



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-040

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

#### **Appearances:**

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

Frishman & Faber, PC, attorneys for respondents, Jill F. Faber, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse respondents for their son's tuition costs at the Kildonan School (Kildonan) for the 2008-09 school year.<sup>1</sup> The appeal must be dismissed.

At the time the impartial hearing convened in October 2008, the student was receiving home instruction services from the district for 1½ hours per day and, according to the parents, he started attending Kildonan in January 2009 (IHO Exs. IV; VII). The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8 [c][10]; 8 NYCRR 200.1[zz][6]).

With regard to the relevant aspects of the student's educational history, as a young child the student exhibited episodes of difficulty with swallowing, vomiting, and intestinal problems (Dist. Ex. 33 at p. 2). He also demonstrated motor skill weakness, hyperactivity, impulsivity, difficulty staying on task and had trouble sleeping (id.). The student received early intervention

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<sup>1</sup> One of the respondents is identified in the hearing record as the student's legal guardian while the other is the legal guardian's spouse and the student's caregiver (Tr. pp. 521, 589). Both participated in these proceedings without objection by either party, and accordingly I will refer to them together as "the parents" in this decision.

services (EIS) through the Committee on Preschool Special Education (CPSE) and attended a "pre-school early intervention program" where he received "language and social stimulation" (*id.* at pp. 2-3; Dist. Ex. 108 at p. 1). At approximately five years of age, a pediatric neurologist reportedly offered the student diagnoses of an attention deficit hyperactivity disorder (ADHD), an oppositional defiant disorder (ODD), separation anxiety, and perceptual-motor delays (Dist. Exs. 33 at p. 2; 108 at p. 1). While the student was in kindergarten, the Committee on Special Education (CSE) determined that he was eligible for special education services as a student with a learning disability (Dist. Exs. 33 at p. 3; 108 at p. 1). From first through sixth grade, the student was placed in either the district's self-contained special education classes or inclusion settings and he inconsistently experienced difficulties with following directions and remaining on task (Tr. p. 596; Dist. Exs. 33 at p. 3; 104; 108; 109; 111 at pp. 1, 4; Parent Exs. V; W).

For the 2005-06 school year, the CSE subcommittee recommended that the student receive instruction in a 15:1 special class for math, science, and English, and receive "SEIMC" social studies instruction (Dist. Ex. 104 at p. 4). Counseling services were recommended monthly on a "monitoring basis" (*id.* at pp. 1, 4). On October 28, 2005, the CSE subcommittee convened to review the student's program due to his "considerable behavioral difficulties since the beginning of the school year which have impacted academic progress" (Dist. Ex. 97 at p. 4). According to the resultant October 2005 individualized education program (IEP), the student's teachers reported that he was usually late to class, was not well prepared and that he did not consistently complete necessary assignments (*id.*). Additionally, the student exhibited behavioral difficulties in structured and less-structured situations (*id.*). The CSE subcommittee agreed to search for an alternative day school with an 8:1+1 class ratio and counseling services (*id.*). On November 2, 2005, the CSE chairperson referred the student to the Orange-Ulster Board of Cooperative Educational Services (O-U BOCES) (Dist. Ex. 96).

In November 2005, a consulting psychiatrist reviewed certain records of the student and interviewed the student and one of his parents (Dist. Ex. 93). The psychiatrist noted reports that the student "continue[d] to have poor concentration, distractibility, poor impulse control, defiance at home/school, sudden mood changes . . . [and reportedly] appear[ed] overtired and overeats. He often ha[d] stomachaches, nausea and vomiting which is the result of his 'acid reflux and familial GURD'" (*id.* at p. 1).<sup>2</sup> The psychiatrist concluded that the student "exhibits signs and symptoms" of an attention deficit disorder and an ODD, was at risk for development of a mood disorder, and continued to exhibit a reading disorder (*id.* at p. 2). He recommended that the student be referred to a more structured educational program that would offer "more intensive learning and behavioral supports" in addition to "outside" of school therapy and monitoring of his "clinical needs" (*id.* at p. 2).

By letter to the district dated December 6, 2005, O-U BOCES accepted the student into one of its junior high school special education programs (Dist. Ex. 91). On December 19, 2005, the student began attending an O-U BOCES 8:1+1 special class and received one session each of group and individual counseling per week and also academic intervention services (AIS) in reading (Dist. Ex. 78 at p. 3).

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<sup>2</sup> Although the hearing record is unclear, the psychiatrist may have been referring to gastroesophageal reflux disease (GERD).

In 2006, the student received a diagnosis of achalasia (Tr. p. 632). The hearing record describes achalasia as "the failure of the lower esophageal sphincter to relax and the lack of esophageal peristalsis" (Parent Ex. S at p. 1). In April 2006, the principal at O-U BOCES informed the parents of the number of the student's absences and instances of lateness and stressed that it was important that the student consistently attend school (Dist. Ex. 84).

In May 2006, one of the district's special education teachers conducted an academic achievement evaluation of the student (Dist. Ex. 83). Administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) yielded a broad reading standard score of 67 (1st percentile, very low) (*id.* at pp. 1, 3-4). The special education teacher reported that the student did not recognize many words by sight, nor did he demonstrate knowledge of how to decode unknown or unfamiliar words, which directly affected his reading comprehension skills (*id.* at p. 1). The student's performance on subtests involving mathematical computational and problem solving skills revealed relative strengths in these areas, and he achieved a broad math standard score of 80 (9th percentile, low average) (*id.* at pp. 2-4). The student demonstrated weaknesses in all areas of written language (1st percentile, very low) (*id.*). The special education teacher concluded that the student's academic skills were in the very low range, and his "fluency with academic tasks" and his ability to apply academic skills were both within the low range of functioning (*id.* at p. 3).

By letter dated May 30, 2006, the student's guidance counselor from O-U BOCES informed the parents that the student was in jeopardy of failing math, history, and English language arts, which were courses that were necessary for the student to be promoted to the next grade level (Dist. Ex. 82). At the end of the 2005-06 school year, an IEP progress report indicated that, out of a possible twenty short-term objectives, the student received designations of "not achieved" on six, "not progressing satisfactorily" on three, "some progress" on nine, and "progressing satisfactorily" on two (Dist. Ex. 81).

On June 19, 2006, the CSE subcommittee convened for the student's annual review and to develop his IEP for the 2006-07 school year (Dist. Ex. 78). Attendees included the parents, staff from the district and O-U BOCES, and counsel for the parties (*id.* at p. 3). According to the resultant June 2006 IEP, the student's special education teacher reported at the meeting that the student had been suspended for two days and had "many" incident reports (*id.*). Reports at the meeting regarding the student's attendance indicated that he had been absent for 37 out of 102 school days (*id.*). The June 2006 IEP stated that the counselor reported that the student had made some progress within counseling sessions, and although his interaction with peers was not always appropriate, he had made some positive peer relationships (*id.* at p. 4). According to the IEP, the student reportedly "did not appear to invest himself in the present program" (*id.* at pp. 3-4). According to the June 2006 IEP, the parents expressed their concern about the student's reading skills, and the district offered the student summer tutoring services in reading (*id.* at p. 4). For the 2006-07 school year, the CSE subcommittee recommended that the student be placed in a 6:1+1 special class with one individual and one group session of counseling per week and a "reading lab" (*id.*).

In August 2006, the student underwent surgery related to his achalasia and was released from the hospital in early September 2006, with a recommendation that the student be allowed to

carry water with him at all times (Dist. Ex. 76).<sup>3</sup> Thereafter, the student attended an O-U BOCES 6:1+1 special class for the 2006-07 school year (eighth grade) (see Dist. Exs. 74; 75). The student's first quarter academic grades consisted of 78 (social studies), 77 (science), 85 (math), 79 (English) and 68 (AIS reading) (Dist. Ex. 74).

On December 8, 2006, the CSE subcommittee convened for a program review (Dist. Ex. 71). According to the resultant December 2006 IEP, the student's special education teacher reported that the student's effort and progress were inconsistent and despite his need for consistent supervision, he was appropriately placed in the class (*id.* at p. 4). The student reportedly made progress in English and inconsistent progress in reading (*id.*). The CSE subcommittee did not recommend any changes to the student's program, but added to the IEP his need to be allowed access to water throughout the day (*id.* at pp. 1, 4).

In a letter dated December 15, 2006, the guidance counselor at O-U BOCES informed the parents that the student was in jeopardy of failing social studies, and physical education for the second marking period (Dist. Ex. 70). In March 2007, the guidance counselor notified the parents that the student was in jeopardy of failing English, science, and home and careers for the third marking period (Dist. Ex. 66).

On March 9, 2007, a district school psychologist conducted a psychological evaluation of the student (Dist. Ex. 65). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score (91) within the average range of cognitive abilities, with average verbal comprehension and working memory skills, and low average nonverbal reasoning skills and processing speed skills reported (*id.* at p. 3). Visual motor assessments indicated that the student's visual motor skills were within the low average range and suggestive of difficulty with pencil and paper tasks, which may affect his written class work (*id.* at p. 4). Teacher reports indicated that the student expressed somatic complaints and that his attention skills were "weaker than expected" (*id.* at p. 5). The student reportedly demonstrated oppositional behaviors in the classroom, which coupled with his decreased nonverbal and processing speed skills, according to the school psychologist, may have reduced his ability to "gain academic success" (*id.*). An April 25, 2007 administration of the WJ-III ACH yielded a broad reading standard score of 65 (1st percentile), a basic reading skills standard score of 72 (3rd percentile), and a math calculation standard score of 74 (4th percentile) (Dist. Ex. 63 at p. 1).<sup>4</sup>

In May 2007, the guidance counselor at O-U BOCES informed the parents that the student was in jeopardy of failing social studies and science for the fourth marking period or for the year (Dist. Ex. 61). During the 2006-07 school year, the student was absent 47 out of a possible 179 school days (Dist. Ex. 75). His final academic grades were as follows: 72 (social studies), 59 (science), 77 (English), 82 (math), and a "P" (AIS reading) (Dist. Ex. 58).

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<sup>3</sup> The student received a diagnosis of sleep apnea during the 2006-07 school year (Tr. p. 635); however, the hearing record does not include more specific details.

<sup>4</sup> The hearing record includes a score report for the April 2007 administration of the WJ-III ACH, but does not include a narrative evaluation report (Dist. Ex. 63).

On May 24, 2007, the CSE subcommittee convened for the student's annual review and to develop his IEP for the 2007-08 school year (Dist. Ex. 59). Attendees included the CSE chairperson, a "teacher," the school psychologist who conducted the March 2007 psychological evaluation, a social worker, and the parents (id. at p. 4). The resultant May 2007 IEP indicated that the CSE subcommittee reviewed the March 2007 psychological evaluation of the student, along with teacher reports indicating that the student's completion of work was inconsistent (id.). According to the IEP, the student could be "oppositional" which may affect the learning process, and he needed to be focused, redirected, and in a structured environment (id.). At the time of the meeting, the May 2007 CSE subcommittee noted that the student was not passing science and needed to "make up work" in English in order to pass (id.). For the 2007-08 school year, the CSE subcommittee recommended that the student return to the district and be placed in a 15:1 special class for English, math, science, and social studies, and receive one period per day of resource room services and one session per week of individual counseling services (id. at p. 1).

Upon returning to the district for the 2007-08 school year (ninth grade), the student attended the district's high school; however, he was reportedly hospitalized in September 2007 for an unspecified length of time and underwent surgery related to his achalasia in October 2007 (Dist. Ex. 33 at p. 4; Parent Ex. S). The student received home instruction services from October 10, 2007 through November 2, 2007 (Dist. Ex. 9 at p. 1). The student's grades as of November 2, 2007 were as follows: 86 (English), 75 (math), 74 (social studies), 75 (reading), and an "incomplete" in science (Parent Ex. X). Upon his return to school in November 2007, the student was reportedly pushed down a flight of stairs (Tr. pp. 625-27). On November 30, 2007 the student received after-school detention for insubordination and disrupting the class (Parent Exs. L; N). On December 20, 2007 the student received a three day out-of-school suspension after a physical altercation with another student (Parent Exs. K; L; P). The student's attendance from the time he returned to the district's school in November 2007 through the district's winter school vacation was described as "erratic" due to "the varying conditions of his chronic illness" (Dist. Ex. 33 at p. 4). In December 2007, the student's guidance counselor, teachers, and parents met to discuss behaviors that the student exhibited at school and the teachers' expectations regarding the types of behaviors that "would be allowed and not allowed" (Tr. pp. 297, 341-47).

On January 15, 2008, the student began receiving home instruction services "due to a medical leave of absence" (Dist. Exs. 9 at p. 1; 10 at p. 5). As of January 25, 2008, the student received the following grades: 86 (English), 57 (math), 66 (social studies), 70 (reading), and an "incomplete" in science (Parent Ex. Z). The hearing record also reflects that the student attended the district's school on January 29, 2008 and was involved in a physical altercation with another student, resulting in the student receiving a five day out-of-school suspension (Dist. Ex. 33 at pp. 4-5; Parent Exs. L-O).

In January 2008, the student's teachers prepared progress reports that were reviewed on January 31, 2008 by the CSE subcommittee at a program review meeting (Dist. Exs. 47; 49-53). Overall, the student's teachers commented that he had difficulty paying attention in class, was reluctant and could put forth more effort to work, needed frequent redirection, and exhibited disruptive classroom behaviors (Dist. Exs. 47 at p. 4; 49; 51-53). At that time, the student was passing all of his classes, but his teachers reported that he required "a great deal" of supervision and redirection (id.). The student's absences were noted by the CSE subcommittee (id.). The CSE subcommittee did not recommend any changes to the student's program at that time (id.).

In January and February 2008, district staff and the parents were in contact regarding completion of the student's assignments, his grades, and the January 29, 2008 altercation (Parent Exs. C-J). In February and March 2008, the student's teachers prepared progress reports that were reviewed on March 11, 2008 by the CSE subcommittee at a program review meeting (Dist. Exs. 34 at p. 4; 37; 39-42; 45). At that time, the student was passing his classes and receiving home instruction services due to his suspension and a recent hospital visit related to his achalasia (Dist. Ex. 34 at p. 4; see Dist. Ex. 36). In their progress reports, the student's teachers commented that the student had frequent absences, required frequent redirection, exhibited disruptive classroom behaviors, and had difficulty completing class work (Dist. Exs. 37; 39-42; 45). Two teachers suggested consideration of a more restrictive placement for the student (Dist. Exs. 40; 41). The CSE subcommittee determined that in accordance with "building policy," the student should continue to receive home instruction services "because of [his] present medical condition" (Dist. Ex. 34 at p. 4).

Over three dates in February 2008 and three dates in March 2008, a psychologist conducted a private neuropsychological evaluation of the student (Dist. Ex. 33). The psychologist noted the student's ADHD, ODD, learning disability, asthma, sleep apnea, and achalasia diagnoses (id. at p. 1). The psychologist further noted that in addition to the difficulties that the ADHD and learning disabilities posed, the student's academic achievement was "significantly impeded" by his inconsistent school attendance due to his medical condition (id.). The psychologist administered a number of evaluations to assess the student's language skills, verbal learning and memory, visual-spatial functioning, visual memory, motor and visual-motor functioning, executive functioning, social perception, and academic skills (id. at pp. 7-14). The parents and the student also completed behavior rating scales (id. at pp. 14-15). Based on a review of the student's educational records, the psychologist concluded that the student had consistently demonstrated "average intellectual functioning and significantly poorer academic achievement" (id. at p. 16). The student's reading and writing were weaker than his math skills (id.). The psychologist stated that "[a]lthough there is variability in test scores, overall [the student] does not appear to be making significant gains, not only relative to his intelligence, but also in absolute terms" in that his "academic language" skills remained at a second to third grade level (id.). She further reported that the student's poor reading decoding skills were a result of impairment in phonological processing and rapid naming, and that his "dyslexia" was "moderately severe" (id.). The psychologist's report discussed the student's difficulty with attention and memory, and possible reasons for his "oppositional" behavior when asked to follow directions (id. at pp. 17-18). In addition, the psychologist indicated that the student may not always "read[]" teachers and peers correctly and that his self-esteem was low (id. at p. 18). The psychologist's report provided numerous specific recommendations, which described an educational program specifically designed for students with learning disabilities and an ADHD that was "not too large" and that supported close collaboration among teachers (id. at pp. 19-21). According to the psychologist, the student's program should also provide flexible and individualized instruction, with special accommodations in consideration of his ADHD, reading disorder, and inconsistent attendance (id.).

On March 11, 2008, a superintendent's hearing was held with regard to the January 29, 2008 incident (Tr. p. 413). The hearing record in this case indicates that no further suspensions were imposed by the district (Dist. Ex. 34 at p. 4). Upon completion of his out-of-school suspension, the student did not return to school, but continued to receive home instruction services for the remainder of the school year (Tr. p. 367; Dist. Ex. 9 at p. 1). In a March 28, 2008 report

card, the student received the following grades: 91 (English), 89 (math), 97 (science), 72 (social studies), and 80 (reading) (Parent Ex. OO).

In spring 2008, the CSE chairperson contacted and sought suggestions from a representative of the State Education Department (SED), who provided her with the names of four potential out-of-State residential schools for the student (Tr. pp. 1030-31; see Dist. Exs. 28-31). On May 9, 2008, the parents and the CSE chairperson, among others, participated in a resolution session that was conducted pursuant to a due process complaint notice that had been filed by the parents (Tr. pp. 639-41, 1029-30).<sup>5</sup> The four out-of-State residential schools were discussed at the resolution session (Tr. p. 1032). On May 9, 2008, the parent provided the district with consent to share the student's records with the out-of-State residential schools,<sup>6</sup> and with three letters dated May 14, 2008, the CSE chairperson sent the student's information to three of the schools, notifying them that each of their programs was being considered as an "Emergency Interim Placement" and that the district was seeking a prompt response to avoid conducting a full impartial hearing (Dist. Exs. 25-31). The three out-of-State residential schools responded to the district by May 19, 2008, each declining to accept the student (Dist. Exs. 22-24).

According to the parents, they and the student visited Kildonan in spring 2008, at which time the student was administered a "preliminary test" (Tr. pp. 913-15). On June 4, 2008, the parents completed an application for the student to attend Kildonan (Dist. Ex. 115). With a letter dated June 13, 2008, the CSE chairperson sent the student's information to the fourth out-of-State residential school, the F.L. Chamberlain School (Chamberlain), informing the school that the district was seeking an "Emergency Interim Placement" for the student (Dist. Ex. 19).

In June 2008, the student's high school teachers prepared progress reports in anticipation of a CSE subcommittee annual review meeting (Dist. Exs. 10 at p. 1; 12-18). The progress reports indicated that it was difficult to assess the student's academic skill level because he had completed school work with his 1:1 home instruction services teacher, and some reports reiterated the difficulty the student had in the classroom while attending the district's program (Dist. Exs. 12; 14; 16-18). In an undated "Home Bound Instruction Summary" report the student's home instruction teacher described the student's performance during the time she worked with him from October 10, 2007 through November 2, 2007 and from January 15, 2008 to June 17, 2008 (Dist. Ex. 9 at p. 1). The home instruction teacher reported that she "tutored" the student in all subjects (id.). In describing the student's "pronounced reading and writing difficulties," the home instruction teacher stated that the student "lacked the skills necessary to decode words, use context clues, etc.," that he had a "very hard time putting a sentence together," and an "extremely hard time" spelling words (id.). She stated that the student's reading skills were at a third grade level, which made it difficult for him to "truly understand the ninth grade curriculum" (id. at p. 2). The home instruction teacher stated that the student's self-esteem improved when he realized that he

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<sup>5</sup> The details of that proceeding and the underlying due process complaint notice are not included in the hearing record.

<sup>6</sup> During the impartial hearing, the parties disputed the number of consent forms that were signed by the parent on May 9, 2008 (Tr. pp. 652-53; 1033-34, 1044, 1068).

was making progress and she opined that the student "would benefit from a small educational setting where he can be given the attention he needs" (id. at p. 1).

On June 19, 2008, the CSE subcommittee convened for the student's annual review and to develop an IEP and recommend a placement for the 2008-09 school year (Dist. Ex. 10). Attendees included the CSE chairperson, a school psychologist, a special education teacher, a regular education teacher, a school counselor, and the parents (id. at p. 5). The CSE reviewed the spring 2008 private neuropsychological evaluation report (Tr. pp. 155-56, 159-60; Dist. Ex. 10 at p. 5; see Dist. Ex. 33). According to the resultant June 2008 IEP, the student had passed science, English, math and social studies for the year and the subcommittee discussed the parents' request to locate a placement for the student that would focus on his reading and writing weaknesses and "ADHD issues" (Dist. Ex. 10 at p. 5). For the 2008-09 school year, the CSE subcommittee recommended that the student be placed in an "alternative setting,"<sup>7</sup> in a 12:1+1 special class for English, reading, math, science, and social studies and receive one session per week of individual counseling services (id. at pp. 1, 5). The June 2008 IEP stated that if a placement for the student was not identified by the beginning of the school year, "the student's medical needs are expected to require that he remain on a medical leave of absence with home instruction" (id. at p. 5). The CSE subcommittee agreed to address the parents' requests for an increase in home instruction hours and specific reading instruction services in the fall if necessary (id.).

In a due process complaint notice dated July 28, 2008, the parents, through their attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2006-07 and 2007-08 school years and that the district had not provided the parent with an IEP for the student for the 2008-09 school year or identified a proposed educational placement for the student (Parent Ex. A at pp. 1-2).<sup>8</sup> Among other things, the parents alleged that the district failed to address the student's reading and social/behavioral needs and provide adequate home instruction services and program and testing modifications (id. at pp. 2-4). The parents sought compensatory reading instruction, reimbursement for private reading tutoring for the 2006-07 and 2007-08 school years, and tuition reimbursement for unilaterally placing the student at Kildonan for the 2008-09 school year (id. at p. 6).

On August 6, 2008, the student and the parents visited and participated in an interview with Chamberlain (Dist. Exs. 6; 114). In an e-mail dated August 7, 2008, the parents described to Chamberlain staff the reasons why they believed they needed to identify a different program for the student (Dist. Ex. 114). Despite the positive experience they had during the three hours spent at Chamberlain, the parents determined that travel time, expense of travel and the student's medical condition did not make it a viable program for him, in addition to the student's concern that there were not enough students at Chamberlain with significant reading deficits and his need to be in an "entrenched reading environment" (id.).

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<sup>7</sup> The district's CSE chairperson indicated that alternative setting referred to a placement located somewhere other than in the district's high school (Tr. pp. 168-69).

<sup>8</sup> The hearing record indicates that an IEP was sent to the parents after the district's July 10, 2008 meeting of the board of education meeting (see Dist. Ex. 8).

In a letter dated August 8, 2008, Kildonan's director of admissions notified the parents that the student had been accepted to Kildonan for the 2008-09 school year (Dist. Ex. 117).<sup>9</sup> In a letter dated August 13, 2008, an admissions associate from Chamberlain informed the district's CSE chairperson that although Chamberlain's admissions committee "determined [the student] is an appropriate candidate for admission," it was her understanding that the parents had "concerns regarding the distance of Chamberlain School from [the student's] home and therefore do not wish to proceed with the admissions process" (Dist. Ex. 6).

On August 29, 2008, the CSE subcommittee convened to complete the student's annual review (Dist. Ex. 4). Attendees included the CSE chairperson, a special education teacher, a regular education teacher, and a school psychologist (*id.* at p. 5). The parents participated at the August CSE subcommittee meeting by telephone (*id.*). According to the resultant August 2008 IEP, the CSE subcommittee reviewed the outcome of the placement search and stated that Chamberlain determined that the student was appropriate for its program (*id.*). The CSE subcommittee meeting comments indicated that the student's testing accommodations and program modifications were reviewed and references on the IEP to the student's behavior as "oppositional" were removed at the request of the parent (*id.* at pp. 5-6). For the 2008-09 school year, the CSE subcommittee recommended that the student be placed in an 8:1+1 special class setting with a related service consisting of one 45-minute group session of counseling per week (*id.* at pp. 1, 6). The CSE subcommittee identified Chamberlain as the recommended program for implementing the student's IEP (*id.*). The CSE subcommittee indicated that the student's need for home instruction was "obviated" due to its recommendation for "an appropriate special education program" (*id.* at p. 6). The CSE subcommittee agreed to consider the student's need for home instruction services upon receipt of medical notification regarding the student's inability to attend the school program for medical reasons (*id.*). On September 18, 2008, the district granted the student's physician's September 16, 2008 request for the student to receive home instruction services through September 30, 2008 due to surgery related to his achalasia (Dist. Exs. 1-2).

An impartial hearing convened in October 2008 and testimony was heard over the course of five days. In January 2009, the impartial hearing officer received additional exhibits from the parties, through their attorneys, with regard to the parents' enrollment of the student at Kildonan (IHO Exs. VII-X). In a decision dated February 19, 2009, the impartial hearing officer determined that the district failed to offer evidence that it provided a FAPE or to rebut the parents' evidence that the district failed to appropriately implement the student's IEP for the 2006-07 school year (IHO Decision at p. 17). With regard to the 2007-08 school year, the impartial hearing officer determined that the district failed to conduct a functional behavioral assessment (FBA) or prepare a behavioral intervention plan (BIP), failed to provide the student with the recommended counseling services and consequently failed to offer the student a FAPE (*id.* at pp. 19-20). The impartial hearing officer also noted, among other things, that the district had failed to adequately explain why the CSE changed the student's placement from a 6:1+1 special class during the 2006-07 school year to 15:1 special classes in his academic subject areas in the 2007-08 school year, particularly in view of the lack of improvement and his substantial reading and writing deficits (*id.* at pp. 20-21). However, the impartial hearing officer also determined that the parents did not proffer evidence regarding the nature of the tutoring services or attendant expenses during the

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<sup>9</sup> The hearing record indicates that his acceptance was as a "boarding student" (*see* Parent Ex. QQ).

2006-07 or 2007-08 school years and found that the parents failed to establish that they were entitled to reimbursement (id. at p. 32).<sup>10</sup>

With respect to the 2008-09 school year, the impartial hearing officer rejected the parents' arguments that the district's recommendation of Chamberlain was predetermined or denied the parents' meaningful participation in the CSE (IHO Decision at pp. 23-24). The impartial hearing officer also noted that the district did not conduct an FBA and that the environment at Chamberlain was substantially more restrictive than the student's previous placement (id. at p. 23). The impartial hearing officer concluded that Chamberlain's: (1) emphasis on its therapeutic services, (2) lack of a significant number of students with severe reading and writing deficits, (3) distance from home, and (4) restrictive opportunities to communicate with his family rendered the program inappropriate for the student (id. at pp. 26-27). The impartial hearing officer also determined that the program at Kildonan was, among other things, consistent with the recommendations of the private psychologist as a structured program for students with learning disabilities and ADHD, as well as the student's needs as identified in the 2008-09 IEP (id. at p. 29).

The impartial hearing officer noted that the district did not contest the parents' tuition reimbursement claim on equitable grounds and rejected the district's evidentiary arguments regarding the student's enrollment at Kildonan (IHO Decision at p. 31). The impartial hearing officer ordered the district to reimburse the parents for the tuition paid to Kildonan at the end of the 2008-09 school year upon the presentation of documentation demonstrating the tuition paid and the student's attendance during the 2008-09 school year (id. at p. 32).

The district appeals, contending that it offered the student a FAPE for the 2006-07, 2007-08, and 2008-09 school years. The district argues that the impartial hearing officer erred in concluding that an FBA should have been conducted or that the student required a BIP. The district asserts that Chamberlain's program was appropriate for the student. The district also alleges that Kildonan did not provide extensive immersion in reading and writing and was inappropriate for the student's social/emotional needs. According to the district, the impartial hearing officer erred in accepting evidence of the student's attendance at Kildonan.

In their answer, the parents assert, among other things, that the district failed to demonstrate that the Chamberlain program was appropriate for the student and that Kildonan was appropriate for the student.

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]).

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<sup>10</sup> The impartial hearing officer also determined it was not necessary to address the parents' "compensatory services" claim (IHO Decision at p. 32). Since the parents do not cross-appeal any aspect of the impartial hearing officer's order, I do not address the impartial hearing officer's compensatory education determination.

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; 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]; 8 NYCRR 200.5[j][4][ii]; 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A student's recommended program must 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, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

At the outset I will briefly address the district's contentions that it offered the student a FAPE for the 2006-07 and 2007-08 school years. I note that the impartial hearing officer did not grant the parents any relief with respect to their claims for the 2006-07 or 2007-08 school years and the parents have not cross-appealed any aspect of the impartial hearing officer's order (see IHO Decision at p. 32). Moreover, I note that it does not appear that the student is receiving services in accordance with either the 2006-07 or 2007-08 IEPs (IHO Exs. IV; VII). Accordingly, I find that the district's arguments have been rendered academic and must be dismissed as moot.

Turning next to the district's arguments that Chamberlain was an appropriate program for the student for the 2008-09 school year, for the reasons stated below, I agree with the impartial hearing officer's conclusions that Chamberlain's "principal focus is therapeutic," and that it could offer "individualized daily one to one reading instruction" from qualified personnel to address his reading needs (IHO Decision at p. 26); however, the hearing record does not support the conclusion that the student's behavioral needs were such that a therapeutic, out-of-State residential placement was required.

The hearing record indicates that the June 2008 CSE subcommittee reviewed and considered the March 2008 private neuropsychological evaluation report, and concluded that the student exhibited "a real weakness in the area of reading and writing" (Tr. pp. 158-62; Dist. Ex. 10 at p. 5). The CSE subcommittee also reviewed teacher reports developed in June 2008 (Tr. pp. 165-66; see Dist. Exs. 12-18). The CSE chairperson acknowledged that the information provided in the June 2008 teacher reports regarding the student's behavior reflected what his behavior was like when he was present in school, and that some teachers were unable to assess his behavior because he had not been in class since January 2008 (Tr. pp. 165-66).<sup>11</sup> The CSE chairperson noted that the June 2008 CSE subcommittee, in agreement with the March 2008 psychologist's recommendations, was "looking for a program basically focusing on students who have weaknesses in reading and writing and ADHD issues" (Tr. p. 162). She testified that the June 2008 CSE subcommittee recommended seeking a program with a small class ratio and with an emphasis on reading and writing in addition to counseling (Tr. p. 163). She further testified that the counseling service was recommended for the purpose of addressing issues of immaturity and socialization and behaviors such as disrupting peers, interrupting, and exhibiting off-task behaviors (Tr. pp. 163-64).

The August 29, 2008 IEP indicated that the student's cognitive abilities were within the average range, but that academic achievement assessments revealed below average range skills in reading, math, and writing (Dist. Ex. 4 at p. 3). The August 2008 IEP stated that the student struggled with encoding and decoding and despite his ability to communicate "at grade level," he exhibited difficulty translating information presented orally into written form (id.). In addition, the IEP stated that the student had difficulty with planning, keeping track of materials, and completing tasks; and that his difficulty with memory concentration affected his academic performance (id.). The CSE subcommittee described the student's rate of progress as "inconsistent" and indicated that he was "capable of achieving more than he shows" (id.). The CSE subcommittee identified the student's needs in the areas of decoding and encoding; written

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<sup>11</sup> The CSE chairperson testified that the student did not attend school for approximately 50 percent of the 2007-08 school year due to medical problems (Tr. pp. 150-51, 288).

expression including the rules of punctuation, spelling and grammar and essay writing; basic math operations and word problems; and his need to improve class preparation skills and his ability to transition from one activity to another in the classroom (id.).

The August 2008 IEP describes the student's social skills as "immature" compared to his age and grade level peers, and that in a traditional school setting the student sought peer attention in inappropriate ways or that he was often argumentative and defiant with adults (Dist. Ex. 4 at p. 3). The August 2008 IEP also stated that the student's social and behavioral immaturity interfered with his acquisition of "basic and cognitive skills" (id.). The CSE subcommittee indicated that the student needed to appropriately seek peer attention and with counseling, needed to develop coping strategies for conflict situations and accept correction from adults and peers appropriately (id. at p. 4).

Regarding the student's management needs, the August 2008 IEP indicated that the student required teacher redirection to stay on task and the academic and behavioral supports that are provided in a small class placement (Dist. Ex. 4 at p. 4). The CSE subcommittee determined that the student would benefit from a classroom setting in which behavior expectations and routines are clear, consistent, and prioritized (id.). The August 2008 IEP stated that the student had diagnoses of an ADHD, asthma and achalasia, and that due to his poor planning skills, he would need extended time to complete missed work due to illness (id.).

The August 2008 IEP recommended a variety of program modifications including textbooks for home, books on tape/CD, copy of class notes, and preferential seating; testing accommodations including tests read, small group administration, revised directions, extended time, and use of a computer/calculator; and annual goals and short-term objectives in the areas of study skills, reading, writing, math, and social/emotional/behavioral (Dist. Ex. 4 at pp. 1-2, 6-10). The student's social/emotional/behavioral annual goals included communicating and interacting in a socially acceptable manner with peers, teachers and adults, and using effective coping strategies when faced with conflict situations (id. at p. 9).

With regard to the program recommended by the district, the admissions director at Chamberlain testified that at the time of the impartial hearing, approximately 95 boarding and 14 day co-ed students attended Chamberlain, ranging in age from 11-18 in 6th through 12th grade (Tr. pp. 30, 40). The admissions director indicated that Chamberlain is considered a therapeutic boarding school with a continuity of services on its campus that establishes a therapeutic environment (Tr. p. 49; see Parent Exs. KK; LL).<sup>12</sup> Many of the students are described as have a learning disability and/or an emotional disability, with the greatest percentage of students carrying diagnoses of a bipolar disorder (53 percent) and/or an ADHD (49 percent) (Tr. p. 40; Dist. Ex. 113 at p. 2). Other diagnoses contained in Chamberlain's "Diagnostic Profile" included nonverbal learning disability (21 percent), generalized anxiety and "PTSD" (18 percent), Asperger syndrome (17 percent), and "PDD" and "OCD" (14 percent) (Dist. Ex. 113 at p. 2).

According to the hearing record, Chamberlain's "clinical staff" is composed of two psychiatrists, a clinical director, an assistant clinical director, a family enrichment coordinator, and

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<sup>12</sup> The hearing record indicates that Chamberlain is a member of the National Association of Therapeutic Schools and Programs (Tr. pp. 104-06).

eight therapists, who are all Masters level clinicians with a variety of licensures (Tr. pp. 50-51; Dist. Ex. 113 at p. 3).<sup>13</sup> Students at Chamberlain are required to participate in one 45-minute session of individual therapy per week and are also involved in "therapeutic groups" arranged by specific topics, including social skills, dialectical behavioral therapy, and cognitive behavioral therapy (Tr. pp. 50-52; Parent Ex. LL). The admissions director indicated that Chamberlain is a "highly structured and supervised program" with 24-hour supervision of students (Tr. p. 66).

The composition of a student's treatment team at Chamberlain includes staff such as house managers, a classroom teacher, an academic advisor, a therapist, and a doctor (Tr. p. 55). For students exhibiting problematic behaviors, the admissions director testified that Chamberlain staff assess whether or not the behavior is a "choice," or a manifestation of a learning disability or an emotional problem (Tr. p. 59). The students' treatment team decides on the appropriate intervention and if the behavioral management system is not working for a student, develops individual behavior plans (Tr. pp. 59-61).

The director of studies (principal) at Chamberlain testified that not all students need or receive a "reading program per se other than what is offered through the curriculum standards for their grade level" (Tr. pp. 987, 995). He further testified; however, that Chamberlain offers the services of a full-time reading specialist and a full-time reading teacher for students who need remedial help or specialized reading instruction (Tr. pp. 995-96, 1011). The reading teacher is "certified in the Wilson reading program and Orton-Gillingham;" however, Chamberlain most frequently uses a reading program entitled the "Sunday System," described in the hearing record as an Orton-Gillingham based program (Tr. p. 1011). The reading specialist, who is also a speech-language pathologist, is "trained and uses frequently the Lindamood-Bell materials" (Tr. pp. 1013-14). During the 2008-09 school year, approximately thirty students received individualized reading programs and approximately four students were receiving five sessions per week of individual reading instruction in addition to reading instruction during an inclusion period in the classroom (Tr. pp. 996-98, 1020).

While the foregoing evidence demonstrates that Chamberlain could have addressed the student's reading and writing deficits, it does not support the district's conclusion that an out-of-State therapeutic residential placement was necessary to address his needs. The psychologist who conducted the student's March 2008 private neuropsychological evaluation testified that the student's reading disorder was "moderate to severe, probably more on the severe end" and that some of the behaviors characterized as "oppositional defiant" were behaviors related to his reading disorder and ADHD (Tr. pp. 783, 796-97). Her evaluation report describes how some of the student's behaviors were also related to his difficulty with memory and poor self-esteem due to his reading deficits (Dist. Ex. 33 at pp. 17-18). She testified that her evaluation would have indicated whether the student had an ODD, but that the results did not lead her to conclude the student had an ODD (Tr. pp. 823-24). The psychologist further testified that the student did not need placement in a therapeutic facility and opined that she would not recommend individual psychotherapy for the student if he was able to learn to "manage his ADHD" and improve his self-esteem (Tr. pp. 824-25, 827).

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<sup>13</sup> The hearing record refers to Chamberlain staff as "therapists," "clinicians," and "counselors" interchangeably (Tr. pp. 117-18; Dist. Ex. 113 at p. 3).

The hearing record does not indicate that the CSE subcommittee considered the June 2008 report developed by the student's home instruction provider, who had worked with the student from January through June 2008 (Tr. pp. 201-02; Dist. Ex. 9). The home instructor's report does not reflect that the student exhibited significant behavioral problems and, although she reported that working with the student was "at times very trying and not so easy," it was due to the student's frustration at being unable to complete the work presented (Dist. Ex. 9 at p. 2; see Tr. p. 210). She reported that the student "tried as best as he could, and even when he wanted to give up and [she] nagged him to keep going, he was very respectful and didn't give [her] any trouble" (Dist. Ex. 9 at p. 2). Notably, the August 2008 IEP present levels of performance, identification of the student's needs, and annual goals and short-term objectives do not lead to the conclusion that the student exhibits significant behavioral difficulties and they do not support the conclusion that a therapeutic residential placement is required (see Dist. Ex. 4 at pp. 3-4).<sup>14</sup> In addition, the hearing record reflects that the most recent FBA of the student was conducted in June 2003 (Parent Ex. V), and accordingly, I find that that district lacked sufficient evaluative information to support its recommendation that the student required a therapeutic residential placement in order to meet his behavioral needs.

I also note that the CSE chairperson testified that the district did not have a program smaller than a 15:1, and that the student required a smaller class program with more support (Tr. p. 170). The CSE chairperson testified that prior to the June 2008 CSE subcommittee meeting, she sought assistance from an SED representative, who primarily addresses the identification of out-of-State residential programs that may meet a student's needs (Tr. pp. 175-78, 262). Although the chairperson conceded that the appropriate process to identify a program includes the exhaustion of in-State options, she testified that she did not investigate any neighboring public school programs, any area day school programs, or BOCES programs (Tr. pp. 172-74, 221-22, 263). She also testified that she did informally describe the student's deficits to the SED representative, but did not recall explaining that the district had not exhausted in-State options before seeking SED's assistance (Tr. p. 276). The CSE chairperson testified that she contacted a single in-State program and determined that it did not have a strong enough reading program for the student and the hearing record reflects that no other in-State options were considered by the CSE subcommittee (Tr. pp. 174-75, 220-21). Although the hearing record demonstrates that the district reasoned it would be appropriate to seek an "alternative" special education program aside from those specifically offered by the district, there is no indication that the CSE ever concluded that the student required an out-of-State residential placement (see Tr. pp. 280-81; Educ. Law § 4407[a]; 8 NYCRR 200.6[j][1][iii][e]; see also 34 C.F.R. § 300.116[b][3]; 8 NYCRR 200.4[d][4][ii][b]). Under the circumstances presented in this case, particularly in light of the student's physical needs and the distance of Chamberlain from the student's home, I find that the district did not meet its burden of proof to establish that it recommended an appropriate program for the student. The student was therefore not offered a FAPE for the 2008-09 school year.

Turning next to the parties' contentions regarding the student's placement at Kildonan, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington,

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<sup>14</sup> I also note that although the student had two suspensions from school during the 2007-08 school year (Dist. Ex. 33 at pp. 4-5; Parent Exs. K; L-P), the district did not proffer any evidence that the suspensions were related to his learning disability or were considered in the district's determination to place the student in a therapeutic residential placement.

471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Walczak, 142 F.3d at 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 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 by itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364). 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).

In this case, the impartial hearing officer, in a thorough and well-reasoned analysis, determined that the parents had established that the program at Kildonan is appropriate for the student for the 2008-09 school year (IHO Decision at pp. 28-31). In addition, for the reasons described below, I agree with the impartial hearing officer's conclusion that Kildonan is appropriate to address the student's needs.

The hearing record indicates that a "typical" day at Kildonan includes morning meeting time, academic and elective class instruction, language tutorial, academic study hall, and language tutorial study hall (Tr. pp. 862-63). The director testified that Kildonan conducts screenings with each student in order to individualize instruction and the curriculum it offers, in addition to standardized testing conducted at the beginning and at the end of the year (Tr. pp. 846, 883). At different times during the year, tutors communicate in writing and orally with teachers regarding a student's level of instruction, reading and writing ability (Tr. p. 883). Generally, the class ratios are small with one teacher to four or five students (Tr. p. 847). Kildonan also has an assistive technology department, and the hearing record specifically describes the types of assistive technology used in the classrooms to address students' needs (Tr. pp. 847-48).

The director of the Kildonan Teacher Training Institute (director) testified that many students attending Kildonan have large discrepancies similar to the student's, between their actual grade level and their grade-level reading abilities (compare Tr. pp. 894-95, with Dist. Exs. 33 at pp. 13; 115 at p. 1). She further testified that Kildonan provides literacy support and instruction for students in a variety of ways throughout the school day (Tr. pp. 842-43). Students have daily 45-minute individual language tutorial sessions with tutors trained in the Orton-Gillingham methodology, who provide students with assignments that they work on in the "language training" study halls (Tr. pp. 842-43; see Tr. pp. 871-72).<sup>15</sup> During the daily language tutorial, students complete ten minutes of oral reading and are "pretty much reading aloud all the time" (Tr. pp. 873-74). The director testified that "just about every day [students] have writing instruction incorporated into their tutorial," although it varied depending on an individual student's needs (Tr. pp. 875-76). Students also have at least one academic study hall per day, which is supervised by tutors who check for understanding of the assignments, and provide additional help (Tr. p. 843; see Tr. p. 872). Many of the tutors teach the students' academic classes throughout the school day and the director testified that "the Orton-Gillingham approach is also applied completely throughout the day in all their academic subjects" (Tr. pp. 843-44).<sup>16</sup> For students who require more "intensive instruction or more one-on one," Kildonan offers more than one individual tutorial session per day, or individual academic classes (Tr. pp. 845-47, 879). If needed, Kildonan also offers academic instruction at a level below a student's current grade level (Tr. p. 880).

The director at Kildonan testified that "a majority" of the students at the school are diagnosed as having an ADD or an ADHD, and the nature of the instruction and strategies used

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<sup>15</sup> The hearing record indicates that Kildonan tutors hold at least a Bachelors degree, in addition to 70 hours of training about "dyslexia" (Tr. p. 852).

<sup>16</sup> The director testified that in academic classes, students who are not at the reading level of the texts used during the class are read to "so they can keep up with their learning academic subject matter" (Tr. pp. 874-75). Tutors incorporate academic-class writing assignments into their instruction for students who have difficulty with written language and are assisted by "proctors" during their academic study halls (Tr. pp. 876-77).

during language tutorials "keep[s] the student engaged in what's going on" (Tr. pp. 844-45, 868-69, 878-79). For example, the nature of instruction during the language tutorial and academic classes changes frequently, and incorporates "hands-on" activities rather than lecture-style instruction for "long periods of time" (Tr. pp. 878-79). Kildonan's academic dean provides training to tutors and teachers about attention deficit disorders and instructional methods used to assist students with those needs (Tr. pp. 868-69, 888-89). According to the director, the multisensory approach used during the language tutorial provides "continual repetition and feedback and spiraling" (Tr. p. 869).

With regard to the social/emotional and behavioral characteristics of students attending Kildonan, the director testified that "most of the kids" who attend Kildonan as junior high or high school students experience frustration or "negative feelings" (Tr. pp. 850-51). The director testified that Kildonan addresses poor self-esteem and frustration by providing daily individual tutoring sessions, in which students experience success with the writing process and have a tutor they can go to when they have concerns (Tr. p. 849). She testified that many of the students' concerns related to frustration and poor academic performance improve or resolve themselves (Tr. p. 851).

I also note that the psychologist recommended that the student receive a program "specifically designed for students with learning disabilities and ADHD," that is not too large, supports close coordination among teachers and staff, and which provides flexible instruction to accommodate the student's symptoms of an ADHD and a reading disorder, and also guidance to help the student "practice methods of self-management" (Dist. Ex. 33 at pp. 19-20). The hearing record reflects that Kildonan offers such a program, that many students at Kildonan have similar profiles to the student's regarding reading deficits, difficulties with ADHD-related behaviors, and poor self-image, and that staff at Kildonan have experience instructing students with needs similar to the student in this matter (compare Tr. pp. 844-45, 850-51, 894-95, with Dist. Ex. 33 at pp. 13-21). I am persuaded by the evidence provided by the home instructor and the psychologist, who opined that the student's behavioral difficulties were largely the result of his reading, attention and memory problems, and low self-esteem due to his poor reading skills (Dist. Exs. 9; 33 at pp. 17-18; Tr. pp. 885-86; compare Application of the Bd. of Educ., Appeal No. 08-084 [noting that the parents unilateral placement was appropriate notwithstanding the lack of counseling services where reading disorder affected student's behavior], with Application of the Bd. of Educ., Appeal No. 08-029 [noting that the lack of appropriate related services such as counseling rendered the parent's unilateral placement inappropriate when testing and psychiatric evaluation of the student's social skills deficits resulted in recommendations for formal counseling and therapeutic supports]). I also note that Kildonan is less restrictive than Chamberlain in as much as it is located in-State, approximately 80 minutes from the student's home, which would permit the student to attend five days per week as a boarding student during the week, but remain at home on weekends (Tr. p. 920; see 8 NYCRR 200.4[d][4][ii][b]).<sup>17</sup> Accordingly, I find that the parents met their burden to establish that Kildonan was an appropriate program for the student.

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<sup>17</sup> The hearing record indicates that Chamberlain is located between four and six hours away from the student's home (Tr. pp. 684, 919).

With regard to the district's contention that the impartial hearing officer improperly considered evidence of the student's enrollment at Kildonan, I note that the formal rules of evidence that are applicable in civil proceedings are relaxed in impartial hearings (Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; see Application of a Child with a Disability, Appeal No. 07-027; see also Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006] [strict formal rules of evidence need not be observed at administrative hearings]). In this case, the impartial hearing officer afforded both parties a reasonable opportunity to be heard on this issue and the district has not adequately challenged the veracity of the evidence (IHO Exs. VII-X). Moreover, I note that the impartial hearing officer took appropriate precautions to ensure that the district would only be held responsible for reimbursement of actual expenses incurred by the parents (see IHO Decision at p. 32). Under the circumstances of this case, I find the district's argument is unpersuasive. In view of the foregoing, I find no reason to disturb the decision of the impartial hearing officer.

I have examined the parties remaining contentions and find it is unnecessary to address them in light of my decisions herein.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
April 27, 2009

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**