The University of the State of New York

The State Education Department
State Review Officer

No. 08-130

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Millbrook Central School District

Appearances:
Family Advocates, Inc., attorneys for petitioners, RosaLee Charpentier, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, Esq. and Garrett L. Silveira, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that respondent (the district) offered an appropriate educational program to their son (the student) for the 2007-08 school year. The district cross-appeals from the impartial hearing officer's determination insofar as it ordered the district to fund the student's tuition for the entire 2007-08 school year at the Kildonan School (Kildonan). The appeal must be sustained in part. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending Kildonan, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7; see also Tr. p. 735). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

According to his father, the student's early years of development were uneventful (Parent Ex. M at p. 7). The student attended nursery school for two years, during which he consciously avoided language-related activities (id.). He then began kindergarten in a district school, where he demonstrated significantly delayed reading abilities (id.). His reading difficulties persisted during the student's first grade year in a district elementary school, during which he also constantly complained of sickness and stomach pains in order to avoid attending school (id. at p. 8). At the conclusion of his first grade year, the student was evaluated by a district school psychologist, who opined that the student had a learning disability (id. at p. 7). During the summer between his first and second grade years, the parents arranged for a Kildonan instructor to individually tutor the

student twice per week, after which he was purportedly performing at grade level as he started second grade (id. at pp. 8-9).

The district's Committee on Special Education (CSE) initially determined that the student was eligible for special education services as a student with a learning disability in June 2003, while he was in second grade in a district elementary school (Parent Ex. M. at p. 3). In September 2003, the parents sought an independent psychological evaluation of the student, after which he received a diagnosis of "dyslexia" (Dist. Ex. SDIII-D at p. 17). The evaluating psychologist suggested that the student be taught using a multisensory approach such as Orton-Gillingham (OG) or Wilson (id.).

On October 15, 2003, the CSE reconvened, and recommended a special class in language arts and math, in a 15:1+1 setting; testing accommodations consisting of untimed tests, administered in a special location, with both directions and questions read aloud and explained; and program modifications consisting of modified homework assignments and preferential seating (Dist. Ex. SDII-A at p. 1). Although exhibiting "overall average intellectual ability," the CSE noted that the student "demonstrates a significant non-verbal learning disability that interferes with his progress in reading, writing, and math" (id. at p. 2). While attending second grade in the district, the parents procured a different Kildonan instructor to individually tutor him once per week, and the student's father observed his son's regression back to feigning illness in order to avoid attending school, and refusing to read (id. at p. 9). His father attributed this regression to a decrease in the amount of individual tutoring and the district's use of Wilson teaching methodology, as opposed to the OG the student received from the Kildonan tutors (id.). By the end of second grade, the student had missed 30 days of school, and, according to his father, made little or no progress academically in reading and math, and had no calendar skills (id. at p. 10). His father revealed that the student did not feel that the special classes were challenging him, that the student missed a great deal of work during the general education portion of his program when he was pulled out of the classroom, and, despite the CSE's recommendation that he receive preferential seating, that the student often occupied a seat in the back of the classroom during class (id.). Socially, the student complained of being teased by students in his homeroom and on the school bus (id.).

In May 2004, the student's pediatrician opined that during the 2003-04 school year, the student "has suffered emotionally, and appears to be depressed and anxious" (Dist. Ex. SDIII-I). She sought the opinion of a pediatric neurologist, who, on July 28, 2004, confirmed the student's previous dyslexia diagnosis and concurred with the psychologist's recommendation that OG be implemented to teach the student (Dist. Ex. SDIII-J at pp. 1-2). The student subsequently underwent a neuropsychological evaluation, and, on August 13, 2004, the evaluating neuropsychologist issued Axis I diagnoses of a reading disorder, mathematics disorder, and disorder of written expression (Dist. Ex. SDIII-K at p. 14).

On September 2, 2004, the CSE developed an individualized education program (IEP) for the student's third grade school year of 2004-05 (Dist. Ex. SDII-B).[1] The CSE continued its

[1] According to the hearing record, this meeting followed a previous CSE meeting conducted in May 2004, which resulted in an IEP recommending that the student remain in his current special education class; the parents rejected this IEP and the district convened the September 2, 2004 CSE to consider changing the May 2004 IEP (see Parent Ex. M at pp. 11-12). The May 2004 IEP is not included in the hearing record.

recommendation of the 15:1+1 special class in language arts and math, and added individual counseling once per week and individual occupational therapy (OT) once per week (id. at p. 1). The CSE also recommended shortening the student's reading and math homework assignments by 50 percent, and allowed him to use graph paper when performing math problems (id. at p. 2). The parents rejected the September 2, 2004 IEP and placed the student at Kildonan for the 2004-05 school year, where he would remain for his third (2004-05), fourth (2005-06), fifth (2006-07) and sixth (2007-08) grade school years (Parent Ex. M at pp. 3-4, 12).

On May 3, 2007, while the student was attending fifth grade at Kildonan, the CSE convened to develop an IEP for the student's sixth grade school year of 2007-08 (Dist. Ex. SDII-E). In attendance were the CSE chairperson, the school psychologist, a psychologist intern, two district special education teachers, a district regular education teacher, a district guidance counselor, and both parents; a parent representative participated telephonically (id. at p. 4). The May 3, 2007 CSE recommended an integrated special class in English, math, science, and social studies for 42 minutes each per day in a 15:1 setting, a non-integrated special class in reading for 42 minutes per day in a 5:1 setting, and a non-integrated special class in study skills for 42 minutes per day in a 15:1 setting (id. at p. 1). In the area of related services, it recommended OT, once per week for 30 minutes per session in a 1:1 setting at a special location (id.). The CSE further recommended testing accommodations consisting of modified tests administered by a special educator, special location, questions read and explained, directions read and explained, use of a calculator, extended time (1.5), and answering questions orally at teacher discretion (id. at p. 2). Program modifications included modified homework assignments, preferential seating close to the teacher, use of graph paper for math problems, checking for understanding, directions repeated and/or rephrased, use of a calculator, a copy of class notes, books on tape, a modified curriculum for science and social studies, a waiver of the "home and careers" class, and highlighting/enlarging operational signs for math (id.). The CSE did not recommend any assistive technology devices; however, the student was recommended for an assistive technology evaluation (id. at pp. 2, 4).

The May 3, 2007 CSE based its recommendation on its consideration of the following data: (1) test results from April 24, 2007 administrations of the Peabody Individual Achievement Test – Revised (PIAT-R), Test of Word Reading Efficiency, and the Wechsler Individual Achievement Test – II (WIAT-II); (2) test results from a June 22, 2006 administration of the Wechsler Intelligence Scale for Children IV (WISC-IV); (3) an April 24, 2007 educational assessment; (4) an April 24, 2007 social history; (5) September 7, 2006 hearing and vision reports; (6) a September 7, 2006 physical examination; (7) a June 22, 2006 psychoeducational evaluation; (8) a May 25, 2006 classroom observation; (9) an April 27, 2004 OT report; (10) a March 26, 2004 vision report; (11) a March 11, 2004 OT evaluation; (12) an October 10, 2003 speech/language evaluation; and (13) a September 11, 2003 neuropsychological report (Dist. Ex. SD-II-E at pp. 3-5). In addition, the CSE reviewed progress reports and the results of testing administered by Kildonan (Tr. pp. 1193-1202, 1402).

By letter dated August 21, 2007 to the district's CSE chairperson, the parents rejected the May 3, 2007 IEP, and advised the district they would not be placing the student in the district for the 2007-08 school year and that they intended to seek reimbursement for any costs associated with providing the student's 2007-08 education (Parent Ex. D). The parents opined that the IEP was inappropriate for the student because "we don't believe that using the integrated model for special education instruction is efficacious for remediating [the student's] dyslexia" (id.). They contended that the student "should be placed in a quiet classroom with a small group of students;

this will not be the case if [the student] is integrated into a regular classroom" (id.). They alleged that the district "failed to address our request for daily individual tutoring" for the student, questioned "how will he be able to keep up with an integrated class knowing that he has a significant processing delay," and posited that the May 3, 2007 IEP "does not address [the student's] need for intensive multi-sensory instruction" (id.).

The student's father filed a due process complaint notice dated February 28, 2008 (Parent Ex. A). In the complaint, the student's father references multiple letters dating back to 2004 sent to the district expressing dissatisfaction with several previous IEPs unrelated to this appeal (id. at pp. 1-2). The allegations referencing the May 3, 2007 IEP, which is the IEP at issue in this appeal, include: (1) that the integrated model of instruction recommended by the CSE is not effective for addressing the student's dyslexia; (2) that the May 3, 2007 IEP does not address the parents' request for individual tutoring for the student; (3) that mainstreaming is not appropriate given the student's significant processing delay; (4) that the IEP does not provide "an intensive multisensory learning environment for the student;" (5) that the modified homework assignments, preferential seating, and modified curriculum as recommended by the May 3, 2007 IEP would result in a "dumbing down" of the material to show the illusion of progress from the district's perspective; (6) that testing accommodations should be observed by a non-district employee to ensure fair test results; (7) that extended testing time (1.5) is not sufficient for the student, and that all tests should be untimed; (8) that measurements of IEP goals should be done by an objective party, and the parents should be able to view the evaluations; and (9) that reading goal number 5, which aims to increase the student's decoding skills from beginning second grade level to end of second grade level and that writing goal number 6, which aims to increase the student's spelling skills from beginning second grade level to end of second grade level, both represent low expectations, not only for the student, but for the district itself (id. at pp. 3-4). The student's father concludes his complaint by requesting development of a revised IEP within 30 days, or, in the alternative, an impartial hearing relative to the May 3, 2007 IEP and his request tuition reimbursement from the district for his placement of the student at Kildonan for the 2007-08 school year (id. at p. 4).

The hearing record also contains a subsequent due process complaint notice, dated March 13, 2008, which, as the student's father writes "supersedes the letter dated February 28, 2008. . . The content of this letter differs from the previous letter only in the last paragraph" (Dist. Ex. SDI-A at p. 1). A review of the letter confirms that it is identical to the due process complaint of February 28, 2008, except for the last paragraph, which references a previous decision dated September 10, 2007 from an impartial hearing officer who determined that the placement recommended by the district was inappropriate and that the parents' unilateral placement of the student at Kildonan for the 2006-07 school year was appropriate (Dist. Ex. SDI-A at p. 4; see Parent Ex. M at pp. 34, 37, 39, 44). In the last paragraph of his March 13, 2008 due process complaint, the student's father asserts that because the district did not appeal the September 10, 2007 impartial hearing officer's decision, the district is obligated to continue to fund the student's placement at Kildonan as the student's pendency placement, pending the resolution of the instant appeal (Dist. Ex. SDI-A at p. 4).

An impartial hearing convened on May 13, 2008, and concluded on August 12, 2008, after seven days of testimony. In his 19-page decision dated September 23, 2008, the impartial hearing officer decided that the educational program recommended by the district in its May 3, 2007 IEP was appropriate to meet the student's special education needs (IHO Decision at p. 9). He opined that the parents' allegation that one year's growth in decoding and spelling skills reflected "low

expectations" was not supported by the hearing record (id.). He also noted that "it is uncontested that placement in the program recommended by the CSE would afford the student tremendous opportunity for contact with nondisabled peers" (id.). Having found the district's recommended program appropriate, the impartial hearing officer declined to address whether the Kildonan placement was appropriate or whether equitable considerations supported the parents' claim for tuition reimbursement (id.). However, the impartial hearing officer awarded the parents tuition for the student's entire 2007-08 school year at Kildonan based upon a pendency theory (id. at pp. 5, 9). The impartial hearing officer determined that because the district elected not to appeal the prior decision from another impartial hearing officer dated September 10, 2007 (determining that the parents' placement of their son at Kildonan was appropriate for the 2006-07 school year), that Kildonan therefore became the student's pendency placement for the 2007-08 school year, and he ordered the district to pay the student's full tuition at Kildonan for all of the 2007-08 school year (id.; see also Parent Ex. M).

