The University of the State of New York

The State Education Department
State Review Officer

No. 07-114

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

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorney for petitioner, Michael K. Lambert, Esq., of counsel

Family Advocates, Inc., attorney for respondents, RosaLee Charpentier, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Carmel Central School District, appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' daughter and ordered it to reimburse respondents for their daughter's tuition costs at the Kildonan School (Kildonan) for the 2006-07 school year. The appeal must be sustained.

Preliminarily, I will address a procedural issue. The regulations of the Commissioner of Education provide that a memorandum of law shall not exceed 20 pages in length (8 NYCRR 279.8[a][5]), and specifically state that documents that fail to comply with the form requirements may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]; Application of a Child with a Disability, Appeal No. 06-065; Application of the Bd. of Educ., Appeal No. 04-080). The memorandum of law that respondents submitted at the time of their answer exceeded 20 pages in length and was rejected. Although respondents subsequently filed with the Office of State Review an amended memorandum of law consisting of 20 pages, the amended memorandum of law did not comply with the font size and line spacing requirements of the state regulations (8 NYCRR 279.8[a][2]). Therefore, in the exercise of my discretion, I reject respondents' amended memorandum of law and will not consider the document.

At the commencement of the impartial hearing, respondents' daughter was attending ninth grade at Kildonan (Tr. pp. 6, 7). Kildonan has not been approved by the Commissioner of

Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student was described as a friendly and capable student, who was sometimes reticent to initiate social interaction (Dist. Exs. 1d at p. 4; 33 at p. 2; 39a at p. 61). Her cognitive abilities were described in the average range of functioning and her academic achievement test scores were primarily in the low average to average range with relative strengths in understanding directions and writing samples (above average) and relative weakness in math fluency (low) (Dist. Exs. 29 at p. 4; 33 at p. 4). The student's eligibility for special education programs and services and classification as a student with a learning disability are not in dispute in this proceeding (see 8 NYCRR 200.1[zz][6]).

The student's prior educational history is described in Application of a Child with a Disability, Appeal No. 05-063 and Application of a Child with a Disability, Appeal No. 06-005 and will not be repeated here in detail. Briefly, the student was initially classified as learning disabled by petitioner's Committee on Special Education (CSE) when she was in first grade (Tr. p. 41). The student's overall intellectual functioning falls within the average range, and she has received varying levels of special education services throughout her elementary school years to address her deficits in reading, math, and spelling (Dist. Ex. 21 at p. 3). For the 2002-03 and 2003-04 school years, respondents unilaterally enrolled the student in private placements (Tr. p. 58; see Dist. Ex. 21 at p. 3). Respondents unilaterally placed the student at Kildonan for the 2004-05 and 2005-06 school years (Application of a Child with a Disability, Appeal No. 06-005; Application of a Child with a Disability, Appeal No. 05-063).

The February 2006 progress reports from Kildonan indicated that the student was performing satisfactorily except in her science class (Dist. Ex. 39a at pp. 59-64). The student's science instructor reported that the student had a difficult term and achieved limited success due to the student's frequent absences that prevented her from receiving repetition of the concepts covered in class, which was necessary for the student's mastery of the concepts (id. at p. 63). The Kildonan instructor who provided individual language training tutorials to the student reported that the student had a good memory for spelling words, including words learned during the 2005-06 school year; recognized when her writing did not flow; and was an "outstanding" independent reader (id. at p. 59). The student received a grade of B in literature and was reported to demonstrate a willingness to read aloud in class as well as to role-play different characters in plays (id. at p. 61). The student's math instructor reported that the student made good progress in math and improved her grades by completing all her assignments, correcting those assignments, and increasing her test grades (id. at p. 60). The instructor opined that the student had a high aptitude in math and needed to continue to apply herself (id.).

The CSE convened on March 28, 2006 for the student's annual review and to develop her individualized education program (IEP) for the 2006-07 school year (Dist. Ex. 1c). CSE meeting notes stated that the March 2006 CSE reviewed reports from the student's teachers at Kildonan and determined that she had made excellent progress in language training, math, literature, and history, but that science was more difficult for her (id. at p. 1). The March 2006 CSE proposed placement at petitioner's high school with a program of consultant teacher for all academic classes, special class reading, and counseling (id.). CSE meeting notes stated that the March 2006 CSE would schedule another meeting with representatives from petitioner's high school to finalize the student's IEP (id.).

Achievement testing of the student by Kildonan in May 2006 yielded standard (and percentile) scores of 86 (18) in word identification and 97 (41) in word attack, as measured by the Woodcock Reading Mastery Test-R/NU; and 8 (25) in rate, 7 (16) in accuracy, and 6 (9) in fluency as measured by the Gray Oral Reading Test-Fourth Edition (Dist. Ex. 39a at p. 73). On the Test of Written Spelling-4, the student achieved a standard (and percentile) score of 90 (26) (id.). Administration of the Gates-MacGinitie Reading Tests-Fourth Edition yielded grade equivalent (and percentile) scores of 6.9 (33) in vocabulary and 10.2 (63) in comprehension (id.). In the area of mathematics, the student achieved grade equivalent (and percentile) scores of 10.2 (63) in problem solving, 6.9 (27) in procedures, and a total score of 8.7 (48), as measured by the Stanford Achievement Test (id. at p. 74).

The June 2006 progress reports from Kildonan indicated that the student received grades of B in math, B+ in literature, B in history, and C in science (Dist. Ex. 39a at pp. 67-70). The Kildonan instructor who provided individual language training tutorials to respondents' daughter, reported that the student's scores on the diagnostic testing administered in May 2006 revealed significant gains in her reading rate, accuracy, and fluency; great improvement in spelling; and gains in both reading comprehension and word attack (id. at p. 66).

Petitioner conducted an educational evaluation of the student on August 8, 2006 (Dist. Ex. 33). Administration of Form A of the Woodcock-Johnson III Tests of Achievement (WJ III) yielded standard scores in broad reading and broad written language consistent with previous testing completed by petitioner in June 2004, with some increase in each area (id. at p. 1). The student achieved standard (and percentile) subtest scores of 90 (25) in letter-word identification, 85 (16) in reading fluency, 91 (26) in story recall, 112 (78) in understanding directions, 88 (21) in calculation, 63 (1) in math fluency, 88 (22) in spelling, 80 (9) in writing fluency, 96 (39) in passage comprehension, 93 (31) in applied problems, and 118 (88) in writing samples (id. at p. 4). The evaluator determined that compared to other students her age, the student exhibited average English oral language skills, low average academic skills, an average ability to apply academic skills, and that her fluency with academic tasks was low (id. at p. 3). No discrepancies were noted among her achievement areas (id.).

The CSE reconvened on August 10, 2006 to finalize the student's IEP for the 2006-07 school year (ninth grade) (Dist. Ex. 1d). The August 2006 CSE recommended that the student be placed at petitioner's high school and recommended a program of consultant teacher support for English, math, science, and social studies; special class reading daily; and counseling one time per week in a small group (id. at pp. 1-2.). Program modifications included refocusing and redirection, preferential seating, copy of class notes, extended time for in class assignments, books on tape, use of a calculator, and modified homework assignments (id. at p. 2). Assistive technology devices and services included use of a word processor, books on tape, and an unspecified assistive technology consultation (id.). The student was afforded the following testing modifications: extended time (1.5); directions read/explained; clarification of test questions; special location; spelling requirements waived; and use of a word processor (id.). The proposed IEP contained annual goals related to study skills, reading, writing, mathematics, and social emotional needs (id. at pp. 5-8).

By two letters both dated August 23, 2006, respondents rejected the August 2006 CSE's recommended program, alleging substantive violations, gave notice of their unilateral enrollment

of their daughter in Kildonan for the 2006-07 school year, and requested transportation to Kildonan (Dist. Ex. 2a; Parent Ex. Q). By due process complaint notice dated August 23, 2006, respondents requested an impartial hearing seeking tuition reimbursement for the 2006-07 school year (Dist. Ex. 2b).

The impartial hearing commenced on April 10, 2007 and ended on June 26, 2007 after seven days of testimony. By order dated August 24, 2007, the impartial hearing officer found that he was without jurisdiction to determine procedural issues because none were raised in the due process complaint notice (IHO Decision at p. 18).[1] The impartial hearing officer then found that, although much discussion occurred during the August 2006 CSE meeting and adequate information was gathered and reflected in the August 2006 IEP, petitioner did not provide the student with a free appropriate public education (FAPE)[2] because of the "uninspired rendition" of the student's present levels of performance in the August 2006 IEP (id. at p. 19). The impartial hearing officer further found that Kildonan was an appropriate placement for the student and that the equities favored an award of tuition reimbursement and related costs to respondents (id. at pp. 23-26).

Petitioner appeals and requests that the impartial hearing officer's decision awarding tuition and transportation reimbursement be overturned. Petitioner asserts that the impartial hearing officer exceeded his jurisdiction and erred by basing his determination upon contentions not asserted in the due process complaint notice. Petitioner further contends that the impartial hearing officer erred by finding that it failed to offer a FAPE based on the "uninspired rendition" of the student's present levels of performance in the August 2006 IEP because that is not the proper legal standard for review. Further, petitioner alleges that respondents failed to demonstrate that the August 2006 IEP was inappropriate based upon their arguments asserted in the due process complaint notice. Petitioner asserts that the August 2006 IEP was appropriate and would have led to continued educational gains for the student. Petitioner also contends that the impartial hearing officer erred in finding that Kildonan was appropriate because he did not consider the legal requirement of placement of a student with a disability in the least restrictive environment (LRE). Therefore, petitioner requests a finding that respondents failed to meet their burden of demonstrating the inappropriateness of the August 2006 IEP, that petitioner offered the student an

[1] The page numbers cited in this decision were added to the impartial hearing officer's decision upon its receipt by the Office of State Review staff in the interests of clarity and accuracy. They were not a part of the hearing record before the State Review Officer.

[2] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

appropriate program for the 2006-07 school year, and that respondents failed to demonstrate that Kildonan was an appropriate placement.

In their answer, respondents request that the impartial hearing officer's decision be upheld in its entirety and that petitioner's appeal be dismissed.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[3] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195,

[3] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

As an initial matter, I concur with petitioner's contention that the impartial hearing officer erred by considering evidence concerning issues not raised in respondents' due process complaint notice. Under the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the due process hearing that were not raised in its original due process complaint notice unless the original complaint is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). The Senate Report pertaining to this amendment to the IDEA noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments'

notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (id.). In the instant case, a review of respondents' due process complaint notice reveals that they specifically alleged three substantive violations regarding the student's August 2006 IEP (Dist. Ex. 2b). The due process complaint notice does not include any allegations pertaining to the appropriateness of the goals or present levels of performance in the August 2006 IEP (id.). During the impartial hearing, counsel for respondents questioned the propriety of the goals listed in the June 2006 IEP, at which time petitioner's counsel objected, noting that the issue was not properly before the impartial hearing officer because it had not been raised in respondents' due process complaint notice (Tr. pp. 171, 1031, 1038-39). The impartial hearing officer allowed counsel for respondents to question the witnesses on the development and appropriateness of the goals in the August 2006 IEP, and further determined that he had subject matter jurisdiction with respect to this issue, although it was not raised in respondents' due process complaint notice. The impartial hearing officer also permitted witnesses to testify in response to questions from respondents' counsel regarding procedural matters that were not contained in the due process complaint notice over the objections of petitioner's counsel (Tr. pp. 583-88, 676-78, 689). Furthermore, the impartial hearing officer assumed subject matter jurisdiction with respect to the student's present levels of performance in the August 2006 IEP even though it was not raised in respondents' due process complaint notice or at the impartial hearing. A review of the hearing record also indicates that at no point during the impartial hearing did respondents' counsel amend the due process complaint notice, nor did she make any request to do so. Under the circumstances, I agree with petitioner that the impartial hearing officer should have confined his determination to issues raised in respondents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

Petitioner further contends that the challenged IEP for the 2006-07 school year was appropriate and would have led to continued educational gains for the student. For the reasons discussed below, I agree.

