



The University of the State of New York

The State Education Department State Review Officer

No. 08-084

Application of the BOARD OF EDUCATION OF THE KINGSTON CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Jeffrey J. Schiro, Esq., of counsel

Family Advocates, Inc., attorneys 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 in part.

At the time of the hearing, the student was attending the Kildonan School (Kildonan) (Dist. Exs. 11; 13; IHO Ex. 1). Kildonan is a private day and boarding school for boys and girls in grades two through twelve (Apr. 11, 2008 Tr. p. 11). It serves students who have "average to above average intelligence" and have been given a diagnosis of either "dyslexia" or a specific language-based learning disability, or who present with a constellation of strengths and weaknesses that would suggest such a diagnosis (*id.*). Kildonan is not approved by the Commissioner of Education 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 is not in dispute in this proceeding (*see* 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record describes the student as having superior perceptual abilities and average verbal abilities (Dist. Ex. 3 at pp. 3, 12). He was noted to have difficulty in the processing and retention of sequential material and his recall of visual material surpassed his recall of verbal information (*id.* at p. 12). The hearing record also indicates that significant impairment was noted in the student's phonological processing abilities and written language skills, and that the student required a multisensory instructional approach (*id.*; Dist. Ex. 10 at p. 3).

The student attended a private prekindergarten program from the ages of three to five (Feb. 27, 2008 Tr. pp. 82-83). At that time, the parents noticed that the student had a "very strange

pencil grip," was "prone to falling," and had "some clumsiness" and "motor issues" (Feb. 27, 2008 Tr. p. 81). The student attended public school kindergarten within the district (Feb. 27, 2008 Tr. p. 83). In kindergarten, he still had "a strange pencil grip," would reverse some letters, and continued having gross motor issues "like falling" (Feb. 27, 2008 Tr. pp. 83-84). According to his mother, the student was a "very jovial child and always very cooperative" and "[a]ll his teachers loved him" so he "tended to do very well" in school even if there were "some things he was slow in" (Feb. 27, 2008 Tr. p. 84). When the student was in the first grade, the parents started noticing that he "had some behavior issues during group reading time" (id.). When the student was in the second grade, the parents noticed that he "started to have reading issues" that they brought this to his teacher's attention (id.). According to the student's mother, the teacher "thought maybe he had ADD because he did have trouble focusing especially during language arts period," but that they should "wait and see" (Feb. 27, 2008 Tr. pp. 85-86).¹ During the summer before the third grade, the parents hired a tutor to help their son with reading and writing because he "wasn't keeping up with his work," "was having trouble focusing," and "was really having an aversion to reading" (Feb. 27, 2008 Tr. pp. 87-88, 91).² During the third grade, the student had "trouble completing his work," "especially reading and writing" (Feb. 27, 2008 Tr. p. 87). A tutor continued assisting the student during that school year (id.). In the fourth grade, the student's mother reported that the student "scored a two on the state ELA test" (Feb. 27, 2008 Tr. p. 92).³ The student's mother also reported that at some point prior to the ELA test, the student was given some extra help in reading (id.). The student was promoted from the fourth grade, but reportedly become "increasingly unhappy" and it became harder for him to keep up with his work as it got progressively more difficult (Feb. 27, 2008 Tr. pp. 92, 94-95). Reading and writing continued to be difficult for the student in the fifth grade and, although he appeared to do well on the "surface level," the student's mother reported that he came home "very unhappy and very stressed," and "started going to the nurse quite a bit not feeling well" (Feb. 27, 2008 Tr. p. 95).

The student attended sixth grade in a district middle school, which was described as a "rocky transition" for the student, and it was further reported that he "really started to show deficits in his reading" (Feb. 27, 2008 Tr. p. 97). The student reportedly "really started having trouble keeping up with his work at home" and was missing a lot of time in classes (Feb. 27, 2008 Tr. pp. 97, 99).⁴ The student "performed below expected proficiency level" in sixth grade on the "TONYSS" exam and was subsequently given "extra support" by the district in reading (Feb. 27, 2008 Tr. pp. 100-101, 102). He also participated in a private reading program in the summer following sixth grade, which the student's mother stated "didn't work" for the student (Feb. 27, 2008 Tr. p. 103). The student's situation got "worse" in the seventh grade and the student "really, really struggled and couldn't keep up with the work," went to the nurse more often, and was "really very, very depressed at home" (Feb. 27, 2008 Tr. p. 104). As a result, the parents obtained counseling for the student with a social worker who purportedly noted some "mis-readings of

¹ "ADD" is assumed to mean an attention deficit disorder.

² The parents hired a tutor for the student "every summer through fifth grade" (Feb. 27, 2008 Tr. p. 91).

³ The student's mother defined "ELA" as the English language arts assessment and described the score of "two" as meaning that the student's reading and writing skills were "below the expected level" for the student's age or grade (Feb. 27, 2008 Tr. p. 92).

⁴ The student's mother also noted that the student had developed back pain, started having injuries in school, and was going to the nurse (Feb. 27, 2008 Tr. p. 97).

social cues, and sometimes [the student] verbally turned words around" (Feb. 27, 2008 Tr. pp. 104-05). The social worker suggested that the student be tested for dyslexia (Feb. 27, 2008 Tr. p. 105).

On April 18, 2005, the student's father took him to Kildonan for "a very brief assessment" to ascertain a need for further testing for dyslexia, and to see if he qualified for admission to Kildonan (Feb. 27, 2008 Tr. pp. 105-06; May 6, 2008 Tr. pp. 53-54; Parent Ex. F). Further testing was reportedly recommended by Kildonan (May 6, 2008 Tr. p. 53).

In early May 2005, the student's father provided consent for the district to conduct a "multisensory language therapy screening" of the student to assess the student's reading level (Parent Ex. H at pp. 1-2). The resultant May 5, 2005 report indicated that administration of the Comprehensive Test of Phonological Processing (CTOPP) yielded "poor" range and "very poor" range scores in phonological awareness (Dist. Ex. 2 at pp. 1, 3). The student's scores in phonological memory and rapid naming were also in the poor range (*id.* at p. 3). Results of the Gray Oral Reading Tests - Fourth Edition (GORT-4) indicated that the student scored in the average range for reading comprehension (*id.*). Scores for rate, accuracy, and fluency were in the below average or poor ranges (*id.*). The student's overall reading quotient was described as poor (*id.*). Although the student's reading comprehension score was in the average range, the multisensory language therapy screening report indicated that the student's phonological weaknesses may contribute to his poor fluency (*id.*).

On May 9, 2005, the district conducted an "academic screening" of the student due to suspected difficulty with reading and writing (Dist. Ex. 15). The academic screening report indicated that at that time, the student's father "assert[ed]" that the student was dyslexic, and as a result his ability to be successful in school was significantly impaired (*id.* at p. 1). Administration of selected subtests of the Wechsler Individual Achievement Test - Second Edition (WIAT-II) yielded standard (and percentile) scores of 90 (25) in word reading, 70 (2) in pseudoword decoding, and 79 (8) in written expression (*id.* at pp. 1-2). Achievement test results revealed word reading abilities that were within the expected range of the student's overall cognitive ability (*id.* at p. 2).⁵ Phonetic decoding skills and written expression were below expectancy based upon the student's cognitive ability (*id.*). The evaluator indicated that based on test results and the student's classroom performance, the student demonstrated a learning disability in decoding and written expression, and should be provided with remediation services (*id.*). Recommendations included determining whether the student met the "eligibility requirements for a 504 Accommodation Plan," provision of multisensory reading services, and a suggestion to provide advanced organizers to the student for use as reference during lessons (*id.*).

