The University of the State of New York

The State Education Department
State Review Officer
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No. 19-011

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

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Neelanjan Choudhury, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the cost of their daughter's tuition at the Kildonan School (Kildonan) for a portion of the 2016-17 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student for a portion of the 2016-17 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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

According to the hearing record, the student was adopted by her parents from overseas in January 2012 and has a history of developmental trauma due to earlier experiences of abandonment and deprivation (Dist. Exs. 2 at p. 2; 51 at p. 1). The student has received various diagnoses, including post-traumatic stress disorder (PTSD), generalized anxiety disorder, attention deficit hyperactivity disorder (ADHD), reactive attachment disorder (RAD), and language based learning disability (Dist. Exs. 13 at p. 2; 51 at p. 1).

With regard to the student's educational history, the student attended a district elementary school for a portion of the 2011-12 school year and was initially placed in a third grade general

education classroom with English as a second language (ESL) services (Tr. p. 416; Dist. Ex. 66 at p. 1). The student repeated third grade in the general education classroom receiving ESL services for the 2012-13 school year (id.). She was referred to the CSE in May 2013 by her parents and found eligible for special education as a student with a learning disability at her initial CSE meeting in October of 2013 (Dist. Ex. 2 at p. 2).[1] For the student's 2013-14 and 2014-15 school years (fourth and fifth grades), she attended a 15:1+1 special class in a different elementary school within the district and received speech-language and counseling services (see Tr. pp. 417-19; Dist. Exs. 1 at pp. 1, 10, 11; 2 at p. 2). For the student's 2015-16 school year (sixth grade) the student received integrated co-teaching (ICT) services in math and English language arts (ELA) daily (Dist. Ex. 5 at pp. 1, 10). The student also attended a 15:1 special class for math and ELA with support periods consisting of three 40-minute sessions per six-day cycle, along with speech-language and counseling services (id.).

The student was "voluntarily admitted" to a psychiatric hospital on March 14, 2016 (Dist. Exs. 8 at p. 1; 11 at p. 1). The hospital report indicates that the student's parents reported that the student exhibited behaviors that were concerning (Dist. Ex. 11 at p. 3). The parents expressed that when the student was frustrated or upset, she would curl up into a ball and cry for hours (id.). The parents also expressed that when upset or frustrated, the student can hide in her closet for days and doesn't speak or eat (id.). In addition, the parents expressed that the student has tried to run away three times previously (id.). The parents also described an incident in which their house was searched because the student went missing for 15 hours, and it was discovered that the student had been hiding behind her dresser (id.).

On May 26, 2016, the CSE convened to develop the student's IEP for the 2016-17 school year (seventh grade) (Dist. Ex. 14). The May 2016 CSE found that the student remained eligible for special education as a student with a learning disability and recommended the same program as the previous year which consisted of ICT services for math and ELA daily and a 15:1 special class for math and ELA with support periods, as well as speech-language and counseling services (id. at pp. 1, 10). However, based on a review of the student's testing results which "revealed significant deficits in [the student's] reasoning skills, as well as her ability to retain verbal/auditory information" and the parents' report that the student was "still struggling at home with managing her emotions, …[including] isolating herself in her room, [and] messing up her personal belongings," the CSE also recommended that the district conduct an out-of-district search in order to find the student a more therapeutic program that could "meet all of [the student's] academic and social-emotional needs" (id. at p. 1).

On August 29, 2016, the CSE reconvened to discuss the student's acceptance into the Summit School (Summit), a State-approved nonpublic school (Dist. Ex. 19 at p. 1). The August 2016 CSE recommended that the student attend an 8:1+1 special class at Summit for the 2016-17 school year with related services of counseling and speech-language services (id. pp. 1, 11). During the August 2016 CSE meeting, discussion occurred regarding the student's classification as a student with a learning disability and the parents requested a neuropsychological evaluation,

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

to be considered prior to a change in the student's classification (id. at p.1).[2] The parents also requested that the student attend a residential program (id.). The CSE was "to reconvene pending the results of the neuropsych[ological] evaluation" and the parents "were in agreement with the CSE recommendations" (id.).