The CSE convened on March 28, 2006 for the student's annual review and to develop her IEP for the 2006-07 school year (Dist. Ex. 1c). The hearing record reflects that the May 2006 CSE reviewed reports from the student's teachers at Kildonan and determined that she had made excellent progress in language training, math, literature, and history, but that science was more difficult for her (Tr. pp. 194, 197, 225; Dist. Ex. 1c at p. 1). The student's father testified that the consultant teacher model at petitioner's high school was proposed, but not "solidified" and that a reading program was discussed (Tr. p. 200). The student's father further testified that he asked for the meeting to be adjourned because representatives from petitioner's high school were not in attendance (Tr. p. 198). CSE meeting notes indicate that another CSE meeting would be scheduled to include representatives from the high school in order to finalize the student's IEP (Dist. Ex. 1c at p. 1).

The CSE reconvened on August 10, 2006 (District Ex. 1d). The student and her mother were in attendance as were a middle school psychologist, a high school special education consultant teacher, and a ninth grade regular education English teacher (id. at p. 4). The August 2006 CSE chairperson was also the psychologist at petitioner's high school (Dist. Ex. 42 at p. 1). The hearing record reflects that the August 2006 CSE reviewed updated evaluative information, including progress reports from the student's private placement; discussed in detail the student's strengths and needs; proposed goals to address the student's identified areas of deficit; and explained the recommended placement and related services (Dist. Ex. 42). The student was included in the August 2006 CSE's discussions (id. at pp. 2, 3, 5, 13, 14, 16, 18).

The August 2006 CSE recommended that the student be placed at petitioner's high school and receive a program of consultant teacher support for English, math, science, and social studies, special class reading daily, and counseling one time per week in a small group (District Ex. 1d at pp. 1-2.). Program modifications included refocusing and redirection, preferential seating, copy of class notes, extended time for in class assignments, books on tape, use of a calculator, and modified homework assignments (id. at p. 2). Assistive technology devices and services included use of a word processor, books on tape, and an unspecified assistive technology consultation (id.). The student was afforded the following testing modifications: extended time (1.5); directions read/explained; clarification of test questions; special location; spelling requirements waived; and use of a word processor (id.). The proposed IEP contained annual goals related to study skills, reading, writing, mathematics, and social emotional needs (id. at pp. 5-8).

The consultant teacher model at petitioner's high school consists of a regular education teacher and a special education teacher working together within one classroom (Tr. p. 418). A regular education curriculum is followed (Tr. pp. 90, 1014-15). The role of the special education teacher is to support the students who are identified as special education students and to provide them with specific accommodations and any modifications to the curriculum or materials to ensure that the students are successful within the regular education and Regents curriculum (Tr. pp. 418-19, 959). A ninth grade special education consultant teacher testified that the consultant teacher also supports the regular education teacher to meet the needs of the "different learners" in the classroom (Tr. p. 1024; Dist. Ex. 42 at p. 6). She indicated that consultant teacher services are "subtle" so that students do not feel targeted as special education students within a regular education classroom (Tr. pp. 1024-25). Petitioner's CSE chairperson and the special education consultant teacher both testified that classification alone is not a criterion for placement in the consultant teacher model but that students must have the cognitive ability to understand the curriculum when provided with individualized support (Tr. p. 1092). Consideration of the consultant model as a placement for a student is based on standard scores, information from teachers regarding the student's progress and level of motivation, and the student's ability to understand language and the curriculum (Tr. pp. 419-20). Accommodations and modifications, in addition to those specified on a student's IEP, such as a reading station that students can report to when they are having difficulty reading or writing in a class or are taking a test, are available to students throughout the day (Tr. pp. 889-92). The CSE chairperson testified that after school help is also available to all students and is provided by a group of five teachers, including a special education teacher (Tr. p. 445).

The special reading class proposed for the student is taught by a special education teacher certified in levels one and two of the Wilson reading program (Wilson) (Tr. pp. 876-77). She

described Wilson as a systematic language-based program based on the Orton-Gillingham methodology used specifically with adolescents who have problems with decoding, encoding, and reading fluency (Tr. pp. 877-79). The special reading class recommended for the student meets daily for 40 minutes and is comprised of seven students who all exhibit difficulty with decoding, spelling, and their reading fluency (Tr. pp. 881, 884). The reading teacher administers pre-tests at the start of the school year and assesses the students' progress on a daily basis (Tr. pp. 902, 929-932). The special education reading teacher testified at length about how she would address the student's reading and writing deficits including methods of direct instruction, assessment of progress, and use of assistive technology and opined that the content taught was the same as what the student had been taught at Kildonan (Tr. pp. 885-89, 897, 928-29; see Dist. Ex. 39d). Within the special reading class, the student would have received both individual and group instruction dependent upon her areas of need and those of the other students in the class (Tr. pp. 902, 911, 926). The special education reading teacher testified that she meets with the special education consultant teachers every other day to discuss students and use of assistive technology programs and accommodations (Tr. pp. 940-41).

The student's cognitive functioning is in the average range (full scale IQ score 105) and the results of educational achievement testing completed two days prior to the August 2006 CSE meeting indicate that compared to other students her age, she exhibits skills primarily in the low average to average range with relative strengths in understanding directions and writing samples (above average) and relative weakness in math fluency (low) (Dist. Exs. 29 at p. 4; 33 at p. 4). Her oral language skills are average as is her ability to apply academic skills (Dist. Ex. 33 at p. 4). Petitioner's director of pupil services testified that the student has the ability to understand what is said and can participate commensurate with her cognitive ability (Tr. p. 1093). The special reading class teacher testified that the student's passage comprehension and oral language standard scores indicated that she could absorb the material presented in a regular education classroom at the same rate as other students (Tr. p. 892; see Dist. Exs. 39d; 39e). Progress reports from the student's instructors at Kildonan indicated the student performed satisfactorily, was typically prepared for class, and that she demonstrated the willingness and initiative to improve her grades when needed (Dist. Ex. 39a at pp. 59-64). The Kildonan instructor who provided individual language training tutorials to respondents' daughter reported that the student's scores on diagnostic testing administered in May 2006 revealed significant gains in her reading rate, accuracy, and fluency; great improvement in spelling; and gains in both reading comprehension and word attack (id. at p. 66). The Kildonan academic dean testified that the student demonstrated "substantial growth" in comprehension and vocabulary (Tr. p. 322).

The student achieved a broad reading cluster standard score of 88 and a broad math cluster standard score of 85 as measured by the WJ-III, and a processing speed index standard score of 100 (average range) as measured by the WISC-IV (Dist. Exs. 29 at pp. 2, 5; 33 at p. 4). Class profiles contained in the hearing record reflect that the special education students enrolled in the classes that the CSE proposed for the student have IQ scores ranging from 87 to 113 and reading achievement standard scores ranging from 68 to 94 in the proposed reading class, 84 to 100 in the proposed science class, 80 to 100 in the proposed English class, and 80 to 100 in the proposed global studies class (Dist. Ex. 35 at pp. 2, 4-6). In the student's proposed math class, the math achievement standard scores ranged from 85 to 102 (id. at p. 3). Processing speed scores ranged from 70 to 134, with an average score of 92 (Dist. Ex. 36).

Based on the hearing record before me, I find that petitioner's proposed program was reasonably calculated to provide educational benefits to the student during the 2006-07 school year, reflected the requisite alignment between the student's needs and her goals necessary for the provision of an appropriate program in the LRE, and provided for respondents' daughter to be grouped with students of similar special education needs and abilities.

Several times throughout the August 2006 CSE meeting, the student's mother was provided the opportunity to voice any concerns or disagreements with the recommendations being made, but she did not do so (Tr. pp. 6, 14, 15, 16, 18, 19). Moreover, although the Kildonan dean testified that in January or February 2006 he had recommended to respondents that the student remain at Kildonan for the 2006-07 school year, this was not shared by respondents at either the March or August 2006 CSE meetings (Tr. pp. 226, 296, 335; Dist. Ex. 42). Respondents' contentions in their due process complaint notice that the student works at a very slow rate, that she would be the slowest student in the class recommended by the August 2006 CSE, and that she must be taught with other students who have been diagnosed with dyslexia by the Orton-Gillingham methodology are not supported by the hearing record (see Dist. Ex. 2b). Testimony elicited from the Kildonan academic dean indicated that with the exception of math, placement of students in subject matter classes at Kildonan is based on their cognitive functioning without regard to their reading level (Tr. pp. 327-30). The Kildonan academic dean further testified that none of the student's instructors at Kildonan possess any level of Orton-Gillingham certification, including the instructor who provided individual language training tutorials to respondents' daughter (Tr. p. 348-49).

Moreover, I agree with petitioner's assertion that the impartial hearing officer erred in finding that it failed to offer the student a FAPE because of the "uninspired rendition" of the student's present levels of performance in the August 2006 IEP. The student's August 2006 IEP contained a statement of her present levels of performance in a number of areas, including stating her abilities and needs (Dist. Ex. 1d at p. 3). It described her cognitive abilities as "average, with the exception of processing speed," her math skills as "in the low average range," and her reading and writing skills as "below average" (id.). Under the area of academic achievement, functional performance, and learning characteristics, the proposed IEP referenced broad as well as subtest scores resulting from recent educational achievement testing (id.). The proposed IEP also stated that the student's social and emotional levels and abilities were "within age expectations overall" but that she was "sometimes reticent to initiate social interactions" (id. at p. 4).

Global statements such as "[the student's] cognitive abilities are average with the exception of processing speed" and "[the student's] reading and writing skills are below average," by themselves do not clearly convey the student's present levels of educational performance nor identify the specific deficits that need to be addressed (Dist. Ex. 1d at p. 3). However, here the inclusion of the student's subtest standard scores provides additional details necessary to identify the specific areas within reading, math, and writing that require remediation and provides a baseline from which to project goals (id.). Furthermore, there is ample evidence in the hearing record indicating that at the March 2006 CSE meeting, the CSE reviewed progress reports from Kildonan and discussed the student's present levels (Tr. pp. 194, 197, 225) and that at the August 2006 CSE meeting, the student's present levels of performance were reviewed and discussed in detail by the special education teacher who would have taught the student in math (Tr. pp. 425, 960; Dist. Ex. 42 at pp. 1-6). Although the student's present levels of performance as written on

the August 2006 IEP do not, standing alone, comply with the requirements of federal and state law (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), for the reasons discussed above, this did not impede the student's right to a FAPE, significantly impede respondents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998]; Application of the Bd. of Educ., Appeal No. 07-043; Application of the Bd. of Educ., Appeal No. 04-031; compare Application of the Bd. of Educ., Appeal No. 02-025, with Application of a Child with a Disability, Appeal No. 04-046). I therefore caution petitioner that it is required to develop present levels of performance in the student's IEP consistent with federal and state regulations (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]).

As a final matter, I note that petitioner was remiss in not filing the record of the proceeding before the impartial hearing officer together with the petition for review as required by section 279.9(b) of the regulations of the Commissioner of Education. I caution petitioner to comply with Part 279 of the state regulations pertaining to the filing of a hearing record.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated August 24, 2007 is annulled to the extent that it determined that petitioner did not offer the student a FAPE for the 2006-07 school year and granted respondents' request for tuition and transportation reimbursement for that year.

Dated: **Albany, New York**
November 14, 2007

PAUL F. KELLY
STATE REVIEW OFFICER