



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-064

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

Appearances:

Law Office of Peter D. Hoffman, P.C., attorneys for petitioners, Betty J. Potenza, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Marc E. Sharff, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Kildonan School (Kildonan) for the 2007-08 school year. Respondent (the district) cross-appeals from that portion of the impartial hearing officer's decision which determined that the district failed to offer an appropriate educational program to the student for the 2007-08 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student attended sixth grade at Kildonan (Tr. pp. 1000-06, 1042-50, 1169-70, 1186-97; Dist. Exs. 1D-1E; 12). The Commissioner of Education has not approved Kildonan as a school with which school 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 as a student with an other health impairment (OHI) is not in dispute on appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]; Tr. pp. 49-50); however, the parents asserted below that the district failed to correctly diagnose the student as having dyslexia (Tr. pp. 49-50; Dist. Ex. 1 at pp. 5-7).

According to the hearing record, the student's early history was marked by delays in speech and language development, temper tantrums and aggressive behavior, sensory processing difficulties, and a limited attention span (see Dist. Exs. 39-44). The parents, who adopted the student from Russia when he was 18 months old, first sought therapy for the student when he exhibited institutional behaviors, such as rocking and hoarding, several months after they brought

the student home to the United States (Tr. pp. 865-68, 1084-85). After eliminating the institutional behaviors, the parents began observing other cognitive and physical issues (Tr. pp. 867-69; Dist. Ex. 41 at p. 3). At that time, the student's pediatrician recommended an evaluation through the Early Intervention Program (EI) (Tr. pp. 867-70, 877-78, 1087-89; Dist. Exs. 43-44; see Dist. Exs. 40 at p. 1; 42; see generally Dist. Ex. 41 at pp. 2-3). During the EI evaluation process, the parents reported that although very little information existed about the student's medical or developmental history prior to the adoption, they were aware that the student's biological mother abused alcohol during the pregnancy (Tr. pp. 1065-66, 1073; Dist. Exs. 43-44; see Dist. Ex. 39 at p. 2). As a result of the EI evaluations, which revealed significant expressive language and articulation delays, as well as behavioral issues, the student received speech-language therapy and behavior modification services (Tr. pp. 869-70; Dist. Exs. 40; 41 at p. 3; 43).

Subsequently, the district's Committee on Preschool Special Education (CPSE) evaluated the student and found him eligible for special education programs and services as a preschool student with a disability (Tr. pp. 872-81; see Dist. Exs. 37-39; 41 at p. 8; 42-43). For the 1999-2000 school year, the CPSE recommended—and the student attended—a 6:1+1 special class for preschool, where the student also received related services of speech-language therapy, counseling, and occupational therapy (OT) (Dist. Ex. 41 at p. 3; see Tr. pp. 1073-78). At that time, the student's neurologist prescribed medication to treat the student's "extreme impulsivity" (Tr. pp. 1073-75; Dist. Ex. 39 at p. 2; see Dist. Exs. 37 at p. 6; 38 at p. 6).

Upon transitioning to the Committee on Special Education (CSE), the CSE found the student eligible for special education programs and services as a student with a speech or language impairment (Tr. p. 1091; see generally Dist. Ex. 34 at p. 1). The student attended the district's developmental kindergarten during the 2000-01 school year, where he continued to struggle with language and articulation (Dist. Ex. 36 at p. 1). For first grade (2001-02) and second grade (2002-03), the student attended a 12:1+1 "special class-collaboration" and received related services of speech-language therapy, OT, and counseling (Dist. Exs. 33 at p. 1; 34 at p. 1). As described in the individualized education programs (IEPs), the student demonstrated "extremely disordered" spontaneous speech and was "prone to distractibility, impulsivity, inattention and overstimulation" (Dist. Exs. 33 at pp. 1, 3; 34 at pp. 1, 3). An evaluation of the student conducted by a neurologist in spring 2003 indicated that the student had significant learning disabilities, including a decoding disorder and graphomotor problems, and the neurologist noted possible etiologies for the student's impairments as "fetal alcohol syndrome" and "Fragile X syndrome" (Dist. Ex. 56 at p. 1). The evaluation report noted concerns regarding the student's continued behavioral problems and that the student's attention deficit hyperactivity disorder (ADHD) significantly interfered with his home and school activities, which necessitated a medication change at that time (Dist. Ex. 56 at pp. 1-3; see Dist. Ex. 33 at p. 3). At the student's annual review for the 2003-04 school year, a subcommittee of the CSE noted in the "Comments" section of the IEP that the student had improved his social skills and his ability to build friendships and that his articulation skills had "improved dramatically" (Dist. Ex. 30 at p. 4). However, the CSE also noted the student's continued difficulties with reading and decoding skills, and further, that the student's grammar and syntax remained areas of weakness (id.). For third grade (2003-04), the student attended 12:1+1 special classes in a special education setting for language arts and mathematics, and for science and social studies, the student attended a special class in a general education setting (id. at p. 1). As related services, the student continued to receive speech-language therapy, OT, and counseling (id.).