The student began attending Summit on September 1, 2016 (Dist. Exs. 15 at p. 2; 20 at p. 1).[3] On October 18, 2016, the CSE reconvened to discuss the parents' concerns regarding the student's behavior at home and with the annual goals in the 2016-17 IEP (Dist. Ex. 56 at p. 1). The parents expressed to the October 2016 CSE that, at home, the student was going through periods without eating or sleeping and would wrap herself up and lay in the corners of her room and/or closet (id.). The parents maintained that the student would benefit from a residential program (id.). The CSE noted that "at this time, concerns [regarding the student's behaviors] [were] only seen in the home" and recommended supports in the home to provide strategies when the behaviors were occurring (id. at p. 2). The student's teacher and team from Summit reported that the student had "adjusted nicely to the program" and was opening up more to her social worker (id.). They also reported that the student complied with tasks in the classroom setting (id. at pp. 1-2). The CSE agreed to reconvene to review the student's progress in 4-6 weeks (id. at p. 2).

On November 20, 2016, the district conducted a neuropsychological evaluation of the student at the parents' request (Dist. Ex. 66). The evaluation revealed deficits in the student's "executive functions, components of attention, visual and auditory sustained attention," and ability to encode visual and auditory information into long-term memory (Dist. Ex. 66 at p. 11). On January 18, 2017, the CSE reconvened to review the results of the November 2016 neuropsychological evaluation (Dist. Ex. 99 at p. 1). The January 2017 CSE recommended continuing the same 8:1+1 special class and related services based on the student's progress at Summit (id. at pp. 2, 12). However, the parents informed the CSE that they had parentally placed

[2] The August 29, 2016 IEP included a special alert that the student was "diagnosed with PTSD, Attachment Reactive Disorder, [and] personality disorder" as provided by the psychiatric hospital to which the student had been admitted on March 14, 2016 (Dist. Ex. 19 at p. 1).

[3] In a September 8, 2016 email to the Summit School principal, the parent requested permission for the student to be picked up by her private therapist during school hours, at a non-academic time such as lunch (Dist. Ex. 26). In a September 9, 2016 response, the principal advised the parent that as discussed with them previously, Summit "believe[d] in the importance of a full school day, from beginning to end" (Dist. Ex. 27 at p. 1). The principal's email indicated, "[w]e see a lot of value in the periods of 'down time,' like lunch or mentoring or even an elective class" (id.). The email further noted the student would also be pulled out for therapy as well as for speech-language appointments (id.). That being said, the principal indicated in the email that the parent was allowed to have the student picked up from school for whatever reason and by whomever he chose (id.). The email indicated the school was recommending the student experience a full school day at Summit School for her social, emotional, and academic benefit (id.). A series of additional emails between the parents and the Summit School principal and social worker reflect that on or about September 29, 2016, the private therapist saw the student outside of school during school hours (Dist. Exs. 28 at pp. 2-6; 29; 30 at pp. 1-2; 31 at p. 1; 34; 35 at pp. 1-3; 37 at p.1; 38 at p. 1; 39 at p.1).

the student at Kildonan where she began after the holiday break on January 3, 2017 and that the student was doing well and was coming home much more relaxed (id.; see Tr. p. 517).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated July 24, 2017, the parents argued that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (IHO Ex. I at p. 9).[5] Initially, the parents argued that the student's IEP "was not being implemented and services were not being provided as mutually agreed upon" (id.). Next, the parents argued that the annual goals on the IEPs were changed and deleted without the parents' knowledge or approval (id.). The parents further argued that the lack of support in the student's classroom led to inappropriate touching of the student by other students (id.). Additionally, the parents argued that the student was prevented from "learn[ing] [about] appropriate social/emotional relationships and skills" due to the lack of appropriate behavioral support (id.). Next, the parents alleged that the student lacked access to a computer reading program which "prevent[ed] phonetic instruction" not allowing the student "to make adequate progress" (id.). The parents also alleged that there was a "lack of instruction on money as per [the] IEP" (id.). The parent argued that the program at Summit was not therapeutic and did not meet the student's needs (id.). The parents also argued that they addressed their issues and concerns at multiple CSE meetings and in written correspondence, as well as with Summit staff; however, the student's IEPs continued to be incorrect through November 2016 (id.). Lastly, the parents indicated that they had parentally placed the student at Kildonan and were seeking tuition reimbursement for "that time of the 2016-2017 school year" (id.).

