



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-017

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

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Garrett L. Silveira, Esq., of counsel

Law Offices of Andrew K. Cuddy, attorneys for respondents, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered it to reimburse respondents (the parents) for their son's tuition costs at the Kildonan School (Kildonan) for the 2008-09 school year. The appeal must be dismissed.

At the beginning of the 2008-09 school year, the student attended a district school (Tr. pp. 315-16). After the first day of the impartial hearing when the district conceded that it had not offered the student a free appropriate public education (FAPE) for the 2008-09 school year, the parents unilaterally removed the student from the district's school on September 24, 2008 and enrolled him at Kildonan (Tr. p. 312). The student had previously attended Kildonan for his fifth grade (2006-07) and sixth grade (2007-08) school years (Tr. pp. 290-93, 303-03, 345-46).¹ Kildonan has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see Tr. p. 70; 8 NYCRR 200.1[d], 200.7).

As assessed by standardized testing, the student's overall cognitive ability is within the low average range (Parent Ex. 22 at p. 5). The student has reportedly received diagnoses of attention deficit disorder and "dyslexia" and has also received a diagnosis of a "significant" auditory processing and receptive language processing disorder (Parent Exs. 19 at p. 7; 21; 22 at p. 2). Articulation errors and oral motor issues have been noted to affect the student's intelligibility (Parent Ex. 19 at p. 8). In addition, the student has received several medical diagnoses (Parent

¹ The student attended Kildonan for the 2006-07 and 2007-08 school years pursuant to settlement agreements entered into between the district and the parents where the district agreed to reimburse the parents for the student's tuition and provide the student with transportation (IHO Ex. 3 at pp. 6-10, 11-16).

Exs. 21; 22 at p. 2). Academically, the student demonstrates an "impairment" in phonemic awareness (Parent Ex. 19 at pp. 7, 8), difficulty decoding multi-syllabic words, difficulty with spelling, weaknesses in math computation and fluency, and difficulty with organization and attending (Parent Exs. 25; 26; 29 at p. 6; 31 at pp. 6, 8; 49 at pp. 2, 4). As reported by the student's mother, the student has an attention deficit hyperactivity disorder (ADHD) for which he takes medication (Tr. p. 329). The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (Parent Ex. 1; Dist. Ex. A; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The district determined that the student was eligible for special education services as a student with a learning disability subsequent to his referral to its Committee on Special Education (CSE) in January 2003 for significant academic delays (see Parent Ex. 22 at p. 1). Because of an unrelated medical condition, the district provided the student with home instruction for all but the first two weeks of his third grade (2004-05) school year (Tr. pp. 289-90). In addition, the parents provided the student with private tutoring from a tutor certified in Orton-Gillingham for at least a part of that school year and were reimbursed by the district for the costs (Tr. pp. 294, 296, 447).

The student attended a district school for the 2005-06 school year when he was in the fourth grade and received instruction in an inclusion class; instruction in a special class for math and English language arts; and related services of occupational therapy (OT), speech-language therapy, and counseling (see Parent Ex. 22 at p. 1). During at least part of that school year, the parents provided the student with private speech-language therapy (Tr. pp. 449-50; see Parent Ex. 64).

As part of the student's May 2006 triennial reevaluation, a district psychologist conducted a psychosocial reevaluation (Parent Ex. 22). The student's cognitive functioning was assessed using the Woodcock-Johnson III Tests of Cognitive Abilities (id. at p. 1). Based on the student's test performance, the evaluator concluded that the student's overall cognitive ability was in the low average range (id. at p. 5). According to the evaluator, the student possessed well-developed verbal abilities; however, he also presented with weaknesses in auditory processing speed and difficulties with visual information processing and short and long-term memory (id.). The evaluator indicated that the student's "difficulty establishing new visual associations would be expected to impact the ease with which he learns sound/symbol correspondences, printed words, and similar visual representations" (id.).

A district speech-language report dated May 1, 2006, indicated that the student received speech-language services three times per week, which focused on the use and care of an auditory trainer, improving oral motor skills, improving articulation, improving auditory attention using "Earobics" and improving oral language organization (Parent Ex. 24 at p. 1). The speech-language pathologist reported that the student's progress had been variable across all areas despite his apparent enjoyment of all treatment strategies and interventions (id.). She noted the student's reluctance to use an auditory trainer during group instruction, opined that he was becoming more self-conscious about using the equipment, and stated that future goals related to improving the student's ability to attend in a noisy environment might need to be addressed through less invasive strategies (id. at pp. 1-2). According to the speech-language pathologist, the student had successfully learned oral motor sequences that increased his awareness of lip protrusion and retraction; however, he had not generalized these movements during the articulation of sounds (id. at p. 2). The speech-language pathologist reported that the student had mastered Earobics games involving counting and sequencing sounds as well as counting and sequencing sounds in simple and complex syllables (id.). The student's speech-language therapy included instruction in the use

of sequence words to help the student organize verbal messages (id.). According to the speech-language pathologist, despite the student's ability to identify and explain the use of sequence words, his oral messages were characterized by "excessive detail, meanderings and difficulty separating the important from the non-important which make it difficult for his listeners to follow him and maintain interest in his conversation" (id.). The student was unable to monitor himself during spontaneous speech (id. at p. 3). The speech-language pathologist recommended that the student continue to receive speech-language services for the 2006-07 school year (id.).

The student's private speech-language pathologist prepared a speech-language report in June 2006 (Parent Ex. 64). The report indicated that the student had diagnoses of "dyslexia" and a central auditory processing disorder which created academic, social, and self-esteem "issues" (id. at p. 1). The therapist noted that the student had received speech-language therapy for many years and had "so many" difficulties to be addressed (id.). She opined that self-esteem and self-confidence were essential and needed to be the top priority when working on goals (id.). Among other things, the private speech-language pathologist recommended that the student undergo a comprehensive language evaluation, if one had not been done recently and that an oral motor assessment be conducted if the student was to have oral motor goals (id. at p. 2). She offered "goal ideas" related to phonemic awareness and decoding, developing strategies, following multiple verbal directions, finding the main idea, sequencing, and developing expressive language and language processing abilities (id.).

In May 2007, the student underwent an auditory and language processing reevaluation for the stated purposes of assessing his auditory and language processing following maturation and intervention as well as recommending additional strategies or programs to assist him academically (Parent Ex. 19 at p. 2). A previous auditory and language processing evaluation had been conducted by the same speech-language pathologist/audiologist in February 2005 (id. at p. 1). The evaluator noted that the student was not on medication during the testing session, which permitted a more accurate comparison with previous scores (id. at p. 2). An audiological evaluation revealed that the student's hearing was within normal limits and that the student demonstrated good speech discrimination in quiet and in noise (id. at pp. 2, 7). Administration of the Test of Auditory Processing Disorders in Children-Revised (SCAN-C) and the Staggered Spondaic Word Test (SSW) revealed the presence of an auditory processing deficit (id. at pp. 2-3, 7-8). According to the evaluator, results of the SCAN-C revealed improvement in the student's auditory closure and auditory figure-ground listening, but difficulties in integration (id. at p. 7). Student responses on the SSW produced decoding and tolerance fading memory patterns associated with difficulties in reading accuracy, comprehension, short-term memory, figure-ground listening, receptive and expressive language, and attention, which were consistent with parent report (id. at pp. 3, 7-8). The evaluator noted that student reversals suggested continued organizational problems (id. at pp. 3, 8). Assessment of the student's phonemic awareness using the Phonemic Synthesis Test and The Lindamood Auditory Conceptualization Test revealed that the student's sound blending had improved, as had his phonemic awareness (decoding) skills (id.). However, the student had difficulty manipulating sounds within words and his phonemic awareness skills continued to be below grade level (id. at pp. 3-4, 8). The examiner noted impairments in the student's temporal integration, which affected the speed with which he was able to process a message (id. at pp. 4, 8). The evaluator reported a "considerable improvement" in the student's auditory comprehension and indicated that the student demonstrated above average skills in this area (id. at pp. 4-5, 8).

The student's language skills were assessed using the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) (Parent Ex. 19 at p. 7). The student's expressive language skills were judged to be in the average range, which, as noted by the evaluator, was an improvement (id.). The evaluator noted strengths in the student's ability to define words, formulate sentences, and understand and explain word classes (id. at p. 8). The evaluator reported that the student's receptive language skills were deficient and noted that the student struggled to understand concepts and follow directions, understand semantic relationships, and assemble sentences (id. at p. 9). As reported by the evaluator, the student demonstrated word retrieval difficulties in conversation and articulation errors and oral motor issues continued to affect the student's intelligibility (id. at p. 8). The evaluator observed inattention, poor eye contact, distractibility, difficulty focusing, and mishearing during her examination (id.). She recommended that a diagnosis of apraxia be ruled out (id.).

The evaluator offered the following recommendations to improve the student's auditory and language processing: continued educational placement as the student was "doing well and thriving;" continued pharmacological intervention to improve attention, focus and auditory processing; the provision of classroom accommodations including preferential seating, testing given in a separate location with directions read, repeated, and explained to ensure understanding; study notes and study guides before class (preteaching); continued speech-language therapy by a therapist knowledgeable and trained to deliver therapy to students with a central auditory processing disorder and language disorders; continued reading instruction using a phonemic awareness multisensory approach; and consideration of the "Fast ForWord" computer program (Parent Ex. 19 at p. 8). The evaluator concluded her report by stating that the student's progress was "noteworthy" (id. at p. 9).

On March 13, 2008, the CSE convened to review the student's progress at Kildonan and to develop his individualized education program (IEP) for the 2008-09 school year (Parent Ex. 2 at p. 7). Participants included a CSE chairperson, a special education teacher, a school psychologist, a regular education teacher, and the student's mother (id.). At the district's invitation, a representative from Kildonan also participated in part of the CSE meeting by telephone (Tr. p. 69; Parent Ex. 2 at p. 7).

During the meeting, the Kildonan representative provided the CSE with a summary of the student's instruction and corresponding performance (Parent Ex. 2 at p. 4). The representative advised the CSE that the student had continued to make progress at Kildonan during the 2007-08 school year, including in the areas of reading and math (Tr. pp. 111, 125; Parent Ex. 2 at p. 4). The resultant IEP indicated that the student's reading program at Kildonan focused on phoneme and vowel sound combinations, decoding, and encoding (Parent Ex. 2 at p. 4). The student participated in a larger group reading class that addressed topics in grammar including sentence structure and the proper use of word types, and provided extended reading activities and spelling activities (id.). The instructional goals of the student's reading program at Kildonan included developing reading comprehension and automaticity in the student's decoding, encoding, and use of word types (id.). According to the IEP, the student's math program at Kildonan included working on activities relating to percents, decimals, and fractions; multiplication and division facts and their retention; and multi-digit addition and subtraction with regrouping (id.). In the area of written expression, the student's program at Kildonan focused on editing skills, paragraph structure, and punctuation (id.). The IEP indicated that the student's program included assistive technology consisting of touch typing and spell check to supplement the student's writing skills,

as well as text read back (id.). The March 2008 CSE concluded that it did not have sufficient information regarding the student's present levels of performance and therefore the CSE decided to observe the student at Kildonan prior to completing the IEP (Tr. pp. 69, 96, 574; Parent Ex. 2 at p. 7).

On April 11, 2008, the district's CSE chairperson and school psychologist observed the student at Kildonan (Tr. pp. 69, 87; Parent Ex. 2). The observation indicated that the student was a very hard worker who displayed very few behavioral concerns (Parent Ex. 2 at p. 4). The observation further indicated that the student continued to require directions to be broken down to assure his understanding of them and also required that expectations regarding work and behavior be provided (id.).

On June 9, 2008, the CSE reconvened to complete the development of the student's IEP for the 2008-09 school year (Parent Ex. 2 at p. 7). Meeting attendees included a CSE chairperson, a special education teacher, a school psychologist, a regular education teacher, and the student's mother (id.). The CSE concluded that the student had a significant delay in language skills, attentional skills, and reading decoding, which inhibited his progress in the general education curriculum (id. at p. 4). According to the June 2008 CSE, the student required a small structured environment to learn reading and English language arts skills and required much drill and practice for retention and generalization of skills (id. at p. 6). The CSE also determined that the student had significant auditory processing deficits that interfered with his education, and which required specific classroom modifications (id.).

The CSE recommended that the student be placed in a 15:1+1 special class at a district middle school, and receive 1:1 reading instruction by a special education itinerant teacher, speech-language services on a weekly basis, and adaptive physical education services (Parent Ex. 2 at pp. 1-2). The student's IEP for the 2008-09 school year also provided that lunch, physical education, and "special area classes," including music and art, would take place with his general education peers (id. at p. 3). The IEP set forth three reading goals and seven speech-language goals (id. at pp. 8-9). The IEP specified that the student would receive program modifications, accommodations, and supplementary aids and services that would include checking for understanding, modified assignments, the use of graphic organizers, visual cues and reminders, copies of class notes, reteaching relevant materials, refocusing and redirection, and preferential seating (id. at pp. 2, 3). The IEP also provided that the student would receive assistive technology services and/or support as needed by having access to a word processor, computer assisted academic instruction, and a calculator or math tables (id. at p. 3).

By due process complaint notice from their attorney dated July 9, 2008, the parents requested an impartial hearing and asserted that the district failed to offer the student a FAPE for the 2008-09 school year (Parent Ex. 1). The parents asserted that the district failed to recommend an appropriate program and argued that the IEP was substantively and procedurally deficient (id. at pp. 2-3). The parents requested, among other things, continued placement of the student at Kildonan for the 2008-09 school year, the provision of an appropriate IEP, and that the student's current placement at Kildonan serve as the student's pendency placement (id. at p. 4).

By letter dated August 13, 2008 and delivered to the district on that date, the parents advised the district that "as of September 2008 [the student] will attend Kildonan" (Parent Ex. 53; see Tr. pp. 74-77).

On September 19, 2008, the impartial hearing officer rendered an interim decision regarding the student's pendency placement (IHO Ex. 4). The impartial hearing officer found that the parties' "release and settlement agreements" relating to the student's attendance at Kildonan for the 2005-06 and 2006-07 school years expressly stated that "the [p]arties understand and agree that nothing in this Agreement shall establish any pendency placement, program, or service for Student" and therefore, the impartial hearing officer denied the parents' request that Kildonan be considered the student's pendency placement (id. at pp. 4-5).

An impartial hearing convened for five days from September 23, 2008 to November 11, 2008 (Tr. pp. 1, 38, 250, 395, 485). During the September 23, 2008 proceedings, the district, through its counsel, conceded that it had not offered the student a FAPE for the 2008-09 school year (Tr. pp. 3, 16-17).

The impartial hearing officer rendered his decision on January 5, 2009 (IHO Decision at p. 20). In light of the district's concession that it had failed to offer the student a FAPE, the impartial hearing officer limited his review to the appropriateness of the parent's placement of the student at Kildonan and whether equitable considerations supported an award of tuition reimbursement to the parents (id. at p. 11). The impartial hearing officer concluded that Kildonan was an appropriate placement for the student and that equitable considerations did not preclude the parents' tuition reimbursement request (id. at p. 20). Accordingly, the impartial hearing officer awarded the parents reimbursement for the student's tuition costs at Kildonan for the 2008-09 school year (id.).

With respect to the appropriateness of the student's program at Kildonan, the impartial hearing officer disagreed with the district's contention that Kildonan failed to address the student's unique educational needs (IHO Decision at pp. 11-13). The impartial hearing officer concluded that while he agreed that direct speech-language services would be beneficial to the student's development, the hearing record showed that the student had been able to derive meaningful educational benefit from his instruction at Kildonan without such services (id. at p. 14). The impartial hearing officer concluded that Kildonan's small class size and academic supports in the form of redirection addressed the student's attention deficits (id. at pp. 14-15). After reviewing the student's 2007-08 grades from Kildonan and narrative comments submitted by the student's teachers, the impartial hearing officer concluded that the student was "making meaningful academic progress in his educational program" (id. at p. 17). The impartial hearing officer acknowledged that the student "had not achieved perfection in all of his core subjects," but concluded that perfection was not the relevant standard (id.). The impartial hearing officer further reviewed and compared the student's May 2007 standardized test scores with the student's May 2008 scores (id. at pp. 17-18). Based on the comparison, he determined that the student had not regressed academically and had achieved some level of progress, with the exception of the student's "word attack" scores (id. at p. 18). With respect to the district's contention that the Kildonan reports did not identify the specialized instruction given to the student and did not provide sufficient detail regarding curricular level or academic expectations in the student's content area classes, the impartial hearing officer concluded that the testimony of the student's tutor, who was also the founder of Kildonan, as well as the course descriptions provided sufficient specificity (id. at pp. 18-19). Regarding the district's assertion that Kildonan was not the least restrictive environment (LRE) for the student, the impartial hearing officer concluded that the hearing record showed that Kildonan was exclusively a boarding school for grades seven through twelve, stated that LRE considerations were to be balanced with the requirement that each student receive an appropriate education, determined that Kildonan was appropriate for the student, and found that

the hearing record did not show that there was an alternative day program appropriate for the student (id. at p. 19).

The district appeals the impartial hearing officer's determination regarding the appropriateness of the student's program at Kildonan. It asserts that the hearing record does not provide sufficient evidence to show that Kildonan was an appropriate placement for the student. The district asserts that the parents offered no testimony from the student's core academic teachers or other Kildonan employees who were knowledgeable about the student's needs. Rather, the district asserts that testimonial evidence was limited to the student's mother and his tutor who had only worked with the student for less than a month in the areas of reading, writing, and spelling. The district further asserts that the parents failed to present any evidence of how Kildonan addressed the student's needs. The district contends that the student's educational needs go beyond reading and that the student requires speech-language therapy as a related service. It argues that the impartial hearing officer erred in concluding that the student improved in auditory and language processing deficit(s) without the provision of speech-language services and that the impartial hearing officer ignored the testimony of the district's speech-language therapist and educators. Additionally, the district argues that the impartial hearing officer ignored the recommendation of a private evaluator that the student receive speech-language therapy. The district also argues that the impartial hearing officer erred in determining that Kildonan addressed the student's "significant" auditory and receptive language processing disorder. Further, the district asserts that Kildonan's school records are replete with references regarding the student's difficulties in the areas of following directions, processing needs, and attending and that there was no evidence in the hearing record regarding how Kildonan would meet these needs.

The district further argues that review of the Kildonan reports shows that the student had performed more poorly at Kildonan in sixth grade than in fifth grade and that therefore, the impartial hearing officer erred in concluding that the student achieved meaningful academic progress at Kildonan. It also argues that testimony from the student's mother regarding the student's progress at Kildonan was insufficient to determine that the student had made progress at Kildonan and that the impartial hearing officer had misconstrued her testimony.

Finally, the district disputes the impartial hearing officer's findings with respect to LRE considerations related to the appropriateness of the parents' placement. It asserts that the impartial hearing officer erred in determining that the student required a weekday residential placement in a school attended only by disabled children, that there was no evidence to support the conclusion that the student required a residential placement in order to benefit from education, and that the student should be educated in a placement where he has exposure to non-disabled peers.

The parents answer and deny the district's claims in relevant part. The parents assert that the student's "major disability" is dyslexia and the "the majority of his educational issues relate to [that condition]." They further set forth that "core aspects" of the Kildonan program are small class size and 1:1 tutoring and that these features serve to address the student's difficulties with auditory processing, attention, organization, and following directions. The parents deny the district's assertion that the student did not make meaningful progress at Kildonan and contend that a review of the student's test scores in 2007 and 2008 show that the student made progress at Kildonan. They also set forth that the student's needs in articulation do not interfere with the receipt of educational benefit at Kildonan and that the student does not need speech-language services to receive educational benefit. As it relates to the appropriateness of Kildonan's program and LRE considerations, the parents argue that it is relevant that the district has conceded that it

did not offer the student a FAPE for the 2008-09 school year as well as that the district has not suggested any alternative placements closer to the student's home where he could receive a FAPE.

The district conceded at the impartial hearing that it did not offer the student a FAPE for the 2008-09 school year (Tr. pp. 3, 16-17). Moreover, the district has not appealed the impartial hearing officer's finding that equitable considerations weigh in the parents' favor. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Therefore, the only issue before me is whether Kildonan is appropriate for the student's needs (see Green v. New York City Dep't of Educ., 2008 WL 919609, at *6 [S.D.N.Y. Mar. 31, 2008] [where equitable considerations were not at issue and a school district conceded that it failed to provide the student with a FAPE, the question before the Court was whether the private education services obtained by the parents were appropriate for the student's needs]).

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the state in favor of an unapproved option is not by itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply

in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89 [emphasis added]).

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

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

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

In 2007, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

I must now consider whether the parents have met their burden of proving the appropriateness of their placement of the student at Kildonan (see Burlington, 471 U.S. at 369-70). As set forth below, I concur with the impartial hearing officer that there is sufficient evidence in the hearing record to show that Kildonan provided the student with educational instruction specially designed to meet the unique needs of a student with a disability, supported by such

services as are necessary to permit the child to benefit from instruction (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

The hearing record indicates that Kildonan is a school for students with dyslexia (Tr. p. 356). The school employs the Orton-Gillingham methodology for instructing students, which is described as language-based and multisensory (Tr. p. 347). According to the student's tutor, who is also the founder of Kildonan, every student receives a 45-minute daily tutorial consisting of 1:1 language teaching provided by a person who is both trained and supervised (Tr. pp. 343, 349-50, 478). In addition, students in the upper and middle school have a daily study period held in the evening which is devoted exclusively to tutorial assignments (Tr. p. 350). As reported by the student's tutor, all of the teachers at Kildonan have been through the associate level of Orton-Gillingham training, consisting of 60 hours (Tr. pp. 351, 469-70, 478; see Tr. p. 358). The student's tutor further testified that classes at Kildonan consist of "no more than ten" students and there are seven or eight students in most classes (Tr. p. 462).

For the 2008-09 school year, Kildonan provides the student with small class instruction in each of his core subject classes. The student's mother testified that there were "four or five students" in the student's seventh grade class (Tr. pp. 452, 462). In addition to small class instruction, the school's founder, who had extensive training in and teaching experience with the Orton-Gillingham methodology, provides the student's daily language tutorial (Tr. pp. 343-45, 358, 380-81). The tutor indicated that she had conducted an informal evaluation of the student when he entered Kildonan in September 2008 (Tr. pp. 365, 472-77). In addition, she noted that she had tutored the student for a few sessions and had spoken to the student's tutor from the previous year (Tr. pp. 379, 388-89). The tutor testified that in order to improve the student's oral reading rate she would spend 10-15 minutes of every tutorial practicing oral reading (Tr. pp. 381-82). She indicated that to improve the student's reading accuracy she would signal to the student that he had made a mistake and when necessary remind the student of sounds or techniques (Tr. p. 382). To address the student's spelling weaknesses, the tutor indicated that she had begun developing a spelling pack for the student and the student would practice writing the words and using them in sentences (id.). She further noted that she had begun to review spelling rule generalizations with the student (id.). In subsequent testimony, the tutor testified that she had been working with the student on handwriting and punctuation and that she had just started to teach the student touch typing (Tr. p. 460).

The hearing record indicates that Kildonan's small class size and intensive 1:1 tutorial is consistent with the educational program recommended by the district's CSE and also consistent with witness testimony (Tr. pp. 90-93; Parent Ex. 2 at pp. 1-2, 6). I note that a district witness, who was a certified special education teacher in New York, certified in Orton-Gillingham, and had expertise and teaching credentials specific to teaching students with dyslexia (the district's Orton-Gillingham certified witness), testified that the student needed multisensory language instruction with an Orton-Gillingham type of program for between 45 and 60 minutes a day and that the receipt of such instruction was "at the top" of the student's educational priority (Tr. pp. 489-91, 540, 551). Further, the speech-language pathologist/audiologist, who evaluated the student's auditory and language processing needs in February 2005 and who prepared a reevaluation of those needs in May 2007, recommended that the student both continue with reading instruction of the type that he was receiving at Kildonan and also with his educational placement there (Parent Ex. 19 at pp. 1, 8, 9).

Furthermore, the hearing record indicates that Kildonan employs numerous program modifications and accommodations consistent with those recommended by the district for the student. The CSE chairperson indicated that the student's weaknesses in organization, processing, and memory would have been addressed by the district through the program modifications, accommodations, and supplementary aides and services recommended by the CSE (Tr. p. 165). The modifications and accommodations identified by the CSE chairperson included checking for understanding, modified assignments with simplified visual input, use of a graphic organizer, visual cues and reminders, copy of class notes, refocusing and redirection, and reteaching of materials (Tr. pp. 168-69). With respect to checking for understanding and reteaching, Kildonan language training notes indicate that the student's language tutor reviewed the student's ability to apply previously learned skills and that the student practiced spelling errors from his own writing (Parent Exs. 31 at p. 1; 49 at p. 1). With respect to visual cues and reminders, the CSE chairperson acknowledged that when she had visited Kildonan she had observed "visual cues, reminders on the wall, scheduling or class agenda, which is oftentimes used as a visual cue" (Tr. p. 169). In addition, the progress note from the student's June 2008 language tutorial indicated that when visual aids were drawn on the student's spelling card the student was able to remember the correct letters in the appropriate order (Parent Ex. 49 at p. 1). With respect to "copy of class notes," a June 2008 Kildonan progress note indicated "that notes were supplied in the seventh grade" (*id.* at p. 4). With respect to the student's weaknesses in working memory, the district's Orton-Gillingham certified witness testified that Orton-Gillingham instruction addressed students' difficulties with working memory (Tr. pp. 555-56). In addition, the CSE chairperson testified that "taking ideas and making connections" as detailed in one the student's Kildonan progress reports was related to working memory (Tr. p. 152). Lastly, the student's March 11, 2008 progress report from Kildonan indicated that the focus of the winter term in literature 6 was on "a drama unit in which the students engaged in exercises aimed at developing powers of observation, concentration, imagination and memory" (Parent Ex. 29 at p. 5).

The student's tutor testified that his deficits in attention were addressed at Kildonan by "the fact that the classes are small and [the student] can be brought back in when he wanders" (Tr. p. 463). Not inconsistent with this testimony, the district's Orton-Gillingham certified witness opined that academic instruction provided in a small group and the 1:1 attention provided during Orton-Gillingham instruction were helpful to address the "attentional issues" of a student (Tr. pp. 489-91, 557-58).

The district argues that the student has a significant auditory and language processing deficit that is not being addressed by Kildonan because it does not provide speech-language services to the student. At the impartial hearing, the CSE chairperson testified that the recommendation that the student receive speech-language therapy services for the 2008-09 school year was based on the May 2007 auditory and language processing evaluation (Tr. pp. 161, 204). She noted that the report indicated that the student had some speech needs, that it was the CSE's understanding that the student had not received speech-language therapy, and that the "issues or challenges identified in the report just did not go away" (Tr. p. 161). The CSE chairperson testified that the district did not conduct any further assessment of the student's speech-language needs in preparation for the 2008-09 recommendation (Tr. p. 205). She acknowledged that the speech-language goals and objectives contained in the student's IEP were "nearly identical" to the goals from the previous year and there was no determination whether the student had achieved those specific speech-language goals (Tr. pp. 207-09). According to the CSE chairperson, the CSE decided to continue the speech-language goals from the 2007-08 IEP because it had no knowledge

of whether the student attained them (Tr. p. 213). The district's speech-language therapist testified, among other things, that the student had difficulty producing words with multiple syllables (Tr. p. 265). She indicated that the student should receive speech-language services because he had delays in auditory processing, articulation, and language that would be addressed by a speech therapist (Tr. p. 273).

Although Kildonan does not have certified speech-language therapists on its staff and did not provide the student with speech-language services by such personnel (Tr. pp. 161-62, 458), the hearing record suggests that at least some of the student's speech-language needs would be addressed by the student's Orton-Gillingham program at Kildonan. The CSE chairperson acknowledged having conversations with the student's mother relative to Kildonan staff working on a structure that would have implemented the student's IEP goals related to multisyllabic words (Tr. p. 235). The student's tutor also testified that the Orton-Gillingham methodology included work with syllabication as well as breaking down words through a focus on morphology (Tr. pp. 385-86). The district's Orton-Gillingham certified witness testified that the student's conversational deficits appeared to impact his participation in the educational setting in that he struggled with sentence structure and semantics (Tr. p. 542). She acknowledged, however, that people who are trained in Orton-Gillingham would have some level of ability to address those deficits (Tr. p. 543). Lastly, the student's tutor at Kildonan testified that Orton-Gillingham training includes an articulation component related to the way in which sounds are formed in the mouth (Tr. p. 471).

I concur with the impartial hearing officer that, that while speech-language services may have been beneficial to the student, the absence of speech-language services does not warrant a finding that the parents' placement of the student at Kildonan was not appropriate. Even though Kildonan did not provide direct speech-language therapy to the student, it is evident from the hearing record that Kildonan's educational program did address several of the student's speech-language needs within its program (see Application of the Dep't of Educ., Appeal No. 08-062). Therefore, under the circumstances of this case, I concur with the impartial hearing officer and find that the hearing record does not show that the student required speech-language therapy services separate and apart from the language training and educational program provided at Kildonan to permit the student to receive educational benefits (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364, 365). Moreover, based on the foregoing, I find that the parents provided sufficient evidence about the student's identified special education needs and how Kildonan was addressing those needs to meet their burden. Accordingly, I conclude that the hearing record provides sufficient evidence of the educational instruction that was provided to the student at Kildonan and was specifically designed to address his deficits (see Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364; see also Application of the Dep't of Educ., Appeal No. 08-081; Application of the Dep't of Educ., Appeal No. 08-062; Application of the Bd. of Educ., Appeal No. 05-092; Application of a Child with a Disability, Appeal No. 02-093; Application of a Child with a Disability, Appeal No. 97-2; Application of the Bd. of Educ., Appeal No. 96-9).

In addition, I note that the student attended Kildonan during the 2006-07 and 2007-08 school years and the hearing record contains the results of a number of standardized tests administered by Kildonan during this time (see Parent Ex. 48). A comparison of the student's standardized test scores between May 2007 and May 2008 indicate that the student made some progress in deficit areas (id. at p. 3). Specifically, on the Gray Oral Reading Test –Fourth Edition (GORT-4) the student's reading "accuracy" improved from a scaled score of 3 to a scaled score of

6 and the student's standard score on the Test of Written Spelling-Fourth Edition increased from 68 to 82 (*id.*). With respect to mathematics, the student's scores on the Stanford Diagnostic Mathematics Test – Fourth Edition (SDMT-4) section on computation increased from the 21st to the 41st percentile (*id.*). Although the district's witnesses dispute the amount of progress that the 2007 and 2008 testing indicate, they agree that, with the lone exception of the student's May 2007 score on the Woodcock Reading Mastery Test-Revised/Normative Update (WRMT-R/NU) word attack subtest, the testing scores show that the student did make some amount of progress in the particular educational areas tested (*see* Tr. pp. 182-96, 545-49). I also note that the student's tutor at Kildonan determined that the student's scores on the 2007 and 2008 testing reflected the student's progress (Tr. pp. 344-45, 357-58, 372-78). Thus, the hearing record also demonstrates that the student had made academic progress while attending Kildonan.

The district also argues that Kildonan does not provide the student with special education services in the LRE. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (*Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 [1st Cir. 2002]; *M.S. v. Bd. of Educ.*, 231 F.3d 96, 105 [2d Cir. 2000]). The impartial hearing officer held that the student's placement at Kildonan was consistent with LRE considerations (IHO Decision at p. 19). Among other things, the hearing record showed that for grades seven through twelve, Kildonan was exclusively a boarding school (*see id.* at p. 19; Tr. p. 345), that Kildonan's seventh grade boarding program included an evening study period devoted to the student's' tutorial assignments (Tr. p. 350) and that there was no alternative day program available (IHO Decision at p. 19). Taking into consideration these factors as well as the entire hearing record, I will not disturb the impartial hearing officer's finding that LRE considerations do not preclude a determination that Kildonan was an appropriate placement for the student for the 2008-09 school year.

I have considered the district's remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 12, 2009

PAUL F. KELLY
STATE REVIEW OFFICER