



The University of the State of New York

The State Education Department
State Review Officer
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No. 20-015

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

Appearances:

Raymond J. Shalhoub, Esq., attorney for petitioners

Girvin & Ferlazzo, PC, attorneys for respondent, by Tara L. Moffett, 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 their son's tuition costs at the Kildonan School (Kildonan) and Camp Dunnabeck for the 2017-18 and 2018-19 school years. The appeal must be dismissed.

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

The student attended a private school for preschool through second grade where concerns were noted with respect to the student's academic development (Dist. Exs. 1 at p. 1; 21 at p. 2; Joint Ex. 1 at p. 3). The district of location conducted an evaluation of the student "that was not indicative of a learning disability at that time" but which raised concerns regarding the student's working memory and processing speed (Dist. Ex. 1 at p. 1).

The student transferred to the district elementary school at the beginning of the third grade (September 2013) where screenings revealed weaknesses in math and reading (Dist. Ex. 1 at p. 1)

An initial psychoeducational evaluation conducted by the district indicated the presence of a learning disability along with attention regulation and executive functioning weaknesses (Dist. Ex. 1 at p. 1; Joint Ex. 1 at p. 4). In addition, the evaluation revealed significant weaknesses in the student's reading, decoding, spelling, written expression, and math skills and noted that the student struggled in the areas of organizational skills, working memory, and processing speed (Dist. Ex. 1 at p. 1; Joint Ex. 1 at p. 4). As such, the evaluator recommended that the student be referred to the CSE for the development of an IEP (Joint Ex. 1 at p. 4). An occupational therapy (OT) evaluation, also conducted in September 2013, demonstrated the student's need for support "in that area" (Dist. Ex. 1 at p. 1; Joint Ex. 1 at pp. 5-6).

In March 2014 the student underwent testing by a private evaluator whose assessment indicated that the student had an attention deficit hyperactivity disorder (ADHD)-combined type and a learning disability (dysgraphia) (Dist. Ex. 1 at p. 1; Joint Ex. 1 at pp. 2, 4). In addition, the evaluator found that the student had weaknesses in executive functioning, auditory processing, and handwriting (Dist. Ex. 1 at p. 1; Joint Ex. 1 at pp. 2, 4).

The district conducted a speech-language evaluation, which also took place in March 2014, and reported that the student's scores on measures of oral and written language and language fundamentals were in the average range and that speech-language therapy was not indicated (Joint Ex. 1 at p. 5). Subsequently, the student underwent a private speech-language evaluation in November 2014, the results of which indicated that the student performed in the average range in oral expression and the severely impaired range in listening comprehension (Dist. Ex. 1 p. 1; Joint Ex. 1 at p. 5). The November 2014 assessment results also revealed weaknesses in the student's reading comprehension and written expression (Dist. Ex. 1 at p. 2; Joint Ex. 1 at p. 5). The private speech-language evaluator recommended the student receive speech-language therapy (Dist. Ex. 1 at pp. 1-2; see Joint Ex. 1 at p. 5). Based on the discrepancies between the district evaluation and the private evaluation, the district conducted a follow-up evaluation which again revealed scores in the average range across subtests, and therefore it did not recommend speech-language therapy services for the student (Joint Ex. 1 at p. 5).

In March 2015, the district conducted an academic assessment "to help understand [the student's] level of progress over the past year" (Dist. Ex. 1 at p. 1). The resultant report indicated that the student's "greatest level of growth" was in reading and that he demonstrated slower progress in math and writing (Dist. Ex. 1 at pp. 1-4; Joint Ex. 1 at pp. 4, 5). The report noted that the student's ability to demonstrate skills in the classroom could be impacted by his level of attention regulation, executive function skills, weak working memory skills, and processing speed (Dist. Ex. 1 at p. 2). In October 2015, the district conducted an assistive technology evaluation and recommended that the student use an iPad and specific applications to support academics and also that he develop keyboarding skills (Joint Ex. 1 at p. 6).

Following the district's evaluation, the parents requested and obtained a publicly-funded independent educational evaluation (IEE), in the form of a neuropsychological evaluation, which took place from September 2015 to February 2016 ("February 2016 neuropsychological IEE") (Tr.

pp. 50-51; Dist. Ex. 42 at p. 2; Joint Ex. 1 at pp. 1-24).¹ The neuropsychologist who evaluated the student found that he met the criteria for the diagnoses of developmental dyslexia, disorder of written expression, dysgraphia, ADHD-combined presentation, and separation anxiety disorder (Joint Ex. 1 at p. 15). According to the neuropsychologist, the student had been receiving private, intensive, multisensory reading and writing remediation using an Orton-Gillingham methodology, Alphabet Phonics, three times a week since summer 2015 (id. at pp. 3, 13).

On April 12, 2016 a CSE convened to conduct an annual review and develop an IEP for the student for the 2016-17 school year (sixth grade) (Dist. Ex. 3 at pp. 1-14).^{2, 3} Finding the student eligible for special education as a student with a learning disability, the April 2016 CSE recommended that the student receive two 40-minute sessions per week of direct consultant teacher services for both English language arts (ELA) and math (Dist. Exs. 3 at pp. 1, 9; 7 at pp. 1, 2). In addition, the CSE recommended numerous supplementary aids and services and program modification/accommodations including one 40-minute session every other day of specialized tutorial along with assistive technology devices and an assistive technology consultation four times per year (Dist. Exs. 3 at pp. 9, 10; 7 at pp. 1, 2).

At the end of the April 2016 CSE meeting, the parents provided the district with a letter requesting 12-month services for the student at a school for "Dyslexic Children" and additional tutoring, both at district expense (Dist. Exs. 4 at pp. 1-2; 7 at p. 2). On April 27, 2016 the director of pupil personnel services (PPS director) and the instructional administrator for elementary special education met with the parents to discuss their requests and offered the student the opportunity to attend a district 12-month program, which the parents declined (Dist. Exs. 6 at pp. 1-2; 7 at p. 2).⁴ At the end of the April 27, 2016 meeting the parents provided the district with a written request for mediation, which reiterated the parents request for 12-month services for the student and additional educational tutoring throughout the school year "in the methodology that is appropriate for [the student's needs]" (Dist. Exs. 5; 6 at p. 2). In an April 27, 2016 follow-up letter, the district outlined the above discussions and stated that the parents' request for district-funded private tutoring was declined and requested that, if the parents chose to pursue private tutoring,

¹ While the IHO exhibit list attached an April 4, 2016 date to the neuropsychological evaluation report, a review of the exhibit entered into the hearing record reveals April 4, 2016 to be the date the document was received by the district's pupil personnel services office (IHO Decision at p. 26; Joint Ex. 1 at p. 1). The cover letter forwarding the neuropsychological evaluation report to the district was dated March 31, 2016 and the evaluation report indicated that the evaluation was conducted over the course of a number of non-consecutive days beginning on September 9, 2015 and ending on February 9, 2016 (Joint Ex. 1 at pp. 2, 6, 22-24). For purposes of this decision, the evaluation shall be referred to as the February 2016 neuropsychological IEE.

² In a June 2016 prior written notice of the proposed continuation of special education, the district noted that the CSE did not have sufficient time to review and consider the February 2016 neuropsychological IEE recommendations in order to "add to or make changes to" the 2016-17 IEP (Dist. Ex. 7 at pp. 1-2; see Tr. p. 90).

³ Although the hearing record indicates that the student was initially classified as a student with a disability during the 2013-14 school year, the first IEP in evidence is the student's April 2016 IEP (Parent Ex. B at p. 2).

⁴ The PPS director indicated that the district offered "a six-week half-day extended school year program for students to prevent regression in reading, math and writing skills" (Dist. Ex. 6 at p. 1).

that the tutoring be conducted outside of the school hours to ensure continuity of programming (Dist. Ex. 6 at p. 1). The district initiated a formal request for special education mediation on April 28, 2016 (Dist. Ex. 6 at pp. 2-4).

A June 1, 2016 prior written notice summarized the discussion that took place at the April 2016 CSE meeting, as well as the special education services recommended for the student for the 2016-17 school year (Dist. Ex. 7). The prior written notice explained that reading was not listed as a separate service on the IEP because all sixth graders took a reading class, and that the CSE recommended OT be discontinued as the student's skills fell in the very high range and he no longer qualified for the support (*id.* at p. 1).⁵ The prior written notice stated that the CSE did not recommend the student for 12-month services or programs because substantial regression was not noted by the teaching staff and further noted that the CSE recommended the continuation of assistive technology devices and consultation (*id.* at pp. 1, 2).

In a June 22, 2016 letter to the district, the parents detailed their concerns regarding the student's April 2016 IEP to the district (Joint Ex. 2). They stated that, in light of the student's "minimal progress" during the 2015-16 school year, they were concerned that the CSE recommended the removal of resource room, reduction in consultant teacher services, and complete elimination of related services (OT and counseling) from the student's IEP (Joint Ex. 2 at p. 1). The parents also expressed concern that the number of annual goals were reduced, despite the student's failure to achieve those goals during the prior school year (*id.*). The parent's requested that the district agree to the continue to provide services to the student "at least" at the level recommended in an October 2015 IEP (*id.* at pp. 1-2). The parents stated that they considered it "imperative" that the student receive immediate intensive remediation in reading and writing to include multisensory instruction by a qualified specialist (*id.* at p. 2). Additionally, the parents stated that they felt the 12-month school program recommended by the district "would fall short" of what the student needed for an appropriate education (*id.*). Based on the foregoing, the parents provided the district with notice of their intention to place the student at Kildonan for summer 2016 and seek reimbursement or public funding for the cost of the placement (*id.*).

In a July 7, 2016 response to the parents, the district stated that a follow-up CSE meeting would be scheduled to address the parents' concerns regarding the CSE's recommendations for the 2016-17 school year and that, while the parents were free to make arrangements for summer activities, the district was not responsible for the cost of these outside supports or services (Dist. Ex. 8 at pp. 1-2).⁶

⁵ The prior written notice explained that the student would have a reading goal on his IEP but that reading services would not be listed because all students would receive reading instruction in a reading class and the teacher for that class would make sure the student was working toward his goal (Dist. Ex. 7 at p. 2). The prior written notice indicated that the district's middle school screened all sixth-grade students in the fall and placed them in groups with similar instructional needs, allowing students to work together on their goals (*id.*).

⁶ The letter from the district explained that a 12-month school year IEP "focused only on the areas where a student was expected to experience substantial regression" and "would not be designed to provide remediation or supplemental instruction to move the student ahead during the summer" (Dist. Ex. 8 at p. 1).

On August 30, 2016, a CSE reconvened to conduct a requested review and review the results of the February 2016 neuropsychological IEE (Dist. Ex. 10 at p. 1; Joint Ex. 3 at p. 1). The August 2016 CSE increased the student's direct consultant teacher services for both ELA and math to one 80-minute session every other day and added reading resource room once every other day for 40 minutes, a social work consultation twice monthly for 30 minutes, and program modifications of special seating closer to instruction, use of visual aids, and use of a calculator (Dist. Ex. 10 at pp. 1-2; Joint Ex. 3 at pp. 1, 12, 14). According to a prior written notice dated August 30, 2016, the parents "expressed their appreciation of the increase in services" (Dist. Ex. 10 at p. 2).

The student attended the district program recommended in the August 2016 IEP until February break 2017 (Tr. pp. 55-56; Joint Exs. 6; 7 at pp. 6, 7). By letter dated March 6, 2017, the parents advised the district that the student would complete the rest of the 2016-17 school year at Kildonan, suggesting that the district did not fully understanding the student's learning disability (dyslexia), that his needs were not being met, and that there were concerns for immediate intervention (Dist. Ex. 11 at pp. 1-2; see Parent Ex. B at p. 3; Joint Ex. 4). In their letter, the parents stated that they hoped "this [wa]s just a leave of absence and [the parties would] resume next year as a better working team" (Dist. Ex. 11 at p. 2).

In April 2017, the parents obtained a "comprehensive record review" and updated achievement testing through a private psychologist (Dist. Ex. 21 at pp. 1-4).⁷ Based on a comparative analysis of current and past testing, the private psychologist determined that a consistent pattern of test results over time indicated that the student's cognitive functioning and achievement test scores "ke[pt] him functioning in class approximately one to two years below grade level expectations"(id. at p. 4). He opined that the student's performance was a combination of his ADHD and learning disability (id.). The private psychologist conducted a subsequent "brief end-of-the-year" achievement evaluation in June 2017 that yielded testing results "remarkably consistent" with past test scores and which indicated the student had made good progress at Kildonan (Joint Ex. 5 at p. 3).

In a July 17, 2017 letter to the district, the parents stated that the student had a "very successful" end of the academic year at Kildonan and that he could return to the district if a number of "things," which the parent identified, could be integrated into the student's IEP (Joint Ex. 5 at pp. 1-2).⁸ The parents requested a CSE meeting to develop an appropriate IEP for the student before the start of the 2017-18 school year and noted that, if the district could provide an appropriate education for the student, they would be happy to have him attend the district's middle school for the 2017-18 school year (id. at pp. 1-2). Included with the parents' letter were copies of

⁷ Subsequent district correspondence indicated that this April 2017 report was not received by the district until September 9, 2017 (see Dist. Exs. 16 at p. 1; 19 at p. 1; 21 at pp. 1-4).

⁸ The parents' list of things included: small group instruction with a qualified Orton-Gillingham instructor, a schedule that was clear and repeated daily, guided help in preparing and understanding organization (daily), implementation of technology throughout the student's day, pre-teaching and re-teaching, lessons that incorporated hands on experiences, a schedule that provided academic, physical, and mental balance, and use of the student's IEP in every class (Joint Ex. 5 at p. 2).

the student's third quarter report card from Kildonan, results of standardized testing conducted by Kildonan in May 2017, and the June 2017 achievement testing conducted by the private psychologist (*id.* at pp. 3-14). For summer 2017, the student attended the first three-week session of Camp Dunnabeck at Kildonan (Dist. Ex. 23 at p. 8).

In a letter to the district, dated August 24, 2017, the parents stated that, despite their July 2017 request, the district had not developed an IEP for the student for the 2017-18 school year and therefore they would be placing the student at Kildonan and seeking tuition reimbursement from the district (Dist. Ex. 15). On the same date, the district sent a response letter requesting additional reports and testing results and again requested consent to communicate with Kildonan (Dist. Ex. 16 at p. 1).

The CSE convened on September 5, 2017 to conduct an annual review and to develop an IEP for the student for the 2017-18 school year (seventh grade) (Dist. Ex. 23 at p. 1). Finding the student remained eligible for special education and related services as a student with a learning disability, the CSE recommended two 80-minute sessions per four-day cycle of direct consultant teacher services for both ELA and math, one 80-minute session every other day of resource room in a group of five, three 30-minute sessions per month of individual counseling and a counseling consultation once monthly for 30 minutes (Dist. Exs. 23 at pp. 1, 12-17; 24 at p. 1). The CSE also recommended numerous supplementary aids and services, program modifications, and accommodations including five 40-minute sessions per week of specialized tutorial in a class of no more than 15, a shared teaching assistant daily for 40-minutes for social studies and science classes, one 40-minute session every other day of word study tutorial, and an assistive technology consultation six times yearly for 60 minutes (Dist. Exs. 23 at pp. 1, 12-17; 24 at p. 1). In a prior written notice dated September 5, 2017, the district explained the September 5, 2017 CSE's recommendations, detailing the areas of deficit or the types of skills that the programs and services would target (Dist. Ex. 24 at pp. 1-2).

In a September 7, 2017 letter the parent notified the district of their position that the September 5, 2017 IEP was not appropriately responsive to the student's academic and social/emotional needs and, accordingly, their plan to return the student to Kildonan and seek tuition reimbursement from the district for the 2017-18 school year (Joint Ex. 6).

Shortly thereafter, the CSE reconvened on September 25, 2017 for a requested review and considered the April 2017 record review and updated achievement testing conducted by the private psychologist, as well as school reports from Kildonan (Dist. Ex. 27 at p. 1; Joint Ex. 7 at p. 1; *see* Dist. Ex. 21).⁹ The September 25, 2017 CSE recommended the continuation of the programs, services, and supports recommended in the September 5, 2017 IEP and increased the frequency of the assistive technology consultation to eight times per year, the counseling consultation to weekly, and team meetings to four times per year and added weekly communication with the parent and planned breaks for the student for classes longer than 60 minutes (*compare* Joint Ex. 7 at pp. 12-16, *with* Dist. Ex. 23 at pp. 12-16; *see* Dist. Ex. 27 at p. 1). According to a prior written notice

⁹ The district initially scheduled the CSE meeting for September 19, 2017 but rescheduled to September 25 to accommodate the participation of Kildonan staff (Dist. Exs. 25 at p. 1; 26 at p. 1).

dated October 11, 2017, the parents expressed concern that the student exhibited social/emotional distress at home and did not exhibit the skills to complete homework or use assistive technology and that they did not perceive in the student the growth that the district staff described (Dist. Ex. 27 at p. 1).

The student continued to attend Kildonan for the 2017-18 school year (Dist. Ex. 30 at pp. 1-11; see Dist. Ex. 29 at p. 1).

The CSE convened on May 11, 2018 to conduct an annual review and develop an IEP for the student for the 2018-19 school year (eighth grade) (Dist. Exs. 28 at p. 1; 29 at p. 1; Joint Ex. 8 at pp. 1-19). Finding the student remained eligible for special education and related services as a student with a learning disability the May 2018 CSE continued the recommendation of two 80-minute sessions per four-day cycle of direct consultant teacher services for both ELA and math; one 80-minute session every other day of resource room in a group of five; and supplementary aids and services and program modifications and accommodations including five 40-minute sessions per week of specialized tutorial in a class of no more than 15, a shared teaching assistant daily for 40-minutes for social studies and science classes, and one 40-minute session every other day of word study tutorial, as well as weekly email communication with the parents and team meetings with the parents four times per year, a counseling consultation eight times per year and a weekly assistive technology consultation (Joint Ex. 8 at pp. 1, 12-17). In addition, the CSE recommended that the student receive 12-month services within a 15:1 special class for two hours and 30 minutes daily (id. at pp. 1, 17). The May 2018 CSE discontinued the recommendation of individual counseling (compare Joint Ex. 7 at pp. 1, 12; with Joint Ex. 8 at pp. 1, 12; see Dist. Ex. 29 at p. 1).

The student attended Kildonan during the 2018-19 school year (see Parent Ex. A at p. 2; Dist. Exs. 38 at pp. 1, 13; 39 at p. 1; 40 at p. 1

A. Due Process Complaint Notice

By due process complaint notice dated May 28, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18 and 2018-19 school years (IHO Ex. I at pp. 1-2). The parents asserted that the CSEs for the relevant school years failed to "properly address[]" the findings of the February 2016 neuropsychological IEE or provide services to address the student's needs related to his diagnoses of dyslexia and a disorder in written expression (id. at p. 1). The parents further alleged that, although they cooperated with the district and the CSE, "they were left with no choice" but to enroll the student in Kildonan and Camp Dunnabeck because those programs provided the daily intervention to treat dyslexia that the student required in order to make progress (id. at pp. 1-2). The parents requested reimbursement for the costs of the student's attendance at Kildonan and Camp Dunnabeck during the 2016-17, 2017-18, and 2018-19 school years, including the costs of related services and tuition (id. at p. 2).

In a response to the parents' due process complaint notice, dated June 10, 2019, the district asserted that claims with respect to the 2016-17 school year were barred by the relevant statute of

limitations and that the IEPs in question offered the student a FAPE in the least restrictive environment (LRE) (IHO Ex. II).

B. Impartial Hearing Officer Decision

On October 10, 2019, the parties met for an impartial hearing, which concluded on the same date (Tr. pp. 1-231).^{10, 11} In a decision dated December 21, 2019, the IHO first determined that the parents' claims concerning the 2016-17 school year were barred by the statute of limitations (IHO Decision at pp. 19-21). Next, the IHO found that the district offered the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (*id.* at p. 22).¹² In particular, the IHO found that the CSEs developed appropriate IEPs for the student based upon "current and relevant information" that addressed the student's needs, particularly in reading, writing, and math (*id.*). The IHO further found that the student made progress in the general education curriculum and towards his IEP annual goals with those supports and services in place (*id.*).

Regarding the 2016-17 school year, the IHO noted that, prior to the student's withdrawal from the district in March 2017, the student received resource room instruction from "a licensed and certified reading teacher" who provided "Wilson multisensory language instruction," among other methodologies, to address IEP goals designed to improve the student's reading accuracy and fluency (IHO Decision at pp. 22-23). The IHO found that during that time the student was passing all his classes and making progress towards IEP goals (*id.* at p. 23).

With respect to the September 5, 2017 IEP for the 2017-18 school year, the IHO noted that the CSE increased the amount of resource room and "special tutorial" recommended and added counseling and a "word study" class (IHO Decision at p. 23). Additionally, the IHO found that the CSE had considered other placement options and set forth the rationale for its recommendations in a prior written notice before the start of the school year (*id.*).

With respect to the May 11, 2018 IEP for the 2018-19 school year, the IHO found that the CSE continued to offer a similar program to the previous school year but removed counseling and added 12-month services based on input and testing from Kildonan (IHO Decision at pp. 23-24).

Having determined that the district offered the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years, the IHO found that he did not need to address the appropriateness of

¹⁰ The IHO held a prehearing conference with the parties on August 23, 2019, which the IHO summarized in a letter of the same date (IHO Ex. V). In the letter, the IHO indicated that he would reserve decision regarding the district's motion to dismiss certain of the parents' claims based on the statute of limitations (*id.*; *see* IHO Exs. III; IV).

¹¹ Both parties presented direct testimony from some witnesses by affidavits (*see* Parent Exs. A-B; Dist. Ex. 42).

¹² The IHO indicated that he examined the district's offer of a FAPE to the student for the 2016-17 school year, notwithstanding his determination that the parents' claims pertaining to that school year were barred by the statute of limitations (IHO Decision at p. 21 n.6).

the unilateral placements at Kildonan and Camp Dunnabeck, or whether equitable considerations supported the parents' requests for relief (IHO decision at p. 24).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2017-18 and 2018-19 school years and denying the parents' request for the costs of the student's attendance at Kildonan and Camp Dunnabeck for those school years.^{13, 14}

First, the parents assert that the IHO erred with respect to annual goals in the disputed IEPs. The parents contend that the IHO erred in finding that the recommended services were adequate for the student to make progress toward the goals because the goals themselves were inadequate. Primarily, the parents allege that the IEP goals failed to address the student's principal needs concerning his diagnosis of dyslexia. The parents contend that evaluations placed the student's reading fluency and accuracy in the fifth percentile and that the IHO erred in finding that the goals addressed accuracy and fluency because no such goals are present in the student's IEPs for the 2017-18 and 2018-19 school years.

Next, the parents contend that the IHO relied upon retrospective evidence to make other crucial findings with respect to the services provided in the disputed IEPs. The parents assert that the private neuropsychologist who evaluated the student recommended daily participation in a reading intervention group of not more than three students for 60 minutes using a multi-sensory structured language program. The parents contend that a sufficiently comparable service was not included in any of the operative IEPs and that this omission was a key factor in the parents' decision to unilaterally place the student at Kildonan, which did offer the recommended reading program. However, the parents note that a district reading specialist testified via affidavit at the impartial hearing that the student received a related service in the form of an "Orton-Gillingam" reading intervention program in a group of three students for 40 minutes every other day. The parents contend that, although there was a "resource room" service offered in the IEPs with a 5:1 student-teacher ratio, there was nothing in the IEPs that resembled the reading program about which the district reading specialist testified. The parents objected to the testimony concerning the reading intervention program at the impartial hearing and contend that the testimony was impermissibly retrospective and should not have been admitted. The parents contend they were unaware of the

¹³ The verification accompanying the parents' request for review was signed by the parents' attorney, instead of one or both of the parents. The parents' attorney is hereby reminded that State regulation requires that "at least one of the petitioners" must verify the request for review (8 NYCRR 279.7[b]). Also regarding the pleading requirements, in a footnote with its memorandum of law, the district implies that the parents inappropriately combined their request for review and supporting memorandum of law into a single document; however, nothing in State regulations prohibits a party from filing a pleading alone, without an accompanying memorandum of law, so long as the pleading does not exceed page limitations set forth in State regulation and meets the minimum content requirements (8 NYCRR 279.8[b]-[c]).

¹⁴ Neither party has challenged the IHO's determination that the parents' claims concerning the 2016-17 school year were barred by the statute of limitations and as such the IHO's determination on that issue has become final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

reading service until seeing the reading specialist's testimony and that the IHO erred in relying on the testimony to interpret the IEPs as including a specialized reading service that was not fairly set forth in the IEPs.

For relief, the parents request reimbursement for the costs of the student's attendance at Kildonan and Camp Dunnabeck for the 2017-18 and 2018-19 school years.

In an answer, the district responds to the parents' allegations with admissions and denials and requests that the IHO's decision be upheld in its entirety. The district generally asserts that the request for review raises issues that were not raised in the parents' due process complaint notice, as well as issues pertaining to the 2016-17 school year, which is no longer the subject of this matter.

With respect to the parents' claim that the annual goals were inadequate and did not address the student's needs, the district first contends that claims concerning annual goals were not raised in the parent's due process complaint notice and are therefore not properly raised on appeal. In any event, the district contends that the annual goals in the IEPs at issue were appropriate.

The district also contends that the IHO properly admitted the testimony of the district reading specialist and overruled the parents' objection thereto and that the testimony was not unduly retrospective. Moreover, the district contends that the CSEs offered an appropriate program with related services during the 2017-18 and 2018-19 school years. The district further asserts that the parents were aware of the specialized reading program. Finally, the district contends that the disputed testimony was not determinative of the IHO's finding that the district offered the student a FAPE.

Finally, the district asserts that Kildonan was not an appropriate unilateral placement for the student, that the student did not make significant progress there, and that equitable considerations do not weigh in favor of an award of tuition reimbursement for the 2017-18 and 2018-19 school years.

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 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]).¹⁵

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

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

VI. Discussion

A. September 5 and September 25, 2017 IEPs

1. Annual Goals

The parents contend that their "[c]omplaint [wa]s largely based on the fact that the [d]istrict failed to" include annual goals tailored to the student's primary disability, namely his reading accuracy and fluency skills. The parents argue that the adequacy of the annual goals was central to their case and that this subject was ignored by the IHO and that he erred in finding that the student was making progress toward his annual goals "which were designed to improve his reading accuracy and fluency," as "no such goals exist" in the IEPs for the 2017-18 and 2018-19 school years.

Initially, the district contends that issues with respect to the annual goals in the student's IEPs are not properly raised on appeal because the parents did not raise claims concerning IEP

¹⁵ 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).

goals in their due process complaint notice. 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[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][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, the parents' due process complaint notice focused on the CSEs' failure to address the findings of the February 2016 neuropsychological IEE or provide services to address the student's needs related to his diagnoses of dyslexia and a disorder in written expression, with no explicit reference to the annual goals in the IEPs (IHO Ex. I at p. 1). Far from identifying annual goals as "an issue central to [their] case" (Req. for Rev. at p. 4), the due process complaint notice, at most, raises a general challenge to the sufficiency of the IEPs in terms of how they address the student's needs related to reading and writing (*see* IHO Ex. I at p. 1). In any event, the hearing record nevertheless indicates that the appropriateness of the annual goals was first raised by counsel for the district during direct questioning of district witnesses at the impartial hearing and appears to have been for the purpose of defending the annual goals (*see* Tr. pp. 54, 162-64, 167-68). Therefore, although the parents did not squarely raise the issue of annual goals in the due process complaint notice (*see* IHO Ex. I), the hearing record indicates that the district may have opened the door to the issue with respect to the IEPs for both the 2017-18 and 2018-19 school years (M.H., 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]). Under these circumstances, the issue of the annual goals raised by the parents on appeal will be addressed.

Turning to the merits of the parents' claim, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

While the IEPs in place prior to the 2017-18 school year are not being contested in this matter, a brief review of the recommended annual goals leading up to the development of the September 2017 IEP provides useful background with respect to the adequacy of the annual goals included in the September 2017 IEP, as well context for the IHO's remark about the student's work on reading accuracy and fluency, which the parents specifically challenge (*see* IHO Decision at p. 23; Req. for Rev. at p. 3).

The student's IEP for the 2015-16 school year contained an annual goal that addressed the student's reading accuracy (Dist. Ex. 2 at p. 1). A June 2016 progress report indicated that the student had achieved this goal which required him to read a short text at a mid-late fourth grade level with 98 percent accuracy (id.). According to the progress report, the student had made "terrific progress" over the course of the school year, was able to read a mid-late fourth grade text with 99 percent accuracy and satisfactory comprehension, and had shown beginning skills in being able to self-monitor his pace and implement strategies to support his comprehension (id.).

Although the student had demonstrated progress in his ability to read accurately, the CSE continued to recommend a goal that targeted the student's reading accuracy and fluency for the 2016-17 school year (Joint Ex. 3 at p. 12). The present levels of performance section of the student's August 2016 IEP cited information from the February 2016 neuropsychological IEE, which indicated that the student the student struggled with sight word recognition, although his ability to decode words was average, and demonstrated average verbal abilities and good speech prosody and that his reading skills were impacted by working memory deficits (Joint Ex. 3 at p. 7; see Joint Ex. 1 at pp. 8-9). Based on the February 2016 neuropsychological IEE report, the August 2016 IEP further stated that the student's sight word fluency was average, although his word recognition skills were below average (Joint Ex. 3 at p. 7; see Joint Ex. 1 at pp. 9-10, 22). The IEP indicated that when the student tried to work quickly or was pressed for time he was more error prone and that he would benefit from reminders to work slowly and carefully so that he would read more accurately and not omit or substitute words (Joint Ex. 3 at p. 7).¹⁶

The August 2016 IEP also included reports that the student benefitted from small group instruction, seating near the teacher with prompting to maintain focus, and teacher modeling of specific strategies before reading independently, as well as organizational techniques and the use of masks and highlighters while reading (Joint Ex. 3 at p. 7). The August 2016 IEP indicated that the student usually read at a fast pace which at times caused him to mispronounce a word, skip words, misinterpret punctuation marks, or forget to read with expression and that with prompting the student was able to slow down and self-monitor his reading for fluency and accuracy (id.).

The August 2016 IEP included an annual goal that targeted the student's ability to demonstrate attention and self-pacing to read fluently with 95 percent accuracy on familiar and unfamiliar reading passages at the fifth-grade level (Joint Ex. 3 at p. 12). A January 2017 progress report indicated that the student was making satisfactory progress toward this goal and was expected to achieve it, that he continued to develop his fluency and word accuracy skills when reading texts aloud, that he recently read a fifth-grade level text with 97 percent accuracy at a rate

¹⁶ The August 2016 IEP cited scores from the neuropsychologist's administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student in March 2016 (compare Joint Ex. 3 at p. 5, with Joint Ex. 1 at p. 22). The reported scores were as following: reading comprehension (63rd percentile), pseudoword decoding (47th percentile), word reading (13th percentile), and oral reading fluency (13th percentile) (Joint Ex. 3 at p. 5; see Joint Ex. 1 at p. 22). In addition, the student's "speed of reading words in isolation" was at the 25th percentile while his speed of reading nonsense words in isolation was at the 5th percentile (Joint Ex. 3 at p. 5; see Joint Ex. 1 at p. 22).

of 101 words per minute, and that he was more aware of word errors than in the past and worked to correct some of his errors (Dist. Ex. 14 at p. 2).¹⁷

It was the goals in the August 2016 IEP that IHO was referencing when he indicated that the student was working on reading accuracy and fluency during the beginning of the 2016-17 school year (see IHO Decision at p. 23, citing Tr. p. 71; Dist. Ex. 42 at pp. 4-5). Accordingly, the parents' assertion that "the IHO erred by . . . finding that such goals existed" in the IEPs for the student's 2017-18 and 2018-19 school year is without merit, as the IHO made no such finding (Req. for Rev. at pp. 3-4).

As part of the student's September 5 and September 25, 2017 IEPs, the CSEs recommended eight annual goals designed to address the student's identified needs (Dist. Ex. 23 at pp. 11-12; Joint Ex. 7 at p. 11). More specifically, the September 2017 IEPs included: two annual goals related to study skills, one for creating and using folders to organize work and materials and to record deadlines and test dates and one for attending to instruction and remaining focused and on task; two annual goals related to reading, one involving using learned strategies to spell grade-level phonetically regular words and another involving summarizing and restating or relating key information in sequential order and naming at least three details; one annual goal related writing involving the use of a word processor with word prediction software to generate an essay with a logical introduction, supporting details, and conclusion using the pre-writing, drafting, editing, and finalization process; two annual goals related to math which involved listing the order of operations in solving assorted addition, subtraction, multiplication, and division problems and identifying, applying, and solving math problems using numerical and algebraic expressions and equations; and one social/emotional/behavioral goal which involved identifying and using coping strategies to help lessen feelings of frustration or anxiety (Dist. Ex. 23 at pp. 11-12; Joint Ex. 7 at p. 11).

Neither the September 5 nor the September 25, 2017 IEPs included an annual goal that specifically targeted the student's reading accuracy and fluency skills (see Dist. Ex. 23 at pp. 11-12; Joint Ex. 7 at p. 11). In his affidavit testimony, the student's father stated that one of the principal reasons the parents decided to place the student at Kildonan was that the district "took away" reading fluency goals even though the student was still reading a grade level behind (Parent Ex. B at p. 3).

Although, as detailed above, the student had previously achieved an annual goal addressing reading accuracy during the 2015-16 school year, and was expected to achieve an annual goal addressing fluency and accuracy by the end of the 2016-17 school year (see Dist. Exs. 2 at p. 1; 14 at p. 2), information available to the September 5 and September 25, 2017 CSEs continued to identify reading accuracy and fluency as an area of need for the student (see Dist. Ex. 23 at pp. 8, 9; Joint Ex. 7 at pp. 7-8, 9).

¹⁷ The January 2017 progress report was the last district report available before the student was placed at Kildonan (see Parent Ex. B at p. 3; Dist. Ex. 11 at pp. 1-2; Joint Exs. 4; 6; 7 at pp. 6, 7).

The September 5, 2017 IEP reflected district reports from the first half of the 2016-17 school year that noted the student had worked on reading fluency and self-pacing as well as self-monitoring skills focused on reducing minor miscues or substitutions when reading; as of January 2017, the student was reading a fifth grade level text with 97 percent accuracy at a rate of 101 words per minute (Dist. Ex. 23 at p. 8; see Dist. Ex. 14 at p. 2). The district staff further reported that the student was learning to "slow down" his pace so he could monitor for accuracy and demonstrated accurate sound/symbol association but exhibited difficulty transferring those skills to spelling and needed to work on expanding his sight word recognition and vocabulary and that his inability to fully attend to text impacted his comprehension (Dist. Ex. 23 at p. 8).

In addition to the district's assessment of the student's reading skills, the September 5, 2017 IEP also included the results of testing conducted by Kildonan toward the end of the 2016-17 school year (Dist. Ex. 23 at pp. 2-3). Kildonan testing conducted in May 2017 indicated that the student was functioning in the average range on measures of word identification, spelling, and reading rate, and below the average range in word attack and reading accuracy and fluency (Joint Ex. 5 at pp. 6-7). The September 5, 2017 IEP also included anecdotal information from Kildonan which indicated that the student continued to have difficulties with reading accurately and fluently and still demonstrated miscues, substitutions, and omissions, and that he benefitted from reading out loud and discussions following reading activities, which helped to reinforce comprehension of what he read (Dist. Ex. 23 at p. 8).

Further, the September 5, 2017 IEP included information from the private psychologist who conducted updated achievement testing of the student in June 2017 and who noted that the student demonstrated better application of skills (reading comprehension, math applications) than basic skills (reading accuracy, math computation) and stated that this pattern related to the student's dual diagnoses of a learning disability and ADHD (Dist. Ex. 23 at p. 8; see Joint Ex. 5 at p. 3). Within the June 2017 report, the psychologist indicated that the student's then-current testing results (reading accuracy SS=89, reading comprehension SS=105, math computation SS=85, math application SS=95) were "remarkably" consistent with past test scores (Joint Ex. 5 at p. 3).

The September 5, 2017 prior written notice reflected additional student needs that were identified in the September 5, 2017 IEP and stated that the student had difficulties with written expression, organization and time management, focus and remaining on task, and working independently and that all of these impacted his overall academic performance and required specialized instruction, supports, and accommodations (Dist. Ex. 24 at p. 1; see Dist. Ex. 23 at pp. 5, 7). The September 5, 2017 prior written notice also stated that the September 5, 2017 CSE recommended support in reading, writing, and spelling activities because the student presented with deficits in attention and working memory which impacted his reading fluency and accuracy and that he also presented with difficulties with self-monitoring and pacing which affected his ability to accurately recognize and decode what he was reading (Dist. Ex. 24 at p. 1).

According to the affidavit testimony from the district reading specialist, she reported at the September 5, 2017 CSE meeting that the student consistently struggled with maintaining focus and attention, which had a direct impact on his reading accuracy (Dist. Ex. 42 at p. 7; see Dist. Ex. 24 at p. 1).

When the CSE reconvened on September 25, 2017, the Kildonan staff agreed that the student's attention and dysregulation had a big impact on his ability to access and demonstrate his knowledge in reading and writing (Tr. pp. 69, 72). The September 25, 2017 IEP reflected that, per the fourth quarter report from Kildonan, the student continued to work on phonetic decoding, vocabulary, and spelling and that discussions about a book he read helped him develop his oral vocabulary and his use of context clues to decipher the meaning of unknown words (Joint Ex. 7 at pp. 8-9).

The September 25, 2017 CSE reviewed results from a private psychological evaluation conducted in April 2017 by the same psychologist who conducted the June 2017 testing considered by the September 5, 2017 CSE (compare Joint Ex. 7 at p. 8, and Dist. Ex. 21 at pp. 2-4, with, Dist. Ex. 23 at p. 8, and Joint Ex. 5 at p. 3).¹⁸ According to the psychologist, past psychoeducational testing of the student had produced a diagnostic pattern of poor reading recognition/accuracy/decoding and poor reading fluency (Dist. Ex. 21 at p. 2). The psychologist administered a standardized measure of academic achievement and conducted a comparative analysis of current and past testing (id. at p. 3). He determined that the consistent pattern of test results over time indicated that the student's cognitive functioning and achievement test scores "ke[pt] him functioning in class approximately one to two years below grade level expectations" (id. at p. 4). The psychologist concluded that the diagnostic test results of the district, the private neuropsychologist, and Kildonan, as well as his own testing, were "not as discrepant as believed by the family" (id.).

According to the district reading specialist, Kildonan staff reviewed their recent testing and noted that administration of the Woodcock Reading Mastery Test-Third Edition (WRMT-III) to the student yielded a standard score of 72, falling in the 3rd percentile, and that the student "'fell apart' decoding multi-syllabic words" (Dist. Ex. 42 at p. 9; see Dist. Ex. 22).¹⁹ The reading specialist indicated that she reviewed her data and noted that the student was demonstrating word reading accuracy at the 98th percentile, with an average speed of 99 words per minute on the Qualitative Reading Inventory-Fifth Edition (QRI-5), which assessed his ability to read grade level text in context (Dist. Ex. 42 at p. 9). She shared with the CSE that the student "demonstrated solid comprehension when reading words in context, particularly when he slowed his pace and considered what he was reading" and that, while "he tended to misread basic sight words," this

¹⁸ The September 5, 2017 CSE did not have the April 2017 report from the private psychologist. In July 2017, the parents provided the district with a letter from the private psychologist that summarized the results of the administration of the WIAT-III to the student in June 2017 and referenced an earlier report from April 2017 (Joint Ex. 5 at p. 3). By letter dated August 24, 2017, the district requested, among other things, that the parents share a copy of the private psychologist's April 2017 report (Dist. Ex. 16 at p. 1). The same day the CSE convened on September 5, 2017, the parents signed consent for the district receive information from the private psychologist (Dist. Ex. 20). Thereafter, on September 7, 2017, the district received a copy of the private psychologist's April 2017 report (see Dist. Ex. 20 at p. 1).

¹⁹ It is unclear what documentation, if any, the September 25, 2017 CSE had regarding the scores resulting from Kildonan's administration of standardized tests in September 2017 or if the Kildonan staff who participated in the CSE just verbally reported the results of the testing at the CSE meeting. The tests results were before the May 2018 CSE and listed in the IEP (Joint Ex. 8 at p. 3).

was likely due to inattention or reduced stamina, not ability, and that, when he worked with her, "he did not misread larger, multi-syllabic words" (id.).

The September 25, 2017 CSE continued the same annual goals as set forth in the September 5, 2017 IEP (compare Joint Ex. 7 at p. 11, with Dist. Ex. 23 at pp. 11-12).

In this instance, the September 5 and September 25, 2017 IEPs sufficiently described the student's needs in reading (see Dist. Ex. 23 at p. 8; Joint Ex. 7 at pp. 7-8). While the hearing record demonstrates that the September 5 and September 25, 2017 IEPs failed to include an annual goal to specifically address the student's reading accuracy and fluency skills, the failure to address each of a student's needs by way of an annual goal does not necessarily constitute a denial of a FAPE (J.L. v. City Sch. Dist. of the City of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]). Courts have determined that an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE. (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

Moreover, the September 2017 IEPs addressed the student's reading accuracy and fluency needs by recommending consultant teacher services in addition to supplemental aids and services and program modifications/accommodations as detailed below, as well as through the inclusion of an annual goal targeting the student's ability to attend to instruction and focus on tasks, which was identified as having an impact on his reading accuracy and fluency (Dist. Ex. 23 at pp. 1, 11-15; Joint Ex. 7 at pp. 1, 11-16). Therefore, the absence of an annual goal to address the student's reading accuracy and fluency needs does not support a finding that the district failed to offer the student a FAPE for the 2017-18 school year.

2. Specialized Reading Instruction

The parents' appeal in this matter focuses on the IHO's decision to allow written testimony from the district's reading specialist regarding the resource room program—which the parents identify as retrospective in nature—and all the findings supported by this testimony. It is not entirely clear which of the IHO's determinations rested on the testimony of the reading specialist, if any (see IHO Decision at pp. 22-23), but as the testimony was germane to the district's defense of the CSEs' recommendations to address the student's reading needs, the CSEs' recommendations in this area shall be examined in turn.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with

Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).²⁰

The parents note that, within the February 2016 neuropsychological IEE report, the neuropsychologist stated that the gap in the student's academic skills would widen if the student was not provided with the "most intensive remediation possible" and recommended daily participation in a reading intervention group of not more than three students for 60 minutes using a multi-sensory structured language program, such as Orton-Gillingham (Joint Ex. 1 at p. 15). The parents argue that a sufficient, comparable service was not included in any of the operative IEPs.

Initially, in order to satisfy its obligation to consider the private evaluation, the CSE was not required to adopt the recommendations of the neuropsychologist (J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Rather, as discussed below, the evidence in the hearing record shows that the CSEs considered the student's needs and recommended supports to address his reading deficits. That the CSEs did not adopt a recommendation identical to the 3:1 reading intervention group proposed by the neuropsychologist does not, without more, support a finding that the district failed to offer the student a FAPE.

The testimony with which the parents take issue also specifically relates to the idea of a 3:1 reading group (see Tr. pp. 190-97). In particular, the parents argue that a district reading group with three students (i.e., consistent with the recommendation of the neuropsychologist) was not described on the IEPs. The district reading specialist testified that she was assigned to the student's resource room during the 2016-17 school year and provided him with Wilson multisensory language instruction every other day for 40 minutes in a small group with included three students (Dist. Ex. 42 at pp. 2, 4). The reading specialist further stated that, consistent with the IEP annual goals, the student worked on word identification, spelling, pseudoword decoding, focus and attending, and pacing to help develop and increase his reading for accuracy and fluency (id. at pp. 4-5, 7). The reading specialist reported that, in addition to Wilson reading instruction and

²⁰ Recent State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>; see generally Educ. Law § 305[56]; Dear Colleague Letter, 66 IDELR 188 [OSERS 2015]).

strategies, the student had other reading and comprehension skill progress monitoring including QRI-5 assessments at regular intervals (*id.* at p. 5).

The Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP"; however, testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (*see R.E.*, 694 F.3d at 186-88; *see also E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; *P.C. v. Rye City Sch. Dist.*, 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]).

Here, the reading specialist's testimony is limited to the actual reading program described in the August 2016 IEP, which states "Resource room Program (Resource Room – Reading): Group" and which was implemented during a portion of the 2016-17 school year (Joint Ex. 3 at pp. 1, 12; *see* Dist. Ex. 42 at pp. 4-5, 9, 13). Thus, even if the August 2016 IEP was at issue in this appeal, the majority of the testimony of the reading specialist would not be impermissibly retrospective as it describes the service listed in the IEP.²¹ Further, for the purposes of examining the appropriateness of the IEPs for the 2017-18 and 2018-19 school years, the testimony is not retrospective inasmuch as the district reading specialist attended the relevant CSE meetings for the student's 2017-18 and 2018-19 school years, at which she reported on the student's progress, and the testimony describes IEP services as implemented in the district program prior to the development of the IEPs at issue and the parents' placement decision (*see* Dist. Exs. 23 at p. 1; 42 at pp. 7-9; Joint Exs. 7 at p. 1; 8 at p. 1).

Turning to the appropriateness of the recommendations of the September 5 and September 25, 2017 CSEs to address the student's reading needs, a review of the student's progress during the 2016-17 school year provides context for the CSEs' recommendations for the student for the 2017-18 school year and the parents' position that the student required 1:1 reading support, rather than support in a small group. In her affidavit testimony, the reading specialist noted that, during the first five months of the 2016-17 school year, the student showed growth with the pre-writing and the brainstorming process and made progress in reading (Dist. Ex. 42 at pp. 5, 7, 9).²² The district's reading specialist indicated that "through daily review of sounds, practice decoding and encoding using segmentation and blending skills unique to the Wilson program [the student] successfully

²¹ The parents argue that reading specialist's testimony about the number of students in the resource room during the 2016-17 school year (three students) represented an improper attempt to rehabilitate the IEP recommendation for a resource room. However, State regulation requires a resource room not exceed a ratio of 5:1 (8 NYCRR 200.6[f][3]) and at no point did the reading specialist testify that the student's class could not exceed three students or that the student specifically needed the smaller 3:1 grouping in order to receive benefit from the reading instruction.

²² The student's father reported that the student took part in a 2016 summer program at Kildonan where he made improvement in reading and writing (Parent Ex. B at p. 3).

completed books 1, 2, and 3 of the Wilson reading program during his 5-plus months . . . attending [the district's middle school]" (*id.* at p. 5). The reading specialist stated that the student was able to decode single-syllable and multisyllabic words containing short vowel patterns and closed syllable types as evidenced by his ability to accurately read Wilson word lists for each lesson (*id.*). She explained that students must read at least 13/15 words correct to demonstrate mastery and that between October 2016 and January 2017 the student decoded 15/15 words correctly on 10 occasions, and 14/15 words correctly on 3 occasions (*id.* at pp. 5, 19). The reading specialist stated that she monitored the student's oral reading (accuracy and fluency) and the student was able to accurately decode 95 percent or more of the passages that he read (*id.* at p. 5). The reading specialist indicated that during the 2016-17 school year the student's reading skills were also monitored using the QRI-5 (*id.*). The student progressed from reading a fourth-grade text with 97 percent accuracy, 99 words per minute, and 88 percent comprehension in November 2016 to reading a fifth-grade text with 97 percent accuracy, 101 words per minute, and 88 percent comprehension in January 2017 (*id.*). The reading specialist reported that the student's fluency and accuracy increased over the five months during the 2016-17 school year that he was in attendance (*id.*).

Further, according to the student's second quarter report card and IEP progress report for the 2016-17 school year, he was passing his classes and making gradual progress towards his study skills, writing, and mathematics IEP goals and satisfactory progress towards his reading goal (Dist. Ex. 14; see also Tr. pp. 54-55, 58-59, 156-57).²³

The student attended Kildonan during the second half of the 2016-17 school and, according to a July 2017 letter, the parents advised the district that the student had a "very successful end of the academic year" (Joint Ex. 5 at p. 1). The July 2017 letter set out several programmatic features the parents felt needed to be integrated into the student's IEP so that "we might be able to return"

²³ With respect to information summarized in the April 2017 report from the private psychologist—which, as noted above, was available to the September 25, 2017 CSE—although the student's standardized test scores for reading did not increase between March 2015 and April 2017, the hearing record still supports the district's assertion that the student made progress while attending district schools and receiving reading instruction in a small group setting, as detailed above. A comparison of the student's performance on the Kaufman Test of Educational Achievement-Second Edition (KTEA-II), administered by the district in March 2015 and by the private psychologist in April 2017, showed little variation in the student's standard scores on measures of reading (Dist. Ex. 21 at p. 3). For example, in March 2015 the student attained standard scores of 87 in reading accuracy, 106 in reading comprehension, and a total reading score of 95 (*id.*). When the test was re-administered in April 2017, the student attained standard scores of 88 in reading accuracy, 108 in reading comprehension, and a total reading score of 98 (*id.*). The district reading specialist testified that "As student's age, earning the same or similar score is indicative that the student's skills have kept pace with continuing and expanding demands" (Dist. Ex. 42 at p. 5). The school psychologist testified that he "infer[ed] that the standard scores remained in the average range and that there was skill growth there because when you look at a standard score in March of 2015, those are based on what's expected of [the student] at his age. And then when you look at the standard scores in April 2017, that is what is expected of his age at that date" (Tr. p. 155). The school psychologist explained that to maintain relatively the same standard score the student had to answer more questions and had to do better on the test (Tr. p. 155). He stated that to him the scores indicated progress (Tr. p. 155). However, whether or not the standard scores are indicative of progress, additional data collected by the district shows that the student mastered specific reading skills and increased his reading level while receiving small group instruction from the district (see Dist. Exs. 14; 42 at pp. 5, 7, 9).

to a district placement (*id.* at p. 2). As noted above, specifically, the parents identified small group instruction with a qualified Orton-Gillingham instructor, a clear schedule that was repeated daily, guided help in organization, individualized implementation of technology, pre-teaching and re-teaching, hands on experiences, a schedule that would give the student academic, physical and mental balance, and IEP implementation in every class as changes that would allow the student to return to a public school setting (*id.*). According to the PPS director, the September 5, 2017 CSE addressed each of the points raised in the parents' July 2017 letter (Tr. pp. 66-67).

Relative to the August 2016 IEP, the September 5, 2017 CSE recommended the same 80-minute sessions of consultant teacher services in ELA and math (adjusted from every other day to two sessions per four day cycle) but doubled the recommendation for resource room services from 40 minutes every other day to 80 minutes every other day, added psychological counseling services to address the parents' report that the student continued to experience anxiety, and continued the previous supplementary aids/program modifications/accommodations and assistive technology supports but added additional specialized tutorial (increased to daily, from every other day), support from a shared teacher's assistant in social studies and science, and a word study class every other day (compare Dist. Ex. 23 at pp. 12-16, with Joint Ex. 3 at pp. 12-15; see Tr. p. 67; Dist. Ex. 24 at pp. 1-1). According to the September 5, 2017 prior written notice, the CSE considered and rejected "more restrictive settings" as the student's needs could be met in the "general education program" with the identified supports and services, "without requiring removal to self-contained academic classes or more restrictive placements" (Dist. Ex. 24 at p. 2).

The September 5, 2017 prior written notice indicated that direct consultant teacher services in ELA were recommended to address the student's needs related to reading accuracy and fluency, comprehension, spelling, and writing (format and development, content, editing and revising) (Dist. Ex. 24 at pp. 1, 2).²⁴ As the parents argue, the September 5, 2017 IEP is silent with respect to what areas of deficit would be addressed in the resource room program (see Dist. Ex. 23 at pp. 1, 12); however, the September 5, 2017 prior written notice stated that resource room was recommended for supplemental instruction and support for reinforcement, pre-teaching, and re-teaching of writing and math strategies (Dist. Ex. 24 at pp. 1-2).²⁵

²⁴ State regulations provide that "[d]irect consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher, to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]). Consultant teacher services do "not include primary academic instruction" but aim to adapt "content, methodology, or delivery of instruction" to the student ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 8, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/documents/continuum-schoolage-revNov13.pdf>).

²⁵ A resource room program is defined by State regulation as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). State policy guidance further clarifies that resource room services are for the purpose of "supplementing" instruction ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 9 [emphasis in the original]).

In addition to consultant teacher and resource room services, further review of the September 5, 2017 IEP and accompanying prior written notice reveals that the CSE recommended supplementary aides and services along with program modifications and accommodations to address the student's needs in reading. The September 5, 2017 CSE recommended that the student receive five 40-minute sessions per week of specialized tutorial in a class of no more than 15 students to provide re-teaching, pre-teaching, and reinforcement and review of key concepts and skills (Dist. Exs. 23 at p. 14; 24 at p. 1). Although within the September 5, 2017 prior written notice the specialized tutorial was identified as an "intensive support[]" offered in the general education setting," the student's September 5, 2017 IEP indicated that for this service the student would have access to a subject matter teacher, special education teacher and/or teaching assistant (Dist. Ex. 23 at p. 14; 24 at p. 2). The September 5, 2017 CSE also recommended that the student receive one 40-minute session five times per week of word study tutorial class to provide the student with supplemental instruction in decoding and encoding to support reading skill development (Dist. Ex. 23 at p. 15). The September 5, 2015 prior written notice indicated that the instruction would be provided by a certified reading teacher and would also support the development of vocabulary (Dist. Ex. 24 at p. 1). At the impartial hearing, the PPS director confirmed that the word study tutorial was a program with a certified literacy specialist, recommended to continue work on the student's fluency and decoding needs (Tr. p. 79).²⁶

Also, and in addition to the supplementary aids and services and program modifications/accommodations targeting the student's reading needs, the September 5, 2017 IEP included accommodations and supports targeting the student's writing needs including the use of editing and revising lists, use of graphic organizers, use of a word processor with spell and grammar check, copy of class notes, and access to a portable word processor and software for access to word prediction, highlighting information, and extracting notes from the internet (Dist. Ex. 23 at pp. 12-15). Additionally, the September 5, 2017 IEP identified the following resources and supports to address the student's attention-related needs and need for a multi-sensory structured language program such as quiet locations and seating away from distracting peers, use of technology as reading and writing support, models and multiple examples (visual/hands on whenever possible), orally discussing tasks and steps required, movement breaks, and visual schedules, checklists, and reminder strategies (Dist. Ex. 23 at pp. 5-7, 9-10).

The CSE reconvened on September 25, 2017 and maintained the same recommendations as set forth in the September 5, 2017 IEP with the addition of a few supports (compare Joint Ex. 7 at pp. 12-16, with Dist. Ex. 23 at pp. 12-16). The October 2017 prior written notice stated that the CSE considered and rejected the parents' request for 1:1 Orton-Gillingham instruction, as well as the small class size the private school offered (seven to eight students in a class) (Dist. Ex. 27 at p. 3; see Dist. Ex. 42 at p. 9).

²⁶ The September 5, 2017 CSE further provided that the student receive one 40-minute session daily of a shared teaching assistant for social studies and science classes (Dist. Ex. 23 at p. 14; 24 at p. 1). The September 5, 2017 prior written notice indicated that the shared teaching assistant, working under the direction of the classroom teacher, was recommended to support focusing and attending, to help repeat and reinforce instruction, to break down tasks, ensure use of assistive technology, and provide accommodations and modifications as outlined in the IEP (Dist. Ex. 24 at p. 1).

During the CSE meeting, the parents and staff from Kildonan shared their position that the student required 1:1 instruction for reading but district staff indicated that—based on the student's performance in the district, as well as reports from Kildonan—the student made progress in small groups and performed in the average range in the general education classroom setting with support (Tr. pp. 72-75, 113-15; Dist. Ex. 42 at p. 9). As summarized above, and consistent with the position of the district members of the CSE, the evidence in the hearing record supports that the student made progress during the 2016-17 school year in the general education setting with small group supports (see Dist. Exs. 14; 42 at p. 5). With respect to the duration of the reading instruction period, the September 25, 2017 CSE also considered and rejected 60-minute periods, which the student was receiving at his private placement (Dist. Ex. 27 at p. 3). The October 2017 prior written notice stated that given the student's ADHD he required frequent breaks and that shorter length reading class periods were more instructionally appropriate for the student (*id.*). The prior written notice indicated that in the 80-minute district classes the CSE recommended that the student receive a movement break that accommodated his ADHD without losing instructional time (*id.*; compare Dist. Ex. 23 at pp. 12-15, with Joint Ex. 7 at pp. 14-15). The CSE maintained that the student had made progress in the small group setting where he received reading services and that with the recommended nine hours per week of instruction in a small group setting (resource room, word study class, specialized tutorial) the student would be getting intensive instruction on a daily basis (Dist. Ex. 27 at p. 3).

With regard to the parents' preference for Orton-Gillingham methodology, the PPS director testified that, while district reading teachers may embed Orton Gillingham approaches, they were not the sole foundation of reading instruction as reading encompassed "many more complex behaviors and needs and characteristics that just go beyond a decoding and fluency program" (Tr. p. 97). The PPS director added that in general they did not specify methodologies in IEPs but instead specified goals, needs and strengths and that it was the teacher's professional responsibility to develop and use approaches, methods, and materials to help the student make progress in reading (*id.*).

As detailed above, the hearing record does not support the parents' contention that the IHO erred in admitting or relying upon the testimony of the district reading specialist regarding the reading instruction the student received during the 2016-17 school year. Further, the hearing record supports the district's position that the September 5 and September 25, 2017 IEPs adequately addressed the student's needs—including his needs related to his diagnosis of dyslexia—through the inclusion of a constellation of supports and services targeting the student's reading deficits, and that the district offered the student FAPE in the LRE for the 2017-18 school year.

B. May 2018 IEP

1. Annual Goals

The parents raise the same arguments with respect to the annual goals included in the May 2018 IEP. Keeping in mind the legal standards set forth above, the evidence in the hearing record does not support the parents' contention that the annual goals contained in the May 2018 IEP denied the student a FAPE.

With respect to new information available to the May 2018 CSE, the PPS director testified that when the CSE reconvened on May 11, 2018 it had report cards and test results from Kildonan, as well as a description of the student's progress and the work Kildonan was doing with the student (Tr. p. 78).

The IEP developed as a result of the May 2018 CSE meeting identified the student needs as being very similar to the prior school year, as detailed above, and stated that he continued to have difficulties with attention, focus, working independently, and organization and time management, and benefitted from reinforcement of skills in small group settings and from hands on activities and visuals or other concrete references (compare Joint Ex. 8 at pp. 6-11, with Joint Ex. 7 at pp. 5-10; see Dist. Ex. 29 at p.1). The prior written notice summarizing the May 2018 CSE meeting stated that the student's "deficits with attention and working memory continue to affect reading fluency and accuracy as well as self-monitoring in order to accurately recognize sight words and decode words" (Dist. Ex. 29 at p. 2).

The IEP included results from standardized testing conducted by Kildonan in September 2017 reflecting the following percentile scores: on the Gates-MacGinitie Reading Test Fourth Edition (GMRT), the 43 percentile for reading comprehension and total reading and 39th percentile for vocabulary; on the Gray Oral Reading Test-Fifth Edition (GORT-5), the fifth percentile for accuracy and the ninth percentile for fluency and rate; and, on the WRMT-III, the third percentile on the word attack subtest (standard score 72) and the 23rd percentile on the word identification subtest (standard score 89) (id. at p. 2; see Dist. Ex. 22). With respect to reading, the May 2018 IEP included information from Kildonan describing the student as "an avid reader who [wa]s beginning to enjoy reading" but indicated that the student was still "working on decoding of multisyllabic words" (Joint Ex. 8 at p. 8). According to the IEP, Kildonan staff could not identify the student's approximate reading level but named a book similar to books that the student read (id.).²⁷ According to the PPS director, committee members had concerns that the student was not making progress at Kildonan (Tr. pp. 78-79).

In this case the annual goals included in the September 2017 IEP were carried over to the May 2018 IEP with the exception of a social/emotional goal targeting the student's ability to identify and use coping strategies to help lessen feelings of frustration or anxiety, which was dropped (compare Dist. Ex. 23 at pp. 11-12, with Joint Ex. 8 at pp. 11-12). The May 2018 IEP indicated that the student did not access counseling or present with anxiety at Kildonan (Dist. Ex. 29 at p. 2; Joint Ex. 8 at p. 9).

The carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'" (P.C., 232 F. Supp. 3d at 413-15, quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; see J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at * 12 [S.D.N.Y. Feb. 7, 2018] [a

²⁷ According to the district PPS director, the book identified by Kildonan was a mid-third grade level book (Tr. p. 79).

subsequent IEP during the same school year is not inappropriate "simply because it did not change significantly" compared to its predecessor IEP]).

Here, absent changes in the student's needs and for the reasons stated above, the evidence in the hearing record supports a finding that the May 2018 IEP included annual goals which appropriately targeted several of the student's areas of deficit and that the failure to include an annual goal to address the student's reading accuracy and fluency, without more, does not support a finding that the district failed to offer the student a FAPE.

2. Specialized Reading Instruction

For the May 2018 IEP the parents raise the same argument concerning the testimony of the reading specialist, which has been sufficiently addressed above. As for the appropriateness of the May 2018 IEP with respect to the student's reading needs, the May 2018 CSE identified student's needs as being very similar to his needs during the prior school year (compare Joint Ex. 7 at pp. 5-10, with Joint Ex. 8 at pp. 6-10).

The IEP indicated that the student received daily 1:1 reading instruction at Kildonan "based on Orton-Gillingham principles yet flexibly adapted to address [the student's] attention difficulties" (Joint Ex. 8 at p. 8). The IEP reported information from Kildonan staff that the student struggled "even in a small structured setting" due to his attentional difficulties (id.).

Apart from the discontinuation of individual counseling services, the May 2018 IEP included the same programs, services and supports recommended in the September 25, 2017 IEP (compare Joint Ex. 7 at pp. 12-16, with Joint Ex. 8 at pp. 12-17). However, in addition, the May 2018 CSE recommended that the student receive 12-month services in the form of a 15:1 special class, five times weekly for two hours and thirty minutes (Dist. Ex. 29 at pp. 1, 2; Joint Ex. 8 at pp. 1, 17). According to the May 2018 prior written notice, the May 2018 CSE recommended 12-month services for the student because standardized testing completed by Kildonan demonstrated regression in word attack skills during summer 2017, even though the student attended Kildonan for three weeks of summer instruction (Dist. Ex. 29 at p. 2).

The May 2018 prior written notice again specifically described the CSE's rationale in recommending the particular supports and services set forth in the IEP and the type of supports that would be provided or skills addressed by each, including the following: math consultant teacher services (to work on math computation and math applications); ELA consultant teacher services (to work on reading accuracy and comprehension and writing); resource room services (for supplemental instruction and support in reading and math), shared teaching assistant in sciences and social studies (to support focus and attending and to help implement other supports in the IEP), specialized tutorial (to provide re-teaching, pre-teaching, and reinforcement and review of key concepts and skills), and word study class (to provide "supplemental instruction from a certified reading teacher in decoding and encoding and to support reading comprehension and development of vocabulary") (Dist. Ex. 29 at p. 2). In addition, the prior written notice indicated that, during the May 2018 CSE meeting, the special education teacher elaborated upon "the instructional format" of several of the services (id.). Specifically, the special education teacher shared that small groups and customized lessons were used during tutorial classes, that

"[s]mall group/station teaching" was used in the ELA and math classes with the consultant teacher services, and that "[o]ngoing review, reteaching, preteaching and interactive activities [we]re provided in resource room and tutorial classes" (id.).

Again, absent changes in the student's needs, the hearing record demonstrates that the May 2018 IEP adequately addressed the student's reading deficits and that the district offered the student FAPE in the LRE for the 2018-19 school year.

VII. Conclusion

Having determined that the parents' challenges to the IHO's determination that the district offered the student a FAPE in the LRE for the 2017-18 and 2018-19 school years are without merit, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parents' unilateral placement of the student at Kildonan and Camp Dunnabeck or whether equitable considerations weigh in favor of the parents' requested relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 26, 2020**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**