



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-024

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

Appearances:

Girvin & Ferlazzo, PC, attorneys for petitioner, Christopher P. Langlois, Esq., of counsel

Cuddy Law Firm, PLLC, attorneys for respondents, Jason H. Sterne, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Kildonan School (Kildonan) for the 2014-15 and 2015-16 school years. The parents cross-appeal from the IHO's decision insofar as the IHO dismissed or did not address certain of the parents' claims, as well as from the IHO's determination to reduce the tuition reimbursement award by 10 percent on equitable grounds. The appeal must be dismissed. The cross-appeal must be sustained in part.¹

¹ In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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

In spring 2011, during third grade, the student was referred for evaluation pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]), and a section 504 accommodation plan was subsequently created (Tr. pp. 610-12). To address delays in speech, fine and gross motor skills, and reading concerns, the student received multiple accommodations during the 2011-12 school year (Parent Ex. A at p. 2). The section 504 plan also provided for occupational therapy (OT) and speech-language therapy services (*id.*). In addition, the parents obtained private speech-language therapy and counseling services for the student (Tr. pp. 1138-39, 1141-42; Parent Ex. A at p. 2).

In spring of the student's fourth grade school year, the CSE determined that the student was eligible to receive special education services and, during the 2012-13 school year (fifth grade), the student attended a district public school in an "integrated coteaching environment" (Tr. pp. 362-63, 613, 619-20).² According to the student's mother, the student experienced anxiety, panic attacks, and school refusals related to his academic difficulties, which worsened over time (Tr. pp. 620-22, 741-42, 1136-38; *see* Dist. Ex. 29). The student's mother reported that the student relayed to his parents that he "constantly failed at everything," "was never good enough," "couldn't write his name," and "couldn't keep up" (Tr. p. 1138). According to the student's mother, the student also indicated that he could not keep up, was "pushed for things that he couldn't do," was often kept in from recess to finish work, and was not allowed to participate in "Fun Fridays" because he had not completed written homework assignments and that, as a result, he was scared to go to school, hated going to school, and ultimately "shut down" (*id.*).

The parents placed the student at Kildonan for the 2013-14 school year (sixth grade) (Tr. pp. 586-87; Dist. Ex. 25 at p. 2; Parent Exs. G-I).^{3, 4}

In letters dated April 2, 2014, and April 29, 2014, the district notified the parents of the upcoming annual review and requested consent to evaluate the student (Dist. Exs. 7; 8). The student subsequently underwent several evaluations, including a May 2014 OT evaluation and June 2014 educational and psychological evaluations (*see* Dist. Exs. 1; 2; 4). A CSE convened on June 17, 2014, to conduct the student's annual review and develop an IEP for the 2014-15 school year (seventh grade) (Dist. Ex. 3). The CSE determined that the student was eligible for special education and services as a student with a learning disability and recommended that he receive integrated co-teaching (ICT) services in math and English, five times per week each, and one 40-minute session per day of resource room services (*id.* at pp. 1, 12).⁵ The June 2014 IEP included a number of program modifications and accommodations, including shared aide services, as well as testing accommodations (*id.* at pp. 13, 14). The IEP also recommended that the student undergo

² The IEP generated by the CSE for the student's 2012-13 school year was not placed into evidence.

³ The hearing record reflects that the parents initiated an impartial hearing regarding the district's provision of a free appropriate public education (FAPE) to the student during the 2012-13 and 2013-14 school years that was settled by stipulation of the parties (IHO Ex. 4 at pp. 1-2 n.1).

⁴ Kildonan has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (8 NYCRR 200.1[d]; 200.7).

⁵ The student's eligibility for special education programs and services as a student with a learning disability is not in dispute (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

both an assistive technology evaluation and a counseling assessment (id. at pp. 12, 13). The IEP included multiple strategies to address the student's management needs and also indicated that "[d]ata regarding any interfering behaviors [would] be collected in September of the 2014-2015 school year, and a formal [functional behavioral assessment] FBA/[behavioral intervention plan] BIP may be developed as necessary to address any such behaviors" (id. at p. 9). The IEP further reflected that, although the student required positive behavioral interventions, supports, and strategies to address behaviors that impeded learning, he did not need a BIP at the time the IEP was developed (id. at p. 10).

By prior written notice dated June 30, 2014, the district described the recommendations contained in the June 2014 IEP and the evaluative information the CSE relied upon when formulating the IEP (Dist. Ex. 9). The district further indicated that the CSE had considered a "self contained classroom" placement for the student but rejected this option as "too restrictive" (id. at p. 2).

In a letter dated August 16, 2014, the parents notified the district that they disagreed with the "recommended program and placement" and that they were placing the student at Kildonan for the 2014-15 school year "at public expense" (Dist. Ex. 11).

The CSE reconvened on September 3, 2014, to address the parents' concerns (Dist. Ex. 12; see Dist. Exs. 14; 25). The IEP that resulted from the September 2014 CSE meeting was nearly identical to the June 2014 IEP; the only substantive change was the removal of the shared aide (compare Dist. Ex. 3, with Dist. Ex. 12; see Dist. Ex. 14 at p. 1).

By prior written notice dated September 16, 2014, the district described the recommendations contained in the September 2014 IEP and indicated that the CSE relied on "[c]onsultation with parents" and staff when developing the IEP (Dist. Ex. 14 at p. 1). The district further indicated that the shared aide had been removed at the request of the parents but that "no additional changes to the 2014-2015 IEP were requested or proposed" (id. at pp. 1-2). The student remained at Kildonan for the 2014-15 school year (see Parent Exs. D-F).

A CSE convened on June 17, 2015, to conduct the student's annual review and develop an IEP for the 2015-16 school year (eighth grade) (Dist. Ex. 5). The CSE recommended that the student receive ICT services in math and English, five times per week each, and a daily 15:1 special class for "academic support" (id. at p. 13). The CSE also recommended that the student be provided with resources to address his management needs and program modifications and accommodations largely similar to those provided in the September 2014 IEP (compare Dist. Ex. 5 at pp. 9-10, 13-14, with Dist. Ex. 12 at pp. 9, 13). According to the June 2015 IEP, the student did not need positive behavioral interventions, supports, or other strategies to address behaviors that impeded learning; the CSE also determined that he did not require a BIP (Dist. Ex. 5 at p. 10).

By prior written notice dated July 21, 2015, the district described the recommendations made by the June 2015 CSE and indicated that the CSE relied upon "[r]eview of progress" and "[c]onsultation with parents" when formulating the IEP and that "[n]o other options were considered" (Dist. Ex. 17 at p. 1).

In a letter dated August 21, 2015, the parents notified the district that they disagreed with the "recommended program and placement" and were placing the student at Kildonan "at public expense" for the 2015-16 school year (Dist. Ex. 19).

The CSE reconvened on September 10, 2015, to address the parents' concerns and review the program offered to the student through the June 2015 IEP (Dist. Ex. 20; see Dist. Exs. 22; 27). The resultant September 2015 IEP contained no substantive changes to the program and placement recommended in the June 2015 IEP (compare Dist. Ex. 20, with Dist. Ex. 5; see Dist. Ex. 22 at p. 1).

By prior written notice dated September 30, 2015, the district indicated that the CSE reconvened to address the parents' concerns but that "[a]t the meeting, the parents did not identify specific areas of concern or expand upon their objections other than to reiterate that the [d]istrict was not able to meet their son's needs" (Dist. Ex. 22 at p. 1). The notice specified that the CSE reviewed and discussed "fourth quarter progress reports" and "end of year testing" from Kildonan, and summarized the recommendations included in the September 2015 IEP (id.). According to the notice, the "parents objected to a placement which was not Kildonan," but that the September 2015 CSE rejected the parents' request as it "determined that an in-district program with appropriate supports and services to address reading, writing, math and academic skills would allow [the student] to access the general education curriculum in the least restrictive environment appropriate to meet his needs and to allow meaningful opportunities for integration with nondisabled peers" (id. at p. 2). The prior written notice also indicated that the district "offered to develop a transition support plan" to help the student integrate back into the public school if he were to return, but that the parents "advised" the district that the student was going to continue at Kildonan (id. at p. 2).

A. Due Process Complaint Notices

In a due process complaint notice dated January 7, 2016, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 and 2015-16 school years and requested reimbursement for the costs of the student's tuition at Kildonan for those school years (see IHO Ex. 1).

For the 2014-15 school year, the parents asserted that the CSE failed to develop a BIP, create annual goals, recommend counseling, or otherwise address the student's anxiety and school refusal (IHO Ex. 1 at pp. 2-3). The parents also asserted that the IEPs failed to provide specialized instruction to address the student's deficits in reading and written expression (id. at p. 2). The parents further contended that the district did not conduct the assistive technology evaluation recommended on the student's IEP and that the failure to offer assistive technology denied the student a FAPE (id. at p. 3). In addition, the parents argued that the district improperly failed to offer speech-language therapy despite the student's pragmatic language deficits (id.).

The parents next asserted that the goals contained on the IEP were not appropriate and did not address the student's areas of need in reading and writing (IHO Ex. 1 at p. 2). They further asserted that, overall, the goals were neither meaningful nor measurable and were not appropriate to address the student's needs (id. at p. 3). The parents also argued that the goals did not address all the student's areas of need, including academic, social/emotional, and behavioral needs (id.).

For the 2015-16 school year, the parents asserted identical claims to those raised with respect to the 2014-15 school year (IHO Ex. 1 at pp. 3-4). In addition, the parents contended that the district improperly recommended a 15:1 special class instead of resource room services, which represented a reduction in the level of support offered to the student (id. at p. 4). For relief, the parents requested that the district reimburse them for the costs of the student's tuition at Kildonan

for the 2014-15 and 2015-16 school years and that the district pay the parents' attorney's fees and costs (id. at p. 5).

After an impartial hearing convened on April 7, 2016, the parents filed a second due process complaint notice on April 14, 2016, which they requested be consolidated with the January 2016 due process complaint notice (IHO Ex. 3 at p. 1). In the April 2016 due process complaint notice, the parents asserted that the June 2014 educational evaluation was not appropriate because a district school principal decided what assessments the evaluator would administer and the evaluator permitted the student to use a computer and did not set forth any recommendations for the student's program (id. at p. 3). Notwithstanding the alleged deficiencies, the parents also emphasized that the evaluation report showed that the student had not made "meaningful progress" in reading while in the district (id.). In addition, the parents asserted that the recommendations for a general education placement with ICT services for English and math, combined with either resource room services (for the 2014-15 school year) or a 15:1 academic support special class (for the 2015-16 school year), were inappropriate for both school years given the student's need for a smaller, structured setting and 1:1 reading instruction (id. at pp. 2-3). The IHO consolidated the due process complaint notices over the district's objections (IHO Ex. 6; see IHO Ex. 4 at pp. 3-5).⁶

B. Impartial Hearing Officer Decision

The impartial hearing, which had commenced on April 7, 2016, concluded on August 3, 2016, after six days of proceedings (Tr. pp. 1-1234). By decision dated February 10, 2017, the IHO determined that the district failed to offer the student a FAPE for both the 2014-15 and 2015-16 school years, that Kildonan was an appropriate unilateral placement for the student, and that equitable factors required a 10 percent reduction in the award of tuition reimbursement (IHO Decision at pp. 9-27).⁷

Initially, the IHO determined that for both the 2014-15 and 2015-16 school years, the district had established that it followed "proper procedures" in developing the student's IEPs and offered substantively appropriate programs, except with respect to the issue of school avoidance (IHO Decision at p. 9).

With respect to the parents' assertion that the CSE relied on an improper and insufficient reading evaluation, the IHO found that, while it was "unusual" that the principal determined which reading assessments the evaluator would administer, the hearing record did not support a finding that the evaluation was inadequate (IHO Decision at p. 13). The IHO also found that, although the district did not conduct an assistive technology assessment, the student's "absence" from the district schools "prevented an assistive technology evaluation" and, in any event, the IEPs for both

⁶ The consolidation order is incorrectly dated April 18, 2018 (IHO Ex. 6 at p. 5).

⁷ It is unclear why the IHO's decision was not issued until February 2017, over one year after the parents filed their first due process complaint notice. Although the parties did not submit post hearing briefs until November 2016, over three months after the hearing concluded, the IHO did not specify when he determined the record to be closed—after which time the IHO was required to issue the decision within two weeks—and it is unclear why the IHO did not issue a decision for another two and a half months after receipt of the post hearing briefs (8 NYCRR 200.5[j][5]; see IHO Exs. 8; 9). The hearing record contains no explanation for the delay, in part, because the IHO failed to include any documentation in the hearing record relating to extensions of time to the decision timeline granted at the request of the parties, as required by State regulations (8 NYCRR 200.5[j][5][i], [iv], [vi][c]).

school years reflected the CSE's consideration of appropriate technologies, as each recommended the use of a keyboard, computer, and calculator (id. at p. 10).

As to the parents' assertion that the IEPs failed to provide speech-language therapy, the IHO found that the hearing record did not demonstrate that the student required speech-language therapy, noting that testing did not indicate such a need, and that the student's teacher from Kildonan did not report any speech-language needs (IHO Decision at p. 11).

Turning to the parents' contention that the IEPs failed to provide specialized instruction in reading and writing, the IHO found that the recommendation for instruction by a special education teacher for ICT services, as well as the provision for resource room services or special class for academic support, met "the basic definition" of specialized instruction (IHO Decision at p. 9). The IHO further held that, if the parents meant specialized instruction to mean the use of a particular methodology, their assertion was not supported by caselaw (id. at p. 10). The IHO also determined that the recommendation for a general education placement with ICT services was consistent with the school psychologist's recommendation and that the CSEs did not have reason to suspect that the recommendation would be insufficient to address the student's needs (id. at pp. 12-13). Further, regarding the parents' argument that the change in recommendation from resource room services for the 2014-15 school year to a 15:1 academic support special class for the 2015-16 school year represented a reduction in support, the IHO found that the shift was "primarily a procedural change" that did not result in a denial of a FAPE (id. at pp. 11-12).

Despite having found the program recommendation to be otherwise appropriate, the IHO determined that the student's school refusal remained the central issue of the case and that, by failing to address this issue adequately, the district failed to offer the student a FAPE (IHO Decision at pp. 9, 14-19). The IHO found that, despite its awareness of the student's school refusal, the district "never got to the bottom" of the issue, "failed to offer solutions to enable the [s]tudent to return to school," and thereby failed to offer the student a FAPE (id. at pp. 14-16). The IHO pointed to several modifications and suggestions discussed by the CSEs to address the issue, such as counseling, "check ins," assigning a point person at the school to help transition the student back to school, placing the student in a small group for students with school anxiety, and slowly transitioning the student back to school through community events (id.). The IHO found that, while these modifications might have addressed the student's anxiety once at school, they were insufficient to address the student's inability to return to school because of the "considerable nature of the [s]tudent's school anxieties" (id. at pp. 15-16). The IHO suggested that home-based services may be needed to promote the student's transition back to the district school or that further psychological evaluations or an FBA and BIP might be warranted (id. at p. 16). Moreover, the IHO found that the district's failure to conduct an FBA and create a BIP "during the relevant time periods" amounted to "serious procedural violations" which resulted in a denial of a FAPE (id. at p. 17).

With respect to the goals contained in the IEPs, the IHO determined that the goals for math, writing, reading, and spelling were reasonably measurable and generally matched the student's areas of academic need (IHO Decision at p. 18). However, the IHO found that the CSE failed to develop goals to address the student's school refusal and thus failed to address the student's social/emotional and behavioral needs (id.).⁸ In summary, the IHO found that the district was

⁸ The IHO noted that the district did not observe any behavioral or anxiety issues or interfering behaviors in its

aware of the student's school refusal and the parents' concerns relating thereto and that the failure to address this need prior to the student returning to the district was "circular" and "problematic" (id. at pp. 18-19). Accordingly, the IHO determined that, by not making recommendations to enable the student to return to school, the district failed to offer the student a FAPE (id. at p. 19).

The IHO next determined that Kildonan was an appropriate unilateral placement, not because it provided instruction in areas lacking in the programs recommended by the district, but because the student was able to attend school and receive benefit from the instruction he received (IHO Decision at pp. 22-23). With respect to equitable considerations, the IHO found that, although the parents attended the CSE meetings and provided adequate notice of their intention to unilaterally place the student, they did not raise their concerns at the CSE meetings, preventing the district from being able to address them (id. at pp. 24-27). Consequently, the IHO ordered the district to reimburse the parents for ninety percent of the costs of the student's tuition at Kildonan for the 2014-15 and 2015-16 school years (id. at p. 27).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years, that Kildonan was an appropriate unilateral placement for the student for both school years, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement in any amount.

With respect to the determination that the district failed to offer the student a FAPE by not addressing the student's school refusal, the district asserts that, at the time the IEPs for the 2014-15 and 2015-16 school years were developed, the student was not engaging in any school refusal or avoidance behaviors and there was no evidence in the hearing record that the student would engage in such activity if he returned to the district. The district also asserts that the services offered in the IEPs were sufficient to prevent or respond to any school refusal or avoidance behaviors, were any to develop upon the student's attendance at the district school.

With respect to the determination that Kildonan was an appropriate unilateral placement for the student, the district asserts that the IHO erred because Kildonan did not represent the least restrictive environment (LRE) in which the student could receive educational benefits and the hearing record did not indicate that the student made meaningful progress at Kildonan. Finally, due to equitable factors favored, the district asserts that the IHO erred in awarding any tuition reimbursement. The district asserts that the parents never expressed any objections to the IEPs and affirmatively declined offered services which could have addressed their concerns regarding school refusal or avoidance behaviors by the student.

In an answer and cross-appeal, the parents assert general admissions and denials, and argue in favor of upholding the IHO's determinations that the district failed to offer the student a FAPE, that Kildonan was an appropriate unilateral placement, and that equitable considerations did not warrant further reduction in the award of tuition reimbursement. In the context of their denials, the parents also set forth factual allegations relating to: the appropriateness of the district's June 2014 evaluation; the adequacy of the information, evaluations, and assessments available to the CSEs regarding the student's behavioral functioning; and the appropriateness of the special

June 2014 evaluation of the student (IHO Decision at p. 18 n.7).

education programs set forth in the student's IEPs, including an allegation that the CSEs recommended ICT services for the student due to availability of placements and services in the district rather than because ICT services addressed the student's needs.

The parents cross-appeal, asserting that the IHO erred in: (a) finding that the failure to recommend a specific methodology did not deny the student a FAPE; (b) relying on retrospective testimony to determine that the recommended 15:1 academic support special class would include six or seven students; and (c) determining that a recommendation for a general education classroom placement with ICT services, along with resource room services or a 15:1 academic support special class, was appropriate to meet the student's needs. The parents also appeal from the IHO's reduction of the award of tuition reimbursement based on equitable considerations, arguing that they communicated their concerns about the CSEs' recommendations to the district and did not otherwise impede the district's ability to offer the student a FAPE.

In its answer to the cross-appeal, the district asserts general admissions and denials. In a reply to the parents' answer and cross-appeal, the district asserts that, although the parents raise the issue of the adequacy of the district's June 2014 evaluation, the IHO ruled that the evaluation was adequate and the parents did not cross-appeal this determination. The district also asserts that the parents improperly raise the issue of whether the CSEs had adequate information, evaluations, or assessments regarding the student's behavioral functioning, which was not raised in either of the parents' due process complaint notices. The district accordingly asserts that neither of these issues is properly raised for review. In the alternative, the district contends that, even if properly raised, the parents' claims are without merit.

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]). 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 [2d Cir. Aug. 16, 2010]).

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; see Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 998-1001 [2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]). 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]). 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 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).

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]).

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, 12-16 [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 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).

VI. Discussion

A. Scope of Review

There are several preliminary issues to address prior to reaching the merits. First, the IHO made specific findings that have not been challenged by the parties, including: that the district's failure to conduct an assistive technology assessment did not rise to the level of a denial of a FAPE; that the record does not establish that the student required speech-language therapy; and that the annual goals were measurable and aligned with the student's areas of academic need, with the exception of a lack of annual goals to address the student's school refusal (see IHO Decision at pp. 10, 11, 18). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, these determinations will not be reviewed on appeal.

Next, the district contends that, to the extent the parents assert that the June 2014 educational evaluation was not appropriate, the IHO specifically found that the hearing record did not support such a finding and the parents did not cross-appeal from this determination. The regulations governing practice before the Office of State Review require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). To the extent that the parents assert the evaluator who conducted the evaluation "did not conduct a comprehensive evaluation," they have done so generally, in response to the district's factual assertions relating to the June 2014 educational evaluation, and do not identify the adequacy of the evaluation as an issue presented for review on appeal. Therefore, the IHO's determination on this issue is also final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, this issue will not be reviewed.

The district also asserts that the parents did not raise the issue of the adequacy of the evaluative information available to the CSEs concerning the student's behavioral functioning in either of their due process complaint notices and, therefore, the parents may not raise this issue for the first time on appeal. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. §

1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue, and did not include this issue in their original or second due process complaint notice, I decline to review these issues for the first time on appeal. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions that limit the issues meaningless (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that an issue was not properly preserved for review because it was not raised in the party's due process complaint notice]). Nor did the district open the door to this claim by raising evidence relating to it as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-51).

Turning to the parents' cross-appeal that the IHO should have found that the CSEs' failure to specify a methodology on the student's IEPs denied the student a FAPE, in their due process complaint notice, the parents asserted that the IEPs failed to provide for specialized instruction to address the student's deficits in reading and written expression (IHO Ex. 1 at p. 2) but did not reference a claim relating to methodology. After reviewing the parents' claim relating to specialized instruction, the IHO set forth an alternative reading of this claim, explaining that, to the extent the parents meant specialized instruction to mean the use of a particular methodology, their assertion was not supported by caselaw (IHO Decision at pp. 10). However, a review of the due process complaint notice does not support the broad alternative reading and, because the parents did not previously raise the issue of methodology and the district did not otherwise open the door to the question (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see M.H., 685 F.3d at 249-51; R.E., 694 F.3d at 187 n.4), I find that the issue was outside the scope of the impartial hearing and is now outside the scope of my review.^{9, 10} However, even if properly raised, the evidence in the hearing record supports the IHO's ultimate

⁹ The closest the parents came to asserting that it was necessary for the student to receive instruction using the Orton-Gillingham methodology was the statement in their post-hearing brief that the CSE did not discuss or consider the use of any particular methodology, despite the student having progressed at Kildonan (IHO Ex. 8 at p. 16). However, because this issue was not previously raised, it could not be asserted for the first time in a post-hearing brief (see B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *4-*6 [S.D.N.Y. May 14, 2013], aff'd, 569 Fed. App'x 57 [2d Cir. June 18, 2014]).

¹⁰ The IHO identified the parties' post-hearing briefs as IHO Exhibits 8 and 9, but did not specify which exhibit was the parents' brief and which was the district's brief. For purposes of this decision, the parents' post-hearing brief is referenced as IHO Exhibit 8, and the district's post-hearing brief as IHO Exhibit 9.

finding in that the CSEs at issue had before them no information indicating that the student needed instruction via a particular methodology in order to receive educational benefit.¹¹

B. Social/Emotional Needs

The district initially asserts that the IHO erred in finding that the student had a "significant problem" with school refusal and avoidance behaviors. It argues that the student did not present with school refusal issues while at Kildonan and, as such, there was no evaluative information that would lead the CSE to believe that the student required an FBA. The district further asserts that the IHO erred in finding that the district denied the student a FAPE based on its failure to conduct an FBA or develop a BIP, and to develop goals designed to address the student's school refusal behaviors. In addition, the district claims that the IHO erroneously found that the student would engage in school refusal or avoidance behaviors were he to return to the district.

The IDEA requires that when a student's "behavior impedes the child's learning or that of others," the CSE must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]). When a student's "behavior impedes his or her learning or that of the others," the CSE is required to conduct an FBA, to "ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1][v]; see 8 NYCRR 200.1[r]; 200.22[a]). The CSE must also consider the creation of a BIP to provide strategies to reduce the problem behavior, when it cannot be managed by classroom-wide behavioral interventions (8 NYCRR 200.22[b]). Also, when appropriate, an IEP must include counseling services if necessary for the student to benefit from special education and receive a FAPE (34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

1. 2014-15 School Year

The hearing record reflects that, at the time the CSE was developing the student's IEP for the 2014-15 seventh grade year, the CSE had a significant amount of information about the student's social/emotional needs and school refusal. Specifically, a review of the transcript of the September 2014 CSE meeting reflects that the parents reported at the meeting that, when the student was last in the district, what had been "set up" for the student was not implemented and, by the time the CSE met several months later, the student was "lost" and had become "frustrated

¹¹ Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017] [holding that "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, absent evidence to the contrary a program that does not recommend the use of that methodology will not be reasonably calculated to enable the student to receive educational benefits]).

and emotional" (Dist. Ex. 25 at p. 18). The parents indicated that the student was concerned about drawing attention to himself and to his difficulties with academics; for example, they stated that the CSE had previously discussed providing an aide to support the student but that the student was greatly opposed to the idea of having a staff member following him or hovering over his shoulder (id. at p. 28). The parents also reported that the student felt singled out when pulled out for reading instruction and believed his reading teacher thought he was "dumb" because she started him at a level below what he was able to do (id. at p. 18). In addition, the parents indicated there were instances where teachers did not believe the student had done his homework, despite knowing that his father had done it with him the night before, which his father reported, "crushe[d]" the student (id. at p. 19).¹² The student's father indicated that the student was shutting down emotionally in part due to events such as losing his recess privileges for talking (id. at pp. 21, 39).

The student's mother indicated at the September 2014 CSE meeting that the situation at the district "spiraled down to a point where [their] son was not even verbal" (Dist. Ex. 25 at p. 21). She reported that one of the student's teachers told her that the student was not speaking in school and that the teacher was unable to get him to talk (id.). The student's mother reported that school was "overwhelming" and "torturous" for her son and that they "lived . . . at the psychologist offices and did everything under the sun" (id. at p. 22). The parents indicated that, at times, the student was unable to function, that they could not get him to be physically mobile, and that he had missed almost half the school year because he was unable to come to school (id. at pp. 22, 31-32).¹³ In addition, the student's mother stated that, at the time of the September 2014 CSE meeting, the thought of coming back to the district for the 2014-15 school year brought on "extreme emotion" for the student, to the point of a "[p]anic attack," and that the student did not even want to drive by the school (id. at pp. 22, 30). She also stated that the student was unwilling to even talk about the school or his friends there (id. at p. 31). The student's mother reported that she felt the student's behavior was "not healthy" and that one of his psychologists described the student as a bottle of soda that shook all day, noting that he tried so hard to hold it in but would explode when he left school, in a complete breakdown (id. at pp. 22, 32, 36-37). She told the CSE that the student's doctors said, "you can't do this to this kid anymore" (id. at p. 37).

Despite the information that the parents provided at the September 2014 CSE meeting regarding the student's social/emotional needs and school refusal, the district school psychologist noted at that meeting that the IEP did not include a social/emotional component to provide the student with social/emotional supports (Dist. Ex. 25 at p. 33). Consistent with this, the district director of pupil personnel services, who acted as the CSE chairperson, indicated that, while the IEP reflected that a counseling assessment was to be completed in September 2014, based on the information the CSE already had at the time of the September 2014 meeting, the student demonstrated a need and social/emotional supports should have been put into place "immediately" (Tr. pp. 496-97; Dist. Ex. 25 at p. 33). The school psychologist noted that the CSE was "a little late" in developing these supports but suggested several options to address the student's social/emotional needs including his school refusal (Dist. Ex. 25 at p. 34). Specifically, the

¹² The CSE chairperson testified that the parents shared that the 2012-13 school year "was not a very good one" for the student due to homework incidents, getting yelled at in the lunch room by the lunch lady, and not being allowed to go out for recess (Tr. p. 559).

¹³ A district attendance report indicates that during the 2012-13 school year, the student was absent 29 times, tardy 15 times, and released early from school 10 times (Dist. Ex. 29).

psychologist stated at the CSE meeting that, based on the parents' description of the student, she would have liked to have the student come to school a few times before school started in September, and she would adjust the length of his school day to help him feel safe (*id.*). The psychologist also indicated that the student could start the day with a check-in with the psychologist or counselor to see how he was doing and that, if his anxiety level increased during the day, he could end his day at that point, and that the district would try to gradually extend the student's time at school (*id.*).¹⁴ The psychologist also suggested providing the student with a "support system person" that the student could connect with at any point during the day, who was not a teaching assistant, a shared aide, or a special education person, so he would not be seen as "different" (*id.*). The CSE chairperson added that the student would not necessarily need to go home but could check in with the support person to "calm down and re-center himself" (*id.* at p. 35). He added that staff could help the student to catch up with his work in the resource room and throughout the day in his classes, and that the student could initially take as much time as he needed in order to feel comfortable (*id.* at pp. 35, 38).

The CSE members also made suggestions on how to improve the student's perception of the school and get him used to the school campus, including by attending fun school events, using the pool, or participating in scheduled visits wherein the student would be paired with a peer who would take him around, introduce him to groups of students, and participate in the school day with him (Dist. Ex. 25 at pp. 42-43).

Notwithstanding that at the time of the September 2014 CSE meeting the CSE had information about the student's social/emotional needs and brainstormed multiple supports to address the student's anxiety, comfort level at school, and ultimately his school refusal, this information did not appear on the September 2014 IEP (*see* Dist. Ex. 12). Present levels of performance in the area of social development indicated that the student was "well mannered" and "followed all rules in the class room" (*id.* at p. 7). The IEP described the student as "quiet," "[c]onscientious," and "[f]riendly with peers" (*id.*). Social development needs included an increase in the student's level of risk-taking and confidence across all environments, as well as level of perseverance in all subject areas (*id.*). A review of the September 2014 IEP reveals nothing in the IEP that acknowledges, describes, or addresses the student's significant anxiety surrounding approaching the school building and past school refusal behavior (*see* Dist. Ex. 12). Rather, the September 2014 IEP reflects the recommendation for a counseling assessment in September to determine the student's need for counseling services (Dist. Ex. 12 at p. 13).¹⁵

¹⁴ The district school counselor opined that, if the student had left school early, he might have felt uncomfortable explaining to his peers why he was not in his afternoon classes and that, rather than addressing his anxiety, it might have made him feel "different" (Dist. Ex. 25 at p. 38).

¹⁵ The hearing record reflects that the draft of the June 2014 IEP included counseling services; however, the parents requested this be changed to a counseling assessment (Tr. pp. 319-20). Regardless of the parents' expressed preferences or requests at the CSE meetings, it was ultimately the district's obligation to ensure that the student's special education program and related services aligned with his needs (*Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; *cf. Loretta P. v. Bd. of Educ.*, 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"])).

Based on the description of the student's needs discussed at the September 2014 CSE meeting, the supports recommended to address the student's social/emotional needs and school refusal were insufficient. While the IHO found that the district's failure to conduct an FBA or develop a BIP were serious procedural errors that resulted in a denial of a FAPE, it would have been difficult for the district to complete an FBA or develop a BIP for a student who was not currently exhibiting interfering behaviors and was not attending the district's school (IHO Decision at p. 17; see Tr. pp. 419-21, 555-57). However, a review of the hearing record supports the IHO's finding that the district's failure to recommend supports, strategies, or services to assist the student in returning to school and support him once he was there constituted a failure to offer the student a FAPE (IHO Decision at pp. 14, 19). Based on the input of the parents, at the time of the September 2014 CSE meeting, the district was aware that the student's inability to go into, or even near, the district school was a result of his inability to cope with anxiety related to his earlier school failure there (see Dist. Ex. 25). The hearing record shows that, at the time of the September 2014 CSE meeting, this was the student's most significant need, as it prevented him from accessing any academic supports and special education services that the district offered. Given the circumstances of this case, it is not necessary to make a determination as to the appropriateness of the social/emotional supports and strategies discussed at the September 2014 CSE meeting because none of this information was included in the September 2014 IEP. However, by not including in the IEP any of the supports discussed at the September 2014 CSE meeting, or otherwise addressing the student's social/emotional needs in the IEP, such as through counseling services, annual goals, or management strategies, the district failed to address the student's anxiety and school refusal, and denied the student a FAPE (see Lexington County Sch. Dist. 1 v. Frazier, 2011 WL 4435690, at *9-*10 [D.S.C. Sept. 22, 2011] [holding that the failure to address a student's school refusal in an IEP rose to the level of a denial of a FAPE, noting that the student "would not be able to obtain any benefit from the IEP designed by the District if he refused to attend school altogether"]; Application of the Bd. of Educ., Appeal No. 15-103).

2. 2015-16 School Year

The hearing record reflects that the June 2015 CSE meeting was attended by the parents, the CSE chairperson, and two district special education teachers, all of whom had attended the September 2014 CSE meeting and, therefore, were aware of the student's history of school refusal and social/emotional needs (Dist. Exs. 5 at p. 1; 12 at p. 1; see Dist. Exs. 25 at p. 1; 26 at p. 1). Transcripts of the June 2015 CSE meeting reflect that the student's third quarter report card from Kildonan was used to update information for the student's IEP for the 2015-16 school year (Dist. Ex. 26 at pp. 1, 5, 6). The report card indicated that, overall, the student had a positive year both academically and with regard to his social/emotional functioning at Kildonan, although he had not been able to overcome his anxiety related to homework, and the IEP indicated that "work output [wa]s very challenging for [the student]" (Dist. Ex. 5 at p. 10; see generally Parent Ex. E). A review of the transcripts of the June 2015 CSE meeting reflects that the student continued to exhibit anxiety related to returning to the district school (Dist. Ex. 26 at pp. 3, 22). The student's mother reported that, although the parents had offered to bring the student to various activities and events at the district school, he had not yet gone to the district school and he could not be persuaded to do so at the time of the CSE meeting (id. at p. 3). She indicated that, on the morning of the June 2015 CSE meeting, the student was not comfortable going to the school for his sister's field day and that his ability to go to the school had not progressed (id. at pp. 3, 22).

At the June 2015 CSE meeting, in response to the student's mother asking what the district could do to assist the student in transitioning to the district, the CSE chairperson reiterated several of the supports discussed by the September 2014 CSE (Dist. Ex. 26 at p. 22). For example, he suggested beginning the student's transition by having the student connect to something fun, such as a going to a football game, field day, or using the pool at the school, and having the student go to the school over the summer, without any expectations placed on the student (*id.*). The CSE chairperson added that he could meet the family at the school, get to know the student, show him where his classes would be, and that the student could possibly begin to meet some of his teachers (*id.*). He also identified the two special education teachers who would potentially be the student's "point people, his support people" (*id.* at pp. 9, 10, 22).

The CSE chairperson noted that the counseling assessment had "rolled over" from the previous year's IEP to the draft of the June 2015 IEP, but that the current CSE thought, at least initially, that counseling services would be "really important" (Dist. Ex. 26 at pp. 18, 23, 24).¹⁶ The CSE chairperson recommended that the student initially participate in small group counseling, which he described as a relaxed setting in which the student would meet with the counselor and other students who had similar school anxiety (*id.* at p. 24). He indicated that the secondary school psychologist could also be a point person for the student if he felt anxious and needed to leave class (*id.* at pp. 23-24). The CSE chairperson indicated that the district could develop "a system through a behavior support plan" where the secondary school psychologist would be the student's "go to person" (*id.* at p. 24).

Additionally, in response to the parent's report at the June 2015 CSE meeting that, in the past, the student had lost recess privileges for talking in the lunchroom, the CSE chairperson offered as an option having the student eat lunch in the office with a couple of friends (Dist. Ex. 26 at pp. 25-26). The CSE chairperson stated that this accommodation was "not written in [the IEP]" but that the district could implement it if it "[wa]s something [the student] needed," and that "if it ha[d] to be in [the IEP], [the CSE] would put it in there" (*id.* at p. 26).

In response to parent concerns regarding teacher accountability and a prior IEP not being implemented, the CSE chairperson noted that he required teachers to document that they had read a student's IEP and knew what was in it (Dist. Ex. 26 at p. 27). He also stated that, if the student was "not feeling good" about what was going on at school, the parents should let the CSE chairperson, the student's point person, or the student's case manager know, and he would address it (*id.* at p. 28).¹⁷ He added that he recommended going to the case manager first because she would be the person who was with the student in English and math class and attended team planning meetings with the student's science and social studies teachers, so she would know what was going on in those classes as well (*id.*).

Despite having discussed the student's then-current social/emotional needs surrounding his perception of the district school and the above potential social/emotional supports, a review of the resultant IEP shows that this information was not included on the June 2015 IEP (*see* Dist. Ex. 5).

¹⁶ However, later during the meeting the CSE chairperson decided to remove the recommendation for a counseling assessment, but indicated that one could be performed depending on how the parents and student felt if the student returned to the district (Dist. Ex. 26 at pp. 39-40).

¹⁷ The CSE chairperson indicated that the student's case manager would be the eighth-grade "integrated teacher" (Dist. Ex. 26 at p. 10).

Specifically, the social development present levels of performance on the June 2015 IEP are the same as the September 2014 IEP, but for the statement that the student had positive relationships with adults, and the removal of the statement that he was a conscientious student and friendly with peers (compare Dist. Ex. 5 at p. 7, with Dist. Ex. 12 at p. 7).

As noted above, in response to the parents' August 2015 letter, the CSE reconvened in September 2015 (Dist. Ex. 20; see Dist. Ex. 19). A review of the hearing record, including the transcript of the CSE meeting, reveals that this meeting was attended by personnel who had not previously attended the September 2014 or June 2015 CSE meetings, including a school counselor, a regular education teacher, and a school psychologist (Dist. Ex. 27 at p. 1; see Dist. Ex. 20 at p. 1). As such, at the start of the CSE meeting, the student's mother gave a synopsis of the student's history of difficulties when he attended the district school (Dist. Ex. 27 at pp. 2-6).

The student's mother indicated that the student's difficulties in school started with "little things" in kindergarten that got bigger and more profound each year, and that things at school became more difficult for the student over time (Dist. Ex. 27 at pp. 2-3). She reported that, by third grade, the student was unable to do the amount of writing required, that his difficulties were very pronounced, and that he began exhibiting behavioral concerns (id. at p. 3). For example, the parent indicated that, during fourth grade, the student's teacher reported that he did not talk at all at school, although he was typically very outgoing at home (id.). She indicated that things went downhill from there, with fifth grade being "one of the worst years of our entire family's life" (id.).

The student's father added that the parents tried everything that had been recommended to them, such as morning meetings and medication but that the student presented with "very high anxiety and school refusal" (Dist. Ex. 27 at p. 3). The parents explained at the September 2015 CSE meeting that, in conjunction with the CSE chairperson, they had recently attempted to get the student to go to the school on the pretense of helping his sister find where her classes would be (id. at p. 4). However, the student had a "full on panic attack," which his mother described as crying hysterically and screaming that he did not want to go to the school (id.). The parents further indicated that, when the student had a panic attack, he became so upset that he could not function and that, afterward, he was exhausted and the parents had to "scoop him up and put him in his room," where he would then sleep (id. at pp. 3-4). The student's mother added that, several years ago, the student had panic attacks daily, it was a daily struggle to get him to school, and that the last year the student was in the district he missed more school than he attended and even the days he went, he was tardy or had to leave early (id. at pp. 4, 6). The student's mother also indicated that the student had received private counseling services without success (id. at p. 8).

The student's father also indicated that, although they spoke to the school administrators at the time the student attended the district school, "[t]he problem was that things that [they] had agreed upon didn't get implemented," and the student had "had enough of that" (Dist. Ex. 27 at pp. 4, 15). The parents also noted that the student's past experience in the district with homework—including being given too much homework, being punished by teachers for not being able to finish his homework, and teachers not believing he had done his homework and making him redo it—all "fuel[ed]" his anxiety (id. at pp. 16-17).

The transcript of the September 2015 CSE meeting shows that the student's father identified as a "hurdle" the task of actually getting the student to the district school, and the CSE chairperson acknowledged it had been a "block for [the student] to come to the [district school] building" (Dist. Ex. 27 at pp. 5, 8). The CSE chairperson noted that both the district and the parents had hoped to

reintroduce the student to the school building but that despite the parents' attempts each year, they were unsuccessful in doing so (id. at p. 5). The parents reported that the student did not want to have anything to do with the district school, even driving by it (id. at pp. 5, 6). When asked how the student would respond if the parents decided to "make a change," implying the student would return to the district school, they indicated he would have a "full on panic attack" and that they would not put their son back in that situation (id. at p. 18). Similarly, the secondary school psychologist indicated that the student sounded like the type of student who, after having a bad experience, would not be able to move past it and return to the district (id. at p. 25).

During the September 2015 CSE meeting, to address the student's inability to cope with entering or being near the district's buildings, the CSE chairperson summarized suggestions for transitioning the student back to the district that had been made at earlier CSE meetings; for example, the CSE chairperson meeting the student in a neutral place, having school personnel come to the student's home, initially having the student come to school for fun activities, and slowly reintegrating the student back to the school (Dist. Ex. 27 at pp. 5-6). Additionally, the CSE chairperson testified that he had offered to meet the student at home or in a neutral place to convince the student that he was a "good guy" and that district staff would "take good care of him" in an effort to put a friendly face on the school (Tr. pp. 557-58; Dist. Ex. 27 at p. 6). A review of the transcript of the September 2015 CSE meeting does not reveal that other social/emotional supports were discussed by the CSE at the September 2015 CSE meeting to transition the student to the district for the 2015-16 year (see Dist. Ex. 27).

However, the parents and the CSE did discuss that the student may require a change of environment due to his inability to return to the district (Dist. Ex. 27 at pp. 18-22). The special education teacher stated that he understood that the parents did not want to risk what they currently had at Kildonan, but that the student was "eventually. . . going to have to start the transition," and asked how the CSE could "help transition [the student] to something different" (id. at pp. 21-22).¹⁸ The CSE chairperson also stated that the student "need[ed] a different school experience that could also be a positive experience" (id. at p. 22). The CSE discussed a program at a high school located outside of the district for ninth grade that the parents were interested in, and the CSE chairperson offered to arrange a tour there (id. at pp. 18-19, 21- 22).¹⁹ However, no outside options were discussed for the student for the 2015-16 school year (see id. at pp. 1-28).

As with the prior IEPs, despite reviewing the student's history and some of the social/emotional supports that had been discussed at previous CSE meetings to address the student's social/emotional needs and school refusal, the September 2015 CSE did not memorialize any of these needs or strategies on the September 2015 IEP (see Dist. Ex. 20). While the September 2015 CSE agreed that the student needed a different environment and brainstormed possibilities for the student for his ninth-grade year, it failed to offer supports for the student to return to school for eighth grade on the September 2015 IEP (Dist. Ex. 27 at pp. 18-19, 21-22). As such, by not including in the IEP any of the supports discussed at the September 2015 CSE

¹⁸ The parents also reported to the September 2015 CSE that the student had attended Kildonan for the past two years and that he had no problems with tardiness, attendance, or not wanting to go to school (Dist. Ex. 27 at pp. 3, 7, 10). The CSE chairperson indicated that he had received the student's fourth quarter report from Kildonan and that they were "very positive" (id. at p. 4).

¹⁹ The CSE chairperson indicated that the district had sent students who had also come from Kildonan to the program referred to during the meeting (Dist. Ex. 27 at p. 18).

meeting, or otherwise addressing the student's social/emotional needs in the IEP, such as through counseling services, annual goals, or management strategies, the district failed to address the student's anxiety and school refusal, and denied the student a FAPE (see Frazier, 2011 WL 4435690, at *9-*10).

C. General Education with ICT Services

Due to the findings above that the student was denied a FAPE for the 2014-15 and the 2015-16 school years based on the district's failure to appropriately address the student's social/emotional needs, as well as the subsequent passage of time, it would be of little benefit to determine whether placement in a general education class with ICT services and the additional supports provided on the student's IEPs would have been sufficiently supportive to meet the student's needs other than his social/emotional needs for the 2014-15 and 2015-16 school years. However, as described below, a closer look at the student's needs may be beneficial to the parties to frame future educational planning for the student, especially given that the CSE is likely scheduled to reconvene in June 2017 to develop the student's IEP for the 2017-18 school year.

