The University of the State of New York

The State Education Department
State Review Officer
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No. 15-096

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 Arlington Central School District

Appearances:
Gina DeCrescenzo, P.C., attorneys for petitioners, Benjamin J. Hinerfeld, Esq., and Gina M. DeCrescenzo, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the parents' claims pertaining to the 2012-13 school year were barred by the statute of limitations; that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2013-14 and 2014-15 school years was appropriate; and which denied the parents' request to be reimbursed for their son's tuition costs at the Kildonan School (Kildonan) for the 2014-15 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

At all times relevant to the challenged school years, the student has been eligible for special education programs and services and has attended a district public school until September 2014 when he was placed at Kildonan.

As way of a background, the student was initially found eligible for special education services as a preschool student with a disability during the 2008-09 school year and received occupational therapy (OT) beginning in spring 2009 due to significant fine motor difficulties and

attention needs (Tr. pp. 37-38; Dist. Exs. 14 at p. 108; 15 at p. 113; 22 at p. 137).[1] Although the CSE did not find the student eligible for special education at the start of the 2009-10 school year (kindergarten), the student received academic intervention services which targeted sound/symbol associations, sight word recognition, and other pre-reading skills (Tr. pp. 37-38; Dist. Exs. 22 at p. 137; 23 at p. 143; Parent Ex. I). In March 2010, the parents referred the student to the CSE (Tr. pp. 37-38, 42-43, 1357; Dist. Exs. 38; 39). On April 29, 2010, a CSE convened and found the student eligible for special education as a student with a learning disability (Dist. Ex. 3 at p. 11).[2] For the remainder of the 2009-10 school year, the CSE recommended one 90-minute session per week of consultant teacher services and one two-hour and 30-minute session per week of resource room services (id.).

For the 2010-11 school year (first grade), the CSE continued to find the student eligible for special education as a student with a learning disability and recommended that the student receive integrated co-teaching (ICT) services in a general education classroom for 10 hours per week along with one two-hour and 30-minute session per week of resource room in a group of five (Dist. Ex. 4 at p. 17). For the 2011-12 school year (second grade), the CSE convened in April 2011 and recommended ICT services and resource room in the same duration as in the April 2010 IEP and also recommended one 30-minute session per week of OT in a small group (compare Dist. Ex. 6 at p. 25, with Dist. Ex. 4 at p. 17). In November 2011, the CSE removed resource room support from the student's IEP (Dist. Ex. 7 at p. 35). According to the district's supervisor for special education, the November 2011 CSE determined that the student "had been responding well to the services, and that his level of progress at that moment did not require . . . [the] support of the resource room" (Tr. p. 59).

On June 8, 2012, the CSE convened to develop an IEP for the 2012-13 school year (third grade) (Dist. Ex. 8 at p. 46). The June 2012 CSE recommended that the student receive ICT services in a general education classroom for 10 hours per week as well as one two-hour and 30-minute session per week of resource room in a group of five and one 30-minute session per week of OT in a small group (id.). In addition, the June 2012 CSE developed 16 annual goals targeting the student's needs in the areas of study skills, reading, writing, math, and motor skills (id. at pp. 52-53). The June 2012 CSE also recommended strategies to address the student's management needs (id. at pp. 50-51).

On May 23, 2013, the CSE convened to develop an IEP for the 2013-14 school year (fourth grade) (Dist. Ex. 9 at p. 57). The May 2013 CSE recommended that the student receive ICT services in a general education classroom for 10 hours per week and one two hour and 30-minute session per week of resource room in a small group (id.). The May 2013 CSE also recommended six 30-minute sessions per year of OT consultation (Dist. Ex. 9 at p. 66). In addition, the May 2013 CSE developed 11 annual goals targeting the student's needs in the areas of study skills,

[1] Unlike the parents' exhibits, the district's exhibits appear to be numbered cumulatively, in sequential order (e.g. the first page of District Exhibit 2 was enumerated as page "00008" rather than Exhibit 2 page 1); however, as some exhibits were admitted out of sequence (Dist. Ex. 10A was enumerated as page numbers 210-221, while Dist. Ex. 11 begins at page number 81) the value of this approach is questionable and made the parties' references to the district's exhibits difficult to follow in some instances. Reluctantly, the citations in this decision will rely on the district's assigned pagination.

[2] The student's eligibility for special education programs and related services as a student with a learning disability for the 2012-13, 2013-14, and 2014-15 school years is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

reading, writing, and math (Dist. Ex. 8 at p. 65). The May 2013 CSE also recommended strategies to address the student's academic and management needs (id. at pp. 62-64).

On March 27, 2014, the CSE convened to discuss changes to the student's program for the remainder of the 2013-14 school year (fourth grade) (Dist. Ex. 10 at pp. 69-72, 159) and to develop an IEP for the 2014-15 school year (Dist. Ex. 10A at pp. 210, 212; see also Tr. pp. 71-72, 77, 159, 444). With regard to the student's program for the remainder of the 2013-14 school year, the CSE recommended that an assistive technology (AT) consultation and a Conners attention rating scale be conducted (Dist. Exs. 10 at p. 69; 54 at p. 205; see also Tr. pp. 70, 74-75, 159-60, 1440, 1445-46, 1628-29; Dist. Ex. 44 at p. 182).[3] The March 2014 CSE also recommended that the additional testing modification of "[t]ests read" be implemented for the remainder of the 2013-14 school year (Dist. Ex. 10 at pp. 69, 79). With regard to the 2014-15 school year, the March 2014 CSE recommended a 12-month program consisting of two, two-hour sessions per week of direct consultant teacher services for July and August 2014 (Dist. Ex. 10A at pp. 210, 220). Beginning in September 2014, the CSE recommended ICT services in a general education classroom for 10 hours per week and one two-hour session per week of resource room in a group of 5 (Dist. Ex. 10A at pp. 210, 219, 220). In addition, the March 2014 CSE developed 12 annual goals targeting the student's needs in the areas of study skills, reading, writing, and math (id. at pp. 217-18). The March 2014 CSE also recommended resources and strategies to address the student's academic and management needs (id. at pp. 215-17).

By letter dated May 5, 2014, the parents informed the district that they "decided to get a second opinion and have a full evaluation "done on [the student] outside of the school district" (Dist. Ex. 45; see also Tr. pp. 85-86, 2695). The parents identified a specific evaluator whom they wished to conduct the evaluation and requested a CSE meeting to discuss the issue (Dist. Ex. 45).

The CSE reconvened on May 13, 2014 in response to the parents' request (Dist. Exs. 10B at p. 222; 46 at p. 186; 54 at p. 205; see also Tr. pp. 84, 86). The May 2014 CSE reviewed the results of the April 2014 AT consultation and recommended three AT programs—Bookshare, Write 10, and Read2go—as well as 10, 30-minute sessions per year of AT consultation for the 2014-15 school year (Dist. Exs. 37; 46 at p. 186; 54 at p. 205; see Dist. Ex. 10A at p. 219; see also Tr. pp. 84, 729-32, 1660-64, 2697).[4] In addition, the May 2014 CSE reviewed the results of the Conners rating scale and the parents' letter dated May 5, 2014 (Dist. Ex. 10B at p. 222). At the May 2014 CSE meeting, the parents requested an independent educational evaluation (IEE) (Dist. Exs. 10 at p. 222; 46 at p. 186; see also Tr. pp. 87-88, 1667, 1671-74, 2177-78, 2700). The May 2014 CSE informed the parents that they needed to identify which district evaluation they disagreed with and clarified that the parents were not required to explain why they disagreed with it (Tr. pp. 87-88; Dist. Exs. 10B at p. 222; 46 at p. 186). The parents responded, indicating they would send a follow up letter identifying the type of IEE they sought and informing the May 2014

[3] Although the March 2014 CSE initiated an AT consultation, the March 2014 IEP included the commentary of a review of the report of an April 2014 AT consultation and recommendations for AT programs and services (Dist. Ex. 10A at pp. 210-11, 219-20). As the AT consultation had not yet taken place at the time of the March 2014 CSE meeting, it appears that there must be an error in the March 2014 IEP; however, the hearing record does not explain the nature of the error or how it occurred.

[4] The May 2014 IEP does not include recommendations for AT programs or services (Dist. Ex. 10B). However, a prior written notice sent after the May 2014 CSE meeting and the CSE's chronological contact forms describe AT programs and services recommended by the May 2014 CSE (Dist. Exs. 46 at p. 186; 54 at p. 205).

CSE that they were considering placing the student at Kildonan (Dist. Exs. 10B at p. 223; 46 at p. 186; see also Tr. pp. 87-88, 90, 222-23, 1669, 1674-75, 2700).

On June 10, 2014, the CSE reconvened to review the student's program for the 2014-15 school year (fifth grade) (Dist. Ex. 11 at pp. 81-82). The parents requested a neuropsychological evaluation, and the June 2014 CSE agreed to have a neuropsychological evaluation of the student conducted (Dist. Exs. 11 at p. 82; 47 at p. 188; see also Dist. Ex. 48 at p. 190; see also Tr. pp. 94-96, 2184-85, 2710). The parents expressed concern over the student's academic progress and the June 2014 CSE discussed the student's reading levels over the past year (Dist. Exs. 11 at p. 82; 47 at p. 188; 54 at p. 206; see also Tr. pp. 489, 737-38, 741-42, 2184-85, 2188, 2711-14, 2760-62).

By letter dated July 8, 2014, the parents informed the district that due to the district's denial of the student's right to a FAPE they would remove the student from the public school, place him at Kildonan, and seek reimbursement for the costs of their unilateral placement from the district (Dist. Ex. 49).

In a letter dated July 11, 2014, the district confirmed receipt of the parents' July 8, 2014 correspondence (Dist. Ex. 50; see also Tr. pp. 115, 1461, 2717). The district indicated that it was prepared to convene a CSE to review the student's program and requested that the parents notify the district if they wanted to schedule a CSE meeting (Dist. Ex. 50; see also Tr. pp. 114-15).

On July 28, 2014, the parents signed an enrollment contract with Kildonan for the student's attendance during the 2014-15 school year (see Parent Ex. C at pp. 1-4).

On August 25, 2014, the CSE reconvened to review the student's IEP for the 2014-15 school year (Dist. Exs. 12 at p. 93; 51 at p. 196; 54 at p. 207). The August 2014 CSE recommended that the student receive ICT services in a general education classroom for instruction in English, math, social studies and science and one two hour and 30-minute session per week of resource room in a small group (Dist. Exs. 12 at pp. 93-94, 102; 51 at p. 196; 54 at p. 208; see also Tr. pp. 105, 107, 120).[5] The August 2014 CSE also recommended access to an iPod to access previously recommended software and four, 60-minute sessions per year of social work consultation (Dist. Exs. 12 at pp. 94, 104; 51 at p. 196; 54 at p. 208-09; see also Tr. p. 120).[6] The CSE also developed two additional annual goals targeting the student's social/emotional and behavioral needs (Dist. Exs. 12 at p. 102; 54 at p. 209; see also Tr. pp. 119-20).

A. Due Process Complaint Notice

In a due process complaint notice dated October 28, 2014, the parents alleged that the district failed to offer the student a free and appropriate public education (FAPE) for the 2012-13, 2013-14, and 2014-15 school years (IHO Ex. I at pp. 4-5). Specifically, the parents alleged that the district's implementation of the Wilson Reading System(Wilson) in a resource room for two hours and 30-minutes per week was inconsistent with the "Wilson manual," which mandates 60 to

[5] The August 2014 CSE specifically recommended ICT services of one session per day in English for one-hour and 45-minutes, one session per day in Math for one-hour, one session every other day in science for 45-minutes, and one session every other day in social studies for 45-minutes (Dist. Ex. 12 at pp. 93, 102).

[6] While the August 2014 IEP references an "i-Pod," the hearing record reflects confusion as to whether the August 2014 CSE intended to recommend an iPod or an iPad (Dist. Ex. 12 at p. 104; Tr. pp. 862-64).

90 minutes of instruction daily (id. at p. 5).[7] The parents further argued that the district failed to provide appropriate reading interventions and that the student made no more than trivial improvement in reading (id.). The parents asserted that the student's lack of progress in English language arts and math demonstrated that the district did not adequately address the student's "language-based learning disability" (id.). In addition, the parents contended that the student required multisensory instruction that was sequential, structured, and research-based (id.). The parents further alleged that the March 2014 CSE improperly reduced the student's reading interventions from two hours and 30-minutes per week to two hours per week (id.).

With respect to the student's unilateral placement, the parents alleged that Kildonan provided instruction specially designed to meet the student's unique needs (IHO Ex. I at p. 5). The parents asserted that the academic program at Kildonan incorporated Orton-Gillingham, a multisensory form of instruction, which utilized the type of approach that the student required to learn (id. at p. 6). The parents further contended that due to the student's executive functioning difficulty, the student benefitted from the rigorous academic program provided at Kildonan geared towards students with reading disabilities (id.).

As for equitable considerations, the parents alleged that they made every effort to participate meaningfully in the CSE process; timely notified the district of their dissatisfaction with the CSE's program and placement recommendation for the 2014-15 school year; continued to attempt to collaborate with the CSE; and provided the requisite 10-business day notice to the district (IHO Ex. I at p. 6).

For relief, the parents sought "[a]nnulment" of the student's current IEP; provision of an appropriate IEP including an appropriate program, related services, accommodations and supports developed with "equal participation of the [p]arents"; an IEP that included appropriate, measurable and meaningful annual goals and objectives to address the student's needs; the costs of the student's education at Kildonan for the 2014-15 school year; and "continued placement" at Kildonan (IHO Ex. I at pp. 6-7).

In a November 21, 2014 response to the parents' due process complaint notice, the district argued that it offered the student a FAPE for the disputed school years and specifically responded to each of the parents' allegations (IHO Ex. II at pp.1-3). Additionally, the district argued that the parents' claims regarding the appropriateness of the 2012-13 IEP were barred by the "applicable" two year statute of limitations (IHO Ex. II at p. 1 n.1).

B. Impartial Hearing Officer Decision

On November 13, 2014 the IHO conducted a prehearing conference, which resulted in a prehearing conference order addressing the scheduling of hearing dates and evidentiary matters (IHO Ex. III at pp. 1-2).

On January 7, 2014, the parties proceeded to an impartial hearing which concluded on June 23, 2015 after 11 days of proceedings (see Tr. pp. 1-2787). In an interim decision dated July 6, 2015, the IHO found that the parents' claims related to the 2012-13 school year were barred by the IDEA's two year statute of limitations (IHO Ex. XII at p. 2). With regard to the parents' argument

[7] Unless otherwise noted, the parents did not specify which IEP or school year to which their allegations related (see IHO Ex. 1 at pp. 4-5).

that the specific misrepresentation exception applied, the IHO found that the parents' due process complaint notice did not allege that the parents were misled by the district with respect to the 2012-13 school year (id.). The IHO also found that the parents did not testify at the impartial hearing that they were misled with regard to any IEPs developed prior to the 2013-14 and 2014-15 school years (id.).

In a decision dated August 19, 2015, the IHO concluded that the district offered the student a FAPE for the 2013-14 and 2014-15 school years and therefore, denied the parents' requests for compensatory education arising from the 2013-14 school year and tuition reimbursement for the 2014-15 school year (see IHO Decision at pp. 27-30).[8]

First, the IHO noted that the parents' due process complaint notice contained an allegation that the student did not make academic progress between the 2010-11 and the 2013-14 school years (IHO Decision at p. 25). The IHO reiterated his previous determination that any claims arising earlier than two years prior to the filing of the due process complaint notice on October 28, 2014 were barred by the IDEA's two year statute of limitations (id.). The IHO determined that the only school years at issue were the 2013-14 and 2014-15 school years (id.).

With respect to the 2013-14 school year, the IHO found that even if the IEP for the 2013-14 school year was insufficient to offer the student a FAPE, he could not conclude that the IEP and the educational services provided by the district for the 2013-14 school year constituted a "gross violation" of the IDEA (IHO Decision at p. 27). The IHO further found that the IEPs generated, and the services provided to the student, during the 2013-14 school year did not result in a denial of educational services (id.).

As for the student's progress during the 2013-14 school year, the IHO found the student made progress and that his progress was not "trivial" (IHO Decision at p. 29). The IHO observed that the CSE was not provided with any educationally relevant information that the student did not make progress (id.). The IHO found the testimony of the student's fourth grade special education teacher particularly persuasive on the subject of the student's progress (id.). The IHO noted that it was undisputed that the student advanced from fourth to fifth grade and that the student performed at grade level with the exception of reading (id.).

Turning to the 2014-15 school year, the IHO found that the hearing record did not demonstrate that a complete and exclusive application of Wilson was necessary for the student to make progress in learning to read (IHO Decision at p. 28). The IHO observed that the June and August 2014 IEPs did not require an exclusive application of Wilson (id.). The IHO additionally noted that the student's teachers did not testify that the student could not benefit from instruction without the exclusive application of Wilson (id.). The IHO further stated that none of the witnesses testified that Wilson or Orton-Gillingham methodology was the only way to teach a learning disabled student how to read (id.). Thus, the IHO found that the lack of a requirement for

[8] The IHO failed to cite to specific transcript and exhibit pages in the findings of fact and conclusions of law section of his decision (see IHO Decision at pp. 25-30), which makes it difficult to ascertain the basis for the IHO's conclusions. The IHO is reminded that State regulations provide that "[t]he decision of the impartial hearing officer shall . . . set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

instruction in Wilson or Orton-Gillingham in the student's IEPs for the 2014-15 school year did not result in a denial of FAPE (id.).

With regard to the program recommended by the CSE for the 2014-15 school year, the IHO found that the CSE offered appropriate services to the student based upon "information given by professionally trained staff" to the CSE (IHO Decision at p. 29). The IHO recognized that a private neuropsychological evaluation report obtained by the parents recommended a significant increase in the amount of specialized reading instruction, but did not find this report relevant as it was not provided to the CSE nor did the private evaluator who conducted the evaluation attend any CSE meetings (id.).[9]

Having concluded that the district offered the student a FAPE for the 2014-15 school year, the IHO found it unnecessary to address the appropriateness of the parents' unilateral placement or equitable considerations (IHO Decision at p. 29).[10]

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 and 2014-15 school years. Initially, the parents assert that the IHO erred in finding that the parents' claims for the 2012-13 school year were barred by the IDEA's two-year statute of limitations. Alternatively, the parents argue that the specific misrepresentation exception to the statute of limitations applies because the district misrepresented that it was using Wilson to remediate the student's decoding deficits.

Generally, the parents assert that the IHO erred in finding the testimony of the private evaluator who conducted the July 2014 neuropsychological evaluation irrelevant to the parents' claims for the disputed school years. The parents aver that the IHO failed to address the issue of the student's need for a multisensory approach to remediate his severe decoding deficit. The parents contend that the IHO erred in disregarding their argument that the district failed to provide instruction using Wilson by a properly trained staff for a sufficient amount of time, in appropriately composed groups, and in proper sequence.

With respect to the 2013-14 school year, the parents assert that the IHO erred in finding that the student made meaningful progress. The parents argue that the district did not provide any evidence that the student made progress in decoding during the fourth grade; that the IHO erroneously relied on running records scores as evidence of the student's progress in reading; and that progress reports and academic test scores indicated that the student's decoding skills regressed.

As for the 2014-15 school year, the parents argue that the district offered virtually the same IEP for the 2014-15 school year as it offered for the 2013-14 school year. The parents assert that

[9] The IHO noted the possibility that the CSE might have provided the student with a greater level of reading instruction if it had been provided with the neuropsychological evaluation report or if the private evaluator who conducted evaluation had attended a CSE meeting (IHO Decision at p. 29).

[10] The IHO's decision does not contain "a list identifying each exhibit admitted into evidence," as required by State regulations (8 NYCRR 200.5[j][5][v]).

the IHO erred in allowing testimony regarding Wilson because Wilson was not included as a part of the August 2014 IEP.

With regard to the unilateral placement, the parents contend that they met their burden of demonstrating that Kildonan was appropriate. The parents argue that Kildonan addressed the student's decoding deficit in an intensive, appropriately staffed program and that the student made significant progress in decoding during the 2014-15 school year. The parents further assert that equitable considerations do not diminish or preclude an award of tuition reimbursement, arguing that they fully cooperated with the district.

The parents request a determination that the district failed to offer the student a FAPE for the 2012-13, 2013-14 and 2014-15 school years or, alternatively, that the parents' claims regarding the 2012-13 school year be remanded to a different IHO for a determination on the merits. The parents further request compensatory academic tutoring for the district's failure to provide the student with an appropriate program, placement, services, and supports for the 2012-13 and 2013-14 school years and reimbursement for the student's tuition at Kildonan for the 2014-15 school year.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. As a preliminary matter, the district argues that the parents' petition should be dismissed based on the parents' failure to properly serve the notice of intention to seek review as well as their failure to comply with State regulations governing pleading requirements. The district further argues that the IHO properly found that the parents' claims for the 2012-13 school year were barred by the statute of limitations and that the district offered the student a FAPE for the 2013-14 and 2014-15 school years. The district further asserts that the parents failed to prove that the unilateral placement provided the student with instruction specially designed to meet the student's unique educational needs. The district also contends that equitable considerations do not support the parents' requested relief, arguing that the parents failed to raise their complaints or objections at the March 2014 CSE meeting; failed to provide consent for the district's neuropsychological evaluation of the student; and chose not to have the student attend the district's summer program during the 2014-15 school year.

V. Applicable Standards

Two purposes of the 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 Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; 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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119,

129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL

2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

Along with its answer, the district submits an affidavit from a district employee to support its argument that the parents' petition should be dismissed on the basis of the parents' failure to properly serve the notice of intention to seek review upon the district (Answer Ex. 1 at pp. 1-2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (Application of a Student with a Disability, Appeal No. 08-030; see 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

The district's additional evidence postdates the impartial hearing, relates to issues which occurred after the IHO rendered his decision, and is relevant to the issue of whether this

proceeding was properly initiated (Answer Ex. 1). Accordingly, the district's additional evidence is accepted.

2. Service and Form of Pleadings

Next, the district asserts that the parents' petition should be dismissed based on the parents' failure to properly serve the notice of intention to seek review. The district further contends that the petition should be dismissed because it does not set forth citations to the hearing record. Although the parents did not strictly comply with State regulations in the service of the notice of intent to seek review or in the drafting of the petition, I exercise my discretion and decline to reject the parents' pleadings for those reasons.

A parent who seeks review of an IHO's decision by an SRO shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less than ten days before service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (8 NYCRR 279.2[b]). Personal service may be effectuated "by delivering a copy of the petition to the district clerk, to any trustee or any member of the board of education of such school district, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service" (8 NYCRR 275.8[a]; see 8 NYCRR 279.2[a]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Here, the district correctly argues that the service of the notice of intention to seek review upon the district did not technically comply with State regulations. It appears that the parents served the notice of intention to seek review upon a receptionist at the district's office and there is no indication that the receptionist was authorized to accept service under State regulations (Answer Ex. 1 at pp. 1-2; see 8 NYCRR 275.8[a]; 279.2[a], [b]). However, this noncompliance was excusable in this instance as the district clerk, who was authorized to accept service on behalf of the district, received the notice of intention to seek review on the same day that the parents attempted to effectuate service (Answer Ex. 1 at pp. 1-2). Moreover, the district requested and received a specific extension of time to file the hearing record and, in fact, did so (id. at p. 2). As the district was provided the opportunity to file the hearing record, the purpose of the notice of intention to seek review (i.e. to ensure timely filing of the hearing record) was met, and there was no harm to the district (see Application of a Child with a Disability, Appeal No. 00-062). Therefore, the district's request to dismiss the petition on this basis is denied.

State regulations further provide that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8 NYCRR 279.8[b]). Moreover, all pleadings must "set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][3]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 366-67 [S.D.N.Y. 2013]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of an untimely petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; but see J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015] [stating that summary dismissal for violation of "formatting requirements" would be improper, noting that "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored"]).

In addition, contrary to the district's argument, the parents' petition contains sufficient citations to the hearing record to satisfy the requirements of State regulations (8 NYCRR 279.8[b]). While the district cites several paragraphs in its petition that do not contain citations to the hearing record, the majority of the allegations in parents' petition do, in fact, include specific citations to the hearing record (compare Answer ¶ 31, with Pet. ¶¶1-150). Moreover, the district was able to formulate a response to the parents' allegations in its Answer. Thus, neither of the alleged violations, alone nor cumulatively, are sufficient to warrant dismissal of the petition.

3. Statute of Limitations

The parents assert that the IHO erred in finding that the parents' claims for the 2012-13 school year were barred by the two-year statute of limitations. The parents argue that their claims relating to the 2012-13 school year claims accrued when they received the student's initial progress report in November 2012 or, alternatively, that the statute of limitations should be tolled because the district specifically misrepresented that it was using Wilson to remediate the student's decoding deficit. The district asserts the IHO properly dismissed the parents' claims regarding the 2012-13 school year as beyond the two-year statute of limitations. The district argues that the parents' claims regarding the 2012-13 school year accrued on June 8, 2012 when the IEP was created, and that no exception to the statute of limitations applies.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[11] An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process

[11] New York State has not explicitly established a different limitations period.

complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

As a preliminary matter, any claims pertaining to the recommendations of the June 2012 CSE are barred by the statute of limitations as the parents knew or should have known about any deficiencies with the June 2012 IEP by June 2012. The hearing record shows that the parents attended the June 2012 CSE meeting (Tr. pp. 1361-62; 1565-66; Dist. Ex. 8 at p. 46). The parents testified that they attended the June 2012 CSE meeting and that the student's IEP was discussed at the meeting (Tr. p. 1362). According to the parents, the June 2012 CSE discussed the student's progress and what services the student would receive for the following year (Tr. p. 1363; see also Tr. pp. 1567-86). The parents further testified that the June 2012 CSE recommended resource room services and the continuation of ICT services and OT (Tr. pp. 1586-88). The parents additionally testified that they did not voice any disagreement with the CSE's recommendations (Tr. p. 1587). Following the June 2012 CSE meeting, the parent received a copy of the IEP along with a prior written notice (Tr. pp. 1577-78, 1588; see Dist. Ex. 41). The parents argue that they did not know the "critical facts" underlying their injuries regarding the June 2012 IEP until they received a November 2012 progress report from the district (Pet. ¶¶ 10-13, quoting K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *19 [E.D.N.Y. Aug. 6, 2014]). However, the parents do not identify anything in the November 2012 progress report, other than that it indicated the student was making inconsistent progress towards decoding multi-syllabic words (IHO Ex. X at p. 4; see Dist. Ex. 56 at p. 259).[12] A cause of action generally accrues when a plaintiff learns of the injury which is the basis of the complaint (see M.D., 334 F.3d at 221). As the parents were previously aware of the student's deficits in decoding and the recommendations included in the June 2012 IEP to address decoding, the parents claims related to the CSE's recommendations included in the June 2012 IEP accrued in June 2012 and the parents had until June 2014 to file a due process complaint notice to contest them.[13]

However, the IHO erred by finding that the parents' claim related to the implementation of the June 2012 IEP during the 2012-13 school year was barred by the IDEA's two-year statute of limitations. The parents' due process complaint notice, dated October 28, 2014, alleges that the district failed to provide appropriate reading interventions including a multisensory approach to

[12] K.H. is distinguishable from the present case: in K.H., a district court held that a student first knew about a potential IDEA violation when he "became aware that he might have specific learning disabilities" as the result of information contained within a private evaluation report (K.H., 2014 WL 3866430, at *17 [E.D.N.Y. Aug. 6, 2014]).

[13] The parents additionally contend that the "specific misrepresentation" exception to the statute of limitations applies. Specifically, the parents claim that the district represented that it was implementing Wilson during the 2012-13 school year when, in fact, it was not. Assuming the truth of this allegation for purposes of argument, the June 2012 IEP does not indicate that the student used, or required, instruction using the Wilson methodology. Therefore, the district cannot be faulted for failing to implement a particular methodology when it was not obligated to do so.

reading as described in the June 2012 IEP (see IHO Ex. I at p. 5).[14] This allegation pertains to the time period in which the June 2012 was implemented; i.e., the remainder of the 2012-13 school year (see K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995] [date of CSE meeting not determinative for statute of limitations purposes where plaintiff "challenge[d] the IEPs and the implementation of his IEPs . . ."] [emphasis added]; accord G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1130-35 [Or. 2011]). Thus, claims relating to the implementation of the June 2012 IEP during the 2012-13 school year subsequent to October 28, 2012 (i.e., two years before the date of the due process complaint notice) were not barred by the statute of limitations and were, therefore, properly raised by the parent in this proceeding.

Accordingly, the IHO's finding as to the statute of limitations is reversed and, as further explained below, this matter shall be remanded for a determination of the parents' implementation claim relating to the 2012-13 school year.

B. 2012-13 School Year

Due to the IHO's finding and the district's contention that the parents' claims regarding the 2012-13 school year were barred by the statute of limitations, the hearing record contains limited information about how the district implemented the student's reading services in accordance with the June 2012 IEP from October 28, 2012 through the end of the 2012-13 school year. Accordingly, the matter is remanded to the IHO for a determination as to whether the district implemented the student's reading services provided in the June 2012 IEP, from October 28, 2012 through the end of the 2012-13 school year (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013].

The hearing record contains limited information, which is summarized below to assist the IHO and the parties in framing and addressing the disputed issue. The June 2012 IEP indicated that the student needed "a multi-sensory approach," to improve his ability to decode text, and to improve his comprehension and encoding skills, and additional instruction and practice using multiple strategies (i.e. picture cues, contextual cues) to decode unfamiliar words (Dist. Ex. 8 at p. 50). The June 2012 IEP included annual goals addressing the student's needs in decoding, comprehension, identifying sight words, fluency and spelling (Dist. Ex. 8 at pp. 52-53). The June 2012 IEP provided the student with a weekly two and a half hour session of resource room in a group of five, and 10 hours per week of ICT services (Dist. Ex. 8 at p. 1).

The student's April and June 2013 progress report reflected that the district provided instruction to support the student in working toward his IEP goals in decoding, comprehension and encoding (compare Dist. Ex. 56 at pp. 259-63, with Dist. Ex. 8 at pp. 52-53). For example, the progress report indicates that during the 2012-13 school year the student was engaged in decoding multisyllabic words, answering comprehension questions, identifying high frequency words,

[14] While the June 2012 IEP included a management need related to a multisensory approach, it did not include instruction in Wilson (Dist. Ex. 8 at p. 50). Accordingly, any argument that the district should have implemented Wilson during the 2012-13 school year, in substance, is a claim that the student's IEP should have included it, which is barred by the statute of limitations for same reasons as other claims related to the June 2012 IEP.

reading with appropriate expression and fluency, applying spelling strategies to written assignments, and identifying operations needed to solve math word problems (Dist. Ex. 56 at pp. 259-61, 263). A January 2013 report card indicated that the student worked on a number of skills and strategies to improve his reading including silent reading of non-fiction material, locating answers, listening, note-taking, completing graphic organizers, discussing the parts of a "how-to" assignment, and using a "direction sheet" in answering questions (Dist. Ex. 57 at p. 286). However, the progress reports do not indicate whether these instructional techniques were provided using a multisensory approach. (see Dist. Ex. 56 at pp. 259, 261, 263).

The parents testified that their understanding was that the student received reading support in both resource room and when the student was in the larger classroom with both teachers (Tr. pp. 1593, 1754).[15] The parents also stated that at a meeting held prior to the May 2013 CSE meeting, the student's then-current teacher said that reading was the student's "weak area" and stated that in the resource room she worked with the student on "breaking down words," understanding classroom reading material, and improving the fluency of the student's reading (Tr. pp. 1592, 1594). The parent added that she understood from the pre-CSE meeting that in resource room the student was in a small group of three to five students (Tr. pp. 1594-95). Regarding spelling, the parents stated that the teacher engaged the student in activities such as sorting words according to vowel/consonant patterns, blind and speed sorting of words, and putting spelling words in sentences (Tr. pp. 1612-13). In addition the parent stated that the teacher reported that the student was trying to spell words correctly by going back to his written work to "try to fix any misspelled words" (Tr. pp. 1597-98). The parent testified that it was her understanding that the teachers were working directly with the student to try to improve his decoding and encoding skills (Tr. p. 1608). The parent further testified that as of May 2013, she did not have any questions regarding what the district was doing to support the student's reading needs in both resource room and in the "main classroom" (Tr. pp. 1596-97).

However, the parents could not recall exactly the material shared by the teachers at the meeting held prior to the May 2013 CSE meeting (see Tr. pp. 1592-95). Specifically, the parents' testimony does not explain the particular strategies or approach utilized by the teachers to help the student decode, comprehend, or read fluently. The May 2013 IEP stated that the student used strategies taught to decode unfamiliar words and used the word wall to help him spell words (Tr. pp. 1591, 1599-1600; Dist. Ex. 9 at pp. 57, 62). However, as with the progress reports from the 2012-13 school year, the May 2013 IEP did not indicate whether the strategies taught or the instruction provided to the student used a multisensory approach. (Dist. Ex. 9 at p. 62). Similarly, a December 2012 academic update completed by the student's then-current teacher listed "multisensory" as one of the student's learning styles, but the hearing record contains no other specific reference to the implementation of this approach during the 2012-13 school year (Dist. Ex. 30 at p. 157; see Tr. pp. 1-2776).

As the parent raised a specific claim regarding the implementation of a multisensory approach to reading (IHO Ex. I at p. 5) and the IHO did not make any findings regarding this claim (IHO Ex. XII at p. 2), this matter is remanded to the IHO to determine whether the district implemented a multisensory approach to reading, as provided for in the June 2012 IEP, from October 28, 2012 through the end of the 2012-13 school year and if not whether the failure to

[15] The parent testified she understood the "resource room" to be a partitioned area of the student's classroom (Tr. pp. 1592-93).

implement a multisensory approach constituted a material deviation from substantial or significant provisions of the June 2012 IEP such that the student was denied an educational benefit (see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. 2010]; V.M. v. North Colonic Cent. Sch. Dist., 954 F. Supp. 2d 102, 118-19 [N.D.N.Y. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]). The IHO is directed to determine whether there is sufficient evidence in the hearing record to make a determination as to this issue and, if not, to request evidence or testimony from the parties which will allow him to render a decision. Additionally, if the parents are seeking compensatory education as relief, the parties should assist the IHO in determining what compensatory services would be appropriate under the circumstances.

C. 2013-14 School Year

Turning to the 2013-14 school year, the parents contend that the district failed to implement the May 2013 IEP insofar as the district failed to provide the student with a multisensory decoding and encoding program. The district argues that it implemented the May 2013 IEP by utilizing a balanced literacy approach which included multisensory reading instruction. A review of the hearing record reveals that during the 2013-14 school year the district provided the student with a program which addressed his needs in decoding and encoding in conformity with the May 2013 IEP.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Therefore, a district's failure to implement these services will constitute a denial of FAPE if a party establishes that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243, 1252 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; T.M. v Dist. of Columbia, 75 F. Supp. 3d 233, 242 [D.D.C. 2014]; V.M. v N. Colonie Cent. School Dist., 954 F Supp. 2d 102, 118-19 [N.D.N.Y. 2013]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In this instance, although the student's needs are not directly in dispute, a discussion of the student's needs identified in the May 2013 IEP facilitates a determination as to whether the district implemented the provisions of the May 2013 IEP. The May 2013 IEP included academic testing results and school reports that identified the student's weaknesses in word reading and spelling, and which found that the student performed below average or below grade level in the areas of reading, comprehension, vocabulary, fluency, word recognition and writing (Dist. Ex. 9 at pp. 57-

62). The May 2013 IEP stated that the student's difficulty with decoding impeded his ability to read with correct speed, accuracy, and proper expression (id. at p. 62). Regarding encoding, the May 2013 IEP stated that the student misspelled words and often did not apply the phonetic skills he had learned to his written assignments (id.). In math, the IEP stated that the student's weak encoding and decoding skills impeded his ability to correctly decode word problems and his ability to explain his answers in writing (id. at p. 61).

The parents' arguments regarding the services offered by the district during the 2013-14 school year focus on the student's needs in the areas of decoding and encoding and the parents contend that the IHO erred by failing to distinguish between the student's overall reading and his decoding skills. Although the student exhibited weaknesses in encoding and decoding skills (and the district was required to address those deficits), the district was also required to do so within "a comprehensive and integrated literacy curriculum" aimed at ensuring that the student would acquire skills necessary to progress in the general education curriculum ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About "Lack of Instruction" in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html). As set forth below, the district's program was designed to help the student become a more proficient reader and addressed the student's deficits in decoding and encoding, as well as reading fluency, comprehension, and written expression.

As noted above, the May 2013 IEP provided ICT services for 10 hours per week and resource room services for two hours and 30 minutes per week (Dist. Ex. 9 at pp. 57, 66). To support the student with respect to his academic and management needs, the May 2013 IEP included modifications and accommodations such as special seating, refocusing, redirection, checks for understanding, and repeated directions (Dist. Ex. 9 at pp. 62, 64, 66). In addition, the IEP included annual goals for reading which addressed the student's needs in decoding multi-syllabic words, reading with appropriate expression and fluency, and answering comprehension questions requiring inferencing (compare Dist. Ex. 9 at p. 62, with Dist. Ex. 9 at p. 65). The May 2013 IEP also included an annual goal in writing which addressed the student's need to identify spelling errors and spell correctly and a math annual goal addressing the student's need to identify the operation needed and correctly solve word problems (compare Dist. Ex. 9 at p. 65, with Dist. Ex. 9 at pp. 61-62).[16]

The May 2013 IEP also stated that the student needed a multisensory approach to improve his decoding and encoding skills (Dist. Ex. 9 at p. 62). The district's special education supervisor explained at the impartial hearing that a multisensory approach is "instruction that addresses []

[16] As noted above, the IHO found that "even if the IEP for the 2013-14 school year was not sufficient to provide FAPE, there is no reason . . . to conclude that . . . the educational services . . . constitute[d] a 'gross violation' of the IDEA" (IHO Decision at p. 27). It is unclear why the IHO applied this standard; however, it should be noted that the "gross violation" standard is only applicable in determining when compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; M.W. v New York City Dept. of Educ., 2015 WL 5025368, at *3 [S.D.N.Y. Aug. 25, 2015]). Thus, here, even if the IHO found that the district failed to offer the student a FAPE, the gross violation standard would not have applied for purposes of a compensatory education analysis as the student continued to meet the eligibility criteria for receiving instruction under the IDEA (see E. Lyme, 790 F.3d 440, 456 n.15).

tactile, visual information, being able to manipulate the information that is provided . . . and [is] provided in different manners" (Tr. p. 200). The student's fourth grade special education teacher stated that, during the 2013-14 school year, she used a balanced literacy approach with the student (Tr. pp. 359, 361, 533-34). She explained that balanced literacy is an approach in which each of the components of language arts are taught: decoding, comprehension and fluency (Tr. p. 638). A district resource room teacher further explained that the components of balanced literacy were shared reading, interactive reading aloud, independent reading, word study, shared writing, interactive writing and independent writing (Tr. p. 904). The resource room teacher and the special education teacher both testified that this approach was supported by a substantial amount of research that demonstrated the efficacy of the program for students (Tr. pp. 543, 903-04).

The special education teacher testified regarding multisensory approaches used in the student's classroom during the 2013-14 school year. She described an activity she used to build the student's vocabulary in which character traits were put up on the wall and the students had to "act out" some of the traits so that the words would "become second nature to them" (Tr. pp. 313-15). The special education teacher also stated that, in reading instruction, she used the "workshop" model which entailed conferencing with students or during book clubs in which the students would come together to talk about a book (Tr. pp. 315-16). The special education teacher also stated that she used a "read aloud" activity in which she read a book that was "for most students a little beyond what they would read on their own" (Tr. pp. 316-17). She further testified that the students were actively engaged in the activity through working on vocabulary and talking with their partners about parts of the book (Tr. p. 317). The student's fourth grade regular education teacher explained that, during the "read aloud" activity, the teacher modeled what reading looks like and sounds like for the students (Tr. pp. 695-96). Additionally, both the parents and the student's fourth grade regular education teacher testified that in order to further support the student's needs in decoding and encoding the district implemented the use of assistive technology (AT) such as Bookshare, Read2go, and Write10 at the end of the 2013-14 school year (Tr. at pp. 732-34, 1660-67).[17]

To address the student's writing needs, the special education teacher explained that she used a spelling program based on "Words Their Way" with the student in which he learned to identify the pattern of words and sort words according to these patterns (Tr. pp. 313-14, 641-42). The special education teacher noted that the activity was not one of simply memorizing words, and opined that it was helpful for the student (Tr. pp. 313-14). In addition, a 2013-14 progress report covering the period from May 13, 2014 through June 24, 2014 (May-June 2014 progress report) indicated that the student was encouraged to use visual cues from the "resources around him" such as words contained in oral directions or words found on resources located throughout the classroom, to support his spelling (Dist. Ex. 56 at p. 270). The progress report also indicated that the student used strategies such as learning spelling patterns and applying these patterns to other words (id.).

The special education teacher testified that she provided resource room services to the

[17] The parents and the student's fourth grade regular education teacher testified that although the March 2014 IEP indicated that the AT was to be implemented in the following school year, some of the AT recommendations were implemented during the last month of the 2013-14 school year (Tr. pp. 733-34, 1666; see Dist. Ex. 10A at pp. 219-20).

student for 30 minutes a day during the 2013-14 school year (Tr. pp. 573-74).[18] The special education teacher stated that her focus during resource room was addressing the student's decoding and encoding needs (Tr. pp. 311-12, 355-56, 518, 579). The special education teacher stated that she used parts of Wilson to teach the student "syllabication rules" (Tr. p. 356). The special education teacher noted that Wilson was very structured and was good for teaching students how to decode words, take words apart, and chunk words into syllables (Tr. p. 392). According to the parents, the special education teacher told them that in the resource room she broke down words for the student to improve his understanding and spelling skills (Tr. pp. 1637-38).

The special education teacher also stated that she worked with the student by manipulating sounds and putting the sounds together to make words (Tr. pp. 356-57). The special education teacher stated that she instructed the student in a program called "Nifty Thrifty Fifty" in which the students looked at the prefixes, suffixes and base words of longer words (Tr. pp. 313, 450, 518, 601-02). She explained that this activity helped with decoding as it aided students with recognizing word parts (Tr. p. 602). The May-June 2013-14 progress report indicated that during resource room, the student practiced reading sentences and short texts silently before reading them orally, which helped to increase the student's fluency and expression (Dist. Ex. 56 at p. 268). The parents testified that at a March 2014 teacher conference, the special education teacher reported that the student used a word wall, practiced with word cards, and played games to develop his decoding and encoding skills in the resource room (Tr. pp. 1615-16).

As detailed above, a review of the hearing record reveals that the district used multisensory teaching approaches in providing the student with instruction to meet his needs in reading, decoding, and encoding.[19] Thus, the evidence in the hearing record supports the conclusion that the district provided appropriate reading interventions and did not fail to implement material portions of the May 2013 IEP (A.P., 370 Fed. App'x at 205).

D. 2014-15 School Year

Next, the parents contend that the district failed to offer the student a FAPE for the 2014-15 school year. At the outset, it is first necessary to identify which IEP is in dispute in this proceeding. The March and June 2014 IEPs were superseded as a result of the August 2014 IEP, which became the operative IEP for purposes of this proceeding (see Dist. Exs. 10B, 11-12; see also McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Accordingly, this decision will refer to the August 2014 IEP as the IEP at issue for the 2014-15 school year.

On appeal, the parents present two principal arguments. First, the parents contend that the district erroneously reduced the amount of resource room services. This claim is factually incorrect. The August 2014 IEP recommended the same amount of resource room services as the student received during the 2013-14 school year: two hour and 30-minutes per week (compare Dist. Ex. 12 at pp. 93, 102, with Dist. Ex. 9 at pp. 57, 66). Therefore, although the August 2014

[18] The special education teacher was also the student's resource room teacher for the 2013-14 school year (Tr. pp. 296, 311, 355).

[19] Additionally, I note that the parents testified that they believed that the district was implementing the services described in the May 2013 IEP (Tr. p. 2685).

CSE was not necessarily obligated to maintain or increase the student's existing service levels, the evidence in the hearing record demonstrates that the CSE did not, in fact, reduce the amount of resource room services recommended by the May 2013 IEP.

Second, the parents assert that the IHO erred in finding that the student made progress during the 2013-14 school year such that the CSE's recommendations for the 2014-15 school year were appropriate. The hearing record supports the IHO's finding that the student made meaningful progress during the 2013-14 school year. Moreover, the evidence in the hearing record shows that the August 2014 CSE made a number of changes and additions to the student's IEP designed to address the student's identified needs and were reasonably calculated to provide the student with educational benefit.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

In this case, the student's progress report for the 2013-14 school year shows that the student achieved three of the 11 annual goals set out for him in the beginning of the year (Dist. Ex. 56 at pp. 266-72). The progress report indicated that the student achieved annual goals which involved decoding a list of multi-syllabic words, answering comprehension questions related to a story that required inferencing, and composing a paragraph of seven sentences (id. at pp. 268-70). The progress report also indicated that the student was progressing gradually toward the annual goal of reading with appropriate expression and fluency, and noted that reading and rereading a variety of texts as well as reading sentences and short texts silently before reading them orally helped to increase his fluency and expression (id. at p. 268). The progress report reflected that the student was progressing gradually toward the annual goal of solving math word problems and that he had made inconsistent progress toward the annual goal of identifying spelling errors and correctly spelling words (id. at pp. 270, 272).

The student's third quarter 2013-14 progress report also contained comments regarding the student's progress toward his annual goals (Dist. Ex. 57 at pp. 301-306). Under the heading "How I've Grown," the progress report indicated that when reading poetry the student demonstrated the ability to read in small chunks and infer moods and tones; showed improvement in writing similes and using repetition; exhibited a greater amount of confidence when writing essays; improved organizing his ideas and using transition words; and that he learned how to use facts in his writing and create an image (id. at pp. 301, 303, 305).

The August 2014 IEP indicated that the student made about a year's worth of progress in reading during the previous year (i.e., the 2013-14 school year); (Dist. Ex. 12 at pp. 94). In addition, the August 2014 IEP indicated that the student was increasing the pace at which he

learned new words; beginning to vary the types of sentences he wrote; and was making progress in learning his math facts and in his ability to learn multiple ways to solve comprehension problems (id. at p. 98).

Regarding the student's reading progress, the special education teacher stated that in late November or December the student became engaged in certain books and that he frequently wanted to read (Tr. p. 339). The special education teacher considered this "a bit of a turning point" for the student, which "showed [that the student] was making progress" (id.). In addition, after reviewing the books the student read throughout the 2013-14 school year, the special education teacher testified that the student's ability to read progressively more challenging books demonstrated progress (Tr. pp. 374-77). The student's fourth grade regular education teacher also opined that the student's writing ability improved (Tr. p. 711). The regular education teacher also testified that although the teachers saw the student growing and that his ability to decode sight words had improved, she thought that the parents wanted the student to make more progress (Tr. p. 704).

The above evidence supports the IHO's finding that the student made progress during the 2013-14 school year such that the district was not precluded from offering a similar educational recommendation for the following year. Although I empathize with the parents' concerns about the student's rate of progress in the district program, the IDEA guarantees access to an appropriate public education, not specific results (see Rowley, 458 U.S. at 192; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 132; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]).

Turning to the recommendations of the August 2014 CSE, the hearing record shows that the student's needs were consistent with those depicted in the May 2013 IEP with the exception of a few changes, which as discussed below were appropriately addressed by the August 2014 CSE (compare Dist. Ex. 9 at pp. 61-64, with Dist. Ex. 12 at pp. 98-100).

According to the student's fourth grade regular education teacher, the student showed signs of regression in reading in the beginning of the 2013-14 school year (Tr. p. 776). She testified that at the end of the 2012-13 school year, the student achieved running record level "N" and at the beginning of the 2013-14 school year the student was accessed at the K/L level, which she indicated would be a "bit of a regression" (Tr. pp. 776, 779; see Dist. Ex. 63).[20] She further testified that the drop in the student's reading level indicated that the student's ability to decode those texts had regressed (Tr. p. 776). According to the district special education supervisor, the March 2014 CSE agreed that the student would "severely" regress without special education services and thus recommended a summer program (Tr. pp. 72-73).[21] The student's fourth grade special education teacher corroborated this testimony, stating that the March 2014 CSE determined that the student

[20] The student's fourth grade special education teacher testified that Fountas and Pinnell was an assessment system used by the district to evaluate student reading abilities, and included leveled passages from A to Z, with A being the easiest, and Z being the most difficult (Tr. pp. 320-22; see Dist. Ex. 63).

[21] Although the August 2014 IEP is the operative IEP for purposes of State-level review, it is necessary to analyze the discussions which took place during the May and June 2014 CSE meetings to provide context to the August 2014 IEP's recommendations.

may regress if he did not have the support of an instructional program during the summer (Tr. p. 530). The parents testified that they asked about a summer program at the March 2014 CSE meeting (Tr. pp. 1440, 1446-48). In April 2014, the student's fourth grade special education teacher completed a regression statement indicating that the student would regress in reading, especially decoding and word recognition; writing, particularly in encoding; and math facts if 12-month services were not provided (Dist. Ex. 36). She further indicated that the student ended the 2012-13 school year at level "M" and returned in September 2013 as a level "L" (Dist. Ex. 36). She also reported that in class, the student forgot sight words and how to encode frequently used words when there was any lapse in practice (id.). The August 2014 IEP recommended 12-month services which consisted of two, two-hour sessions per week of direct consultant teacher services (Dist. Ex. 10A at pp. 210, 220).

At the March 2014 CSE meeting, the parents requested an AT consultation of the student (Dist. Ex. 37 at p.1; Tr. pp. 1440, 1445-46, 1628). According to the AT specialist, the parents requested the AT consultation due to their concerns about the student's continued difficulties in encoding and decoding (Dist. Ex. 37 at p. 170). In the April 2014 AT consultation report, the AT specialist reported that the student was cooperative and comfortable at the computer; the student thought that text to speech and word prediction software would be helpful to him; the student easily scanned for the correct predicted word when using the Write 10 program; and that the student stated he felt like he understood the book better when he read along with the computer (Dist. Ex. 37 at p. 171). The AT specialist recommended in the April 2014 AT consultation report that the student receive Bookshare; access to a classroom computer with Read2go and Read and Write 10 installed; and 10 follow up AT consults for student and staff training in Read and Write 10 and Bookshare use (Dist. Ex. 27 at p. 171).[22]

The AT specialist attended the May 2014 CSE meeting, and the CSE reviewed the results of the AT consultation report (compare Dist. Ex. 10B at p. 222, with Dist. Ex. 37 at p. 171; Tr. pp. 84, 729, 1659-60, 2697). The parents testified that the AT specialist discussed her report with the CSE and opined that the student could benefit from the AT programs (Tr. pp. 1660-61). The May 2014 CSE recommended three AT programs (i.e., Bookshare, Write 10 and Read2go), along with 10, 30-minute sessions per year of AT consultation for the 2014-15 school year (Dist. Exs. 10B at p. 222; 10A at p. 219; 37 at p. 170).[23] The August 2014 IEP recommended Bookshare, Read2Go and Write 10 and an iPod to access the previously recommended software (Dist. Exs. 12 at pp. 94, 103-04).

At both the June and August 2014 CSE meetings, the parents informed the CSEs that the student's medication for attention deficits had been discontinued on or about May 5, 2014 and the student's teachers reported that the student had been more distractible since that time (Dist. Exs. 11 at p. 82; 12 at p. 94; 47 at p. 188; 51 at p. 196; 54 at pp. 206). Additionally, at the August 2014

[22] Write Ten is a word prediction software program that as the student is typing, a list of words appears in the prediction panel, definitions of the words are available along with a reading of the word, and the student could pick one of the words from the prediction panel (Dist. Ex. 37 at p. 171; see also Tr. pp. 730-31; 1664-65). Bookshare allows a student to listen to a book being read rather than having to read it (Dist. Ex. 37 at p. 171; see also Tr. p. 730). Read2Go is a program that highlights the words in a story and the student can either follow along or can have the story read to him (Tr. p. 1663).

[23] As already mentioned, the March 2014 IEP for the 2014-15 school year mistakenly includes the May 2014 CSE recommendations for AT programs and AT consultation that should have been included in the May 2014 IEP (compare Dist. Ex. 10A at pp. 210-11; 219, with Dist. Ex. 10B at pp. 222, 232).

CSE meeting, the parents reported that the student had been experiencing a higher level of anxiety (Dist. Ex. 12 at p. 94). The August 2014 CSE developed two additional annual goals targeting the student's social/emotional and behavioral needs (Dist. Exs. 12 at p. 102; 54 at p. 209). The district special education supervisor testified that the parents' comments about the student's level of anxiety "prompted the committee to develop a couple of social-emotional goals at that meeting" (Tr. pp. 119-20). The August 2014 CSE also recommended the addition of four, one-hour sessions per year of social work consultation services (Dist. Exs. 12 at pp. 94, 104).

The August 2014 CSE recommended ICT services in a general education setting consisting of one session in English for one-hour and 45-minutes per day; one session in math for one-hour per day; one session in science every other day for 45-minutes; and one session of social studies every other day for 45-minutes (Dist. Ex. 12 at pp. 93, 102). A district fifth grade special education co-teacher explained that in fifth grade science and social studies, the general education students and some of the special education students "go out and are mixed up and disbursed amongst the other [regular] education teachers to give them a little taste of middle school freedom where they are moving classrooms (Tr. p. 815).[24] She further testified that the "[s]tudents that do have co-teach on their IEPs remain in the co-taught class" where she and a regular education teacher provide instruction (id.).

All the changes to the student's IEP for the 2014-15 school year discussed above contradict the parents' argument that the August 2014 IEP was the same as the IEP for the 2013-14 school year, and that the changes made to the 2014-15 IEP were merely "window-dressing" (Parent Post-Hr'g Br. at p. 22). Specifically, the August 2014 CSE addressed changes in the student's needs with appropriate modifications to the student's IEP for the 2014-15 school year. Based upon the foregoing, the evidence in the hearing record supports a finding that the August 2014 IEP—including its continuation of ICT services in a general education setting and two hours and 30-minutes per week of resource room services, along with recommendations for a 12-month program, AT programs and services, and social work consultation services—was appropriate to meet the student's needs and reasonably calculated to enable the student to receive an educational benefit.

With regard to the parents' privately obtained neuropsychological evaluation, the parents assert that IHO erred in finding the testimony of the private evaluator who conducted the neuropsychological evaluation was not relevant to the parents' claims for the 2012-13, 2013-14, and 2014-15 school years. As the IHO correctly noted, there is no evidence in the hearing record that the neuropsychological evaluation report was provided to the CSE at or prior to the August 2014 CSE meeting, nor did the private evaluator who conducted the neuropsychological evaluation attend any of the disputed CSE meetings (IHO Decision at p. 29). This is because, according to the parents, the evaluator did not submit a copy of the evaluation report to the parents until "the end of September" (Tr. p. 1706; see also Dist. Ex. 12 at p. 93). Therefore, the IHO was correct in not considering the evaluator's testimony or her neuropsychological evaluation report to assess the recommendations of the August 2014 CSE because this information was not available to the CSE and, therefore, may not be used by the parents to invalidate it (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also

[24] This testimony is relevant as it "explain[s] or justif[ies] what is listed in the written IEP" (R.E., 694 F.3d at 185).

true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013][holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y.][refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]).[25]

In any event, even assuming that the neuropsychological evaluation report existed at the time of the August 2014 CSE meeting, it does not contain information as to the student's needs that was unknown to the CSE.[26] Consistent with teacher reports and previous testing results, the evaluator found that the student displayed poor decoding, fluency, and spelling skills (compare Parent Ex. D at pp. 14-15, 17, with Dist. Ex. 9 at p. 62). The evaluator also identified the student's difficulty in reading and solving math word problems (compare Parent Ex. D at p. 19, with Dist. Ex. 9 at pp. 61-62). The evaluator described the student's test scores as "a picture of severe dyslexia" and stated that the student presented with dysgraphia (Parent Ex. D at pp. 15, 17). In addition the evaluator found the student's executive functions were "challenged" (id. at p. 12). The evaluator stated that generating written work put the student at a "clear disadvantage when expressing himself creatively and/or conveying what he knows" (id. at p. 18).

In the neuropsychological evaluation report, the evaluator recommended intensive reading remediation, a multisensory curriculum, technology with supplemental adult support to support the student's needs in reading and writing, executive skills coaching, a learning environment without the interference of behaviorally disruptive special needs children, and up-to-date progress monitoring of the student's level of achievement (Parent Ex. D at pp. 24-25). The evaluator recommended the student continue with medication to address attention needs to help curb the student's distractibility (id. at p. 25). The evaluator also offered a number of specific learning supports from which the student would benefit such as: mastering keyboarding skills, using voice recognition software, securing class notes, and breaking math word problems down (id. at pp. 25-26).

A review of the hearing record shows that the CSEs were aware of the student's needs as described in the neuropsychological evaluation report. Nevertheless, because the district has now been provided with a copy of this evaluation report, and the parents have attempted to ascertain the district's criteria to ensure that the report meets the district's criteria, the CSE is hereby ordered to reconvene and consider the neuropsychological evaluation report if it is has not already done so (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]; see Dist. Ex. 60).

[25] The parents assert that the IHO erred in relaying on testimony by the student's projected teacher for the 2014-15 school year indicating that the student would have benefitted from instruction without the exclusive use of Wilson (Pet. ¶¶27-28). Without determining whether the IHO's reliance on such testimony was impermissible, in rendering my decision, I have not relied on such testimony other than as discussed above describing how the student's fifth grade ICT classroom would have functioned.

[26] In this regard, the parents did not contend that the district failed to evaluate the student in all areas of suspected disability, nor did they challenge the accuracy of the August 2014 IEP's present levels of performance in their due process complaint notice (see IHO Ex. 1 at pp. 4-5).

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district implemented the student's IEP for the 2013-14 school year and offered the student a FAPE in the LRE for the 2014-15 school year, there is no need to consider whether the student's unilateral placement at Kildonan was appropriate or whether equitable considerations support the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). Additionally, this matter must be remanded for the limited issue of the implementation of the June 2012 IEP during the 2012-13 school as described above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 19, 2015 is modified, by reversing those portions which determined that the parents' claims related to the implementation of the June 2012 IEP from October 28, 2012 through the end of the 2012-13 school year were barred by the statute of limitations;

IT IS FURTHER ORDERED that the matter is remanded to the same IHO who issued the August 19, 2015 decision to render a decision as to whether the district implemented a multisensory approach to reading from October 28, 2012 through the end of the 2012-13 school year and if not whether the failure to implement a multisensory approach constituted a material deviation from substantial or significant provisions of the June 2012 IEP such that the student was denied an educational benefit;

IT IS FURTHER ORDERED that, if the IHO who presided over the impartial hearing is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations; and

IT IS FURTHER ORDERED that the CSE reconvene to consider the parents' private neuropsychological evaluation report, if it has not already done so.

Dated: **Albany, New York**
October 29, 2015

STEVEN KROLAK
STATE REVIEW OFFICER