The parents appeal from the impartial hearing officer's decision, seeking an order from a State Review Officer determining that, with respect to the conduct of the impartial hearing: (1) they were denied access to an impartial hearing; (2) they were denied opportunity to present their complaints, documents, and testimony at the impartial hearing; (3) they were denied their right to legal counsel; (4) they were denied the opportunity to call and cross-examine district witnesses; (5) they were denied opportunity to rebut the testimony of the district's "surprise" witness, a special education teacher; and (6) they were "mistreated, humiliated, and abused" by the impartial hearing officer. With respect to that portion of the impartial hearing officer's decision determining that the district's recommended program was appropriate for the student for the 2007-08 school year, the parents seek an order determining that the September 23, 2008 decision is erroneous, defective, and not based upon evidence contained in the hearing record, insofar as the May 3, 2007[2] IEP fails to: (a) include information about the student's current levels of functioning; (b) provide appropriate classroom accommodations, supports, and modifications; (c) include necessary assistive technology services; (d) provide appropriate goals and criteria for measuring progress objectively; and (e) address the student's individual needs. The parents further assert that the district failed to meet its burden of proof, to respond to the parents' concerns or complaints, to act in good faith with regard to the student's physical or mental welfare, to provide the student a free appropriate public education (FAPE) during the 2007-08 school year, and to develop an IEP that was procedurally and substantively appropriate. With respect to their placement of the student at Kildonan during the 2007-08 school year, the parents seek an order determining that: (1) Kildonan is the student's current placement; (2) Kildonan was the appropriate placement for the student during the 2007-08 school year; and (3) the district is obligated to pay the student's tuition at Kildonan for the 2007-08 school year as the student's last agreed upon placement, as well as the parents' related costs through the conclusion of appeal(s), until a new placement is agreed upon or directed by an administrative or judicial determination. The parents also seek an order from a State Review Officer referring the district to the Commissioner of Education "for appropriate penalty, fines, in-servicing, staff removals, and other disciplinary action" for its alleged failure to fund the student's placement at Kildonan in accordance with the prior decision of another impartial

[2] In the petition, the parents refer to the subject IEP as "the 2006-07 IEP" when in fact the IEP which is the subject of this appeal covers the 2007-08 school year (see Pet. at ¶¶ 11-12; Dist. Ex. SDII-E at p. 1).

hearing officer dated September 10, 2007.[3] I note that no memorandum of law accompanied the filing of the parents' petition.

The district answers, countering that the parents' allegations that they were denied opportunity to call and cross-examine district witnesses are without merit, insofar as the parents called the district's school psychologist as their own witness and cross-examined both the school psychologist and the alleged "surprise" witness, a district special education teacher. The district also raises four affirmative defenses, including: (1) that the petition fails to properly cite to the hearing record; (2) that the petition raises issues not previously raised in the due process complaint notice; (3) that the impartial hearing officer correctly determined that, based upon reliable record evidence, the district's recommended program as set forth in the May 3, 2007 IEP was reasonably calculated to address the student's educational needs and to confer educational benefit to the student, and his decision should be upheld and affirmed in its entirety; and (4) that even if the impartial hearing officer had considered whether the parents' placement of their son at Kildonan was an appropriate placement for the 2007-08 school year, the hearing record wholly supports a determination that the parents failed to meet their burden of persuasion that Kildonan was an appropriate placement that met the student's special education needs for the 2007-08 school year.

The district also cross-appeals that portion of the impartial hearing officer's September 23, 2008 decision determining that the district is obligated to fully reimburse the parents for the student's tuition at Kildonan for the 2007-08 school year, maintaining that the district is only responsible for reimbursing tuition during the pendency of any administrative proceedings, which commence with the filing of a due process complaint notice. The parents answer the district's cross-appeal, countering that their August 21, 2007 letter to the district rejecting the recommended placement triggered the district's pendency obligation.

At the outset, I will address several procedural matters arising on appeal. First, I note that the parents did not comply with State regulations when serving their reply and memorandum of law. According to the affidavit of service accompanying the district's answer, the district served its answer on November 7, 2008 (see Resp't Aff. of Service). The affidavit of service accompanying the parents' reply indicates it was served on November 14, 2008, seven days after the answer (see Pet'r Aff. of Service). Although not referenced in the affidavit of service, the memorandum of law, dated November 13, 2008, accompanied the reply (see Pet'r Aff. of Service; Pet'r Mem. of Law at pp. 5, 16). In reference to the parents' reply, 8 NYCRR 279.6 requires that a reply be served within three days after service of the answer. In view of the parents' failure to comply with the aforementioned State regulations, I decline to consider their reply or memorandum of law in connection with this appeal.

Next, I will address the district's contention that because the parents' allegations contained in their petition that the May 3, 2007 IEP was procedurally and substantively deficient were not raised in their due process complaint notice, they are outside the scope of the subject appeal. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C.

[3] In the petition, the parents assign a date of September 13, 2007 to the previous impartial hearing officer decision for the 2006-07 school year, when other evidence in the hearing record indicates the prior decision is dated September 10, 2007 (see Pet. at ¶¶ 3, 8).

§ 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912422, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-102; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065).

In the case at bar, the parents allege several procedural and substantive deficiencies in the May 3, 2007 CSE meeting and resultant IEP in their petition that are not raised in the due process complaint notice, including the district's alleged failure to include devices and services on the IEP for assistive technology devices, as well as a lack of goals in this area; the alleged failure of the CSE to consider information from the student's current placement at Kildonan; the alleged failure of the CSE to invite or include a representative from Kildonan to participate at the CSE meeting; and the alleged failure of the IEP to address areas of concern specifically identified in evaluations that were available to the CSE at the time it developed the May 3, 2007 IEP (see Parent Ex. A). The hearing record further demonstrates that the district's attorney consistently objected to testimony addressing issues not previously raised in the parents' due process complaint notice (see, e.g., Tr. pp. 273, 291-92, 334-35, 362-71, 394-96, 1183-86). Under these circumstances, I decline to consider these allegations enumerated in the parents' petition that were not previously raised in their due process complaint notice (Application of a Student with a Disability, Appeal No. 08-102; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student with a Disability, Appeal No. 08-008; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

Additionally, to the extent that the parents seek a "referral" of the district to the Commissioner of Education "for appropriate penalty, fines, in-servicing, staff removals, and other disciplinary action" for its alleged failure to fund the student's placement at Kildonan, I decline to address such a request. Under State regulations, a State Review Officer is "designated by the commissioner to conduct impartial State-level review pursuant to Education Law, section 4402(2) of the determination of an impartial hearing officer in a hearing related to the identification, evaluation, program or placement of a student with a disability" (8 NYCRR 279.1[b]).

I now address the parents' procedural allegations concerning the manner in which the impartial hearing officer conducted the hearing. In their petition, the parents allege that during the impartial hearing, the impartial hearing officer: (1) refused to permit the parents to offer testimony relating to their objections to previous educational programs from past school years unrelated to the instant appeal; (2) refused to permit the parents to mark exhibits referred to during hearing testimony; (3) denied the parents reasonable opportunity to cross-examine district witnesses,

namely the school psychologist and a district special education teacher;[4] and (4) allowed the testimony of the district's special education teacher, despite the fact that the "substance" of said testimony was not disclosed to the parents at least five days prior to its presentation at the impartial hearing. However, I note that despite the size of the hearing record in the instant appeal, which consists of more than 1500 pages of transcript and in excess of 150 documentary exhibits amassed during an impartial hearing that lasted for seven full days, the parents fail to include a single citation to the hearing record in support of the allegations adduced in their petition. State regulation directs that "[t]he petition, answer, reply and memorandum of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR

[4] The hearing record reflects that on June 23, 2008, the impartial hearing officer conducted a telephone conference with the attorneys for both parties for the purpose of scheduling hearing dates (IHO Ex. IHO-XLVIII at pp. 1-2). During the conference, the impartial hearing officer stated for the record that he did not believe that the parents' attorney's "statements concerning her own availability were being made in good faith" (id. at p. 2; see generally Gagliardo v. Arlington Cent. Sch. Dist., 373 F. Supp. 2d 460 [S.D.N.Y. June 17, 2005]). The impartial hearing officer scheduled impartial hearing dates on August 12, 13, 14, and/or 15, 2008, despite the parents' attorney's representation that she would not be available on those dates (IHO Ex. IHO-XLVIII at p. 2). The impartial hearing officer permitted the parents' attorney to make a written application to reschedule the hearing dates, provided that she furnish affidavits supporting each claim of unavailability, including "specificity concerning any scheduled appointments" during those dates and information "as to why any such appointments cannot be rescheduled" (id. at pp. 2-3). The parents' attorney submitted two affirmations, dated June 27, 2008 and July 18, 2008, affirming that she was unavailable due to a personal appointment, business appointments with clients, and another impartial hearing in another school district on August 12 and 13, 2008, all of which had been scheduled prior to the June 23, 2008 conference (IHO Exs. IHO-LII; IHO-LVIII at pp. 1-2; IHO-LIX at pp. 1-2). On July 28, 2008, the impartial hearing officer issued a written directive denying the parents' attorney's request for rescheduling the hearing dates on August 12, 13, 14, and/or 15, 2008, stating "contrary to what was required in my letter-order dated June 23, 2008, there was no explanation in [the parents' attorney's] Attorney Affirmation, dated July 18, 2008, as to why the [other matters] could not have been rescheduled" (IHO Ex. IHO-LX at pp. 1, 5). At the conclusion of the hearing session on August 11, 2008, which was attended by both parents, the district's attorney inquired "What time are we starting tomorrow," to which the parents' counsel responded "We are not" (Tr. pp. 1174-75, 1335). On August 12, 2008, the parents' attorney failed to appear (Tr. p. 1340), but the hearing was attended by the mother of the parents' attorney and the student's mother (Tr. pp. 1339, 1344). The mother of the parents' attorney's mother was not able to conduct the witness examination, indicating that "I know something about it but I am not able to do that" (Tr. p. 1379). The student's mother conducted the hearing questioning herself, with an assurance from the impartial hearing officer that he would entertain an application from either party to recall a witness (Tr. pp. 1380-81, 1413, 1529). The impartial hearing officer agreed to allow the student's mother some latitude, considering that she is not an attorney (Tr. pp. 1383-85; see Tr. pp. 1405, 1407, 1410-11, 1413, 1420, 1422-24, 1440, 1461, 1511, 1514, 1528-30). The student's mother called and examined the school psychologist (Tr. pp. 1391-1414, 1453-63) and cross-examined the district's special education teacher (Tr. pp. 1511-15). At the conclusion of the impartial hearing, the impartial hearing officer permitted the parents to submit a written application to reopen the hearing (Tr. pp. 1527-31, 1543). On August 15, 2008, the parents' attorney filed a written application to reopen the impartial hearing, without referencing her failure to appear on August 12, 2008 (IHO Ex. IHO-LXVIII). The district opposed her application on the ground that the parents' attorney "made no effort to establish good cause for her failure to be in attendance at the August 12, 2008 hearing [and] merely reiterated that she desired to present certain additional information during the course of the hearing" (IHO Ex. IHO-LXIX at p. 2). The district's attorney also provided a written affirmation indicating that both an attorney with his law firm and the parents' attorney had appeared at a different impartial hearing in a different school district than those previously identified by the parents' attorney in her affirmations on August 12, 2008, and that this hearing had been scheduled on July 11, 2008, which was several weeks after the conference and scheduling order in the instant case (see IHO Exs. IHO-XLVIII at p. 2; IHO-LXIX at pp. 2, 5, 8-9). The impartial hearing officer concurred with the district's argument, and, on August 24, 2008, denied the parents' attorney's application, simultaneously striking the testimony of the school psychologist called by the parents on the ground that the district did not have an opportunity to cross-examine the witness (IHO Ex. IHO-LXX; see Tr. pp. 1486-90).

279.8[b]; see Application of a Student with a Disability, Appeal No. 08-102; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-003 [dismissing a petition that inter alia did not reference the hearing record]; see also 8 NYCRR 279.1[a], 276.4[b]). State regulations further provide that documents that fail to comply with the above-mentioned requirement may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 06-065; Application of the Bd. of Educ., Appeal No. 04-080). Accordingly, pursuant to the discretion afforded to me under 8 NYCRR 279.8(a), I decline to consider these allegations.[5]

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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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]; 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

[5] I also note that the hearing record illustrates that the student was unilaterally placed at Kildonan throughout the impartial hearing by virtue of pendency, and if I were to reach this issue on the merits, I note that the parents have not made any assertions that the alleged procedural defects in the impartial hearing impacted their decision making or that there was any specific loss of educational opportunity for the student that was attributable to procedures employed at the impartial hearing (see Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 382 [2d Cir. 2003] [holding that delays in the administrative process did not endanger the student's right to a FAPE]; Heather S. v. Wisconsin, 125 F.3d 1045, 1059-60 [7th Cir. 1997] [holding that procedural flaws did not deprive the student of educational opportunity]; Amann v. Stow Sch. Sys., 982 F.2d 644, 653 [1st Cir. 1992] [holding that the impartial hearing officer's actions did not result in remediable harm to the student]; O.O. v. Dist. of Columbia, 573 F. Supp. 2d 41, 48-49 [D.D.C. August 27, 2008] [holding that procedural violations with regard to resolution sessions and due process hearings did not deprive the student of educational benefit]).

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). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111 [2d Cir. 2008]).

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 Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-070; 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 the 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 (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).

I now address the appropriateness of the district's recommended program**.** In their petition, the parents contend that while the 2007-08 IEP called for a substantially less intensive placement option than previously recommended by the CSE, there was no evidence that the student demonstrated a need for such decreased intensity. During the impartial hearing, the parents asserted that the program recommended by the CSE for the 2007-08 school year failed to address

the student's educational needs in that it did not include a daily 1:1 language arts tutorial, which they believed the student required (Tr. pp. 257-58, 430). Additionally, they argued that the student's processing delays would prevent him from keeping pace with the level of instruction utilized in integrated academic classes (Tr. pp. 160-61, 251-53, 755).

According to the hearing record, the documents considered by the May 3, 2007 CSE revealed a significant discrepancy between the student's verbal and nonverbal cognitive abilities, with the student's verbal abilities appearing relatively stronger (Dist. Ex. SDIII-M at p. 3). The data further uncovered that significant weaknesses in the student's attention, working memory, and processing speed hampered his learning and academic performance (id. at p. 4). The documents portrayed the student as "quiet" and "shy," "motivated to learn and do well," and a "well liked" member of his class (Dist. Exs. SDIII-M at p. 4; SDIV-V at pp. 1, 4). An evaluation report indicated that the student appeared to become "fatigued" by the number of problems and the length of time it took him to complete some tasks (Dist. Ex. SDIII-O at p. 1).

The district's assessment of the student indicated that the student demonstrated "severe" difficulty reading individual words with accuracy and speed, but that his reading comprehension was average (Dist. Ex. SDIII-O at pp. 1, 2). The district evaluator concluded that the student's basic reading skills were significantly below expectations (id. at p. 2). Additionally, the student performed significantly below average on measures of spelling and written expression (id.). Testing administered by Kildonan in October 2006 indicated that the student's word identification and word attack skills were within the average range, but that his ability to read fluently was significantly delayed (Dist. Ex. SDIV-S at p. 1). Kildonan's testing also demonstrated that his reading comprehension skills were slightly below average (id.).

In order to address the student's reading deficits, the May 3, 2007 CSE recommended that he receive daily reading instruction in a 5:1 special class (Tr. p. 1405; Dist. Ex. SDII-E at p. 1). This special reading class was designed for students "showing significant continued … difficulty with word reading" (Tr. p. 1449). According to the CSE chairperson, the instruction in the reading skills class was to be based on an OG method (Tr. p. 1287). To further address the student's reading deficits, the CSE recommended that the student use books on tape to supplement standard textbooks and English literature novels (Tr. pp. 1450-51; Dist. Ex. SDII-E at p. 2).

According to the student's father, at the May 3, 2007 CSE meeting, the parents were told that the district teachers had received two weeks of introductory OG training; however, he added that the parents were told neither how the district would implement OG nor what the content of the reading skills class would be (Tr. pp. 258-59, 261, 896, 898-99, 1045). The student's father further testified that he voiced his objection to the 5:1 setting for the reading class at the May 3, 2007 CSE meeting (Tr. p. 260). He further noted that at Kildonan, the student received individual language arts instruction using the OG approach for 50 minutes daily (Tr. pp. 257-58).

The hearing record indicates that although the district's testing indicated that the student's standard scores on measures of word reading efficiency declined from 2006 to 2007 (compare Dist. Ex. SDIII-M at p. 4, with Dist. Ex. SD-III O at p. 1), and that the student's word reading and spelling skills as measured by standardized testing remained significantly delayed, the May 3, 2007 CSE nevertheless recommended less intensive reading instruction for the student than he had received during the 2006-07 school year. Specifically, the CSE recommended that the student receive reading instruction in a group of five, rather than individually, as he had during previous

academic years (Dist. Ex. SDII-E at p. 1). Furthermore, the May 3, 2007 CSE recommended that the student receive essentially the same OG-based teaching approach as he had received previously, despite the demonstrated delay and decline in the student's reading skills as evidenced by the district's own measurements. According to the student's father, the May 3, 2007 CSE failed to respond to his request for individual tutoring for his son (Tr. pp. 430-31). Likewise, the hearing record contains no explanation for why the CSE recommended less intensive reading instruction for the student, given that the instructional approach would remain the same.

