (6th percentile) (id. at p. 1). At the time of the evaluation, the student was receiving speech-language therapy one time per week in a small group (id.). The speech-language therapist reported that in general, the student's social communication skills appeared typical and appropriate for his chronological age (id. at p. 2). However, she noted that at times the student's behavior could be immature and distracting (id.). She further noted that although the student's skills were adequate for communication, his classroom performance may be inconsistent due to attending difficulties (id.). The speech-

language therapist stated that "[b]ased on productivity, test results, and minimal progress, Speech/Language services [were] not recommended for 2010-2011" (*id.*). She opined that therapy continued to be more social than truly beneficial to the student and that it may be counterproductive to pull him from his academic classes (*id.*). The speech-language therapist stated that although the student still demonstrated some weaknesses in auditory memory and recall, these skills could be further addressed and enhanced within the student's regular and special education programs (*id.*). She stated that use of strategies such as previewing material and listening checks would be beneficial to the student in his learning environment (*id.*).

Administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) by the student's special education teacher in April 2010 yielded the following standard scores and percentile ranks: word reading 70 (2nd percentile), reading comprehension 83 (13th percentile), pseudoword decoding 88 (21st percentile), numerical operations 67 (1st percentile), math reasoning 79 (8th percentile), spelling 63 (1st percentile), written expression 79 (8th percentile), and listening comprehension 82 (12th percentile) (Dist. Ex. 23 at p. 6). The student's composite scores were as follows: reading 78 (7th percentile), mathematics 71 (3rd percentile), and written language 68 (2nd percentile) (*id.*). On the Key Math-Revised, administered in March 2010, the student attained a standard score of 82 (12th percentile) in basic concepts, 75 (5th percentile) in operations, and 75 (5th percentile) in applications (Dist. Ex. 25 at pp. 4-5).

By letter dated April 13, 2010, the parents were advised by the district of an annual review/reevaluation meeting scheduled for April 30, 2010 pertaining to the 2010-11 school year (ninth grade) (Dist. Ex. 26). The student's mother and stepfather were unable to attend the April 30, 2010 CSE subcommittee meeting and instead met with the student's teachers and the assistant principal on April 21, 2010 to discuss the student's needs with respect to the 2010-11 school year (Tr. pp. 726-28). At that meeting, the student's mother expressed concern that the student would not receive special class instruction for academics in ninth grade (Tr. pp. 730-37).

The hearing record reflects that during the second semester of eighth grade, the student was the subject of bullying (Tr. pp. 317-18, 382, 737, 745). In addition, the student witnessed and reported incidents of inappropriate behavior among his classmates that caused him to have concern for his own safety (Tr. pp. 738-45).

On April 30, 2010, a subcommittee of the CSE convened for the student's annual review/reevaluation (Dist. Ex. 25). Meeting participants included the CSE chairperson, school psychologist, special education teacher, regular education teacher, speech-language therapist, social worker, the student, and the student's father (*id.* at p. 7). The CSE subcommittee reviewed the results of its updated testing, as well as the student's academic progress (Tr. p. 82).

As detailed in the present levels of performance in the April 2010 IEP, the student's overall level of cognitive functioning as measured by the WISC-IV was within the "[b]orderline" to "[l]ow [a]verage" range (Dist. Ex. 25 at p. 3). The IEP indicated that the student's nonverbal reasoning skills were within the average range, but that he had significant weaknesses in information processing and may have difficulty keeping up with his peers in a wide variety of situations that required age appropriate thinking and reasoning abilities (*id.*). Based on the student's learning characteristics, the IEP indicated that the student should be provided with opportunities for frequent repetition when presented with unfamiliar tasks (*id.*). With respect to

academics, the IEP stated that although the student's language arts achievement was below grade level standards, the student continued to make progress in that area (id. at p. 4). The IEP further stated that the student often worked hard to decode sentences and if interested in the subject matter, the student would laboriously sound out words (id.). In addition, the IEP noted that the student often repeated the beginning of a sentence and used context clues to figure out unknown words (id.). According to the IEP, the student demonstrated the ability to apply his phonetic awareness to multisyllabic words (id. at p. 2). Tapping out sounds helped the student with order and blending skills (id. at p. 4). With respect to writing, the IEP stated that the student was able to express his ideas through written language with greater independence (id.). The student appeared to enjoy writing more and was willing to expand on his ideas when interested in the writing topic (id.). As reflected in the IEP, the student demonstrated a creative flair for writing; however, his poor spelling tended to impede the process (id.). The IEP indicated that the student's knowledge of punctuation was not always reflected in his writing, and noted that the student benefited from writing conferences to edit his work (id.). The student was reported as having significant weaknesses in basic math computations and math reasoning (id.). According to the IEP, the student's reliance on multiplication charts and calculators was "absolute," his frustration level was extremely low, and he often refused help (id.). When the student did accept help, he benefited from task analysis and an "I do/You do" approach (id.). The IEP indicated that the student benefited from the small class environment where there were minimal distractions and further noted that the student required constant refocusing and checks for understanding due to receptive language weaknesses (id.). The IEP stated that the student showed great success when a subject allowed itself for a more artistic approach (id.). In addition, the student responded well to positive reinforcement behavior plans and reported that verbal praise helped him to be more successful (id.).

With respect to social development, the IEP indicated that the student had a history of being bullied by his peers; however, he was able to "win over" many of his peers with dance routines (Dist. Ex. 25 at p. 6). According to the IEP, the student enjoyed being the center of attention at school dances and also enjoyed creating singing groups with peers (id.). The IEP stated that the student did not have a problem standing up for himself when he felt he was being "abused" by adults or peers and noted that the student was taking a more respectful approach to handling challenging situations (id.). The IEP reflected that group lessons were sometimes difficult to complete due to the student's interruptions (id.). However, it also noted that the student had made tremendous gains in taking responsibility for his own behavior and when redirected he would often apologize and refocus himself (id.). The IEP reflected the student's need to develop more positive interaction with his peers and adults/authority figures, and to increase time spent on task and decrease behaviors that kept him off task (id.). With respect to management needs, the IEP indicated that classroom rules and expectations, as well as consequences, needed to be very clear for the student and that the student needed to increase his ability to work independently (id. at p. 7). The IEP noted that the student frustrated easily, refused to use learning strategies, and preferred to get answers from adults (id.). However, the IEP also indicated that at times the student could be a very hard worker who did not give up (id.).

According to the meeting minutes from the April 2010 CSE subcommittee, the educational evaluation of the student revealed significant academic delays, most notably in sight word vocabulary, spelling, and math computation (Dist. Ex. 25 at p. 7). The meeting minutes further indicated that the student's self-report revealed concerns with attending (id.). The

student's father was noted to have expressed concern regarding the student's reading deficits and how they would impact the student in high school, but did not object to the overall IEP (Tr. pp. 30, 43, 82-83, 152-53; Dist. Ex. 25 at p. 7).

For the 2010-11 school year, the CSE subcommittee found the student eligible for special education services as a student with a learning disability (Dist. Exs. 24; 25 at p. 8).² The student was scheduled to attend general education classes for English, Algebra 1A, and Global Studies 1 (Tr. pp. 49, 71-75, 629; Dist. Ex. 25). To support the student in the general education classes, the CSE subcommittee recommended that his general education English class be supplemented with consultant teacher services; his Global Studies 1 class be supplemented by a lab (resource room) 2.5 times per week for 45 minutes; and his Algebra 1A class be supplemented by a math resource room 2.5 times per week for 45 minutes (Dist. Ex. 25 at p. 1). In addition, the CSE subcommittee recommended that the student attend a 12:1 special class for community skills once daily for 45 minutes, and resource room 2.5 times per week for 45 minutes (*id.*). With respect to related services, the CSE subcommittee recommended that the student receive counseling one time per month and that the student's speech-language therapy services be discontinued (*id.* at p. 2).³ In addition to special education and related services, the CSE subcommittee recommended the student for numerous program modifications and accommodations including checks for understanding, provision of a copy of class notes, assignments broken down into smaller segments, and directions repeated (*id.*). The CSE subcommittee also recommended that the student be afforded testing accommodations of tests read; special location for full period, final, and State exams; extended time (1.5); revised test directions; and additional paper for math tests only (*id.* at p. 3). The April 2010 IEP included annual goals related to study skills, writing, mathematics, and social/emotional/behavioral development (*id.* at pp. 8-10). The IEP reflected that the student was expected to earn a Regents diploma in June 2014 (*id.* at p. 3).

In May 2010, the parents requested that two of the district's special education teachers fill out reference forms for the student to attend Kildonan (Tr. pp. 156, 368-69; see Dist. Exs. A; B).

A copy of the student's April 2010 IEP was mailed to the parents on or around June 16, 2010 (Dist. Ex. 21).

As reflected in his June 2010 report card, the student received the following final grades for his eighth grade core academic classes: English 69, reading 81, social studies 66, math 66, and science 60 (Dist. Ex. 19). The student's English teacher commented that the student was not working up to his ability and that his grades had dropped during the last five weeks of school (*id.*). The student's reading teacher stated that the student needed to apply more consistent effort, while the student's math teacher reported that the student was not working up to his ability (*id.*). The student's report card indicated that he had 12 unexcused absences for the fourth quarter (*id.*). The student's 2009-10 IEP progress report indicated that the student achieved one IEP goal

² The student had previously been classified as having a speech or language impairment (Dist. Ex. 33 at p. 1).

³ The April 2010 CSE subcommittee recommended the student for extended school year (ESY) services in the form of four hours per week of special education itinerant teacher (SEIT) services (Dist. Ex. 25 at p. 2). The parents declined these services because they believed them to be insufficient and also because they had concerns regarding the student's safety (Tr. p. 755; Dist. Ex. 14; see Dist. Exs. 15; 17; 76 at p. 2).

related to fostering positive relationships with peers and had made some progress toward his reading goals (Dist. Ex. 20). The report reflected that the student had not progressed satisfactorily toward his writing goals or the majority of his mathematics goals (id. at p. 2). Between January and June 2010, the student had six instances of disruptive behavior or insubordination for which he received lunch detention or in-school suspension (Dist. Ex. 22).

In late June 2010, the student interviewed at Kildonan and was assessed by Kildonan staff as part of the school's admissions process (Tr. pp. 479-81; Parent Ex. N).

By letter to the CSE chairperson dated July 16, 2010, the parents informed the district that they were not in agreement with the recommendations of the April 2010 CSE subcommittee (Dist. Ex. 16). Specifically, the parents asserted that the proposed IEP did not address the student's individual learning needs (id.). According to the parents, the district had failed to provide a safe learning environment for the student for the latter half of the 2009-10 school year, which resulted in the student experiencing a high level of anxiety regarding school and his classmates (id.). The parents opined that the anxiety, when combined with the "sheer size" of the district's high school, made the student's success the following year "extremely unlikely" (id.). Furthermore they noted that the district's proposed IEP did not address this concern (id.). The parents asserted that the district's accommodations to date had been "much too slow to produce a functionally literate high school graduate in [four] more years" (id.). They noted that the student's reading, writing, and basic arithmetic skills were currently between a third and fourth grade level, based on hours of working with the student (id.). They asserted that the proposed IEP appeared to be "more of the same," with even less focus on reading and language (id.). The parents requested that the CSE arrange for a complete, independent neuropsychological evaluation of the student, noting that the student had struggled with school from the beginning and that the evaluation was long overdue (id.). The parents opined that until the results of the evaluation were obtained, any IEP developed by the district would be based on an incomplete student profile (id.).

On July 28, 2010, the parents signed an agreement enrolling the student at Kildonan for the 2010-11 school year (Parent Ex. L). On that same day, the parents made a \$5,000.00 deposit to the school (Parent Ex. R at p. 1).⁴

In a response to the parents' July 16, 2010 letter, the district's director of special education indicated that he wanted to schedule a CSE meeting to discuss the parents' concerns (Dist. Ex. 80). He further informed the parents that the neuropsychological evaluation they requested had been approved (id.).

In July and August 2010, the student's mother exchanged a series of e-mails with the student's reading teacher from the district (Dist. Ex. 76). In an e-mail dated August 11, 2010, the student's mother detailed her concerns with the district's recommended program and requested a

⁴ The parents were subsequently notified in a letter dated August 2, 2010 from the director of student recruitment/financial aid at Kildonan that the student had been awarded an additional \$5,000.00 in financial aide, bringing his total grant for the 2010-11 school year to \$10,000.00 (Parent Ex. M). The letter indicated that the grant did not need to be repaid, but that it would be reduced by the amount of any additional funding the parents received (id.).

letter from the student's reading teacher advocating for his placement at Kildonan (id. at pp. 2-4). The student's reading teacher indicated that she knew little about the private school and would not advocate for it or recommend it, but agreed to submit a letter to the parents detailing the methods she used in her classroom to afford the student the opportunity to improve his phonemic awareness (id. at p. 5).⁵

On August 21, 2010, the parents made a second deposit of \$15,000.00 to Kildonan (Parent Ex. R at p. 2).

In a letter dated August 24, 2010, the parents advised the district that they did not agree with the recommendations of the April 2010 CSE subcommittee (Dist. Ex. 11 at p. 1). They opined that the student could only be served in a placement with an individualized learning environment with specialists appropriately and specifically trained to teach to his areas of need (id.). The parents asserted that to date, the district had failed to offer such a program (id.). They further asserted that Kildonan was an appropriate placement for the student and indicated that they had secured a placement there for the student for the 2010-11 school year (id.). The parents advised the district that they had retained counsel and intended to request an impartial hearing to seek reimbursement for the student's tuition costs at Kildonan (id.). They requested a copy of a class profile for each of the student's classes and indicated their desire to schedule a classroom observation once the school year was underway (id.). Citing their July 16, 2010 letter, the parents reiterated their concerns regarding the size of the district's high school, the "range" of students in the district's school, the student's need for a specialized and individualized learning program, the lack of congruity between the student's level of functioning and the proposed program, the student's need for an environment where he could feel comfortable with his learning disability, the inappropriate level of counseling, the lack of a behavioral plan, the decision to remove speech-language services from the student's IEP, and the student's need for more 1:1 support from a trained special education professional than what was proposed (id. at p. 2).

A subcommittee of the CSE convened on August 30, 2010 (Dist. Ex. 9). Meeting participants included the CSE chairperson, a school psychologist, a special education teacher, a

⁵ In a summary dated August 16, 2010, the student's reading teacher reported that the student benefited from the highly structured, systematic, and cumulative nature of the Wilson Reading System; and that by utilizing multiple modalities, the student experienced substantial success in gaining phonemic awareness (Dist. Ex. 76 at p. 6). The reading teacher reported that the student's willingness to tap out sounds and use colored pencils to code words by syllable types allowed him to be "cued in" and systematically decode words (id.). The reading teacher reported that she incrementally paced the student's learning of new sound elements, building on each bit of new knowledge and gave the student ample opportunity for practice (id.). She noted that she introduced the student to High Interest/Low Vocabulary novels to ensure that he stayed motivated and engaged, and "practiced sounds as well as context clues as reading strategies" (id.). According to the reading teacher, the student demonstrated serious deficits in attention and needed to be praised often and given short "spurts" of academic activities with built in "down time" afterward (id.). She noted that the student responded to a token economy established to promote on-task behavior (id.). The reading teacher reported that use of the software program "audacity" helped the student with his fluency (id.). She stated that since the student entered her class in the middle of sixth grade she had seen an improvement in his overall reading ability, although she would still categorize him as a reluctant reader (id.). The reading teacher opined that the student needed to improve his reading fluency by reading regularly (id.).

regular education teacher, the student, the student's parents and brother, an intern, and a second CSE chairperson who helped co-chair the meeting (Tr. p. 32; Dist. Ex. 9 at p. 8).⁶

Minutes from the August 2010 meeting reflected that the CSE subcommittee discussed the parents' concerns regarding the student's safety, functional abilities, and reading (Dist. Ex. 9 at p. 8). With respect to the student's safety, the CSE subcommittee discussed modifying the recommended counseling services and conducting a transitional functional behavioral assessment (FBA) (*id.*). The CSE subcommittee also informed the parents that the particular students they were concerned about would not be attending the district's high school (*id.*). With respect to the student's functional abilities, the district's special education teacher detailed the recommended community skills program that addressed skills such as self-awareness, learning styles, and "habits of mind" (*id.*). According to the meeting minutes, the student continued to exhibit low self-esteem and it was determined that community skills and speech-language intervention would address the areas of self-advocacy, pragmatic development, and auditory recall strategies (*id.*). The CSE subcommittee determined that refocusing/redirection and reteaching of materials would be added to the student's IEP as program modifications to compensate for the student's difficulty with working memory (*id.*). With respect to reading, the meeting minutes indicated that the parents expressed concern regarding the student's continued weaknesses in this area (*id.*). The CSE subcommittee discussed the reading methodologies used by the district's teachers, including Orton-Gillingham and Wilson, and also discussed the need for the student to have a strong work ethic in order to make progress (*id.*). According to the meeting minutes, the CSE subcommittee recommended removing resource room 2.5 times per week from the student's IEP and replacing it with daily reading instruction, which the IEP characterized as a "regular education support" (*id.* at pp. 2, 8). The CSE discussed expectations with respect to a high school diploma, and noted that access to the general education curriculum was required in order for the student to attain the number of credits necessary to complete high school (*id.* at p. 8). The CSE subcommittee meeting minutes indicated that the student would be part of "Link Crew" to help with his transition to high school (*id.*).⁷

For the 2010-11 school year, the student was scheduled to attend general education classes for English, Global Studies 1, and Algebra 1A (*see* Dist. Ex. 74). To support the student in his general education classes, the August 2010 CSE subcommittee recommended that the student receive consultant teacher services to supplement his English class; attend a Global Studies 1 lab (resource room) 2.5 times per week for 45 minutes to supplement his Global Studies 1 class; and attend a math resource room 2.5 times per week for 45 minutes to supplement his Algebra 1A class (Dist. Ex. 9 at pp. 1-2). In addition, the CSE subcommittee recommended that the student attend a 12:1+1 special class for community skills daily for 45 minutes (*id.* at p. 2). The August 2010 IEP stated that the student would attend a "Foundations of Reading" class every day as general education support, and indicated that a multisensory approach would be employed in this class (*id.*). The CSE subcommittee recommended that the student receive individual counseling weekly through October 10, 2010, and two times per

⁶ The hearing record indicates that the intern who attended the August 2010 CSE subcommittee meeting was employed by the district as a speech-language pathologist (Tr. p. 550).

⁷ "Link Crew" is described in the hearing record as a program that connects incoming ninth graders with upperclassmen to try to "create some peer models" (Tr. p. 41).

month thereafter (id.). In addition, the CSE restored speech-language therapy to the student's IEP in the form of twice weekly consultations (id.). The IEP indicated that a "functional behavior plan" would be completed to address the student's difficulty with transition and low self-esteem, and program modifications of refocusing/redirection and reteaching of materials were added to the student's IEP (id. at pp. 2, 8). In addition, speech-language goals were added to the student's IEP (id. at p. 11). The IEP indicated that a program review would be conducted after the first marking period (id. at p. 8). According to meeting minutes, the student's mother stated that she would take the discussion into consideration, but that the student would be attending Kildonan (id.).

Following the August 2010 CSE subcommittee meeting, the neuropsychological evaluation of the student that had been requested by the parents and approved by the district was conducted over two days in September 2010 (Parent Ex. K). The psychologist concluded that the student had a language-based learning disability and that the limiting factor in the student's academic success was his developmental aphasia (id. at p. 7). He further concluded that the student was presenting with an adjustment disorder with depressive and anxious features secondary to his language disorder (id. at pp. 6-7). To address the student's needs, the psychologist recommended that an intensive effort be initiated with the main focus being the enhancement of the student's language skills (id. at p. 7). More specifically, he recommended that the student receive intensive speech-language therapy, small group or 1:1 reading remediation, and small group or 1:1 math instruction (id.). The psychologist opined that a mental health specialist would be helpful for the student should his affective state become problematic and to serve as a liaison between the student's school-based and home-based treatment teams (id. at pp. 7-8). The CSE did not reconvene to review the neuropsychological evaluation (Tr. pp. 54-55; see Tr. pp. 57, 64-67, 419).⁸

Due Process Complaint Notice and Response

By due process complaint notice dated November 18, 2010, the parents requested an impartial hearing, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year for a variety of procedural and substantive reasons (Dist. Ex. 6). Among other things, the parents asserted that the recommended placement at the district's high school was inappropriate for the student, that the district's recommended program was inappropriate and insufficient for the student, that the district changed its recommendations at the August 2010 CSE meeting from its earlier April 2010 CSE meeting without a basis for doing so, and that Kildonan was an appropriate placement for the student (id.).

Specifically, the parents asserted that the CSE's recommendation that the student attend the district's high school was inappropriate because the school is too large and such a heavily populated setting would cause the student to regress in the areas of distractibility, focus, anxiety, attention, and behavior (Dist. Ex. 6 at p. 7). The parents further asserted that the high school had

⁸ The hearing record indicates that the district requested that the parents complete a "Parent Non-Public School Placement Acknowledgement/Consent Form" indicating that they had elected to place the student at a nonpublic school at the parents' expense (Dist. Ex. 7). I note, however, that the parents in this case alleged that the student was not offered a FAPE for the 2010-11 school year and that they were seeking tuition reimbursement for their placement of the student at Kildonan (Dist. Exs. 6; 11; 16).

too great a range of students, and that the student had had "numerous altercations with his peers" during the 2009-10 school year, which resulted in the student removing himself from the district's middle school for the last two weeks of that school year (id. at pp. 7-8).

Regarding the program recommended by the district, the parents specifically raised the following assertions: (1) the district failed to offer the student the direct special education instruction that he required due to his language disorder; (2) the recommended general education placement was inappropriate as the student required a small classroom with a small student-to-teacher ratio for all subjects in order to make any meaningful progress; (3) the district did not address the student's social and emotional needs as there were no emotional goals included on his IEP and the recommendation for counseling was inappropriate to meet his needs; (4) neither an FBA nor a behavioral intervention plan (BIP) had been developed; (5) the district personnel expected to instruct the student were not qualified to deliver support to him because he required full-time support from a special education trained professional in order to make progress; (6) the student required a full-time special education program due to his dysphasia and academic, social, emotional, and behavioral needs; (7) the CSE failed to reconvene to discuss the results of the September 2010 neuropsychological evaluation; (8) the IEP did not appropriately address the student's anxiety and there were no goals related to his anxiety; (9) the IEP did not address the student's inattentiveness, distractibility, and inability to focus in the classroom; (10) the IEP did not include reading goals; and (11) the goals in the IEP were "miscalculated," did not address all of the student's needs, and did not include specific levels necessary for measuring progress (Dist. Ex. 6 at pp. 8-12).

The parents also asserted that Kildonan was appropriate for the student because it offered a small, nurturing environment and focused on educating students who struggle with complex language-based learning disabilities (Dist. Ex. 6 at p. 13). The parents asserted that, among other things, all of the student's needs were met at Kildonan, the student's anxiety was reduced, his distractibility and attention were being addressed, the material was multisensory and engaging, the student received a sufficient level of 1:1 support but was expected to operate independently, the student received the appropriate level of support in all areas, and the student was progressing at a steady rate (id.).

As relief, the parents requested that the impartial hearing officer determine that the student was denied a FAPE for the 2010-11 school year, find that the parents' placement of the student at Kildonan was appropriate, and order the district to reimburse the parents for the costs of the student's at Kildonan for the 2010-11 school year (Dist. Ex. 6 at p. 14).

By letter dated November 23, 2010, the district acknowledged receipt of the parents' due process complaint notice and provided the parents with information regarding a resolution session (Dist. Ex. 4). In a response to the parents' impartial hearing request dated November 29, 2010, the district refuted the parents' claims and asserted that it offered the student a FAPE for the 2010-11 school year (Dist. Ex. 3 at p. 3). Specifically, the district alleged that the CSE had reconvened on August 30, 2010 to address the parents' concerns outlined in their August 24, 2010 letter regarding the student's reading, speech-language, counseling and behavioral/emotional needs and recommended replacing the student's resource room with a Foundations of Reading class every day, reinstating a speech-language consultation direct/indirect twice weekly, increasing individual counseling services to once per week for four

weeks and then twice per month thereafter, and recommending an FBA (*id.* at p. 2). The district alleged that it recommended program modifications, testing accommodations, and goals to address the student's needs (*id.*). It also alleged that the CSE's recommendations were based on review of the parents' August 2010 letter, an April 2010 educational evaluation, a March 2010 speech-language reevaluation, a February 2010 psychological reevaluation summary report, social history updates from September 2009 and March 2007, physical examinations from August 2009 and August 2008, an April 2009 attendance record, an April 2009 report card, January 2009 discipline reports, a March 2007 observation, a March 2007 psychological evaluation, a February 2007 speech-language evaluation, a February 2005 OT evaluation, parent concerns, and committee discussion (*id.*). The district also alleged that it had considered a general education setting without support services for the student but rejected such a program because the student's then-current academic functioning indicated that a more intensive setting with support was needed to address the student's needs (*id.*). Furthermore, the district asserted that Kildonan was not an appropriate placement for the student and that the equities did not favor the parents (*id.*).

The parties met for a resolution session on December 3, 2010; however, they were unable to reach an agreement (Parent Ex. H at p. 2; *see* 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]). In a letter dated January 20, 2011, the district offered to reconvene a CSE meeting to discuss the lack of reading goals on the August 2010 IEP and address the parents' concerns (Dist. Ex. 2). The parents declined the district's offer (Dist. Ex. 1).

Impartial Hearing Officer Decision

An impartial hearing convened on February 16, 2011 and concluded on June 3, 2011, after seven days of proceedings (Tr. pp. 1-1008). In a decision dated August 18, 2011, an impartial hearing officer determined that the district offered the student a FAPE for the 2010-11 school year and denied the parents' request for tuition reimbursement at Kildonan (IHO Decision at p. 21). The impartial hearing officer determined that the student's August 2010 IEP recommended a program and services designed to meet the student's needs in the least restrictive environment (LRE) (*id.*). Specifically, the impartial hearing officer determined that the August 2010 IEP provided support to the student in his areas of identified need—math, reading, English, global studies, speech and language therapy, counseling, relationships, community skills, transition to the high school, and attitude and motivation (*id.* at pp. 19-20). He determined that the recommended program met the requirement of being the student's LRE by allowing the student to learn in a small individualized setting and also exposing him to the general student body (*id.* at p. 20). Regarding the parents' claim that the district failed to consider the neuropsychological evaluation, the impartial hearing officer determined that the evaluation was conducted after the 2010-11 school year had started and thus could not have impacted any decisions made by the August 2010 CSE (*id.* at p. 19).

The impartial hearing officer further found that the program at Kildonan was "narrow" and did not provide the student with the breadth of services that he needed (IHO Decision at p. 20). He determined that the fact that the teachers at Kildonan were not certified in the subjects they taught or in special education raised questions as to their ability to provide the quality of services needed by the student (*id.*). The impartial hearing officer further opined that Kildonan was not the LRE for the student (*id.*). Regarding the parents' intentions, the impartial hearing

officer determined that the parents had decided that the student would attend Kildonan for the 2010-11 school year prior to the August 2010 CSE meeting (id. at p. 19).

Appeal for State-Level Review

This appeal by the parents ensued. The parents allege that the impartial hearing officer erred in his determination that the district offered the student a FAPE for the 2010-11 school year. The parents further assert that their unilateral placement of the student at Kildonan for the 2010-11 school year was appropriate and that equities favor an award of tuition reimbursement.

Regarding their allegation that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2010-11 school year, the parents allege that the impartial hearing officer failed to adequately consider the district's procedural errors and how those errors created a denial of a FAPE. Specifically, the parents allege that the CSE failed to give appropriate weight to the documents provided at the CSE meetings when developing the student's IEP, namely the student's scores on the WIAT-II and his eighth grade progress report, and that the student's IEP failed to contain reading goals that were necessary to address the student's educational needs.

The parents also allege that the IEP created for the student failed to address the complexity of his needs or recommend an appropriate program, resulting in a denial of a FAPE. The parents allege that the impartial hearing officer erred when he found that the 2010-11 IEP correctly summarized and addressed the student's areas of special education needs. They further contend that the goals were inappropriate because they did not pertain to the student's specific academic and emotional deficits, and did not build on the goals contained in the student's IEPs from previous years. The parents also allege that the district failed to demonstrate why general education classes were recommended for the student, especially given the student's known issue of distractibility, and that the district is unable to demonstrate the appropriateness of the recommended classes at the district high school and did not present sufficient evidence or testimony at the impartial hearing to prove that the recommended program would address the student's unique special education needs and allow him to make progress.

The parents allege that their unilateral placement of the student at Kildonan was appropriate and that the impartial hearing officer applied an erroneous standard in assessing the appropriateness of the student's placement at Kildonan. The parents assert that a unilateral placement need not be perfect, that the absence of State approval and certified instructors is not dispositive in determining the appropriateness of a unilateral placement, and that they had met their burden of proof to show that Kildonan was an appropriate placement for the student. The parents further allege that equitable considerations favor an award of tuition reimbursement, stating that they acted reasonably and in good faith with the CSE, did nothing to impede the CSE process, were open to a public school placement that would provide the student with appropriate special education support, continued to work with the district to develop an appropriate IEP for the student, and satisfied notice requirements. The parents request that a State Review Officer overturn the impartial hearing officer's decision that the district offered the student a FAPE for the 2010-11 school year, find that their unilateral placement of the student at Kildonan was appropriate, find that equitable considerations favor the parents, and award them reimbursement for the student's tuition costs at Kildonan.

The district submitted an answer, alleging the impartial hearing officer properly found that the recommendations for the student for the 2010-11 school year would have appropriately addressed his special education needs in the LRE. Specifically, the district alleges that the IEPs developed for the student for the 2010-11 school year were "procedurally appropriate," included updated levels of performance and indicated his individual learning needs, established annual goals which addressed his areas of need, and showed how those goals would be evaluated. The district further contends that the CSE had sufficient evaluative information and reports from teachers and service providers upon which to base its recommendations for the student and that the lack of reading goals on the IEP did not deny the student a FAPE. Furthermore, the district argues that even if the lack of reading goals constituted a procedural violation, it did not result in a denial of a FAPE because the parents declined the district's offer to reconvene a CSE meeting to develop reading goals. The district also alleges that the CSE met in August 2010 after being informed about the parents' concerns and addressed those concerns at the meeting and further, that the student had obligations outside of school that interfered with school, homework completion, and attendance. The district next alleges that the CSE did not review the neuropsychological evaluation results prior to making its recommendation for the 2010-11 school year because the evaluation was not available prior to the August 2010 meeting, but the IEP nonetheless provided many of the recommendations made by the evaluator. Moreover, the district contends that it had no legal obligation to reconvene a CSE subsequent to the August 2010 meeting because the parents made it clear that the student would not return to the district's schools.

Regarding the parents' unilateral placement, the district contends that Kildonan was not appropriate for the student because the school did not work on goals, did not have accommodations for the student, and did not provide counseling or speech-language therapy. Lastly, the district contends that the equities bar reimbursement in this case because the parents did not intend to accept a public school placement. The district requests that a State Review Officer dismiss the parents' petition and affirm the impartial hearing officer's decision in all respects.

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 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).

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

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

Discussion

CSE Consideration of Evaluative Data

The parents allege that the impartial hearing officer erred because he failed to address the parents' assertions that the CSE made procedural errors that resulted in a denial of a FAPE. First, the parents allege that the IEP was procedurally invalid because the documents and evaluations before the CSE did not support the district's recommendation of general education classes and instead demonstrated the appropriateness of the student's placement in a full-time special education environment. Further, the parents assert that the CSE failed to properly consider the student's scores on the WIAT-II and his eighth grade progress report, and argue that the CSE did not fully understand the student's educational deficits and therefore was unable to develop an IEP that addressed the student's needs.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR

200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]). Additionally, a CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 C.F.R. 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ. of Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Here, the hearing record shows that the student's 2010-11 IEP was developed following a team meeting with the parents on April 21, 2010 and two CSE subcommittee meetings held on April 30, 2010 and August 30, 2010 (Dist. Exs. 9; 25). Initially, district staff met with the parents on April 21, 2010 to accommodate the student's mother and stepfather who could not attend the scheduled April 30, 2010 CSE subcommittee meeting (Tr. pp. 726-28). The student's mother recalled that there were about twelve people in the group, including the assistant principal and many of the student's teachers, and stated that she was "very impressed actually" (Tr. pp. 726-27). The student's mother recalled that at the April 21, 2010 meeting, the parties discussed what would normally be discussed at a CSE meeting, including what the student's ninth grade program would consist of (Tr. p. 728). She confirmed that the program reflected in the April 30, 2010 IEP was the program that was reviewed with her at the April 21, 2010 meeting and that she voiced her concerns regarding the recommended program at that time (Tr. pp. 730-33, 736-37).

The CSE subcommittee convened for the first time for the 2010-11 school year on April 30, 2010 (Dist. Ex. 25). Among others, the CSE subcommittee included the school psychologist who provided the student with counseling, the student's special education teacher for science and social studies, the student's speech-language therapist, the student, and his father (id. at p. 7). According to CSE subcommittee meeting minutes, results of the district's educational, psychological, and speech-language evaluations were reviewed (id. at pp. 7-8). The results of standardized testing, including the WIAT-II, were reflected in the student's April 30, 2010 IEP (id. at p. 4).⁹ The subcommittee chairperson recalled that in addition to testing, the CSE subcommittee reviewed the student's eighth grade program and his academic progress (Tr. p. 82). The student's father expressed concern regarding the student's reading ability and staff members explained that there were general education programs available at the high school for students

⁹ The special education teacher who administered the WIAT-II to the student testified that the scores were an accurate reflection of the student's levels and that he had significant deficits in reading, math, and writing (Tr. pp. 181-82). In addition, the director of special education, who co-chaired the August 2010 CSE subcommittee, acknowledged that with the exception of pseudoword decoding, the student's scores on the WIAT-II were mostly in the low average to very low range (Tr. pp. 47-48, 89-90).

with reading difficulties (Tr. p. 83). The student's father did not otherwise object to the CSE subcommittee's recommendations (Tr. pp. 82-83).

The CSE reconvened on August 30, 2010 in response to concerns expressed by the parents in a letter dated July 16, 2010, and later in a letter dated August 24, 2010 (Tr. pp. 30-32; see Dist. Exs. 11; 16). Meeting attendees included, among others, the teacher of the proposed community skills class, the teacher of the general education reading class, an intern who was employed by the district as a speech-language pathologist, a school psychologist, and the student, his parents, and the student's brother (Dist. Ex. 9 at p. 8). The August 2010 CSE subcommittee reviewed the April 2010 IEP, as well as the parents concerns as detailed in their August 24, 2010 letter to the district (Tr. pp. 32-36; see Dist. Ex. 11). The August 2010 CSE subcommittee modified the proposed IEP based on the parents' concerns.

Based on the foregoing, I find that the April 2010 and August 2010 CSEs had sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP and offer him a FAPE (see Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2). While the parents assert that the evaluative data compels a different placement recommendation, I note that a group of persons, including the parents, make placement decisions in conformity with LRE provisions (34 C.F.R. § 300.116). Placement decisions are made only after the development of an IEP and in accordance with its terms (34 C.F.R. § 300.116[b][2]). Having found that the CSE had adequate evaluative data and information about the student to ascertain his needs and develop an IEP, I will address below the parents' allegations regarding the appropriateness of the district's placement recommendation.

August 2010 IEP

Annual Goals

On appeal, the parents assert that the district's failure to include reading goals in the student's IEP resulted in a denial of a FAPE for the 2010-11 school year. They contend that the student has severe reading deficits and that reading is his primary area of concern. The parents further assert that failing to include the necessary reading goals in the student's IEP was a significant procedural defect as it would have prevented a teacher from being able to implement the IEP at the start of the school year. They further assert that any teacher reading the student's IEP would have insufficient information about the student's needs and how to address them in the classroom.

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability and to enable the student to be involved in and make progress in the general education curriculum (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with

placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

In this case, the hearing record confirms that the student had significant deficits in reading (Tr. pp. 238, 245, 253; see Dist. Ex. 26 at p. 6). As noted above, to address these deficits, the CSE subcommittee recommended that the student attend a general education Foundations of Reading and Writing class for one period daily (Dist. Exs. 9 at pp. 2, 8; 74). The teacher of the proposed reading class participated in the August 2010 CSE meeting (Tr. p. 387; Dist. Ex. 9 at p. 8). According to the assistant principal, during the CSE subcommittee meeting, the reading teacher described the general education reading class, noting that the class was multisensory, that she conducted pretesting at the beginning of the school year, that the program was tailored to the individual student, and that if the student had needs in reading she would figure out what those needs were and create a program around them (Tr. pp. 904-91). The principal recalled that the reading teacher also indicated that she incorporated Wilson and Orton-Gillingham into the reading program (Tr. p. 941). The reading teacher confirmed that she attended the August 2010 CSE subcommittee meeting, where she discussed the general education reading program (Tr. pp. 387, 400). She added that she worked closely with the English teachers and provided them with strategies that they could incorporate into their classes (Tr. p. 397). With respect to IEP goals, the reading teacher testified that a lack of IEP reading goals did not affect how she would teach a student, as she had students in her class who did not have IEPs (Tr. p. 395). She further testified that she completed a diagnostic assessment and created goals for students who did not have IEPs (id.).

Based upon the foregoing, I find that although the student's 2010-11 IEP did not include specific annual goals to address the student's reading needs, the hearing record details the accommodations and supports available to the student in the general education reading class. Therefore, under the circumstances of this case, the CSE was not required to develop specific annual goals in reading to enable the student to be involved in and make progress in the general education curriculum (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]; see also Application of the Bd. of Educ., Appeal No. 11-007 [lack of spelling goals despite the student's "pronounced deficit" in spelling did not result in a denial of a FAPE given that the deficiency could be corrected by a meeting with the parents and the teacher's testimony that she could address the student's spelling needs in his resource room]). Moreover, I note that although the parents expressed concern regarding the lack of reading goals on the student's IEP, the district offered to reconvene a CSE meeting prior to the start of the impartial hearing and develop reading goals for the student, but that the parents declined the offer (Dist. Exs. 1-2).

The parents also assert that the August 2010 IEP lacked social/emotional goals that addressed the student's lack of self-esteem. They allege that the student's social/emotional/behavioral goals only addressed the student's communication and interaction with others, areas in which he had already made significant progress. A review of the student's August 2010 IEP shows that it included two social/emotional/behavioral goals; the first related to communicating and interacting in a socially appropriate manner with teachers and adults, and the second related to identifying and displaying appropriate reactions and appropriate alternative solutions to challenging social situations that occur in school (Dist. Ex. 9 at p. 11). Despite the student's social progress, the hearing record suggests that the August 2010

social/emotional/behavioral IEP goals were appropriate for the student. With respect to the first goal, the hearing record indicates that the student received lunch detention and in-school suspension several times during the 2009-10 school year due to insubordination and disruptive behavior (Dist. Ex. 22). I note that under "social development," the student's IEP indicated that he needed to develop more positive interactions with his peers and adults/authority figures (Dist. Ex. 9 at p. 7). With respect to the second goal, the school psychologist testified that although the student could talk about his role in conflict situations and take responsibility for his choices, "he still needed some practice in what to do once you get in the real situation" (Tr. p. 284). The parents correctly assert that the August 2010 IEP lacked goals addressing the student's self-esteem; however, I decline to find a denial of a FAPE on this basis where the IEP included a notation that an FBA would be completed to address the student's difficulty with frustration and low self-esteem (Dist. Ex. 9 at p. 2). Thus, I find that the social/emotional/behavioral goals included on the August 2010 IEP were appropriate for the student as they were aligned with his identified needs and were designed to enable him to be involved in and make progress in the general education curriculum (see O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]).

Finally, the parents assert that the student did not make progress toward the math goals contained in his 2009-10 IEP and the August 2010 CSE erred by not carrying over these goals into the student's 2010-11 IEP. The parents maintain that a CSE must consider the degree to which a child achieved his or her IEP goals and objectives in order to determine whether to include, modify, or remove these objectives in subsequent IEPs. The hearing record shows that the student's 2009-10 IEP included a math goal targeting the student's ability to solve one step word problems, which the student made some progress toward achieving (Dist. Ex. 20 at p. 2). However, the 2009-10 IEP also included math goals targeting the student's ability to solve word problems involving integers; solve algebraic expressions; and solve problems given input values for formulas for surface area, rate and density, which the student did not make satisfactory progress toward achieving (*id.*). The student's 2010-11 IEP included math goals targeting his ability to solve problems requiring the solution of multistep equations and correctly graphing inequalities on a number line (Dist. Ex. 9 at p. 11). Although the student's eighth grade math teacher testified that the student needed to continue to work on the unmet goals from the prior year's IEP, she indicated that they were not carried over to the 2010-11 IEP because it was "not customary" to carry over goals; rather, she stated that "we find different skills to address around the same area" (Tr. p. 375). I note that there is no requirement under the IDEA that goals be carried over from one year to the next. As previously discussed, the hearing record reveals that the CSE reviewed evaluative reports and had sufficient information before it to determine the student's needs. Based on the information before the August 2010 CSE subcommittee, the annual math goals contained in the August 2010 IEP appropriately addressed the student's needs and were designed to enable him to be involved in and make progress in the general education curriculum (see O'Toole 144 F.3d at 701).

District's Recommendation – 2010-11 School Year

Next, I turn to the parties' dispute regarding the appropriateness of the August 2010 CSE subcommittee's recommendation that the student be placed in general education classes. As previously discussed, the hearing record shows that the August 2010 CSE subcommittee recommended a combination of regular education supports, consultant teacher services, special

class instruction, resource room services, related services, and program modifications and accommodations. The parents' primary concern regarding the district's recommended program is that it did not adequately address the student's ongoing deficits in reading and math (Tr. pp. 151, 304-05, 719, 731, 769, 884-85). They assert that because the student's reading deficiencies affect the student in all "scholastic" areas, the student requires a full day of special education instruction. With respect to math, the parents claim that for ninth grade the student would have been placed in a general education math class, which was a large classroom setting with students who did not have learning disabilities and who were more functionally advanced than the student. The parents further assert that the student had not made any progress in math at the end of eighth grade, despite being placed in a highly specialized math class, and that he would not have comprehended the substantive material taught in the ninth grade general education class. They contend that the student requires placement in smaller, special education classes. For the reasons set forth below, I find the evidence in the hearing record demonstrates that the district's recommended educational program was reasonably calculated to enable the student to receive educational benefits in the LRE for the 2010-11 school year.

At the time of the August 2010 CSE meeting, the student was functioning cognitively in the borderline range and demonstrated significant deficits in reading, math, and writing (Tr. pp. 181-82; Dist. Exs. 23 at pp. 6, 11-12; 25 at pp. 4-5). The student also exhibited delays in receptive and expressive language, and although his language skills were judged to be adequate for communication, they were affected by his ability to attend (Tr. p. 553; Dist. Exs. 20 at pp. 2-3; 27 at p. 7). The student was distractible in class, but he also distracted others (Tr. pp. 250, 259, 356-57, 360, 546). According to his parents, the student had difficulty completing homework due to his inability to understand the work (Tr. pp. 747, 790, 861). According to the student's teacher, the student's participation in plays outside of school interfered with his attendance and homework completion (Tr. pp. 961-63, 972, 991). At times, the student lacked motivation; however, his lack of motivation and difficulty attending were attributed at least in part, to a sense of being overwhelmed (Tr. pp. 170-71, 347; see Tr. p. 357). The student had a significant number of absences from his academic classes during the 2009-10 school year (Dist. Ex. 19).¹⁰

With respect to reading, the hearing record shows that during eighth grade (2009-10), the student attended a 15:1 special class for reading taught by a teacher dually certified in reading and in special education (Tr. p. 215). Although the class was designated on the student's IEP as having up to 15 students, testimony at the impartial hearing revealed that in actuality, only five students were enrolled in the class for the 2009-10 school year (Tr. pp. 247, 249). In addition to the reading teacher, the class was supported by a teacher assistant who was not reflected on the student's IEP (Tr. p. 237; see Dist. Ex. 33). In April 2010, the student's reading and writing skills as assessed by the district were at the 7th and 2nd percentiles, respectively (Dist. Ex. 23 at p. 6). As reflected in the student's June 2010 report card, the student received a final grade of 81 in reading for the 2009-10 school year (Dist. Ex. 19). Teacher comments indicated that the student had good classroom participation, but that he needed to apply more consistent effort and make better use of class time (id.). The report card also indicated that the student was absent from his reading class for 31 days during the 2009-10 school year (id.). The student's IEP progress report

¹⁰ Although the district submitted an attendance log and disciplinary record into evidence, and the student's report card indicated the number of times that he was absent each quarter, the documents do not fully account for the student's absences (Dist. Exs. 18; 19; 22).

for eighth grade indicated that the student had made some progress toward his IEP reading goals (Dist. Ex. 20 at p. 1).

The student's eighth grade reading teacher reported that there was a change in the student during the latter part of eighth grade in that he "slowed down a lot" and was not really attentive to tasks with which he was presented (Tr. p. 232; see Tr. pp. 262-63). She noted that the student's fluency improved a little; however, overall the student made minimal gains in reading and he was very difficult to engage (Tr. pp. 236-37). The reading teacher reported that at times she worked 1:1 with the student, as did the reading assistant and that they tried many different strategies to engage the student (Tr. p. 237). According to the reading teacher, at times the strategies worked but at other times, if the student didn't want to do the work, the strategies were unsuccessful (id.). The reading teacher noted that it was hard for the student to work independently for long periods of time and staff would need to intervene and provide the student with individual attention (Tr. p. 251). The reading teacher reported that the student had made tremendous gains in reading between sixth and eighth grades; however, she acknowledged that at the end of eighth grade the student still had significant deficits in reading and that he continued to need reading support (Tr. pp. 238, 245, 253).

The April 2010 CSE subcommittee did not recommend reading instruction for the student (Dist. Ex. 25). However, when the CSE subcommittee reconvened in August 2010, the members discussed the parents' concerns regarding the student's reading weaknesses and recommended that he receive daily reading instruction through the district's Foundations of Reading and Writing class, which was a general education class (Dist. Ex. 9 at pp. 2, 8). According to the hearing record, the student would have attended the general education reading class for one period daily (Dist. Ex. 74). At the impartial hearing, the reading teacher of the Foundations in Reading and Writing class testified that she was dually certified in reading and special education (Tr. p. 386). She described the Foundations of Reading and Writing class as an "intervention remediation class," and indicated that typically the class was offered every other day, but that she had some students who attended the class daily (Tr. pp. 388, 403-04). As the Foundations of Reading and Writing class was a general education program, it was not listed as a special education service on the student's IEP, nor, as previously discussed, were IEP goals developed for the student to address his reading deficits (Tr. pp. 49, 52, 253, 394, 402, 982).

The hearing record suggests that despite being a general education class, the instruction provided in the Foundations of Reading and Writing class was similar to the instruction provided to the student during the previous year in his special education reading class (compare Tr. pp. 216-20, with Tr. pp. 389-92, 395-96). The hearing record also shows that the teacher of the Foundations of Reading and Writing class informed the parents at the August 2010 CSE meeting that she tested students at the beginning of the school year and developed a program based on the student's needs (Tr. pp. 941-42). The Foundations of Reading and Writing teacher reported that she employed the Wilson Reading Program and other multisensory strategies within her class, and this information was shared with the parents at the August 2010 CSE subcommittee meeting (Tr. pp. 390, 395-96, 941). She noted that the Wilson Reading Program included instruction in decoding, fluency, spelling, and comprehension (Tr. p. 391). She further noted that she addressed written expression, including grammar, in her class (Tr. pp. 391-92, 396-97). The director of special education testified that the general education reading classes were small classes, ranging from three to eight students (Tr. p. 52). The reading teacher testified that during

the 2010-11 school year, there were between six and eight students in her Foundations of Reading and Writing classes (Tr. pp. 387-88).

As noted above, the parents asserted that the student's placement in a general education algebra class for ninth grade math was inappropriate. With respect to math, the hearing record shows that during eighth grade, the student attended a 15:1 special class taught by a special education teacher (Tr. p. 353). Although not indicated on the student's IEP, additional support was provided by a teaching assistant assigned to the class (Tr. p. 353; Dist. Ex. 33 at p. 1). In spring 2010, the student's math skills as assessed by the district were between the 3rd and 12th percentiles (Dist. Exs. 9 at p. 5; 23 at p. 6). The student's June 2010 report card indicated that the student received a final grade of 66 in math, and his teacher commented that the student was not working up to his ability (Dist. Ex. 19). The student missed math class 34 times during the 2009-10 school year (*id.*). The student's IEP progress report for the 2009-10 school year indicated that the student had not made satisfactory progress toward three of his four IEP goals (Tr. pp. 374-75; Dist Ex. 20 at p. 2).

The student's special education teacher for math testified that during the 2009-10 school year, she focused on the State standards for eighth grade math while providing students with additional support for basic skills, which many of them required (Tr. p. 353). According to the special education teacher, when the student entered her class his basic skills were very weak and, based on informal assessment, the student was performing "around" a third grade level (Tr. p. 354). She noted that the student was convinced that he was "awful" at math, would become easily frustrated, and had a tendency to "shut down" (*id.*). The special education teacher reported that sometimes she or her assistant would work with the student 1:1 in a space removed from the group, which was at times very productive (Tr. p. 355). However, she noted that that if the student became frustrated, then it did not matter where they were or how they tried to address concepts (*id.*). She stated that she felt confident that she would be able to see greater accomplishment from the student when she worked with him 1:1 and that she broke things down step by step for the student so that he could learn to follow the steps and be successful (*id.*). She cited an example in which she worked 1:1 with the student and he was able to "accomplish so much more than he was able to get done when he had the rest of his peers around him" (Tr. p. 356).

The student's special education teacher for math reported that the student was distracted by peers, as well as himself (Tr. pp. 357, 360). She indicated that when the student became frustrated by the work he would employ avoidance measures, such as chitchatting with friends or attempted to be the center of attention (Tr. p. 357). According to the special education teacher, over the course of the school year the student began to "slack off," and by the end of the year he was not handing in much homework (Tr. pp. 357-58). The special education teacher reported that she offered the student assistance through a math lab or staying after school (Tr. p. 358). She testified that math lab was offered during school and that the student attended perhaps "a handful of times" (Tr. p. 359). She also indicated that another teacher had arranged for the student to stay after school on Wednesdays and that sometimes the student's math needs would be addressed then (*id.*). According to the special education teacher, when she formally assessed the student toward the end of the 2009-10 school year, he was performing at about a fifth grade level in basic concepts and about a fourth grade level in operations and applications (Tr. pp. 361-64; *see* Dist. Ex. 9 at p. 5). She testified that the student's performance on the test indicated to

her that despite the lack of homework and the student's challenges in terms of distractibility, he still progressed and was getting something out of the math program (Tr. p. 361). The special education teacher explained that the decline in the student's report card grades was directly linked to the student's poor performance on tests and quizzes, lack of homework, and "difficulty accomplishing much in the way of class work" (Tr. p. 364). The special education teacher acknowledged that the student often required individualized support in math in order to progress and that at times the individualized support was instrumental in the student making progress (Tr. p. 370).

The hearing record indicates that the student would have been enrolled in a general education Algebra 1A class for the 2010-11 school year and that the August 2010 CSE subcommittee recommended that the student attend math resource room every other day to support him in the general education class (Tr. pp. 34, 72-75; Dist. Ex. 74). The teacher of the proposed math resource room testified that she was certified in both special education and math (Tr. p. 663). She, along with other district staff, described the Algebra 1A class as the first year of a two-year integrated algebra program that covered the integrated algebra curriculum at a slower pace with reteaching and more practice time (Tr. pp. 71-72, 365, 665, 684-85, 697). According to the resource room teacher, the math resource room class met every other day for 45 minutes and consisted of students taking Algebra 1A (Tr. p. 664). Not all of the students in the Algebra 1A class had IEPs (Tr. p. 699). The resource room teacher reported that she followed the classroom curriculum very closely and reviewed and retaught what was done in the Algebra 1A class (Tr. p. 666). She further reported that she provided students with the opportunity for practice; previewed lessons; helped students prepare for tests; and reviewed study skills, test taking practices, and organizational skills (Tr. pp. 666-68, 709). The resource room teacher commented that she provided students with a chance to start their homework in her class so that they did not go home and not know how to do it (Tr. p. 667).

According to the resource room teacher, there was almost daily contact between her and the teacher of the Algebra 1A class (Tr. p. 667). The resource room teacher indicated that knowledge of fractions and simple division was not necessary for a student to participate in the Algebra 1A class because students who lacked those skills would be taught them (Tr. p. 687). She noted that other students who did not have multiplication or division skills, or an understanding of negative numbers or fractions, were successful in her program (Tr. p. 689). According to the resource room teacher, during the 2010-11 school year the students in her class were functioning in the single digit percentiles for math, and some of them were below the 1st percentile (Tr. pp. 681-82, 710). The student's eighth grade special education teacher reported that she recommended the student for math resource room because his needs were significant enough that he would need support in addition to the Algebra 1A program, which was already a slower paced program (Tr. p. 367). Despite the student's need for individualized attention in eighth grade, the special education teacher opined that any difficulty the student might have in the ninth grade general education math class could be addressed by the support the student would receive in the smaller resource room setting (Tr. pp. 378-79). The proposed IEP for the 2010-11 school year included two math goals to address the student's math needs (Dist. Ex. 9 at p. 10).

In eighth grade, the student attended a 15:1 special class for English (Tr. pp. 328-29, 334; Dist. Ex. 33 at p. 1). As reflected in the student's June 2010 report card, his final grade for the class was 69 (Dist. Ex. 19). The student's teacher commented that he was not working up to his

ability and that there had been a significant drop in his grades during the last five weeks of school (*id.*). The student's report card indicated that he missed English class 36 times during the 2010-11 school year (*id.*). The student's IEP progress report indicated that he was not progressing satisfactorily toward his 2009-10 IEP writing goals (Dist. Ex. 20 at p. 2).

The August 2010 CSE subcommittee recommended that for the 2010-11 school year, the student receive consultant teacher support in a ninth grade general education English class (Tr. pp. 49-50; Dist. Ex. 9 at p. 1). The hearing record indicates that the recommended English class would have been co-taught by an English teacher and a special education teacher (Tr. p. 561). According to the special education teacher, the co-taught class employed a more multisensory approach to learning than the other general education classes (Tr. pp. 562-63). The special education teacher testified that the teachers tried to "hit as many different learning styles" as they could, and that every lesson included skill work, group work, games, and reteaching (Tr. pp. 563-64). At the impartial hearing, the special education teacher testified that the co-taught class included classroom systems set up to assist students with class work and homework organization, and that students with working memory difficulties were aided by the presence of an additional staff member and a lot of repetition (Tr. pp. 568-70). With respect to writing, the special education teacher reported that staff used a "very elaborate" template that was gradually faded and also engaged in conferencing to assist students with writing assignments (Tr. pp. 572-74). He noted that reading content and comprehension, but not decoding, were addressed in the English class; and that spelling was addressed in "usage" but not in isolation (Tr. pp. 574-76). The special education teacher testified that he had never met the student, but based on a review of the student's August 2010 IEP, he fit the profile of other students who had done well in his class (Tr. pp. 581-82). The student's proposed 2010-11 IEP included two writing goals (Dist. Ex. 9 at p. 10).

The student attended general education social studies and science classes for eighth grade where he received consultant teacher support (Dist. Ex. 33). The student's June 2010 report card reflected the following final grades for eighth grade: science 60 and social studies 66 (Dist. Ex. 19). During eighth grade, the student was absent from 37 social studies classes and 26 science classes (*id.*).¹¹ The student's eighth grade special education teacher for science and social studies testified that she had also taught the student those subjects during his seventh grade year (Tr. pp. 119-120). She reported that in eighth grade the student seemed to have more self-motivation than he did in seventh grade (Tr. p. 136). She also noted that the student was less "silly" and more independent (Tr. p. 137). However, the special education teacher reported that the student continued to have difficulty completing his social studies homework (Tr. pp. 137-38). To address the needs of the student, as well as those of other students, the special education teacher modified her teaching schedule so that she could offer students a study hall every other day (Tr. pp. 138-39). The special education teacher attributed the student's declining grades to a lack of homework completion in science, and suggested that family problems also affected the student's grades (Tr. pp. 146-47). The special education teacher reported that in social studies the student performed poorly on tests and quizzes and although he had the opportunity to improve his grades by redoing part of the tests, he rarely did so (Tr. p. 148). The special education teacher opined that the student's grades for the second half of the 2009-10 school year did not accurately reflect

¹¹ According to the student's special education teacher, some of the student's absences from social studies were due to disciplinary reasons and other times, the student was picked up early from school (Tr. p. 149).

the student's ability (Tr. pp. 150, 179, 209). She noted that the student demonstrated that he was capable of doing the expected work during the first two marking periods, but for the second half of the school year he "just sort of threw his hands up" (Tr. p. 150). She confirmed that the student was not progressing satisfactorily in science and social studies in eighth grade (Tr. p. 180).

The hearing record indicates that the student would have been enrolled in a general education Global Studies 1 class for the 2010-11 school year and that the August 2010 CSE subcommittee recommended that the student attend a resource room (Global Lab) every other day to support him in that class (Tr. p. 629; Dist. Exs. 9 at p. 1; 74). The resource room teacher testified that the Global Lab was a support for the general education Global Studies 1 class and that in the lab she retaught concepts introduced by the regular education teacher, modified assignments, provided testing accommodations, and offered homework assistance when needed (Tr. pp. 628-29, 631). She indicated that the curriculum for her class was based on the New York State curriculum for ninth grade Global Studies (Tr. p. 652). She noted that she had almost daily contact with the regular education Global Studies 1 teacher (Tr. p. 633). The resource room teacher testified that during the 2010-11 school year, there were students in the Global Lab with reading weaknesses (Tr. pp. 653-54, 657-661). The student's schedule for the 2010-11 school year did not include a science class (see Dist. Ex. 74).

In addition to his academic classes, the student attended a 12:1+1 study skills class in eighth grade (Dist. Ex. 33). As reflected in the student's June 2010 report card, the student received a final grade of 88 for study skills and was absent on 30 days from the class (Dist. Ex. 19). The student's IEP progress report indicated that during the 2009-10 school year, the student had not achieved a goal related to arriving to class on time and being prepared, but that he had made progress toward turning in homework assignments on time (Dist. Ex. 20). However, the student's special education study skills teacher testified that the student had progressed satisfactorily with respect to homework because she helped him in study hall with his homework assignments (Tr. pp. 177-78). The special education teacher indicated that during the eighth grade study skills class she worked on test preparation, reinforcing concepts, team building, and organization (Tr. p. 160).

Similar to the student's eighth grade study skills class, the August 2010 CSE subcommittee recommended that in ninth grade the student be placed in a 12:1 special class for community skills daily for 45 minutes (Dist. Ex. 9 at p. 1). The teacher of the proposed community skills class is certified as a special education teacher and participated as such at the August 2010 CSE subcommittee meeting (Tr. pp. 586-87; Dist. Ex. 9 at p. 8). The community skills special education teacher described the class as providing a mixture of the supports offered to students in a resource room, combined with a school-to-work component and lessons in communication and social skills (Tr. pp. 588-89). He indicated that the class was for students who were at risk for some academic failure (Tr. p. 594). According to the special education teacher, an outside instructor came into the class two days per week and did lessons and activities with the students that focused on job readiness skills (Tr. p. 588). He noted that the skills centered around "being employable" (Tr. p. 589). The special education teacher also reported that one or two days per week he ran his class like a "traditional" resource room, working on test taking strategies and study skills (Tr. pp. 590-91). He indicated that he communicated frequently with the students' content area teachers and that the schedules of the

students assigned to the community skills class were structured so that most of them had the same teachers for math, social studies, and English (Tr. p. 591). The special education teacher testified that occasionally he was able to pull a student from an academic class and work with the student individually (Tr. p. 592). The August 2010 IEP included three study skills goals (Dist. Ex. 9 at p. 10).

The hearing record shows that for eighth grade the student received related services consisting of a weekly speech-language consultation and a monthly counseling consult (Dist. Ex. 33). The student's speech-language therapist reported that during eighth grade she worked with the student on developing vocabulary skills, as well as processing and memory skills (Tr. p. 530). She testified that some days she pushed into the student's reading group and worked with the reading teacher on phonemic awareness, comprehension, and context clues, and other times, she would see the student in a small group in her room (Tr. p. 531). The speech-language therapist cited the student's distractibility as interfering with his performance during eighth grade and indicated that she saw a decrease in the student's progress as it was more difficult to keep him on task and focused (Tr. p. 530; Dist. Ex. 27 at p. 2). The speech-language therapist conducted a formal assessment of the student's language skills in March 2010, which revealed that the student continued to exhibit deficits in expressive and receptive language (Dist. Ex. 27). However, due to the questionable benefit of the weekly speech-language sessions, she recommended that speech-language therapy be discontinued for the 2010-11 school year (*id.* at p. 2).¹² Although the April 2010 CSE subcommittee did not recommend speech-language therapy services for the student, the August 2010 CSE subcommittee recommended that the student receive two 45-minute speech-language consultations per week, an increase from the previous school year (Dist. Ex. 9 at p. 2). The recommended IEP included three speech-language goals (*id.* at p. 11). Although not designated as such in the meeting minutes, a speech-language therapist participated at the August 2010 CSE meeting (Tr. pp. 550-51).

The school psychologist testified that she provided the student's counseling consult in eighth grade (Tr. p. 282). She indicated that in contrast to direct counseling, which was more intensive, the consult was "more of check and connect to see how things [we]re going" (Tr. pp. 282-83). The school psychologist testified that she would check in with the student on a monthly basis to see how he was doing academically and socially, and that she also keep in touch with the student's teachers (Tr. p. 283). The school psychologist testified that she been providing the student with counseling services since sixth grade, and during that time, the student had matured and was doing better socially (Tr. p 284). She noted that the student was able to talk about his role in conflict situations, but that he still needed some practice on what to do in a real situation (*id.*). The school psychologist reported that the student struggled academically (Tr. p. 313). According to the school psychologist, the student shared with her that there were times when school was "so difficult for him" and that he would almost talk himself into believing that he could not do something, even if it was adjusted to his level (Tr. pp. 313-14). The school psychologist confirmed that despite reports from the student's eighth grade teachers citing his lack of effort, she did not consider increasing the student's counseling services (Tr. pp. 346-47). The school psychologist acknowledged that the student had been called names by other students and that she had discussed this issue with the student (Tr. pp. 317-19). She indicated that

¹² The speech-language therapist reported that she had been the student's therapist for sixth through eighth grades (Tr. p. 528).

although it caused the student concern, she did not recall these incidents having a significant impact on school or attendance (Tr. p. 319).¹³ The student achieved one of two social/emotional goals contained in his eighth grade IEP (Tr. pp. 340-41; Dist. Ex. 20 at p. 3).

The August 2010 CSE subcommittee revised the counseling recommendations made by the April 2010 CSE subcommittee by recommending the student for additional counseling services for the first month of school to assist him with transitioning to the high school (Tr. p. 937; compare Dist. Ex. 25 at p. 2, with Dist. Ex. 9 at p. 2). More specifically, the August 2010 CSE subcommittee recommended that the student receive individual counseling for one 45-minute session per week for the first week of school and individual counseling for two 45-minute sessions per month thereafter (Dist. Ex. 9 at p. 2). This represented an increase in counseling services from the previous school year (compare Dist. Ex. 33 at p. 2, with Dist. Ex. 9 at p. 2). The director of special education testified that the August 2010 CSE subcommittee recommended "front loading" counseling based on a lengthy discussion regarding the student's self-esteem (Tr. p. 937). In addition, the CSE subcommittee recommended that a "functional behavior plan" be completed to address the student's difficulty with frustration and low self-esteem (Dist. Ex. 9 at pp. 2, 8). As discussed above, the August 2010 IEP indicated that the student would be part of the "Link Crew" (id. at p. 8).

Testing completed by the district's school psychologist during the 2009-10 school year indicated that the student had weaknesses in verbal comprehension and deficits in working memory and processing speed, which meant, according to the school psychologist, that the student would require repetition, reinforcement of learned skills, tasks broken down, and additional time to process information, including information presented orally (Tr. pp. 287-92, 301-02, 325). Testing further suggested that the student perceived himself to have difficulty with attending (Dist. Ex. 23 at p. 22). The school psychologist opined that when teaching the student it was not necessarily the size of the group that mattered, as much as making sure that what the student was taught was reinforced and repeated, and that he had a lot of practice (Tr. pp. 325-26). She opined that although the student's IEP indicated that he benefited from a small class setting that did not mean that the student required it throughout his entire school day (Tr. p. 345). In addition to special education and related services, the August 2010 CSE subcommittee also recommended program supports and accommodations, as well as testing accommodations for the student (Dist. Ex. 9 at pp. 2-3). The program modifications and accommodations included checks for understanding, provision of a copy of class notes, breaking assignments down into smaller segments, directions repeated, refocusing and redirection, and reteaching of materials (id. at p. 2). The recommended testing accommodations included tests read; special location for full period, final, and State exams; extended time (1.5); revised test directions; and additional paper (id. at p. 3). The August 2010 IEP further indicated that the student's program would be reviewed after the first marking period of the 2010-11 school year (Dist. Ex. 9 at p. 2).

Minutes from the August 2010 CSE subcommittee meeting indicated that the subcommittee members discussed the requirements for a high school diploma (Dist. Ex. 9 at p. 8). The school psychologist testified that high school students needed to be exposed to the general education curriculum in order to earn a Regents diploma (Tr. p. 333). She noted that if

¹³ The student's math teacher indicated that such incidents negatively affected the student and caused him to be distracted in his work (Tr. p. 382).

students are pulled from general education classes it becomes very difficult for them to have the exposure they need to earn a Regents diploma (Tr. p. 333; see Tr. pp. 336-37). The director of special education reported that there were special education classes available at the high school, but that they tended to support students with "far greater impairments" than the student in this case, and that the district wanted to create a combination of access to the general education curriculum for the student along with specialized support in his area of disability (Tr. pp. 944-45).

Based on the foregoing, I find that the August 2010 CSE subcommittee recommended a program consisting of a combination of regular education supports, consultant teacher services, special class instruction, resource room services, related services, and program modifications and accommodations that was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While I acknowledge the parents' concerns about shifting the student to a general education environment given his academic performance during the prior school year, I find that the August 2010 CSE subcommittee identified the student's multiple individual needs, developed annual goals to address those needs, and offered a program in the general education environment with similar levels of special education support as the student received in his special class placement the prior year. I further concur with the impartial hearing officer's conclusion that the district offered the student a program designed to provide him with access to his nondisabled peers while at the same time tailoring the recommended program to the student's unique needs (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 111).

Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to address the appropriateness of the student's unilateral placement at Kildonan, and I need not consider whether equitable considerations support the parents' reimbursement request; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 11-080; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 26, 2011**


**STEPHANIE DEYOE
STATE REVIEW OFFICER**