



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-007

Application of the BOARD OF EDUCATION OF THE BEACON CITY 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

Asher, Gaughran, LLP, attorneys for respondents, Julie Gaughran, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Kildonan School (Kildonan) for the 2009-10 school year. The appeal must be sustained.

The hearing record demonstrates that the student, who had been enrolled at Kildonan since the 2005-06 school year (fifth grade), received diagnoses of a language-based learning disability, dyslexia, anxiety, and an attention deficit hyperactivity disorder (ADHD), and exhibited dysnomia¹ and deficits in attention and executive functioning (Tr. pp. 345, 379, 571-73, 575-85, 1004, 1053-59, 1062-70, 1091, 1205-18, 1225-29, 1480, 1485, 1586; Dist. Exs. 1 at pp. 1-3; 3 at pp. 1, 3, 5-6; 4 at pp. 8-9; 7 at pp. 1-2; 9 at pp. 1, 3-4; 10 at pp. 2, 4, 6; Parent Exs. D at p. 44; E at p. 5; F at pp. 1, 3; N at p. 2). 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 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

¹ Dysnomia is described in the hearing record as a "verbal labeling deficit" (Dist. Ex. 4 at p. 5; see Tr. pp. 1205-10, 1227).

Background

The hearing record reflects that the student was educated in the district from kindergarten (1999-2000) through fourth grade (2004-05) (Tr. pp. 1029-30; see Dist. Ex. 1 at p. 3). The student's mother related that her son first manifested attention issues in kindergarten, which persisted through first grade and resulted in a diagnosis of an ADHD² (Tr. pp. 1031-33, 1053-56; Dist. Ex. 1 at pp. 1-2). In first grade, the student also began experiencing reading difficulties, particularly with letter and word sounds; in response, the district placed him in a reading class five days per week (Tr. pp. 1033-34). The school psychologist evaluated the student and acknowledged that although the student demonstrated a reading deficit and attentional difficulties, "there wasn't a big enough discrepancy at that time to say that he had a learning disability," and the district provided him with continued reading instruction and resource room services (Tr. pp. 1034-35).³ It was during this time that the student began to demonstrate anxiety as well, which was addressed through counseling (Tr. pp. 1053-54).

During second grade, the student's reading difficulties continued, prompting the district to provide him with in-school tutoring and additional instructional support in English language arts (ELA) in addition to parentally-obtained private tutoring during summer 2002 (Tr. pp. 1036-41, 1053; Dist. Ex. 1 at p. 2). Additionally, the student's mother observed an increase in the student's anxiety (Tr. pp. 1057-59). After the parents met with district staff, it was decided that the student would be retained for second grade during the 2002-03 school year (Tr. pp. 1040-41; Dist. Ex. 1 at p. 3). Also during summer 2002, the parents procured a private evaluation of their son by a "learning specialist" who offered a diagnosis of "a language based learning disability, dyslexia" (Tr. pp. 1045-46; Dist. Ex. 1 at p. 3).⁴ After receiving the private evaluation results, the district evaluated the student and identified encoding, decoding, letter word recognition, reading comprehension, and language concerns (Tr. p. 1047). In February 2003, the Committee on Special Education (CSE) determined him eligible for special education and related services as a student with a learning disability (Tr. pp. 1046-48;⁵ see Tr. p. 1043). The student was placed in an integrated co-teaching (ICT)⁶ classroom and received speech-language and occupational therapy

² According to the hearing record, the student's ADHD has been addressed pharmacologically from first grade to the present (Tr. pp. 1055-57; see Dist. Exs. 5; 8).

³ The hearing record does not contain a documentary report from the school psychologist's evaluation of the student.

⁴ The hearing record does not contain a documentary report relative to the learning specialist's evaluation of the student; however, the student's mother advised that the learning specialist recommended "an intense, remedial, systematic approach to reading such as Orton-Gillingham to learn his letters, to learn how to decode, [and] encode" (Tr. p. 1046).