With regard to the CSE's recommendation to place the student in integrated special classes, the school psychologist opined that the student's general ability index score of 97 on the WISC-IV suggested that the student had the vocabulary, fund of general information, and ability to reason using language, and that he could be expected to understand grade level material (Tr. pp. 1426-27). Similarly, the psychologist testified that the student's score on the verbal comprehension index of the WISC-IV suggested that the student was a "verbally dominant learner" capable of learning grade level material in a classroom environment (Tr. pp. 1427-28). According to the school psychologist, instructional strategies for working with the student would include the use of additional verbal explanations, as well as the use of "bridging" or connecting new information to previously learned information (Tr. pp. 1428-29). She further testified that in order to address the student's difficulty with working memory, multi-step directions would be broken down, and, through pre-teaching, the student would be exposed to material prior to its introduction into the larger classroom setting (Tr. p. 1430). Additional modifications and accommodations designed to address the student's weaknesses in working memory included seating in close proximity to the teacher, checking for understanding, and the repetition and/or rephrasing of directions (Tr. p. 1450). To ameliorate the student's weaknesses in processing speed, the school psychologist explained that the student would be provided with a copy of class notes, thereby eliminating his need to simultaneously listen and take notes (Tr. pp. 1430-31, 1458-59). The student would also be afforded additional time to complete tasks (Tr. pp. 1431, 1450). To further support the student in the general education curriculum, the May 3, 2007 CSE recommended that he attend a special study skills class on a daily basis (Dist. Ex. SDII-E at p. 1).

Documents considered by the May 3, 2007 CSE contained conflicting evidence regarding the student's math abilities. Testing conducted by Kildonan suggested that as of October 2006, the student's mathematical ability with respect to concepts and applications was in the average range, which represented a significant improvement from prior testing conducted in May 2006 (Dist. Ex. SDIV –S at p. 1). By contrast, district testing administered in May 2007 revealed significant deficits in the student's math reasoning ability, and a decline in scores from the previous year (Dist. Exs. SDIII-M at p. 4; SDIII-O at p. 1). The district evaluator noted that the student mixed adding and subtracting in the same problem and encountered difficulty with graphs, telling time to the quarter hour, money, and solving number patterns (Dist. Ex. SDIII-O at p. 2). Testing by both the district and Kildonan revealed significant deficits in the student's math computation skills (Dist. Exs. SDIII-O at p. 2, SDIV-S at p. 1).

The district's school psychologist testified that one of the student's greatest difficulties was his lack of "automaticity" with regard to math facts (Tr. p. 1402). To address the student's math needs, the CSE recommended that the student participate in an integrated special class for math and be provided with modifications and accommodations consisting of: use of a calculator, use of graph paper, and highlighting/enlarging operational signs for math (Tr. p. 1402; Dist. Ex. SDII-E at p. 2). The school psychologist further opined that the extra support available in the integrated

program, coupled with the special class for study skills and the student's previous math exposure, would promote the student's success in the district's integrated program (Tr. p. 1402).

Throughout the impartial hearing, the student's father expressed concern that the student would not be able to keep pace with the non-disabled students in an integrated class, which would impact the student's well-being (Tr. pp. 160-61, 252, 466-67). His father testified that the student "constantly" had to ask for rephrasing, and that his son also "had an issue" processing multiple instructions (Tr. p. 252). He believed that given the class ratio and his son's educational needs, his teachers in the integrated class would lack the time to furnish the student with individual instructions, and that the student would lack sufficient time to process the instructions (Dist. Ex. SDI-A at p. 3). He added that in the integrated environment, teachers would be expected to teach general education students at the level necessary for them to pass exams or fulfill State requirements (Tr. p. 343). The student's father observed that the May 3, 2007 IEP called for a modified curriculum for science and social studies, but not in his son's two weakest subjects, English and math (Tr. p. 255). The student's father predicted that his son "would perform terribly in an integrated math environment" (Tr. p. 473). He feared that in the proposed integrated math class, the student would not have the support of multisensory learning techniques, or a small group of peers, and that the instruction in the math class would not correspond with the instruction provided in the student's other academic courses (Tr. pp. 477-78). The student's father also testified that in fifth grade, the student received individual math tutoring outside of class (Tr. pp. 751-52). It is not clear from the hearing record if the May 3, 2007 CSE was aware of the student's need for math tutoring during the prior 2006-07 school year.

However, the hearing record establishes that at the time of the May 3, 2007 CSE meeting, the district's own testing indicated that the student demonstrated "severe weaknesses" in mathematical reasoning and math computation, in contrast to previous assessments (Dist. Ex. SDIII-O at p. 2). The district's evaluator noted that the student was functioning lower than when he was previously evaluated in June 2006 (id.). Additionally, the evaluator noted that the student experienced difficulty with more basic math skills, such as telling time to the quarter hour, money concepts, and reading numerals in the thousands (id.). Given the fact that not only was the student demonstrating such a marked decline in math skills, but that he also continued to experience difficulty with reading and processing information, I find it unlikely that the student would have been successful in an integrated math class, in which, as his father suggested, the teachers would be expected to teach general education students at the level necessary for them to pass exams or fulfill State requirements (Tr. p. 343).

The parents correctly assert that for the 2006-07 school year the CSE recommended that the student receive math instruction in a non-integrated 15:1+1 class (Dist. Ex. SDII-D at p. 1). Although subsequent district testing revealed a decline in the student's math functioning between 2006 and 2007, the CSE recommended the student for a less intensive 15:1 integrated math class for the 2007-08 school year, which according to the student's father, could contain as many as 30 students (Tr. pp. 251, 880-89). Although not reflected in the May 3, 2007 IEP, the CSE chairperson testified that the CSE considered recommending that the student be placed in self-contained classes for English and math, but ultimately decided that those placements would be too restrictive (Tr. pp. 1286-87; Dist. Ex. SDII-E at p. 5). However, the school psychologist testified that no other placement options were considered for the student (Tr. p. 1405). The CSE chairperson conceded that there were no self-contained classes in the district's middle school

during the 2007-08 school year, but added that the district could have accommodated the student, although she did not specify how (Tr. pp. 1296-97).

The results of both district and Kildonan testing indicated that the student continued to demonstrate significant deficits in word decoding, reading fluency and spelling, despite daily, individual language arts instruction at Kildonan. Additionally, despite receiving instruction in a self-contained math class at Kildonan, the student's achievement in mathematics declined. Based on the student's performance it seems unlikely that he would make meaningful progress in reading and math given less intensive services using the same instructional methods. Based upon the hearing record, I cannot concur with the impartial hearing officer's determination that the May 3, 2007 IEP was reasonably calculated to confer education benefit upon the student, and I find that the district failed to offer the student a FAPE for the 2007-08 school year. Having determined that the district did not offer the student a FAPE for the 2007-08 school year, I now consider the appropriateness of the parents' 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,, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; 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).

The hearing record describes Kildonan as a coeducational boarding and day college-preparatory and general academic school for students with dyslexia (Parent Ex. J at p. 1). According to a school synopsis contained in the hearing record, the Kildonan academic program revolves around intensive, daily, one-to-one OG tutoring for each student (id.). Subject matter courses are designed to meet the learning style of dyslexic students, with visual, auditory, and kinesthetic presentations supplementing traditional textbooks (id.). Reading and writing demands at Kildonan are reduced or eliminated from content area courses while the students work toward developing those skills during tutorial (id.). The program includes evening and weekend study halls (id.). The student's father described the classes at Kildonan as "very small," and testified that the school provided an "oral interactive environment" (Tr. pp. 264, 432-33). He stated that Kildonan featured one core curriculum, presented to all students, and not subject to change or modification (Tr. p. 264). He advised that Kildonan employed multisensory research-based learning techniques throughout all of its classes, and that the classes were "tied together so they work off each other" (Tr. pp. 264, 431-32).

The parents placed the student at Kildonan for the 2004-05 school year, and he remained at the private school during the 2005-06 and 2006-07 school years (Tr. pp. 149-50). As previously noted, at the time of the May 3, 2007 CSE meeting, standardized testing administered by Kildonan between May 2006 and October 2006 indicated that the student demonstrated notable improvement in his ability with respect to mathematical concepts and applications (Dist. Ex. SDIV-S at p. 1). Although testing indicated some improvement in the student's vocabulary, spelling and math computation skills, his performance in spelling and math computation remained significantly delayed, as did the student's reading fluency (id.). A June 4, 2007 interim progress report from the student's Kildonan language tutor indicated that the student had a "productive year" and that "his testing does not yet reflect the solid gains he has made as a result of his hard work" (Dist. Ex. SDIV-W at p. 1). The tutor commented that the student's test scores indicate that he "still struggles with isolated word decoding" and with spelling consonant "-le" and silent "-e" words (id.). She acknowledged gains in the student's comprehension and vocabulary skills, and commented that the student had "begun to use some of the phonetic word-attack strategies for dealing with isolated words" (id.). According to his report cards and progress notes contained in the hearing record, during the 2006-07 school year, the student's performance in core academic

classes at Kildonan was rated as "beginning," "developing," or "secure" (Dist. Exs. SDIV-T; SDIV-U; SDIV-V; SDIV-W; SDIV-X). The "beginning" designation meant that the student achieved between "0" and "about 25" percent "compliance" relative to a given skill; the "developing" designation indicated that a student's compliance was between 25 percent to 75-80 percent; and the "secure" designation symbolized that the student had achieved compliance of 80 percent or greater (Parent Ex. LL). The student's 2006-07 report cards and interim progress notes suggest that while the student made notable progress in science and social studies, he improved only minimally in literature and math (compare Dist Ex. SDIV-T, with Dist. Ex. SDIV-W). No Kildonan staff testified at the impartial hearing, and an affidavit in lieu of testimony submitted by Kildonan's director was disallowed by the impartial hearing officer.[6]

Standardized test results contained in the hearing record suggest that the student demonstrated some progress in reading comprehension, math computation, and spelling between October 2007 and May 2008 (Parent Ex. NN). However, during this same time period, his standard scores in mathematical concepts and applications continued to decline, while his standard and scaled scores in word attack and overall reading fluency remained the same (id.). The student's math skills and reading fluency remained significantly delayed (id.).[7] The student's father, however, testified during the impartial hearing that the student made progress during the 2007-08 school year with regard to attending (Tr. pp. 1102-03), class participation (Tr. p. 1105), oral reading (Tr. pp. 1107-08), memory (Tr. pp. 1109-10), vocabulary and comprehension (Tr. pp. 1110-11), spelling (Tr. pp. 1112-14), and math computation (Tr. pp. 1114-15).

The student's language tutor at Kildonan commented that during the 2007-08 school year, the student "developed fluency as a reader and as a writer using technology" (Parent Ex. T). She observed that the student "requires frequent repetition and practice before he can apply a concept independently" (id.). She noted that he was able to apply appropriate reading strategies to reading both highly motivating and less motivating books (id.). According to his tutor, the student was able to read a passage from a comprehension book and answer questions about it "with increased fluency, accuracy and independence" (id.). She theorized that the student's growth in writing was related to his interest level, and recalled that he had written paragraphs about history that were "well organized and instructive" (id.). However, she also noted that the student's required practice sentences were "short and lacking in depth" (id.). She did not identify any specific skills that the student mastered during the 2007-08 school year.

The co-directors of Kildonan reported that the student continued to make progress at Kildonan, noting that as a sixth grader, "he has become an independent reader and writer" (Parent Ex. U). They opined that the student was able to succeed at Kildonan because "individual assignments are tailored to [his] interests as well as his needs" (id.). The co- directors indicated that the student's "keyboarding skills have freed him from the many demands required by

[6] An affidavit from Kildonan's director (IHO Ex. IHO-LXVII) was disallowed by the impartial hearing officer based upon the parents' attorney's submission of a deficient affidavit explaining the reasons for the affiant's unavailability to personally appear at the impartial hearing (Tr. pp. 669-70, 1128-49; IHO Exs. IHO-XLIV; IHO-LXX).

[7] As measured by the Gray Oral Reading Test, Fourth Edition (GORT-4), the student's reading fluency was at the fifth percentile (Parent Ex. NN). However, the student's percentile score on the concepts and applications section of the Stanford Diagnostic Mathematics Test, Fourth Edition, fell below the first percentile (id.).

handwriting that interfere with expressing his ideas fluently," and that through the use of computer technology, he was learning to improve his editing skills (id.). The co-directors conceded that the student's learning issues "will always make decoding and word recognition out of context difficult," a fact that was reflected in the student's low scores on some standardized measures (id.). They reported that the student was "able to articulate his ideas, but needs time to formulate and organize his thoughts" (id.). They confirmed that "mathematical calculations remain difficult" for the student (id.).

Interim progress notes from Kildonan contained in the hearing record reveal that although the student was "motivated" and becoming more "confident," he continued to struggle with math during the 2007-08 school year (Parent Exs. E at p. 1; F at p. 3). As detailed in the first term Kildonan interim progress reports, the student had difficulty working independently, required prompting to begin work, and required repetition of instructions and reminders to stay focused (Parent Ex. F at p. 3). His father acknowledged that the student's math scores "dropped substantially" in fall 2007 (Tr. pp. 758-59). As a result of the student's deficits, he was placed in a smaller math class designed to work at a pace better suited to his learning style (Tr. pp. 460-61, 729; Parent Ex. F at p. 3). Despite this change, the student's ability relative to mathematical concepts and applications, as measured by Kildonan itself, continued to decline (Parent Ex. NN).

A comparison of the student's October 2007 and April 2008 interim progress reports demonstrates that in literature, the student progressed from "developing" to "secure" with respect to building on ideas and making connections (compare Parent Ex. N, with Parent Ex. V). In math, he progressed from "beginning" to "developing" with respect to demonstrating academic risk taking and confidence in his abilities, and his ability to follow class rules improved from "developing" to "secure" (id.). The student's social studies and science teachers recognized improvement in the student's ability to generate new ways of viewing situations, building on ideas, and making connections and demonstrating confidence (id.). Throughout the 2007-08 school year, several of the student's skills were judged to be "developing" (Parent Exs. E; F; N; O; V). An April 21, 2008 interim report rated the student's understanding of concepts in literature, social studies and science as "secure," while his understanding of math concepts was adjudged to be "developing" (Parent Ex. V).

The hearing record also establishes that Kildonan is a school specializing in educating students with dyslexia (Parent Ex. J at p. 1), and offers no student exposure to non-disabled peers. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

After carefully considering the totality of the evidence in the hearing record, I determine that the parents have not shown that Kildonan's special education program was appropriate to meet the student's special education needs, and that Kildonan did not provide the student with special education services in the LRE during the 2007-08 school year. The Kildonan interim progress reports contained in the hearing record describe both the school's special education program, and the student's progress within it, in vague, nebulous terms that render a specific analysis of either exceedingly difficult. These reports do not detail the student's specific deficits in reading and mathematics, nor do they contain sufficiently detailed information regarding the curriculum, level of materials being used or objective academic expectations for the student's content area classes.

The lack of specific information regarding the student's language arts and math skills is notable given that the student received a 1:1 OG tutorial for fifty minutes daily and was placed in a math class with only four students (see Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364; see also Application of the Dep't of Educ., Appeal No. 08-081; Application of the Dep't of Educ., Appeal No. 08-062; Application of the Bd. of Educ., Appeal No. 05-092; Application of a Child with a Disability, Appeal No. 02-093; Application of a Child with a Disability, Appeal No. 97-2; Application of the Bd. of Educ., Appeal No. 96-9). Furthermore, I find Kildonan's grading system as utilized in its interim progress reports to be so overly broad as to prevent any meaningful assessment of the student's actual progress. Absent more detailed information describing the specific aspects of instruction provided by Kildonan to the student, and information identifying specific skills mastered by the student while in its special education program, I find that the hearing record does not afford a basis upon which I can determine whether the student's performance as reported by Kildonan during the 2007-08 school year indicates that he received educational benefits.

Having already determined that the parents' unilateral placement of the student was inappropriate, I need not reach the issue of whether equitable considerations support the parents' claim for reimbursement, the third criterion of the Burlington analysis (Application of a Student with a Disability, Appeal No. 08-073; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

I will now consider the district's cross-appeal, which seeks to overturn that portion of the impartial hearing officer's September 23, 2008 decision determining that the district is obligated to fund the student's tuition at Kildonan for the entire 2007-08 school year as the student's pendency placement. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629

F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

In the instant appeal, the parties do not dispute that Kildonan constitutes the student's pendency placement by virtue of the district's election not to appeal the prior impartial hearing officer's decision dated September 10, 2007 (see Parent Ex. M). Rather, the district contends in its cross-appeal that the impartial hearing officer erred in determining that it was responsible under a pendency theory to fund the student's tuition at Kildonan for the entire 2007-08 school year. The district argues that it is only responsible for funding tuition during the pendency of any administrative proceedings, which commence with the filing of a due process complaint notice. The parents counter that their August 21, 2007 letter to the district rejecting the recommended placement served to trigger the district's pendency obligation.

I agree with the district that the parents' pendency claim did not begin until February 28, 2008, the date that they filed their due process complaint notice (Letter to Winston, 213 IDELR 102 [OSEP 1987]). In order to invoke the pendency provisions of the IDEA, a due process proceeding must be pending (Schutz, 290 F.3d 481-82, 484-85; Student X, 2008 WL 4890440 at *20; O'Shea, 353 F. Supp. 2d at 455-56; Application of a Child with a Disability, Appeal No. 07-136). The parents' letter of August 21, 2007 merely informed the district of the parents' rejection of the program recommended pursuant to the May 3, 2007 IEP, and did not by itself initiate a due process proceeding (see 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]); therefore, it did not trigger the pendency provisions under the IDEA and State Education Law. Furthermore, the student's father states at the conclusion of his August 21, 2007 letter "It is my understanding that

we have one year from the date of the IEP for an impartial hearing to take place. Please let us know if this is not accurate. You can expect to hear from us in the near future requesting an impartial hearing" (Parent Ex. D) (emphasis added). This qualifying language clearly establishes that it was not the father's intent for this letter to serve as a request for an impartial hearing. Since the parents in the instant appeal did not commence this due process proceeding until February 28, 2008, the date of their due process complaint notice, the impartial hearing officer erred by directing the district to fund the student's tuition for the entire 2007-08 school year.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated September 23, 2008 is hereby annulled to the extent that it determined that respondent offered the student an appropriate program for the 2007-08 school year and directed respondent to fund the student's tuition for the entire 2007-08 school year at Kildonan; and

IT IS FURTHER ORDERED that, if it has not already done so, respondent fund the student's tuition at Kildonan for the 2007-08 school year from the date of the parents' due process complaint notice, February 28, 2008.

Dated: **Albany, New York**
December 8, 2008

JOSEPH P. FREY
STATE REVIEW OFFICER