In spring 2004, the district conducted a psychological evaluation as a part of the student's triennial review, which yielded a full-scale intelligence quotient (IQ) score in the "[l]ow [a]verage range of cognitive functioning" on the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) (Dist. Ex. 23 at pp. 1-2). An administration of the Wechsler Individual Achievement Test—Second Edition (WIAT-II) confirmed deficits in the student's decoding, reading comprehension, mathematical reasoning, spelling, written expression, and oral expression skills (Dist. Exs. 26 at pp. 1-3; 27 at pp. 1-2). In an annual summary, the student's teachers reported that the student exhibited "age appropriate expectations" in his social/emotional functioning, but academically, the student made limited progress in reading and demonstrated "great difficulty progressing independently as a fluent reader" (Dist. Ex. 25). The teachers further noted that the student demonstrated difficulty with the mechanics and structure of writing, and exhibited weak spelling skills (*id.*). In addition, the teachers stated that the student required additional time to learn new mathematics concepts and skills (*id.*). Toward the end of the student's third grade year, a CSE subcommittee held an annual review and recommended that the student's classification be changed to other health impairment to more accurately reflect his educational needs (Dist. Ex. 24 at p. 4). The IEP indicated that the student continued to receive medication for behaviors associated with ADHD (*id.*). The CSE subcommittee developed an IEP for the student for fourth grade (2004-05), which recommended the following: a 12:1+1 special class in a special education setting for language arts, mathematics, and social studies; consultant teacher indirect services in a general education setting; speech-language therapy; OT; counseling; and four 45-minute sessions per week of specialized reading instruction (*id.* at pp. 1, 4). Although not specified in the student's 2004-05 IEP, the district implemented the Wilson Reading Program (Wilson) as the student's specialized reading instruction in September 2004, and the student received Wilson instruction from a district special education teacher under the guidance of a Wilson trainer (Tr. pp. 68-70, 447-48, 512-13, 921-24; *see* Tr. pp. 396-99; Dist. Ex. 24 at p. 4).

For fifth grade during the 2005-06 school year, a CSE subcommittee recommended that the student be placed in 12:1+1 special classes for language arts, mathematics, and social studies (Dist. Ex. 20 at p. 1). The CSE subcommittee also recommended indirect consultant teacher services to support the student in science class (*id.*). As noted in the student's IEP, the CSE subcommittee recommended four 40-minute sessions of specialized reading instruction per week based upon the student's "excellent response to a special reading class last year" (*id.* at pp. 1, 4). Additionally, the CSE subcommittee recommended that the student receive related services of two 30-minute sessions of speech-language therapy per week, one monthly OT consultation, and one 30-minute session of counseling per week (*id.* at p. 1). Due to the development of a bowel disorder, the CSE subcommittee developed a toileting schedule to be monitored by the school nurse (*id.* at p. 4). The student's IEP progress report for the 2005-06 school year indicated that he achieved 2 out of 35 IEP short-term objectives (*see* Dist. Ex. 15 at pp. 1-5). The student's special education reading teacher reported that the student progressed from level 4.1 to level 7.1 in the Wilson program during the 2005-06 school year (Tr. pp. 430-32; *see* Dist. Ex. 50 at p. 1).

At the parents' request, the student repeated fifth grade during the 2006-07 school year (Tr. pp. 950-51). On April 3, 2006, a CSE subcommittee convened to conduct the student's annual

review and to develop his IEP for the 2006-07 school year (Parent Ex. E at p. 11). According to the IEP, although the student showed "little progress" in reading, decoding, and comprehension, he had a large sight word vocabulary (*id.* at p. 3). The IEP further indicated that the student exhibited difficulty writing sentences, and he functioned "below grade level" in spelling and reading comprehension (*id.*). For the 2006-07 school year, the CSE subcommittee recommended placement in 15:1+1 "co-teach" classes for the student's academic courses and that he attend a daily skills class (*id.* at p. 1). The CSE subcommittee further recommended that the student receive 3 hours per week of reading instruction in a group of 5:1, as well as related services of two 30-minute sessions of speech-language therapy per week and one 30-minute session per week of counseling (*id.* at pp. 1-2). The student continued to receive Wilson as his specialized reading instruction during the 2006-07 school year, and he progressed from level 7.1 to level 9.2 during that year (*see* Tr. pp. 405-07, 432-33; Dist. Ex. 45 at pp. 1-2).¹

During fall 2006, the district sought the parents' consent to conduct a multi-disciplinary evaluation for the student's triennial evaluation, which the parents signed on November 18, 2006 (Parent Ex. W). On the consent form returned to the district, the parents had inserted a handwritten request for the district to use specific evaluations, as well as a handwritten request inquiring as to whether the district had a "way to check for dyslexia" (*id.*). As part of the triennial evaluation, the parents completed an updated social history report, dated November 5, 2006 (Dist. Ex. 5 at pp. 1-2). The parents indicated in the social history report that although the student "matured emotionally" and "rarely" had "melt-downs," he continued to have difficulties making friends and communicating (*id.*). The parents also reported that the student could not read body language or facial expressions, had poor reading and writing abilities, and other language-based problems (*id.* at p. 2).

On January 9, 10, and 11, 2007, the district conducted the student's triennial evaluation (*see* Dist. Exs. 8-10; 13 at pp. 1, 4-5). An administration of the WIAT-II to assess the student's academic achievement yielded the following subtest standard scores: word reading, 75; reading comprehension, 89; pseudoword decoding, 70; numerical operations, 80; math reasoning 90; spelling, 72; written expression, 72; and listening comprehension, 85 (Dist. Ex. 10 at p. 1). As part of the psychological evaluation, a district school psychologist administered the WISC-IV, which yielded the following standard scores: verbal comprehension, 98; perceptual reasoning, 84; working memory, 77; and processing speed, 118 (Dist. Ex. 8 at p. 2). In her evaluation report, the psychologist noted that the student's full scale IQ score of 91 must be interpreted "with caution" due to the range of scatter among the index scores (*id.* at p. 3). However, she also concluded that the evaluation results suggested that the student's overall level of intellectual functioning was within the average range (*id.* at p. 4). The psychologist noted that the student's ability to comprehend and reason with auditorily presented material was within the average range, while the student's ability to reason with visually presented nonverbal material was within the low-average range (*id.* at p. 3). Additionally, the psychologist reported that the student's ability to hold and manipulate auditorily presented verbal information in working memory was within the borderline range, while his ability to process visually presented material was in the high-average range (*id.* at pp. 3-4). According to the psychologist, the student received an age-equivalent of 7-6 (standard

¹ The student received his specialized reading instruction from the same district special education teacher during the 2005-06 and 2006-07 school years, who was a certified Wilson instructor (Tr. pp. 396-99, 406).

score, 81) on the Developmental Test of Visual Motor Integration (VMI), which suggested weaknesses in the student's fine-motor control and visual-motor-spatial integration skills (id. at p. 4). Referring to the WIAT-II evaluation results, the psychologist concluded that the student demonstrated a significant discrepancy between expected levels of achievement and actual levels of achievement in reading, mathematics, and written expression (id. at pp. 3-4).

To assess the student's language skills for the triennial evaluation, the student's speech-language therapist administered the Clinical Evaluation of Language Fundamentals—Fourth Edition (CELF-4) (Dist. Ex. 9 at p. 1; see Tr. pp. 628, 632-48). The student received a core language standard score of 60, which placed the student in the "very low range of functioning" (Dist. Ex. 9 at pp. 1, 6). More specifically, the student received a receptive language index of 81 (borderline range), an expressive language index of 57 (very low range), and a language memory index of 52 (very low range) (id. at pp. 1, 6-7).

On January 12, 2007, the parents completed an application for the student's admission to Kildonan beginning September 2007 as a day student (Parent Ex. I at pp. 1, 4). When describing the student's "difficulty with basic skills" in the application, the parents noted that the student read approximately at a "grade 3 level" and that he made "significant improvement after receiving Wilson training beginning 2 years ago" (id. at p. 5).

On January 22, 2007, a CSE subcommittee convened to conduct the student's annual review and to develop his IEP for sixth grade during the 2007-08 school year (Dist. Ex. 13 at p. 1). Meeting participants included the following: a CSE subcommittee chairperson; the student's special education teacher; a regular education teacher; a school psychologist; the student's speech-language therapist; a social worker; the student's special education Wilson reading instructor; and the student's mother (id. at p. 4). The January 2007 IEP included the results of the student's triennial evaluation (id. at pp. 3-4). The student's special education teacher reported that the student made progress and quickly mastered new concepts; however, he did not always apply the strategies he had learned to his reading (id. at p. 4). The student's teacher noted that the student exhibited good listening comprehension skills, but weak expressive language skills (id.). According to the meeting minutes, the student's mother stated her belief that the student "may have dyslexia" (id.).

For the 2007-08 school year (sixth grade), the CSE subcommittee recommended placement in 15:1+1 special classes in a special education setting for English, mathematics, science, and social studies; a daily skills class in a special education setting; five 39-minute sessions per week of reading instruction in a group of 5:1; and related services of two 30-minute sessions per week of speech-language therapy in a group and one 30-minute session per week of counseling in a group (Dist. Ex. 13 at p. 1). The CSE subcommittee also recommended the following program modifications and accommodations: to support auditory presentations with visuals; access to a word processor; additional time to complete tasks; checking for understanding of assignments; checking work in progress; cuing the student to key points (overhead, underline); and breaking tasks down into manageable parts (id. at p. 2). In addition, the IEP included the following testing accommodations: extended time; a location with minimal distractions; directions explained; questions and passages read (as permitted by the State Education Department on State assessments); and the use of a scribe to record answers for writing passages (id.). The student's IEP included annual goals to address the student's identified needs in the areas of study skills,

reading, writing, mathematics, speech-language, and social/emotional/behavioral concerns (*id.* at pp. 5-7).

By letter dated January 23, 2007, the parents confirmed a telephone conversation of the same date with Kildonan's director of admissions to discuss the student's application to Kildonan (Dist. Ex. 55). With the letter, the parents enclosed copies of the student's most recent testing performed by the district, as well as an initial evaluation and report cards (*id.*).

According to testimony at the impartial hearing, the parents visited the CSE subcommittee's recommended sixth grade placement in the district's middle school sometime in February or early March 2007 (Tr. pp. 980-83).

By letter dated March 5, 2007, the parents rejected the proposed IEP, program, and placement for the 2007-08 school year because the IEP did not offer "sufficiently intensive" "special instruction," and the district's recommended placement was not appropriate (Dist. Ex. 12). According to the letter, the parents intended to enroll the student at Kildonan where he would be "supported in an Orton-Gillingham, multi-sensory, full immersion program that will provide the learning and educationally supportive environment" recommended for the student's "specific learning disabilities" (*id.*). The parents also indicated their intention to seek reimbursement for the costs of their son's tuition at Kildonan, including "supervision, consultation and team meetings" (*id.*). In addition, the parents requested that the district provide transportation or fund the costs associated with the student's transportation to Kildonan (*id.*). According to the testimony at the impartial hearing, the parents retained an attorney after the January 22, 2007 CSE subcommittee meeting and prior to sending the March 5, 2007 letter to the district because they "didn't know how else to proceed" (Tr. pp. 986, 1687-88, 1690-91).

In or around this same time period, the parents' attorney referred them to a neuropsychologist, and on March 9, 2007, the parents met with the neuropsychologist for an intake interview (Tr. pp. 1694, 1846-48; Dist. Ex. 52 at pp. 1-3). According to the neuropsychologist's testimony at the impartial hearing, he conducted intake interviews with parents to determine whether to proceed with an evaluation (Tr. pp. 1850-52). At this particular intake interview, he learned that the parents had retained an attorney and that they wanted their son evaluated (Tr. pp. 1849-53; Dist. Ex. 52 at pp. 1-3).

By letter dated March 27, 2007, Kildonan's director of admissions wrote to the parents advising that the admissions committee had accepted the student for enrollment for the 2007-08 school year (Dist. Ex. 53). The director of admissions requested that the parents execute the enclosed contract and remit a deposit by April 12, 2007, to ensure the student's placement (*id.*). On April 4, 2007, the parents executed an enrollment contract with Kildonan for their son's attendance during the 2007-08 school year (Parent Ex. K). By letter dated April 13, 2007, the director of admissions acknowledged receipt of the parents' deposit for the student's attendance at Kildonan for the 2007-08 school year (Dist. Ex. 54).

On April 27, 2007, the student's special education Wilson reading instructor administered the Wilson Assessment of Decoding and Encoding (WADE) (Dist. Ex. 7). The teacher reported both "total scores"—the percent correct of all test items administered—and "mastery scores," the percent correct of all test items administered up to the last Wilson instructional substep level taught

to the student (id. at p. 1). The evaluation report identified level 8.5 as the last Wilson instructional substep taught to the student prior to the assessment (id.). The evaluator reported that based upon the WADE results, the student achieved 92 percent mastery of "real" and "sight words" through level 8.5 for decoding (id. at p. 2). The evaluator also noted that the student improved his encoding skills, but that he failed to consistently "use the spelling choices procedure unless prompted, resulting in misspellings" (id.). She also noted that the student's "level of attention and concentration" resulted in an inconsistent performance (id.).

On April 27, 2007, the neuropsychologist who the parents were referred to by their attorney administered his own evaluation of the student (Parent Ex. V). The neuropsychologist testified at the impartial hearing that when he evaluated the student on April 27, 2007, he was aware that the parents intended to enroll the student at Kildonan (Tr. pp. 1839-40, 1847-49).

According to his evaluation report, the neuropsychologist used a "focal battery approach" to assess the student's language, executive, and reading skills (Parent Ex. V at p. 1). Based upon the evaluation results, the student demonstrated word finding difficulties, and he exhibited below average language production with respect to organization, usage, and sentence construction (id. at p. 3). The neuropsychologist noted weaknesses in the student's complex phonological skills, specifically in his ability to segment and blend phonemes in words and in his ability to sequence and demonstrate short-term recall of phonemes in rhyming words (id.). Notably, the neuropsychologist characterized the student's language processing and factual comprehension skills as "quite good" (id.). The neuropsychologist reported that the student demonstrated "significant problems sequencing and recalling verbal 'strings' and understanding complex syntax" (id.). The student demonstrated average overall attention skills as measured by a continuous performance test (id.). Teacher ratings placed the student in the average range for both attention and inhibition, which contrasted with the parents' ratings that indicated problems with attention and inhibition (id.). The neuropsychologist explained that the apparent discrepancy could result from "the trailing medication effect in the afternoon" (id.). With respect to basic working memory, the student performed within the average range in verbal information (id.). However, he noted that the student's complex working memory, processing speed, set-shifting, organization, and planning skills remained poor (id.).

According to the neuropsychologist, an assessment of the student's academic skills revealed "massive decoding struggles," which lead to "shallow comprehension" of materials read (Parent Ex. V at p. 4). The neuropsychologist reported that the student's ability to perform varied mathematical operations fell within the average range with some "vulnerability" noted in complex division, fractions, decimals, and negative numbers (id.). Based upon a structured interview with the student and his mother, and on parent behavioral rating scales, the neuropsychologist concluded that the student was a "fairly well adjusted youngster" with "lingering" behavioral features that did not reach the level of a disruptive behavior disorder (id.). He also noted that the student's behavior and social skills had improved (id.).

Under clinical impressions, the neuropsychologist concluded that the student continued to have the "core neurocognitive deficits associated with dyslexia" (Parent Ex. V at p. 4). Citing the student's additional problems with spelling and writing, the neuropsychologist opined that the student met the DSM-IV criteria for a reading disorder and a disorder of written expression (id.). The neuropsychologist further determined that the student met the criteria for ADHD and that the

student's pattern of cognitive deficits and behavioral features was consistent with fetal alcohol effect (FAE) (id.). The neuropsychologist opined that the student's educational program had not led to substantial remediation of his reading and language disorder (id. at p. 5). Based upon the student's lack of progress and the severity of his language and reading deficits, the neuropsychologist recommended that the student attend a specialized program for children with language-based learning disorders (id.). He further recommended that the program "be guided by" an Orton-Gillingham (OG) based reading intervention approach delivered "daily and intensely," that the reading instruction be "coupled" with language therapy four times per week, and that the student receive training in organizational skills (id.). The neuropsychologist noted the importance of improving oral reading fluency and recommended that activities should be included in the student's reading program that were designed to increase the student's ability to decode text accurately and fluently (id.).

Due to the parents' notification to the district that they did not agree with the 2007-08 IEP developed at the January 2007 meeting, a CSE subcommittee convened on June 5, 2007 to review the student's program (Dist. Ex. 3 at p. 12). Meeting participants included the following: a CSE subcommittee chairperson; the student's fifth grade special education classroom teacher; the student's fifth grade regular education classroom teacher; a school psychologist; the student's speech-language therapist; a social worker; the student's special education Wilson reading instructor; the student's mother; the district's attorney; and the parents' attorney (id. at p. 5; see Tr. pp. 60-62). Discussing the student's academic functioning, the special education classroom teacher identified written expression as the student's greatest challenge, noting that he had difficulty organizing and expressing his thoughts in a logical sequence (Dist. Ex. 3 at p. 5). According to the special education Wilson reading instructor, the student improved his reading skills, he actively engaged in reading instruction, and he had begun to apply decoding strategies to his content area reading in the resource room (id.). She further reported that the student's fluency was also "increasing," and that the student had progressed to level 9.1 in the Wilson program (id.).

As noted by the student's special education Wilson instructor, the student did not apply learned strategies in the classroom when he rushed and approached tasks in a disorganized manner; however, when redirected and prompted to slow down, the student would respond and be successful with the presented tasks (Dist. Ex. 3 at p. 6). The CSE subcommittee discussed the student's use of a spell check device during reading class, which prompted the CSE subcommittee to consider adding the use of the device to the student's IEP as a supplementary aid in all of his classes, as well as considering whether to waive the student's spelling requirements during some testing situations (id.). The student's speech-language therapist described to the CSE subcommittee the strategies she used to support the student's writing needs (id.). She further reported that the student had successfully achieved all of his speech-language goals for the year (id.). According to the student's regular education teacher, the student received a score of 3 on the New York State fifth grade social studies assessment, and his oral expression had improved in the classroom (id.). Upon report by the student's regular education teacher that the student struggled with numerical operations, the CSE subcommittee recommended an additional program modification and testing accommodation that would allow the student to use a calculator for tests and within the classroom (id.). The CSE subcommittee decided to adjourn further discussions at

the meeting until the district received the parents' private neuropsychological evaluation report (id.).²

On July 10, 2007, a CSE subcommittee reconvened to consider the parents' private neuropsychological evaluation report (Dist. Ex. 3 at pp. 1, 5-6). Meeting participants included the following: a CSE subcommittee chairperson; the student's fifth grade regular education classroom teacher; the student's special education Wilson reading instructor; a school psychologist; the student's speech-language therapist; a middle school special education reading teacher; the student's anticipated special education classroom teacher for sixth grade; the parents' private neuropsychologist (via telephone); the student's mother; the district's attorney; and the parents' attorney (Tr. pp. 61-62; Dist. Ex. 3 at p. 5). The CSE subcommittee revised the student's present levels of performance to include the district's April 2007 WADE results and the results from the private neuropsychological evaluation (Dist. Ex. 3 at pp. 3-4; compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 13 at pp. 3-4). The CSE subcommittee discussed the student's significant progress within his reading class and the student's development of necessary strategies to decode (Dist. Ex. 3 at p. 5). According to the IEP, the student also made significant progress in his decoding and comprehension, and he continued to expand his sight word vocabulary (id. at p. 3). However, the IEP further indicated that while the student demonstrated improvement in his ability to read phonetically controlled text fluently, he did not always generalize the skill to non-controlled text (id.). The CSE subcommittee discussed the student's inability to generalize these skills "across content areas" and noted that in order to address this weakness, the student required "instruction in all content areas consistently implementing the same multi-sensory strategies for reading all material" (id. at p. 5). The special education teacher of the recommended sixth grade classroom—who, herself, was a Wilson certified reading instructor—discussed the classroom strategies she used, including the use of kinesthetic activities to aid students in sustaining focused attention (id.; see Tr. pp. 62-63, 725-30). According to the IEP, the student exhibited difficulty writing sentences and his spelling skills were below grade level (Dist. Ex. 3 at p. 3). The student had shown improvement in mathematical calculations and when provided with reading support, the student could apply strategies to solve basic mathematical problems (id.). The IEP also indicated that the student required assistance organizing homework assignments and pacing work (id.).

With respect to the student's speech-language needs, the IEP indicated that the student demonstrated significant growth in receptive and expressive vocabulary and sentence organization (Dist. Ex. 3 at p. 4). The IEP indicated that the student needed to improve his skills related to sentence organization, utilizing descriptive language, concepts, and following multi-step directions (id.). Socially, the IEP noted that the student was eager to interact with adults and peers, but issues existed with respect to personal and social boundaries and direct eye contact (id.). The IEP noted that at times, the student would model inappropriate behavior "in an effort to fit in with the crowd" (id.). The IEP also indicated that the student continued to have toileting needs (id. at p. 5).

² It should also be noted that at the June 5, 2007 CSE subcommittee meeting, the parents stated that they had visited the district's proposed placement recommended by the January 2007 CSE subcommittee and the student "would not fit in either group" (Dist. Ex. 3 at p. 6). The parents also stated at the June 2007 CSE subcommittee meeting that the student had been unilaterally enrolled at Kildonan "beginning in September 2007" (id.).

At the meeting, the student's mother received a class profile for the recommended sixth grade placement, as she was concerned that the student's "abilities" and "challenges" were discrepant from the other students in the recommended placement (Dist. Ex. 3 at p. 5). A sixth grade special education teacher commented about the similarity of the student's strengths and weaknesses compared to the students in the recommended placement (id.). The CSE subcommittee reviewed the neuropsychological evaluation report, noting the neuropsychologist's opinion that the student presented with a "language-based learning disability with ADHD affected by FAE etiology" (id.). The IEP noted that the neuropsychologist's recommendation for daily reading instruction had already been recommended by the CSE subcommittee and that the CSE subcommittee reviewed and discussed the student's academic goals, including the modifications and accommodations required to support the student's achievement of the identified goals (id.). The CSE subcommittee discussed and developed a plan to address the student's toileting needs by adding an additional, individual counseling session to the student's IEP (id. at pp. 5-6). In addition, the CSE subcommittee recommended special transportation for the student in a small van in response to the parents' request for such service (id. at pp. 1, 6).

Consistent with the January 2007 CSE subcommittee recommendations, the July 2007 CSE subcommittee recommended placement in 15:1+1 special classes in a special education setting for English, mathematics, science, and social studies; a daily skills class in a special education setting; five 39-minute sessions per week of specialized reading instruction in a group of 5:1; and related services of two 30-minute sessions per week of speech-language therapy in a group (Dist. Ex. 3 at p. 1; compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 13 at p. 1). The July 2007 CSE subcommittee increased the student's counseling services from one 30-minute group session per week to two 30-minute sessions per week (one individual session and one group session per week) (Dist. Ex. 3 at pp. 1-2; compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 13 at p. 1). The July 2007 CSE subcommittee also recommended additional program modifications, accommodations, and supplementary aids and services, including books on tape, a copy of class notes, preferential seating, refocusing and redirection, the use of a calculator, spell check, the use of graph paper, the use of a graphic organizer, and the use of arithmetic tables (Dist. Ex. 3 at p. 2; compare Dist. Ex. 3 at p. 2, with Dist. Ex. 13 at p. 2). In addition, the CSE subcommittee recommended testing accommodations beyond those recommended by the January 2007 CSE subcommittee, including the use of a calculator, the provision of arithmetic tables, and the waiver of spelling requirements (id.). The CSE subcommittee also revised the student's annual goals (Dist. Ex. 3 at pp. 7-12; compare Dist. Ex. 3 at pp. 7-12, with Dist. Ex. 13 at pp. 5-7).

By letters dated August 20, 2007, the parents rejected the 2007-08 IEP developed at the July 2007 CSE subcommittee meeting and notified the district that the student would attend Kildonan for the 2007-08 school year because it "would be the most appropriate placement" for the student (Dist. Exs. 1D-1E).³

By due process complaint notice dated September 24, 2007, the parents requested an impartial hearing (Dist. Ex. 1 at pp. 2, 5). The parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year based upon the

³ For purposes of clarity, the five exhibits attached to the parents' September 24, 2007 due process complaint notice will be referred to in citations as District exhibits 1A through 1E (Dist. Exs. 1A-1E).

following alleged violations: throughout the student's nine years of attendance in the district, the district failed to diagnose or identify the student's reading disability as dyslexia; the district failed to remediate the student's reading disability, dyslexia; the district failed to disclose the student's reading disability to the parents; and the district failed in the student's previous IEPs to include a "statement of the special education and related services and supplementary aids and services, based upon peer-reviewed research" (*id.* at pp. 3, 5-7). Relevant to the program and placement offered in the student's 2007-08 IEP, the parents alleged that the 2007-08 IEP failed to contain the necessary remediation and failed to address the student's dyslexia; the IEP failed to recognize the student's diagnosis of dyslexia and instead, referred to "significant reading difficulties and ADHD;" the IEP failed to address the parents' concerns raised about the student's dyslexia at the July 10, 2007 CSE subcommittee meeting; the district failed to understand and willfully ignored the privately obtained neuropsychological report provided by the parents, and thus, failed to offer an appropriate program to remediate the student's underlying condition of dyslexia; the goals in the IEP failed to provide "academic and functional goals" to meet the student's needs or to enable the student to make progress in the general education curriculum; the IEP failed to describe how the student's progress on the stated goals would be measured or reported; the instruction proposed in the IEP did not "use 'scientifically based instructional practices;" the IEP failed to contain a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research;" and the IEP failed to describe how the student's reading program would be integrated into the classroom (*id.* at pp. 5-8).

As relief, the parents proposed the following: that the district intensify its search for an appropriate program for the student; that the district expand its search for an appropriate program to include State-approved and non-State approved out-of-district programs; the development of an IEP that reflected the student's "main disability, dyslexia;" the development of an IEP that included an OG reading program "thoroughly integrated into the entire curriculum;" the development of an IEP that included speech-language therapy, OT, and physical therapy (PT) "as it concerns dyslexia;" the removal of "all references" to OHI in the student's 2007-08 IEP; the "expungement of IEPs" dated January 22, 2007, June 5, 2007, and July 10, 2007; an award of compensatory education to remedy the student's lack of progress for the past nine years; reimbursement of attorney's fees and costs; an order directing the district to reimburse the parents for the costs of the student's tuition at Kildonan for the 2007-08 school year, as well as transportation services and sums advanced by the parents; and an order directing the district to reimburse the parents for private evaluations and private tutoring services (Dist. Ex. 1 at pp. 3, 8).

The parties proceeded to an impartial hearing on March 14, 2008, which concluded after nine days on December 11, 2008 (Tr. pp. 1, 2313). By decision dated April 26, 2009, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2007-08 school year, that the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at Kildonan, and that the parents were not entitled to reimbursement for the

costs of the student's unilateral enrollment at Kildonan (IHO Decision at pp. 13-41).⁴ In her decision, the impartial hearing officer analyzed the district's recommended special education programs and services for the 2007-08 school year, focusing her attention on the evidence presented regarding the proposed 15:1+1 special class, the daily reading instruction offered, and how the district would implement the recommended programs and services (*id.* at pp. 15-17). The impartial hearing officer then discussed and analyzed the student's impairments based upon the evidence presented and concluded that the district adequately identified the student's functional impairments, and further, that the district's failure to identify the student as dyslexic on his IEP did not constitute a denial of a FAPE (*id.* at pp. 17-19).

Turning to the question of whether the district's recommended special education programs and services for the 2007-08 school year were reasonably calculated to enable the student to receive meaningful educational benefits, the impartial hearing officer first concluded that the programmatic changes recommended for the 2007-08 school year were "inconsequential" (IHO Decision at pp. 20-21). In particular, the impartial hearing officer found that although the district offered daily reading instruction to the student, the cumulative impact would only amount to an additional 15 minutes per week of reading instruction when compared to the reading instruction provided to the student during the 2006-07 school year (*id.* at p. 20). Second, the impartial hearing officer concluded that the CSE's recommended placement of the student in a "self-contained" 15:1+1 special class—when compared to the student's educational setting during the 2006-07 school year—constituted a "*de minimus*" change in his program and thus, was not afforded any weight in her analysis (*id.*). Taken together, the impartial hearing officer noted that the 2007-08 special education programs and services were "essentially the same" as the programs previously provided, which did not "bolster" the district's claim that it offered the student an appropriate program (*id.* at pp. 20-21).

Next, the impartial hearing officer discussed and analyzed the evidence presented at the impartial hearing regarding the student's past progress in the district's programs and the likelihood of the student's progress under the recommended special education programs and services offered for the 2007-08 school year (IHO Decision at pp. 21-30). In her analysis, the impartial hearing officer relied heavily upon her comparison of the student's standardized test scores from the administration of the WIAT-II in 2004 and 2007, and based upon her comparison, she concluded that the student failed to make progress in decoding, pseudoword decoding, and written expression within those three years (*id.* at p. 21). The impartial hearing officer noted that while the evidence indicated that the student made progress within the Wilson reading program, the weight of the evidence identified the student's inability to generalize the skills learned in reading to his content areas and the minimal progress made in regard to reading and writing (*id.* at pp. 21-24). She further

⁴ 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 law took effect for impartial hearings commenced on or after October 14, 2007 (see *Application of the Bd. of Educ.*, Appeal No. 08-016). In this case, the parents commenced the impartial hearing by due process complaint notice dated September 24, 2007, prior to the effective date of the amendment; thus, in this matter, the impartial hearing officer properly placed the burden of persuasion in the administrative hearing challenging the IEP upon the party seeking relief—the parents—as required at that time (see *Schaffer v. Weast*, 546 U.S. 49, 51, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

noted that although testimonial evidence pointed to expectations that the student would soon begin to generalize his skills, the hearing record did not contain sufficient evidence as to the "extent of the improvement expected or whether and to what extent . . . gaps with peers would be reduced" (*id.* at p. 22). In addition, the impartial hearing officer noted that the neuropsychologist testified that the district's programs had failed to substantially remediate the student's reading and language difficulties, and that the student had not made progress in "fundamental phonological and reading decoding skills" (*id.* at pp. 24-25).

Based upon the foregoing, the impartial hearing officer concluded that the district's recommended special education programs and services for the 2007-08 school year failed to offer the student a FAPE (IHO Decision at pp. 27-30). The impartial hearing officer noted that the 2007-08 program was "essentially the same as that provided previously" and that although the district acknowledged the student's limited progress in the past, the district could not support its claim that it offered the student a FAPE by relying upon the assertion that the previous programs provided "some progress" (*id.* at p. 27). The impartial hearing officer also found that notwithstanding the student's progress within the Wilson reading program, the hearing record contained undisputed evidence that the student failed to generalize those skills to his content areas and that the student's progress within Wilson was not an "indicator for the student's future progress" (*id.*).

Turning to the question of whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at Kildonan, the impartial hearing officer concluded that the evidence established that the student failed to make appropriate educational progress at Kildonan, and thus, the parents were not entitled to reimbursement for the costs of the student's tuition (IHO Decision at pp. 30-35). Although the parents submitted the student's Kildonan progress reports and report cards into evidence, the impartial hearing officer found that these documents did not "reflect any kind of curriculum-based measures to establish progress in content area subjects" (*id.* at pp. 32-33). Thus, under the circumstances, the impartial hearing officer determined that a "meaningful assessment of the student's actual progress in those areas [was] not possible" (*id.* at p. 33). She also noted the neuropsychologist's testimony about the student's "incremental improvements" while at Kildonan (*id.*). In addition, the impartial hearing officer further determined that Kildonan's instructional program, alone, did not satisfy the neuropsychologist's recommendations for a program that would enable the student to make appropriate educational progress (*id.* at p. 35). She noted that the hearing record provided little, if any, evidence as to how OG was used within the classrooms at Kildonan (*id.*).

The impartial hearing officer then went on to find that based upon the neuropsychologist's recommendations—which "emphasized" the student's need for speech-language therapy services in order to make appropriate educational progress in reading—the parents' unilateral placement at Kildonan was not appropriate (IHO Decision at pp. 35-38). The impartial hearing officer concluded that the evidence firmly established the student's speech-language needs and further, that speech-language therapy was "very critical" to address the student's "expressive language problems and phonological difficulties" (*id.* at p. 36). Thus, the impartial hearing officer determined that the student required speech-language therapy services in order to benefit from instruction and that the lack of integrated speech-language therapy services for the student while he attended Kildonan further served to demonstrate that the parents failed to sustain their burden to establish the appropriateness of the unilateral placement (*id.* at pp. 36-40). She noted that

although the parents asserted that they privately obtained and provided speech-language therapy services to the student while at Kildonan, the parents failed to submit sufficient evidence that the alleged services "appropriately supplemented the Kildonan program" (id. at pp. 38-39). Specifically, she noted that the hearing record contained no evidence of when or how much speech-language therapy the parents provided to the student during the 2007-08 school year, the qualifications of the speech-language therapy provider, or the focus of the therapy (id. at p. 39). Absent such evidence, the impartial hearing officer gave no weight to the privately provided services (id.).

On appeal, the parents disagree with the impartial hearing officer's finding that they failed to sustain their burden to establish the appropriateness of the student's unilateral placement at Kildonan and therefore, were not entitled to reimbursement for the costs of the student's tuition at Kildonan for the 2007-08 school year. In support, the parents assert that the impartial hearing officer improperly concluded that the parents did not present sufficient evidence to establish that the student made appropriate educational progress at Kildonan. The parents also assert that the impartial hearing officer improperly determined that the student did not routinely volunteer to read aloud in his content-area courses at Kildonan and improperly relied upon testimony to support her finding that Kildonan did not appropriately meet the student's special education needs. In addition, the parents disagree with the impartial hearing officer's conclusion that Kildonan's instructional program, alone, did not satisfy the neuropsychologist's recommendations that would enable the student to make appropriate educational progress and further supported the impartial hearing officer's conclusion that Kildonan did not appropriately meet the student's special education needs. The parents seek to overturn the impartial hearing officer's decision regarding the appropriateness of the student's unilateral placement at Kildonan and request the following as relief: an order directing the district to reimburse the parents for the costs of the student's tuition at Kildonan for the 2007-08 school year; an order declaring that the parents are the prevailing party; an order granting the parents leave to submit a statutory fee application; and any other further relief deemed just under the circumstances.

In its answer, the district seeks to uphold the impartial hearing officer's determination that the parents failed to sustain their burden to establish the appropriateness of Kildonan, but cross-appeals and seeks to reverse that portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2007-08 school year. The district contends in the cross-appeal that the impartial hearing officer erred in finding that the CSE's recommendation to increase the student's reading instruction from four to five sessions per week and to move the student from a co-teach classroom to a self-contained classroom constituted de minimus changes in the student's special education programs and services for the 2007-08 school year, and thus, failed to offer the student a program that was reasonably calculated to enable him to receive meaningful educational benefits. The district argues that based upon the evidence, the student significantly improved his reading with the implementation of the Wilson reading program and further, that the student's progress in reading supported the CSE's recommendations to modestly increase the student's services for the 2007-08 school year. The district also argues that the student needed to make progress in reading before he could apply and generalize these skills to his academic classes. Notwithstanding the student's progress in reading, the district contends that the evidence supports the conclusion that the student also made progress in speech-language therapy and behaviorally, as the student's ADHD no longer affected the student's learning. Moreover, the district asserts that evidence of the student's progress in speech-language therapy

and behavior demonstrated the appropriateness of the programs and services offered by the district in the past and constituted appropriate issues for the CSE's consideration when determining the student's program and services for the 2007-08 school year. Finally, the district argues that the impartial hearing officer erred in determining that the student required two periods per day of reading instruction based upon the neuropsychologist's testimony, since neither the parents nor the neuropsychologist advised the CSE at the July 10, 2007 meeting that the student required this level of reading instruction. The district also argues that to the extent that a determination is made on appeal that the student required two periods per day of reading instruction, Kildonan's unstructured, undefined study hall does not—in addition to the 1:1 daily tutorial—fulfill this requirement. As relief, the district seeks to overturn that portion of the impartial hearing officer's decision that found the district failed to offer the student a FAPE, but seeks to uphold that portion of the impartial hearing officer's decision that found the parents failed to sustain their burden as to the appropriateness of the student's unilateral placement at Kildonan.

The parents allege in their answer to the district's cross-appeal that the impartial hearing officer properly determined that the district failed to offer the student a FAPE for the 2007-08 school year and therefore, the district's cross-appeal should be dismissed in its entirety.

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 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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, 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]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; 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]).

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 student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in

favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; 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. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 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 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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).

Upon independent review and due consideration of the hearing record in this matter, I find that the impartial hearing officer, in a thorough and well-reasoned 45-page decision, correctly determined that the district failed to offer the student a FAPE for the 2007-08 school year, and

further, that the parents failed to sustain their burden to establish that the student's unilateral placement at Kildonan was appropriate to meet the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 05-081). The impartial hearing officer accurately recounted the facts of the case, she set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2007-08 school year and whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at Kildonan (IHO Decision at pp. 1-45). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she carefully marshaled and weighed the evidence in support of her conclusions and properly supported her conclusions with citations to the hearing record (*id.*). In short, based upon an independent review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
August 4, 2009

PAUL F. KELLY
STATE REVIEW OFFICER