



The University of the State of New York

The State Education Department State Review Officer

No. 08-029

Application of the BOARD OF EDUCATION OF THE LAKELAND 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 for petitioner, Marc E. Sharff, Esq., of counsel

Family Advocates, Inc. for respondents, RosaLee Charpentier, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it did not offer a free appropriate public education (FAPE) to the student for the 2007-08 school year, and awarded respondents (the parents) reimbursement for their placement of their son in a private school. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled at the Kildonan School (Kildonan), a program for students with learning disabilities, and was receiving one-to-one reading instruction for 45 minutes, five days per week using the Orton-Gillingham method (IHO Decision at p. 13). The student was classified as a student with a learning disability (LD) in second grade and received a diagnosis of an attention deficit hyperactivity disorder (ADHD), which is controlled by medication, in third grade (Joint Ex. 22 at p. 1). A neuropsychological examination conducted during May and June 2005 "confirmed the presence a severe learning disability in reading and writing," and opined that the student's "pattern of performance indicated that weaknesses in auditory processing, phonemic awareness, higher level receptive and expressive language, and aspects of auditory-verbal learning and memory contribute to his learning difficulties" (*id.* at pp. 11-12). His eligibility for special education programs and services and his classification as a student with an LD are not in dispute (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The student's difficulties with reading were first identified in preschool and kindergarten (Tr. pp. 713-15). In first grade, the student was placed in a reading recovery program and utilized the district's resource room, but continued to struggle with reading (Tr. pp. 715-16). He was

classified in second grade, diagnosed with ADHD in third grade, and for both his second and third grade year, the student remained in the reading recovery program and continued to receive resource room services (Tr. pp. 717, 719, 723-27). In fourth grade, the student was placed in a resource room program utilizing the Wilson Reading System¹ (Wilson) in a small group setting (Tr. pp. 727-29).

On May 26, 2004, a district Committee on Special Education (CSE) convened and recommended that for the 2004-05 school year, the student receive a Wilson-based reading room program four times per week, at 45 minutes per session, in a small group setting with no more than a 5:1 class ratio (Parent Ex. 3 at p. 1). The student's struggles in reading continued during the school year, and his mother testified that her son was temporarily removed from the Wilson program "for maybe a month or two months or something like that" due to lack of progress (Tr. pp. 742-43). During this removal, the student's mother testified that the student received "[n]o reading at all" (Tr. p. 743).

As part of a psychoeducational evaluation conducted on February 14, 2005, the Wechsler Intelligence Scale for Children – IV (WISC-IV) was administered to the student (Joint Ex. 27 at p. 3). The student's performance on the WISC-IV yielded a verbal comprehension score of 112 (79th percentile), a perceptual reasoning score of 127 (96th percentile), a working memory score of 94 (34th percentile), a processing speed score of 80 (9th percentile) and a full scale IQ score of 108 (70th percentile) (id.).

The evaluator noted that, during testing, the student talked excessively, with "excessive speed" and occasional episodes of poor enunciation, and was asked to limit his responses to two or three sentences (Joint Ex. 27 at p. 1). Personality testing indicated that the student did not experience significant emotional factors affecting his school performance, but the evaluator noted that the student's manner of excessive talking and atypical thinking affected the student's social development at school (id. at p. 5).

The evaluator recommended "an intensive reading decoding program with minimal noise distractions and frequent refocusing" (Joint Ex. 7 at p. 5). She also recommended that the student's parents consider review by a pediatric neurologist to address inattention and excessive talking (id.).

On February 18, 2005, an educational evaluation was conducted as part of the student's triennial review (Joint Ex. 26). Administration of the Wechsler Individual Achievement Test – II (WIAT-II) yielded standard (and percentile) scores of 61 (0.5) in word reading, 80 (9) in pseudoword decoding, and 68 (2) in reading comprehension, for a reading composite score of 66 (1) (id. at p. 2). In math, the student achieved a standard score of 121 (92) in numerical operations, and 110 (75) in math reasoning, for a math composite score of 119 (90) (id.). The student also achieved scores of 73 (4) in spelling and 83 (13) in written expression, for a written language

¹ According to the hearing record, the Wilson Reading System is a highly structured reading and writing program designed to assist second through twelfth grade students who are struggling to read (Joint Ex. 41 at p. 1). Wilson is described as being based upon Orton-Gillingham multisensory philosophy and principles and organized into a 12-step reading program (id.). It is further described as helping students learn the structures of words and language by instructing them to decode and encode (spell) fluently, and, in its intensive model, providing LD students with tutoring or small group instruction by a certified instructor (id.).

composite score of 77 (6) and a standard score of 112 (79) in listening comprehension (id.). The evaluator noted that the student appeared excited about using testing as an opportunity to demonstrate what he knew, but had difficulty admitting when a task was too difficult for him (id.). The evaluator also noted that the student continued to "mix reality and fantasy" during conversation, as he had done when he was younger (id.). She also noted that it was difficult to bring the student to a conclusion when he began discussing a topic, and that he did not appear to be aware of his listener's desire to change topics (id.). The evaluator reported that this behavior was typical of the student's behavior in classroom settings and also noted that, despite his pleasant affect, the student did not demonstrate "good social judgment" (id.).

Subsequent to the parents' request for an independent educational evaluation (IEE), a neuropsychological evaluation of the student was conducted over several days during May and June 2005 (Joint Ex. 22). Formal assessment of the student's executive functioning indicated adequate performance in nonverbal concept formation and cognitive flexibility in the presence of visual cues (id. at pp. 4-5, 19). The student's performance in the absence of visual cues suggested difficulty mentally managing and manipulating multiple bits of information, particularly sequential information (id. at p. 5).

Tests of auditory processing identified deficits in phonological awareness and auditory discrimination (Joint Ex. 22 at pp. 6, 16-17). Expressive language testing revealed intelligible and fluent speech that was "tangential at times" (id. at p. 6). Expressive language organization and formulation skills were apparent in informal sampling, but word retrieval problems were identified (id.). The evaluator also reported weaknesses and inefficiencies in aspects of the student's expressive and receptive language, characterized by difficulties with retrieval, organization, formulation, and processing lengthy semantically-complex language, particularly when it was necessary for the student to make inferences (id. at p. 7).

Tests of visual perception identified difficulties with spatial organization and inattention to visual detail when presented with complex visual stimuli (Joint Ex. 22 at p. 8). Tests of academic achievement indicated an ability to decode at an early second grade level, with writing skills at an early third grade level (id. at p. 9).

Observation of the student during evaluation revealed rigid behavior patterns (Joint Ex. 22 at p. 3). The evaluator noted that the student rearranged randomly-placed tokens into color-matched rows and persisted in this behavior despite being directed several times not to do so (id.). The student made good eye contact during the evaluation sessions and was "quite verbal" (id.).

The neuropsychologist reported that the student's parents described their son as "a very happy youngster who has a great attitude" (Joint Ex. 22 at p. 2). His mother reported that her son made friends easily but had difficulty maintaining friendships, and that he did not know how to interact with peers (id.). The student's mother indicated that the student experienced difficulties in conversations because of his preoccupation with specific topics that interested him and he had difficulty separating fact from fantasy (id.). Additionally, the student exhibited "rigid behavior and thought patterns," had become increasingly more socially isolated, and was often picked on by his peers (id. at pp. 2, 3).

As part of the evaluation, the student's mother and father completed the Achenbach Child Behavior Checklist (CBC) and the Conners Parent Rating Scale (Conners) (Joint Ex. 22 at p. 10). Responses on the CBC yielded clinically significant findings for borderline level somatic problems (id.). Responses from the student's mother also indicated many symptoms associated with ADHD, although the student's father did not report these behaviors (id.). On the Conners, responses from the student's mother indicated clinically significant findings with social problems and problems related to ADHD (id.). Responses from the student's father indicated clinically significant elevations (moderate to marked) in social problems, hyperactive-impulsive behavior and psychosomatic symptoms (id.).

The student's classroom and resource room teachers completed the Achenbach Teacher Report (Joint Ex. 22 at p. 10). Their responses identified somatic complaints, attention problems and argumentative, defiant, frustrated behaviors (id.). On the Conners Teacher Rating Scale – Revised, teacher responses yielded clinically significant elevations for social problems, oppositionality, restlessness, impulsiveness and inattentiveness (id.). On the Social Responsiveness Scale, the student's teachers reported difficulty with social interactions, idiosyncratic mannerisms, rigid and inflexible behavior, and a narrow range of interests (id.). The student's mother reported similar concerns, but to a lesser degree (id.). Both parents and teachers expressed concern regarding the student's tendency to blend fact and fiction and to attribute fantasy-like characteristics to himself, as well as his difficulty distinguishing reality from fantasy (id. at p. 11).

The neuropsychologist concluded that the student met criteria for diagnoses of a reading disorder, a disorder of written expression, a mixed receptive-expressive language disorder, a developmental coordination disorder and ADHD (Joint Ex. 22 at p. 13). The evaluator also reported that the student "displayed some features of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS)," and recommended a psychiatric evaluation to gather additional information about the student's thought processes and to help determine appropriate intervention strategies (id.). The evaluator's other recommendations included a central auditory processing evaluation to explore auditory processing and phonemic awareness deficits, a speech-language evaluation with emphasis on semantic-pragmatic and higher-level figurative language, and an occupational therapy (OT) evaluation to investigate graphomotor weaknesses (id.). She further recommended individual psychotherapeutic support, and participation in a small social skills group (id.). To support the student in the classroom, the evaluator recommended books on tape, increased access to a computer and development of keyboard skills, and various testing accommodations including testing in a separate location and availability of a scribe (id. at pp. 13-14).

On June 22, 2005, the CSE convened to review the results of the independent neuropsychological evaluation report and to develop an individualized education program (IEP) for the student for the 2005-06 school year (Joint Ex. 20). The neuropsychologist who conducted the neuropsychological evaluation of the student participated by telephone, expressed concern regarding the student's fantasies and inability to draw boundaries, and urged pursuit of a diagnosis beyond ADHD (id. at p. 4). The CSE received consent from the parents to conduct additional evaluations and recommended reconvening to review any additional recommendations (id. at p. 5).

For the 2005-06 school year, the CSE recommended that for English, social studies, math, and interdisciplinary core classes, the student be placed in the district's "Oasis program," a special education program featuring a 12:1+1 class ratio and intended for students who are academically capable at grade level, but have social and emotional issues (Tr. pp. 101-02; Joint Ex. 20 at p. 1). The Oasis program also provided a special skills class, five times per week, with a 12:1+1 class ratio, designed to help the student develop his organizational skills and enable him to complete long-term projects (Tr. p. 109; Joint Ex. 20 at p. 1). The student was also to receive monthly speech-language consultations (Joint Ex. 20 at p. 1). With regard to the student's reading and writing, the CSE recommended continuing the Wilson program, two times per six-day cycle, for 44 minutes per session, in a small group setting with a class ratio of not more than 5:1 (id.). The IEP noted that the student was entering the early stages of step two in the 12-step Wilson program (id.). The CSE also recommended small group counseling sessions with the school psychologist twice per week, 30 minutes per session, with a 5:1 class ratio, to improve his social interactions with peers and develop his ability to have reciprocal conversations (Tr. p. 217; Joint Ex. 20 at p. 1).

The student's progress report on his 2005-06 IEP goals indicated that he had mastered objectives for decoding monosyllabic words and for identifying the main idea and details of a given story and was "progressing satisfactorily" in decoding end blends and three consonant blends, decoding words through syllabification, self-correcting reading errors and making inferences (Joint Ex. 11 at pp. 1-2) The student also mastered five of his objectives for writing and four objectives in the social/emotional domain (id. at pp. 2-3). The student's June 29, 2006 report card reflected final grades of 83 in science, 91 in consumer studies, 81 in tech lab, 88 in math, and 99 in physical education (Joint Ex. 12). His final examination grade in social studies was 85 (id.). He achieved a passing mark in reading (id.). The student's fourth term grade in English was a 65, and his English teacher included comments on the report card noting that the student had difficulty with the reading comprehension necessary for the subject and needed to improve his behavior (id.).

A psychiatric evaluation of the student was conducted on October 31, 2005 (Joint Ex. 18). The evaluation included an interview with the student's mother, who reported that the student's peers were "picking on him," but acknowledged that "there are things about him that are different" (id. at p. 4).

The student exhibited poor eye contact and tense posture during the assessment (Joint Ex. 18 at p. 5). He was cooperative and attentive but at times evasive when confronted with inaccuracies in his thinking (id.). The evaluator described the student's speech as hesitant and at times monotone and pedantic (id.). The student's affect was constricted, and his thought processes were circumstantial and at times tangential (id.). He was distractible, his speech was characterized by confabulations, and his thoughts were preoccupied with his own interests, such as dinosaurs and spiders (id.). The student exhibited difficulties with recent memory, which the evaluator opined may be related to deficits in speech and language retrieval (id. at p. 6). The evaluator also noted that the student presented with "episodic confabulation when he gets lost in his fantasy world based on his misconstruing information that he's learned or needing to feel in control and more knowledgeable than his peers" (id.). During an interview with the student, the student indicated that he was not getting along with everyone and opined that others want to get him into trouble (id. at p. 3).

The psychiatrist offered an Axis 1 diagnosis of ADHD, inattentive type and an Axis 2 diagnosis of PDD-NOS (Joint Ex. 18 at p. 6.). Other Axis 2 diagnoses included reading disorder, written expression disorder, mixed expressive-receptive language disorder, and coordination disorder possibly due to PDD-NOS (id.). The evaluator concluded that the student did not qualify for a diagnosis of Asperger's Syndrome (id.). The psychiatrist recommended participation in a social skills group and a trial of medication to help organize the student's reality testing, and opined that the district's Oasis program with therapeutic supports provided by the district's school psychologist would be appropriate at that time (id. at pp. 6-7).

An OT evaluation was conducted on November 29, 2005 (Joint Ex. 17). Administration of the Wide Range Assessment of Visual Motor Abilities (VMA) yielded a visual motor standard score of 126 (96th percentile), a visual spatial standard score of 115 (84th percentile) and a fine motor standard score of 111 (77th percentile) (id. at p. 1). On the Evaluation Tool of Children's Handwriting (ETCH) the student's writing was described as fluent, consistent and legible despite many formational errors (id. at pp. 3-4). The evaluator indicated that OT services were not required at that time (id. at p. 4).

A Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF – 4) was administered as part of a speech-language evaluation on December 1, 2005 (Joint Ex. 16). The student's performance yielded standard (and percentile) scores of 112 (79) in expressive language, 105 (63) in receptive language, and a core language standard score of 111 (77) (id. at p. 1). The evaluator noted that the student's articulation and fluency were within normal limits and, based upon formal testing and informal observation, determined that speech-language services were not required at that time (id. at p. 9).

A CSE subcommittee convened on December 12, 2005 to discuss the recent speech-language, OT and psychiatric evaluations of the student (Joint Ex. 15 at p. 4). Notes from the review indicate that the CSE discussed the psychiatric evaluation report, which confirmed the presence of a learning disability and ADHD and also offered a diagnosis of PDD-NOS (id.). Noting that the evaluating psychiatrist recommended continuation in the district's Oasis program to address social-emotional deficits, the CSE recommended continued placement in that program and made no changes to the 2005-06 IEP (id. at pp 4, 5).

The CSE convened on April 18, 2006 for the student's annual review and to prepare an IEP for the 2006-07 school year (Joint Ex. 14). The IEP developed at the April 2006 meeting notes that the student had been very successful in regular education science class as well as in his Oasis math class (id. at p. 3). He performed successfully in social studies but experienced difficulty when reading or writing was required, and learned most effectively when listening to class discussions, using visual aids, or participating in hands-on activities (id.). The student was described as "generally cooperative" but the IEP noted that he avoided difficult assignments at home and in school (id.).

The CSE recommended mainstream math and continued placement in the Oasis program for English Language Arts (ELA), science, social studies, and skills classes, but increased his Wilson-based resource room reading to three hours per week, in a small group setting not to exceed 5:1 (Tr. p. 228; Joint Ex. 14 at p. 1). The CSE also recommended continued counseling with the school psychologist once per week for 30 minutes, in a small group setting (Joint Ex. 14 at p. 1).

The CSE further recommended extended school year services of resource room reading instruction three times per week for one hour and 30 minutes (id. at p. 2). However, for the 2006-07 school year, the student attended Kildonan, a private school that is not approved by the State to provide special education services to students with disabilities (see 8 NYCRR 200.1[d], 200.7; IHO Decision at p. 12). While at Kildonan, the student received one-to-one reading instruction 45 minutes per day, utilizing the Orton-Gillingham approach (Tr. p. 1095).²

In a November 20, 2006 progress report from Kildonan, the student's language training teacher reported that the student submitted his nightly tutoring assignments "neatly and on time" (Parent Ex. 10 at p. 1). His math teacher reported that the student turned in every assignment, earning a term average of 91.4 percent for those assignments (id. at p. 2). The student's literature teacher urged him to "put forth his best effort" on assignments, noting that his last two projects "did not reflect his capabilities" (id. at p. 3). The literature teacher also noted that the student regularly contributed to class discussions, but encouraged him to "stay focused on the topic of discussion" (id.). The student's history teacher reported that the student's assignments and quiz grades were above average, but that he had difficulty submitting assignments on time (id. at p. 4). The history teacher also noted that the student had a tendency to become distracted, and that while the student was an "enthusiastic contributor to class discussions," his enthusiasm sometimes "got the better of him, and his behavior became a concern" (id.). The student's earth science teacher noted some improvement in the student's weekend assignments, resulting in an average of 78 percent for assignments (id. at p. 5). She also commented on the student's class participation, but noted that the student had difficulty remaining focused on the topic to be discussed (id.). She further commented that the student "needs to remember that his role in the classroom is that of student, not teacher," and that this role would allow other students to "learn without distraction" (id.).

On May 3, 2007, the CSE met for the student's annual review and to prepare a 2007-08 IEP for the student's eighth grade school year (Joint Ex. 6). For the 2007-08 school year, the CSE recommended that the student be placed in the 12:1+1 Oasis program for English language arts, a skills class and a social skills class (id. at p. 1). A 5:1 special class reading program was recommended five times per week for 39 minutes (id.). For math and science, the CSE recommended that the student be placed in a 12:1+1 co-teaching special education program within the regular education setting (id. at pp. 1-2). The CSE also recommended that the student receive counseling once per week in a small group (id. at p. 2).

The parents testified that with respect to the student's reading and writing instruction, they believed that Kildonan's one-to-one Orton-Gillingham program was more intense and beneficial to their son than the district's Wilson-based program (Tr. pp. 804, 1207-08), and that they wanted the district's IEP to match the one-to-one Orton-Gillingham program offered at Kildonan (Tr. pp. 1094-98, 1207). The district reiterated its recommendation that a small group setting was more

² According to the hearing record, Orton-Gillingham is a multisensory approach to teaching reading and writing skills that is frequently used to teach students with dyslexia and other learning disabilities (Joint Ex. 34). With the Orton-Gillingham program, skills are taught in a definite, structured sequence (for example, single sounds come before words and short words come before long words), but the approach can be adapted to complement the strengths and address the weaknesses of the individual (id.).

appropriate in order to afford the student peer interaction and promote skills development (Tr. pp. 665-68).

In a June 4, 2007 progress report from Kildonan, the student's language training teacher noted improvement in the student's understanding of phonetic elements (Joint Ex. 4 at p. 1). The language training teacher remarked that the student sometimes strayed off topic during instruction and that he often offended others by correcting them or by inappropriately imposing his knowledge (id.). The student's math teacher reported that the student was very successful in both testing and the quality of his work, and indicated that the student's "classroom demeanor" was improving (id. at p. 2). His literature teacher reported that the student's writing skills had improved and that the student often led discussions, but frequently had to be reminded to "keep his contributions on topic" (id. at p. 3). The student's history teacher reported improved accuracy on quizzes, but also reported inconsistency in completing assignments on time (id. at p. 4). The history teacher noted that the student's actions were sometimes impulsive and disruptive and he encouraged the student to "be more receptive to other points of view" (id.). The student's science teacher reported inconsistency in completing assignments, and also noted that the student "struggled to allow others to express their understanding" and "found it hard to not be constantly at the center of attention" (id. at p. 5). The student's department grade of 60 percent in science reflected his poor listening skills and demonstrated unwillingness to cooperate (id.). A "student life" report from the Kildonan dean of students noted that the student required a great deal of redirection during community service meetings and that his "behavior prevented him from fully contributing to the group," and also noted that the student had participated in discussion with the dean of students regarding appropriate social behavior (id. at p. 6).

By due process complaint notice dated July 23, 2007, the parents requested an impartial hearing (IHO Ex. 9). The parents formally rejected the May 3, 2007 IEP, advised that they would be placing their son at Kildonan for the upcoming 2007-08 school year, and sought payment of the student's tuition at Kildonan, including the costs of the student's five day per week boarding at Kildonan and transportation (id.).

An impartial hearing was convened on October 16, 2007 and concluded on January 17, 2008, after five days of testimony. The impartial hearing officer determined that the district's IEP was appropriate in all aspects except for reading instruction (IHO Decision at p. 30). Specifically, the impartial hearing officer found the May 2007 IEP deficient because it did not offer the student reading instruction in a one-to-one setting, and because it did not provide sufficient pre- and post-CSE testing data to demonstrate that the district's proposed reading program in a small group (5:1) setting would promote the student's progress (id.). By decision dated February 26, 2008, the impartial hearing officer found that the parents met their burden of proving that the district did not offer a FAPE to the student for the 2007-08 school year, and awarded the parents the student's full tuition at Kildonan (id. at pp. 33-34).

The district appeals from the impartial hearing officer's decision and seeks to overturn the decision in its entirety. Specifically, the district asserts that the parents failed to meet their burden of proving that the district's recommended program for the student for the 2007-08 school year was inappropriate, and that they also failed to prove that the Kildonan program was appropriate for the student.

The parents answered, requesting: (1) dismissal of the petition in its entirety; (2) affirmation of the impartial hearing officer's decision; (3) a declaration that the student was denied a FAPE for the 2007-08 school year; (4) a declaration that the parents' unilateral placement of the student at Kildonan for the 2007-08 school year was appropriate and conferred educational benefit upon him; and (5) a declaration that the equities support funding of their unilateral placement at Kildonan.

Initially, I will address the parents' assertion, raised for the first time on appeal, that the May 3, 2007 IEP is a nullity because the CSE was improperly constituted. The parents contend that because the CSE ultimately recommended placement of the student into mainstream math and science classes, a regular education teacher should have been included as part of the CSE for such discussion and recommendation (see 34 C.F.R. § 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). I note that the parents neither amended their due process complaint notice to include this claim nor properly raised it during the impartial hearing. The district did not consent to include this claim as a part of the impartial hearing. Therefore, this claim is outside the scope of my review because it was not properly raised below and I therefore decline to find the IEP a "nullity" based on this claim (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii], 279.12[a]; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139). Having made a dispositive determination of this claim, I further note that the hearing record before me indicates that a regular education teacher did participate in the CSE meeting and the regular education teacher testified that she had previously taught the student (Tr. pp. 59-61, 66; Joint Ex. 6 at p. 5). Further, the impartial hearing officer determined that the May 2007 CSE was properly constituted (IHO Decision at p. 16).

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]). The student's

recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).³

As noted above, in his decision, the impartial hearing officer determined that ". . . the CSE's program recommendation to the [s]tudent, in all aspects except the intensity of reading instruction, offered meaningful educational benefit and would enable him to progress in his educational program" (IHO Decision at p. 26). As neither of the parties appealed this determination as it applies to the non-reading components of the May 3, 2007 IEP, that determination of meaningful educational benefit is final. The next matter for consideration is the issue of "whether the student needed one-to-one instruction in order for him to receive educational benefit to gain language decoding and encoding skills or whether instruction in a small group would be sufficient for him to acquire those skills" (*id.* at p. 21).

An independent reading of the hearing record reveals that the student was offered a FAPE for the 2007-08 school year. The hearing record does not contain any procedural inadequacies that resulted in a denial of FAPE, nor does it demonstrate that the parents were denied an opportunity to meaningfully participate in the formulation of the May 2007 IEP (see Cerra, 427 F.3d 186; see also Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366 [S.D.N.Y. 2006]). On the contrary, the hearing record shows that the parents took an active role in the development of their son's IEP. They both attended the 2007 CSE meeting (Joint Ex. 6 at p. 5). The parents did not present any evidence indicating that they were denied an opportunity to review and contribute to the IEP goals and objectives. Further, the parents did not contact the district after the CSE meeting to voice any questions or concerns about the IEP until they filed their due process complaint notice (Tr. p. 959).

In his decision, the impartial hearing officer determined that "the deficiency in the intensity of reading instruction for a [s]tudent with this [s]tudent's deficits -- coupled with the lack of pre- and post-testing information before the CSE to demonstrate that progress in a group setting had occurred -- is a substantive denial of FAPE" (IHO Decision at p. 30). I do not find that this determination is supported by the hearing record.

Meeting notes from the May 2007 CSE indicate that the CSE reviewed an April 30, 2007 interim report and February 26, 2007 teacher reports from Kildonan, a report of the December 14, 2006 classroom observation at Kildonan and all evaluation reports from 2005 (Joint Ex. 6. at p. 6). Meeting notes also indicate that the Kildonan academic dean participated in the annual review by telephone (*id.* at p. 5). The CSE did not have access to May 2007 test results from Kildonan or

³ On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. Here, the burden of proof is not a dispositive factor. The decision rendered herein is amply supported by the evidence in the hearing record. Moreover, neither party raises this issue on appeal.

the Kildonan teacher progress reports from April and June 2007 (Tr. pp. 320, 362; Joint Exs. 4; 5; 7).

The student attended Kildonan during the 2006-07 school year, and the CSE relied upon Kildonan for current test data and progress reports. Information available from Kildonan included a narrative report dated February 26, 2007 prepared by the student's language training tutor at Kildonan (Joint Ex. 9). This report described the sounds the student was working on in his daily sessions, but made no mention of any measurable progress in reading (*id.*). An April 30, 2007 interim grade report from Kildonan lacks an entry from the student's reading teacher (Joint Ex. 7). The district's 2007-08 reading teacher, who participated in the May 2007 CSE meeting, testified that the CSE also considered October 2006 scores from tests administered at Kildonan (Tr. pp. 506-07; Joint Ex. 5). However, she noted that the results had been presented as part of an informal inventory used by Kildonan to monitor progress in its own program, and that only selected subtest results were provided instead of a full test battery (Tr. pp. 464, 506-07), thereby presenting an incomplete picture of the student's progress.

While it appears that the information provided by Kildonan for the CSE's review was not extensive, it was supplemented by reports of comprehensive district assessments conducted from October to December 2005, which contained information about the student's performance less than a year and a half before the CSE convened on May 2007. The narrative description in the February 26, 2007 Kildonan report (Joint Ex. 9 at p. 1) regarding the student's reading performance is consistent with information in these 2005 evaluation reports and supports the CSE's recommended increase in reading instruction to five sessions per week, consistent with the amount of instruction the student was receiving at Kildonan when the CSE convened. Additionally, the 2007-08 reading teacher testified that had the student returned to the district for the 2007-08 school year, the district would have assessed his Wilson mastery level through an inventory, thereby ensuring his placement at the appropriate level of instruction (Tr. pp. 508-09).

The hearing record indicates that the May 2007 CSE considered a significant amount of current evaluative data regarding the student (Joint Ex. 6 at pp. 3-4). None of the evaluation reports contained in the record upon which the May 2007 CSE based its recommendations recommended that the student receive one-to-one intensive reading classes based in Orton-Gillingham. The present levels of performance contained in the 2007-08 IEP identified, among other things, the student's academic, functional, and learning needs based on information contained in those reports (*id.* at pp. 3-4, 7-9).

Other than the student's parents, there is no testimonial or documentary evidence contained in the hearing record to suggest that the district's placement was inappropriate. The testimony of Kildonan's academic dean is silent on the issue (Tr. pp. 963-1037). The student's father suggested that the district did not present other options for reading instruction other than a Wilson-based program in a small group setting (Tr. pp. 1094-98). However, the hearing record before me does not support this contention. At the impartial hearing, the CSE chairperson testified that the CSE recommended a small group setting, but had the flexibility to offer individual instruction if, after review of the district's programs and the evaluation of the student's needs, the CSE deemed it appropriate (Tr. pp. 666-67).

The hearing record indicates that members of the May 2007 CSE agreed to reconvene after the start of the school year to discuss potentially increasing the frequency of the student's Wilson reading instruction (Tr. pp. 259-60, 1206-07; IHO Decision at p. 26). In his decision, the impartial hearing officer commented "I find the CSE's willingness to be flexible and possibly increase the intensity of the service, after a short period in the new school year, as supporting a less-than-high level of confidence in the appropriateness of its recommendation for reading instruction in a group setting" (IHO Decision at p. 26). This finding is not supported by the hearing record. The 2007-08 reading teacher testified that the district would have reevaluated the student upon his return to the district to determine the appropriate level of Wilson instruction (Tr. pp. 508-09). She further testified that, because the severity of the student's reading deficit, the CSE considered reconvening to review the student's needs "after we worked with him" (Tr. pp. 434-35, 445). She also testified that the CSE's recommendation to consider reconvening was in response to concerns raised by the student's parents (Tr. pp. 446-47).

Additionally, several of the district's CSE participants testified not only as to appropriateness of the IEP program, but also as to student's progress while in the Wilson-based small group setting. His former sixth grade Wilson reading teacher testified that he did make progress, albeit limited, in the Wilson program (Tr. pp. 1158, 1169), that by the end of sixth grade, he had completed two or three books in the Wilson sequence (Tr. pp. 1168-71), and that Wilson was an appropriate program for the student's needs (Tr. p. 1161). The district's chairperson for the May 2007 CSE cited several sources opining that Wilson was an appropriate form of reading intervention for dyslexic students (Tr. pp. 660-61), and further testified that the class profile for the district's eighth grade Wilson reading program (Joint Ex. 8) was consistent with the student's special education needs (Tr. p. 676). The student's former sixth grade special education English/Oasis reading teacher also testified that the student progressed during sixth grade (Tr. p. 1189). Another special education teacher present at the May 2008 CSE meeting opined that the student's October 2006 Kildonan test scores supported the CSE's recommended placement of the student in a small group setting for reading instruction (Tr. pp. 504-05; Joint Ex. 5). The student's sixth grade regular education teacher, who also participated in the May 3, 2007 CSE, believed that the Wilson program proposed by the CSE was "tailor made" for the student's weaknesses (Tr. p. 147). The district's school psychologist, who counseled the student during his sixth grade year and also participated in the May 2007 CSE meeting, testified that the CSE considered the parents' request for more intensive reading instruction for the student in a one-to-one setting, but believed that he would be more productive in a small group setting (Tr. pp. 379-82).

Further, an October 31, 2005 psychiatric evaluation report offered a diagnosis of PDD-NOS, and recommended participation in a social skills group, a trial of an antipsychotic medication, and continuation of therapeutic supports provided by the district's school psychologist, who had been providing counseling to the student (Joint Ex. 18 at pp. 6-7). Given the serious nature of the psychiatrist's PDD-NOS diagnosis, as well as the severity of the student's behaviors as described by his parents, teachers and independent evaluators, I find that the CSE correctly identified the student's need for a program to address his social/emotional deficits and properly recommended his placement in the district's Oasis program for the 2007-08 school year. I note that the impartial hearing officer also determined that "[t]he Oasis placement and the co-teach classes and counseling confer real educational benefit on the [s]tudent" (IHO Decision at p. 30), and I concur with his determination.

In his decision, the impartial hearing officer noted in particular that the student's former sixth grade special education reading teacher was unable to provide documentation of the student's progress in Wilson because records were not maintained after the student left the district (Tr. pp. 1171-73; IHO Decision at p. 28). Although the teacher clearly recalled and testified that the student progressed by completing two levels of Wilson before departing for Kildonan (Tr. pp. 1168-72), it was unclear to the impartial hearing officer whether the student completed two levels above an established baseline or whether the student had only completed the first two levels in the Wilson sequence (IHO Decision at p. 28).

The special education reading teacher testified that all Wilson students "start at a baseline" and that by the end of the 2005-06 school year, the student had "moved up two levels" (Tr. p. 1168). She subsequently explained that a Wilson-based non-standardized test is administered to candidates for Wilson instruction (Tr. pp. 1175-76).⁴ She testified that the student had completed two or three of the Wilson books in 2005-06, and explained that the student was assessed weekly to determine his mastery level in each book (Tr. pp. 1170-71). I note that the student's 2005-06 IEP states that, as of June 22, 2005, the student was "at the early stages of Step 2" in the Wilson program, which clarifies the student's status in that program during his last year in the district (Joint Ex. 20 at p. 1).

Although she no longer had access to documentation, the student's former sixth grade reading teacher testified as to the student's strengths and needs based upon her work with him during the 2005-06 school year, noting his decoding difficulties, his need to practice strategies for fluency, and his need to become familiar with rules of phonics to enable him to break up words for decoding (Tr. pp. 1155-56). She opined that Wilson was appropriate for the student (Tr. pp. 1161-62), and that "[h]e made progress, but it was little progress" in reading during that year (Tr. p. 1158). She attributed this limited progress to the student's "difficulty buying into" the program (Tr. p. 1160). She testified that the student was often "combative" or "argumentative" during reading instruction (Tr. p. 1158). Additionally, she also testified that she had prepared reward-based individualized packets for the student's use at home to provide him with additional practice in reading fluency, but that the student's mother indicated to her that she had not had time to work with her son on these practice packets (Tr. pp. 1157-60).

In conclusion, I do not find that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2007-08 school year is supported by the hearing record. As set forth above, I find that an independent review of the hearing record does not reveal that the proposed 5:1 Wilson-based reading class could not have addressed the student's needs or that the student required one-to-one Orton-Gillingham instruction in his areas of deficit in order to receive a FAPE. I also note the impartial hearing officer's final determinations that other aspects of the 2007-08 IEP, including the recommended counseling services, offered meaningful educational benefits. Based upon the information before me, I find that the program proposed in the May 3, 2007 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit in the LRE (Viola, 414 F. Supp. 2d at 382 [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra,

⁴ The special education reading teacher who would have taught the student in the district in 2007-08 identified this test as the "WADE," an assessment designed specifically for determining the appropriate level at which to begin a student's Wilson instruction (Tr. pp. 442-43).

427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the foregoing, I concur with the district that it offered the student an appropriate program for the 2007-08 school year.

Generally, having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parents' unilateral placement of their son at Kildonan was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058). However, in the instant matter, I elect to examine this issue.

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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see also Frank G., 459 F.3d at 364-65).

The district asserts that the student requires counseling services to address his attention deficits and his social/emotional needs. Counseling services were recommended on the 2007-08 IEP and were determined by the impartial hearing officer as appropriate (IHO Decision at p. 26), and, as noted previously, no appeal of the determination was made. The parents assert that, although the student has weak social skills, the student is neither presently receiving counseling at Kildonan, nor in need of it (Tr. pp. 940-41, 1113, 1129).

The hearing record contains numerous references to the student's social skills deficits. A February 14, 2005 psychoeducational evaluation report notes that the student's manner of excessive talking and atypical thinking appears to be impacting him socially at school (Joint Ex. 27 at p. 5). A February 18, 2005 educational evaluation report noted that the student continued to "mix reality and fantasy" during conversation, as he had done when he was younger (Joint Ex. 26 at p. 2). The educational evaluator also reported that it was difficult to bring the student to a conclusion when he began discussing a topic, and that he did not appear to be aware of his listener's desire to change topics (id.). The evaluator further reported that this behavior manifested itself in reading and classroom settings and opined that the student did not demonstrate "good social judgment" (id.). A June 20, 2005 neuropsychological evaluation report noted that the student's mother described the student's difficulties in conversations related to his preoccupation with specific topics that interested him, and his difficulty separating fact from fantasy (Joint Ex. 22 at p. 2). The neuropsychological evaluation report also noted that the student's mother indicated that the student exhibited "rigid behavior and thought patterns," had become increasingly isolated socially, and was often picked on by his peers (id. at pp. 2, 3). The neuropsychologist's observation of the student during testing confirmed the presence of rigid behavior patterns (id. at p. 3). Additionally, teacher responses on the Achenbach Teacher Report and the Conners Teacher Rating Scale – Revised identified "argumentative," "defiant," and "frustrated" behaviors, as well as clinically significant elevations for "social problems," "oppositonality," "restlessness," "impulsiveness" and "inattentiveness" (id. at p. 10). Teacher responses on the Social Responsiveness Scale identified difficulty with social interactions, idiosyncratic mannerisms, rigid and inflexible behavior, and a narrow range of interests (id.). The evaluator also reported that the student "displayed some features of PDD-NOS" and recommended a psychiatric evaluation (id. at p. 13).

As noted above, an October 31, 2005 psychiatric evaluation report described the student's speech as "hesitant" and at times "pedantic" and "monotone," his affect as "constricted," and his thought processes as "circumstantial and at times quite tangential," characterized by confabulations and preoccupation with his own interests (Joint Ex. 18 at p. 5). The psychiatrist offered a diagnosis of PDD-NOS, and recommended participation in a social skills group, a trial of an antipsychotic medication, and continuation of therapeutic supports provided by the district's school psychologist, who had been providing counseling to the student (*id.* at pp. 6-7).

As noted by the impartial hearing officer, Kildonan's educational focus is on students with learning disabilities (IHO Decision at p. 33). However, Kildonan does not provide formal counseling services or social skills training as recommended by the student's evaluating psychiatrist (Tr. p. 1008; Joint Ex. 18 at pp. 6-7). Kildonan's academic dean testified that he was not familiar with what type of counseling the student had received prior to enrollment at Kildonan (Tr. p. 1009), and opined that the student benefited from regular meetings with either the dean of students or the assistant headmaster (Tr. pp. 1004, 1008). The Kildonan academic dean described the student as having "minor social issues" (Tr. p. 1003), and made no reference whatsoever to the student's PDD-NOS diagnosis. Further, the Kildonan academic dean's opinion that the student benefited from an informal manner of addressing the student's serious psychiatric diagnosis (Tr. p. 1008) is contravened by the Kildonan progress reports contained in the hearing record, which refer to the student's continued social skills difficulties (Parent Exs. 9; 10; 11; 12; 13; Joint Exs. 4; 9; 39).

The district also argues that Kildonan does not provide the student with special education services in the LRE. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S. v. Bd. Of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). Furthermore, a residential placement is one of the most restrictive educational placements available for a student (Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-024; Application of a Child with a Disability, Appeal No. 03-066) and is not appropriate unless it is required for a student to benefit from his or her educational program (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]).

Kildonan's academic dean testified that all of the students at the school are disabled, and that during the school day, the student has neither interaction with any non-disabled students nor exposure to any behavior or academic performance of any non-disabled students (Tr. pp. 1024-25). Additionally, Kildonan is located an hour's drive away from the student's home (Tr. pp. 805, 808), which, due to his parent's inability to drive him, necessitated the student's boarding on campus five days a week (Tr. p. 880; Parent Ex. 8 at p. 2; IHO Ex. 9).

After reviewing the hearing record, I concur with the district's contention that Kildonan's residential program is inappropriately restrictive for the student given his needs and that there are inadequate services or programs offered to meet the student's social/emotional needs. For the reasons set forth above, I determine that the hearing record does not demonstrate that the placement of the student at Kildonan for the 2007-08 school year was appropriate.

Having already determined that the school district offered the student a FAPE for the 2007-08 school year, and that the parents' unilateral placement of the student was inappropriate, I need not reach the issue of whether equitable considerations support the parents' claim for reimbursement, the third criterion of the Burlington analysis, and the necessary inquiry is at an end (Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated February 26, 2008 is annulled to the extent that it determined that petitioner did not offer the student a FAPE for the 2007-08 school year, that respondents' unilateral placement of the student at Kildonan was appropriate and that granted respondents' request for funding for that year.

Dated: **Albany, New York**
 May 19, 2008

PAUL F. KELLY
STATE REVIEW OFFICER