



The University of the State of New York

The State Education Department State Review Officer

No. 08-055

Application of the BOARD OF EDUCATION OF THE WARWICK VALLEY 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:

Gervin & Ferlazzo, P.C., attorneys for petitioner, Karen Norlander, Esq., of counsel

Sussman & Watkins, attorneys for respondents, Michael H. Sussman, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2007-08 school year, found that the parents' proposed unilateral placement of their son at the Kildonan School (Kildonan) for the 2007-08 school year was appropriate, and remanded the matter to the Committee on Special Education (CSE) to recommend an appropriate placement for the student consistent with the impartial hearing officer's decision. The appeal must be sustained in part.

As a preliminary matter, the district attached three exhibits to the petition for consideration as additional documentary evidence in this appeal (Pet. Exs. A-C). Exhibit A is a copy of the Board of Education's resolution, dated June 9, 2008, authorizing the instant appeal (Pet. Ex. A). Exhibit B is the district's prior written notice to the parents regarding the CSE's recommendations for special education programs, services, and placement for the 2008-09 school year (Pet. Ex. B). Exhibit C is the parents' June 12, 2008 letter to the district rejecting the programs, services, and placement recommended for the 2008-09 school year and notifying the district of their intent to unilaterally place their son at Kildonan as a residential student for the 2008-09 school year, including summer 2008, and to seek reimbursement for the costs of their son's tuition at Kildonan for the 2008-09 school year (Pet. Ex. C). In their answer, the parents object to the consideration of Exhibits B and C (Answer ¶¶ 20-21 at p. 4). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the

evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, none of the attached exhibits were available at the time of the impartial hearing. Upon review, I find it is not necessary at this time to consider any of the attached exhibits as additional documentary evidence because they are not necessary in order to render a decision in this matter.

At the time of the impartial hearing, the student was attending an 8:1+1 special class at the Board of Cooperative Educational Services' (BOCES) Walden Learning Center (Walden) (Tr. pp. 1, 10, 42). Walden's program is designed to primarily serve students classified as having an emotional disturbance (ED) from kindergarten through twelfth grade (Tr. pp. 874-75). The parents' proposed unilateral placement for the 2007-08 school year, Kildonan, is a private special education school serving students with language-based learning disabilities (Tr. p. 1399). The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability (LD) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The student, who was adopted and brought to the United States in August 2004, first entered a third grade general education setting in a district elementary school in September 2004 (Tr. pp. 70-72; Joint Exs. 11 at p. 2; 20 at p. 3).¹ Due to "out of control and defiant behaviors in the classroom," the student's teacher referred him to the office of special education for an initial evaluation (Joint Ex. 11 at pp. 1-2). A social assessment report, dated December 2004, indicated that the student left his classroom against the teacher's wishes, mocked other children, ripped up papers, and hid within the classroom (id. at p. 2). The report also contained information about the trauma and abuse sustained by the student early in his life, his placement in an orphanage from age six to age nine, and the corporal punishment administered to the student at the orphanage as discipline (id. at pp. 1-3; see Joint Ex. 12 at p. 1). According to the student's mother, he was difficult to "manage" at home and exhibited difficulty with supervision and following rules (Joint Ex. 11 at p. 2).² At that time, the student and his parents received counseling through a private clinical social worker (id.; see Joint Ex. 12 at p. 1). Based upon the student's history, the evaluator recommended a psychiatric evaluation (Joint Ex. 11 at p. 2).

At the time of the psychiatric evaluation in January 2005, the student was attending an intensive day treatment (IDT) classroom at the BOCES' Liberty Street School (Liberty Street) (Joint Ex. 12 at pp. 1-2; see Tr. pp. 72-73; Joint Ex. 11 at p. 3). The student had been placed in the IDT classroom in late November/early December 2004 as a result of the "bolting" episodes in his third grade classroom and pending recommendations by the CSE (Joint Exs. 11 at p. 2; 12 at p. 1). The psychiatrist noted that the student ran from his classroom "in an apparent panic" and for "no discernible reason other than becoming emotionally overwhelmed as a newcomer to this culture, new to the language, and new to his adoptive family" (Joint Ex. 12 at p. 1). In the IDT

¹ According to the hearing record, the student completed second grade prior to his adoption (Joint Ex. 11 at p. 3).

² All references to the student's mother, father, and/or parents are to the student's adoptive mother, adoptive father, and/or adoptive parents.

classroom, the student "responded positively," made "tremendous progress," and was "well behaved" (id.; Joint Ex. 11 at p. 3). As a result of the evaluation, the psychiatrist changed the student's initial intake diagnosis of Adjustment Disorder with Mixed Disturbance of Emotions and Conduct to Post-Traumatic Stress Disorder (Complex Type) and Reactive Attachment Disorder of Early Childhood (Joint Ex. 12 at pp. 1-2). The psychiatrist recommended a "temporary" classification as a student with an emotional disturbance and placement in a "therapeutic" school program such as Liberty Street (id. at p. 2).

In February 2005, the district conducted a bilingual psycho-educational assessment to evaluate concerns related to the student's behavior and "weak academic skills" (Joint Ex. 13 at p. 1).³ The educational psychologist assessed the student's social/emotional functioning, cognitive functioning, and academic achievement with the assistance of a translator (id. at pp. 2-7). In the summary of findings, the evaluator concluded that the student's "early experiences" and "developmental history" could account for the "social and emotional difficulties he experience[d] in the adaptation process" (id. at p. 7). Based upon observations of the student and information provided by his teachers and parents, the student continued to experience "mild to moderate emotional disturbance," which impacted "his overall functioning in varying degrees" (id.). The psychologist noted that the student was "eager to learn," but feared failure, and that he had developed "good receptive language abilities," but demonstrated difficulty with expressive language (id.). Regarding cognitive functioning, the psychologist noted that a "qualitative analysis" of the student's performance suggested "ability levels far above the results of his actual performance" (id.). At that time, the assessments did not reveal "cognitive deficits indicative of learning disabilities" (id. at p. 8). The psychologist recommended continued special support services to assist the student during his adaptation process; instruction at the Liberty Street program to "accelerate the acquisition of basic skills and promote his overall educational progress;" counseling to resolve his emotional conflicts and enhance social interactions; continued monitoring of his social, emotional, and academic functioning; and a nurturing and secure home environment (id.).

After completing the evaluation process, the CSE convened on March 3, 2005 to develop the student's initial individualized education program (IEP) for the 2005-06 school year (Joint Ex. 15 at p. 1). The CSE found the student eligible for special education programs and services as a student with an emotional disturbance⁴ and recommended placement in a 6:1+1 special class at Liberty Street with counseling as a related service (id.).⁵ The IEP noted that the student exhibited "impulsive" behavior, that concerns existed regarding the student's self-management and self-control skills, that the student's classroom behavior "seriously" interfered with instruction, and that the student's unpredictable and withdrawn behaviors required supervision (id. at p. 3). Under management needs, the CSE noted that the student's significant delays required an intensive, small student-to-teacher ratio environment to progress academically (id.). The CSE developed annual

³ Prior to his adoption, English was not the student's primary language (Joint Ex. 13 at p. 1).

⁴ See 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4].

⁵ State regulations describe a 6:1+1 special class as the "maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]).

goals and short-term objectives to address the student's identified areas of need in study skills, reading, writing, mathematics, and social/emotional behavior (*id.* at pp. 4-6). In April 2005, the student transitioned from the IDT classroom at Liberty Street to the recommended 6:1+1 special class at Liberty Street (Joint Ex. 14 at p. 4; *see* Tr. pp. 74-75). The student remained in the 6:1+1 special class through the conclusion of the 2005-06 school year (*see* Joint Ex. 16 at pp. 1-8).

As noted within the section for committee meeting information, the IEP indicated that the CSE also convened on June 6, 2005 to conduct the student's annual review (Joint Ex. 15 at p. 4). At that time, the CSE reviewed teacher progress reports, which noted the student's strong abilities in mathematics and content areas, difficulties in reading, and difficulties in writing (*id.*; Joint Ex. 14). Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) in May 2005 revealed that the student scored a 3.9 grade equivalency in broad math, a 1.2 grade equivalency in broad reading, and a 1.3 grade equivalency in broad written language (Joint Ex. 15 at p. 4; *see* Joint Exs. 14 at p. 1; 35 at pp. 1-2). The CSE noted that at times the student's anxiety interfered with his functioning, that he participated in counseling and that he experienced some anxiety in new situations (Joint Ex. 15 at p. 4). The student's English as a Second Language (ESL) teacher also reported that he was "somewhat nervous and shy" (*id.*).⁶ At that time, the student worked on sight words and vocabulary (*id.*). The IEP also indicated that the student exhibited "age appropriate" behavior (*id.*). The CSE determined that the student was eligible for extended school year services (ESY) during summer 2005 and recommended a continuation of the student's placement in a 6:1+1 special class at Liberty Street with counseling as a related service (*id.* at pp. 1, 4; *see* Joint Ex. 48 at pp. 1-5).

On February 21, 2006, a subcommittee of the CSE met to conduct the student's annual review and to prepare his 2006-07 IEP (Joint Ex. 17 at p. 1). For the 2006-07 school year, the CSE subcommittee recommended continued placement in the 6:1+1 special class at Liberty Street, counseling as a related service, and ESY services during summer 2006 (*id.*). The student's 2006-07 IEP contained annual goals and short-term objectives in the areas of study skills, reading, writing, mathematics, and social/emotional behavior (*id.* at pp. 4-6). The CSE subcommittee noted in the IEP that the student "made steady progress," performed assignments with assistance, and demonstrated difficulty following "written directions" (*id.* at p. 3). Under social/emotional development, the IEP indicated that the student exhibited "impulsive" behavior, that his classroom behavior "interfere[d] with instruction," that the student demonstrated "inconsistent social judgment," and that he had "mild to moderate" difficulty relating to peers and "occasional" problems relating to adults (*id.*). With respect to management needs, the IEP indicated that the student's significant delays required an intensive, small student-to-teacher ratio environment to progress academically (*id.*). As part of the student's behavioral management program, which included "counseling, growth recognition and corrective components," the student could also use a "time-out" area as necessary (*id.*). In addition, the CSE subcommittee noted that the student required a structured environment, and he needed to "decrease distractibility in small group lessons" and to "reduce class disruptions" (*id.*). The student remained in the 6:1+1 special class at Liberty Street through the conclusion of the 2006-07 school year (*see* Joint Ex. 19 at pp. 1-8).

⁶ In May 2005, results of an English Proficiency Level assessment indicated that the student performed within the "beginning" level (Dist. Ex. 6).

Although not available for review at the February 2006 CSE subcommittee meeting, an administration of the WJ-III ACH in May 2006 revealed that the student scored a 5.0 grade equivalency in broad math, a 2.2 grade equivalency in broad reading, and a 2.9 grade equivalency in broad written language, which demonstrated increased scores in all areas when compared to the May 2005 administration of the WJ-III ACH (compare Joint Ex. 36 at pp. 1-2, with Joint Ex. 35 at p. 1; see Joint Ex. 16 at p. 1). In addition, a May 2006 assessment of the student's English Proficiency Level indicated that he performed within the "intermediate" level, which demonstrated an improvement from the May 2005 administration (compare Dist. Ex. 7, with Dist. Ex. 6). In November 2006, the student participated in the New York State Grade 5 Social Studies Assessment as part of the New York State Testing Program (Joint Ex. 45). The student received a final score of 70, which fell within performance level "3" and indicated that the student showed "knowledge and understanding of content, concepts, and skills required for elementary-level achievement of the five learning standards that are assessed in social studies" (id.).⁷ During January 2007, the student participated in the New York State Testing Program for English Language Arts (ELA) and received a scale score of 641 falling within the scale score range of level "2," which indicated that the student "partially demonstrated the knowledge and skills required by the ELA Learning Standards" (Joint Ex. 47 at p. 1). Similarly in March 2007, the student participated in the New York State Testing Program for mathematics and received a scale score of 661 falling within the scale score range of level "3," which indicated that the student "demonstrated the knowledge and skills required by the Mathematics Learning Standards" (Joint Ex. 46 at p. 1).

In February 2007 while the student attended fifth grade, the district prepared an updated social history and conducted an updated psychological evaluation (Joint Exs. 20-21). In the summary of the student's background information, the report noted that the student's private psychiatrist changed the student's medical diagnosis to bipolar disorder (Joint Ex. 21 at p. 1). At that time, the student's private psychiatrist treated the student with medications that stabilized his behavior (id.). The report also noted that the student made "steady progress" during his attendance at Liberty Street and demonstrated increased self-confidence in his abilities, developed social interaction skills with peers, participated more in class, and developed academic skills (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) revealed that the student performed within the average range of cognitive abilities in verbal comprehension skills, perceptual reasoning skills (visual-spatial reasoning and perceptual-organizational skills), and processing speed (speed of mental problem-solving and attention), and obtained a full-scale IQ score of 84, which fell within the low average range of cognitive abilities (id. at pp. 2-4). With respect to verbal comprehension skills, the WISC-IV scores indicated that the student exhibited strengths in abstract verbal reasoning and weaknesses in word knowledge (id. at p. 3). On subtests measuring working memory (attention, concentration, mental reasoning, and auditory short-term memory), the student performed within the extremely low average range

⁷ Based upon the student's 2005-06 and 2006-07 IEPs, the student would participate in the same state or local assessments that were administered to general education students (Joint Exs. 15 at p. 2; 17 at p. 2). According to the student's 2005-06 IEP, he received test accommodations that waived spelling requirements, allowed directions to be read and explained, and provided for extended time (1.5) (Joint Ex. 15 at p. 2). In the student's 2006-07 IEP, the student's test accommodations waived spelling requirements, allowed directions to be read and explained, provided extended time (1.5), allowed questions and choices read for tests that did not measure reading comprehension, and required minimal distractions (e.g., visual distractions) (Joint Ex. 17 at p. 2).

of cognitive abilities and the evaluator noted that working memory deficits (auditory short-term memory) impeded "learning and processing complex tasks such as reading and writing" (id.).

To assess the student's achievement skills in reading, mathematics, and written language, the evaluator administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II) (Joint Ex. 21 at pp. 2, 4, 7). Overall, the student's composite reading score (decoding and comprehension) and composite written language score (spelling and written expression) both fell within the extremely low range, while his composite mathematics score (calculation and math reasoning) fell within the average range (id. at p. 4). The WIAT-II scores revealed that the student performed at the second grade level in decoding skills, phonetic skills, comprehension skills, spelling, and written expression skills (id.). In mathematics, the student's scores revealed performance at the fifth grade level (id.).

In summary, the evaluator concluded that the student's profile suggested a learning disability in reading and written language (dyslexia) and recommended small group multisensory instruction, continuation of the Orton-Gillingham approach to address reading and writing skills, presentation of information and assignments in "small incremental steps," modified assignments and verbal directions to ensure "comprehension," additional time to process auditory information and complete written work, and that the student be taught "specific strategies to deal with conflicts, frustration, anxiety, and stressful social situations" (Joint Ex. 21 at p. 6). The evaluator also recommended activities and games to improve the student's auditory memory skills, vocabulary skills, and matrix reasoning skills (id.).

On March 14, 2007, the CSE convened to conduct the student's annual review and to develop his IEP for the 2007-08 school year (see Joint Exs. 6 at p. 5; 38 at p. 5). According to the IEP Comments, the CSE reviewed background information and the psychological evaluation report, noting the student's diagnosis of bipolar disorder and associated treatment with medications (Joint Ex. 6 at p. 5). At that time, the student's special education teacher reported that the student had "opened up in the classroom," improved his social skills and interacted with peers and adults, increased his feelings of comfort within the classroom, and was "now taking more chances" (id.). In mathematics, the student currently worked in a fourth grade level book, and in reading, he currently worked in a second grade level book (id.). The student's teacher used the Orton-Gillingham approach with the student, but he continued to "struggle" with "sounds, letters and vowels" (id.). At the meeting, the student's mother expressed concern that the program for the past 2½ years had failed to address the student's "severe learning disability" (id.). The CSE recommended changing the student's classification to multiply disabled, providing ESY services for summer 2007 at the BOCES' Chester Learning Center (Chester), and recommended placing the student in an 8:1+1 special class at Chester for the 2007-08 school year (id.; Tr. p. 1316).⁸ The student was also referred for a central auditory processing evaluation (Joint Ex. 6 at p. 5).

The student's mother testified that at the March 2007 CSE meeting she rejected the recommended placement at Chester because "it was another ED program, the same kids, with no

⁸ State regulations describe an 8:1+1 special class as the "maximum class size for special classes containing students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][b]).

reading-related services" (Tr. p. 1308; see Tr. pp. 1305-06). Based upon the results of the district's psychological evaluation, which indicated a learning disability in reading and writing, the student's mother wanted the district to "start attending to the learning disability" (Tr. pp. 1308-09). According to her testimony, the student's mother had initially considered a unilateral placement for her son in a "non-approved" school (Windward) prior to the March 2007 CSE meeting, which she located through internet research for schools for dyslexia and had also visited (Tr. pp. 1305-06, 1309). When the student's mother advised the March 2007 CSE that she was considering placing her son at a non-approved school, the CSE chairperson advised her that the district "would not approve a placement at the non-approved school," and that "in order to get your child placed in a school that is not on the state approved list, it would be a huge battle" (Tr. pp. 1305-06).

In April and May 2007, the student's mother obtained a private neuropsychological evaluation and a private auditory processing evaluation (Joint Exs. 22 at p. 1; 23 at p. 1). According to the neuropsychological evaluation report, the student's private psychiatrist diagnosed the student with bipolar disorder in April 2005, treated the student with three psychotropic medications, and continued to follow him (Joint Ex. 22 at pp. 1, 6). The evaluators also noted that the student continued to receive weekly private counseling with a clinical social worker (id.). The private evaluation included the administration of approximately 22 tests and behavioral observations over the course of three days (id. at pp. 1-2). In the report, the evaluators reviewed and incorporated the district's February 2007 WISC-IV results and separately summarized individual measures of discrete neuropsychological functions (id. at pp. 2-6, 8-10). Briefly, in the area of attention/executive processes, the student's performance varied on tasks measuring basic and complex attention, his "ability to maintain sustained attention was within normal limits," and his executive functioning was within the low average to average range (id. at p. 3). On tests assessing the student's learning and memory of "verbal/auditory and non-verbal/visual material," the student performed within normal limits with some evidence of organizational difficulty (id. at pp. 3-4). In auditory processing, the student demonstrated a varied performance ranging from the extremely low average range to the average range; in particular, he performed in the extremely low range on measures of phonemic awareness (id. at p. 4). Assessments measuring language indicated that the student's receptive and expressive language abilities were "generally compromised" (id.). On tasks measuring visual perception/construction/organization, the student's visual-perceptual and visual-constructional abilities were within normal limits, but his performance on organizational skills was "compromised" (id. at pp. 4-5). On fine-motor tasks, the student's performance varied between the extremely low average range to the superior range (id. at p. 5). In the area measuring academic/achievement, the student's performance in reading (decoding and comprehension) and spelling were "three years or more below his current grade level" in contrast to his computational mathematics skills, which were at or above grade level (id.). On written language, the student performed below grade level expectations (id.).

Finally, in the area of behavioral/emotional status, the student's mother reported "behaviors associated with anxiety, depressed mood, inattention, social withdrawal, and the presence of atypical behaviors (i.e., seems unaware of others, repeats activities over and over, and appears out of touch with reality)" (Joint Ex. 22 at p. 5). She noted that the student's "social skills and ability to adapt to the changing demands of his environment" were areas of concern (id.). The student's mother also reported "symptoms of oppositional/defiant behaviors" that were not reported by the student's teachers (id.). On "critical items," the student's mother acknowledged that the student said "I want to die," "I want to kill myself," or "I wish I were dead" (id.). Similarly, the student's

teacher reported hearing the student say "I want to die" or "I wish I were dead" (id.). By self-report, the student "acknowledged the presence of feelings and behaviors associated with school maladjustment, anxiety, hyperactivity, and low self-reliance" (id.). The student also "denied the presence of auditory and visual hallucinations, but acknowledged occasional suicidal ideation" with no intent or plan (id. at pp. 5-6). The student's responses to measures of "projective self-assessment" indicated that he "often" experienced feelings of "inadequacy, low self-esteem, and socialization difficulty" (id. at p. 6). In addition, the student did not have sufficient coping mechanisms to deal with frustration (id.).

Before making their recommendations, the evaluators noted that the results "should be regarded with caution due to language and cultural differences" (Joint Ex. 22 at p. 6). Based upon the information gathered, the evaluators recommended the following: continued follow-up and treatment with the student's private psychiatrist; more intensive special education intervention in the areas of reading (decoding and comprehension), spelling and written language; an intensive 1:1 reading program with a reading specialist, using a multisensory approach such as Orton-Gillingham or Wilson to target the student's dyslexia; coordination and integration of the student's reading program between his reading teacher and classroom teacher; assistance in the areas of organizational and study skills; preview of materials presented in his classroom and/or reading assignments; breaking down "complex ideas into their elemental components" when presenting new material to the student; and use of repetition and verification to ensure understanding (id. at p. 7). The evaluators suggested changing the student's classification from emotionally disturbed to learning disabled since the student's "emotional issues are currently under control and are no longer his primary difficulty" (id.). In addition, the evaluators recommended continued counseling with the private clinical social worker and that supportive psychotherapy services were warranted due to the student's emotional and social difficulties (id.). Goals in therapy should address the student's self-esteem issues, his feelings about his remaining family members, and appropriate coping mechanisms for frustration and socialization difficulties (id.).

The student's mother testified that as a result of the district's psychological testing and the privately obtained evaluations, she began seeking "a placement that would address" the student's reading and writing issues instead of "behavioral concerns" (Tr. pp. 1298-99). The student's mother learned about Kildonan through her advocate, contacted the admission's director at Kildonan, provided Kildonan with copies of documents—including all of the student's IEPs, the district's February 2007 psychological evaluation report, and "initial testing"—brought her son to Kildonan for an interview, and returned to Kildonan on a subsequent date so that her son could spend a day participating in classes (Tr. pp. 1299-1302). The admission's director testified that Kildonan received the student's application on April 25, 2007 (Tr. pp. 1434-35). The admission's director also testified that based upon the district's February 2007 psychological evaluation report, she told the student's mother that he was "not appropriate" to attend Kildonan because the student was "classified as emotionally disturbed" (Tr. p. 1432). On May 5, 2007, Kildonan received the student's April/May 2007 privately obtained neuropsychological evaluation report (Tr. p. 1435).

According to her testimony, the student's mother learned about Walden from the student's private psychiatrist and visited the program with her son in spring 2007 (Tr. p. 1310). A CSE meeting was held on June 15, 2007 and at that meeting, the student's mother presented Walden for consideration as a placement for her son for the 2007-08 school year (Tr. pp. 1310-13). At the June 2007 CSE meeting, the committee reviewed the privately obtained neuropsychological

evaluation report and auditory processing evaluation report (Joint Exs. 6 at p. 5; 38 at pp. 5-6). The CSE incorporated information from the private evaluations within the IEP Comments and recommended a speech-language evaluation and an occupational therapy (OT) evaluation (Joint Ex. 5 at p. 5). The IEP Comments indicated that the student had already been accepted at Walden for the 2007-08 school year and would attend an 8:1+1 special class with group and individual counseling (*id.*). In addition, the IEP Comments noted that the "reading specialist reviewed the intensive reading program that [the] student will be receiving" (*id.*). The CSE recommended changing the student's classification to learning disabled (*id.*; Tr. pp. 1312-13).⁹ During summer 2007, the student received ESY services at Chester (*see* Joint Ex. 26 at pp. 1-6).

By e-mail dated June 22, 2007, Kildonan's admission's director wrote to the student's mother that she had "read over [the student's] new testing and was very happy to see that the Emotional Disorder has been [re]placed by Learning Disabled. Therefore, we are accepting him for September" (Joint Ex. 31 at p. 2; *see* Tr. pp. 1435-37).¹⁰ The admission's director testified that because the updated report "lifted the emotional disability and changed it to learning disability," the student was "more appropriate" for Kildonan and he was accepted (Tr. pp. 1432, 1437; *see* Tr. pp. 1302-03). Kildonan sent a letter dated June 26, 2007, which notified the parents of the student's acceptance for the 2007-08 school year and enclosed a contract (Parent Ex. A). The student's mother testified that although her son had been accepted at Kildonan for the 2007-08 school year, he did not attend because based upon her previous conversation with the CSE chairperson at the March 2007 CSE meeting, she understood that the district would not approve a placement at a "non-approved" school without a "huge battle" and at that time, she "did not have the resources legally, financially to start the long battle" (Tr. pp. 1302-07). She further testified that she was placing her son at Walden where he would receive reading, and if that placement did not work, she "resigned" herself to "fight it legally" (Tr. p. 1307). In July 2007, the district conducted the OT and speech-language evaluations recommended by the June 2007 CSE (Joint Exs. 24-25).

On August 14, 2007, a subcommittee of the CSE conducted a program review to discuss and review the OT and speech-language evaluations (Joint Ex. 6 at pp. 1, 5-6). The CSE subcommittee incorporated information from the OT and speech-language evaluations within the IEP Comments and recommended one 30-minute session per week of speech-language therapy in a 3:1 setting, one 30-minute session per week of speech-language therapy in a 1:1 setting, and one 30-minute session per week of OT in a 1:1 setting (*id.*). In addition, the CSE subcommittee developed annual goals for speech-language therapy and OT (*id.* at pp. 9-11). The IEP also contained recommendations that the student receive one 30-minute session per week of counseling in a 5:1 setting and one 30-minute session per week of counseling in a 1:1 setting, with annual goals to address the student's social/emotional/behavioral needs (*id.* at pp. 1, 10-11). With respect to reading, the CSE subcommittee recommended five 30-minute sessions per week of 1:1 reading instruction with a certified literacy specialist (*id.* at p. 2). In addition, the IEP contained annual goals and objectives to address the student's needs in the areas of reading, mathematics, study

⁹ *See* 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6].

¹⁰ The "new testing" referred to the student's April/May 2007 privately obtained neuropsychological evaluation (Tr. pp. 1435-37).

skills, writing, decoding, and vocabulary (*id.* at pp. 6-9, 11). The student began attending Walden in September 2007 (Tr. p. 1313).

On October 11, 2007, Walden's social worker called the student's mother to discuss concerns about an issue that had occurred at school that day involving the student (Tr. pp. 1319-20). The student's mother testified that during that telephone call, the social worker told her that "your son does not fit in this program," and that they were considering "moving him to another program" (Tr. p. 1320). According to her testimony, the student's mother attended a meeting on October 17, 2007 with Walden's social worker and the student's teacher (Tr. pp. 1320-21). At the meeting, the student's mother learned that her son did not exhibit behaviors similar to other students in the program and that Walden was considering an "ED placement" in an 8:1+1 special class in a local school building (LSB), which would provide more challenging academics (Tr. pp. 1321-23). At that time, the student's mother responded that if Walden was not appropriate, she "already" had a school that accepted her son and that she wanted an "LD placement" and not another "ED placement" (Tr. pp. 1322-23). She further testified that soon after the meeting at Walden, she contacted the district to schedule a CSE meeting because Walden was "not an appropriate fit" for her son (Tr. pp. 1329-30). Although the CSE chairperson was "caught a little off guard" by this information, a CSE meeting was scheduled for November 16, 2007 (Tr. p. 1330). On November 14, 2007, the student's mother visited the proposed LSB 8:1+1 special class placement recommended by Walden, but rejected it because it was another "ED placement" (Tr. p. 1328).

On November 16, 2007, the CSE subcommittee met pursuant to the parents' request (Joint Ex. 39 at p. 1). Attendees at the meeting included the CSE chairperson, the student's mother, the student's private clinical social worker, the parents' advocate, and the school psychologist (*id.*). In addition, Walden staff—the principal, the social worker, the student's teacher, and the student's reading teacher—participated via teleconference (*id.*). The student's teacher stated that the student was "doing extremely well here" and his "behavior was not the issue" (*id.*). She further stated that "behaviorally it is not very necessary for him to be here" (*id.*). The student's teacher noted that at that time, the student's main deficit was his reading and Walden had approached the student's mother to recommend the LSB placement as the "next step" and as a "less restrictive environment" for him (*id.*). According to the student's teacher, the recommended placement was a BOCES' 8:1+1 special class in a local school building, which would be the next step in returning the student to his regular school district (*id.*). In that setting, the student could be "mainstreamed into a regular education class in reading or math or science or social studies" depending on his abilities (*id.* at p. 4). The students in the LSB placement had less behavioral problems and could function in a regular public school setting "without needing the supports here at Walden" (*id.*). The recommended placement also offered a full-time clinician for counseling and social skills development (*id.*). Walden's social worker commented that once the student became comfortable at the LSB placement, she expected that he "would definitely be able to do some mainstreaming" (*id.*). In addition, the LSB placement would add an "intensive reading instructor" to work with the student (*id.* at p. 5).

The CSE subcommittee also discussed the student's progress in reading; the student's most recent testing results for fluency, rate, accuracy, and comprehension; using a multisensory program for reading instruction; the student's progress in mathematics and writing; and the student's strengths and weaknesses (Joint Ex. 39 at pp. 1-4). In particular, the student's reading teacher

stated that the student's fluency was at a "2.5 to 3, 3rd grade" level; his rate was at a "3rd grade" level; his accuracy was at a "2.7 grade" level; and the student's comprehension skills were at a "6th grade" level (*id.* at pp. 2-3). The reading teacher noted that although the student struggled with decoding and read slowly, he was able to read by himself and comprehend the material (*id.*). With the extra help of either the teacher or an aide reading with the student, he could read and comprehend grade level material in other subjects (*id.* at pp. 3-4).

The student's mother, advocate, and private clinical social worker directly questioned the reasoning for recommending another "ED placement" when the student's classification was LD and his primary deficit had been identified as reading (Joint Ex. 39 at pp. 4-7). Walden's principal responded that he and his staff were committed to "honoring [the] least restrictive environment" (LRE) (*id.* at p. 5). The Walden social worker noted that she was concerned with placing the student in a "very stressful environment" given the student's psychiatric history and that placement in an LSB was the "logical, secure, comfortable next step" (*id.*). According to Walden staff, the BOCES continuum had no other options to offer the student other than the recommended LSB placement (*id.* at pp. 5-6).

After the student's mother rejected the recommended LSB program, the CSE chairperson advised the student's mother that before recommending a private school program, the chairperson was mandated by law to find an appropriate program in the LRE within the district (Joint Ex. 39 at pp. 8-9). The student's mother stated that Kildonan had already accepted her son, that she wanted the district to place her son at Kildonan, that she wanted the district to pay for Kildonan, and that she was prepared for her attorney to "take action" (*id.* at p. 9). The CSE chairperson determined that another CSE meeting would be necessary so that she could have time to review other resources within the district and the nearby counties (*id.*).

By due process complaint notice dated November 21, 2007, the parents provided notice to the district of their intention to unilaterally place their son at Kildonan in January 2008 because Walden was not an appropriate placement for their son (Joint Ex. 1 at pp. 1-2). The parents asserted that Walden was not appropriate because it primarily served students with behavioral challenges and their son's dyslexia and reading and writing deficits must be addressed in a school dedicated to that profile (*id.* at p. 1). In the letter, the parents asserted that Kildonan had a strong reputation and provided intensive focus on dyslexia which would allow their son to "overcome his reading and writing deficits and make educational and emotional progress" (*id.* at pp. 1-2). The parents requested an impartial hearing to pursue tuition reimbursement for and transportation to the unilateral placement of the student at Kildonan for the 2007-08 school year (*id.* at pp. 1-2).

On December 5, 2007, the CSE convened to conduct a program review (Joint Exs. 8 at p. 1; 40). Attendees at the meeting included the CSE chairperson, the school psychologist, the student's mother, the parents' advocate, and an additional parent member (Joint Ex. 8 at pp. 4-5).¹¹ In addition, the Walden staff who participated in the November 16, 2007 CSE meeting—the principal, the social worker, the student's teacher, and the student's reading teacher—participated via teleconference (*id.*). The CSE reviewed and discussed much of the same information presented

¹¹ The CSE chairperson and the school psychologist at the December 5, 2007 CSE meeting were not the same individuals who participated at the November 16, 2007 CSE meeting as the CSE chairperson and the school psychologist (compare Joint Ex. 8 at p. 4, with Joint Ex. 39 at p. 1).

at the November 2007 CSE meeting, including the student's progress in reading and his current grade-level assessments (Joint Ex. 40 at pp. 1-4, 7-11, 13). The student's teacher indicated that in social studies, science, and math, the student followed the State curriculum at the sixth grade level (id. at pp. 11-13). The student's teacher also noted that the student was becoming more independent in his work, he circled words or asked for assistance with words he had difficulty decoding, and that he offered to read out loud in front of the entire class (id. at p. 12). She further indicated that although the student did require individual assistance to perform grade-level work and had difficulty decoding words, his ability to compensate for these weaknesses allowed him to comprehend and retain the information presented (id. at pp. 12-13). When the CSE then turned its attention to placement alternatives, there was a general consensus and understanding that the student no longer exhibited behavioral issues (id. at pp. 13, 15-16, 18, 21-24). The student's teacher also reported that although the student had observed his current classmates exhibit inappropriate behaviors at times, the student was "mature enough to know not to be influence[d] by those behaviors" and that he was not "negatively influenced" by those behaviors (id. at pp. 21-22). However, the members of the CSE also recognized, and raised as a concern, the student's significant psychiatric history and continued treatment with medications (id. at pp. 23-24). At the conclusion of the meeting, the CSE recommended increasing the student's 1:1 reading instruction from five 30-minute sessions per week to five 60-minute sessions per week (id. at pp. 19-20, 27; see Joint Ex. 8 at p. 2). The CSE also developed additional annual goals for reading (Joint Ex. 8 at pp. 6-7).

By letter dated December 6, 2007, the district responded to the parents' November 21, 2007 due process complaint notice, which the district received on November 28, 2007 (Joint Ex. 2 at pp. 1-2). On December 10, 2007, the parties met at a resolution session, but were unable to resolve the matter (Joint Ex. 43 at pp. 1-34). By e-mail dated January 14, 2008, the parents notified the district that since their son could not board residentially at Kildonan as a sixth grade student and the district denied their request to provide transportation to Kildonan for their son as a sixth grade day student, they could no longer unilaterally place their son at Kildonan in January 2008 and he would continue to attend Walden (Joint Ex. 2 at p. 1). In light of these facts, the parents stated that the impartial hearing requested by their November 21, 2007 due process complaint notice would now determine whether the district offered the student a free appropriate public education (FAPE)¹² for the 2007-08 school year and whether the district should be ordered by the impartial hearing officer to place their son at Kildonan and "pay tuition and provide transportation" (id. at pp. 1-2). The January 14, 2008 letter further indicated that "absent a district-provided placement which is appropriate, the hearing officer has jurisdiction to require placement of [the student] at Kildonan with payment of tuition and transportation" (id. at p. 2). After a telephone conference

¹² The term "free appropriate public education" means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

and an exchange of letters, the impartial hearing officer determined that the January 14, 2008 e-mail amended the parents' November 21, 2007 due process complaint notice and that new hearing dates would be established to accommodate a resolution session (Joint Exs. 3 at p. 2; 5 at pp. 1-3; IHO Ex. at pp. 1-3). The district then responded to the parents' January 14, 2008 amended complaint by letter dated January 24, 2008 (Joint Ex. 4 at pp. 1-2). On January 28, 2008, the parties attended a second resolution session in this matter (Joint Ex. 44 at pp. 1-37).

Unable to reach a resolution, the parties returned to a CSE meeting to conduct a program review on February 4, 2008 (Joint Exs. 38 at p. 1; 41).¹³ The CSE reviewed, discussed, and updated in detail the student's present levels of academic achievement, social and physical development, and management needs (Joint Ex. 41 at pp. 5-58, 63-65; compare Joint Ex. 38 at pp. 3-4, with Joint Ex. 8 at pp. 3-4). The CSE determined that academically the student struggled to decode written language, but exhibited a high level of comprehension (Joint Ex. 38 at p. 3). The CSE noted that since September 2007, the student had improved his ability to read independently, he readily volunteered to read in class, and he was focused and determined to develop his reading skills (id.). During the 2007-08 school year, the student made "slow but steady" progress in his reading program and in his acquisition of basic language skills critical to reading (id.). The February 2008 IEP documented that the student increased his reading accuracy and rate from 76 to 84 words per minute, but that he demonstrated difficulty with some higher levels of blending words and syllabication (id.). At the time of the CSE meeting, the student used a fourth grade level book for reading instruction (id.). In writing, the student could articulate his thoughts, but needed assistance putting his ideas into grammatically correct sentences with proper punctuation (id.). He was learning to self-edit and made slow but steady progress in spelling (id.). The student expressed himself well, fully understood the English language, and comfortably asked and answered questions in class (id.). The February 2008 IEP described the student's math computation skills as "grade appropriate" and indicated that he worked on multi-step word problems focusing on multiplication and division (id.). In addition to the narrative academic information, the IEP included scores from OT, speech-language and cognitive assessments completed in February and July 2007 (id. at pp. 3-4). Academically, the February 2008 IEP identified the student's needs in the areas of sight word vocabulary, oral comprehension, expressive writing skills, grammar/punctuation rules, word problems, and spelling (id. at p. 3). The IEP indicated that the student needed a multisensory systematic approach to reading integrated in all subject areas with directions clarified and checked for understanding (id.).

Socially, the February 2008 IEP noted that the student actively participated in classroom activities when he became comfortable in his environment (Joint Ex. 38 at p. 4). The IEP described the student as polite, honest, respectful, kind, patient, generous, and as having a good sense of humor (id.). The student related well to peers and adults and responded well to praise and positive feedback (id.). Walden staff reported that the student did not present behavioral problems that required special attention and that he was a positive role model for other classmates (id.). The IEP noted that at times the student expressed self-doubt about his abilities and became anxious when asked to perform tasks he viewed as academically challenging (id.). The student needed to build

¹³ In December 2007, the district's school psychologist conducted a classroom observation of the student at Walden and prepared a report (Joint Ex. 30). In January 2008, Walden's social worker and the student's teacher prepared updated progress reports (Joint Exs. 32-33).

his self-confidence and focus on his accomplishments and strengths, as well as manage his anxiety and fears so they did not interfere with his academic growth (*id.*). Physically, the student's fine-motor deficiencies affected his writing skills and required development in order to increase the student's "physical process of movement in writing" (*id.*).

Regarding the management needs, the February 2008 IEP indicated that the student required an individualized, structured, multisensory, scientifically-based reading program that focused on phonemic awareness and a working knowledge of phonics (Joint Ex. 38 at p. 4). The CSE recommended that his language arts instruction should be delivered in a class that offered specifically designed instruction in a group no larger than 15 students (*id.*). In addition, the student also required a program that provided regular opportunities for collaboration, integration and reinforcement of reading skills, writing skills, and language development across all content areas (*id.*). Although the student did not have any social/emotional needs that required special support or programmatic modifications, the CSE concluded that the student would receive the necessary level of support through specialized instruction with indirect consultation between his assigned counselor and his teachers (*id.*). He also needed a classroom free of inappropriate behaviors that distracted him from learning (*id.*). The CSE reviewed, modified, or developed annual goals and short-term objectives to address the student's identified needs in the areas of study skills, reading, writing, speech-language, social/emotional/behavioral, and motor skills (*id.* at pp. 8-11; Joint Ex. 41 at pp. 59-87).¹⁴

Based upon the information presented at the meeting, the CSE recommended placement in the district's middle school collaborative program with daily 1:1 reading instruction, weekly counseling provided through indirect consultation, and related services of OT and speech-language therapy (Joint Exs. 38 at pp. 1-2, 4, 7; 41 at pp. 93-118). Specifically, the student's program consisted of daily ELA instruction by a special education teacher in a 15:1+1 self-contained special class, daily study skills instruction by a special education teacher in a 15:1+1 self-contained special class, and daily 1:1 specialized reading instruction (Joint Exs. 38 at p. 1; 41 at pp. 93-96).¹⁵ In addition, the student's science and social studies instruction would be provided in an "integrated" setting comprised of approximately 24 total students, including 12 to 13 special education students, and would be taught by a regular education teacher, a special education teacher, and an aide (Joint Exs. 38 at p. 1; 41 at pp. 94-95; *see* Tr. p. 119). The special education teacher who taught the student's 15:1+1 self-contained ELA and study skills classes would be the same special education teacher who provided instruction in the student's integrated science and social studies classes (Joint Ex. 41 at pp. 94-95, 109-14; *see* Tr. pp. 119, 162). As discussed at the CSE meeting, the student's mathematics instruction would be provided in a general education setting consisting of 12 students and would be taught by a dually certified regular/special education teacher (Joint Ex. 41 at pp. 103-09; *see* Tr. pp. 144-46). The CSE recommended that the student receive one session per week of individual OT to develop his fine-motor skills (Joint Ex. 38 at pp. 1, 4). The CSE also recommended that the student receive one group and one individual session per week of speech-

¹⁴ The CSE did not review the student's annual goals and short-term objectives for speech-language or motor skills because the student's therapists were not present at the meeting (Joint Exs. 38 at p. 5; 41 at pp. 79, 86-87).

¹⁵ State regulations describe a 15:1 special class as the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).

language therapy to expand his vocabulary and oral expression skills (*id.*). The district's assistant superintendent testified that the CSE based its final recommendation for placement in the middle school collaborative program upon Walden reports, presentations at the meeting, and information provided by teachers who currently taught in the district's middle school collaborative program (Tr. p. 629; *see* Joint Ex. 41 at pp. 115-18).

By letter dated February 14, 2008, the district forwarded the IEP developed at the February 2008 CSE meeting to the student's parents (Joint Ex. 9 at pp. 1-10). The parents responded by letter dated February 19, 2008, identified errors contained within the IEP, and continued to express their rejection of the middle school placement, the inappropriateness of Walden, and the unavailability of an alternative placement in an approved private school (*id.* at pp. 12-13). The district corrected some of the errors identified in the parents' letter, explained why some of the parents' suggested changes were not made to the IEP, and forwarded a corrected copy of the IEP to the parents by letter dated February 24, 2008 (*id.* at pp. 14-15).

On March 3, 2008, the parties proceeded to an impartial hearing, which concluded after six days of testimony on April 22, 2008 (Tr. pp. 1, 1396). After the completion of testimony, both parties submitted lengthy post-hearing briefs (IHO Exs. IV-V). In its post-hearing brief, the district argued that the February 4, 2008 IEP offered the student a FAPE in the LRE (IHO Ex. V at pp. 14-28). The district also asserted that the parents did not sustain their burden to establish that Kildonan was an appropriate placement, and furthermore, that Kildonan was too restrictive a placement and the impartial hearing officer should have dismissed the parents' claim as moot¹⁶ when the parents abandoned their request for placement at and transportation to Kildonan for the 2007-08 school on the last day of the impartial hearing (*id.* at pp. 28-35). Finally, the district contended that equitable considerations precluded an order directing the district to place the student at Kildonan (*id.* at pp. 35-37). The parents also submitted a post-hearing brief, which argued that the February 4, 2008 IEP failed to offer the student a FAPE, that Kildonan was an appropriate placement, that equitable considerations supported a finding that Kildonan was an appropriate placement, and that the parents' claim should not be dismissed as moot because a determination would serve to "establish pendency placement which will control, until further review, the placement to be afforded [to the student] for the 2008-09 school year" (IHO Ex. IV at pp. 6-10, 73-79). The parents' post-hearing brief then provided a detailed review of the evidence presented at the impartial hearing (*id.* at pp. 10-73).

By decision dated May 19, 2008, the impartial hearing officer determined that the parents' claim fell within the exception to the mootness doctrine "due to the length of time required to complete administrative and judicial review of the IEP challenges, and because of the likelihood that the identical issues will arise in the next school year" (IHO Decision at pp. 36-37). She also determined that the parents' claim fell within the exception to the mootness doctrine because the "parents are entitled to a determination on the merits as to what constitutes an appropriate program [for the student], as such a determination . . . would alter [the student's] pendency placement in subsequent proceedings" (*id.* at pp. 36-37). The impartial hearing officer specifically declined to address, however, what effect, if any, the current decision would have on the parents' "right to funding for [the student's] placement at the Kildonan School (as a boarding student) for the 2008-

¹⁶ The district also raised this issue at the impartial hearing (Tr. pp. 1437-38, 1458-76).

09 school year" and held that such a determination was beyond the scope of review in the instant proceeding and would need to be the subject of subsequent litigation (id. at p. 37).

The impartial hearing officer went on to address the merits of the case and concluded that the district failed to sustain its burden to establish that the February 4, 2008 IEP offered the student a FAPE because the district did not establish that the proposed program was reasonably calculated to enable the student to receive educational benefits (IHO Decision at pp. 37-39). The impartial hearing officer noted particular concerns with the district's recommended placement in large, integrated classes with general education students; the academic and functional levels of the students in the proposed 15:1+1 self-contained classes; the student's emotional fragility; the lack of sufficient support to allow the student to attend large, integrated classes; the substantial change in placement compared to the student's program at Walden; the student's ability to adjust to the significant change in placements; the ability to provide individualized attention to the student in the recommended program; the management needs of the students in the recommended placement; and the instructional level of materials to be used by the student in the recommended program (id.).

Having determined that the district's recommended program failed to offer the student a FAPE, the impartial hearing officer turned her attention to whether the parents met their burden to establish that the proposed placement at Kildonan was appropriate (IHO Decision at pp. 39-40). The impartial hearing officer determined that "at the time the parents initiated this hearing, the Kildonan School could have provided [the student] with an appropriate educational program which combined the need for a small, secure, nurturing environment and intensive, individualized reading instruction" (id. at p. 40). The impartial hearing officer did not make any determination with respect to equitable considerations because no issue existed as to "tuition reimbursement," and she remanded the matter to the CSE "to recommend an appropriate program" consistent with her decision (id. at p. 41).

On appeal, the district asserts that the impartial hearing officer erred when she failed to dismiss the parents' due process complaint notice as premature when the parents withdrew their requested relief for the 2007-08 school year and instead sought placement of their son as a residential (boarding) student at Kildonan for the 2008-09 school year. In addition, the district contends that the impartial hearing officer erred when she determined that the district failed to offer the student a FAPE for the 2007-08 school year and that Kildonan was an appropriate placement. In addition, the district argues that the impartial hearing officer exceeded her authority by ordering the district to convene a CSE to "make a recommendation consistent" with her determination that the district should place the student in an "appropriate private school," and by finding the parents' claim for placement of their son at Kildonan proper. Finally, the district asserts that the impartial hearing officer should have denied the parents' requested relief based upon equitable considerations. The district seeks annulment of the impartial hearing officer's decision in its entirety and findings that the district offered the student a FAPE for the 2007-08 school year, that Kildonan was not an appropriate placement, that the impartial hearing officer exceeded her authority, and that the parents are not entitled to relief based upon equitable considerations. In their answer, the parents seek to uphold the impartial hearing officer's decision in its entirety.

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 IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). A student's educational program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 that 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 Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

Moreover, parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105).

The New York State Legislature amended the 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; see Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-018).

Turning to the merits of the appeal, I disagree with the district's allegation that the impartial hearing officer erred when she determined that the district failed to offer the student a FAPE for the 2007-08 school year. A thorough review of the hearing record indicates that the impartial hearing officer properly concluded that the district failed to provide sufficient evidence that the recommended placement was reasonably calculated to allow the student to receive educational benefits (see IHO Decision at pp. 37-39). In her decision, many of the impartial hearing officer's concerns focused on the size in the integrated classes, the student's fragile emotional status, and the student's ability to adjust to such a significant change in placement considering the fact that since November/December 2004, the student had only been placed in either a 6:1+1 or an 8:1+1 special class in a small school (see id.).

Although the district's middle school collaborative program represents a cohesive, supportive, and thoughtful program, the impartial hearing officer correctly found that for this student the large, integrated classes constituted a significant and substantial change from the

student's then-current program at Walden (IHO Decision at pp. 37-39). The hearing record indicates that since November/December 2004, the student attended either a 6:1+1 or an 8:1+1 special class in a small school (Joint Exs. 6 at p. 1; 11 at p. 2; 12 at p. 1; 15 at pp. 1, 4; 17 at p. 1). In addition, the hearing record also indicates that while it is undisputed that this student presents with a language-based learning disability, it is also undisputed that the student presents with a significant history of psychiatric and social/emotional issues that continued to be identified as areas of concern in the student's most recent evaluations conducted in 2007 (Joint Exs. 21-22). As noted in the district's February 2007 psychological evaluation, the evaluator opined that although the student had demonstrated increased self-confidence in his abilities, developed social interaction skills with peers, participated more in class, and developed academic skills, she recommended teaching the student "specific strategies to deal with conflicts, frustration, anxiety, and stressful social situations" (Joint Ex. 21 at pp. 1, 6). In the April/May 2007 neuropsychological evaluation, the student's mother reported "behaviors associated with anxiety, depressed mood, inattention, social withdrawal, and the presence of atypical behaviors (i.e., seems unaware of others, repeats activities over and over, and appears out of touch with reality)" (Joint Ex. 22 at p. 5). She also noted difficulties with her son's social skills, his ability to adapt to changing demands in his environment, and symptoms of oppositional/defiant behavior (*id.*). Critical items acknowledged by the student's mother and the student's teacher alluded to suicidal thoughts, which were further acknowledged by the student's own self-reporting (*id.*). In addition, the student self-reported the presence of feelings and behaviors associated with school maladjustment, anxiety, hyperactivity, and low self-reliance; feelings of inadequacy, low self-esteem, and socialization difficulties; and that he did not have sufficient coping mechanisms to deal with frustration (*id.* at pp. 5-6). Both evaluation reports also noted the presence of bipolar disorder, the need for psychotropic medications to stabilize the student's mood and behavior, and the need for continued follow-up with the student's private psychiatrist (Joint Exs. 21 at p. 1; 22 at p. 1).

Thus, given that the student's social/emotional needs continued to be reported as an area of concern in his most recent psychological and neuropsychological evaluations while the student remained in a 6:1+1 special class, the district's recommended placement in large, integrated classes is not appropriate, especially since the student's February 2008 IEP does not contain any additional support or direct counseling to sufficiently address any impact on the student's social or emotional issues that may be triggered by such a significant and substantial change in placement. Although it is also undisputed in the hearing record that in October 2007 the student no longer presented with behavioral issues or management needs within the classroom to warrant placement in either a 6:1+1 or an 8:1+1 special class as defined by State regulations, the district's recommended placement in large, integrated classes, without adequate support recommended on the IEP, is not supported by the hearing record.¹⁷

Having determined that the district's placement recommended in the February 4, 2008 IEP failed to offer the student a FAPE, I will now consider the district's contention that the impartial hearing officer erred when she determined that the parents sustained their burden to establish that Kildonan "could have provided [the student] with an appropriate educational program" in a "small,

¹⁷ Although I find that the February 2008 IEP failed to offer the student a FAPE, I do note that the district responded to the parents' identified concerns and held multiple CSE meetings in an attempt to fashion an IEP that would meet the parents' concerns and the student's needs.

secure, nurturing environment and intensive, individualized reading instruction" (IHO Decision at p. 40). Upon consideration of the hearing record, I agree with the district's contention.

At the impartial hearing, the admission's director described Kildonan as a private school serving 145 students with average to above-average IQs in second through twelfth grades, who present with dyslexia or a language-based learning disability and exhibit below grade level reading and writing skills (Tr. pp. 1399-1400). Kildonan does not admit students who are "emotionally disturbed" (Tr. p. 1400). All academic content is provided in separate classes and the "subject matter teachers are not working on decoding" (*id.*). While all students in a class would receive the same homework assignments, the production of the assignment would vary according to the students' individual abilities (Tr. p. 1441). All of the teachers at Kildonan have a bachelor's degree and have received training in Orton-Gillingham from Kildonan (Tr. pp. 1401-02, 1443-45). The admission's director testified that in the seventh grade curriculum, the teachers use textbooks "a little bit," summarize material for the students, and present material both visually and auditorily (Tr. pp. 1405-06). Kildonan allows students to board residentially beginning in the seventh grade; otherwise, students attend as a day student (Tr. pp. 1402, 1409-10).

At Kildonan, students are grouped together for the purpose of instruction "basically" according to their schedules, their grade levels, and their intelligence (Tr. pp. 1446-48). The admission's director testified that Kildonan does not provide speech-language therapy or OT because "Orton-Gillingham really addresses those things" (Tr. pp. 1450-51). She further noted that the Orton-Gillingham is "kinesthetic" and thus, the students do not need speech-language therapy "anymore" (Tr. p. 1451). The admission's director also testified that Kildonan's Orton-Gillingham trained teachers could address and meet the student's speech-language therapy goals and that Kildonan's handwriting program covered the student's OT goals (Tr. pp. 1451-53).

With respect to the student, the admission's director testified that the student was admitted to Kildonan because "he was seriously behind academically" and he needed the 1:1 tutoring in Orton-Gillingham (Tr. p. 1403). During the admission's process, the director reviewed several documents including progress reports, the district's February 2007 psychological evaluation, the April/May 2007 neuropsychological evaluation, the privately obtained auditory processing evaluation, fall 2007 reading scores, and a student profile report (Tr. pp. 1411-13, 1415-17, 1422-38). As noted previously, however, the admission's director testified that based upon the district's February 2007 psychological evaluation report, she rejected the student's application for admission because the student was "classified as emotionally disturbed" (Tr. p. 1432). After receiving and reading the student's April/May 2007 neuropsychological evaluation report, the admission's director e-mailed the student's mother and stated that since the "Emotional Disorder" had been "replaced by Learning Disabled," the student had been accepted at Kildonan for September 2007 (Joint Ex. 31 at p. 2; see Tr. pp. 1435-37). The admission's director explained in her testimony that because the updated report "lifted the emotional disability and changed it to learning disability," the student was "more appropriate" for Kildonan and he was accepted (Tr. pp. 1432, 1437; see Tr. pp. 1302-03).

Based upon the hearing record and for many of the same reasons enunciated above, I disagree with the impartial hearing officer's determination that the parents sustained their burden to establish that Kildonan would have been an appropriate placement for their son during the 2007-08 school year. For reasons similar to those set forth above, there is insufficient evidence in the

hearing record to demonstrate that placement at Kildonan was appropriate considering the student's well-documented social/emotional needs. Significantly, the admission's director testified that the student was only appropriate to be accepted at Kildonan when his classification was changed from an emotional disturbance to learning disabled (Tr. pp. 1435-37). At the impartial hearing, it appears that the admission's director attempted to minimize the seriousness of the student's bipolar disorder, post-traumatic stress disorder, reactive attachment disorder, and continuing social/emotional issues in order to justify his acceptance at Kildonan and by stating that "as long as it's under control," the student was appropriate to attend Kildonan (Tr. pp. 1427-37). Although the admission's director further testified that Kildonan makes "sure that [the students] are very well monitored," the hearing record contains no information about counseling at Kildonan or how the student or his psychiatric or social/emotional issues would be "very well monitored." In addition, the hearing record does not contain any information or evidence as to how the student's significant psychiatric history or social/emotional issues would be supported at Kildonan. Thus, without adequate consideration given to the student's social/emotional needs identified in the hearing record and how Kildonan would appropriately address or meet these identified needs, the parents have failed to sustain their burden to establish that Kildonan was appropriate.

I have the considered the district's remaining contentions and find that in light of my determination, I need not address them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it determined that the parents sustained their burden to establish that Kildonan was an appropriate placement for the student for the 2007-08 school year.

Dated: **Albany, New York**
 August 7, 2008

PAUL F. KELLY
STATE REVIEW OFFICER