On June 8, 2005, the district convened to discuss the student and determined that the student had "a disability under Section 504 of the Rehabilitation Act that require[d] an accommodation plan to ensure his full access to all school activities" (Parent Ex. I at p. 1). The district developed a plan that noted that the student had "severe phonological weaknesses which impact[ed] all areas of reading," and that the student's reading ability was "severely impaired" (*id.*

⁵ The academic screening evaluation report indicated that cognitive testing occurred on April 28, 2005 (Dist. Ex. 15 at p.1). The diagnostic tool used during the April 28, 2005 testing was not identified in the hearing record. Testing resulted in a full scale IQ score of 97; a verbal comprehension score of 104; a perceptual reasoning score of 98; a working memory score of 86; and a processing speed score of 97 (*id.*). I note that the IEPs from the 2005-06, 2006-07, and 2007-08 school years do not reflect the April 28, 2005 test results, but do reflect cognitive testing conducted in October 2005 (Dist. Exs. 5 at p. 3; 9 at p. 3; 10 at p. 3).

at p. 2). The district recommended that the student receive accommodations as follows: extended time (double), directions read, questions read, flexible seating, spelling waived, group multisensory reading therapy three times per cycle for 40 minutes in a special location, and a copy of class notes (id.). A letter dated August 24, 2005 was sent from the middle school principal to the parents that included a copy of the 504 accommodation plan and a copy of the due process rights of Section 504 (id. at pp. 1-3).

On or about September 5, 2005, the student's father sent an e-mail correspondence to the middle school principal, in part, requesting a meeting that included the student's multisensory language reading teacher, as well as "something in writing" that would indicate the details of the multisensory reading program (Parent Ex. J). On October 6, 2005, the district's guidance counselor sent an e-mail correspondence to the student's father indicating that she would get back to him with possible meeting dates (Parent Ex. K). The student's father responded by another e-mail, stating he was concerned whether the student was making any progress in the multisensory reading program; that his personal goal was to see some improvement in the student's skills by December 2005; that he was concerned about the student's possible progress and the late start of the multisensory reading instruction; that he did not want the student pulled out of his core academic classes in order to receive multisensory reading instruction; and that the 2005-06 school year should be a "major catch up year" for the student before he began high school (id.).

Between September 17, 2005 and October 15, 2005, the student participated in a psychological evaluation obtained by the parents upon the referral of a private social worker that counseled the student at that time (Feb. 27, 2008 Tr. p. 104). Administration of the WISC-IV yielded a verbal comprehension index score (standard score (SS)⁶/percentile rank) of 106/66th percentile, a perceptual reasoning index score of 121/92nd percentile, a working memory index score of 88/21st percentile, a processing speed index score of 106/66th percentile, and a full scale IQ score of 109/73rd percentile (Dist. Ex. 3 at p. 3). The evaluator noted a disparity between simple auditory/sequential processing and other measures of the student's working memory (id. at p. 4). The psychological evaluation report indicated that although the student was not able to hold a large amount of information in short-term memory, his capacity to mentally manipulate the information that he did hold in his short-term memory was relatively strong (id.). Administration of additional diagnostic tools yielded results that reflected that the student's non-verbal problem solving and reasoning was performed with superior capacity and proficiency when the student was required to identify conceptual similarities between different visual items (id. at pp. 4-6). He was also noted to display executive functioning skills within the average range, which the evaluator determined was more consistent with the student's verbal capacities than with the higher level of performance of many of his visual processes (id. at p. 6). The evaluator opined that while the student might not immediately recognize the most efficient or effective method for solving a problem, he was "sufficiently aware of his problem solving methodology" and was able to shift his strategy to a methodology that improved his performance (id.).

Regarding the student's language abilities, administration of the Expressive One Word Picture Vocabulary Test - Second Edition (EOWPVT-2) yielded a score in the 92nd percentile, reflecting that the student was "very proficient in his verbal expression" (Dist. Ex. 3 at p. 8). However, difficulty with the student's ability to process phonological components of language was noted per the results of administration of the Lindamood Auditory Conceptualization Test (LAC),

⁶ The psychological evaluation report listed the index scores of the WISC-IV as scaled scores (Dist. Ex. 3 at p. 3).

which placed the student at the second half of the third grade in his capacity to note the identity, sequence, and number of phonemes presented (id.). The student was described as "vulnerable" to confusing vowel sounds and consonant sounds (id.). In addition, he made errors on tasks that required him to segment various phonological constructions and reorganize the sounds to fit a related sequence of phonemes (id.). The evaluator indicated in the psychological evaluation report that "[s]uch difficulties (as shall be evident) are highly correlated with impaired reading/decoding, and are the most common cognitive disorder underlying dyslexic disorders" (id.).

Administration of the Test of Written Language - Third Edition (TOWL-3) yielded scaled (and percentile) subtest scores of 5 (5) in contextual conventions, 6 (9) in contextual language, and 11 (63) in story construction (Dist. Ex. 3 at p. 8). The evaluator indicated that when asked to write a story, the student finished in less than half of the allotted time (id.). Although the student's story was described as creative in its thematic content, "significant weakness" was noted in both structure and mechanics (id.).

Administration of the WIAT-II yielded standard subtest scores of 94 in word reading, 82 in pseudoword decoding, 98 in reading comprehension, 81 in spelling, 101 in numerical calculations, 106 in math reasoning, and scores in the third quartile for reading speed and in the second quartile for target words (Dist. Ex. 3 at p. 9). The evaluator's anecdotal comments in the evaluation report indicated that although the student could be quite successful with math reasoning; language based word problems may confuse him and information may need to be repeated in order for the student to perform the problem (id. at p. 10).

Emotionally, the psychological evaluation report described the student at the time of the evaluation as "on the verge of giving up" and as someone that used a variety of mechanisms to escape from the learning environment (Dist. Ex. 3 at p. 16).

The evaluator's recommendations included 150 to 300 hours of intensive reading instruction that focused on the student's phonological processing and its automaticity, and integrated with classroom experiences and into the after-school hours to emphasize fluency training (Dist. Ex. 3 at pp. 12-13). The evaluator indicated that once the effect of the student's reading instruction had been assessed, writing instruction might be needed (id.). The psychological evaluation report provided detailed explanations regarding general principles specific to memory and recall, as well as suggestions for instructing the student that included multisensory presentation of information, connecting new learning with established facts, assessment through papers and projects, assignments or assessments that evaluate the student's capacity to use information and problem solve effectively are preferable to standardized testing, open-book formats, and incorporating information into daily activities and routines (id. at pp. 14-15). Additional recommendations were for extra time to take notes, or use of a note-taker or teacher notes; extra time to process and respond to information; identification and use of problem solving strategies; and "chunking" information (id. at p. 15).

On October 28, 2005, the district conducted a social history with the student's father acting as the informant (Dist. Ex. 4 at p. 1). The social history report described the presenting problem at the time as the student's difficulties in school, based on his difficulty with reading, writing and spelling (id. at p. 2). He was described in the report as having "severe dyslexia," a reported diagnosis that was attributed to be a primary factor at that time in the student's history of school avoidance (id.). The social history report indicated that the student had received private tutoring and in-school services for many years (id.). According to the student's father, although the family

actively inquired of the district about the student's lack of success in reading, writing and spelling; they were informed of his various strengths and weaknesses, but received no indication of an awareness of the severity of the student's reading/dyslexia that had been validated by the district (id. at pp. 2-3). The social history report mentioned, without explanation, that the student had a history of headaches in school for which he went to the school nurse, and that the student was bullied during the previous year (id. at p. 3). It also detailed that the student responded well to the diagnosis of dyslexia because he appeared to have a newfound and improved understanding of himself and a reported sense that he was not "stupid" (id. at p. 4). The student's father indicated that the student was in a vulnerable place at that time and he thought that timing was essential to avoid the possibility that the student would drop out of school (id.). The parents were "looking forward" to the student being placed in Kildonan after the Committee on Special Education (CSE) met (id.).

On or about November 15, 2005, the parents submitted an application to Kildonan for their son's admission as a day student (Dist. Ex. 20 at pp. 1-2). The application notes that the student was referred to Kildonan by his social worker and that he visited Kildonan earlier in the spring (id. at p. 3).

The student's father notified the district by letter on November 16, 2005 that he intended to enroll his son at Kildonan at public expense, and that the letter should be considered the parents' 10-day notice to the district (Parent Ex. A).

The hearing record includes a notice of referral to the CSE addressed to the parents and a request for consent dated November 18, 2005 (Parent Ex. L).

A November 29, 2005 letter from Kildonan notified the parents that the student was accepted to Kildonan for the remainder of the 2005-06 school year (Dist. Ex. 20 at p. 10).

In a December 5, 2005 letter to the district superintendent, the student's father requested that the superintendent consult with the middle school principal and the director of special education on behalf of the student because the student's father "repeatedly asked for help from the CSE office and found the results to be very unresponsive in the appropriate education" of the student (Parent Ex. M). He indicated that he advised the CSE office on November 16, 2005 that he would be enrolling the student in Kildonan "where he could get an appropriate education at public expense" because he could "not imagine that an 8th grader with a 3rd grade reading level would fare well at high school next year" (id.). The parent asked the superintendent to help him get a date for a CSE meeting and also assist with transportation arrangements for the student (id.).

A December 6, 2005 letter invited the parents to an initial referral CSE meeting scheduled for December 15, 2005 (Parent Ex. N).

A December 12, 2005 letter from the student's psychotherapist⁷ indicated that he began seeing the student when the student was in seventh grade and "under enormous stress academically" (Parent Ex. O). The psychotherapist indicated that he urged the student's parents to have the student evaluated for a learning disability that confirmed his impressions that the student was dyslexic (id.). He also urged the parents to find a school setting that would provide the student with intensive remedial help (id.). The psychotherapist saw the student a few days within the date

⁷ In the hearing record, the parents refer to the author of this letter as a "social worker" (Feb. 27, 2008 Tr. p. 104).

of the letter and stated that the student told him that at Kildonan "they understand when I don't understand and also why I don't and help me to be able to" (id.). The letter indicated that since attending Kildonan, the student appeared to display a sense of relief and the beginnings of real confidence in himself because he was reassured that he was not "dumb" (id.). The psychotherapist urged the district to do everything possible to support the student's continued development (id.).

The district's CSE convened on December 15, 2005 for an initial referral meeting (Dist. Ex. 5 at p. 1). The CSE determined that the student was eligible for special education services as a student with a learning disability, with recommended special education services starting on January 9, 2006 (id.). Program recommendations included on the resultant individualized education program (IEP) were for direct consultant teacher services one time daily for 40 minutes in the regular class environment, multisensory language therapy in a group (5:1) four times per six day cycle for 40 minutes in a special location, and speech-language therapy in a group (5:1) two times per six day cycle in a special location (id.). The CSE recommended program modifications of modified curriculum and copies of class notes (id.). The CSE also recommended testing accommodations of extended time (double), questions read and rephrased, questions read, special location with flexible seating, spelling requirements waived, and check for understanding (id. at p. 2). The December 15, 2005 IEP indicated that at that time, the student had significant delays in reading and writing which interfered with his participation in age appropriate activities (id.).

A January 9, 2006 "second request" letter from the CSE chairperson asked the parent for consent to begin the proposed special education services for the student (Parent Ex. P). The student's mother signed the consent form on January 12, 2006, but included the disclaimer, "[h]owever, this consent does not imply or represent acceptance of or agreement with the IEP proposed as a result of the 12/15/05 CSE meeting" (id. at p. 2).

An interim report from Kildonan dated January 16, 2006 indicated that the student made a smooth transition into his math class, and that he was an active participant in literature, science, and history classes (Dist. Ex. 6). The student's math teacher commented that although the student seemed to have a "great aptitude" for math, he could raise his grade by making sure that all of his homework was handed in to the teacher (id.). At the time of the interim report, the student's grades were B- in mathematics, B+ in literature, B in history, and C in science (id.).

Kildonan progress notes dated February 27, 2006 included information about skills addressed in the student's language tutorial specific to cursive writing, phonetic concepts, spelling, composition, and reading aloud (Dist. Ex. 7). The student received the following grades for his academic subjects: A- in math 8, B+ in literature 8, B in history, and B- in science (id. at pp. 2-5). The student also earned a grade of A in sports (id. at p. 6).

An April 24, 2006 Kildonan interim report reflected the following grades in the student's academic subjects: A in mathematics, B in literature, B- in history, and B- in science (Dist. Ex. 8).

The CSE convened on May 11, 2006 for the student's annual review and to develop his IEP for the 2006-07 school year (Dist. Ex. 9 at p. 1). The CSE continued the student's eligibility for special education services as a student with a learning disability (id.). Program recommendations were for 12:1+1 special classes for both English and social studies, daily for 40 minutes; and 12:1+1 integrated classes for both math and science, daily for 40 minutes (id.). Related services recommendations were for group (5:1) multisensory language therapy three times per six day cycle

for 40 minutes in a special location, and group (5:1) speech-language therapy two times per six day cycle for 30 minutes in a special location (id.). The CSE recommended a program modification of a copy of class notes (id. at p. 2). Testing accommodations were the same as those that were recommended in the December 15, 2005 IEP, with the addition of the use of a computer with spell check (id. at p. 2). The May 11, 2006 IEP stated that due to the adverse affect the student's disability had on his ability to learn a language, the student was exempt from the foreign language requirement (id.). The IEP indicated that the student would benefit from a multisensory approach to language arts (id.).

The hearing record reflects that the student attended Kildonan for the 2006-07 school year (Feb. 27, 2008 Tr. p. 153).

On April 18, 2007, the CSE notified the parents of the student's scheduled annual review meeting (Dist. Ex. 14). The CSE convened on May 4, 2007 for the student's annual review and to develop his IEP for the 2007-08 school year (Dist. Ex. 10 at p. 1). The CSE's determinations regarding eligibility, program recommendations and a related services recommendation for speech-language therapy remained the same as those made by the May 11, 2006 CSE and contained on the student's IEP for the 2006-07 school year (compare Dist. Ex. 9 at p. 1, with Dist. Ex. 10 at p. 1). A recommendation for multisensory language therapy three times per six day cycle for 40 minutes in a special location, and group (5:1) was not included on the May 4, 2007 IEP. However, a notation that "[t]he student will benefit from a multisensory approach to language arts" remained on the May 2007 IEP without further clarification (id. at p. 1). Program modifications and testing accommodations remained the same as those that were contained on the May 11, 2006 IEP (compare Dist. Ex. 9 at p. 2, with Dist. Ex. 10 at p. 2).

Under a cover letter dated July 6, 2007, the district forwarded to the parents a copy of the IEP developed at the May 4, 2007 CSE meeting (Parents Ex. B). The letter expressed the district's openness to the parents contacting the district with any questions (id.). The letter further indicated that upon the parents' request, the district would "arrange a meeting to discuss any questions that [they] may have about the recommendation or provide [them] with additional resources to contact to obtain assistance in understanding [the provided] information" (id.).

In a letter dated August 28, 2007 and stamped as received by the district on September 6, 2007, the student's father informed the director of special education that they were rejecting the proposed IEP for the 2007-08 school year; that the parents would be removing the student from the district high school in ten business days; that they would be enrolling the student in Kildonan; and that they were requesting that the district pay for the student's tuition at Kildonan for the 2007-08 school year (Dist. Ex. 11). The parents' letter included a list of multiple reasons why they felt the proposed program was inappropriate for the student (id. at pp. 1-3). The hearing record also contains a substantively identical letter from the student's father to the district dated September 28, 2007 that was stamped received by the district on September 5, 2007 (Feb. 11, 2008 Tr. pp. 50-51; Dist. Ex. 13).⁸

⁸ The letter dated September 28, 2007 appears to vary from the letter dated August 28, 2007 only in that the apparent areas of concern of the parents in the September 28, 2007 letter were typed in upper case letters (compare Dist. Ex. 11, with Dist. Ex. 13). It appears that parent mistakenly dated the letter September 28, 2007; however, testimony from the district clarifies that the district received the letter on September 5, 2007 (Feb. 11, 2008 Tr. pp. 50-51).

In a letter dated September 23, 2007, the special education director at the district responded to the parent's August 28, 2007 letter by inviting the student's father to meet with her to discuss his concerns about the student's 2007-08 IEP (Dist. Ex. 12). The hearing record does not reflect that the parents ever responded to this invitation.

The parents filed a due process complaint notice on November 2, 2007, delineating their objections to the IEP and recommended class placement (IHO Ex. 1). Specifically, the parents contended that: (1) the class size was too large; (2) the peers were inappropriate for a dyslexic child; (3) "evaluation data provided with IEP is unintelligible to parents," the standard scores were "meaningless" and did not correlate to goals, and no baseline grades were given; (4) "social/emotional needs are tremendous within the public school;" (5) no possible or actual teacher for the student's upcoming grade was at May 4, 2007 CSE meeting; (6) there was a lack of necessary assistive technology provided for in the IEP; (7) there was no information on when or where the student would take tests; (8) the IEP ignored the student's needs for substantial modifications to "learning process and environment;" (9) the reports relied upon were not current, the district did not obtain current progress reports or consider updated testing; (10) there was no classroom observation and school-based anxiety was not addressed; (11) the CSE refused to consider any other placements, including Kildonan; (12) "the baseline for study skills goals was not collected or considered;" (13) the student needs spelling instruction in a specialized class and he required goals in this area, but did not require a reading comprehension goal; (14) fluency deficits were apparent, yet not addressed by any goals; and (15) the student has a primary area of deficit in writing and required written expression goals (id.). The parents requested an impartial hearing to obtain reimbursement for tuition at Kildonan for the 2007-08 school year (id.).

The district replied to the due process complaint notice by letter dated November 19, 2007, denying each and every allegation made by the parents (IHO Ex. 2). The district maintained that it offered the student a FAPE that was reasonably calculated to meet his unique learning needs in the least restrictive environment (id. at p. 1).

An impartial hearing convened on February 11, 2008 and concluded on May 6, 2008 after six days of testimony (IHO Decision at pp. 2-4). The district called four witnesses and submitted 20 documents into evidence (id. at p. 37). The parents called three witnesses, one being the mother of the student, and submitted 42 documents into evidence (id. at pp. 38-39). The impartial hearing officer also submitted documents into evidence (Feb. 11, 2008 Tr. p. 6; May 6, 2008 Tr. p. 3; IHO Decision at p. 36).

In a decision dated June 23, 2008, the impartial hearing officer found that the district failed to meet its burden of proving that the program recommended by the district was reasonably calculated to enable the student to receive education benefits (IHO Decision at p. 30). She stated that the CSE did not conduct updated testing prior to the CSE meeting, but rather relied upon testing performed in May and October 2005, and that the CSE did not obtain current school records from Kildonan (id.). She also found that the IEP goals did not adequately address the student's deficits (id.) Specifically, she stated that the IEP did not include any goals for writing, it was unclear why speech-language therapy was recommended, and the IEP did not adequately address the student's reading deficit (id. at pp. 30-31). The impartial hearing officer determined that the parents had met their burden of proving the student's placement at Kildonan was appropriate to meet the student's unique needs and that the parents delay in providing notice to the district of their intent to place the student at Kildonan at public expense was not unreasonable, therefore, equitable considerations supported the parents' claim for tuition reimbursement (id. at pp. 32-34). Based on

her findings, the impartial hearing officer ordered the district to reimburse the parent, upon proof of payment, for tuition paid to Kildonan for the student for the 2007-08 school year (id.).

The district appeals the decision of the impartial hearing officer, alleging that the student was offered a FAPE for the 2007-08 school year, the parents did not meet their burden of proving the appropriateness of Kildonan as a placement for the student, and that the equities do not favor the parents' receipt of tuition reimbursement.

With respect to offering the student a FAPE, the district alleges, inter alia, that the CSE had timely and sufficient evaluative information for the development of the student's IEP; a classroom observation was not necessary to develop an appropriate IEP for the student; the CSE possessed adequate data on the student's performance at Kildonan; the student would have been suitably grouped for instructional purposes in the district's recommended program; the student's special education program would have been supported by multisensory language instruction in decoding and written language; the annual goals were reasonably related to the student's educational deficits; the student's writing needs would have been addressed through completion of assignments as provided in one of the goals in the IEP; and any error in the IEP failing to specify how the student would have been provided with a multisensory approach to language arts was harmless.⁹

Pertaining to the parents' unilateral placement of the student at Kildonan, the district alleges, inter alia, that Kildonan failed to adequately program for the student's deficits in reading fluency, written expression, and speech. The district also states that Kildonan has not been approved by the New York State Education Department to instruct students with disabilities, it lacks State certification, and graduates do not have the option of earning a Regents diploma. Relating to the consideration of equities, the district alleges that the impartial hearing officer erred in concluding that the parents provided the district with adequate written notice of their rejection of the IEP and their intent to enroll their son at Kildonan at public expense. The district requests that the decision of the impartial hearing officer be annulled and vacated.

In their answer, the parents deny many of the allegations of the district and argue, among other things, that the IEP was defective and inappropriate, constituting procedural and substantive violations of federal and State law, that they met their burden of proving Kildonan was an appropriate placement for the student, and that the equities support reimbursement to the parents.

The parents' original answer submitted to this office had attached to it what the parents purported to be end of year reports from Kildonan for the student for the 2007-08 school year. An amended answer that the parents later filed with this office did not contain any attachments, despite the parents referencing the attachment of end of year reports in the body of their amended answer. The parents subsequently sent to this office, under separate cover, the alleged attachments that were omitted from the amended answer. I note that the documents last received by this office were the same documents that were attached to the parents' original answer.

The district submitted a reply responding that the Kildonan reports referenced above should be disregarded, stating, among other things, that the documents were not attached to the original or amended answer served upon the district, they were not introduced into evidence at the hearing,

⁹ The district alleges that the parents knew about the multisensory language program at the recommended placement because of past experience and because one of the parents was employed by the district.

and consideration of the documents is not necessary for a State Review Officer to render a decision in this matter.

At the outset, I will address as a procedural matter the request by the parents for this office to consider documents that were not entered into evidence at the hearing. Generally, documentary evidence not presented at a 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 a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; 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).

The parents refer to the documents at issue as end of year reports for the 2007-08 school year at Kildonan (Amended Answer to Pet. at ¶ 59). The hearing in this matter concluded on May 6, 2008 (IHO Decision at p. 4). While the end of year reports from Kildonan most likely would not have been available at the time of the hearing, they will not be considered in this appeal. From the parents' answer, it appears the reports are being submitted for the purpose of illustrating "significant progress" of the student at Kildonan, which relates to the appropriateness of the parents' unilateral placement of their son at Kildonan (Amended Answer to Pet. at ¶ 59). After a complete review of the hearing record, I find that consideration of the end of year reports from Kildonan is not necessary to render a decision on the issues herein.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE¹⁰ that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400 [d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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

¹⁰ 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]).

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]; E.H. v. Bd. of Educ., 2008 WL 3930028 at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

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 and therefore applies to the present case.

I concur with the impartial hearing officer's determination that the district failed to meet its burden of proving that the program recommended by the district was reasonably calculated to enable the student to receive education benefits.

In formulating the student's 2007-08 IEP on May 4, 2007, the CSE relied upon medical health records dated December 13, 2005, a social history dated November 28, 2005, and a psychological evaluation dated October 15, 2005 (Dist. Ex. 10 at p. 4). The district did not conduct updated testing or a classroom observation of the student prior to the May 4, 2007 CSE meeting (Feb. 11, 2008 Tr. pp. 84, 110-11). Testimony elicited from the district's director of special education indicates that the May 2007 CSE also reviewed two interim reports from Kildonan from the 2005-06 school year when the student was in the eighth grade and considered verbal reports provided via teleconference by the academic dean from Kildonan (Feb. 11, 2008 Tr. pp. 28, 99-100). The director of special education recalled that in reference to the student's academic performance, the academic dean reviewed "probably the most recent" summary reports and that the academic dean indicated that the student had made academic progress at Kildonan during the 2006-07 school year (Feb. 11, 2008 Tr. pp. 28-29, 85). The director of special education also testified that she "believe[d]" that the CSE had "some report cards" and written reports, but was unable to identify which written reports the CSE had considered, and stated that neither the written reports nor the verbal reports provided by the Kildonan academic dean were documented on the May 2007 IEP or anywhere else (Feb. 11, 2008 Tr. p. 85). She further testified that the May 2007 CSE based its determination that the student's primary need in reading was in decoding (phonemic awareness), that he exhibited needs in spelling and writing mechanics, and math word problems upon the results of testing reported in the October 2005 psychological evaluation (Feb. 11, 2008 Tr. pp. 26-27).¹¹

¹¹ Additional evaluative data was made part of the hearing record, but was not shown to have been before the May 2007 CSE. This is additional evaluative data includes: academic achievement testing conducted by Kildonan in October 2006 which reflected that the student achieved grade equivalent scores of 6.9 (SS 91) and 5.7 (SS 92) in word identification and word attack, 11.7 and 12.2 in vocabulary and comprehension, and 4.2 (SS 88) in spelling (Parent Ex. GG at p. 1); testing conducted in May 2007 which revealed grade equivalent scores of 8.0 (SS 94) and 8.7 (SS 100) in word identification and word attack, "PHS" in vocabulary (67th percentile) and comprehension (88th percentile), and 5.2 (SS 88) in spelling (*id.*); and Kildonan language training progress reports from the 2006-07 school year which described the student in November 2006 as "making satisfactory progress in [language] tutoring" (Parent Ex. BB at p. 1), working on daily Orton-Gillingham (O-G) phonics drills, syllabification, spelling rules, and reading aloud for fluency and comprehension (*id.*). The Kildonan language training progress reports from 2006-07 also reflected that regarding writing skills, the student was working on writing simple, compound, and complex sentences; using semicolons to join "like" ideas; writing main and subordinate clauses; and expanding basic paragraphs, (*id.*) and that the student exhibited difficulty with finding and correcting writing errors involving subject-verb agreement (*id.*). The February 2007 language training progress report noted continued work to address the student's needs in phonics, application of spelling rules, and reading comprehension (Parent Ex. DD at p. 1). In the area of writing skills, the student reportedly was able to write detailed, creative sentences using his learned spelling concepts and mastered vocabulary words (*id.*). At the time of the progress note, he was beginning to learn how to write a good introduction for an essay (*id.*).

The academic dean from Kildonan testified that a CSE can obtain reports and testing information about students throughout the school year either from parents or directly from Kildonan; however, the hearing record is not sufficiently developed to determine whether the CSE made attempts to obtain current evaluative data from Kildonan regarding the student's present levels of performance prior to the May 4, 2007 meeting or sufficiently considered any current data it may have had (May 1, 2008 Tr. pp. 7-8). The hearing record also does not show that the student's mother presented any updated evaluative data to the May 2007 CSE. Further, the hearing record does not show that the May 2007 CSE had before it sufficient current evaluative data to utilize as a basis for development of an appropriate IEP.

I also agree with the impartial hearing officer's determination that the goals included on the May 2007 IEP do not adequately address the student's deficits. More specifically, the IEP contains no goals for writing even though writing is an identified primary area of deficit for the student (the other primary area of deficit being reading) (Dist. Ex. 10). This is a significant omission which leads to the conclusion that, for this student, the IEP as developed procedurally impeded the student's right to a FAPE and substantively was not reasonably calculated to enable the student to receive an educational benefit.

The May 2007 IEP indicated that the student had significant delays in reading and writing which interfered in his participation in age appropriate activities (Dist. Ex. 10 at p. 3). It also noted that the student functioned below grade level in written expression, demonstrated difficulty with generating ideas in writing, and demonstrated difficulty with writing sufficient details (Feb. 11, 2008 Tr. p. 107; Dist. Ex. 10 at p. 3). The May 2007 IEP included annual goals in the areas of study skills, reading, and speech-language (Dist. Ex. 10 at pp. 5-6). In the area of reading, the May 2007 IEP included two annual goals to increase the student's decoding skills and reading comprehension skills from the beginning of the ninth grade level to the beginning of the tenth grade level (Dist. Ex. 10 at p. 5). Testimony from the director of special education indicated that the student was in ninth grade at the time the CSE convened in May 2007 (Feb. 11, 2008 Tr. p. 88). The hearing record reflects that although the student's phonemic segmentation skills were strong and solid in isolation, the student continued to require review and reinforcement particularly to apply skills in context (Apr. 11, 2008 Tr. pp. 40-41). However, in the area of comprehension I note that the student has consistently exhibited skills in the average to high average range since May 2006 (see Parent Exs. Z at p. 1; GG at p. 1), yet the May 2007 IEP contained a reading comprehension goal. I also note that despite the student's identified weakness in oral reading, the May 2007 IEP did not include a goal in this area nor did the district's multisensory reading teacher testify how she would address this need in her reading instruction (Feb. 11, 2008 Tr. p. 91; Dist. Ex. 10; Parent Exs. Z at p. 1; GG at p. 1).

Testimony by the district's multisensory language teacher indicated that writing would be included in multisensory instruction, but that the writing exercises would not be "large writing," and that organization of an essay was not something that she addressed (Feb. 11, 2008 Tr. p. 169). She further testified that she devoted no instructional time to written expression including the development of ideas or outlines, but that approximately five to fifteen minutes of every other lesson could focus on writing mechanics, which she defined as grammar, punctuation and capitalization (Feb. 19, 2008 Tr. pp. 118-120). The special education teacher of the proposed 12:1+1 English class testified that she utilized a literature based curriculum with a "heavy" emphasis on writing (Feb. 19, 2008 Tr. p. 147). She indicated that students are tested on four areas in the ELA and that she incorporated those "kinds of writings" into her curriculum to provide students with writing practice such as "listening, taking notes, and being able to write an essay

from the notes that one had taken" (Feb. 19, 2008 Tr. pp. 151-52). She testified that students in her class practice writing nonfiction such as newspaper and magazine articles, analyses of literature, comparisons of two pieces of literature, and interpretations of quotes (Feb. 19, 2008 Tr. pp. 152-53). The special education teacher indicated that when teaching literature analysis she "might ask them to discuss theme or characterization or discuss plot instead of allowing them to choose which device to use until they became familiar with it," or say to the students "this piece is rich in simile" and direct them to try and work the similes into their discussion of a particular piece of literature (Feb. 19, 2008 Tr. pp. 169-70). To assist students with writing mechanics the special education teacher testified that she uses templates, "identifiers," "show[s] them what a good essay would look like," and in the beginning of the fall semester she allows them to use their notes for essay responses (Feb. 19, 2008 Tr. pp. 152-53). Although the hearing record suggests that the curriculum activities in the proposed 12:1+1 English class may have address the student's writing needs, there is insufficient information regarding the instructional strategies used by the special education teacher to teach the types of writing practiced by the students. Furthermore, there is no indication in the hearing record how the special education teacher would have met this particular student's writing needs as they were identified in the May 2007 IEP. Moreover, although the IEP suggests that the student might be considered for general education except for his delays in reading and writing, the May 2007 CSE failed to develop any goals to address the student's writing needs and failed to include the special education teacher for the recommended class as a participant in the CSE as she may have described how she would have addressed the student's specific needs in her class. There is also no testimony in the hearing record indicating how or if the special education teacher for the recommended class would have assessed this student's progress in writing in the absence of any writing goals on the IEP.

The district contends that the student's written expression needs would have been addressed by the district's speech-language pathologist, and through the completion of assignments as provided in the second annual goal of his IEP. I am not persuaded by this argument. Although testimony by the district's speech-language pathologist indicated that she could address the student's written expression needs (Feb. 27, 2008 Tr. pp. 29-30), I find that the impartial hearing officer correctly determined that the speech-language goals as written did not address the student's written expression deficits and that the May 2007 IEP included no information to indicate that the speech-language goal was intended by the CSE to meet the student's writing needs. Therefore, I find that the May 2007 IEP did not address the student's identified deficits in writing, which was one of his primary areas of need.

In light of the above, I concur with the impartial hearing officer that the district failed to meet its burden of proving it offered the student with a FAPE. Therefore, I must discuss the appropriateness of the parents' unilateral placement of the student at Kildonan.

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; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). 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. v. Bd. of Educ., 459 F. 3d 356, 364 [2d Cir. 2006][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])).

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).

I concur with the impartial hearing officer's determination that the parents satisfied their burden of proving that Kildonan provided the student with educational instruction specially designed to meet his unique needs.

According to the academic dean at Kildonan, the school's general philosophy primarily involves the remediation of the basic language needs of students with dyslexia or specific language-based learning disabilities, primarily through a daily 1:1 O-G tutorial for 45 minutes as part of the student's regular schedule (Apr. 11, 2008 Tr. pp. 11-12, 20-21). The hearing record

defines O-G as a sequential multisensory approach to teaching students with dyslexia (Apr. 11, 2008 Tr. p. 12; Parent Exs. LL at p. 1; NN at p. 3). The academic dean also reported that Kildonan provides subject matter curriculum that is college preparatory in nature (Apr. 11, 2008 Tr. p. 20). He indicated that Kildonan provides an atmosphere of social and emotional support for students who have come to the school "feeling kind of beaten down because they had difficulty learning how to read" (*id.*). Core academic subject classes range from between four and ten students per class, with one teacher (Apr. 11, 2008 Tr. p. 21). Subject matter instructional methodology in the classroom mirrors the O-G structure used in the daily 1:1 tutorial, particularly for how instruction is organized and taught for areas of vocabulary and writing (Apr. 11, 2008 Tr. pp. 20-21; May 1, 2008 Tr. p. 25). The academic dean noted that all instruction is multisensory, incorporating the student's auditory, visual and kinesthetic abilities (Apr. 11, 2008 Tr. pp. 22, 47).

The academic dean also testified that the student had difficulty in spelling, writing, and reading fluency and that the student continued to benefit from instruction at Kildonan (Apr. 11, 2008 Tr. pp. 39-43; May 1, 2008 Tr. p. 24). The academic dean explained that since attending Kildonan, the student's phonemic segmentation and phonemic awareness skills have grown to become very strong in isolation (Apr. 11, 2008 Tr. p. 41). At the time of the hearing, the student needed to learn how to apply and generalize those phonemic skills to context in paragraph and essay writing (Apr. 11, 2008 Tr. pp. 41-42). Although he was described as being able to understand and employ the structure of basic paragraphs, the academic dean indicated that the student needed continued work with writing specific to organizing his thoughts into a cohesive composition (Apr. 11, 2008 Tr. pp. 42-43). The student addressed this need in the 1:1 tutorial through analysis of his essays and critically breaking them down (*id.*). On cross examination, the academic dean explained that specific interventions related to spelling take place in the 1:1 language training tutorial in the form of daily drills with sounds, drills pertaining to sound symbol correspondence, syllables and words, word families that follow similar spelling patterns, or similar sound patterns that are spelled differently (May 1, 2008 Tr. p. 41). In addition, the academic dean testified that the student worked with sight word lists, spelling rules and generalizations that are part of O-G (*id.*).