With regard to the program offered to the student for the 2014-15 school year, the hearing record reflects that the June 2014 CSE did not have any information from Kildonan at the time it developed the student's IEP and, therefore, based its recommendation on information provided in a May 2014 educational assessment report completed by a district reading specialist, a June 2014 psychological reevaluation report completed by a district psychologist, a May 2014 OT evaluation report, and State testing results from spring 2012 (Tr. pp. 23, 118, 200, 277-78, 287-88; Dist. Exs. 1; 2; see Dist. Ex. 3 at pp. 3-9).²⁰ This information, which was reflected on the June 2014 IEP, showed that the student's math fluency skills for addition, subtraction and multiplication were in the average range (Dist. Ex. 1 at p. 1; see Dist. Ex. 3 at p. 5). With regard to reading, the student's test results indicated he was able to read a word list at the sixth-grade instructional level (QRI word lists), that he demonstrated average ability on the Test of Silent Word Reading Fluency (TOSWRF), and that his instructional reading level was level R on the Fountas and Pinnell Benchmark Assessments, which the evaluator indicated was at the second half of fourth-grade level, due to the student's limited comprehension at that level (Tr. p. 62; Dist. Ex. 1 at pp. 1; see Dist. Ex. 3 at p. 5). With regard to writing, the student's functioning was determined to be in the average range in vocabulary, logical sentences, sentence combining and contextual conventions, as measured by the Test of Written Language (TOWL), with story composition in the superior range of functioning (Dist. Ex. 1 at p. 2; see Dist. Ex. 3 at p. 5). However, spelling and punctuation scores both fell in the poor range (*id.*). According to the Bear Spelling Inventory (Elementary), the student's performance indicated his "Spelling Stage" was "Early Suffixes and Affixes" (Dist. Ex. 1 at p. 3; see Dist. Ex. 3 at p. 5).

Information related to the student's cognitive ability reflected a "Full-Scale score" of 84, which the evaluator indicated was in the low average range of functioning on the Cognitive Assessment System, although the psychological evaluation report reflected that, because of the variability of the student's scale scores, the full scale score should be deemphasized (Dist. Ex. 2 at p. 3; see Dist. Ex. 3 at p. 5). Overall, according to the evaluator, the testing results suggested that the student demonstrated "intact working memory, visual memory, and conceptual thinking skills"

²⁰ The June 2014 IEP also reflects that some information from a June 2013 OT report was used to develop the student's June 2014 IEP (see Dist. Ex. 3 at pp. 7, 8).

and had "well developed" executive functioning that may be "inhibited when the task requires visual search and sequential processing of information"; however, she also indicated that "[p]rocessing speed continue[d] to be an area of significant weakness as indicated by less accuracy and automaticity," which indicated the need for additional time (Dist. Ex. 2 at pp. 8-9; see Dist. Ex. 3 at pp. 5-6).

The district psychologist who completed the June 2014 psychological reevaluation of the student testified that this student needed more repetition and exposure to new information and that any new information presented to the student should be "overlearned" (Tr. pp. 176-77). She also indicated that the student's strong logic and reasoning skills could be utilized when he learned something new by "talking through with him" some of the complexities that exist (Tr. p. 177). She further added that the student "really probably could use some help dividing his attention" and that "[a] student with those kinds of problems needs things broken down so the tasks aren't overwhelming" (id.). Additionally, both the June and September 2014 IEPs reflected that the student's "reading skills and physical difficulties with written work affect[ed] his ability to keep pace with his peers in activities which require[d] independent reading and writing" (Dist. Exs. 3 at p. 9; 12 at p. 9).

Both the June and September 2014 IEPs provided that the student would attend a general education placement with ICT services in English and math five days per week and daily resource room support for 40-minutes per day to address his academic needs (Dist. Exs. 3 at p. 12; 12 at p. 12).²¹ While the IEPs developed for the student's 2014-15 school year included support for the student's reading and writing deficits with ICT services in English and math, the June and September 2014 IEPs did not provide the student with special education teacher support in science and social studies classes. The IEPs also included an extensive list of strategies (over 20) to address the student's management needs as well as multiple program modifications and accommodations, which the 2014-15 IEPs reflected were to be provided in all classrooms and settings (Dist. Exs. 3 at pp. 9, 13; 12 at pp. 9, 13). However, although the June 2014 IEP included provision of a shared aide to assist the student in all classrooms, this support was removed in the student's September 2014 IEP (compare Dist. Ex. 3 at p. 13, with Dist. Ex. 12 at p. 13).²² Additionally, while transcripts of the September 2014 CSE meeting reflect that there may have been an aide in science and social studies to assist the whole class, there was no discussion of how the student's management needs and program modifications/accommodations would be provided to him in these classes (Dist. Ex. 25 at p. 7).

Turning to the educational planning for the student's 2015-16 school year, review of the June 2015 IEP shows that the program and services were similar to the September 2014 IEP, but with some updates to the student's present levels of performance and the addition of four new goals to address the student's needs in writing, reading, and spelling (compare Dist. Ex. 5, with Dist. Ex. 12). The June and September 2015 IEPs again reflected the recommendation that the student attend a general education placement and receive ICT services in English and math (Dist. Exs. 5 at p. 13; 20 at p. 16). However, the resource room services on the September 2014 IEP were

²¹ Review of the June and September 2014 IEPs indicates that the September 2014 CSE did not review new evaluative information about the student (compare Dist. Ex. 3 at pp. 3-5, with Dist. Ex. 12 at pp. 3-5).

²² The CSE transcripts reflect that the shared aide was removed from the student's June 2014 IEP at the request of the parent (Dist. Ex. 25 at pp. 28, 33).

replaced by a 15:1 special class for academic support (compare Dist. Ex. 12 at p. 12, with Dist. Ex. 5 at p. 13, and Dist. Ex. 20 at p. 16).²³

The September 2015 IEP reflected new information about the student including results of academic testing completed by Kildonan in May 2015, and additional minor updates to the student's present levels of performance (compare Dist. Ex. 5 at pp. 3-6, with Dist. Ex. 20 at pp. 3-4, 7-8). The content of the goals on the September 2015 IEP remained the same as in the June 2015 IEP, with the exception that the schedule of when progress would be measured changed from monthly to every two weeks (compare Dist. Ex. 5 at pp. 11-12, with Dist. Ex. 20 at pp. 14-15).

Transcripts of the June and September 2015 CSE meetings indicated that the CSEs had the student's Kildonan third and fourth quarter progress reports, respectively, when they developed the student's IEPs for the 2015-16 school year (Dist. Exs. 26 at p. 1; 27 at p. 4). However, while the information in the Kildonan reports indicated the student had made progress, it did not offer detail regarding whether or not the student needed support in reading and writing in all academic areas (see Parent Exs. D; E).

Overall, for the reasons discussed above, the program and services included on the IEPs for the student's 2014-15 and 2015-16 school years failed to address the student's social/emotional needs. Other than his social/emotional needs, the information available to the CSEs showed that the student had many academic skills in the average range but that he required a range of environmental modifications and human or material resources in the classroom in order to benefit from instruction. Additionally, while the June and September 2015 CSEs had some updated information that the student had made progress at Kildonan, it offered minimal detail regarding the level of support the student might require in all areas in order to receive educational benefit. Had sufficient supports been in place to allow the student to manage his anxiety and attend school

²³ State regulations define a special class as consisting of students with disabilities who have been grouped together based on the similarity of their individual needs for the purpose of receiving specially designed instruction, in a group of no more than 15 students (8 NYCRR 200.1[uu]; 200.6[h][2]-[4]). Resource room services are defined as the provision of specialized supplementary instruction in an individual or small group setting for a part of the school day, to students who have been grouped together based on the similarity of their individual needs, in a group of no more than five students per teacher (8 NYCRR 200.1[rr]; 200.6[f][3], [4]). The hearing record shows that the district represented that the 15:1 special class for academic support operated in a manner similar to a resource room (Tr. pp. 193-94, 326-27, 352-55, 385, 514-20; Dist. Ex. 26 at pp. 6, 8-9). The parents argue that the district was essentially providing resource room services that circumvented the regulatory maximum on the number of students permitted in such a program. Notwithstanding testimony that the resource room services and the special class were "functionally similar" (see Tr. pp. 514-15, 518), the evidence in the hearing record shows differences between the recommendations other than the maximum number of students. For example, the CSE chairperson indicated that the resource room services recommended for the 2014-15 school year were intended "to support, re-teach, [and] give [the student] extra time to complete classwork, other assignments" (Dist. Ex. 25 at pp. 7, 16-17). In contrast, at the June 2015 CSE meeting, the CSE chairperson and the district special education teacher informed the parents that the academic support class would provide direct specialized instruction in areas that might not be covered in the student's classroom instruction (Dist. Ex. 26 at pp. 13-14, 15-16). The CSE chairperson further described that the purpose of the academic support class was to work on annual goals and provide preteaching and multisensory reading support (id. at pp. 6, 8-9). Moreover, the June 2015 IEP contained a number of annual goals which were designated as goals to be worked on in the academic support special class, while the June 2014 IEP contained no goals specifically to be addressed in the resource room (Dist. Ex. 5 at p. 12; see Dist. Ex. 3). Accordingly, while the district's resource room services and academic support special class may have overlapped in some respects, the hearing record does not support the parent's argument that the district intended to circumvent State regulations.

consistently, the IEPs developed by the CSEs may have been sufficient to meet the student's needs in the areas of academics. On the other hand, the recommended general education classroom setting may not have been the most conducive setting for staff to implement the large number of supports and strategies listed in the IEPs and it is questionable whether the absence of reading and writing support during science and social studies would have had an impact on the student's ability to make progress in these classes. In any event, the question is largely academic for the present inquiry regarding the district's provision of a FAPE during the 2014-15 and 2015-16 school years because, absent recommendations for supports to address the student's social/emotional needs and enable the student to attend school, no matter how aligned the remainder of the program and placement was with the student's other needs, his social/emotional needs prohibited him from receiving the benefit thereof.

Nevertheless, as the CSE looks toward developing the student's IEP for the upcoming school year, it should consider the information Kildonan staff provided during the impartial hearing about the student's needs and what methods were effective to address them.²⁴

The director of language training at Kildonan (director)—who was the student's literature teacher for the 2013-14 school year, his tutor for the 2014-15 school year, and the supervisor of the student's tutor for the 2015-16 school year (Tr. pp. 823, 828)—testified that the student required "a lot of support with language," and "direct and explicit instruction in all aspects" of language, including to build his comprehension skills (Tr. p. 902). Regarding writing, the director indicated that the student needed "writing to be broken down for him," including providing models of the next step in the writing process, visuals, and support (Tr. pp. 902-03). The director testified that the student required a one-to-one "tutor" for writing due to processing speed deficits (Tr. pp. 910-11). At Kildonan, instruction occurred in small groups, so staff could observe when the student's comprehension was "waning," provide supports, and intervene when they believe the student is "fad[ing] away into the background" (Tr. pp. 902, 907-11).

Overall, the testimony of the director describes reading and writing as greater areas of deficit for the student than the district may previously have understood based on the information available to it and, perhaps at times, the overriding impact of the student's needs in the social/emotional realm. However, going forward, the CSEs should weigh this and any other new information about the student from Kildonan and other sources when engaging in educational planning for the student.

D. Unilateral Placement

The district asserts that the IHO erred in finding that Kildonan was an appropriate placement as he made no finding that Kildonan represented the student's LRE or that the student's special education needs were so great that they could only be addressed in the restrictive, non-integrated educational program offered at Kildonan. The district further asserts that the student did not make sufficient progress on standardized testing while at Kildonan to establish its appropriateness as a unilateral placement.

²⁴ It would be inappropriate to rely on the testimony of Kildonan staff in reviewing the appropriateness of the CSEs' recommendations for the student for the 2014-15 and 2015-16 school years since this information was not available to the CSEs at the time the IEPs were developed (R.E., 694 F.3d at 186; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "[e]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided the special education services needed by the student]; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

By way of background, the hearing record reflects that Kildonan is a boarding and day school serving students in second through twelfth grade, all of whom have a language-based learning disability (Tr. pp. 1153, 1172-73; see Tr. p. 827). The head of school at Kildonan testified

that the student's seventh and eighth grade programs at Kildonan consisted of math, science, and history, and that English language arts (ELA) was broken into two separate sections, a literature class and a daily tutorial that provided instruction in the mechanics of language (Tr. p. 1162). Testimony by the director indicated that the student received 1:1 tutoring every day using an Orton-Gillingham approach that targeted reading and writing (Tr. pp. 828-30). She described Orton-Gillingham as a multisensory approach to reading and writing instruction that is structured, direct, and explicit (Tr. pp. 818-19, 822).

The director's testimony indicated that, during the 2014-15 school year, she worked with the student in the 1:1 tutorial on oral reading, explicit instruction in phonics, and meaning-based language (Tr. pp. 849-50). She also indicated that, due to the 1:1 setting, she was able to see when the student's comprehension lapsed and "provide in-the-moment questioning to help lead him to either an inference or even more correct recall of plot development" (Tr. pp. 849-50). According to the director, she addressed the student's needs in the area of writing using modeling of the different steps of the writing process so the student learned a concrete approach (Tr. pp. 850, 852). The director's testimony indicated that she also worked on what she called the "nuts and bolts level" of writing to address the student's handwriting and keyboarding skills (Tr. pp. 852-54).

With regard to the student's academic classes, the hearing record reflects that the classroom teachers at Kildonan were either trained in the Orton-Gillingham method or were "very cognizant of it," and that instruction was often presented in a multisensory fashion (Tr. pp. 1025, 1163). Reading and writing demands were minimized in academic classes and instead, teachers use inquiry-based, hands-on, and project-based learning (Tr. p. 826; see pp. 1163-65).

1. Least Restrictive Environment

The main crux of the district's assertion that Kildonan was an inappropriate unilateral placement for the student is that Kildonan did not represent student's LRE. Generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105), parents are not held as strictly to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 837 [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

In this case, the student did not have access to typically developing peers during his academic classes, as Kildonan is a school designed specifically for students who have "some sort of language-based learning disability" (Tr. pp. 827, 1172-73). Even though Kildonan did not provide the student with access to nondisabled peers, in consideration of the totality of the circumstances, including that Kildonan provided a program that enabled the student to attend school and receive educational benefits as described below, LRE considerations alone provide an insufficient basis to reverse the IHO's finding that the parents' unilateral placement of the student at Kildonan for the 2014-15 and 2015-16 school year was appropriate (C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; Berger, 348 F.3d at 523).

2. Evidence of Progress

The district does not argue that the student did not make any progress while at Kildonan; rather, the district asserts that the results of standardized testing administered at the start and end of each school year at Kildonan, indicated that the student made minimal gains in many areas and declined in several areas over the 2014-15 and 2015-16 school years (see Parent Exs. B; K).²⁵

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S., 506 Fed. App'x at 81; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; see also Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a unilateral placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"). However, although not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

With regard to the district's contention that the standardized testing administered to the student shows either minimal gains or declining scores, a review of the test results reflects that, over the student's three years at Kildonan, despite somewhat inconsistent gains, the student achieved growth overall from the time he entered Kildonan in the 2013-14 school year to the end of the 2015-16 school year in the areas of comprehension, vocabulary, reading accuracy, reading fluency, math computations, math concepts/applications, spelling, and fluency/reading rate (Parent Exs. B; K). Moreover, as described below, the hearing record includes other evidence of the student's academic progress.

A review of the student's Kildonan report cards reveals that, for the 2014-15 school year, the student made significant academic gains. Overall, the student's grades during the 2014-15 school year ranged from 75 to 88 in core academic subjects (Parent Ex. D at pp. 2-6). More specifically, his tutor indicated that the student was engaged academically from the start of the year and that his engagement increased over the course of the year (Parent Exs. D at p. 1; E at p. 1). She reported that writing was an area of "strong growth" for the student during the school year, noting that the student's sentence composition had begun to transfer to his paragraph and essay composition and that he was growing in his ability to generate ideas and express himself fluidly in writing (Parent Ex. D at p. 1). The tutor also indicated that the student had improved in spelling, retained knowledge of the patterns of long vowel spelling in English, and was beginning to apply this knowledge to contextual spelling (Parent Exs. D at p. 1; E at p. 1). With regard to reading

²⁵ While the district cites to District Exhibit 28; that exhibit was not entered into evidence but was introduced for identification only (Tr. pp. 996-97, 1044). In any event, according to the hearing record, District Exhibit 28 consisted of a summary of the scores reported on Parent Exhibits B and K, reorganized by the district's attorney for ease of reference (Tr. pp. 998-1001).

comprehension, she reported that the student had grown in his ability to make inferences, noting his ability to apply this skill while reading (Parent Ex. D at p. 1). At the end of the school year, the tutor noted the student's attempts to apply his new knowledge of distinguishing between words of various origins to his contextual reading, and the initiative he took in suggesting a topic for an essay, as well as his recognition that it would need to be organized differently than past essays (id.).

During the 2014-15 school year, the student's math teacher reported that the student progressed in math, noting the student's: continued positive effort and improvement in handwriting during the second quarter; improvement in his ability to use written mathematical language and in applying appropriate mathematical concepts to real life situations during the third quarter; and noting his use of a number line and class notes to successfully complete problems when performing operations with integers during the fourth quarter (Parent Exs. D at p. 2; E at p. 2; F at p. 2). The student's literature teacher indicated that the student made steady progress during the 2014-15 school year and that, despite his discomfort speaking up voluntarily in a class setting, he engaged with peers in small groups and exhibited good communication skills when discussing context one-on-one and through his writing (Parent Exs. D at p. 3; E at p. 3; F at p. 3). In science, the student had begun to apply scientific language to communicate his understanding of the topics covered in written assignments, begun to make inferences about the data presented, and had begun to demonstrate beginning skills in completing work independently (Parent Exs. D at p. 4; E at p. 4; F at p. 4). The student's history teacher indicated the student often posed insightful questions about societies and was learning to be more flexible by expanding on his pre-existing knowledge and creating new ideas (Parent Exs. D at p. 5; E at p. 5; F at p. 5). The student also took Spanish during the 2014-15 school year, and his Spanish teacher indicated that, by the end of the school year, the student had increased his ability to articulate sounds in Spanish, with a higher degree of clarity and fluency (Parent Ex. D at p. 6).

The hearing record contains somewhat less information regarding the student's progress during the 2015-16 year at Kildonan; however, report cards included in the hearing record indicate that, through the first three quarters of the 2015-16 school year, the student progressed at Kildonan (Parent Exs. C; J). The hearing record reflects that, for the 2015-16 school year, in addition to 1:1 language tutoring, the student took academic classes in mathematics, science, and humanities, which included a combination of history and literature studies (Parent Ex. J at pp. 1-3, 5). Overall the student's grades in math, science, and humanities during the 2015-16 school year ranged from 75 to 85 (id. at pp. 2, 3, 5).

With regard to the student's progress in his 1:1 tutoring, the tutor indicated that the student began the year with a solid start, he demonstrated a positive attitude, and put forth much effort during sessions (Parent Ex. C at p. 1). The report card included a list of the language skills covered with the student and the student's tutor noted that a review of basic phonetic concepts helped those concepts become more automatic for the student (id.). The tutor also indicated that the student had been diligently completing his homework assignments (id.). Testimony by the director indicated that, compared to the books the student was capable of reading when he arrived at Kildonan, at the time of her testimony at the end of the 2015-16 school year, the student was reading more difficult books (Tr. pp. 1007, 1009).

A review of the student's 2015-16 third quarter report card shows that, when compared to the student's first quarter report card, the student made progress. With regard to math, the student's grade improved from 77 in the first quarter, to 80 in the second quarter and 82 in the third quarter

(Parent Ex. J at p. 2). The student reportedly demonstrated ability to select and apply the "appropriate mathematical techniques" when solving more complex problems in familiar situations and generally solved those problems correctly in class, improved his ability to describe whether a solution made sense in the context of real-life situations, and increased his ability to use appropriate mathematical language and different forms of mathematical representation to present information clearly to demonstrate his learning during class (Parent Exs. C at p. 2; J at p. 2).

In science, the student's grades for the first three quarters of the 2015-16 school year were 80, 78, and 85, respectively (Parent Ex. J at p. 3). With regard to the student's performance in humanities class, the student received grades of 75, 75, and 80, respectively, in the first three quarters of the 2015-16 school year (id.).

Based on the above, contrary to the district's assertion, the hearing record contains sufficient evidence regarding the student's progress to indicate that he received educational benefits at Kildonan (see Frank G., 459 F.3d at 364). In addition, as described below, the hearing record also supports the conclusion that the student made social/emotional progress at Kildonan—that area of need which formed the basis for the above determination that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years.

As noted above, testimony by the director described how Kildonan staff addressed the student's anxiety related to learning by providing a nurturing learning environment, including a supportive 1:1 language tutorial, small group classroom settings, minimizing the reading and writing required in his classes, differentiating instruction as needed, collaborating between teachers, and being flexible with respect to expectations regarding homework completion (Tr. pp. 902-09). As a result, the director testified that the student had made social/emotional progress in that the student was more outgoing and at ease socially than when he arrived at Kildonan (Tr. pp. 914-15). The student's report card for the third quarter of the 2014-15 school year reflects that the student responded well to constructive criticism (Parent Ex. E at p. 1). In addition, the student's mother reported at the June 2015 CSE meeting that the student had made "tremendous growth," and had "found some passions that he loves in life" and was "feeling very well" (Dist. Ex. 26 at p. 2). She also stated that the student was feeling "really proud about his accomplishments," and was happy in his ability to do things academically (id.).

The student's language tutor during the 2015-16 school year indicated the student exhibited a positive attitude, put forth effort during sessions, and "diligently complete[d] his homework assignments" during the first quarter of the school year (Parent Ex. C at p. 1). This represented a marked improvement from the previous year, when the student had been unable to "overcome his anxiety regarding homework," despite his tutor's efforts to address this (Parent Ex. D at p. 1; see Tr. pp. 867-70). In addition, despite having difficulty collaborating with a science classmate on an assignment in seventh grade, the student's science teacher in eighth grade indicated the student was not only able to work with a peer, but reported that he worked diligently with his partner (Parent Exs. C at p. 3; E at p. 4). The student's eighth grade math teacher also reported that the student was collaborating with his classmates outside of class and improving his communication, which resulted in an improvement in his grasp of concepts (Parent Ex. C at p. 2). The student's humanities teacher indicated that in eighth grade, the student participated in class discussions—an improvement from the previous year—when his literature teacher reported he did not feel comfortable speaking up in a class setting (Parent Exs. C at p. 4; D at p. 3; E at p. 3).

Furthermore, the student's mother testified that the student had not exhibited any incidents such as panic attacks at Kildonan, and that school refusal and absences were not issues of concern during the time that he attended the school (Tr. pp. 761, 1139-40; see Parent Ex. J at p. 9). The student's mother indicated that the student was happy to go to Kildonan and did so willingly (Tr. pp. 1139-40; Dist. Ex. 27 at pp. 7, 10).²⁶

Accordingly, notwithstanding the student's inconsistent standardized test scores relied upon by the district, the hearing record as a whole shows that the student made progress in academic domains and with respect to his social/emotional needs. In conclusion, considering the totality of circumstances, the district has not set forth a sufficient basis for finding that the IHO erred in his determination that Kildonan was an appropriate unilateral placement for the student during the 2014-15 and 2015-16 school years (Gagliardo, 489 F.3d at 112).

E. Equitable Considerations

The district asserts that, while the IHO decreased the tuition reimbursement award by 10 percent, the IHO erred in awarding any amount of tuition reimbursement because, despite multiple opportunities to do so over the course of four CSE meetings, the parents never expressed any objections to the IEPs developed for the student's 2014-15 or 2015-16 school years, and affirmatively declined services offered by the district which could have addressed their concerns regarding the student's school refusal and avoidance behaviors. The parents object to any reduction in the award of tuition reimbursement.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its

²⁶ A unilateral placement is not appropriate simply because it removes the student from an anxiety-provoking environment, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at *9 [E.D.N.Y. Sept. 28, 2015]). In this case, the district has not argued that Kildonan failed to tailor a program to address the student's unique special education needs; however, the parties are encouraged to consider what strategies or supports might help the student develop coping skills in the future whether he is attending Kildonan or a district-recommended program.

obligations under the IDEA"]; see L.K. v. New York City Dep't of Educ., 2017 WL 219103, at *2 [2d Cir. Jan. 19, 2017]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland Sch. Dist., 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

After reviewing the hearing record, including the audio and written transcripts of the CSE meetings, the evidence, viewed as a whole, shows that the parents cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). While the IHO found, and the district argues, that the district was impeded in its ability to address the student's needs because the parents did not raise concerns at the CSE meetings in areas that they later raised as claims in their due process complaint notices, the parents did raise the concern which forms the basis for the within finding that the district denied the student a FAPE. Most importantly to this determination, the parents consistently expressed—and the district acknowledged—their concern that the district had not provided sufficient support to address the student's inability to attend the district public school as a result of his anxiety (Dist. Exs. 25 at pp. 19-22, 30-32; 26 at pp. 3, 22, 24, 38; 27 at pp. 3-9, 17-18). In addition to expressing their concerns at the CSE meetings, prior to each school year the parents provided notice to the district that they intended to place the student at Kildonan at public expense (Dist. Exs. 11; 19). Accordingly, the IHO's determination that the parents' "negligence" in failing to raise their concerns impeded the district's ability to offer the student a FAPE is reversed and the district is ordered to reimburse the parents for the full cost of the student's tuition at Kildonan for the 2014-15 and 2015-16 school years.²⁷

VII. Conclusion

Based on the foregoing, the IHO properly found that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years and that Kildonan was an appropriate unilateral

²⁷ A review of the CSE meetings demonstrates that the meetings were collaborative, cordial, and civil, with all members of the CSE conducting themselves in a manner consistent with the cooperative process envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see generally Dist. Exs. 13; 16; 21; 25-27).

placement for the student; however, the IHO erred in reducing the award of tuition reimbursement by 10 percent.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that part of the impartial hearing officer's decision, dated February 10, 2016, is modified, by reversing that part which reduced the award of tuition reimbursement by 10 percent; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the full cost of the student's tuition at Kildonan for the 2014-15 and 2015-16 school years.

Dated: **Albany, New York**
 May 8, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER