



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-023

### **Application of the BOARD OF EDUCATION OF THE ARLINGTON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Barbara J. Ebenstein, Esq., attorney for respondents

## **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 the parents for a portion of their son's tuition costs at the Kildonan School (Kildonan) for the 2014-15 school year. The parents cross-appeal from the IHO's determination which denied in part their request for reimbursement of their son's tuition costs at Kildonan for the 2014-15 school year. The appeal must be dismissed. The cross-appeal must be sustained.

### **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 student exhibits weaknesses in the areas of reading, writing, spelling, math, fine and gross motor skills, social/emotional skills, attending, focusing, visual processing skills, and retaining learned information (District Exs. 11; 40; 41; Parent Exs. E; F). Additionally, he has received diagnoses of: learning disorder in reading and spelling, learning disorder in math; attention deficit hyperactivity disorder (ADHD); nonverbal learning disability; and anxiety disorder not otherwise specified (NOS) (Parent Exs. E at p. 15; F at p. 4).

With regard to the student's educational history, the hearing record indicates that the student received early intervention services and attended both a special education preschool and a general education preschool with special education itinerant teacher services prior to reaching school age (Tr. pp. 734-36). During the 2011-12 and 2012-13 school years, the student attended kindergarten and first grade in a nonpublic school within the district and received related services under individualized education services programs (IESPs) (Dist. Exs. 4; 5). During the 2012-13 school year, the parents became concerned that the student was not advancing academically at the private elementary school and obtained a private psychological evaluation of the student that was completed in January 2013 (Tr. pp. 742-44; Parent Ex. E). After obtaining the private psychological evaluation report, the parents contacted the CSE by letter dated February 25, 2013, to request a meeting to discuss the evaluation and the student's placement (Parent Ex. O). The CSE convened on March 13, 2013, and developed an IESP which increased the amount of occupational therapy (OT) provided by the district to the student at the nonpublic school for the remainder of the 2012-13 school year (Dist. Ex. 6). The parents obtained a private psychiatric evaluation in June 2013 and brought it to the attention of the CSE (Tr. pp. 778-81; Parent Ex. F). The CSE reconvened on June 19, 2013 and recommended a program to be implemented in a district public school for the 2013-14 school year; the CSE recommended that the student repeat first grade (Dist. Ex. 7; see Tr. pp. 66-67). The CSE recommended that the student receive integrated co-teaching services (ICT) for eight and three-quarter hours per week in a general education classroom, as well as OT and counseling, along with bimonthly speech-language and OT consultations as supports for school personnel (Dist. Ex. 7 at pp. 1, 12).<sup>1</sup>

During the 2013-14 school year, the student's IEP was modified on four occasions (Tr. pp. 71-79; Dist. Exs. 8-10; 136). First, the CSE amended the IEP in October 2013, without a meeting on written consent of the parents, to arrange for a physical therapy (PT) evaluation of the student (Dist. Ex. 8 at pp. 1-2). Shortly thereafter, in November 2013 the CSE amended the student's IEP on written consent of the parents to add certain testing accommodations (Dist. Ex. 136 at pp. 1-2, 13). Next, the CSE reconvened in December 2013 and amended the student's IEP, adding two weekly 30-minute PT sessions and three yearly PT consultations, as well as consultation with an audiologist to determine if the student would benefit from the provision of an FM system (Dist. Ex. 9 at pp. 1-2, 12-13; see Dist. Ex. 89). Last, the CSE amended the IEP in April 2014, again on written consent of the parents, to arrange for speech-language and auditory processing evaluations of the student (Dist. Ex. 10 at pp. 1-2).

On June 2, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (Dist. Ex. 11 at p. 1). The CSE continued to find the student eligible for special education as a student with an other health-impairment and recommended he receive ICT services for ten hours per week in a general education classroom with: the related services of OT, PT, and counseling; speech-language therapy, OT, and PT consultations as supports for school personnel; a number of program modifications and accommodations; and summer services (Dist. Ex. 11 at pp. 1, 11-13). The district provided the parents with prior written notice of its recommended program (Dist. Ex. 121).

On July 29, 2014, the parents executed an enrollment contract with Kildonan for the student's attendance for the 2014-15 school year (Parent Ex. H). In a letter dated August 4, 2014,

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<sup>1</sup> While a number of the district's exhibits are consecutively Bates paginated, not all are, and for purposes of this decision each exhibit is cited as though separately paginated.

the parents provided the district with notice of their intention to remove the student from the district, unilaterally place him at Kildonan for the 2014-15 school year, and seek reimbursement for the costs of the student's tuition based upon the district's failure to offer the student a free appropriate public education (FAPE) (Dist. Ex. 124). The letter notified the district of the parents' concerns with the lack of progress the student made during the 2013-14 school year in an ICT classroom and with the program recommended in the June 2014 IEP, specifically the recommendation for ICT services for the 2014-15 school year (id.).

In a letter to the parents dated August 11, 2014, the district's supervisor of special education acknowledged receipt of the parents' "ten day notification" and stated that "[u]pon your request," the district was "prepared to schedule a CSE meeting to review [the student's] program" (Dist. Ex. 125).

### **A. Due Process Complaint Notice and Response**

By due process complaint notice, dated March 12, 2015, the parents alleged that the district failed to offer the student a FAPE for the 2014-15 school year and requested an impartial hearing (Dist. Ex. 1 at pp. 1-5). The parents alleged that the CSE significantly impeded their ability to participate in the development of the student's IEP by predetermining the content of the IEP and failing to consider the full continuum of possible placements for the student (id. at p. 4). The parents also alleged that the IEP developed by the June 2014 CSE failed to offer sufficient individualized instruction in math and reading with researched-based methodologies (id.). The parents claimed that the CSE failed to address the student's anxiety by way of a functional behavioral assessment (FBA) or a behavioral intervention plan (BIP) and that the CSE failed to recommend the services and supports the student required in the "large environment" of a public school (id. at p. 5). The parents also claimed that the June 2014 IEP failed to include sufficient assistive technology (id.). As relief, the parents requested tuition reimbursement for the 2014-15 school year (id. at p. 6).<sup>2</sup>

### **B. Impartial Hearing Officer Decision**

On June 15, 2015, the parties proceeded to an impartial hearing, which concluded on January 8, 2016, after seven days of proceedings (see Tr. pp. 1-1427).<sup>3</sup> In a decision dated March 22, 2016, the IHO thoroughly related the testimony provided at the impartial hearing, the parties' respective positions, and the relevant legal standards, and found that the district failed to offer the student a FAPE for the 2014-15 school year (IHO Decision at pp. 33-45). The IHO determined that the CSE "possessed the requisite assessments" to determine the student's needs but failed to "adequately appreciate their contents" and overstated the student's progress in the district placement during the 2013-14 school year (id. at pp. 33-37, 39). Although the IHO found that the June 2014 CSE's recommended placement was not predetermined, she nonetheless found

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<sup>2</sup> In a response dated May 26, 2015, the district contended that the June 2014 IEP was not predetermined, that neither an FBA or BIP was required and the IEP appropriately addressed the student's anxiety, and the IEP offered individualized instruction that was reasonably calculated to offer the student a FAPE in the least restrictive environment (LRE) (Dist. Ex. 2 at pp. 1-2).

<sup>3</sup> The IHO referenced a prehearing conference in her decision; however, the hearing record does not contain a transcript or written summary of the prehearing conference, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

that the CSE had failed to consider the full continuum of services including a small classroom placement (*id.* at pp. 40, 43-44). With respect to the ICT services recommended in the June 2014 IEP, the IHO found that the manner in which the recommended services were set forth on the IEP was confusing and misleading, that recommending weekly hours of ICT services rather than on a full-time basis was not permissible under State regulations, and that it would be impossible for the parents to know how or when the ICT services would be provided for the student (*id.* at pp. 41-43). The IHO also found that the ICT recommendation was not appropriate because the ICT setting would not provide the individual and small-group instruction the student required, there would be too much distraction in an ICT classroom, and the student required full-time specialized instruction in a small class (*id.* at pp. 37-40). Next, the IHO found that although the failure to conduct an FBA of the student and develop a BIP resulted in an IEP that was not clear with respect to how it would address the student's anxiety, this error did not by itself lead to a denial of FAPE since the student's anxiety was accommodated by the district (*id.* at p. 45). Similarly, the IHO found that, while it would have been helpful for the district to conduct an assistive technology evaluation of the student, assistive technology was made available to the student and the failure to refer him for evaluation did not lead to a denial of FAPE (*id.* at pp. 44-45).

Having found that the June 2014 IEP failed to offer the student a FAPE, the IHO turned to the appropriateness of the parents' unilateral placement at Kildonan (IHO Decision at pp. 45-49). The IHO determined that the educational services at Kildonan were "only partially appropriate" (*id.* at p. 49). Specifically, the IHO found that the academic program offered at Kildonan correlated well with the student's academic needs (*id.* at p. 47). However, the IHO determined that the student's placement in a classroom "comprised of four different grade levels for all subject areas except math and English was inappropriate" (*id.* at p. 48). The IHO also noted that "the parents have not pursued the need" for either OT or PT services but that the student received counseling by a therapist retained by Kildonan (*id.*). The IHO also found fault with Kildonan's progress reporting system, finding that the system provided "little substance, if any, in terms of [the student's] progress" (*id.* at p. 49). Lastly, the IHO noted that Kildonan "does not provide a mainstreaming experience" (*id.* at p. 48).

With respect to equitable considerations, the IHO found that the parents cooperated with the district in terms of sharing private evaluations, communicated their concerns with the student's program, and attended all CSE meetings and teacher conferences (IHO Decision at p. 51). However, the IHO found that the parents' "passive approach" at the June 2014 CSE meeting, during which they did not object to the contents of the recommended program or suggest additional services or changes to the program, "militates against the parent-school collaboration anticipated by the IDEA" (*id.*). Moreover, the IHO found that in "failing to clearly object to the CSE's proposals and their assessment of progress and ignoring the [d]istrict's later attempts to reconvene the CSE, the [p]arents eliminated any efforts on the [d]istrict's part to remedy [the student's] IEP" (*id.* at p. 52).

The IHO determined that, on the basis of the partial appropriateness of Kildonan and additional equitable considerations, the parents' request for tuition reimbursement would be granted in a reduced amount, and directed the district to reimburse the parents that amount (IHO Decision at pp. 52-53).

#### IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2014-15 school year. Initially, the district contends that the IHO erred in making findings regarding the accuracy of the evaluative information relied on by the June 2014 CSE and included in the June 2014 IEP because the parents' due process complaint notice did not challenge the evaluations. The district also contends that the IHO erred in finding that the June 2014 CSE failed to consider the full continuum of possible placements for the student. Next, the district contends that the IHO erred in finding that the recommendation for ICT services was misleadingly stated and that the June 2014 IEP offered insufficient small group instruction, because the IEP recommended appropriate services and the student made progress while attending a similar program in a district school the previous school year.

The district also asserts that the IHO erred in finding that the parents' unilateral placement at Kildonan was partially appropriate because Kildonan failed to provide an appropriate curriculum or appropriate functional and age grouping for the student, and the student did not have any access to typically developing peers. The district also contends that the parents did not establish that Kildonan provided related services including speech-language therapy, OT, and counseling. The district next asserts that the parents failed to show that the student made progress at Kildonan during the 2014-15 school year because Kildonan's grading and report card system was unreliable and was not based upon objective criteria by which to measure the student's abilities. With respect to equitable considerations, the district asserts that the IHO erred in reducing her order of tuition reimbursement on an equitable basis after finding that Kildonan was partially appropriate, and contends that, if Kildonan was not fully appropriate, tuition reimbursement should be denied. The district requests that the IHO's order of partial tuition reimbursement be reversed.

In an answer, the parents respond to the district's allegations and argue that the IHO properly found that the district failed to offer the student a FAPE in the 2014-15 school year.<sup>4</sup> In a "cross-petition,"<sup>5</sup> the parents assert that the IHO properly determined that the June 2014 IEP failed to adequately address the student's anxiety, but erred in failing to find that the district denied the student a FAPE on that basis.

With respect to the parents' unilateral placement at Kildonan during the 2014-15 school year, the parents contend that the IHO erred in reducing the tuition reimbursement based on her finding that Kildonan was only partially appropriate. Specifically, the parents contend that,

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<sup>4</sup> The parents submitted an application for an extension of time to answer the petition. Although the application was untimely, it set forth the reasons for the request and the district did not submit a reply objecting to consideration of the answer; accordingly, the answer is accepted as a matter of my discretion (see 8 NYCRR 279.10[e]).

<sup>5</sup> A "cross-petition" is not permitted by State regulations concerning practice before an SRO, which provide that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer . . . , except a reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). Rather, the practice regulations call for any cross-appeal to be set forth within the answer (8 NYCRR 279.4[b]). In any event, taking the parents' two pleadings together, they do not exceed the maximum page length permitted for an answer by State regulations and, despite the parents' failure to conform to the pleading structure set forth by regulation, absent any challenge from the district, I exercise my discretion and accept the pleadings (8 NYCRR 279.8[a][5]).

although the functional and age grouping at Kildonan may not have been ideal, the student received differentiated instruction. Moreover, the parents assert that the curriculum and methods of instruction at Kildonan were appropriate and the hearing record demonstrates that the student made steady progress in reading, writing, and math. The parents admit that the student did not receive speech-language therapy or OT at Kildonan, but deny that the omission of these services rendered Kildonan inappropriate. The parents also deny that Kildonan's progress reporting system was inadequate, asserting that Kildonan administered standardized assessments at the beginning and end of the school year to track progress and that, in addition to regular progress reports from the school, Kildonan teachers and staff communicated with the parents regularly.

Next, the parents assert that the IHO erred in finding that equitable considerations did not support full tuition reimbursement because the parents attended and participated in every CSE meeting, provided the CSE with private evaluations, communicated their concerns with the student's program during the 2013-14 school year to the district, enrolled the student in Kildonan only after considering the CSE's recommended placement, and provided the district with timely written notice of their intention to unilaterally place the student in Kildonan at public expense for the 2014-15 school year. The parents request that the IHO's award of partial tuition reimbursement be reversed and that they be awarded full reimbursement for the costs of the student's tuition at Kildonan.

## **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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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]). 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 [2d Cir. Aug. 16, 2010]).

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]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 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).

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]).

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. June 2014 IEP**

#### **1. The Student's Needs**

While the adequacy of the evaluative information available to the July 2014 CSE and the student's present levels of performance as described in the resultant IEP are not in dispute in this matter, a discussion thereof is relevant to the determination of whether the recommendation for placement in a general education classroom with ICT and related services was appropriate and reasonably calculated to provide the student with educational benefit.<sup>6</sup>

During the 2012-13 school year, the parents sought a private psychological evaluation of the student in order to "identify any particular learning needs he may have" and "ensure [the student] is getting the appropriate interventions to rectify any specific learning needs" (Parent Ex. E at p. 1). The private evaluation was conducted during November and December 2012 and January 2013 and included a classroom observation and the administration of standardized and projective testing (id. at pp. 1, 4). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale intelligence quotient of 93, with the evaluating psychologist noting significant variability in the student's cognitive and intellectual functioning (id. at p. 5). According to the psychologist, the student's performance was strongest on measures of verbal skills, where his scores fell in the high average to superior range (id.). In contrast, the student's ability to process auditory/sequential and visual material, and his nonverbal conceptual abilities, fell within the low average range (id. at p. 6). Although the psychologist reported that the student was "exceptionally strong verbally," based on additional testing, he noted that there were aspects of the student's language that fell significantly below his high average verbal capacities, including phonological processing and receptive language, which

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<sup>6</sup> The district correctly argues that the parents did not challenge the sufficiency or accuracy of the evaluative information available to the June 2014 CSE in their due process complaint notice (Dist. Ex. 1). However, review of the IHO's decision does not reveal that the IHO made a sua sponte finding on such a claim. On the contrary, the IHO acknowledged that the July 2014 CSE "possessed the requisite assessments" but found that the CSE failed to "adequately appreciate their contents" or the student's needs and opined about the import of test setting and the effect of strategies or modifications (such as prompting or memorization) on the student's scores and apparent progress (IHO Decision at pp. 35-36, 37, 39). The IHO did not consider whether or not the CSE's understanding of the student's needs contributed to a denial of a FAPE but, rather, properly examined information about the student's needs in order to review the adequacy of the CSE's recommended placement.

ranged from low average to deficit level functioning (id. at p. 14). Additionally, the psychologist reported that the discrepancy between the student's verbal and nonverbal capacities was evident in his memory function (id.). Specifically, the psychologist reported that the student "demonstrate[d] a superior capacity to learn and retain verbal material, while visual material is poorly learned or maintained" (id.). Furthermore, the psychologist indicated that the student showed significant variability in executive functioning, with notable impairment in his ability to sustain attention for long periods of time (id.). The psychologist also described the student as demonstrating a "nonverbal component" to his cognitive impairment, which significantly impacted his ability to process and retain visual/ spatial material (id. at p. 17). The psychologist opined that nonverbal impairments could impact the development of reading, spelling, and writing, as well as new learning, and were often at the core of math learning disabilities (id.).

The psychologist offered the following diagnoses of the student: learning disorder in reading and spelling, learning disorder in math, ADHD, and a nonverbal learning disability (Parent Ex. E at p. 15). Among other things, the psychologist noted that students with the type of reading difficulties exhibited by the student "demand[ed]" a comprehensive and intensive remedial reading program in order to catch up with his peers (id. at p. 15).

The parents also sought a psychiatric evaluation of the student, which took place in June 2013 (Parent Ex. F). A "brief" psychiatric note, composed by the evaluating psychiatrist, stated that the student had a history of problems related to language development, reading, and self-regulation, and that he had difficulty following multistep instructions and socializing with peers (id. at p. 1). As part of his mental status examination, the psychiatrist reported that the student appeared to be developmentally advanced in terms of his ability to tell a narrative story, but noted that the story revealed "qualities of vagueness" and "suggestions of underlying difficulties with perceptual organization" (id. at p. 2). Based on the student's behavior during a chosen game, the psychiatrist reported that the student exhibited a "highly idiosyncratic style of play" and further noted that student "tended to be impulsive and show little or no strategy" (id. at p. 3). According to the psychiatrist, the student seemed surprised and bothered when he lost the game and the psychiatrist reported that the student's level of vigilance and attention appeared to deteriorate as he became more emotional (id.). Based on his assessment, the psychiatrist concluded that the student presented with significant cognitive, organizational, and attentional problems; however, he did not "fit neatly into any diagnostic template" but showed signs of "multiple 'developmental' variability" (id.). The psychiatrist did not offer a diagnosis of autism but stated that the student shared many of the developmental problems exhibited "in th[at] population" (id.). The psychiatrist opined that the student's social perceptual problems may be closely related to his non-verbal learning deficits (id.). He further opined that the student's difficulty in attention and concentration may be influenced by anxiety and not primarily by difficulty in sustaining attention (id.). Additionally, the psychiatrist suggested that the student was experiencing significant levels of anxiety that he had difficulty articulating and which he expressed through "behavioral disruption, psychological disorganization, and avoidant behavior" (id. at p. 4). The psychiatrist characterized the student as "highly vulnerable" to becoming confused, psychologically overwhelmed, and shutting down with respect to his ability to learn and function academically and emotionally (id.). In addition to the diagnoses offered by the psychologist in the January 2013 psychoeducational evaluation, the psychiatrist determined that the student met the criteria for a diagnosis of an anxiety disorder NOS (id.). To support the student academically, the psychiatrist recommended a "calm, quiet, emotionally supportive

classroom with access to 1:1 support when needed" due to weaknesses in social perception and affect tolerance (id.).

In April 2014, the district formally assessed the student's speech and language skills at the request of the parents (Dist. Ex. 40). Administration of the Auditory Processing Abilities Test and the Clinical Evaluation of Language Fundamentals-Fifth Edition, as well as informal observation by the speech-language pathologist, suggested that the student's receptive and expressive language skills were age appropriate, as were his auditory processing skills (id.). The speech-language pathologist noted that the student had difficulty on two subtests of the Auditory Processing Abilities Test (id. at pp. 4, 5). The first subtest required the student to repeat verbatim sentences that became increasingly longer and the second subtest required the student to recall unrelated word pairs (id. at p. 5). According to the speech-language pathologist, the student demonstrated greater success on listening tasks that were more meaningful (id.). However, she also noted that testing was completed in a quiet environment and represented the student's speech-language skills in an ideal learning environment (id.).

A progress summary report, completed by student's physical therapist in April 2014, indicated that the student was able to follow directions well within a one-to-one setting (Dist. Ex. 41 at p. 1). According to the physical therapist, within the classroom the student had difficulty keeping his body orientated to the teacher providing instruction (id. at p. 2). In addition, during physical education the student had difficulty completing exercises that required him to use both side of his body together, or required him to cross midline (id.). The physical therapist further reported that the student had difficulty performing a cognitive task and sequenced movement pattern simultaneously (id.). The physical therapist concluded that the student's gross motor delays impacted his willingness to participate in group physical games, as well as his ability to attend for sustained periods of time (id.). Among other things, she opined that the student needed to work on improving his proximal stability and postural control in order to improve his ability to attend within the classroom (id.).

The present levels of performance of the student's June 2014 IEP provided additional insight into the student's needs, gleaned from his attendance in the district program during the 2013-14 school year (District Ex. 11 at pp. 1-9). According to the present levels of performance, during the 2013-14 school year, the student's instructional guided reading level increased from a level B (a middle kindergarten level) to level E (a middle first grade level) (id. at p. 6).<sup>7</sup> With respect to reading, the present levels indicated that the student was approaching grade level expectations in comprehension, use of multiple strategies, sound/symbol knowledge, vocabulary development, and word recognition (id.). However, the present levels also indicated that the student continued to be "below grade level expectations" in phonics and word analysis (id.). The IEP stated that the student's performance was inconsistent from day to day; sometimes the student required many prompts, while other days he was able to independently apply his skills (id.). In writing, the present levels of performance indicated that the student was "approaching grade level expectations" in organization and expression of his ideas; however, he continued to be below grade level expectations in grammar and sentence structure, mechanics, spelling, and penmanship (id. at p. 7). The IEP described the student as having "great ideas" for written work but noted that sometimes his ideas were "much more involved than he c[ould] write, even with

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<sup>7</sup> According to June 2014 CSE meeting minutes, at the time of the CSE meeting, the student was reading independently at level E (Dist. Ex. 11 at p. 1).

help" (id.). The IEP further indicated that the student required prompts and reminders to use spaces between words, use his personal word wall, and form letters appropriately (id.). In math, the present levels of performance indicated that the student was below grade level expectations in all areas, that he demonstrated inconsistent retention of math symbols and the steps needed for problem solving and computation, and that he experienced "extreme difficulty understanding math concepts" (id.). Finally, with respect to academic, developmental, and functional needs, the June 2014 IEP indicated that the student needed to improve his reading, writing, and math skills (id.).

With respect to the student's speech-language needs, the present levels of performance of the June 2014 IEP reflected the results of the district's April 2014 speech-language evaluation and further noted that the student could have more difficulty with auditory tasks within the classroom setting and suggested reducing background noise, gaining the student's attention prior to giving directions, and using visual cues and examples to assist the student in understanding directions and orally presented information (Dist. Ex. 11 at p. 7). Socially, the June 2014 IEP described the student as good at following classroom and playground rules, playing cooperatively, and respecting the rights and property of others (id. at p. 8). However, the IEP indicated that, based on teacher observation, the student played easily with two boys in the class but did not seek out others for free play, and had occasional difficulty being in close proximity to a classmate (id.). The present levels noted that the student had improved his ability to go along with changes in routine and unexpected interruptions, but stated that the student benefitted from advanced warnings for changes in routines and from "adults 'playing down' things that might cause him anxiety" (id.).

With regard to the student's fine motor skills, the present levels of performance of the June 2014 IEP indicated that the student demonstrated "some growth" in that he was able to write and trace more proficiently and his ability to cut and hold scissors properly and color had improved (Dist. Ex. 11 at p. 8). However, he continued to have difficulty crossing midline, "even with a model he need[ed] a visual," and he often required directions to be repeated and explained (id.). The present levels also indicated that the student seemed to enjoy proprioceptive and vestibular movement (id.). The present levels of performance described the student's gross motor needs using the narrative from the district's April 2014 PT evaluation (compare Dist. Ex. 41, with Dist. Ex 11 at p. 10).

## **2. Integrated Co-Teaching Services**

The IHO determined that the general education classroom with ICT services would not provide the appropriate individual and small group instruction the student required, the pace of instruction was inappropriate due to the student's processing and memory deficits and anxiety, and that adding one hour and 15 minutes additional hours per week of ICT services from the previous school year would not compensate for the "lack of full-time small group instruction" (IHO Decision at pp. 37-39).<sup>8</sup> For the reasons set forth below, I find that a review of the hearing record supports the IHO's determination that the general education classroom with ICT services would not appropriately meet the student's identified needs.

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<sup>8</sup> The IHO used the phrase "additional two hours" (IHO Decision at p. 38), but the change in recommendation for ICT services from the 2013-14 to the 2014-15 school year was from "1 x Weekly, 8hr - 45min" to "1 x Weekly, 10hr" (compare Dist. Ex. 7at pp. 1, 12, with Dist. Ex. 11 at pp. 1, 11).

Minutes from the June 2014 CSE meeting indicate that, based on a review of goals, the student's parents and school team discussed the student's needs for structure and supports (Dist. Ex. 11 at p. 2). In order to address the student's academic needs, the June 2014 CSE recommended that the student receive ICT services for 10 hours per week in a general education classroom (id. at p. 11). In addition, the CSE recommended numerous supplementary aids and services/program modifications/accommodations including special seating arrangements (close to teacher), refocusing and redirection, access to manipulatives (as needed for math practice and tests when allowed), access to study carrel (as needed), checks for understanding (ask student to repeat direction for tasks), and wait time (extra time to process questions) (id. at p. 12). The CSE also recommended annual goals that targeted the student's: study skills including identifying and bringing necessary supplies to lessons and refocusing without prompting; reading skills including decoding whole sentences, paragraphs, or stories using phrasing at a middle second grade level; writing skills including using taught spelling patterns in writing, proper punctuation, and writing mechanics; and mathematics including identifying place value and solving two-digit addition and subtraction problems with regrouping (id. at p. 10). To address the student's social/emotional needs, the CSE recommended twenty 30-minute sessions of small group counseling over the course of the 2014-15 school year (id. at p. 11). In addition, the CSE recommended a counseling goal that targeted the student's ability to identify situations that led to mood changes and to identify and implement methods of dealing with anxiety (id. at p. 10). Although the CSE found the student's receptive and expressive language skills, as well as his auditory processing skills, to be age appropriate, it recommended three 30-minute speech-language consultations as a support for school personnel on behalf of the student (id. at p. 12). With respect to the student's fine and gross motor needs, the June 2014 CSE recommended that the student receive two 30-minute session of individual OT on a weekly basis and one 30-minute session of PT on a weekly basis (id. at p. 11). The CSE also recommended six 30-minute OT consultations and three 30-minute PT consultations over the course of the school year as a support for school personnel on behalf of the student (id. at p. 12). In addition, the CSE developed annual goals that targeted the student's motor skills including balance, cross pattern movements, weight bearing, hand strength, visual tracking, and maintaining the correct pressure on a pencil (id. at pp. 10-11). The June 2014 CSE determined that the student was eligible to receive special education services during July and August and recommended that he receive two 2-hour sessions of direct consultant teacher services per week and one 30-minute session of individual OT per week for six weeks (id. at pp. 12-13.).

As an initial matter, the IHO opined that the ICT services as implemented during the 2013-14 and as described on the student's June 2014 IEP school year were more akin to consultant teacher services (IHO Decision at p. 41-43; Dist. Ex. 11 at pp. 1, 9). State regulation defines ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulation requires that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). State regulation defines direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes (8 NYCRR

200.1[m][1]). State guidance issued in November 2013 indicates while ICT and consultant teacher services may appear similar, "they differ in the manner and in some circumstances, in the extent to which, supports are provided to the student" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>). The guidance document elaborated that the consultant teacher services focused on an individual student, whereas ICT services focused on the delivery of primary instruction for all of the students ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15). The manner of delivery of primary instruction in some areas is significant for this student, as described below.

Here, according to the district supervisor for special education, the ICT setting was a general education classroom in which a regular education and special education teacher would co-teach and collaborate "throughout the instructional day" (Tr. pp. 85, 109). While neither the June 2014 IEP nor the student's IEP for the 2013-14 school year identified the subject areas in which the student would receive ICT services (see Dist. Exs. 7 at p. 12; 11 at p. 11), the student's special education teacher testified that, during the 2013-14 school year, she would be in the student's classroom for at least the 8 hours and 45 minutes "guaranteed" by his IEP and during the content courses that aligned with the student's academic goals; she specifically indicated that she was in the classroom for math and a portion of English language arts (ELA) (Tr. pp. 343) (Tr. pp. 140-41, 157, 343, 351-55; see Tr. pp. 457-58). The special education teacher indicated that there were approximately 20 to 21 students in the classroom during the 2013-14 school year, six of whom had IEPs (Tr. p. 138). As for the other students in the classroom, the special education teacher indicated that some of their IEPs recommended "consultant teacher service" and at least one student's IEP mandated ten weekly hours of ICT services (Tr. p. 142). The teacher indicated that she had responsibility to all of the students in the classroom and not just those with IEPs (Tr. p. 156). When describing small group support the student received, she specifically indicated that it was not for primary instruction (Tr. pp. 158-59). Accordingly, contrary to the IHO's observations, the ICT services as implemented during the 2013-14 school year and as intended for the 2014-15 school year aligned with the definition of ICT services in the State regulations and State guidance described above.<sup>9</sup>

Turning to the appropriateness of the recommended placement, in a prior written notice, dated June 2, 2014, the district explained why the CSE recommended the student for ICT and

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<sup>9</sup> In addition, the part-time nature of the recommendation was consistent with State regulation and State guidance (see "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 11-15). The extent to which it was consistent with the student's needs shall be examined herein.

related services for the 2014-15 school year (Dist. Ex. 121).<sup>10</sup> In summary, the district reported that the student had made progress in reading comprehension and fluency, composing sentences, social interaction, fine motor, motor planning, and visual perceptual skills, as well as with respect to his gross motor and sensory processing difficulties (*id.* at p. 1). The district's supervisor of special education opined that the CSE's placement recommendation for the 2014-15 school year was appropriate for the student because it was based on his rate of progress within the least restrictive environment and took into consideration the student's strengths (Tr. pp. 88-89). However, the IHO stated that she was not persuaded that descriptions of the student's "tremendous" progress were accurate and suggested that assessments of the student's progress were bolstered by "constant teacher prompting, rehearsal, number grids and memorization" (IHO Decision at pp. 39-40).

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Here, a review of the hearing record reveals that, although the student made progress in some areas, the student's processing, attending, and memory needs, in combination with his lack of progress in the area of math, supports the IHO's determination that the June 2014 CSE's recommendation to continue the student's placement in a general education classroom with part-time ICT services was not appropriate.

Evaluations conducted prior to the 2013-14 school year found that the student had difficulty with processing, attending, and memory and the hearing record shows that the student struggled with all of these in the general education class with ICT services (Parent Exs. E at pp. 5-10, 14; F at pp. 3-4). Notably, in October 2013, the student's special education teacher requested historical information from the student's mother regarding the student's tendency to

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<sup>10</sup> With respect to the IHO's finding that the district failed to consider a small-class placement, State regulation requires that districts ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services (8 NYCRR 200.6; see 34 CFR 300.115[a]). The district's supervisor for special education attended the June 2014 CSE meeting and testified that the CSE considered the student's level of progression and considered the "entire array of services," including settings that were without ICT services, and settings that were "more restrictive" (Tr. pp. 54-55, 79-80, 87-88, 110-15; Dist. Ex. 11 at p. 1). However, the prior written notice provided to the parents indicated that "no other options [were] considered at this time" (Dist. Ex. 121 at p. 2). Once the CSE determined that a general education placement with ICT services and related services was appropriate, the district was not obligated to consider a placement with a smaller class size (see, e.g., G.B. v. New York City Dep't of Educ., 2015 WL 7351582, at \*10-\*11 [S.D.N.Y. Nov. 5, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013]). However, that the district did not commit a procedural violation by not considering additional options on the continuum is not dispositive of whether the recommended placement was substantively appropriately to meet the student's needs.

"tune out" in the classroom (Dist. Ex. 71 at p. 2). A contemporaneous IEP revision request noted that the student worked slowly and needed prompts to keep working (Dist. Ex. 77). The student's first quarter IEP progress report indicated that it was sometimes difficult to get the student's attention to refocus him in large group activities but that, when prompted to refocus, he could remain on task for up to two minutes (Dist. Ex. 122 at p. 2). In December 2013, the supervisor of special education referred the student to a licensed audiologist for consideration of an FM system due to the student's significant attending and processing difficulties (Dist. Ex. 89; see Dist. Ex. 111). In a pretrial assessment of the student's classroom listening behavior completed in January 2014, the student's teacher reported that the student seldom attended to a series of oral directions, comprehended oral instruction in a group situation, or comprehended oral instruction in a noisy environment (Dist. Ex. 90 at p. 1). Moreover, the teacher identified the student's ability to follow simple directions in large or small groups and follow directions after repetition or rephrasing as areas of concern (id. at p. 2).<sup>11</sup> The hearing record shows that the student had difficulty attending in a large group and was better able to attend in a small group and in some one-to-one settings (Tr. pp. 474-75; Dist. Exs. 40 at p. 1; 41 at p. 1). In addition, the hearing record shows that the student had difficulty working independently in a general education class with ICT services. In a second quarter progress report the student's teachers indicated that he was very dependent on adult help, even when he knew what to do (Dist. Ex. 131 at p. 4). They also noted that the student "often doesn't work once the adult moves away from him" (id.).<sup>12</sup> The student's third quarter progress note indicated that the student needed directions repeated, sometimes several times, and that, with respect to mathematics, the student required adult assistance in order to complete most assignments (id. at p. 6). Both third and fourth quarter progress reports indicated that the student needed to improve his ability to work independently (id. at pp. 5, 7).

Furthermore, the hearing record shows that the student had difficulty remembering the academic skills that he had been taught in the general education classroom with ICT services. In a handwritten note to the parent, dated November 12, 2013, the student's special education teacher commented that "the three day weekend was too long" for the student and that he had "forgotten how to add using a number line or drawing circles" (Dist. Ex. 82). A second note from the student's special education teacher, dated March 13, 2014, indicated that the student had "forgotten how to add" and stated that the teacher had begun to reteach the student this skill (Parent Ex. C at p. 1). Notes taken by the student's special education teacher of a parent meeting held in March 2014 showed that the student continued to require frequent prompts to follow the class routine and to keep working (Tr. pp. 192-93; Dist. Ex. 96 at p. 1). With respect to reading, the notes indicated that, when reading to himself, the student did not persevere or remember how he read a difficult passage (Dist. Ex. 96 at p. 1). With respect to math, the meeting notes indicated that, when the student learned a new math rule, he lost the prior rule (id. at p. 2). The student's mother reported that the student needed to be repeatedly reminded to do chores and required help with routine tasks (id. at p. 3). The parent's note summarizing the March 2014 meeting indicated that the student was not gaining independence in class routines and required

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<sup>11</sup> Although post-trial evaluation of the FM system showed that the student's ability to follow simple directions in small groups and follow directions after repetition or rephrasing had improved, the team determined that with or without the system the student usually acted only when his name was called (Dist. Exs. 95; 96 at p. 2).

<sup>12</sup> At the same time, the student's teachers reported that the student was slowly making progress in independently using strategies to help him read (Dist. Ex. 131 at p. 4).

prompts for things that should, by this point in the year, be routine and that the student did not follow instructions given to the entire class (Dist. Ex. 99 at p. 1). The mother's notes further reflected that the student could seem to know how to do something for days and then forget what he had previously been known to do (*id.* at p. 2). In a letter to the CSE chairperson, dated May 16, 2014, the student's special education teacher wrote that the student exhibited inconsistent acquisition and retention of language arts and math skills, that regression was noted over weekends, absences, and vacations, and that recovery of lost skills was inconsistent (Dist. Ex. 114). In her request for 12-month services for the student, the teacher noted that regression occurred on a daily basis and that the student did not ever retain math concepts to mastery (Dist. Ex. 123). Furthermore, the teacher reported that the student required daily reteaching and review for all areas of math and daily reminders to write legibly (*id.*).

Despite the student's difficulties with processing, attending, and memory, the district reported that the student made progress during the 2013-14 school year, characterized by some staff as "tremendous" (Tr. pp. 80-81). According to the student's first grade progress reports, the student showed some progress in reading comprehension and word recognition during the 2013-14 school year, where he moved from performing "below grade level standards" at the beginning of the school year to "approaching proficiency at grade levels standards" at the end of the school year (Dist. Ex. 131 at p. 7). The student also progressed from "approaching proficiency at grade level standards" to "proficient at grade level standards" with respect to the organization and expression of ideas when speaking (*id.*). Over the course of the school year, the progress notes indicated that the student was "slowly making progress in independently using strategies to help him read," "improv[ing] his ability to use meaning based strategies to read text," and "made great progress in reading sight words" (*id.* at pp. 4, 6, 8). The student's instructional level for reading increased from B to F and the student's teachers reported an increase in the student's ability to read sight words at the kindergarten and first grade levels (Tr. pp. 166, 209-11, 214-15, 304-07, 438-441, 444-46; Dist. Exs. 119, 132). The student's 2013-14 IEP progress report showed that he achieved IEP goals related to decoding monosyllabic words and reading and comprehending literature and informational text at a middle of first grade level (Dist. Ex. 122 at p. 3; *see* Tr. pp. 320-23). Although the student's special education teacher testified that the student's decoding had improved to the point where he was starting to decode digraphs (Tr. pp. 321-22), first grade progress reports show that the student moved from "approaching proficiency at grade level" to "below grade level standards" over the course of the school year for phonics/word analysis (Dist. Ex. 131 at p. 7).

With respect to writing, the student's pre and post scores on the district's ELA writing assessment were 32 and 73 percent, respectively (Dist. Ex. 132; *see* Tr. pp. 223-24, 226, 447). Although the student's writing skills remained below grade level standards for the duration of the 2013-14 school year, the student's special education teacher testified that the student made "tremendous" progress in writing (Tr. pp. 169-70; Dist. Ex. 131 at p. 7). In addition, minutes from the June 2014 CSE meeting indicated that the student had made steady progress in writing by composing sentences (Dist. Ex. 11 at p. 1). The student's special education teacher testified that, at the beginning of the school year, the student "was just scribbling for his writing" but not writing actual letters (Tr. p. 308). Both the special education and regular education teachers reported that, by the end of the school year, the student could write a sentence phonetically in a way that he could reread it, as could others (Tr. pp. 308, 441). Both teachers reiterated that, by the end of the year, the student was writing sentences and putting spaces between words,

including almost all of the sounds in the words, and the teachers were able to read it (Tr. pp. 169-70, 441; see Dist. Exs. 96 at pp. 1-2; 131 at p. 6). The student's special education teacher further reported that the student was able to convey some of his feelings in written form, rather than just drawing a picture, and that he was writing sounds that he heard in words, including some vowels (Tr. p. 313).

The student's teachers reported that math was the most challenging subject for the student during the 2013-14 school year and the hearing record shows that he made little progress in this area (Tr. pp. 158, 309-10, 359, 441; see Dist. Ex. 11 at p. 1). As noted above, the student had difficulty remembering how to perform addition and overgeneralized rules that he did remember (Dist. Exs. 2; 96; Parent Ex. C). The student struggled with "number sense" and understanding the value of numbers (Tr. pp. 442, 815). The district reported that the student achieved an IEP goal related to identifying numerals to 30, but noted that the student continued to occasionally transpose the place value of numerals (Dist. Ex. 122 at p. 2; see Tr. pp. 309; 323-24). The student was less successful achieving goals related to addition and subtraction, where only gradual progress was noted (Dist. Ex. 122 at pp. 2-3; see Tr. pp. 328-30). According to district records, the student's pre and post scores on the district's mathematics assessment were 8 and 93 percent, respectively (Dist. Ex. 132; see Tr. pp. 224-25, 441-42, 448). However, the post-instruction score was generally inconsistent with reports of the student's math abilities at this time (Tr. pp. 441-42).

With respect to attending, the district reported that the student met two IEP study skills goals related to refocusing when prompted and working steadily on a task for 10 minutes (Dist. Ex. 122; see Tr. pp. 317-20). The district also reported that the student demonstrated improvement in fine motor skills, motor planning, and visual perceptual skills (Dist. Exs. 11 at p. 1; 122 at pp. 4-5). Finally, the district reported that the student demonstrated progress with respect to social interaction (Dist. Ex. 11 at p.1; see Tr. pp. 428-30; Dist. Ex. 119 at p. 2).

The parents did not challenge the district's assertion that the student demonstrated progress in social interaction, fine and gross motor skills, motor planning, visual perceptual skills, and sensory processing, and acknowledged that the student demonstrated some progress in reading (Tr. p. 815). However, they noted that after two years in first grade the student's final progress report showed that he was performing below grade level standards in math and writing (Dist. Ex. 124; 131).

While the IHO was not persuaded that district descriptions of the student's progress were accurate, the hearing record contains sufficient evidence, detailed above, to determine that the student made meaningful progress in reading and writing during the 2013-14 school year. However, the hearing record does not show that the student benefitted from ICT services for instruction in math during the 2013-14 school year.

Here the hearing record shows that during the 2013-14 school year, the student received his primary math instruction in a large group setting (Tr. pp. 154, 159, 350-51, 424). However, based on the student's difficulty with math, the district employed numerous strategies and accommodations in an attempted to bolster the student's math skills. Specifically, during the second semester the district started providing the student with small group (3-5 students) instruction in math (Tr. pp. 158-60). In addition the student's special education teacher testified

that she provided him with pre-teaching and reteaching of lessons during a thirty minute period during the end of the day (Tr. pp. 313-14). The special education teacher also reported that she had the student sit in close proximity to her and that during guided practice the teachers provided the student with extra practice and monitoring before he began work independently (Tr. p. 314). The teachers also reduced the student's math homework assignments due to his ongoing struggles (Tr. p. 186-87). Despite the teachers' interventions the student made minimal progress in math. The student's special education teacher testified that she felt the student needed more time than was reflected on his 2013-14 IEP (Tr. pp. 315-16). She opined that receiving math instruction two times per day would have helped the student with consistency (Tr. p. 380). The special education teacher reported that she used Touch Math with the student and it worked well for him with respect to addition (Tr. pp. 355-56). In a December 2013 email to the parents, she indicated that she would like to practice daily using Touch Math but that she did not have time to do so (Dist. Ex. 83; see Tr. pp. 357-58).

As to the increase in the hours of ICT services on the student's June 2014 IEP compared to the IEP implemented during the 2013-14 school year, given the testimony of the special education teacher that she was assigned to the student's classroom for at least 10 hours per week during the 2013-14 school year based on another student's IEP mandate of 10 hours of ICT services and that the ICT model meant that primary instruction was delivered with a focus on all of the students in the class as described above, the June 2014 recommendation was, practically speaking, consistent with the level of services delivered during the 2013-14 school year (Tr. p. 142; see Tr. pp. 105-06). Based on the foregoing, where the hearing record shows that the student was not benefitting from receiving his primary math instruction in a large group setting, the recommendation for ICT services in math was insufficiently supportive or individualized to address the student's needs in this area for the 2014-15 school year.

### **3. Anxiety Needs**

The parents assert that the IHO correctly determined that the district did not address the student's needs related to anxiety but erred in finding that this did not result in a denial of a FAPE.<sup>13</sup> In the parents' due process complaint notice, they claimed that the district failed to address the student's anxiety with an appropriate FBA and BIP or with other services and supports (Dist. Ex. 1 at p. 5). On appeal, the parents appear to focus more on the sufficiency of the counseling recommendation in the June 2014 IEP than on the lack of an FBA and BIP. In any event, the evidence in the hearing record supports the IHO's ultimate conclusion that, even if the district committed a violation relating to this claim, it did not result in a denial of 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

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<sup>13</sup> The IHO's decision is not entirely clear as to whether or not she found the district's failure to conduct an FBA and develop a BIP to constitute a procedural violation (see IHO Decision at p. 45). The IHO found that the district "fell short in its obligation to address [the student's] anxiety" but, based on the evidence cited by the IHO, it appears that this finding referred to the district's efforts during the 2013-14 school year and not the extent to which the June 2014 IEP addressed this need. While the district did not appeal this underlying finding, given the IHO's ultimate conclusion that any deficiency did not result in a denial of a FAPE and the parents' cross-appeal thereof, it is unnecessary to review the IHO's finding that the district failed to address the student's anxiety or examine whether or not that determination is final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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. Oct. 16, 2009]; A.C., 553 F.3d at 172). 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]).

The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP adequately addresses the student's problem behaviors (id.). Similarly, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the 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. v. New York City Dep't of Educ., 725 F.3d at 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

According to the district supervisor for special education, the June 2014 CSE considered whether the student required an FBA or BIP and, based on reports from the student's service providers, determined these were not necessary (Tr. pp. 82-83). The student's difficulties that might be characterized as behaviors consisted of difficulty maintaining focus and attention, difficulty following directions, and difficulty "go[ing] along with" transitions or changes in schedule (Dist. Ex. 11 at pp. 1-9; Parent Exs. E at p. 8-10, 16-18; F at p. 3-4). The June 2013 psychiatric note provided a diagnosis of anxiety disorder NOS and described that the student's attention and concentration problems were related to the influence of emotional factors including his anxiety (Parent Ex. F at p. 3). With respect to the student's anxiety during the 2013-14 school year, the student's teachers felt that the anxiety that was initially observed had subsided as the student adjusted to the change in school and settled in (Dist. Ex. 99 at p. 2). In contrast, the hearing record also indicates that the student experienced anxiety throughout the 2013-14 school year, and at times did not want to go to school (Tr. pp. 802-07; Dist. Exs. 71; 93; 96 at p. 3). Review of the evidence in the hearing record reveals a discrepancy in reports relating to the home versus the school environment with respects to the degree of the student's anxiety (compare Tr. pp. 794-97, 803-04, with Tr. pp. 153, 304). The parents communicated their observations of the student's anxiety about school with the student's teachers (Tr. pp. 802-03; Dist. Exs. 71; 93; 96; 115). Notwithstanding this, there is no evidence in the hearing record that the student's behaviors interfered with his own or other students' ability to learn in the school environment. That is, to the extent the student exhibited attention deficits and anxiety in the school setting, these needs were not necessarily problematic behavioral manifestations that warranted an FBA and BIP (see J.S. v New York City Dep't of Educ., 104 F. Supp. 3d 392, 406 [SDNY 2015] [finding that reports of a student's anxiety, motivation, and frustration described the student's "demeanor and emotional state," rather than behaviors], aff'd, 2016 WL 2342490 [2d Cir May 4, 2016]).

As for the counseling services, the IHO pointed out the lack of information in the hearing record regarding the students' receipt of counseling services during the 2013-14 school year and indicated that the district's efforts to address the student's anxiety were "casual[] within the classroom without formal intervention" (IHO Decision at p. 43). However, as summarized above, the June 2014 CSE had sufficient information before it regarding the student's anxiety-related needs and the IHO's speculation about the services or lack thereof is insufficient to cast aspersions on the counseling services recommended in the June 2014 IEP for the 2014-15 school year, particularly absent a claim by the parents that the district failed to implement the student's counseling services during the 2013-14 school year. The June 2014 IEP discussed the student's need to follow rules, his need of advanced warnings before changes in routines, and the benefit of "playing down" events that caused him anxiety (Dist. Ex. 11 at p. 8). The June 2014 IEP also contained a social/emotional goal to improve the student's ability to identify five situations that lead to mood changes in himself or others, and to identify and implement methods of dealing with his anxiety (*id.* at p. 10). Finally, the June 2014 IEP recommended 20 counseling sessions per year in a small group, which was 10 sessions more than the student's IEP for the 2013-14 school year (compare Dist. Ex. at p. 11, with Dist. Ex. 7 at p. 12).

Based on the aforementioned, the June 2014 CSE was aware that the student had needs relating to anxiety and included goals and services in the IEP aligned with those needs. Accordingly, there is no basis in the hearing record to conclude that the IHO erred in her finding that the district's approach to addressing the student's anxiety-related needs did not result in a denial of a FAPE to the student for the 2014-15 school year.

## **B. Unilateral Placement**

The district asserts that the IHO erred in finding that Kildonan was a partially appropriate unilateral placement for the student during the 2014-15 school year. In particular, the district argues that Kildonan did not provide appropriate functional grouping, an appropriate curriculum, necessary related services, or access to non-disabled peers. The parents assert that the IHO, after finding Kildonan only partially appropriate, erred in reducing reimbursement on that basis, and request that the IHO's determination be reversed and full tuition reimbursement be ordered. For the reasons set forth below, I find that Kildonan provided instruction specially designed to meet the unique needs of the student and that a reduction in reimbursement was not warranted.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or develop its own IEP for the student (Carter, 510 U.S. at 13-14). 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], abrogated in part on other grounds by Schaffer v. West, 546 U.S. 49 [2005]). "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 every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the 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 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; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; 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).

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).

The Kildonan head of school described Kildonan as an Orton-Gillingham based program which utilized a "multi-sensory phonics-based patterns-based approach" (Tr. pp. 525-26, 528-29, 542). The head of school further testified that Kildonan only accepted students with strong cognitive skills (Tr. pp. 540-41).

The academic dean of Kildonan testified that, during the 2014-15 school year, students in grades two through five were combined for all classes with the exception of writing, Spanish, music, and, for a period of time during the course of the school year, math (Tr. pp. 1107, 1122-24). Regarding the district's claim that Kildonan did not appropriately group the student by age, while the age range of the children in the student's class may have been greater than three years, parents are not held as strictly to State education standards that are applicable to public school

districts (see Carter, 510 U.S. at 14; see also 8 NYCRR 200.6[h][5] [providing that in many instances the age range of students in a special education class in a public school shall not exceed 36 months]).<sup>14</sup> The academic dean further testified that students received individual attention and were given work that met "the goals of instruction but it might be on a different level" (Tr. p. 1108). The head of school testified that, with regard to grouping multiple grades together, differentiation was based on skill level and not on content (Tr. p. 559). The academic dean explained that the curriculum was teacher-developed with the exception of math, for which they used a curriculum that was described as a "very concrete" program that used a lot of manipulatives and worked well for students with disabilities (Tr. pp. 1108-09, 1271-72). The head of school testified that Kildonan provided a visual arts program that was "connected to tutoring," and that used visual imagery to connect to phonics and spelling patterns, and to assist in smooth acquisition of language skills (Tr. pp. 538-39).

The Kildonan head of school testified that Kildonan differentiated instruction based on skill level (Tr. pp. 559-60). According to the academic dean, the student was in a class of 8 children, which increased to 12 children by the end of the 2014-15 school year, and the hearing record indicates that the class was split into smaller groups for Spanish, math, writing, and music (Tr. pp. 560, 1107, 1190-91). Furthermore, Kildonan provided instruction in reading, writing, and spelling by providing daily 1:1 tutoring from an Orton-Gillingham trained tutor (Tr. pp. 528-30, 556, 565-66, 593-94). According to the 2014-15 quarter four report, the student worked consistently throughout the fourth quarter in his 1:1 tutoring on language skills, including vowel and consonant sounds and decoding (Parent Ex. K at p. 1). Additionally, the student attended a daily study hall proctored by an Orton-Gillingham trained teacher and a literature class, both of which allowed the student to utilize the skills taught in the 1:1 tutoring sessions (Tr. pp. 528-30, 595-96).

In math, the hearing record indicates that Kildonan implemented 1:1 tutoring in response to the student's continued struggle with the subject during the 2014-15 school year (Tr. pp. 1122-24; Parent Ex. M at p. 1). In an October 2014 email to the parents, the student's then-current teacher reported that, because the student's understanding of math concepts was not strong, Kildonan was implementing 1:1 tutoring in order to help him establish the concepts "a little more concretely" (Parent Ex. M at p. 1). Likewise, the academic dean testified that, because the student experienced significant difficulty with basic math concepts and his teacher was having difficulty differentiating instruction for him, Kildonan staff decided 1:1 tutoring would be beneficial to the student (Tr. pp. 1122-24). The 1:1 math instruction focused on the student's weaknesses in basic conceptual development, and provided "intensive remediation" (Tr. p. 1156). The hearing record indicates that the 1:1 instruction began during the second quarter and lasted until approximately February, when other students were added to the tutorial, increasing to a group of four for the remainder of the school year (Tr. pp. 602, 1049, 1124, 1330-31; Parent Ex. M at p. 1).

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<sup>14</sup> Likewise, unilateral placements should not be held to requirements more stringent than applied to the district. Therefore, as to the district's argument that the student was inappropriately placed in a third grade class, the unilateral placement shall be afforded no less discretion than districts on matters relating to a student's promotion from grade to grade and will not be disturbed absent evidence that the determination was arbitrary or capricious (cf. Appeal of A.R., 54 Ed. Dep't Rep., Decision No. 16,665; Appeal of Y.R., 51 Ed. Dep't Rep., Decision No. 16,270; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955]).

Kildonan's academic dean described that the student needed frequent redirection for attentional issues, he needed a less stimulating environment due to his distractibility, he had difficulty reading, and he needed differentiated instruction (Tr. p. 1172). The student's math teacher at Kildonan testified that the student had minimal math skills when she began working with him, specifying that he did not have number sense, and he was inconsistent in his retention of math symbols and the steps for problem solving and computation (Tr. pp. 976-77). The math teacher further testified that, in addition to using a "diagnostic and prescriptive" multisensory Orton-Gillingham approach, she used manipulatives and differentiated math instruction (Tr. pp. 978-81, 1057-58). The academic dean testified that the math teacher developed her own math curriculum based upon her determination of the student's needs (Tr. p. 1231). Furthermore, the math teacher testified that she did not teach by grade level, she taught the skills the student needed to work on (Tr. p. 1367). Additionally, the math teacher testified that the student required a structured, systematic support even in a math class of four students, and she had to continually reinforce approaches and strategies that had been presented (Tr. pp. 987-88, 1373; see Tr. p. 1254).

The hearing record also shows that student had the use of an iPad throughout the academic day at Kildonan, and received training in using assistive technology to address the student's needs and assist in instruction (Tr. pp. 549-553; see Parent Ex. G at p. 5). The head of school also indicated that the student would be trained in text-to-speech and speech-to-text programs, but only after he gained traditional reading and writing skills (Tr. pp. 553-54). Kildonan also provided a cursive writing program, which was utilized to teach whole word formation, spelling skills, and to build decoding skills (Tr. pp. 564-65).

In light of the above, Kildonan provided services to address the student's weaknesses in the areas of reading, writing, spelling, and math with differentiated instruction in a classroom containing 8-12 students, differentiated 1:1 and small-group instruction in math, daily 1:1 specialized reading instruction, and study-hall during which skills were practiced using the Orton-Gillingham methodology.

Turning to the district's claim on appeal that Kildonan was not appropriate because it did not provide the student with OT or speech-language therapy, the June 2014 IEP contained recommendations for OT and PT; however, it indicated that the student exhibited age-appropriate receptive and expressive language skills and did not recommend speech-language therapy (see Dist. Ex. 11 at pp. 7, 11-12). Rather, the June 2014 IEP recommended as a support for school personnel on behalf of the student, speech-language consultations three times per year (id. at p. 12). As such, it does not appear that direct speech-language therapy was a need for the student.

The student's mother testified that the parents did not pursue having the student receive OT and PT at Kildonan—which would have been provided by the school district in which Kildonan was located—because the parents did not feel he needed it (Tr. pp. 923, 1021-23). She further explained that at Kildonan the student worked on cursive handwriting exercises as part of his program, he had a pencil grip, and was practicing every day (Tr. pp. 923, 1022-23). The hearing record indicates that the student was able to write all upper case and lower case letters in cursive by the end of the 2014-15 school year (Tr. pp. 564-65, 828-29; Parent Ex. K at p. 1).

With regard to PT, the parent explained that the student was not presenting with any gross motor issues and that, because he was doing well in Kildonan's equestrian program and with respect to his physical strength, the parents wanted to focus more on the student's academic needs (Tr. pp. 1022-23). The June 2014 IEP indicated that the student continued to exhibit difficulty in bilateral coordination, motor planning, and body awareness in space (Dist. Ex. 11 at pp. 1, 6). Additionally, the April 2014 PT progress summary report indicated that the student demonstrated gross motor delays which impacted on his willingness to participate in group physical games and his ability to attend for sustained periods of time (Dist. Ex. 41 at p. 2). The student's mother testified that the student participated in hockey and hiking and biking, and that she had observed that his ability to participate had improved (Tr. p. 1041). The hearing record also indicates that Kildonan provided a physical education program which included activities such as horseback riding, skiing, snowboarding, swimming, and hiking (Tr. pp. 597-600, 1040-41; Parent Ex. K at pp. 9-10). Finally, the parent testified that, while at Kildonan, she observed improvement in the student's stamina, endurance, coordination and balance (Tr. pp. 1040-41).

Thus, the hearing record shows that Kildonan did not provide OT or PT during the 2014-15 school year, and that speech-language therapy was not identified as a required related service (Tr. pp. 684-85, 923, 1021-23; Dist. Ex. 11 at pp. 11-12). However, the hearing record also shows that Kildonan provided programs that assisted the student in developing both fine and gross motor skills (Tr. pp. 564-65, 597-600, 923, 1021-23; 1040-41). Pertinently, the parents need not show that their unilateral placement provides every service necessary to maximize the student's potential; but rather, must demonstrate that the placement provides education instruction specially designed to meet the student's unique needs and is reasonably calculated to enable the student to receive educational benefits (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365). On balance, the lack of these services that were identified on the June 2014 IEP is not sufficient to support a finding that Kildonan was not appropriate given that these services did not appear to be necessary to the student receiving educational benefits and Kildonan did address the needs to some extent. The student's primary needs related to his attention and academics, and Kildonan, as set forth above, adequately, if not perfectly, addressed them.

With respect to the district's claim that Kildonan was inappropriate because it failed to provide the student with access to typically developing peers, this does not render Kildonan an inappropriate unilateral placement in this instance. The restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105). However, parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 837 ["while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D.-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. 2012]).