An October 15, 2007 grade ten interim report from Kildonan indicated that by that time of the fall semester the student received a grade of B+ in mathematics, literature, and history, and a grade of B in science (Parent Ex. HH). Teacher comments indicated that the student had a good attitude and strong work ethic; that he participated fully in class discussions; that although he demonstrated a competent understanding of science course concepts in his weekend assignments, improvement could be further improved by using notes and adding details; and that in language training, the student's homework assignments appeared rushed and not always completed in a diligent manner (*id.*). The comments showed that, in addition to focusing on decoding and spelling, the student practiced expanding his paragraphs and learned several kinds of composition (*id.*). Also noted was a comment that a five-paragraph essay by the student about the immigration debate in the United States was "especially well constructed" (*id.*).

The student's November 19, 2007 language training progress report from Kildonan indicated that the student worked on cursive writing and keyboarding skills (Parent Ex. II at p. 1). He learned to identify numerous final stable syllables (e.g. -cian, -age, -tion) (*id.*). Consistent with the aforementioned testimony of the academic dean, the student engaged in spelling work that involved dictation of phonemes and words selected to reinforce the phonetic concepts being studied (May 1, 2008 Tr. p. 41; Parent Ex. II at p. 1). He maintained a spelling pack of misspelled words, including those from his writing (Parent Ex. II at p. 1). The student learned several spelling

generalizations, and displayed understanding of many spelling generalizations in isolation, but he had difficulty applying them in his assignments and in writing (id.). Regarding writing, the student benefited from prewriting exercises such as list writing, brainstorming, and outlining (id.). The student learned compound and complex sentences easily, wrote a number of expanded paragraphs, and he was introduced to three different kinds of paragraphs (i.e. example, process, and reason) (id.). The student learned the difference between main and subordinate clauses, and he could combine multiple main clauses into a sentence (id.). The language training progress report also reported that the student read a particular book with a fluid pace and at a fast rate (id.). The progress report noted that while reading aloud, the student's decoding, tone, and inflection were good (id.).

By the end of the first marking period, the student received grades of B+ for world literature, B for geometry and global studies II, and B- for biology (Parent Ex. II at pp. 2-5). Comments noted on the biology progress note were that the student's performance was hindered by his inability to complete assignments in a timely fashion (id. at p. 5).

A January 21, 2008 interim report from Kildonan indicated that the student had received a grade of B in mathematics and literature, and a grade of B- in history and science (Parent Ex. JJ). Difficulty with timely completion of homework assignments continued to be noted (id.).

A February 25, 2008 language training progress report from Kildonan indicated that the student made steady progress in spelling, and that to improve sentence structure he reviewed several parts of speech including nouns, adverbs, adjectives, and prepositions (Parent Ex. OO at p. 1). The student was described as working best if he organized his ideas first with an outline before delving into composition (id.). By the time of the progress report, he had extensively researched and composed an essay on both sides of the issue of human cloning (id.). The student received grades of A- in world literature and B in biology and geometry (id. at pp. 2-4)¹². Teacher comments for biology and geometry included descriptions of continued difficulty with timeliness and completeness of assignments (id. at pp. 2-3). Weekend assignments for world literature were described as "consistently good" (id. at p. 4).

An April 21, 2008 interim report from Kildonan indicated that the student had received grades of A- in mathematics, B+ in science, C+ in history, and D+ in literature (Dist. Ex. 18). Teacher comments indicated that in mathematics, the student attempted some extra credit questions for the first time during the school year (id.). His literature teacher indicated that his assignments were either turned in late or were incomplete (id.). His homework grade "hurt his overall grade" in history (id.). In science, the student completed all of his assignments on time and with quality, but he needed to use class time more effectively (id.). Testimony by the Kildonan academic dean indicated at the time of the hearing that any of the student's problems with literature had been addressed by the literature teacher who provided the student with a routine for how to check his assignments before he considered them finished so that he could make sure he was not submitting incomplete work (May 1, 2008 Tr. p. 48). The academic dean stated that the literature teacher assured him that the student was back on track with completing his assignments on time (id.).

Regarding related services, the academic dean indicated that Kildonan does not offer speech-language therapy (May 1, 2008 Tr. p. 30). However, any issues a student might have

¹² The progress report does not include a report for history class (see Parent Ex. OO).

specific to pragmatics, grammar, vocabulary and word use would be addressed in the 1:1 language tutorial (May 1, 2008 Tr. p. 31). If a student had difficulties such as articulation or stuttering, Kildonan would not be able to address those needs (*id.*). The academic dean stated that he interacts with the student in the instant case almost daily and never noticed a speech impediment or speech related issue (*id.*). I agree with the impartial hearing officer that it is not clear why the CSE recommended speech-language therapy for the student. Therefore, I do not find that the lack of speech-language therapy services at Kildonan negatively impacted the student in this case such as to render Kildonan inappropriate.

Testimony by the student's mother indicated that despite some difficulty with the student's initial transition to Kildonan in December 2005 and a long school day and ride home, the student went to school without complaint and continues to do so willingly (Feb. 27, 2008 Tr. p. 128). At the time of the hearing, the academic dean reported that the student appeared to be a "very happy and well-adjusted student and member of the [Kildonan] community (Apr. 11, 2008 Tr. p. 50). He described the student as very connected to his peers and to his teachers, and as outgoing (Apr. 11, 2008 Tr. pp. 50-51). In addition, the dean opined that the student's academic progress was a "huge contribution" to the student's social and emotional progress (Apr. 11, 2008 Tr. p. 51). The dean indicated that he always sees the student happy and never off on his own, away from peers (*id.*). Furthermore, the dean explained that if any parent is interested in securing counseling services for their child, or if Kildonan feels that counseling is a crucial part of the student's education at the school, Kildonan has a team of counselors who will contract with parents to go to Kildonan and provide services to the students at the school (Apr. 11, 2008 Tr. p. 49, May 1, 2008 Tr. p. 52). Testimony by the private psychologist that conducted the 2005 psychological evaluation indicated that he saw the student at some point subsequent to the testing, but prior to providing testimony at the impartial hearing, and that the student appeared more emotionally positive and optimistic, and that the student seemed to have a capacity to adapt more to stressful situations (Apr. 11, 2008 Tr. pp. 71-72).

Based upon the foregoing, I find that the parent's placement of the student at Kildonan was reasonably calculated to enable the student to receive educational benefits and that the parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

Having found the placement selected by the parents to be appropriate, I now turn to the final criterion for an award of tuition reimbursement, namely, whether the parents' claim is supported by equitable considerations (*see* 20 U.S.C. § 1412[a][10][C]; *Frank G.*, 459 F.3d at 363-64; *Carmel Cent. Sch. Dist. v. V.P.*, 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], *aff'd*, 2006 WL 2335140 [2d Cir. 2006]).

The district alleges that the parents failed to comply with 20 U.S.C. § 1412[a][10][C][iii] and that their request for tuition reimbursement should therefore be denied. The district also alleges that the parents failed to cooperate with the CSE (*see M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 66 [2d Cir. 2000]).

