



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-121

### **Application of the BOARD OF EDUCATION OF THE IRVINGTON UNION FREE 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:**

Kuntz, Spagnuolo & Murphy, P.C., attorney for petitioner, Vanessa M. Gronbach, Esq., of counsel

Law Offices of Deusedi Merced, P.C., attorney for respondent, Deusedi Merced, Esq., of counsel

#### **DECISION**

Petitioner appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's son and ordered it to reimburse respondent for half of her son's tuition costs at the Kildonan School (Kildonan) for the 2006-07 school year. The appeal must be sustained.

At the commencement of the impartial hearing, the student was attending Kildonan in the eighth grade (Tr. pp. 7, 407). Kildonan is a private co-educational boarding and day program for students in grades two through twelve who have dyslexia (Tr. p. 407). 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's eligibility for special education programs and services and classification as a student with a learning disability (LD) are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Between kindergarten and second grade, the student displayed learning difficulties and behavioral difficulties related to reading (Dist. Ex. 36 at p. 2).<sup>1</sup> The student's history includes a diagnosis of an attention deficit hyperactivity disorder (ADHD), learning and behavioral difficulties, and trials of various medications (id. at pp. 2, 3). Prior to moving into petitioner's

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<sup>1</sup> I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 06-074).

school district, the student was identified by the Committee on Special Education (CSE) at his prior school as eligible for special education services as a student with an other health impairment (*id.* at p. 1). When the student was in third grade, he attended an approved New York State non-public school for the provision of special education services (Dist. Exs. 5 at p. 3; 36 at p. 3). Behaviors displayed by the student included tantrums and refusals to do classwork (*id.*). In March 2002, the non-public program reported that it could no longer accept the student into its school (*id.*). The student was home schooled from April to June 2002 (Dist. Ex. 26 at p. 3). Around that time, the student's medication was changed and he reportedly became calmer (*id.*). In July 2002, the student received a diagnosis of a central auditory processing disorder (Dist. Ex. 32 at p. 1).

The student entered petitioner's district in September 2002 (Dist. Ex. 36 at pp. 1, 3). He attended one of petitioner's elementary schools and reportedly adjusted well to it (*id.* at p. 3). He was referred by his mother to petitioner's CSE for an evaluation of his cognitive, academic, speech-language, fine motor and emotional functioning, and to determine continued eligibility for special education services (Tr. pp. 581-82; Dist. Ex. 36 at p. 1). At that time, the CSE determined that the student was eligible to receive special education services as a student with an LD (Dist. Ex. 22 at p. 2).

For the 2004-05 school year, the student was enrolled in a 12:1 self-contained program for reading and language arts (Tr. pp. 49, 51). The student reportedly had difficulty with his special education teacher "personality wise" and sought out the school psychologist for support (Tr. p. 54). For the 2005-06 school year, the student received consultant teacher services in social studies and science (Tr. p. 49; Dist. Ex. 22 at p. 2). He also received building support services during that school year, as well as counseling and speech-language services (Dist. Ex. 22 at p. 2). According to petitioner's school psychologist, the student's program was changed from a self-contained program to consultant teacher services because it appeared that the student's availability to learning was greater in the larger classroom setting (Tr. pp. 49-51). Respondent agreed with this change in program (Tr. p. 51).

During the 2005-06 school year, petitioner's school psychologist saw the student in a weekly group with his friends, which offered him an opportunity to talk and receive feedback from peers, rather than only from an adult (Tr. pp. 53-54). The school psychologist testified that the student knew that her office was a place he could go when he could not "handle the classroom situation" (*id.*). She reported that the student did not display the same level of reactive emotion that he had during the prior school year; however, during January or February 2006, the student's higher level of emotion began to resurface (*id.*). The school psychologist opined that the student's increased level of emotion at that time was due more to outside factors than school related problems (Tr. pp. 54-55).

In a letter dated August 18, 2005, the CSE advised respondent of its intention to conduct a three-year reevaluation of the student in compliance with the Regulations of the Commissioner of Education (8 NYCRR 200.4[b][4]; Dist. Ex. 26 at pp. 1-4). On September 26, 2005, respondent provided the CSE with written consent to evaluate the student (Dist. Ex. 25). Petitioner began conducting the evaluations of the student during the 2005-06 school year (Tr. p. 56; Dist. Exs. 22; 23; 24).

Petitioner's speech-language pathologist conducted a speech-language reevaluation on October 17 and 27, 2005 (Dist. Ex. 24 at p. 1). The speech-language reevaluation report indicated

that the student was an active participant throughout the testing (id.). He was observed to have difficulty sitting still and he required reminders not to lean back on the chair (id.). It was reported that at one point during testing, items from the examiner's desk had to be removed because they distracted the student from the task at hand (id.). The student was noted at times to subvocalize (quietly talk to himself) when attempting to figure out an appropriate response (id.).

Administration of the Comprehensive Assessment of Spoken Language (CASL) yielded a core composite standard score (percentile rank) of 90 (25th percentile) in the average range (Dist. Ex. 24 at pp. 2, 4). Administration of the Test of Auditory-Perceptual Skills – Revised: Upper Level yielded a sum of scaled scores of 66 (40th percentile), and an Auditory Quotient of 96 (id. at pp. 1, 3). Administration of the Test of Problem Solving - Adolescent yielded a standard score of 98 (44th percentile) (id.).

The evaluator's test results indicated that the student demonstrated an understanding of words to determine antonyms and synonyms (Dist. Ex. 24 at p. 3). The student also demonstrated an understanding of grammar rules and was able to change words from singular to plural, or present to past tense (id. at p. 4). According to the evaluator, the student exhibited a solid understanding that even though word order changes, the meaning of a sentence may remain the same (id.). The evaluator noted that the student demonstrated the ability to understand the intended meaning of verbally presented materials, indicative of his understanding that language cannot always be interpreted in a literal manner (id.). In addition, the student demonstrated the ability to retain and then manipulate a series of unrelated numbers and words that increased in length and complexity (id.). As reported by the evaluator, the student demonstrated the ability to recall sentences that increase in length and complexity, although he needed reminders to listen carefully prior to hearing the test item (id.). The student demonstrated the ability to discriminate between words that were phonemically similar to determine if they were the same or opposite (id.). He also demonstrated the ability to interpret oral directions that increased in length and complexity, and he was able to answer thought-provoking questions that required him to use common sense and ingenuity, as well as demonstrate critical thinking and reasoning skills to analyze information, generate solutions, and clarify and evaluate information (id.).

According to the evaluator, when presented with various situations, the student had some difficulty expressing his thoughts and feelings appropriately (Dist. Ex. 24 at p. 4). The speech-language reevaluation report indicated that the student experienced "slight difficulty" when asked to recall a series of unrelated numbers that increased in length and complexity, as demonstrated by the student transposing or omitting numbers from a series of six and seven numbers (id.). The speech-language evaluator further indicated that the student's performance on the pragmatic judgment subtest (73) (4th percentile) of the CASL was not a true representation of the student's abilities, due to the fact that the subtest was administered last and the student provided responses such as "don't know," "something," or he only provided a one word response when asked for two or more (id.).

The speech-language evaluator indicated that the student had a strong desire to be successful and that it was a pleasure to work with him (Dist. Ex. 24 at p. 4). She also indicated that in the classroom the student had already begun to generalize and incorporate strategies that had been taught to him in smaller settings (id.). She noted that teachers needed to have the student's undivided attention prior to presenting oral information because if he was not focused, he would miss key information (id. at pp. 4-5). The evaluator noted that the evaluation report would be

shared with the CSE to assist them in making educational recommendations for the student (id. at p. 5).

Petitioner's school psychologist conducted a psychological reevaluation in December 2005 (Dist. Ex. 22 at p. 1). Administration of the Woodcock-Johnston III Tests of Cognitive Abilities (WJ-III) yielded a General Intellectual Ability (Extended) score of 98 (44th percentile), indicating that overall the student functioned within the average range of cognitive ability (id. at p. 3). The psychological reevaluation report indicated that, with the exception of the student's processing speed score, and taking into account differences in test demands and updated norms, the results of current testing were consistent with the results of the Wechsler Intelligence Scale for Children 3rd Edition (WISC-III) that had been administered in 2002 (id. at p. 2). Results of the WJ-III administered in 2005 reflected that the student's strength was in his fluid reasoning, but that he had relative weaknesses in his processing speed and short-term memory (id. at p. 3). The student's specific cluster scores as a result of the current administration of the WJ-III were: fluid reasoning (114) (82nd percentile) in the high average range; comprehension knowledge (106) (66th percentile) in the average range; long-term retrieval (102) (56th percentile) in the average range; visual spatial thinking (102) (56th percentile) in the average range; auditory processing (92) (30th percentile) in the average range; processing speed (86) (18th percentile) in the low average range; and short term memory (86) (18th percentile) in the low average range (id. at pp. 3-4, 7). Variable performance was noted by the evaluator within the areas of processing speed and short-term memory (id. at p. 6). Regarding processing speed, while the student was able to make quick conceptual decisions with pictorial information, he had difficulty quickly making visual/symbol discriminations (id. at p. 4). Regarding short-term memory, the student's working memory appeared to be better developed when he was presented with numerical information than was his auditory memory span when working with semantic information (id.).

The psychological reevaluation report indicated that the student's day-to-day social and emotional functioning in school was marked with variable effort and performance (Dist. Ex. 22 at p. 4). At times, the student displayed an eagerness to do well, was productive, and was willing to have good discourse about how he was doing in school as well as learn how to establish better work habits (id. at pp. 4-5). The psychological reevaluation report also indicated that at other times the student avoided his work and his teachers, including those teachers whom he felt were supportive of him, and he would create excuses and shift blame to others for his school and personal difficulties (id. at p. 5). Although the situation was described as "better" during the 2005-06 school year, there were times when the student could still reach levels of crisis because of his difficulty regulating negative emotions (id.). However, this difficulty had been "held at bay" more often as a result of the student's increased ability to seek out help as he was reaching those emotional levels (id.). The psychological reevaluation report additionally indicated that as a result of the progress the student had made in his reading skills, his academic self-concept appeared to be improving (id.). At the time of the reevaluation, the student continued to struggle with components of writing and he displayed a pattern of avoiding assignments that involved written work (id.).

As part of the psychological reevaluation, the student completed the Adolescent Self-Report of the Behavior Assessment Scale for Children, Second Edition (BASC-2) (Dist. Ex. 22 at pp. 1, 5). The student's responses (T-score) (percentile) yielded an average emotional symptoms index of (51) (58th percentile) (id. at p. 8). In addition, the student reported average levels on a variety of subscales specific to school problems (47) (43rd percentile), internalizing problems (53)

(67th percentile), inattention/hyperactivity (57) (77th percentile), and personal adjustment (48) (38th percentile) (id.). His responses yielded an "At-Risk" score on the somatization subscale (62) (86th percentile) (id.). The psychological reevaluation report indicated that the student's average scores on the majority of the subscales of the BASC-2 suggested that, when compared to other students his age, the student enjoyed school just as much, held similar attitudes toward his teachers, and did not engage in risky behaviors more often than his chronological peers (id. at p. 5). The student did not report having any more unusual thoughts or perceptions than others his age, or any more anxiety, or depressed feelings or feelings of inadequacy than others his age (id.). The student reported having control over his life and the facility for establishing and maintaining relationships at levels that were typical for persons his age (id.). In addition, the student reported being able to maintain an attention level and level of self-control that was similar to levels displayed by other children his age (id.). He reported having a close relationship with his parents that was characterized by mutual respect and positive interactions (id.). He felt that he was as outgoing and well-liked as the average person his age, reported a self-image similar to others his age, and reported that he had about as much confidence in his ability to make decisions, solve problems, and be dependable as others of his age (id.).

Some concern was noted at the time of the evaluation that the student continued to refrain from fully confronting his difficulties (Dist. Ex. 22 at p. 5). The psychological reevaluation report indicated that the student reported that he worried and at times, became so nervous that he could not breathe (id.). The student also reported that he had a short attention span, often forgot things, sometimes had difficulty paying attention to the teacher or what he was doing, often felt like he had to get up and move around, sometimes had trouble sitting still and standing still in lines, and talked while other people were talking or without waiting for others to say something (id.). The student also reported that he did not like to think about school, that school was boring, that his teachers sometimes wanted too much from him, that he was often disappointed with his grades and while he would like to do better, he did not feel that he could (id.). He also reported that most things were harder for him, that he sometimes failed even when he tried hard, and that he was usually unable to work out a problem if he had one (id.). The student further reported feeling as though his parents often expected too much from him, that what he wanted never seemed to matter, and that he got blamed for things he could not help or did not do (id.). Socially, the student indicated that he sometimes felt lonely and left out of things, that he sometimes felt out of place, that nobody liked him because they did not like the way he did things, and that other people found things wrong with him (id.). In addition, the student reported that he often liked to experiment with new things and sometimes liked to be first to try new things such as when his friends dared him to do something or when he dared others to do things (id.).

Petitioner's school psychologist indicated in the reevaluation report that the student tended to become overwhelmed as realizations and difficulties build because he did not yet have complete access to strategies for managing his feelings (Dist. Ex. 22 at p. 5). The student's feelings of stress might manifest themselves as physical complaints as demonstrated by the student's report that he often had headaches, felt sick to his stomach, and sometimes became dizzy (id. at pp. 5-6). The school psychologist also indicated that while the student continued to exhibit a number of cognitive abilities that would help to support his functioning in school, his variable processing speed and short-term memory would likely affect his educational progress and would require supports that would be determined as a result of the current three-year evaluation (id. at p. 6). She recommended that counseling remain in place as a related service to address the student's continued social-emotional needs (id.).

An educational evaluation report dated June 2006 (Dist. Ex. 16 at p. 4), was reflective of testing that began in early 2006 and was completed prior to the March 2006 CSE meeting (Tr. pp. 344-45). Although the special education teacher who conducted the evaluation did not write the evaluation report until after the CSE convened, he shared testing results with the CSE at the March 2006 meeting (id.). The report indicated that the evaluator had taught the student in several classes during the 2005-06 school year, and that the student appeared relaxed upon entering testing and readily engaged in all tasks presented (Dist. Ex. 16 at p. 1). Behaviorally, the student worked quickly during the evaluation, and at times impulsively, and he often talked himself through the more challenging questions (id. at p. 1). Administration of the WIAT-II on January 26, 2005 (Dist. Ex. 40 at p. 1) yielded a reading composite standard score (SS) (percentile) of 88 (21st percentile), a mathematics composite SS of 97 (42nd percentile), a written language composite SS of 83 (13th percentile), and an oral language composite SS of 124 (95th percentile), resulting in a total composite standard score of 94 (34th percentile) (Dist. Ex. 16 at p. 2). The evaluator noted that analysis of the test scores identified reading decoding as an area of weakness for the student (id. at p. 3). He also noted that the student demonstrated inconsistent knowledge of vowel blends and pronunciation rules, and that although he read comprehension passages slowly and missed many of the key words, he was able to use context clues to piece together meaning (id.). Difficulty was noted with main idea and inferential questions when the student missed too many of the key words to be able to construct meaning (id.). In written language, the student struggled to express himself, although his oral language skills were well above average when compared to age level peers (id.). Spelling was a challenge for him, as was written expression (id.). The educational evaluation report noted that the student's performance improved when he was provided with visual prompts, and opined that the discrepancy between the student's ability to express himself orally and in writing suggested that he may be more successful when given the opportunity to respond orally (id.).

The student's performance on math subtests yielded scores in the average range (id.). During math testing, the student exhibited fidgeting, spinning in his chair, and calling out answers before the evaluator was finished reading the question (id.). The evaluator reported that the student did not demonstrate mastery of basic operations with whole numbers (id. at pp. 3-4). He missed problems involving regrouping in both addition and subtraction (id. at p. 4). Difficulty was noted for all operations involving decimal numbers and fractions (id.). In math reasoning, the student's approach to problems presented was described as impulsive, but with prompts he was able to self-correct (id.). The evaluator indicated that many of the student's problem-solving approaches were dictated by his lack of mastery of basic operations (id.). Overall, the student's academic difficulties were described as "...clearly a function of his weakness in reading and written expression." (id.). The educational evaluator opined that "behavioral and attention issues probably arise from the frustration this engenders" and recommended that decoding skills be emphasized, as should strategies which would "enable [the student] to develop and elaborate his ideas in more detail" (id.).

An April 21, 2006 speech-language summary indicated that the student had successfully completed all speech-language goals for the 2005-06 school year (Dist. Ex. 19). The student was described as usually on track with reading comprehension and independent application of provided strategies (id.). Writing skills continued to be inconsistent as the student was sometimes unfocused (id.). The speech-language pathologist opined that the student needed to become more of a self-advocate in all subject areas (id.).

A subcommittee of petitioner's CSE met on March 22, 2006 for the student's annual review/reevaluation for the 2006-07 school year (Dist. Ex. 20 at pp. 1, 5). The CSE attendees included the student, the student's mother, petitioner's school psychologist who also acted as chairperson of the CSE, petitioner's speech-language pathologist, a regular education teacher, a special education teacher, and a guidance counselor (*id.* at pp. 5, 10). The individualized educational program (IEP) developed by the CSE recommended continuing the student's classification as a student with an LD (*id.* at p. 1). The CSE also recommended placement of the student in the regular education environment, direct consultant teacher services for English and social studies one time per week for two hours for each subject in an integrated setting, and small group counseling (5:1) one time per week for 30 minutes in a special location in order to assist the student in his understanding of how his academic self-concept affects his behavior and to increase his accountability for his decisions (*id.* at pp. 1-2). Recommended program modifications included copies of class notes and access to a word processor for extended written responses (*id.* at p. 2). Recommended testing accommodations included questions and directions read, extended time (1.5) for tests that required written responses, flexible seating, and directions and questions clarified and explained (*id.*). The March 2006 CSE meeting comments state that given the progress the student had exhibited in his language skills, speech-language services would be discontinued for 2006-07 (*id.* at p. 5). The CSE also recommended placing the student in a building support class every other day, and a daily 42-minute developmental reading class taught by a certified reading specialist (Tr. pp. 79-80, 188-89, 490).

The March 22, 2006 IEP indicated that the CSE would reconvene for a program review as soon as possible into the 2006-07 school year (Dist. Ex. 20 at p. 5). The IEP also indicated that respondent reserved the right to hold a second annual review meeting (*id.*). Respondent testified that she reserved the right to request another CSE meeting because she wanted to obtain an independent evaluation of the student (Tr. pp. 591-92, 616-17; *see* Tr. pp. 22, 88). Witnesses testified that respondent wanted time to consider the recommendations made at the March 2006 CSE meeting (Tr. pp. 81, 387). Petitioner's CSE chairperson testified that although respondent reserved her right to seek another CSE meeting, she did not formally ask for a reconvene of the CSE at the March 2006 CSE meeting (Tr. p. 134). According to respondent, the CSE chairperson wanted the teachers that would be teaching the student in fall 2006 to participate in the program review, and it would have been difficult for all of the student's teachers to meet in the summer prior to the beginning of the school year (Tr. p. 592).

Between April 21, 2006 and June 23, 2006 the student participated in an independent psychological evaluation obtained by respondent (Tr. pp. 591-92, 616-617; Dist. Ex. 18 at p. 1). Administration of the Wechsler Intelligence Scale for Children-IV (WISC-IV) yielded composite scores (standard score) (percentile) for verbal comprehension (104) (61st percentile), perceptual reasoning (104-108) (61st to 70th percentile), working memory (80) (9th percentile), and processing speed (85) (16th percentile) (Dist. Ex. 18 at p. 2). The evaluation report indicated that the student demonstrated above average ability on most tests of verbal reasoning, as well as on tests of general information, verbal concept formation, social comprehension, word reasoning, nonverbal concept formation, and perceptual reasoning (*id.* at p. 3). The student's performance yielded a score in the average range on a test of vocabulary (*id.*). Significant weakness was noted on tests of working memory and processing speed (*id.* at pp. 3-4). The evaluator confirmed a previously diagnosed ADHD and concluded that the student demonstrated highly significant ongoing deficiencies in reading and writing skills (*id.* at p. 8). The evaluator recommended more intensive remedial intervention in reading and writing, as well as increased opportunities for

positive engagement with teachers and peers to develop self-esteem (id.). The evaluator also recommended that alternative educational placements be considered, alternative homework assignments be given, the student have access to books on tape, the student be exempt from foreign language, and that there be continued psychotherapy and family counseling (id.).

On May 3, 2006, the special education teacher who had conducted the student's educational reevaluation observed the student in his English class (Dist. Ex. 17). The classroom observation report indicated that the student rushed in with several other students a few moments after the class began and he chose to sit in the back row with another student who had arrived late (id.). The student told the teacher that he had not read the assigned chapter in the book (id.). He did not attempt to answer questions assigned in class (id.). During class discussion about the book, the student was fidgety and put his head down on the desk several times (id.). The observer noted that when the lesson changed to another task involving how to set up note cards for a research project, the student's attention appeared to increase, but he continued to be physically restless (id.). The evaluator observed that the student began the assigned task but frequently stopped to talk with other students or tried to see what they were writing, and was one of the last students in the class to finish the assignment (id.). The student's English teacher reported that these observed behaviors were not atypical for the student, as he often missed or only partially completed homework assignments, and he had an assortment of excuses why assignments were not completed (id.). When the student was prepared for class, he was able to engage in class discussions and offer insight into the readings (id.). He was described as often disengaged and could be disruptive when lacking the background information needed to participate (id.). The student also was described as particularly averse to written tasks (id.). He had a word processor available for use in the classroom and was fairly adept at keyboarding, but he sometimes was resistant to using the word processor (id.).

The student's report card for the 2005-06 school year indicated that he completed the seventh grade with grades of C- in math and English, C+ in science and building support, C in social studies, B- in music, B in home and careers, A- in health, A in physical education, and A+ in technology (Dist. Ex. 14). Teacher comments noted on the report card include "effort has improved," "an enthusiastic participant," "effort is inconsistent," "homework not done consistently," "lab reports not complete," "has trouble staying on task," "projects are good," "needs to be more independent," "commendable effort," and "working to improve writing" (id.). The student failed Spanish with a grade of U (id.).

A 2005-06 progress report for IEP goals indicated that by the end of the school year, the student had achieved three goals and 13 objectives addressing study skills, reading, writing, and speech-language (Dist. Ex. 15 at pp. 6-8). He had not achieved two goals and two objectives addressing organization, word recognition and decoding, and error correction involving grammar in writing (id. at pp. 6-7). The progress note indicated "some progress" for three social/emotional/behavioral goals and 12 objectives addressing self-awareness and self-concept, socially acceptable behaviors in the school environment, and improvement in decision making skills (id. at pp. 8-9).

A July 7, 2006 letter from petitioner to respondent indicated that petitioner's Board of Education reviewed and approved the March 22, 2006 CSE subcommittee's recommendations for the student (Dist. Ex. 13).



On September 6, 2006, the first day of the 2006-07 school year, a subcommittee of the CSE reconvened per respondent's request for a program review, as well as to review the independent psychological evaluation report (Tr. pp. 22, 88-9, 591-92, 616-17; Dist. Ex. 10 at pp. 1, 5). CSE attendees included the student's mother, the student's private therapist, petitioner's school psychologist, the director of pupil personnel services, a reading specialist, a special education teacher, and a regular education teacher (Dist. Ex. 10 at pp. 5, 8). CSE meeting comments indicate that the September 2006 CSE based its recommendations on the latest psychological, educational, and speech-language reports, as well as information regarding the student's classroom functioning, information supplied by the parent, and CSE discussion (id. at p. 5). The September 2006 CSE program recommendations remained largely the same as those recommended by the March 2006 CSE, and provided for additional modifications for extended reading and writing assignments (compare Dist. Ex. 10 at pp. 1-2, with Dist. Ex. 20 at pp. 1-2). To address the student's organizational difficulties, the September 2006 CSE also recommended that daily homework assignments not be weighed as heavily in determining the student's grade (compare Dist. Ex. 10 at p. 2, with Dist. Ex. 20 at p. 2). The CSE also added a testing accommodation to check for understanding (id.) and recommended that the student be exempt from the foreign language requirement (Dist. Ex. 10 at p. 3). Reading and writing goals were also added (compare Dist. Ex. 10 at p. 7, with Dist. Ex. 20 at pp. 6-7). The September 2006 CSE also recommended that the student participate in math lab, a building level service available to all eighth graders (Tr. p. 200). To address difficulties with completion of homework assignments, the student's schedule was adjusted to allow for a study hall with the same special education teacher who taught both his collaborative classes in English and social studies and the building level support classes (Tr. pp. 190-91). The September 2006 CSE also recommended that, in addition to a developmental remedial reading class, the student receive individual reading instruction every other day to address his decoding needs (Tr. p. 520).

Respondent did not voice any substantive objections at the September 2006 CSE meeting regarding the recommendations for the student (Tr. pp. 24, 35, 100-02, 197-98, 524). The special education teacher reported that she contacted all of the student's teachers to update them on the additions made to his IEP so that all changes would be implemented immediately (Tr. pp. 199, 237). She further testified that she would have begun to implement the September 2006 IEP from the day of the meeting and that she had sent an email to respondent the following day to alert her that petitioner's staff was moving forward with the recommendations on the September 2006 IEP (Tr. pp. 199-200, 241-42).

The student attended petitioner's school for the first three days of the 2006-07 school year (Tr. pp. 185-86; Dist. Ex. 11 at p. 1). According to the interim director of pupil personnel services, he received a letter after the September 2006 CSE meeting from respondent that was dated September 1, 2006, but was stamped "received" by petitioner on September 5, 2006 (Tr. pp. 25-26; Dist. Ex. 11). The letter indicated that that respondent was rejecting the March 2006 IEP, that she was unilaterally placing the student at Kildonan on September 12, 2006, and that she would be seeking tuition reimbursement (Dist. Ex. 11). The hearing record shows that respondent had not revealed this information at the September 2006 CSE meeting (Tr. pp. 26, 35, 100, 10-02, 199, 227, 545-46). Petitioner's interim director of pupil personnel services testified that, although he had spoken to respondent over the summer and knew that she was considering placing the student at Kildonan, at the conclusion of the September 2006 CSE meeting, he believed that the student would be continuing to attend petitioner's school and respondent did not state that the student would be attending Kildonan beginning the following week (Tr. pp. 25-26, 31). The hearing record

reveals that other participants at the September 2006 CSE meeting did not know that respondent was considering placement of the student at a private school (Tr. pp. 100, 101-02, 199, 227, 545-46). Further, petitioner's reading specialist testified that she was "surprised" when the student did not continue to attend petitioner's school and that she thought that respondent was "encouraged" by the program offered at the September 2006 CSE meeting (Tr. pp. 520, 526).

A December 2006 letter to respondent indicated that petitioner's Board of Education reviewed and approved the recommendations made for the student by the September 6, 2006 CSE subcommittee (Dist. Ex. 7).

By due process complaint notice dated January 21, 2007, respondent requested an impartial hearing seeking tuition reimbursement for her placement of her son at Kildonan for the 2006-07 school year and reimbursement for transportation costs (Dist. Ex. 5 at p. 6). Respondent alleged that petitioner failed to offer her son a free appropriate public education (FAPE)<sup>2</sup> because the September 6, 2006 IEP was untimely, the annual goals were inappropriate, and the program petitioner offered her son for the 2006-07 school year did not meet his special educational needs (id. at pp. 2, 5-6). An impartial hearing commenced on June 1, 2007 and concluded on June 26, 2007, after three days of testimony.

By decision dated September 12, 2007, the impartial hearing officer determined that petitioner did not offer the student a FAPE because it did not have an appropriate program in place for the student at the beginning of the 2006-07 school year (IHO Decision at p. 5). He further determined that the student's first semester at Kildonan was appropriate; however, the second semester failed to meet the requirement that a program be provided in the least restrictive environment (LRE) (id.). Therefore, the impartial hearing officer awarded respondent half of the tuition at Kildonan for the 2006-07 school year (id.).

Petitioner appeals the impartial hearing officer's decision, contending that the impartial hearing officer erred in awarding half of the tuition at Kildonan to respondent because petitioner's CSE offered an appropriate program to the student in a timely manner. Petitioner further argues that: 1) if any procedural errors are contained in the IEP, those errors did not deprive the student of a FAPE, 2) the impartial hearing officer erred in finding that the student's first semester at Kildonan was appropriate, 3) Kildonan does not meet the student's special education needs because it does not provide counseling to the student, and 4) the impartial hearing officer erred in finding that counseling was available at Kildonan. Petitioner also alleges that the equities do not favor respondent because she did not provide petitioner with ten days notice of her intent to place the student at Kildonan. Petitioner requests that a State Review Officer annul the impartial hearing

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<sup>2</sup> 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]).

officer's decision to the extent that he ordered half of the tuition to respondent at Kildonan for the 2006-07 school year.

In her answer and cross-appeal, respondent argues that the impartial hearing officer erroneously concluded that the second semester of the student's attendance at Kildonan was not appropriate in terms of LRE considerations.<sup>3</sup> Respondent asserts that she is not held strictly to the mandate of LRE and Kildonan was an appropriate placement for the student. Respondent also argues that the impartial hearing officer erred in concluding that petitioner provided the student with a FAPE for the 2005-06 school year.<sup>4</sup> Respondent requests that a State Review Officer annul the impartial hearing officer's decision to the extent that he awarded only half of the tuition to respondent and requests that a State Review Officer award full tuition for Kildonan for the 2006-07 school year.

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]; 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

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<sup>3</sup> In her answer and cross-appeal, respondent attempts to incorporate by reference her post hearing brief to support a number of her allegations. A cross-appeal challenging all or part of an impartial hearing officer's decision must be included in respondent's answer (8 NYCRR 279.4[b]). An answer must include any written argument, memorandum of law, and additional documentary evidence (8 NYCRR 279.5) (emphasis added). State regulations also direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by petitioner to the answer" (8 NYCRR 279.6). In this appeal, respondent is represented by counsel. To the extent that respondent refers to her post-hearing brief in her answer and cross-appeal for factual allegations, a post hearing brief is not a substitute for a properly drafted answer and cross-appeal and cannot be used to circumvent state regulations governing pleading requirements (see Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 06-096). For the foregoing reasons, respondent's assertions that incorporate by reference her post hearing brief and do not contain a clear and concise statement of those assertions were not considered in this appeal.

<sup>4</sup> The impartial hearing officer concluded in his decision that petitioner had offered the student a FAPE for the 2005-06 school year. Respondent argues that the impartial hearing officer erred in addressing this issue as the 2005-06 school year was not raised by either party at the impartial hearing. I agree. However, since this conclusion by the impartial hearing officer had no actual effect upon his decision that petitioner failed to provide a FAPE to the student during the 2006-07 school year, I decline to reverse this portion of the decision.

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, 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).

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 student's recommended program must also be provided in the 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 IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115[a]; see 8 NYCRR 200.6[a][1]).

In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Walczak, 142 F.3d at 122). The Court in Walczak further noted that even when mainstreaming is not a "feasible alternative, the statutory preference for a least restrictive

placement applies" (Walczak, 142 F.3d at 132, citing Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both state and federal regulations require that when considering a placement in the LRE, school districts place the child as close to his home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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]).

Petitioner asserts that the impartial hearing officer erred in finding that it did not offer a FAPE to the student for the 2006-07 school year because it did not have an appropriate program in place for the student at the beginning of the 2006-07 school year. At the beginning of each school year, a school district is required to have an IEP in effect "for each child with a disability in [its] jurisdiction" (20 U.S.C. § 1414[d][2][A]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4(1)(e)(ii); see Cerra, 427 F.3d at 194 (" . . . the District fulfilled its legal obligations by providing the IEP before the first day of school.")). The IEP developed by the March 22, 2006 CSE (Dist. Ex. 20), was approved by petitioner's Board of Education on July 7, 2006 (Dist. Ex. 13). This IEP indicated a start date of September 6, 2006, the first day of the 2006-07 school year and petitioner's special education teacher testified that the March 2006 IEP would have been implemented on September 6, 2006 (Tr. pp. 150, 244-45; Dist. Ex. 20 at p. 1). Therefore, an IEP was in place for the student at the start of the 2006-07 school year.<sup>5</sup> Furthermore, the school district must provide a copy of the IEP to the parent, without the need for a request (34 C.F.R. § 300.345[f]; 64 Fed. Reg. 12587 [comment]; 8 NYCRR 200.4[e][3]). Here, the hearing record does not support a finding that respondent did not have a copy of the March 2006 IEP prior to the beginning of the school year, nor does respondent allege on appeal that she did not have a copy of that IEP. The July 7, 2006 letter from petitioner to respondent detailing the Board of Education's approval of the March 2006 IEP, indicates that respondent had already received a copy of the IEP (Dist. Ex. 13). The hearing record shows that respondent did not refute this. Furthermore, the hearing record indicates that respondent did not object to the March 22, 2006 IEP until September 5, 2006 when petitioner received a letter from respondent dated September 1, 2006 (Dist. Ex. 11 at p. 1). Based on the foregoing, I find that the hearing record does not support the impartial

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<sup>5</sup> I note that on appeal, respondent does not allege that the program recommended in the March 2006 IEP contained any procedural or substantive violations of the IDEA.

hearing officer's finding that petitioner did not have an IEP in effect prior to the start of the 2006-07 school year.

Respondent contends in her cross-appeal that the IEP failed to offer the student a FAPE for the 2006-07 school year because the present levels of achievement, functional performance and individual needs listed on the September 2006 IEP do not provide a meaningful description of the student's present abilities or special education needs.<sup>6</sup> Consistent with results of the multi-disciplinary evaluation, the September 2006 CSE identified the student's present levels of performance through descriptions of the student and numerical data (Dist. Ex. 10 at pp. 1, 3-4). The CSE identified his academic, social development and management needs (*id.* at pp. 1, 3-5). The September 2006 IEP also noted the student's improved participation in counseling sessions and indicated that the student's progress resulted from his increased comfort with his abilities (*id.* at p. 1). The September 2006 IEP also indicated that the student still required support in making responsible decisions and in refraining from shifting blame to others when he was held accountable for avoiding some of his work (*id.* at pp. 1-2). Continued group counseling was recommended to help him understand how his academic self-concept affected his behavior and to increase accountability for his decisions (*id.*).

The September 2006 IEP also reflects the student's academic need for praise and positive reinforcement in order to raise his confidence, fluency support through the use of material slightly below and/or at his independent reading level, ample time to practice reading both at home and at school, use of resources such as correct spelling of words, use of outlines and graphic organizers when writing, reminders to edit written work for correct punctuation, access to a word processor when assigned extended written responses, encouragement to use available technology, and practice in listening activities above the student's instructional reading level to enhance comprehension skills (Dist. Ex. 10 at p. 3). Social development needs listed on the September 2006 IEP included counseling support for the student to continue working toward managing his frustrations and accepting responsibility, and a supportive learning environment that would hold the student to appropriate expectations while being sensitive to his learning needs (*id.* at p. 4). The September 2006 IEP indicated that the student's management needs included a structured classroom environment with a consistent and predictable routine, expectations and outcomes to be clearly stated, adult support when faced with frustrating situations, and redirection and refocusing to maintain attention during lessons (*id.* at p. 5). Based on the above, I find that the September 2006 IEP contained meaningful descriptions of the student's present levels of achievement, functional performance and special education needs.

Respondent also contends that the September 2006 CSE failed to develop appropriate goals for the student. The hearing record reflects that the CSE recommended annual goals for the student that directly reflected his needs as stated in current evaluation results and the September 2006 IEP (Dist. Ex. 10 at pp. 6-7). Each annual goal was measurable over a specified period of time (*id.*). For example, an annual goal addressing study skills stated that the student would turn in his homework assignments on time with 90 percent success over one month (*id.* at p. 6), maintain a notebook with divisions for various subjects and insure that each section contained only information that belongs in that subject area with 100 percent success over one month (*id.*), use a

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<sup>6</sup> Respondent does not identify in her answer and cross-appeal whether she is referring to the March 2006 IEP, September 2006 IEP, or both. For purposes of this appeal, and because the September 2006 IEP is the most recent IEP governing the 2006-07 school year, I refer to the September 2006 IEP.

computer as a compensatory learning strategy to assist in producing written work with correct spelling and punctuation for selected assignments four out of five trials over four months (id.), and apply the test-taking strategy of systematically narrowing choices with 70 percent success on three consecutive occasions (id. at p. 7). His reading goal states that, when given reading material at the beginning of the eighth grade level, the student would correctly decode whole sentences, paragraphs or stories using phrasing with 85 percent success over eight months (id.). I find that the goals and objectives contained in the September 2006 IEP were appropriate.

Petitioner contends that its program recommendations for the student for the 2006-07 school year were appropriate. As previously discussed, the September 2006 CSE continued the special education and related services contained in the March 2006 IEP (compare Dist. Ex. 10, with Dist. Ex. 20). In addition, the September 2006 CSE recommended that the student participate in building support services for math and science; these recommendations did not appear on his IEP because building supports were regular education services (Tr. pp. 23, 79-80, 188, 196-97, 229, 239, 339-40). The hearing record indicates that the building support class functioned similarly to a resource room in that it was a smaller class of about seven students, it offered pre-teaching and re-teaching of material, helped students break down projects, and provided an opportunity for students to take advantage of the teacher's availability by asking questions (Tr. p. 79). The building support class differed from a resource room in that it focused on specific academic subjects such as English and social studies (Tr. pp. 79-80).

In addition to the building support class, the CSE recommended that the student receive small group remedial reading instruction as well as 1:1 reading instruction (Tr. pp. 522-23). Testimony by petitioner's reading specialist indicated that she was trained in multiple reading instructional methodologies, including some that were based on the Orton-Gillingham approach, the phonologically based methodology used at Kildonan (Tr. pp. 408-09, 488-89, 536). The reading teacher reported that during the 2005-06 school year she had used a phonologically based methodology with the student and that he had demonstrated one year's improvement (Tr. pp. 505-09). The reading teacher testified that in addition to the student, there would be four other students in the remedial reading class, that she would teach the class reading strategies, and that she would pre-teach the information and incorporate the student's word decoding and comprehension, note-taking and highlighting skills into content from his academic subjects of science, social studies, and English, so that he would not be "overloaded" by unfamiliar material presented in subject area classes (Tr. pp. 536-38).

Testimony by petitioner's special education teacher indicated that she co-taught the recommended collaborative English and social studies classes with regular education subject area teachers (Tr. p. 186). The special education teacher and each regular education subject area teacher share a common planning time and are part of the team that plans all projects and daily assignments to ensure that all students are succeeding in those classrooms (Tr. pp. 186-87). Within the collaborative classroom structure, the teachers are able to switch back and forth in giving instruction, break the class up into smaller groups and provide more individualized attention to students as need (Tr. p. 187). Five of nineteen students in each of the collaborative classes were classified as students in need of special education services (id.). Four of the five classified students were eligible for special education as students with an LD (id.). In addition, the September 2006 CSE recommended consultant teacher direct services for the student to afford him even more support in the collaborative English and social studies classes (Tr. p. 361). The student's special education teacher testified that on some days the student would have had access to her four times

per day. Further, the hearing record consistently reflects that the student's teachers would have been in communication with each other to assist the student with his special education needs (Tr. pp. 236-37, 241, 343, 538-39). The hearing record indicates that there were numerous individualized supports available to the student within the educational program recommended by the September 2006 CSE that would have met his special education needs. Additionally, considering the testimony given by petitioner's school psychologist that the student appeared more available to learning and displayed growth when placed in larger classroom settings with higher academic and social demands and expectations than smaller classes (Tr. pp. 49-50), I find that the special education and related services recommended by the September 2006 CSE addressed the student's academic, social and management needs as indicated in the IEP and were reasonably calculated to confer education benefit upon the student. Therefore, I find that petitioner offered the student a FAPE in the LRE for the 2006-07 school year.

As I find that petitioner offered a FAPE to the student for the 2006-07 school year, I need not address the appropriateness of respondent's placement of the student at Kildonan or the equitable considerations in this case. I have also considered the parties' remaining contentions and find that I need not reach them in light of my determinations or they are without merit.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled to the extent that it found that petitioner did not offer the student a FAPE for the 2006-07 school year and ordered that petitioner reimburse respondent for half of the student's tuition at Kildonan for the 2006-07 school year.

**Dated: Albany, New York  
December 13, 2007**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**