Although the student would not receive any opportunity for interaction with typically developing peers at Kildonan, the fact that it is more restrictive than the placement recommended in the district public school does not on its own render it inappropriate (C.L., 744 F.3d at 837 [noting that "private schools [for students with disabilities] are necessarily restrictive as they do not educate disabled and nondisabled children together, and may be more restrictive than the

public school from which the child was removed"). In the instant case, the student attended the district public school for the entirety of the 2013-14 school year in a general education setting with part-time ICT services and related services (see Dist. Exs. 7-11). After being informed of the recommended program contained in the June 2014 IEP, the parents rejected the recommended program in August 2014 because they were concerned that ICT services had not provided the student with enough support and another year in the setting would not benefit the student (Dist. Ex. 124). At that time, the student had been accepted at Kildonan and the parents remained interested in that school because it was the only school in the region with a program that provided the level of support the parents believed was lacking in the recommended program (Tr. pp. 767-68, 818-23). Considering the parents' perspective of the limited options regarding the student's program for the 2014-15 school year, the parents' decision to place the student at Kildonan in a special education classroom was not unreasonable (C.L., 744 F.3d at 837 [noting that "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]).

Even though Kildonan did not provide the student with access to nondisabled peers as did the recommended public school placement, in consideration of the totality of the circumstances, including that Kildonan provided the student with specially designed instruction to address his identified needs, LRE considerations do not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at Kildonan for the 2014-15 school year was appropriate (C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

With respect to the student's progress at Kildonan during the 2014-15 school year, a finding of progress is not required for a determination that a student's unilateral placement is adequate (M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S., 506 Fed App'x at 82; Frank G., 459 F.3d at 364). However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty, 315 F.3d at 26-27).

The IHO expressed concern with the subjective nature of Kildonan's report card system and the hearing record shows a lack of specific criteria for the descriptors used in the reports (see IHO Decision at p. 49; Tr. pp. 1232-33, 1383; Parent Ex. K). Nonetheless, the hearing record contains sufficient information by which to consider the student's progress at Kildonan during the 2014-15 school year.

The 2014-15 quarter four report indicated that the student made progress by the end of the school year. Specifically, in English skills, the quarter four report indicated that student improved in his ability to form upper case and lower case cursive letters in isolation, and he could decode some multisyllabic words and compounds words in isolation (Parent Ex. K at p. 1). In math, the quarter four report indicated that the student was improving in his ability to subtract, but that he had reverted to counting backwards to find the answers and he was developing his number sense (id. at p. 2). The student's math teacher testified that his sense of numbers had improved, he had improved his use of with single and double digits, and he had improved in computation (Tr. pp. 982-83). She further testified that the student could add two-digit numbers without regrouping, and he could do subtraction with single digit numbers (Tr. pp. 983-84, 990).

Finally, the math teacher testified that the student was learning to make more sense of numbers and that he had improved in "working with numbers" (Tr. pp. 1376-77).<sup>15</sup>

The Kildonan school student profile reported scores from fall 2014 and spring 2015 assessments in reading, spelling, and math (Parent Ex. J). Comparison of these scores indicate that the student made little or no progress in word decoding, word knowledge, accuracy, fluency, rate, spelling, reading fluency, word attack, and word identification skills (*id.*). In math, the student profile showed limited improvement in computations and concepts and applications (*id.*; see Tr. p. 1128).

With regard to the student's social/emotional skills and anxiety, the hearing record shows that, during the 2014-15 school year at Kildonan, the student became more engaged and interested in school and his emotional outbursts at home decreased (Tr. pp. 826-28, 1406). Specifically, the academic dean described the student as engaged, interested, focused, and engrossed during the 2014-15 school year (Tr. pp. 1121, 1171-72, 1255). The quarter four report described that the student was actively involved in discussions, helped other students review, worked to the best of his ability, was "constantly an enthusiastic participant in class," seemed to enjoy working with his teammates, and was an active participant who listened to instructions and carried out his assignments (Parent Ex. K at pp. 3, 4, 5, 8). The student's father testified that the student "regained his self-esteem and confidence" and that he was enjoying learning and going to school (Tr. p. 1406). The student's mother testified that the 2014-15 school year was "transformative for him" and that he was excited about learning and completing his homework, and that his self-confidence had improved (Tr. pp. 826-28).

Notwithstanding the limited progress reported from the standardized assessment scores, when the hearing record is looked at as a whole, it shows that the student made progress in some academic domains and with respect to his social/emotional needs.

Considering the totality of circumstances, Kildonan was an appropriate unilateral placement for the student during the 2014-15 school year, and I find that the IHO erred in reducing tuition reimbursement based on her finding that Kildonan was only partially appropriate (*Gagliardo*, 489 F.3d at 112).<sup>16</sup>

### **C. Equitable Considerations**

Having determined that the district failed to offer the student a FAPE for the 2014-15 school year and that Kildonan constituted an appropriate unilateral placement for the student, 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; *R.E.*, 694 F.3d at 185, 194; *M.C. v. Voluntown Bd. of*

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<sup>15</sup> However, the math teacher also testified that she did not administer any formal assessments or testing to measure the student's progress (Tr. p. 1368).

<sup>16</sup> While reimbursement awarded to parents may be reduced on equitable grounds on the basis of any segregable services that the parents obtained over and above what the district would have been required to offer a student to provide a FAPE, there is no basis presented in this hearing record to find any of the services provided to the student at Kildonan were segregable in this manner (*L.K. v. New York City Dep't of Educ.*, 2016 WL 899321, at \*8 [S.D.N.Y. Mar. 1, 2016]; see *Application of a Student with a Disability*, Appeal No. 16-006).

Educ., 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"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; see Frank G., 459 F.3d at 363-64; Voluntown, 226 F.3d at 69 n.9).

The IDEA provides that reimbursement may be reduced or denied if the parents did not provide notice, either at the most recent CSE meeting prior to their removal of the student from public school, or in writing to the district ten business days before such removal, "that they were rejecting the placement proposed by the [district] 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; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In the instant case, although the IHO did not specify the proportion of her reduction of tuition reimbursement that rested on equitable considerations as opposed to Kildonan's level of appropriateness, the IHO erred in determining that an award of tuition reimbursement should be reduced on equitable grounds (IHO Decision at pp. 49-52). Although the IHO found that the parents cooperated with the district in terms of sharing private evaluations, communicated their concerns with the student's program via email and in person, and attended all CSE meetings and teacher conferences, the IHO was concerned by the parents' "passive approach" at the June 2014 CSE meeting, in that they did not object to the contents of the recommended program or suggest additional services or changes to the program, and that the parents failed to put the district on notice of their opposition to the IEP and "eliminated any efforts on the district's part to remedy [the student's] IEP so that it would be mutually acceptable to all" (*id.*).

At the outset, the district was aware of the parents' interest in the smaller class setting at Kildonan because the parents informed the district that they were considering placing the student at Kildonan during the June 2014 CSE meeting (Tr. pp. 90-93, 127-28; Dist. Ex. 11 at p. 2). Moreover, the parents put the district on notice of their disagreement with the June 2014 IEP, as well as some of their reasons for disagreeing, via the 10-day notice letter they sent to the CSE

(Dist. Ex. 124). The hearing record also does not support the IHO's finding that the parent's frustrated the district's ability to remedy the recommended program by "ignoring the district's later attempts to reconvene the CSE" (IHO Decision at p. 52). The district's supervisor of special education sent a letter to the parents dated August 11, 2014, which acknowledged the district's receipt of the parents' 10-day notice letter and stated in pertinent part, "Upon your request, we are prepared to schedule a CSE meeting to review [the students'] program. Please let us know if you wish to have a CSE meeting" (Dist. Ex. 125 [emphasis added]). Placing the onus on the parents to initiate a CSE meeting does not constitute an attempt to convene the CSE on the part of the district, and the fact that the parents apparently did not respond in the affirmative cannot be considered a failure to cooperate with the district. To the contrary, the district indicated that it "continue[d] to have full confidence that the recommended program . . . is appropriate for [the student]" (id.).

In light of the above, I find that the parents' request for an award of tuition reimbursement is supported by equitable considerations, and therefore I reverse the IHO's reduction in reimbursement as set forth below.

## **VII. Conclusion**

Based upon the hearing record, the district failed to offer the student a FAPE for the 2014-15 school year, Kildonan was an appropriate unilateral placement for the student, and equitable considerations weigh in favor of the parents' request for relief.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated March 22, 2016, is modified by reversing those portion which determined that Kildonan was a partially appropriate unilateral placement for the student and that equitable considerations did not weigh in favor of full tuition reimbursement; and

**IT IS FURTHER ORDERED** that, upon proof of payment, the district shall reimburse the parents for the total cost of the student's tuition at Kildonan for the 2014-15 school year.

**Dated:** Albany, New York  
June 22, 2016

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**