The final criterion for a tuition reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (*Burlington*, 471 U.S. at 374; *M.C. v. Voluntown*, 226 F.3d 60, 68 [2d Cir. 2000]; *see Carter*, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the

cost of the private education was unreasonable"). With respect to equitable considerations, the IDEA also provides that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181 at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); Application of a Child with a Disability, Appeal No. 07-133; Application of the Dep't of Educ., Appeal No. 07-120; Application of the Dep't of Educ., Appeal No. 07-115; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 07-079; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 07-038; Application of the Dep't of Educ., Appeal No. 07-032; Application of the Bd. of Educ., Appeal No. 06-122; Application of a Child with a Disability, Appeal No. 06-069; Application of the Dep't of Educ., Appeal No. 06-057; Application of a Child with a Disability, Appeal No. 06-042; Application of a Child with a Disability, Appeal No. 06-041; Application of a Child with a Disability, Appeal No. 06-035; Application of the Bd. of Educ., Appeal No. 05-092; Application of the Bd. of Educ., Appeal No. 04-022).

In discussing the equities I note preliminarily that the district had an affirmative obligation to offer the student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d at 371; see Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137). Federal and State statutes and regulations provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93). The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 546 U.S. at 53).

The IEP in this case was not shown to be adequate under the IDEA primarily because of a lack of a showing that it was based on current evaluative data (although current available data was available) and because it failed to have annual instructional goals for a primary need area (writing).

The deficiencies in the IEP appear to be errors of omission.¹³ The IEP deficiencies do not appear to arise out of a refusal of the district to provide instructional goals, or an educational service, or to consider certain evaluative data. In essence, the errors were correctable errors. They could have been remedied in a timely fashion had the parties worked in a collaborative manner as the IDEA envisioned that parents and districts would. The dispute in this matter over the IEP is not one where the parties are at an impasse over what the content of the IEP should be.

The parents gave notice to the district that they intended to place their son at Kildonan at public expense for the 2005-06 school year on November 16, 2005 (Parent Ex. A). They did not provide any similar notice for the 2006-07 school year. The parents chose not to pursue tuition reimbursement for the 2005-06 and 2006-07 school years (Feb. 11, 2008 Tr. p. 132; Feb. 27, 2008 Tr. p. 132).

At the CSE meeting on May 4, 2007, the parents did not make known an intention to enroll their son at Kildonan at public expense for the 2007-08 school year (Feb. 11, 2007 Tr. p. 103; May 6, 2008 Tr. pp. 23-24).¹⁴ The parties attended the May 2007 CSE meeting and together formulated the IEP (Dist. Ex. 10 at p. 4). There is no indication that the student's mother's participation was in any way significantly impeded at the CSE meeting. Nor did the parents inform the district in writing of their concerns with the IEP or an intent to place the student at Kildonan at public expense upon their receipt of the final IEP in July 2007, even though the student's mother had concerns about the IEP and even though the cover letter included with the IEP sent to the parents advised them that if they had any concerns with the enclosed IEP they should contact the district's director of special education so that a discussion or another meeting could take place to address any parental concerns (May 6, 2008 Tr. p. 48; Parent Ex. B; see Tr. p. 136). Instead, the parents waited until no earlier than August 28, 2007 to mail a letter to the district informing it that they were rejecting the IEP and intended to enroll their son in private school at Kildonan at public expense (May 6, 2008 Tr. p. 48; Dist. Ex. 11).¹⁵ The letter from the parents is stamped received by the district on September 6, 2007 (Dist. Ex. 11). Testimony reflects that the 2007-08 school year started on September 5, 2007 (Feb. 11, 2008 Tr. p. 61). Testimony also evidences that prior to receiving the letters dated August 28, 2007 and September 28, 2007, the district had not received any other written or verbal notice of the parents' concerns with the IEP, or their intention to continue their son at Kildonan and to seek tuition reimbursement (id.).¹⁶ Accordingly, the parents did not provide

¹³ I note that the prior year's IEP for the 2006-07 school year, contained annual goals to address the student's writing needs (Dist. Ex. 9). Inexplicably, annual goals for writing were left off the 2007-08 IEP (Dist. Ex. 10).

¹⁴ I note, however, that the IEP generated at the May 4, 2007 CSE meeting listed the student as being unilaterally enrolled at Kildonan (Dist. Ex. 10). Testimony at the hearing indicates that the notation on the 2007-08 IEP may have been carried over from the student's 2006-07 IEP (Feb. 11, 2008 Tr. p. 103).

¹⁵ The August 28, 2007 letter did not take the district up on its offer to meet and address the parents' concerns, but rather advised the district that they were rejecting the May 2007 IEP and were seeking, as relief, not a corrected IEP and public school placement, but private school tuition (Dist. Ex. 11).

¹⁶ I note that the parents submitted a request dated March 30, 2007 to the district seeking transportation for their son to Kildonan for the 2007-08 school year; however, this notice did not meet the statutory requirements under the ten-day notice provision in that the parents did not state their concerns with the recommended program because the request was submitted prior to the CSE's recommendations for the 2007-08 school year, and the request did not seek public funding for their unilateral placement of their son at Kildonan (Parent Ex. U).

the requisite amount of notice to the district (see 20 U.S.C. §§ 1412[a][10][C][iii], 1412[a][10][C][iv]; see also 34 C.F.R. §§ 300.148[d], 300.148[e]).

The student's mother testified that she believed she had satisfied the ten-day notice requirement for the 2007-08 school year because she had, "in previous years," provided the district notice that they were placing their son at Kildonan (May 6, 2008 Tr. p. 48). The hearing record reflects that the parents have received notices of procedural safeguards with correspondences from the CSE that state the requirement of giving notice before making a unilateral placement for which they intend to seek public reimbursement (Parent Exs. B, L, N, P, Q, V). The notice requirement must be fulfilled every school year. Therefore, I disagree with the impartial hearing officer that the student's mother's belief that she had satisfied the notice requirement for the 2007-08 school year by providing notice of her unilateral placement in 2005, was not unreasonable and was enough to overcome the notice requirement.

Based on the foregoing and contrary to the determination by the impartial hearing officer, I find that the parents did not provide the requisite notice to the district that they were unilaterally placing the student at Kildonan and seeking tuition reimbursement, acted unreasonably and, as such, equitable considerations in this case do not favor an award of tuition reimbursement for the parents. In addition, I note that when the parents became aware of deficiencies or omissions in the IEP when they received it during summer 2007, they did not provide notice of their dissatisfaction with the IEP in a timely manner which would have enabled the CSE to attempt to correct any mistakes in the IEP (see Frank G., 459 F. 3d at 376 [finding that separate and apart from the statutory requirements, courts have uniformly held that it is inequitable to permit reimbursement "where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP"] quoting M.C., 226 F.3d at 68). Moreover, in this case, the district contacted the parents on September 23, 2008, in an effort to invite them to meet to discuss their concerns regarding the IEP (Dist. Ex. 12). The parents did not respond to this invitation and instead moved forward with an impartial hearing (Feb. 11, 2008 Tr. pp. 51-52). Under the circumstances of this case, I find that the equities do not support an award of tuition reimbursement.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

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 found that equitable considerations favored the parents and awarded them tuition reimbursement for their unilateral placement of the student at Kildonan for the 2007-08 school year.

Dated: Albany, New York
October 2, 2008

PAUL F. KELLY
STATE REVIEW OFFICER