B. Impartial Hearing Officer Decision

On May 17, 2018, the parties convened for an impartial hearing which concluded on August 21, 2018 after five days of proceedings (see Tr. pp. 1-696). In a decision dated January 3, 2019, the IHO found that the district failed to offer the student a FAPE for the 2016-17 school year and that Kildonan was not an appropriate unilateral placement for the student (IHO Decision at pp. 10-12). Initially, the IHO found that the parents were denied meaningful participation because the district failed to inform them that no special education teacher was available to instruct the student at the start of the 2016-17 school year (id. at p. 10). The IHO further found that a substantive violation of FAPE resulted when the student began attending Summit without instruction by a special education teacher in the fall of 2016 (id.). The IHO also noted that the most demonstrative evidence of the inappropriateness of Summit was the testimony from the district's assistant director of special education who stated that she would not have recommended Summit if she knew that the student would not be educated by special education teachers (id.). Moreover, the IHO found that the parents were justified in removing the student from Summit and seeking reimbursement for Kildonan (id.).

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

[5] The parents originally filed a due process complaint notice on June 28, 2017 which was found to be facially insufficient by the IHO (IHO Ex. 1 at pp. 3-5, 7-8).

With respect to the appropriateness of the unilateral placement, the IHO found that Kildonan was not appropriate to meet the student's needs (IHO Decision at pp. 11-12). The IHO found that the vast majority of the student's needs stemmed from the student's social/emotional issues and nothing in the record supported placement of the student at Kildonan which offered no special education services aimed at addressing the student's social/emotional needs (id. at p. 11). Moreover, the IHO noted that the fact that the parents desired a residential program for the student rather than Summit, undermined the appropriateness of Kildonan because Kildonan lacked the social/emotional supports that the student required (id.). The IHO also found that although the student made progress at Kildonan, the student also made similar progress at Summit and thus the student's progress was not determinative of the appropriateness of Kildonan (id. at pp. 11-12). Regarding equitable considerations, although the IHO did not make a direct finding, the IHO agreed with the district that the parents interfered with the program at Summit by pulling the student out of school for private therapy during the school day (id. at p. 12). Lastly, the IHO denied the parents' request for tuition reimbursement for Kildonan for the 2016-17 school year (id.).

IV. Appeal for State-Level Review

The parents appeal and initially assert that the IHO decision and record close date were untimely. The parents further assert that the IHO wrongfully stated that extensions were requested by the parties when neither the parents nor the district requested such extensions. Furthermore, the parents assert that these extensions caused additional emotional stress on the family as they waited for the IHO to render his decision.

With respect to the appropriateness of the student's unilateral placement, the parents argue that the IHO erred in finding that Kildonan was not an appropriate unilateral placement for the student and denying their request for tuition reimbursement. The parents argue that the IHO erred in finding that the student's main area of need stemmed from her social/emotional issues. The parents argue that although the student suffers from severe mental illness, she also has severe learning disabilities which Kildonan addressed. Next, the parents allege that the IHO erred in finding that Kildonan offered no special education services to address the student's social/emotional issues. The parents argue that although Kildonan did not have any therapists to formally work with the student, Kildonan offered a calm and aggression-free environment. The parents further argue that the student was seen by an outside psychiatrist, an outside psychologist, and the district therapist once a week. Lastly, the parents argue that the IHO erred in finding that the parents interfered with the program at Summit by removing the student for private therapy as it occurred during her lunch period once a week.

As relief, the parents request tuition reimbursement for the student's attendance at Kildonan from the "September 2016 to December 2016 school year,"[6] including uniforms purchased and "advocate fees."

In an answer and cross-appeal, the district responds to the parents' request for review by generally denying the parents' allegations and asserting that the IHO properly found that Kildonan

[6] The student actually attended Kildonan from January 2017 through June 2017 (Tr. pp. 517, 20).

was not an appropriate unilateral placement for the student. Additionally, with respect to the parents' requested relief, the district argues that the parents cannot request relief for the period between September 2016 and December 2016 because the student was not enrolled at Kildonan during that period of time and that the parent may not obtain attorney's fees as there was no evidence that any advocate who assisted the parents was admitted to practice law. In its cross-appeal, the district asserts that the IHO improperly found that it failed to offer the student a FAPE for a portion of the 2016-17 school year because Summit did not have certified special education teachers at the time of the student's enrollment. The district further asserts that the IHO failed to account for the fact that the student's teachers taught under the supervision of a special education teacher. Additionally, the district asserts that the IHO failed to account for the fact that the student's teachers differentiated instruction during small group instruction, that large group instruction was still in a relatively small group of 8:1+1, and that the student was able to receive direct 1:1 instruction.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 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).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Endrew F., 137 S. Ct. at 1001 [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"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]), 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]).[7][autotext 7/27/17]

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

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing

As an initial matter, the parent raises allegations on appeal with respect to the IHO's conduct. Generally, the parent argues that the IHO improperly granted extensions to timelines for the impartial hearing, failed to provide a record close date and failed to render a timely decision.

When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]).

According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]). While an IHO determines

when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial -hearings-september-2017.pdf; see 8 NYCRR 200.5[j][5][iii]).

The parents argue that the IHO's decision is untimely and that the IHO improperly issued extensions on September 28, 2018, October 27, 2018, November 15, 2018 and December 24, 2018. The parents further argue that neither the parents nor the district requested the aforementioned extensions. As a result, the parents argue that the IHO's decision was delayed which caused them additional emotional stress and financial hardship. During the impartial hearing, the IHO informed the parties that there would "probably be another extension after the hearing date is finished so that [he] can review written submissions" (Tr. p. 191). Accordingly, for the September 28th extension, the IHO stated the reason for the extension was to "obtain submissions/review record for decision" (IHO Ex. 2 at p. 14). However, the final three extensions dated October 27, 2018, November 15, 2018 and December 24, 2018 were granted by the IHO after the parties submitted their post-hearing briefs and the IHO indicated the reason for the extensions as "review [the] record for decision" (id. at pp. 15-17). The parties' post hearing briefs were dated October 1, 2018; yet, the IHO did not close the hearing record and issue his decision until January 3, 2019 (IHO Decision at p. 1; IHO Exs. IV; V). The IHO is reminded as stated above that although the IHO is required by regulation to determine when the record is closed and issue a decision no later than 14 days from the date the record is closed (8 NYCRR 200.5[j][5], [j][5][v]), the State Education Department has indicated that "a record is closed when all post-hearing submissions are received by the IHO" ("Changes in the Impartial Hearing Reporting System," Office of Special Educ. [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). Additionally, once the record is closed, State regulation does not permit any further extensions of the timeline to render a decision (8 NYCRR 200.5[j][5][iii]). In this case, there is no indication that the IHO notified the parties of the ultimate date he deemed the record closed or whether the parents agreed to the extensions. However, even if the extensions were at the request of the parties as documented by the IHO, the hearing record supports the parents' position that the IHO did not comply with State regulations in issuing his decision.

In summary, notwithstanding the procedural irregularities described above, there is no evidence to suggest that the student suffered any prejudice as a result. Moreover, the parents have not alleged that the IHO's errors resulted in a denial of a FAPE to the student and have not requested any relief relating thereto.

2. Scope of Impartial Hearing

Turning to the substance of the appeal, the first issue to be addressed is whether the parents sufficiently raised a claim about the qualifications of the special education teachers at Summit and, therefore, whether the IHO erred in determining that the student was denied a FAPE during the 2016-17 school year because the student began attending Summit absent instruction by certified special education teachers in the fall of 2016.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In the instant case, the IHO found that the district failed to offer the student a FAPE for the 2016-17 school year because Summit failed to have certified special education teachers to instruct the student at the start of the school year (IHO Decision at p. 10). However, the parents' due process complaint notice does not include any allegations related to Summit's failure to have certified special education teachers (see IHO Ex. I). Upon review of the hearing record, the district did not subsequently agree to add this issue related to qualifications of the teachers at Summit and the parents did not attempt to amend the due process complaint notice to include this issue. Accordingly, this issue was raised for the first time on appeal and is outside the scope of the impartial hearing (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]]".

Nevertheless, as the IHO made a determination on this issue notwithstanding the fact that the parents' due process complaint notice did not include this claim, the next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education, (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013

WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). The issue of whether the student's teachers at Summit were certified in special education first appeared during cross examination by the parent when he questioned the student's seventh grade math and science teacher as to which certifications she held (Tr. p. 132). While the student's seventh grade math and science teacher testified during direct examination that she had a state certificate in good standing with the education department, the district did not question or elicit testimony from the teacher as to whether she had her special education certification (Tr. p. 97). The information regarding the teacher's state certification was merely general background information elicited by the district during direct examination and, therefore, the district did not "open the door" to a FAPE challenge based on the Summit teachers' lack of special education certification (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). In addition, although the district did ultimately question the student's ELA, social studies and life skills teacher concerning her areas of certification, and elicited information on direct examination that she was working toward receiving a special education certification in grades 7-12, this testimony occurred subsequent to the parents' initiation of questioning pertaining to the Summit teachers' special education certification (Tr. pp. 321-322). Accordingly, the hearing record demonstrates that the issue of special education certification was originally and primarily elicited by the parents and, therefore, the district did not "open the door" to this issue under M.H. Accordingly, the Summit teachers' lack of special education certification is an issue that was raised for the first time by the IHO in her decision and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012].

3. Scope of Review

Given that the IHO erred by making a sua sponte finding that the district failed to offer the student a FAPE for the 2016-17 school year on the ground that the student's teachers at Summit did not have certifications in special education, a determination must be made regarding which remaining claims are properly before me on appeal. Initially, the parents asserted a number of issues in their due process complaint notice which are not raised in their request for review. The following claims related to the 2016-17 year were not raised on appeal: (1) the IEP was not being implemented and services were not being provided as mutually agreed upon; (2) the annual goals on the IEPs were changed and deleted without the parents' knowledge or approval; (3) the lack of support in the student's classroom led to inappropriate touching of the student by other students; (4) the student was prevented from learning about appropriate social/emotional relationships and skills due to the lack of appropriate behavioral support; (5) the student was prevented from receiving phonetic instruction that would allow her to make adequate progress because the student lacked access to a computer reading program; (6) there was a lack of instruction on money as per the IEP; (7) the program at Summit was not therapeutic and did not meet the student's needs; and (8) the parents addressed their issues and concerns at multiple CSE meetings and in writing, as well as with staff at Summit; however, the student's IEP continued to be incorrect through November 2016.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations governing practice before the Office of State Review are explicit and require that the 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]; see also 8 NYCRR 279.4[a], [f]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

Here, the parents do not raise any of the above claims in their request for review nor does the IHO address any of these claims in his decision. The parents also did not, in their request for review, argue that the IHO failed to address the issues listed above. Nor did the parents file an answer to the district's cross-appeal claiming that the IHO failed to address the parents' unaddressed issues in an attempt to advance these issues as set forth in their due process complaint. Accordingly, because it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]), I am constrained to determine that the claims set forth above have been abandoned by the parents and will not be considered further by me on this appeal.

B. Appropriateness of Unilateral Placement

Having reversed the IHO's sua sponte finding that the district failed to offer the student a FAPE for the 2016-17 school year because the student's teachers at Summit did not have certifications in special education, and having determined that all other claims asserted in the due process complaint notice and unaddressed by the IHO concerning FAPE have been abandoned by the parents on appeal, I have addressed all issues that are properly before me. However, in an abundance of caution, I will also consider whether the parents' unilateral placement of the student at Kildonan from January 2017 to June 2017 was appropriate.[8]

[8] Due to the unusual procedural posture of this case, namely that the IHO's determination on FAPE for the 2016-17 school year was found to be beyond the scope of the impartial hearing and thus reversed, and the parents' other claims were deemed abandoned and thus not properly before me for review, the only matter left at issue is whether the parents' unilateral placement of the student was appropriate. Thus, I consider the issue of the appropriateness of Kildonan largely to demonstrate that even if the parents had prevailed with respect to any of their abandoned and unaddressed FAPE claims, they would not be entitled to the relief sought as they failed to meet their burden on their tuition reimbursement claim.

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). 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. of the City Sch. Dist. of Yonkers, 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. of Hyde Park, 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] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is 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]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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).

1. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof facilitates a determination regarding whether the parents' unilateral placement of the student at Kildonan was appropriate.

The hearing record shows that at the time the parents placed the student at Kildonan in January 2017, the then-most recent psychoeducational assessment of the student's cognitive abilities placed her in the "[l]ow [a]verage range of intellectual development" (full scale IQ 82) (Dist. Exs. 2 at p. 7; see Dist. Ex. 66 at pp. 3-5). In addition, a neuropsychological assessment revealed impairments in memory and attending (Dist. Exs. 13 at p. 9; 66 at pp. 5-6, 10-11). The student demonstrated significant delays in academic skills and receptive and expressive language, as well as in her ability to interact socially with peers (Dist. Ex. 56 at pp. 8-9). Although the student continued to make steady progress with respect to encoding and decoding, her skills remained delayed; in addition, she had difficulty with reading comprehension and demonstrated weak fluency skills (Dist. Exs. 13 at p. 7; 56 at p. 7; see Dist. Ex. 50 at p. 5). The student was independently able to produce a complete paragraph including a topic sentence and 3-4 supporting details; however, she was unable to transfer gathered notes into a coherent multi-paragraph essay (Dist. Ex. 56 at p. 7). The student struggled with spelling, mechanics, and writing conventions and her lack of prior knowledge interfered with her ability to add elaboration and detail to longer writing assignments (Dist. Ex. 56 at p. 7; see Dist. Exs. 50 at p. 5; 96 at p. 5). In math, the student was able to follow steps and algorithms when presented with a model but was unable to complete the same tasks independently and struggled to retain new concepts (Dist. Ex. 56 at p. 7). In speech and language, the student had slowly progressed in her ability to understand multi-meaning words and had worked on the use of past tense and plural nouns in sentences and conversations (Dist. Ex. 56 at p. 8). The student had difficulty using objective and subjective pronouns as well as following directions that included before, after and ordinals (Dist. Ex. 56 at p. 8). The student lacked many basic concepts as well as abstract language skills that were needed to be successful with the classroom curriculum (Dist. Ex. 56 at p. 8). With respect to study skills, the student's visual memory was characterized as being "much stronger" than her verbal memory and she was reportedly more likely to retain information when it was accompanied by pictures verses presented auditorily (Dist. Ex. 56 at p. 8; see Dist. Ex. 13 at p. 7). The student demonstrated significant delays in higher-level reasoning skills and learned most effectively when presented visually and in concrete terms (Dist. Exs. 13 at p. 10; 56 at p. 8). The student was well organized and completed her work on time (Dist. Ex. 56 at p. 8).

With regard to social development, district records indicated the student's social skills were generally age appropriate, with the exception of her ability to interact with peers, which was significantly delayed (Dist. Ex. 56 at p. 8). The student had established a few friendships but also on occasion had misinterpreted situations with peers, resulting in mild conflicts, which were resolved through teacher or social worker intervention (Dist. Ex. 56 at p. 8). The student participated in group and individual counseling and was opening up to the social worker more (Dist. Ex. 56 at p. 8). In school, the student was friendly, polite and cooperative and frequently looked for ways to be helpful to her classmates and teachers (Dist. Ex. 56 at p. 8). However, the student exhibited behaviors at home that concerned her parents including refusing to eat or sleep (Tr. pp. 429-33, 500-02; see Dist. Exs. 28 at pp. 1-4; 31 at p. 1; 32 at p. 1; 34; 35 at p. 1; 41; 42 at

pp. 1-3; 46; 47; 51; 54; 56 at p. 9; 72; IHO Ex. A). The student's psychiatrist reported that the student continued to exhibit severe symptoms of post-traumatic stress disorder (PTSD) and reactive attachment disorder (RAD) (Dist. Ex. 54). The student's behavior was unpredictable and she could "suddenly and without identifiable warning signs" become suicidal (Dist. Ex. 54 at p. 1). Due to a language-based disorder, the student had great difficulty expressing her feelings and her symptoms "significantly interfere[d] with her social and academic functioning" (Dist. Ex. 54 at p. 1). The student's psychologist suggested diagnoses of PTSD, chronic; generalized anxiety disorder; attention deficit hyperactivity disorder; and language-based learning disability (Dist. Ex. 51 at p. 5). In October 2016, the student's active symptoms included severe anxiety, moderate depression, severe enuresis, mild to severe developmental delays, a mild eating disorder, severe impairment in peer interactions, and the student was judged to be a mild danger to herself and at severe risk for elopement (Dist. Ex. 51 at p. 1). The student's behaviors were characterized as compulsive; when she suppressed her compulsions at school, she then needed to express them at home (Dist. Ex. 51 at p. 2). Both the psychiatrist and psychologist recommended residential treatment for the student (Dist. Exs. 51 at p. 1; 54).

2. Specially Designed Instruction and Progress

The parents argue on appeal that the IHO erred in finding that Kildonan was not an appropriate educational placement for the student. The parents argue that Kildonan was appropriate because it offered a calm environment for the student. However, the IHO found that the vast majority of the student's needs stemmed from the student's social/emotional issues and that there was nothing in the hearing record that indicated Kildonan addressed the student's social/emotional needs.

The associate headmaster of Kildonan provided a general overview of the school. According to the associate headmaster, Kildonan is a boarding and day school whose program is built around language training which consists of 1:1 instruction in Orton-Gillingham (Tr. pp. 667-68). The language training includes reading, writing and spelling and students at Kildonan receive one 45-minute period of 1:1 instruction everyday (Tr. p. 667).

The associate headmaster testified that Kildonan is an accredited Orton-Gillingham Academy facility (Tr. p. 669). All teachers who use Orton-Gillingham are trained by Kildonan or an equivalent accredited academy (id.). The associate headmaster described Orton-Gillingham as a multi-sensory approach that is structured and sequential and reported that students at Kildonan received direct explicit instruction in reading, writing, and spelling (Tr. pp. 667, 669-70). Additionally, academics including math, science, English, history, art design, physical education and "second language" instruction are "built around" the 1:1 instruction in Orton-Gillingham (id.). According to the associate headmaster, generally, students with a diagnosis of dyslexia or similar language-based learning difference do well with the Orton-Gillingham program (Tr. pp. 670; see Tr. pp. 675-76).

The associate headmaster reported that as part of Kildonan's academic program, students were assessed for physical education (PE) (Tr. p. 670). He explained that the school emphasized "balance sports" such as skiing and horseback riding based on the idea that developing balance skills has a positive effect on students' acquisition of language skills (id.). The associate

headmaster noted that Kildonan did not cite to a specific study or body of research to support this proposition, but that it was a longstanding part of the school's program to emphasize development of balance skills (id.).

According to the associate headmaster's testimony, Kildonan did not usually accept students who have severe behavioral difficulties such as physical altercations in school or aggressive outbursts in the classroom (Tr. p. 671; see Parent Ex. B at pp. 2, 3). He noted that such students would have had to have gone through a significant level of therapeutic support before they could demonstrate the ability to thrive and participate in Kildonan's program (id.). The associate headmaster acknowledged that Kildonan had neither a clinical psychologist nor a licensed clinical social worker on staff (Tr. p. 677). He reported that Kildonan employed a school counselor but that he did not know the counselor's credentials (Tr. p. 677). The associate headmaster testified that "a low percentage" of students at Kildonan were diagnosed with PTSD and "not a significant number" had clinical diagnoses of a reactive attachment or personality disorder (Tr. p. 678). He reported that these student's "would see the school counselor or they may see privately a therapist, any kind of support that can happen on or off campus and those typically are privately arranged in consultation with the school" (Tr. p. 677).

With respect to the student in the instant case, the associate headmaster indicated that he was involved in the intake process for the student which included an in-person interview as well as "visiting the campus, touring the facilities and conversations about [the student's] interests, her goals and whether she felt the school was a good fit for her" (Tr. p. 672). The associate headmaster stated that he felt the student's behavior matched that of the other students at Kildonan and that she was a good fit for the school (Tr. p. 672). Her profile of being diagnosed with a learning disability and having language-based learning difficulties was consistent with that of the students who attended Kildonan (Tr. pp. 672-73).

According to the parent's affidavit "language [wa]s one of [the student's] biggest learning issues" and she struggled with receptive and expressive language, as well as reading and writing (Parent Ex. B at p. 2). The parent stated that "Kildonan offered a program that would work on these skills on a daily basis, with highly qualified and trained staff" (Parent Ex. E at p. 2). The parent reported that the student participated in skiing and horseback riding at Kildonan based on the philosophy that they helped to "connect the right and left hemispheres of the brain, which in turn helps students with reading" (Parent Ex. B at pp. 2-3). According to the parent, the afterschool activities at Kildonan helped the student foster friendships, instead of being fearful of other students and the open campus provided the student with movement breaks between instruction (Parent Ex. B at p. 3). The classes at Kildonan were taught at the student's level and the student was provided with modifications, such as a graphic novel to read Shakespeare (Parent Ex. B at p. 3). In addition, the parent noted that Kildonan offered sign language as a multisensory approach to fostering language acquisition and field trips as a means of providing hands on experiences (Parent Ex. B at p. 3). However, the parent acknowledged that Kildonan did not offer the student services for her therapeutic needs and that the school was "simply a band aid, until we could properly place [the student] into the residential program that she truly needed" (Parent Ex. E at p. 2). Notably, the associate headmaster testified that he was not aware of how the school counselor at Kildonan addressed the student's clinical diagnoses, stating "I can't answer that specifically without speaking to him" (Tr. p. 679). The Kildonan school counselor did not testify and the

hearing record does not contain documentary evidence that would confirm Kildonan provided the student with counseling services.

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that their unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

In the instant case, while the headmaster's testimony provided general information about the program offered at Kildonan, neither the testimonial nor documentary evidence in the hearing record provides sufficient evidence to establish how Kildonan adapted, as appropriate to the student's academic and social/emotional needs, the content, methodology, or delivery of instruction to address the unique needs that resulted from the student's disability such that it provided the student with specially designed instruction. Furthermore, although the parent indicated in his affidavit that the student demonstrated fewer episodes of shutdown at home while she attended Kildonan, a unilateral placement is not appropriate simply because it removes the student from an anxiety-provoking environment or inappropriate peer influences, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the unilateral placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (see R.H. v. Bd. of Educ. Saugerties C. Sch. Dist., 2018 WL 2304740, at *6 [N.D.N.Y. May 21, 2018]. It must be noted that testimony by the parent indicated that the student was admitted to a psychiatric hospital for one week in February 2017 while the student was attending Kildonan (Tr. pp. 526-27; Parent Ex. E at p. 2). The parent testified that the reason for the hospitalization was a "combination of everything" including, "Everything from September and Summit School, to detaching from her friends at Kildonan School, to being pushed educationally at the Kildonan School, and she was having suicidal ideations" (Tr. pp. 526-27). The associate headmaster noted that part of the reason Kildonan offered the support of a school counselor was that it knew "teenagers struggle" with emotional issues that were exacerbated by learning difficulties from the standpoint that students who were self-isolated, excluded, and/or felt stupid in a more traditional classroom setting needed a level of support (Tr. p. 681). While the associate headmaster indicated that Kildonan offered support through the school counselor, small class sizes and close relationships with teachers, he testified that there were limits to the level of support Kildonan provided (id.).

Accordingly, there is insufficient evidence in the hearing record to conclude that Kildonan provided the student with specially designed instruction to address the student's social/emotional needs.

With respect to the student's progress at Kildonan, 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. v.

Southhold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]; 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"]).

Overall, the hearing record contains scant evidence regarding the student's performance at Kildonan; however, her fourth quarter report card indicated that she passed all of her classes (IHO Ex. III). The associate headmaster witnessed the student having positive friendships with peers; she was generally smiling, and she positively engaged both in the academic program and in all areas of school community (i.e., sitting with her friends at a school-wide daily morning meeting and lunch) (Tr. pp. 673, 677). The parent indicated in his affidavit that the student was getting the support she needed educationally (Parent Ex. E at p. 2). When asked whether the student made academic progress, the parent testified that the student was at Kildonan for three and a half months which was "not a long time to show any credible increase as far as skills" (Tr. p. 526).

While some courts have recently deemed evidence of the general educational milieu of a unilateral placement sufficient for purposes of tuition reimbursement (see, e.g., T.K., 810 F.3d 878; W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *26-*36 [S.D.N.Y. Nov. 23, 2016]), in an apparent retreat from the standard, articulated in Gagliardo, that the unilateral placement must provide instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65), the hearing record in this case is insufficient to support a finding that Kildonan met the student's educational needs, including her social/emotional needs, even in light of the more relaxed "general educational milieu" standard. There is no evidence in the hearing record to suggest that Kildonan provided the student with a therapeutic milieu or even claimed to. In addition, it was the district and not Kildonan that provided services to address the student's social/emotional needs. The hearing record shows that the October 2016 IEP included a CSE recommendation for the student to receive individual behavior intervention services in the home/classroom (Dist. Ex. 56 at pp. 1, 12). Testimony by the parent and the district director of special education indicated the district provided a behaviorist to work with the student and her family in their home even though the parents unilaterally placed the student at Kildonan, (Tr. pp. 515-16, 573).[9] The director of special education noted the district provided the behavior intervention services in good faith to support the student and to decrease behaviors not seen while the student was enrolled in any district program setting (Tr. pp. 573-74).

[9] The student also received private counseling during this time (Tr. pp. 515-16).

In sum, the hearing record does not include sufficient information regarding the special education instruction that was designed specifically for the student at Kildonan to support a finding that Kildonan was an appropriate unilateral placement. Based on the foregoing, the hearing record supports the IHO's conclusion that the parents failed to meet their burden to establish that Kildonan provided the student with instruction and services specially designed to meet her unique needs.

VII. Conclusion

Having determined that the IHO erred in finding that the district failed to offer the student a FAPE for the 2016-17 school year, but correctly found that Kildonan was not an appropriate unilateral placement for the student, it is not necessary to determine whether equitable considerations support the parents' claim, and the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 3, 3019, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2016-17 school year.

Dated: **Albany, New York**
March 15, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER