



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-113

Application of the [REDACTED]
[REDACTED] for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability

Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, Neelanjan Choudhury, Esq., of counsel

Gina Decrescenzo, PC, attorneys for respondents, Gina M. Decrescenzo, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse, and to "prospectively reimburse," the parents for their son's tuition costs at the Kildonan School (Kildonan) for the 2011-12, 2012-13, and 2013-14 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record reflects the student has a long history of difficulty related to his ability to participate in the classroom setting with regard to attention, classwork (and homework) completion, behavior, organization, and academics which began in approximately the third grade (Tr. pp. 892-93; Joint Exs. 5-10; 16; 20; 21; 24; 25; 27-31; 34-37; 41-44; 52; 61; 72; 83; 84; 131; 263, 264; 269). With regard to the student's academic functioning, the student's mother informed the district in April 2007, that she had concerns with his reading ability and the possibility of him having a learning disability (Joint Ex. 44 at p. 1). His report cards from his early elementary years reflect a gradual decline in grades and work habits and his scores on State English

language arts (ELA) tests also gradually declined (Joint Exs. 2; 3; 10; 12; 16; 18; 22; 53; 84). The student's cognitive functioning has been determined to fall in the average range (Joint Exs. 44 at p. 3; 234 at p. 2). He has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and dyslexia which in combination negatively impact the student's academic performance (Parent Exs. A; B; Joint Ex. 271 at p. 2).

During February 2010, when the student was in a district public school classroom providing integrated co-teaching (ICT) services as a general education student,¹ the parents referred the student to the CSE due to concerns in the areas of reading, writing, and behavior (Tr. pp. 903-04; Joint Exs. 38; 44 at p. 1). The parents obtained a private evaluation of the student on March 10, 2010, which reflected a diagnosis of dyslexia, and the district completed a psychoeducational evaluation of the student on March 16, 2010, which noted the dyslexia discussed in the private evaluation (Tr. pp. 904-06; Joint Exs. 44; 271).² A speech-language evaluation was completed by the district on March 24, 2010 (Joint Exs. 45; 46).³

A CSE convened on May 19, 2010, and determined that the student did not meet the criteria for classification as a student with a disability, noting that dyslexia was not one of the categories recognized for classification, and the student was therefore not eligible for special education programs and services (Joint Exs. 50; 269). The parents followed up with the student's medical doctor and, the following day, notified the district in writing that the student had begun taking medication for treatment of ADHD (Joint Ex. 49).

To address the student's dyslexia, the parents obtained private tutoring for the student once per week utilizing an Orton-Gillingham-style approach,⁴ which continued through the 2010-11 school year, and the student attended a summer camp during summer 2010 for students with language-based learning disabilities at Kildonan (Tr. pp. 918-22; Joint Exs. 131; 267). In August 2010, at the end of the six-week summer camp—and after receiving pre- and post-assessments of the student's academic performance there—the parents requested a CSE meeting to review the updated information (Joint Ex. 131; see Joint Ex. 265).

A CSE convened on November 16, 2010, and again determined that the student was not eligible to receive special education programs and services despite the parents' documentation of his ADHD (see Parent Ex. A; Joint Exs. 49; 263; 264). However, the resultant CSE ineligibility document reflected that the school reading teacher would complete updated testing to evaluate the student's needs and the student would be referred to the school principal for building level accommodations (Joint Ex. 264 at p. 1).

¹ According to State regulations, ICT services "means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" by staff consisting of at least one general education and one special education teacher; a classroom providing such services may contain no more than 12 students with disabilities (8 NYCRR 200.6[g], [g][1], [g][2]).

² The parties agreed that the March 2010 private evaluation report was improperly paginated; all references are to the document as paginated (Tr. pp. 906-08). The test results were not fully provided (Joint Ex. 271).

³ The March 2010 speech-language evaluation indicated that the student did not demonstrate needs in the speech-language domain (Joint Exs. 45; 46).

⁴ The hearing record reflects that Orton-Gillingham is a "diagnostic and prescriptive" methodology of providing instruction using a multi-sensory approach (Tr. pp. 359-62, 637-42).

On December 7, 2010, a meeting was held pursuant to section 504 of the Rehabilitation Act of 1974 (29 U.S.C. § 794) and the student was found to be eligible for services pursuant to section 504 as his ADHD and dyslexia constituted a limitation on a major life activity (Parent Ex. A; Joint Ex. 61 at p. 1; see 34 CFR 104.3[j]). As a result of the meeting, the district recommended that for the duration of the 2010-11 school year the student would receive program modifications and accommodations pursuant to a plan offered in accordance with section 504 (504 Plan), including the use of a word processor for all assignments, use of a word bank for all writing assignments, preferential seating, the use of graphic organizers for writing assignments, and the provision of refocusing and redirection (Joint Ex. 61 at pp. 1-2). The 504 Plan also provided the student with testing accommodations including extended time (1.5), use of computer/word processor to record responses, redirection and refocusing, and language in directions simplified (Joint Ex. 61 at p. 2). In addition, the student was placed in the school's reading and writing lab (RAW) and was to be evaluated by the school's reading teacher (see Tr. p. 170; Joint Ex. 61 at pp. 1-2).⁵ The parents also requested that the student's teachers check to ensure that the student copied the correct homework assignments into his planner and that the teachers keep in touch with the parents regarding the student's progress (Joint Ex. 61 at p. 2). Accordingly, the student's teachers provided the parents with weekly reports regarding whether the student was prepared for class, had completed classwork and homework, his estimated grade at that point in time, and any comments they had regarding the student's performance each week (Tr. p. 609; Joint Ex. 72).⁶ The student attended a district public school and received services under the 504 Plan in the 2010-11 school year (see Joint Exs. 61, 75). Reports reflected the student demonstrated strong performance in his RAW lab but inconsistent performance in his general education classes (Joint Ex. 72).⁷

For the 2011-12 school year, the hearing record reflects that it was the parents' understanding that the student would receive the same section 504 accommodations he had received the previous school year (Tr. p. 972). According to the student's father, while the district was aware that the parents were pursuing an outside placement, as it had forwarded the student's records to Kildonan, it did not make any efforts to modify the student's 504 Plan (*id.*). Because the parents deemed the 504 Plan insufficient to meet the student's needs, they placed the student at Kildonan for the 2011-12 school year (Tr. pp. 955, 972-73; see Joint Ex. 258).⁸

⁵ The hearing record reflects that the RAW teacher completed pre- and post-testing of the student using a curriculum based measure (CBM) (Tr. pp. 153-55, 161-62, 938). Her testimony further reflected that in May 2011 the student's scores indicated he had caught up with his same-aged peers, although his report card did not reflect similar performance in other subjects (Tr. p. 162; Dist. Ex. 1 at pp. 3, 7, 19, 21, 24, 38, 52, 55; Joint Exs. 72; 75).

⁶ Although not consistently sent to the parent in a timely fashion, the weekly reports were sent home from December 17, 2010 through June 10, 2011 (Tr. p. 609; Dist. Ex. 1 at pp. 3, 7, 19, 21, 24, 38, 52, 54, 55; Joint Ex. 72).

⁷ Notably, at the end of the 2010-11 school year, the student had failed math and the district recommended that he attend summer school (Joint Ex. 77).

⁸ While the student's father testified that he was not certain that all of the accommodations on the 504 Plan were fully implemented (Tr. pp. 949-50, 953-55, 957), his testimony indicated that several of the modifications on the 504 Plan had already been implemented since elementary school with no effect, and that under the 504 Plan, the student's academics did not improve and his behavior worsened (Tr. pp. 955-57).

Testimony by the student's father indicated that while he was considering outside placements, no one at the district provided him with a procedural safeguards notice, nor did anyone at the district advise him that he could challenge the ineligibility determination that was made in November 2010 (Tr. p. 959).

During the 2011-12 school year, while the student attended Kildonan, the parents again referred the student to the CSE (see Joint Ex. 234 at p. 1). Accordingly, a district school psychologist completed a psychological evaluation of the student on March 15, 2012, and on March 16, 2012, a district special education teacher completed achievement testing on the student (Tr. pp. 504-05; Joint Ex. 234; see Joint Ex. 105 at p. 2). Thereafter, on May 18, 2012, a CSE convened and determined the student was eligible for special education programs and services as a student with an other health-impairment (Joint Ex. 105 at p. 1). In addition, and beginning September 5, 2012, the CSE recommended the student be placed in a general education classroom and receive ICT services daily in ELA, social studies, and ELA/SS lab, and that he receive daily resource room services in a 5:1 ratio to address his weaknesses in study skills, overall organization, and written language skills (id.). The IEP also included goals in the areas of study skills and writing, and included several program modifications and testing accommodations (id. at pp. 5-7).

The hearing record reflects that the parents did not believe the services recommended in the May 2012 IEP would provide sufficient assistance to the student because they were similar to what the district had previously provided the student, and that they further disagreed with the student's classification as a student with an other health-impairment (Tr. pp. 988-90, 1009). Despite the parents' provision of two letters from the student's doctor stating that the student had received a diagnosis of dyslexia, the CSE allegedly refused to consider classifying the student based on his dyslexia or a language-based learning disability (Tr. pp. 988-89, 1009-10; Parent Exs A; B). Rather, the CSE indicated that because the majority of the student's issues were related to his ADHD and his test scores were in the average range of functioning, the only disability category under which he was eligible for services was other health-impairment (Tr. pp. 988-89).

By letter and e-mail to the district's director of pupil personnel services (PPS director) dated June 6, 2012, the student's mother rejected the district's March 15, 2012 psychological evaluation and requested an independent educational evaluation (IEE) at public expense, as well as information regarding the district's policies regarding IEEs and "a copy of the district's 2 year special education plan" (Joint Exs. 106; 218). The parents ultimately did not obtain an IEE because their preferred evaluator would charge \$3,800 for an evaluation, and the district put a \$2,400 cap on the cost of IEEs (Tr. pp. 1002-04; see Joint Ex. 215). The parents subsequently rejected the May 2012 IEP on August 22, 2012 in a handwritten note on the form used by the district to obtain consent for initial provision of special education services (Joint Ex. 104).

In a 10-day notice letter to the PPS director dated August 22, 2012, the student's mother rejected the May 2012 IEP for the 2012-13 school year and informed the district that the student would remain at Kildonan as a boarding student and that she was requesting that the district pay the student's tuition and board at Kildonan for both the 2011-12 and 2012-13 school years (Joint

Ex. 275). The student attended Kildonan as a five-day residential student for the 2012-13 school year (Tr. p. 1082; see Joint Exs. 144; 145; 147-149; 152; 180).⁹

On April 24, 2013, a CSE convened to develop the student's IEP for the 2013-14 school year (Joint Ex. 122). The CSE recommended the student be placed in general education and receive ICT services daily for English, social studies, science, math, and math and science labs; a 15:1 special class for reading one period every other day; and one period per day of resource room in a 5:1 ratio (id. at p. 6). The IEP also indicated that the student's program would be reviewed in November (id. at p. 1). The April 2013 IEP carried over the goals from the student's previous IEP in the areas of study skills and writing, and included similar program modifications and testing accommodations as those reflected in the student's previous IEP (compare Joint Ex. 105 at pp. 5-7 with Joint Ex. 122 at pp. 5-7). The hearing record reflects that the student attended Kildonan as a five-day residential student for the 2013-14 school year (see Joint Exs. 153; 154; 201; 285; 288; 289).¹⁰

A. Due Process Complaint Notice

By due process complaint notice dated September 24, 2013, the parents requested an impartial hearing, asserting that the district did not offer the student a free appropriate public education (FAPE) for the 2011-12, 2012-13 and 2013-14 school years (Joint Ex. 284 at pp. 1, 5). In particular, the parents contended that the district violated its "child find" obligations in failing to classify the student as disabled prior to May 2012 and that the CSE erred in ultimately classifying the student as a student with an other health-impairment, rather than a learning disability (id. at p. 5). The parents also contended that the CSE failed to properly evaluate the student in that it failed to conduct a comprehensive writing and spelling evaluation, an assistive technology evaluation, or a functional behavioral assessment (FBA) (id.). Furthermore, the parents contended that the May 2012 and April 2013 IEPs failed to address the students specific academic, physical, social and emotional needs, his need for individualized attention to address his unique learning style, and his need for a behavioral intervention plan (BIP) (id. at pp. 5-6). The parents also asserted that the district failed to timely and appropriately respond to the parents' request for an IEE and placed an unreasonable cap on the cost of the evaluation, below the prevailing rates in the community (at pp. 5-6). The parents also asserted that their unilateral placement of the student at Kildonan was appropriate for the school years at issue and that equitable considerations favored their request for relief which, as relevant here, included reimbursement or prospective payment for the cost of the student's tuition at Kildonan for the 2011-12, 2012-13, and 2013-14 school years, as well as reimbursement for the parents' "out of pocket expenses related to summer programs" (id. at pp. 6-7)

B. Impartial Hearing Officer Decision

⁹ The hearing record reflects that at Kildonan, a five-day residential student or "five day boarder" attended the school each week from late afternoon Sunday through late afternoon or early evening on Friday (Tr. p. 686). In this case the student occasionally remained on campus for the weekend but went home on most weekends (Tr. p. 1083).

¹⁰ Kildonan has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (8 NYCRR 200.1[d]; 200.7).

On January 29, 2014, an impartial hearing was convened and after six days of proceedings, concluded on April 24, 2014 (Tr. pp. 1-1435). In a decision dated June 20, 2014, an IHO found that the district failed to offer the student a FAPE due to cumulative procedural violations during the 2010-11, 2011-12, 2012-13 and 2013-14 school years (IHO Decision at pp. 80-81, 86).¹¹ Specifically, and though not entirely clear, the IHO appears to suggest that a FAPE was denied to the student in the 2011-12 school year because the district's failure to classify the student or conduct an FBA and implement a BIP in the 2010-11 school year resulted in a denial of FAPE by itself, and that the "program" provided by the district during the 2010-11 school year¹² did not provide the student with a FAPE either.¹³ Similarly, the IHO found that the student's IEPs for the 2012-13 and 2013-14 school years did not offer the student a FAPE in that they failed to provide the student with an FBA or a BIP, and did not provide services on a 12-month basis (id. at p. 82). The IHO also found that although the CSE's classification of the student as a student with an other health-impairment was incorrect because a classification of multiple disabilities would have been more appropriate, this error did not amount to a denial of FAPE because the classification was not utilized to eliminate, deny, or avoid delivery of services (id. at pp. 80-81). Additionally, the IHO found that the district did not violate its child find obligations (id. at p. 81).

Regarding the unilateral placement of the student at Kildonan, the IHO found that the placement was appropriate for the student, that the student made progress with the behaviors that impacted his learning while he attended Kildonan, and that Kildonan addressed the student's academic deficits (IHO Decision at pp. 81-82). The IHO also found that equitable considerations favored the parents' request for tuition reimbursement, that the parents' failure to provide notice of their unilateral placement prior to the 2011-12 school year was excused because the district failed to prove that it provided the parents with a copy of the procedural safeguards notice, but that the parents were not entitled to reimbursement for the costs of the student's attendance at the Kildonan summer camp program (id. at p. 82). In addition, and with respect to the parent's request for an IEE, the IHO found that the district had failed to establish reasonable cost containment and "failed to initiate an impartial hearing to defend their initial evaluation or to contest the parent's independent education evaluation for its failure to meet the school district's criteria in which it would include the cost containment criteria" (IHO Decision at p. 80). Accordingly, the IHO ordered tuition reimbursement for the amount paid by the parents during the 2011-12, 2012-13, and 2013-14 school years, and ordered the district to provide "prospective reimbursement" for the amount of the student's tuition covered by a conditional award of financial aid to the student (IHO Decision at pp. 79-80, 83-84).

¹¹ The IHO also issued a "corrected decision" dated July 2, 2014. As there is no indication in the hearing record of the reason for the correction, IHOs may not make substantive modifications to their decisions after issuance (8 NYCRR 200.5[j][5][v]), and there appear to be only minor typographical changes and the addition of a second recitation of the statement required by 8 NYCRR 200.5(j)(5)(v), all references to the IHO Decision refer to the original decision.

¹² Since the district had not classified the student in the 2010-11 school year, the IHO's reference to a "program" in that year appears to relate to the 504 Plan that was provided to the student in December 2010.

¹³ The IHO's decision is, at times, very difficult to follow and internally inconsistent. As a result, it is difficult in places to determine what conclusions the IHO made and upon which grounds he made them. However, the parties on appeal are generally in agreement concerning which issues are in dispute.

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to provide the student a FAPE for the 2010-11, 2011-12, 2012-13, and 2013-14 school years. Specifically, the district contends that the IHO erred in making a finding regarding the 2010-11 school year because that school year was not contested in the due process complaint notice and, in any event, was outside of the applicable limitations period. The district further contends that the IHO erred in finding that the student was eligible for special education services during the 2011-12 school year and erred in finding that the IEPs for the 2012-13 and 2013-14 school years did not offer the student a FAPE. The district contends that an FBA and a BIP were not required because the recommended programs sufficiently addressed the student's behavioral needs.

In addition, the district asserts that the IHO erred in finding that the unilateral placement at Kildonan was appropriate because Kildonan did not address the student's behavioral needs, the student did not make progress, and the IHO did not apply the proper legal standard in making his determination. The district also contends that the IHO erred in finding that a residential program was required to aid the student in homework completion because Kildonan had no plan or program in place to address homework and the student did not make progress in that deficit. The district also asserts that the IHO erred in finding that equitable considerations favored reimbursement because the parents failed to provide adequate notice of their intention to unilaterally place the student at Kildonan for the 2011-12 school year and seek public funding therefor, and failed to disclose certain evaluative information prior to a requested CSE meeting. With respect to the parents' claims regarding an IEE, the district contends that it offered to cover the cost of an IEE with reasonable cost restrictions, but the parents elected not to obtain one. Lastly, the district contends that the IHO erred in ordering prospective funding without evidence that the parents were obliged to pay the requested tuition amount.

In an answer, the parent generally denies the district's allegations and asserts that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12, 2012-13 and 2013-14 school years and correctly ordered full tuition reimbursement for those school years. The parents also contend that the IHO correctly found that Kildonan used specific strategies and interventions to address the student's behaviors and allowed him to learn, that the student's behaviors improved over time at Kildonan, and that the cause of the student's behaviors was academic frustration which the Kildonan educational methodology addressed. With respect to the IEE, the parents assert that the IHO correctly determined that the district's \$2,400 cap was not supportable, and that the research regarding that figure was out-of-date and not based on a particular type of evaluation. The parents also assert that the IHO's findings on equitable considerations were correct and that the IHO correctly ordered prospective tuition reimbursement because the hearing record shows that the scholarship awarded to the student was subject to reimbursement in the event of a change in the parents' financial position. The parents request that the IHO's determinations be upheld except to the extent that he found that the district did not commit a child find violation, that the student should have been classified as a student with multiple disabilities, and did not award the parents reimbursement for the costs of the student's attendance at the Kildonan summer camp program.

V. Applicable Standards

Two purposes of the 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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 CFR 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 R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. The district asserts, and I agree, that the IHO erred in making a FAPE conclusion for the 2010-11 school year. Initially, the parents' due process complaint notice did not raise any FAPE claims related to the 2010-11 school year (see Joint Ex. 284). The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include the issue raised sua sponte by the IHO regarding the provision of a FAPE for the 2010-11 school year (see Joint Ex. 284). Moreover, there is no indication in the hearing record that the district agreed to an expansion of the issues in this case, or that the parents attempted to amend the due process complaint notice. Accordingly, the IHO's determination that the district failed to provide the student a FAPE during the 2010-11 school year is reversed.

In addition, the parents in their answer request that an SRO affirm the IHO's findings "with the exception of the IHO's finding against a Child Find violation, against reimbursement for the Kildonan summer program and the IHO's determination that [the student] should be classified as 'multiply disabled'"; however, they provide no argument in their answer as to why the IHO erred in making these determinations. Inasmuch as the determinations of an IHO are final and binding on the parties unless appealed, and the parents have neither cross-appealed nor asserted any basis in law or fact for departing from the IHO's determinations on these issues, I find that they are not properly raised for review (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 31, 2013]). In any event, reversing the IHO's findings with respect to child find and classification would have no effect on my ultimate disposition of this matter. Further, and with respect to the parents' request for reimbursement for the costs of the student's attendance at the Kildonan summer camp program (which he attended during the summer of the 2010-11 school year), the hearing record provides no basis for a finding that the student required services on a 12-month

basis to prevent substantial regression (8 NYCRR 200.6[k]; see 8 NYCRR 200.1[aaa], [eee]), and the record does not reflect that he received services on a 12-month basis for any school year raised in the due process complaint notice (Tr. pp. 1012, 1074-75, 1112). Accordingly, and especially in light of the lack of any FAPE claims regarding the 2010-11 school year, I see no basis to depart from the IHO's decision on this issue.

Finally, while the parents asserted in their due process complaint notice that the district failed to properly respond to their request for an IEE, they did not specifically request that they be awarded one (Joint Ex. 284 at pp. 5-7). However, as the district raises no objection, I will briefly discuss the matter to provide the parties with guidance regarding how to proceed.

B. 2011-12 School Year

1. Eligibility Determination

The parents in this matter argue (and the IHO appears to have agreed) that the student was eligible for special education services in the 2011-12 school year, and essentially contend that the district denied the student a FAPE for that school year because it did not classify him as a student with a disability. In response, the district argues that the student was not eligible for special education services because the student "tested in the average range" on various standardized tests (including one conducted by the district in March 2010), only showed a relative academic weakness in spelling, and any cognitive deficits that the student may have had did not affect his academic achievement (Pet. at ¶¶ 1, 8). However, I find for the reasons discussed below that, irrespective of what the district's testing might have shown, the CSE was aware (or should have been aware) of sufficient information regarding the student's functional difficulties that, given the totality of the circumstances, the failure of the CSE to have an IEP in place by the start of the 2011-12 school year constituted a denial of a FAPE to the student.

As an initial matter, the record reflects that the district (including the May 2010 CSE, which was the last CSE to consider classifying the student before May 2012) was aware of the student's lengthy history of behavior issues. Information provided in the district's March 2010 psychoeducational evaluation, for example, included that the student had behavioral difficulties at school on a regular basis (Joint Ex. 44 at p. 2), and indicated that the student stated that he was sent to see the intervention specialist "'at least once a month,'" had received "numerous referrals," and liked being sent to the corner in music (*id.*; see Tr. pp. 913-14). The evaluation report also reflected that as far back as second grade his teacher reported that the student's reading skills and concentration needed improvement, that he had some behavioral difficulties that year and that in third grade the student had difficulty following directions the first time asked and in raising his hand without calling out (Joint Ex. 44 at p. 1; see Joint Ex. 3). The March 2010 district psychoeducational evaluation also included an observation of the student in his classroom setting, wherein his behavior exemplified the difficulties the student had with preparation for class, focus and attention, and off-task behaviors (Joint Ex. 44 at p. 2).¹⁴

¹⁴ For example, the evaluator noted that the student did not have his signed math quiz with him and as a result, had to sit on the bench at recess (Joint Ex. 44 at p. 2). He was inattentive to the lesson, yelled "Woo-hoo!" when given an assignment, and rather than begin working, put his work in his folder and began attempting to blow ink out of his pen (*id.*). The student was redirected; however, he immediately took the pen out again when the teacher walked away, and then tried to talk to the student next to him (*id.*). At that point the student began calling out and, after being redirected three times, his seat was moved to a table at the back of the room by

In addition, the hearing record reflects that at the time the parents placed the student at Kildonan prior to the beginning of the 2011-12 school year, the student exhibited significant and ongoing difficulty in the academic realm, as well. In this regard, and contrary to what the district's March 2010 testing may have shown, the record reflects that the student was struggling academically while at the district's schools in the 2010-11 school year. For example, the student's 2010-11 school year report card reflected erratic grades over the course of the school year including failing grades in at least one marking period in each of English, social studies, math, health, home and careers, and physical education (Joint Ex. 75). In addition, the hearing record reflects that at the end of the 2010-11 school year the student had failed math with a final average of 61 and had received final grades of 68 in English, 75 in social studies, 75 in science, 62 in health, 65 in home and careers and 68 in physical education (Tr. pp. 966-67; Joint Exs. 75; 77). Accordingly, the record reflects that, at a minimum, there was a disconnect between the district's testing and the student's actual academic performance.

Further, while the district argues that it was required to employ "pre-referral strategies" to "remediate" the student's performance before providing him with special education, it is notable that the strategies employed by the district that benefitted the student (especially given how they were specifically provided to the student) very closely resemble the provision of "special education." For example, the district argues that in response to the student's "inconsistent" efforts, he was placed in RAW which "was designed to provide supplemental reading and writing instruction for at risk students," and which involved an emphasis on vocabulary, allowed for the grouping of students based on "grade and lexile reading levels," and which would have provided the student with "modified instruction" based on reading materials (Pet. at ¶ 14). In this regard, while testimony by the student's RAW teacher indicates that the RAW lab was a kind of academic intervention that is provided to students who have performed at a level one or two on the State ELA test (Tr. pp. 129-30, 159-60), and while she further indicated that her class usually consisted of 10 to 15 students in three guided reading groups, with one classroom aide, she noted that she worked with the student separately because he was unwilling to read the books that were being used in the other groups (Tr. pp. 130, 133, 135-36, 156-57, 159), and her testimony indicates that the student thrived in this individualized setting. Thus, while the record reflects that the student consistently received significantly higher grades in his RAW lab than in his other classes during the 2010-11 school year, including grades of 85, 87, and 90 respectively, for the second through fourth marking periods, with a final average of 87 for the year (Joint Ex. 75), the student's progress in this class does not necessarily show that the student did not need special education. Rather, considering the student's low and erratic performance in other subjects, the student's performance in his RAW class (where he was receiving individualized attention) suggests that the student needed more individualized instruction.¹⁵ This is especially true since

himself (*id.*). At the end of the observation, the student played with tape on his fingers while taking a quiz (*id.*). Overall the evaluator noted that the student was observed to be "impulsive, easily distracted, and unfocused on the lesson" (*id.*). I note the student's classroom behavior is in stark contrast to that noted during the March 2010 1:1 psychoeducational evaluation, when the student was reported to remain focused and attentive, was polite and cooperative and appeared to put forth good effort (*id.*).

¹⁵ Notably, a review of the weekly progress reports provided to the parents contained in the hearing record reflects that from December 17, 2010 through June 10, 2011, the student's positive performance during RAW lab was in stark contrast to his performance in his other general education classes where he did not receive individualized attention and instruction, both in terms of his grades, his class and homework completion, his preparation for class, his level of cooperation and effort, and his behavior (*see* Joint Ex. 72). For example, the

the district evaluator who completed the achievement testing noted that the student's "ability to pay attention to task affects all reading tasks" and that his "[o]ff-task behaviors result in comprehension difficulties that he does not demonstrate in a one to one testing or teaching situation," and that "[b]ecause of this, his progress and achievement in ELA class is not what would be expected given his skills" (Joint Ex. 44 at p. 5).¹⁶

In addition, the record reflects that the district, in December 2010, provided the student with a 504 Plan. However, according to the student's middle school principal during the 2010-11 school year, the 504 Plan "did not have an effect on [the student's] behavior," which remained inconsistent after the plan was implemented (Tr. p. 105). Her testimony also indicated that the student's behaviors were a form of task refusal and that the school had put interventions in place that "may or may not have been formalized in a behavior plan," such as moving the student's seat closer to the teacher, making sure the student was paying attention and doing the work, providing prompts, and offering a homework lab after school (Tr. pp. 117-18). Thus, despite these interventions, the hearing record reflects that the student's behaviors persisted, suggesting that perhaps more was necessary.

In short, despite the student's low grades and erratic performance in the general education environment during the 2010-11 school year, the record reflects that the CSE repeatedly used the student's average achievement test scores from the March 2010 district psychoeducational evaluation as a basis to conclude that the student was not eligible for special education programs and services (Tr. pp. 192-93, 912, 933-35; Joint Exs. 44 at pp. 7; 264; 269). However, I find that in light of the above, undue weight was placed on these test scores, while factors that evidence a need for special education services were ignored by the district. This is especially true where, as here, evidence in the hearing record suggests the district—which was aware of the student's receipt of diagnoses of dyslexia and an ADHD (Parent Ex. A; Joint Exs. 44 at pp. 2, 7; 49; 52; 61; 75)—refused to acknowledge the significance of the student's dyslexia, stating that it was not one of the 13 disability classifications, despite that the March 2010 private evaluation report noted a correlation between the student's dyslexia, his academic difficulties, and his disruptive

student's estimated grades in RAW each week were consistently in the high 80s to 90 and overall comments by his RAW teacher indicated that the student was doing well, completing his work, having "good weeks" in the class, "put forth solid effort," and noted that, in addition to continuing to work hard his behavior was "great," and that the student had joined a reading group at one point during the year (*id.* at pp. 1-3, 5, 6, 9, 11, 13-15, 17-24). In contrast, comments by his classroom teachers in other subjects reflected that the student often did not complete his classwork as he was reluctant to attempt written assignments in social studies and math; that he neglected to take notes or write answers in his study guide in social studies; that in math he at times required constant refocusing and redirecting, fooled around during class, produced no work for days as he was unable to "settle down" or follow directions, and refused to do assignments or copy notes from the board; that in science, he refused to complete the writing portion of a test, was given detention for calling out and being silly, and struggled to complete work and stay focused (*id.* at pp. 1-12, 14-16, 18, 19, 21, 24). Teachers also commented that the student struggled on tests and quizzes, and further commented on the student's work refusal, poor cooperation, the growing concern for the student's negative attitude toward school, his rudeness at times, lack of effort, inconsistent willingness to participate and work in class, disruptive classroom behavior at times, refusal to attempt a social studies test, and his inability to stay focused (*id.* at pp. 2, 6, 7, 8, 9, 10, 12, 16, 19, 21, 23).

¹⁶ The report also indicated that the student resisted writing activities and was reluctant to write independently; however, could do so when a teacher or assistant sat next to him and encouraged task completion (Joint Ex. 44 at p. 6).

behaviors (Tr. pp. 910-13; Joint Ex. 271 at p. 2).¹⁷ Moreover, I note that the student's scores on the State ELA test went from a level 3 (meets proficiency standard) in the 2008-09 school year to a level 2 (meets basic standard) in the 2009-10 school year, and further down to a level 1 (below standard) during the 2010-11 school year (Joint Exs. 22; 53; 84), which is itself a basis for classification.¹⁸ As such, the CSE should have determined that the student was eligible for special education programs and services as a student with a learning disability by the start of the 2011-12 school year, and its failure to do so constituted a denial of a FAPE to the student for that school year.¹⁹

2. Unilateral Placement

In light of the district's failure to offer the student a FAPE during the 2011-12 school year, I now turn to the appropriateness of the parents' unilateral placement of the student at Kildonan for that school year. A private school placement must be "proper under the Act" (*Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12, 15 [1993]; *Burlington*, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see *Gagliardo*, 489 F.3d at 112, 115; *Walczak*, 142 F.3d at 129; *Matrejek*, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (*Carter*, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (*id.* at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (*Gagliardo*, 489 F.3d at 112; see *M.S. v. Bd. of Educ.*, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (*Gagliardo*, 489 F.3d at 112, quoting *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 364 [2d Cir. 2006]; see *Rowley*, 458 U.S. at 207). Parents need not show that the placement provides

¹⁷ The definition of a learning disability found in State regulations specifies that the "term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" (8 NYCRR 200.1[zz][6] [emphasis added]).

¹⁸ State regulations specify procedures for identifying students with learning disabilities, providing, among other things, that:

A student may be determined to have a learning disability if, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards, the student does not achieve adequately for the student's age or to meet State-approved grade-level standards in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving; and . . . the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development that is determined by the CSE to be relevant to the identification of a learning disability. . . . (8 NYCRR 200.4[j][3], [3][i][b] [emphasis added]).

¹⁹ Although not dispositive, I also note that the middle school principal's testimony indicated that while she believed there was a way to develop a behavior plan for any behavior, she further testified that a student has to want to accept assistance and be "intrinsically motivated" in order for a behavior plan to be effective (Tr. pp. 118-19). This indicates a misunderstanding of the behavioral concept of positive reinforcement whereby a desired behavior, such as task completion, is increased by rewarding the occurrence of that behavior with something that the student desires or feels rewarded by.

every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365). "[T]he restrictiveness of a private placement is a factor, by no means is it dispositive [and] may be relevant in choosing between two or more otherwise appropriate private placement alternatives, or in considering whether a private placement would be more restrictive than necessary to meet the child's needs, but where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option (C.L. v Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837 [2d Cir. 2014]).

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

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

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

According to the head of Kildonan, the mission of the school is to advance the skills and confidence of students with dyslexia in order to prepare them to succeed in college and the workplace (Tr. pp. 631-32). The hearing record reflects that the school is in session for 150 instructional days as opposed to the typical district school year which is 180 instructional days (Tr. pp. 698-99; see Tr. pp. 1282-88). The hearing record reflects that all of the teachers at Kildonan are required to undergo a two-week training in the Orton-Gillingham program as well as attend several professional development meetings per month (Tr. pp. 635-36).

The hearing record reflects that the student has attended Kildonan as a five-day residential student since the 2011-12 school year (Tr. pp. 653, 974). The student's academic day

for each school year at Kildonan consisted of classes in math, literature, history, science, and a math study hall (Tr. pp. 747, 1344; see Joint Exs. 90; 92; 135, 139; 142; 144; 145; 147; 148; 149; 152; 153; 154; 288; 289). Testimony by the head of Kildonan indicated that students typically attended math study hall with their math class in a group of five to eight students and that it was proctored by a math instructor (Tr. p. 819). Each student also received a daily 45-minute 1:1 tutorial called language training which utilized the Orton-Gillingham methodology to address reading, writing and spelling needs and which was specifically designed and tailored to students' needs related to language training and included a diagnostic and prescriptive approach every day within the tutoring session (Tr. pp. 672, 1299-1300, 1325, 1329, 1344; see Joint Exs. 92 at p. 1; 135 at p. 1; 142 at p. 1; 144; 145 at p. 1; 148 at p. 1; 152 at p. 1). The head of Kildonan testified that it was important for the student in the instant case to receive 1:1 tutoring every day because he has strengths and weaknesses in "disparate ways" and a complex learning style that does not fit well in a group setting (Tr. p. 675). For example, at times he moved far ahead in vocabulary but not in reading comprehension and at times moved far ahead in decoding but had difficulty identifying sight words as opposed to words that are based on phonics patterns that he has learned (Tr. p. 675).

Testimony by the head of Kildonan indicated that each teacher calibrated or differentiated each student's work to accommodate their ability level and their rate of advancement and readjusted as needed during the course of the school year based on communication with the student's tutor (Tr. pp. 740-41; see 670-71, 738). He further testified that the tutor helped to provide the accommodations and differentiated learning style that a student needs in the classroom setting throughout the day by communication with the teachers (Tr. p. 1300). Testimony by the student's tutor indicated that teachers and tutors informally have a "constant dialogue" regarding the students' progress and how they can help them and that for example, tutors very often worked on vocabulary from students' subject classes (i.e., history, science, or literature) (Tr. p. 1339). More formal meetings were also held where tutors and teachers met and discussed students and compared information (Tr. pp. 1339-40). Similarly, subject teachers utilized various Orton-Gillingham methods to a lesser extent including multisensory instruction and individualized instruction, as well as certain elements of Orton-Gillingham to write, to decode unfamiliar words using the Latin and Greek components of language, and to understand unfamiliar vocabulary (Tr. pp. 673, 1340).

Testimony by the student's tutor during the 2012-13 school year indicated that all students at Kildonan have access to modifications and accommodations including technology for exams, readers, a scribe, digital text, and dictation software on their iPads (Tr. p. 1343). Testimony by the head of Kildonan indicated that the school provides 1:1 training to students in assistive technology software including text-to-speech and speech-to-text (Tr. pp. 668-69). His testimony indicated that while the student's 1:1 tutor was advancing his skills in reading, writing and spelling, they also want to ensure the student was familiar with assistive technology that would allow him to access the high level content material in his subject classes, and that he was able to complete the rigorous weekend assignments for those subjects which, without the technology, could be beyond his skill level in reading or decoding (Tr. pp. 669-70).

Testimony by the head of Kildonan indicated that five-day residential students are typically at the school from Sunday late afternoon until Friday late afternoon or early evening (Tr. p. 686). He indicated that the residential component includes a two-hour study hall six evenings per week, which is proctored by a teacher from the regular staff who is trained in the

Orton-Gillingham approach to reading (Tr. pp. 653-54, 692). His testimony further indicated that the evening study hall is broken up into a half hour reading period before dinner, that an hour and a half after dinner is dedicated to working on assignments for their 1:1 language training tutor during at least four of the six nights, and that students work on subject matter assignments on the other nights (Tr. pp. 654-55; see also Tr. pp. 1323, 1381). According to the head of the school, each study hall proctor writes a report indicating what assignments each student worked on during the study hall and rates the students' performance on a scale of 1- to 3+ (Tr. pp. 736-37). This report is then posted every night in the faculty room for teachers and tutors to see how students performed (Tr. pp. 736-37).

Contrary to the district's contention that the student did not require the evening study hall component provided in the residential program, testimony by the head of school indicated that the student required the residential component of Kildonan because he was not able to do the assignments from his 1:1 tutor for the language training class at home independently but rather required the assistance of the Orton-Gillingham trained proctor that was provided during the evening study halls at Kildonan to complete his assignments, stay on task, and do well (Tr. pp. 656-57). With regard to weekend homework, testimony by the parent indicated that the student misses the Friday evening proctored study hall because he returns home for the weekend before it begins (Tr. pp. 1089-90). Although the student completes some subject matter homework at home during the weekend, he leaves some work to be completed during the Sunday evening proctored study hall (Tr. p. 1090). Kildonan also provides an additional period after school called ACCO wherein students could finish subject matter assignments that they were unable to complete during weekend study halls (Tr. pp. 737-38).

The head of Kildonan testified that the residential component also included a special session once a month to address and discuss with students, issues that are pertinent to teenagers in general and to those with dyslexia, such as bullying, substance abuse, building self-confidence and self-esteem, and being able to talk freely about their dyslexia and the struggles and talents that are a part of it (Tr. p. 655). He added that students were always supervised by an adult during their free time including in the lounge, the dormitory and on trips to the movies or to the mall on weekends (Tr. p. 655).

In light of the above, I find that Kildonan offered an appropriate program to the student during the 2011-12 school year. Specifically, it is clear from the record that Kildonan is a school designed for students with dyslexia. In that regard, and in light of the district's failure to classify the student for the 2011-12 school year, I note that Kildonan at least provided the student with a program that was specially designed to meet the student's unique needs related to his dyslexia. Specifically, in addition to small class instruction in the core academic subjects, the daily 45-minute 1:1 tutorial provided the student with individualized instruction tailored to his needs, using the Orton-Gillingham methodology which addressed the student's deficits in reading, writing and spelling (Tr. pp. 672, 819, 1299-1300, 1325, 1329, 1344). The tutor identified the specific accommodations that the student required and provided this information to his classroom teachers to implement in the student's other classroom settings (Tr. p. 1299). The student also participated in proctored daily evening and weekend study halls that were designed to carry over the support that the student required in order to complete subject assignments and tutorial assignments (see Tr. pp. 654-55, 819). The student utilized assistive technology to structure his writing into a more visual web design (Joint Ex. 92 at p. 1).

Moreover, in addition to providing a program that was specially designed to address the student's needs, the reports by the student's tutor reflected that he did very well in the 1:1 language training class and exhibited a good attitude and effort, and made progress in spelling, cursive writing, phonics, and expository writing, although he continued to be a reluctant writer and exhibited behaviors related to work avoidance and ADHD (Joint Ex. 92 at p. 1).

Based on the above, I find that Kildonan, including its residential component, was an appropriate program for the student for the 2011-12 school year.

3. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]).

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

It is the district's contention that the IHO erred in finding that equitable considerations favored reimbursement because the parent failed to provide the district with notice of their intention to unilaterally place the student prior to the 2011-12 school year and failed to disclose "additional testing" prior to the June 2013 CSE meeting. With respect to the latter of these contentions, since these actions allegedly occurred well after the 2011-12 school year, this would not be a basis to reduce or deny reimbursement for that year. Moreover, and with respect to the former, I note that the district's pleadings and memoranda do not address the IHO's finding that the district failed to provide the parents with a copy of the procedural safeguards notice, and to that extent I agree with the IHO that the parents' failure to provide notice of their unilateral placement is not a basis to reduce or deny reimbursement (see, e.g., 20 USC

§ 1412[a][10][C][iv]). Moreover, as set forth above, the notice provisions serve the purpose of giving a school district an opportunity to evaluate the student and determine if the district can offer the student a FAPE in a public school. It is clear from the hearing record that the district had ample opportunity to evaluate the student prior to the parents' unilateral placement, in that the parents had twice referred the student to the CSE and the CSE declined to classify the student on both occasions (Parent Ex. A; Joint Exs. 49-50, 263-64, 269). Accordingly, I find that there is no equitable basis to reduce or deny reimbursement for the student's tuition at Kildonan for the 2011-12 school year.

C. 2012-13 School Year

1. May 2012 IEP

As noted above, in May 2012, a CSE met and developed an IEP for the student for the 2012-13 school year. The district contends that the IHO erred in finding that this IEP denied the student a FAPE because an FBA was not conducted, contending that the IEP addressed the student's behaviors "in class and his inability to complete assignments" (Pet. at ¶ 1b). The parents, on the other hand, argue that the IEP "did not in any way address [the student's] behaviors" (Answer at ¶ 1b). For the reasons set forth below, I find that the IHO correctly found that the May 2012 IEP failed to offer the student a FAPE.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 449, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require

that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE" (8 NYCRR 200.22[b][2]). Furthermore, implementation of a student's BIP is required to include "regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

In the instant case, I agree with the IHO that the district should have conducted an FBA and developed a BIP. In this regard I note that the hearing record reflects that the May 18, 2012 CSE relied on academic testing completed by the district on March 16, 2012, a March 15, 2012 district psychological evaluation of the student, a February 27, 2012 progress report from Kildonan, and two letters from the student's doctor regarding ADHD and dyslexia diagnoses, to develop the present levels of performance sections of the May 18, 2012 IEP. In addition, the parents also provided the district with "all the progress reports and interim reports from Kildonan" (Tr. pp. 200-01, 979, 987; Parent Exs. A; B; Joint Exs. 105 at pp. 2, 3; 234). Notably, as described below, a comparison of the student's present levels of performance on the May 2012 IEP with information in the February 2012 Kildonan report reveals that the IEP did not accurately describe the student's classroom functioning and needs.

Specifically, the May 2012 IEP included brief and general statements related to the student's performance in several subjects but did not include descriptions of the student's behavior in the classroom or its effect on his ability to benefit from classroom instruction (Joint Ex. 105 at p. 3). For example, the IEP reflected that the student exhibited "a strength in Math, and was able to grasp concepts, and did his work well" (Joint Ex. 105 at p. 3), while the February 2012 Kildonan report indicated with regard to math that the student had received a grade of C- for the term, rushed through his term exam in half an hour, failing the exam, only sometimes brought required materials to class, sometimes respected the learning environment of the classroom and rarely prepared assignments for class in a timely manner (Joint Ex. 92 at p. 2).²⁰ Further, with regard to his literature class, while the IEP reflected the student had an "inconsistent term" and that he did not always show the "ability to demonstrate his knowledge through academic material" which resulted in grades that did not reflect his actual comprehension of the material (Joint Ex. 105 at p. 3), the Kildonan report indicated that the student did not always follow directions correctly, that his behavior was "erratic," and that "some days he paid attention and participated in positive ways, and other days he showed a seemingly uncontrollable level of energy and lack of focus" (Joint Ex. 92 at p. 3). The report further reflected that when he participated in activities his contributions were "remarkable," but he needed to focus himself more and work on demonstrating his understanding in appropriate and tangible ways (*id.*). Moreover, with regard to science, the IEP reflected only that his teacher reported that he had increased his effort to complete his weekend assignments (*id.* at p. 5), while the Kildonan report indicated that while the student's participation had been more productive and closer to the teacher's expectations, he only sometimes respected the learning environment of the classroom, needed to increase his ability to compromise with classmates so they did not get frustrated when working with him, that there had been times when the student's behavior or his comments to other students resulted in his removal from the class, and that the student had earned a D+ on his term exam as he skipped questions, did not adequately explain some of his answers, and spent a very short amount of time completing the exam (*id.*). The Kildonan report also reflected that in history, the student's performance was inconsistent and that, although he had made some improvement in effort and self-control, his greatest challenge continued to be in making an effort consistent with his strong ability, his minimal responses indicated a desire to complete assignments quickly rather than thoroughly, and he continued to need to take a more serious approach to his studies and develop better self-control during class (*id.* at p. 4).

Based on the information provided in the Kildonan reports, the student exhibited significant interfering behaviors that affected his ability to perform in the classroom, such as a lack of ability to focus and attend; high levels of energy and poor self-control that resulted in him being off-task or off topic, out of seat, calling out, having incomplete or rushed assignments, and poor organizational skills which resulted in not having materials needed for classes (Joint Exs. 90; 92 at pp. 2, 3, 4, 5; 135 at pp. 3, 4). In addition, the student exhibited work avoidance behaviors related to his difficulty with academic tasks, especially written work, including reluctance to complete written work, minimal or inadequately explained answers, and skipping questions which also resulted in late, missing, or incomplete assignments (Joint Exs. 90; 92 at pp. 1, 5; 139). Thus, to the extent that the district argues that an "FBA" was not warranted in this

²⁰ Teacher comments also reflected that while the student was able to work quickly and correctly through problems when he did grasp a concept, when he did not, he hesitated to ask questions, had to be pushed to realize he needed to open himself to new ideas, and often had to go to ACCO to finish assignments because he did not use his study hall time effectively (Joint Ex. 92 at p. 2).

matter (Pet. ¶ 66), I must disagree. However, the district's failure to conduct an FBA and develop a BIP does not, by itself, automatically render the IEP deficient, as the February 2012 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190). In this case, I find that contrary to the district's allegations, the May 2012 IEP does not otherwise adequately address the student's behavioral needs.

Initially, I note that the district contends that the IEP adequately addressed the student's behaviors as it contained annual goals designed to address the student's issues with distraction and completing assignments, as well as supplementary aids and modifications/accommodations to address these needs including modified written assignments for longer assignments, use of a word processor, and graphic organizers (Pet. ¶¶ 76-79). In addition, the district further contends that the provision of testing accommodations including extended time (1.5 times and 2.0 times for written essays) and the use of a word processor would adequately address the student's tendency to rush through assignments and tests (id.). However, while such goals, modifications, and testing accommodations are not inappropriate to address the student's behavior, I am unable to find on the record before me that they were adequate to address the severity and the range of the student's behavioral needs as described in the Kildonan reports. In fact, a review of the student's 504 Plan (which, as noted above, did not adequately address the student's behaviors) reveals that all but one of the program modifications contained in the May 2012 IEP, including the use of a computer/word processor and graphic organizers, the provision of refocusing and redirection, special seating arrangements, and extended (1.5) time, had previously been provided to the student, and proven to be insufficient, under the 504 Plan prior to the student's classification as a student with a disability (compare Joint Ex. 61 at pp. 1-2 with Joint Ex. 105 at pp. 6-7). The only new modification provided by the IEP was modified written assignments for longer writing assignments (Joint Ex. 105 at p. 6). Similarly, with regard to goals, the annual goal in the May 2012 IEP that addressed recording assignments in a planner or assignment book had also previously been addressed by the 504 Plan wherein the comments section noted the parents' request that teachers check to be sure that the student copied the correct homework assignments into his planner (Joint Exs. 61 at p. 2; 105 at p. 5). Thus, as the behavioral supports provided by the May 2012 IEP were so similar to those already tried under the 504 Plan, it is not reasonable to think that they would adequately support the student's behavioral needs as a classified student.

Moreover, the hearing record reflects that the May 2012 IEP provided little if any new or additional academic supports to the student beyond what he had received under the 504 Plan, thus making the IEP deficient to the extent that the student's behaviors related to his academic needs. In this regard, I note that prior to and while under the 504 Plan, the student was participating in a general education ICT classroom and was receiving the support of the ICT services despite that he was a nonclassified student (Tr. pp. 33, 49-50, 916-17; Joint Ex. 61 at p. 2). As discussed above, the student also received reading and writing assistance daily in the district's RAW lab where he received individual support (Tr. pp. 157, 159; see Joint Ex. 72 at pp. 3, 6, 10). I note that the RAW lab which the student had received under the 504 Plan, addressed the student's needs related to silent reading, guided reading, vocabulary, writing, and basically anything that encompasses reading and writing and was the only class that the student had shown consistently strong performance in (Tr. pp. 130, 133; Joint Exs. 72; 75). In comparison, the May

2012 IEP provided the student with daily ICT services in ELA, social studies, and ELA/social studies lab and recommended one period of resource room services in a group of five to address his study skills, overall organization and written language skills (Joint Ex. 105 at p. 1). In other words, the May 2012 IEP failed to consider the student's significantly stronger performance in environments where he received individual support, and failed to provide any such support. To that extent, I note that the addition of one period per day of resource room services in a group setting does not guarantee this level of support (see, e.g., R.E., 694 F.3d at 194 [requiring an IEP to provide for individualized support when required for a FAPE]), and thus I cannot find that it would have been appropriate to meet the student's reading and writing needs.

Based on the above, the hearing record demonstrates that the May 2012 IEP failed to adequately address the student's behavior and reading/writing needs and as such, denied the student a FAPE for the student's 2012-13 school year.

2. Unilateral Placement

For the 2012-13 school year, Kildonan provided the student with a program similar to that he received during the 2011-12 school year, including small classes for core subjects, a 1:1 language training tutorial, and the various day and evening proctored study halls. However, although staff at Kildonan may not have been aware of the student's behaviors when he began attending the school, by the end of the 2011-12 school year, his teachers had documented significant behaviors that interfered with the student's academic performance (Joint Exs. 90; 92; 135; 139; 142; 251). As described below, the hearing record does not support the parents' claims that the student's behavior was addressed and improved during the 2011-12 school year but rather reflects that his behaviors had a significant negative impact on his academic performance and as such, should have been more appropriately addressed during the 2012-13 school year.

As noted above, the Kildonan reports reflect that during the 2011-12 school year, the student exhibited significant behaviors characteristic of ADHD that affected his ability to perform in the classroom including lack of ability to focus and attend; high levels of energy and poor self-control that resulted in being off-task or off topic, out of seat, calling out, having incomplete or rushed assignments; and poor organizational skills which resulted in not having materials needed for classes (Joint Exs. 90; 92 at pp. 2, 3, 4, 5; 135 at pp. 3, 4). The student also exhibited work avoidance behaviors related to his difficulty completing academic tasks, especially with regard to written work, including reluctance to complete written work, minimal or inadequately explained answers, and skipping questions which then resulted in late, missing, or incomplete assignments (Joint Exs. 90; 92 at pp. 1, 5; 139). Notably, some of the student's behaviors could be characterized as related to both his academic difficulties with subsequent work avoidance behaviors or as symptoms of ADHD, for example, doodling and chatting with peers, demonstrating poor effort, leaving questions blank, or entertaining classmates (Joint Exs. 90; 135 at p. 4; 139). Furthermore, I note that the student's ability to function with regard to effort and cooperation was significantly more successful in a 1:1 setting than when he was in a classroom setting with peers (compare Joint Ex. 92 at p. 1, and Joint Ex. 142 at p. 1, with Joint Ex. 92 at pp. 2-5, and Joint Ex. 142 at pp. 2-5).

In addition, the hearing record reflects that there was a social/emotional aspect to the student's work avoidance behaviors. For example, because the student shut down at times when asked to work with peers and then asked to work alone, his science teacher stated that the student

needed to open himself up to working with other students, even if he felt apprehensive about collaborating with them (Joint Ex. 90). The student was also reported to have been removed from the classroom due to his behavior or due to comments he made to other students regarding their achievements and was reported to need to increase his ability to compromise with his peers so they were not frustrated when working with him (Joint Ex. 92 at p. 5). His literature teacher reported that several times the student used a near shouting level voice and at other times he would be silent for days (Joint Ex. 139). His math teacher reported that the student often distracted other students by making inappropriate noises or by initiating side conversations, that he did not like to ask for help and refused help when it was offered, making it difficult for him to learn new concepts and to correct mistakes, and insisted that he knew how to do problems despite failing the term exam (Joint Ex. 142 at p. 2). His math teacher also reported that he often came to class without his work done and became argumentative and defensive when assigned ACCO because it took away from his free time (id.). His science teacher reported that he would sulk at times when his initial attempts to contribute ideas to the group failed (id. at p. 5). The student's art teacher indicated that the student suffered from low self-esteem, that he made comments that implied he was "a bit wounded," and that on many days he stated that he "doesn't care about anything" (Joint Ex. 251 at p. 12).

Notably, testimony by the head of Kildonan indicated that during the 2012-13 school year the student had "very low self-confidence" academically and that the student "struggled to take academic risks and challenges, which was a symptom of his feelings of failure in terms of his language and his ability to do his schoolwork," and that this "impacted a lot of his ability to move forward" (Tr. p. 1344). Testimony by the head of Kildonan indicated that although counseling services were not offered at Kildonan, students were sometimes referred to outside therapists if "there is something behavioral going on, that's chronic" or if academic strategies were unsuccessful (Tr. p. 709). However, despite that Kildonan had a mechanism in place to address the student's low self-esteem, low self-confidence, and fear of academic failure which directly contributed to his academic struggles, most notably work avoidance behaviors, they did not recommend the student for outside counseling services or otherwise address the student's behaviors, for example with positive reinforcement, or a BIP.

Further, the student's performance at Kildonan during the 2012-13 school year reflected that he continued to exhibit significant behaviors that interfered with his academic performance and, furthermore, that his teachers were not readily equipped to address them. For example, testimony by the student's ninth grade language training tutor during the 2012-13 school year indicated that the student's performance in all classes during the winter term was negatively affected by difficulties he was having with his biology teacher (Tr. pp. 1404-06). Most notably, his performance in his 1:1 tutoring class changed from a willing, easily redirected, enthusiastic participant since he began at Kildonan, to demonstrating a drastic decrease in productivity during the winter term of the 2012-13 school year such that it took him two to three weeks to complete assignments that he had previously been able to complete in one week (compare Joint Ex. 92 at p. 1, Joint Ex. 135 at p. 1, Joint Ex. 142 at p. 1, and Joint Ex. 145 at p. 1; with Joint Ex. 148 at p. 1). In addition, the student demonstrated a decrease in cooperation evidenced by making the writing process difficult by, for example, taking 20 minutes to choose a topic that he wanted to write about (Joint Ex. 148 at p. 1). His tutor reported that although the student acknowledged his lack of productivity he was unwilling to correct the behavior, and further noted that the student's reluctance had made his progress "slow drastically" during the winter term (id.). In addition, the student's 1:1 tutor indicated that when the student was having emotional difficulties, it could lead

to decreased willingness to perform required tasks (Tr. pp. 1416-17). Her testimony, however, indicates that she did not have a formal behavior plan in place to address these emotional issues (Tr. p. 1417), and that although informal strategies had been implemented, by the end of the 2012-13 school year Kildonan staff was still trying to find strategies that worked to address the student's lack of effort (Tr. p. 1419).²¹

Moreover, teacher reports in other classes indicated that the student continued to demonstrate behaviors that significantly interfered and impeded his learning at the end of the school year. For example, his math teacher stated in a term report that the student "was able to achieve only a very limited amount of success this term," that he was "erratic turning in his assignments," and that he "hindered his own academic growth." (Joint Ex. 152 at p. 2). Notably, the student's math teacher also indicated that "[i]t was "frustrating not knowing how to motivate him and encourage him to improve his work ethic" (*id.*). In addition, the student's literature teacher indicated that he had "another inconsistent term," that he had difficulty "maintaining any amount of prolonged focus," and that as soon as he was praised for any improvement in his study habits he would relax and produce minimal work, late submissions and "lack luster participation" (*id.* at p. 3). Likewise, the student's biology teacher indicated that the student "continued to do the minimal amount of work both during class and on the weekends," needed repeated redirection to tasks, and if pressed would answer questions verbally but would not dictate them into his iPad to complete assignments (Joint Ex. 152 at pp. 2, 3, 5).

The parents maintain that the cause of the student's behaviors was his frustration with academics and that the sequential individualized approach to learning provided by the Orton-Gillingham methodology utilized at Kildonan would alleviate the student's frustration and anxiety and promote self-confidence as the student's academic skills developed over time. While this may be true, considering how pervasive the behaviors related to this frustration and anxiety were, coupled with the behaviors that were related to the student's ADHD, and considering the extent to which these behaviors negatively impacted the student's academic performance and his social-emotional functioning, and because the student's difficulties in this area continued throughout the 2011-12 and 2012-13 school years, I find that Kildonan should have addressed the student's behaviors at the same time that they worked to increase his academic skills. As such, I find that during the 2012-13 school year, Kildonan did not adequately address the student's behavior and as such it was not an appropriate program for the student. Accordingly, the IHO's order of tuition reimbursement for the cost of attending Kildonan for the 2012-13 school year is reversed.

D. 2013-14 School Year

1. April 2013 IEP

²¹ For example, the tutor stated that she had conversations with the student's literature teacher regarding the student's clear desire to do well and his willingness to only exert minimal efforts to achieve that goal (Tr. pp. 1418-19). In this regard she testified that the literature teacher wanted "to understand what the roots of that were, why was he only exerting minimal effort," and that they "were trying to find strategies that would bring [the student] back the way he had that rally in language training" (Tr. pp. 1418-19).

Similar to its argument regarding the sufficiency of the IEP developed for the 2012-13 school year, the district argues that the IHO incorrectly concluded that the IEP developed for the 2013-14 school year was inappropriate because an FBA was not conducted (Pet. at ¶¶ 1b, 76-79).²² However, for reasons similar to those previously discussed, I am unable to agree.

Specifically, much like the previous year, the record reflects that the student continued to exhibit significant interfering behaviors at the time of the April 2013 CSE meeting. A February 25, 2013 Kildonan term report, which was considered by the April 2013 CSE (Tr. pp. 380-82; see also Joint Ex. 122 at p. 3), for example, reflects that the student experienced continued difficulties relating to work completion during the 2012-13 school year (Joint Ex. 148). In particular, the report indicated that in his 1:1 language training class, the one class in which the student had consistently performed well, the student's productivity had decreased such that one week's worth of assignments was taking him two to three weeks of study halls to complete; that he continued to struggle to internalize the phonetic concepts he was working on; and that he made the writing process difficult by taking 20 minutes to choose a topic and producing inconsistent independent assignments in study hall (id. at p. 1). His math teacher also indicated that the student was only able to attain a limited amount of success during the winter term, as he was inconsistent about submitting assignments, did not use study hall time constructively, and was often lost during class discussions because he was not sufficiently prepared for class (id. at p. 2). In addition, the student's world literature teacher indicated that the student's level of focus changed from week to week, his work earned grades ranging from A to F, and on a few assignments, he struggled to submit his work at all (id. at p. 3). Although he rallied toward the end of the term, the student completed his exam in half the time provided, losing points for incomplete and incorrect answers that he would likely have found had he slowed down and reviewed his work (id.). Further, in biology the report indicated that the student had started off strong and enjoyed his science fair project, but that in class he was "neither disruptive nor engaged," and that despite earning a C+ for participation and a C- for his assignment grade, he earned only a 60% on the final exam as his answers were incomplete, he did not address parts of the questions, and was unable to use the vocabulary words correctly despite being able to take those words with their definitions to the test (id. at p. 5). Likewise, while the student's performance in history was described as fair for the winter term and overall was much stronger than in other subjects (id. at p. 4), it was noted that he occasionally submitted incomplete assignments and was an occasional distraction to his peers, discussing topics that did not pertain to class discussion (id.).

I initially note that the 2013-14 IEP does make reference to some of the student's behaviors. For example, and as noted above, testimony by the student's ninth grade language training tutor during the 2012-13 school year indicated that the student's performance in all classes during the winter term was negatively affected by difficulties he was having with his biology teacher (Tr. pp. 1404-06), and consistent with this, the 2013-14 IEP reflects that the student's productivity declined after the winter break and that he was not utilizing his study hall time effectively to make up his work (Joint Ex. 122 at p. 3). The IEP also briefly notes that the student's algebra teacher reported the student rarely handed in assignments in a timely manner and that his world literature teacher reported he showed inconsistent effort during the winter term, rushing through tests, not utilizing the time allowed (id.). The IEP further noted that, in

²² There are two IEPs in the record related to the 2013-14 school year; the first is from April 2013 and the second—which offers an identical program to the April 2013 IEP—is from June 2013 (compare Joint Ex. 122, with Joint Ex. 127).

biology the student continued to require encouragement and assistance to complete a written report for his science fair experiment but further noted that he was very engaged and successful during hands-on experiments (*id.*). The student's academic progress was reported to be inconsistent during the fall and spring based on his teachers' reports, and that the IEP reflected concerns of the parents including the student's written expression, that he continued to require redirection and positive reminders to stay on tasks, and that global studies assignments were late because the student needed further clarification of the assignment (*id.*). However, a comparison of the description of the student in the April 2013 IEP with that in the February 2013 Kildonan report reflects that the IEP did not accurately describe the extent of the student's increase in work avoidance behaviors, particularly in his 1:1 language training class where he had previously excelled, all of which resulted in a significant decline in his work productivity, including his reduced effort and cooperation in class, his dramatic misuse of study hall time, reduced homework completion and subsequent lack of preparation for class discussions, his varied level of focus and resultant range in grades from A to F, and his rushed and careless efforts on exams (compare Joint Ex. 122 at p. 3 with Joint Ex. 148 at pp. 1-5).

In addition, while the April 2013 CSE modified the student's special education program to include additional ICT services from the year before²³ and added a 15:1 special class for reading every other day (*id.* at p. 1), I am unable to find that this additional support adequately or appropriately addressed the student's significant behavioral needs and as such, offered the student a FAPE for the 2013-14 school year. This is because the CSE failed to address the student's increase in work avoidance behaviors in the April 2013 IEP, in part by not completing an FBA to determine the cause of the increase in the student's work avoidance behaviors. As noted above, the failure to complete an FBA does not automatically result in a denial of a FAPE; however, the CSE did not otherwise attempt to determine the cause of the increased behaviors, nor did it attempt to address them with other supports such as positive reinforcement, a BIP, or counseling services. Moreover, the district uses the same arguments it presented to defend the May 2012 IEP to contend that for the April 2013 IEP, the CSE adequately addressed the student's behaviors, despite that the behaviors reported at the time of the April 2013 CSE meeting were related specifically to work avoidance (Pet. ¶¶ 76-79). Because the strategies to address the student's previous behaviors had already been implemented with limited—if any—success, and because the CSE did not identify or address the work avoidance behaviors that were at issue at the time of the April 2013 CSE meeting, I cannot find that the district adequately or appropriately addressed the student's behavioral needs in the April 2013 IEP.

2. Unilateral Placement

As noted above, the student continued to exhibit significant behaviors while at Kildonan in the 2012-13 school year which were not adequately addressed. From a purely prospective standpoint, therefore, I am unable to find that Kildonan was an appropriate placement for the student in the 2013-14 school year.²⁴

²³ The 2013-14 IEP recommended ICT services in English, social studies, science, math, and math and science labs (Joint Ex. 122).

²⁴ I note that in their memorandum of law, the parents cite to *C.B. v New York City Dep't of Educ.* (2005 WL 1388964 [E.D.N.Y. June 10, 2005]) for the proposition that a determination regarding the appropriateness of a nonpublic placement requires a "prospective evaluation" of the placement "as of when the parents selected the placement" (Parent Mem. of Law at pp. 9-10).

Moreover, and consistent with the evidence regarding the student's continued difficulties during the 2012-13 school year, evidence in the hearing record suggests that the student continued to exhibit interfering behaviors at Kildonan during the 2013-14 school year, as well. The student's math teacher for the 2013-14 school year, for example, indicated that the student handed in homework late, hardly participated in class, and could "easily" have done better (Joint Ex. 289 at p. 3). Notably, this teacher remarked that "we just need to motivate him" (*id.*). Likewise, His literature teacher for the 2013-14 school year commented at the end of the winter term that the student continued to have issues with low self-esteem and poor self-confidence that negatively impacted his classroom academic performance by preventing him from fully engaging in class activities and/or tests (*id.* at p. 2). Further, in an October 2013 interim report, although some teachers' comments reflected improvement in the student's ability to complete assignments and participate appropriately in class, the student's math teacher indicated that the student often had to be reminded to turn on his iPad and open the digital textbook, that he had two missing assignments, and that although he participated in class, his teacher knew he was "capable of more" (Joint Ex. 153). Also, and contrary to testimony in which she indicated that she did not know of any behavior problems exhibited by the student either in her class or outside of her class (Tr. p. 1380), the student's literature teacher indicated that the student continued to make comments during class discussions that were not pertinent to the discussion, and noted that he "[a]t times was more concerned with entertaining his classmates than participating productively in class" (Joint Ex. 153).²⁵ The literature teacher also indicated that the student did not always complete all the sections of his assignments (*id.*). Further, a November 2013 fall term report (Joint Ex. 154) contains examples of behaviors exhibited by the student,²⁶ and a review of a fall 2013 Kildonan School Behavior/Attention Assessment Scale ratings of the student indicates that the student continued to have difficulty with his classroom behavior in a number of respects.²⁷

²⁵ The student's science teacher also noted that that the student, at times, made comments that were not related to the topic at hand (Joint Ex. 153).

²⁶ The student's 1:1 tutor, for example, indicated that there were several instances during the term when the student appeared unfocused and that at those times it was difficult to "win [the student's] attention and accomplish any substantial work" (Joint Ex. 154 at p. 1). The tutor further indicated that the student often avoided writing assignments and was often hesitant to write during tutoring class (*id.*). The November 2013 fall term report also reflected that the student's math teacher indicated that "[i]t seemed as though there were two [students] that came to Geometry class – one who would pay attention and answer lots of questions, and another who would talk to others and do non-math things on his iPad," which distracted other students (*id.* at p. 2). The math teacher also reported that while the student did a good job when he put effort into his work, the student had developed a pattern where he would fall several assignments behind, catch up, and fall behind again, and indicated that he would welcome information on how he could make the class more exciting for the student "while at the same time, serving the interests of [the] other students" (*id.*).

²⁷ Specifically, three of the student's teachers rated his ability to follow directions as "somewhat problematic"; five of his teachers and his dorm supervisor rated his disruptive behaviors as "somewhat problematic" while both his language training tutor and his evening study hall proctor rated them as "problematic"; two teachers rated his assignment completion as "somewhat problematic" and one rated it as "problematic"; and two teachers rated the student's organizational skills as "somewhat problematic" while one rated them as "problematic" (Joint Ex. 201 at pp. 5, 7, 11, 13, 15, 19, 21, 22). Several teachers also indicated that the student continued to exhibit behaviors associated with attention deficits that affected his classroom performance, with a rating of "very often" for behaviors such as failure to give attention to details/makes careless mistakes in schoolwork; difficulty sustaining attention to tasks or activities; avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort; easily distracted by extraneous stimuli; fidgets or squirms in seat; leaves his seat in class when remaining seated is expected; talks excessively; blurts out answers; is "on the go;" does not follow through in instructions and fails to finish school work (not due to oppositional behavior or failure to understand); had

Specific to the 2013-14 school year, the parents contend that Kildonan's program "remained the same," and they do not cite to anything that was done differently with respect to the student's behaviors at Kildonan during that school year versus previous years. In that regard, and while the student's behaviors may have improved during the 2013-14 school year, I am unable to find, for the same reasons discussed above with regard to the 2012-13 school year, that Kildonan adequately addressed the student's continued behavioral needs in the 2013-14 school year. As such, and based on the totality of the record before me, I am unable to find that the student's placement at Kildonan for the 2013-14 school year was appropriate.

E. Independent Educational Evaluation

Finally, the parents assert that the district improperly denied their request for an IEE at public expense, that the IHO correctly determined that the district's \$2,400 cap was not supportable, and that the research regarding that figure was out-of-date and not based on a particular type of evaluation.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district's criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

In the instant case, the district conducted a psychoeducational evaluation of the student on March 15, 2012 (Joint Ex. 234). By letter dated June 6, 2012, the parents notified the district of their request for an IEE based on their disagreement with the results of the March 2012 psychoeducational evaluation (Tr. p. 999; Joint Ex. 218). During the impartial hearing, the student's father testified that he contacted the district's director and inquired whether there were any guidelines or procedures for obtaining an IEE and was advised that he should forward information concerning an evaluator of his choice to the district so the district could determine if the evaluator met the district's guidelines (Tr. pp. 999-1001). By letter dated June 18, 2012, the PPS director advised the parents the district did "not maintain a list of psychologists" but indicated that "if you have the credentials for the school psychologists that you are considering; please send us that information so that we can consider contracting with them, if they meet our

difficulty organizing tasks and activities; and lost items such as school assignments, pencils, and books (id. at pp. 10, 12, 14).

criteria" (Joint Ex. 108). The parents researched evaluators in the region and selected an evaluator whose fee was \$3,800 (Tr. pp. 1001-03). They contacted another evaluator whose fee was \$4,800 (Tr. p. 1003). By e-mail dated August 27, 2012, the parents informed the district of their chosen evaluator and requested public funding for the IEE (Joint Ex. 111 at pp. 1-2). The district apparently approved this request and, in a letter dated August 29, 2012, the district advised the chosen evaluator that the IEE was approved, but that the district would authorize payment not to exceed \$2,400 (Tr. p. 1002; Joint Ex. 215; see Joint Ex. 111 at p. 1). Thereafter, the parents contacted the district and were informed that they could either cover the difference in cost themselves or limit the amount of testing conducted by the evaluator to reduce the cost of the evaluation (Tr. pp. 1003-04).

Also during the impartial hearing, the PPS director testified that the district arrived at the figure of \$2,400 "several years ago" after researching the cost of "this type of evaluation" in the surrounding three-county region (Tr. pp. 213-15, 319). The student's father testified that the parents wanted a comprehensive evaluation, rather than one limited by the district's cost cap to a selection of tests, and did not commission an IEE (Tr. p. 1004).

As stated above, the right of a parent to obtain an IEE at public expense is triggered if the parent disagrees with an evaluation initiated by the district. If the district agrees to provide an IEE at public expense, the district must then provide the parent with a list of independent evaluators from which a parent can obtain an IEE for the student (see Educ. Law § 4402[3]). From the list of independent evaluators, it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the IEE for the student (Wall Twp. Bd. of Educ. v. C.M., 534 F. Supp. 2d 487, 489-490 [D.N.J. 2008]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]; cf. Matter of Chicago Pub. Schs. Dist. No. 299, 110 LRP 70523 [SEA IL 2010]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

Here, it is undisputed that the parents disagreed with the results of the March 2012 psychoeducational evaluation conducted by the district and that the district did not disagree with the parents' request for an IEE at public expense (Joint Exs. 218, 234). However, the hearing record does not indicate that the district provided the parents with a list of independent evaluators meeting the district's criteria from which the parents could choose or provide the parents with its criteria for IEEs; rather, the district accepted the parents' choice of evaluator but

indicated for the first time by letter to the evaluator its willingness to publicly fund an amount less than the total cost of the evaluator's fee (Tr. pp. 212-214, 312-16; Joint Ex. 215). Although the district may establish maximum allowable charges to avoid unreasonable charges for IEEs, in enforcing its cost containment criteria, the district did not allow the parents the opportunity to demonstrate that "unique circumstances" justified public funding of an IEE that did not fall within the district's cost criteria (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). Along these lines, while the district contends that it conducted "research" into the cost of IEEs and that there were evaluators in the region willing to conduct IEEs at the rate the district was willing to pay (Tr. pp. 213-15), the hearing record contains no proof that the district made the parents aware of any evaluators who would conduct a psychoeducational IEE at a cost below the district's cap; rather, the district represented to the parents that it did not maintain a list of psychologists who met the district's criteria (Joint Ex. 108), despite the requirement that it provide the parents with information regarding "where an [IEE] may be obtained, and the school district's criteria applicable for [IEEs]" (8 NYCRR 200.5[g][1][i]). Due to this failure to comply with State and federal regulations regarding responses to parent requests for IEEs, as set forth below I order the district to provide the parents with a list of evaluators who meet the district's criteria for conducting IEEs, from which the parents can select an evaluator to conduct an IEE of the student and, in the event the parents wish to obtain an evaluation from an evaluator whose fee is greater than permitted by the district's cost criteria, to provide the parents with an opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's cost containment criteria.

F. Remedy

The district contends that the IHO erred in awarding prospective tuition reimbursement because the parents did not demonstrate that they owed all of the awarded tuition to the unilateral placement because Kildonan provided grants to the parents that would be reduced only if a tuition award exceeded the unsubsidized tuition amount (Pet. ¶ 92; District MOL at pp. 17-19). The parents contend that the hearing record contains evidence showing that the scholarship provided to the parents is subject to reimbursement should the parents' financial position change and that the student's father and the Kildonan head of school testified that any monies awarded through the hearing process would be applied to Kildonan first to satisfy any grant of tuition assistance previously made (Answer ¶ 92). Thus, in the parents' view, if only the parents' share of tuition reimbursement was awarded, the order would not redress their injury (id.).

The contract for the 2011-12 school year executed by the parents in March 2011 binds the parents to the full amount of tuition for the school year, in the amount of \$59,000.00, and the contract specifies that regardless of any financial aid package that the school offers or provides, the parents remain primarily obligated to pay all of the tuition (Joint. Ex. 258 at pp. 1-2, 4). In light of the above, I award full tuition reimbursement to the parents, as set forth below, upon submission to the district of satisfactory proof of payment by the parents.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision is modified by reversing those portions which found that the unilateral placement at Kildonan was an appropriate placement for the student during the 2012-13 and 2013-14 school years; and

IT IS FURTHER ORDERED that the IHO's decision is modified by reversing those portions which ordered the district to pay for the cost of the student's tuition at Kildonan for the 2012-13 and 2013-14 school years; and

IT IS FURTHER ORDERED that the IHO's decision is modified by reversing so much as directed the district to prospectively fund the costs of the student's tuition at Kildonan for the 2011-12 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of the student's tuition at Kildonan for the 2011-12 school year upon submission of satisfactory proof of payment thereof; and

IT IS FURTHER ORDERED that the district shall provide the parents with a list of evaluators from whom the parents can obtain an IEE for the student and, in the event the parents wish to obtain an evaluation from an evaluator whose fee does not fall within the district's cost criteria, to provide the parents with an opportunity to demonstrate that unique circumstances justify the provision of an IEE at public expense that does not fall within the district's cost criteria.

Dated: **Albany, New York**
 September 19, 2014

HOWARD BEYER
STATE REVIEW OFFICER