⁵ The student's mother stated that she believed that the district determined the student eligible for special education programs and related services in February 2002 (Tr. p. 1048); however, the evidence contained in the hearing record suggests that the student was classified in February 2003 (see Dist. Ex. 1 at pp. 2-3).

⁶ "Integrated co-teaching services," as referred to in State regulations, means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). An April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" further describes ICT services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html>).

(OT) related services (Tr. pp. 1043-44, 1049). The student's performance on year-end State tests prompted the parents to continue private tutoring services for the student during summer 2003 through April 2004 (Tr. pp. 1050-52).

For the 2003-04 school year (third grade), the student remained in an ICT classroom, and although the student's mother acknowledged that his attentional difficulty and anxiety improved, his reading difficulties did not, and he also exhibited writing difficulties (Tr. pp. 1059-61; Dist. Ex. 1 at p. 3). For the 2004-05 school year (fourth grade), the CSE continued the student in his ICT classroom, with resource room and speech-language services; OT services were discontinued (Tr. pp. 1061-62). It was during this time that the student began receiving "rule broken certificates"⁷ from his fourth grade teacher which, according to the hearing record, increased the student's anxiety and contributed to a decline in the student's "emotional and physical health" (Tr. pp. 1066-70; Dist. Ex. 1 at p. 3). At the beginning of his fourth grade year, the parents obtained another private evaluation⁸ of the student which yielded a corroboration of the previous diagnosis of a language-based learning disability, identified as a "serious ... language impairment and reading impairment in the borderline range," and cited a "marked regression in his language" since his evaluation by the district in second grade (Tr. pp. 1062-66). After receiving the results of this evaluation from the parents, the district convened a meeting between school staff and the parents in December 2004 and subsequently removed the student from his then-current ICT class and placed him into another ICT class with approximately 25-26 total students; this change resulted in an increase in the student's anxiety, which prompted his return to counseling from January to April 2005 (Tr. pp. 1071-76; see Dist. Ex. 1 at p. 3). At the recommendation of his private counselors, the student finished fourth grade in an "alternative school" in the district, which he attended for one to two hours per day in a small setting (three or four students to one teacher) and his related services were discontinued (Tr. pp. 1077-79, 1088).

In preparation for the student's fifth grade year (2005-06), the district requested a psychiatric evaluation of the student to determine the source of his recurring anxiety (Tr. pp. 1080-81). The private psychiatrist concluded that the student's anxiety stemmed from his inability to keep up with school work and recommended "a small class that would target his learning needs" (Tr. pp. 1081-83, 1090).⁹ The CSE convened to develop an individualized education program (IEP) for the student's fifth grade year, and again recommended an ICT class, resource room, and speech-language services (Tr. p. 1088). In summer 2005, the parents removed the student from the district placement and unilaterally placed their son at Kildonan for the 2005-06 school year, where he remained for the 2006-07 (sixth grade), 2007-08 (seventh grade), and 2008-09 school years (eighth grade) (Tr. pp. 1091, 1480; Dist. Ex. 1 at pp. 3-5; Parent Ex. N at p. 2).

⁷ The student's mother explained that "rule broken certificates" were issued by the student's teacher for failure to follow classroom directions "the first time they are given;" she added that because her son needed repetition of directions, he received four such certificates in early November – December 2004 (Tr. pp. 1067-70).

⁸ The hearing record does not contain a documentary report relative to this evaluation, nor does it specify the type of evaluation obtained.

⁹ The hearing record does not contain a documentary report relative to this evaluation.

On May 4, 2007,¹⁰ the parents obtained a private neuropsychological evaluation of the student to "aid in differential diagnosis and treatment planning" (Dist. Ex. 4 at p. 1; see Parent Ex. F at pp. 3, 7; see also Tr. pp. 1194-1245). The hearing record indicates that the student received medication to address his attention (Dist. Ex. 4 at pp. 1, 4-5). Behaviorally, the private neuropsychologist described the student as "alert and cooperative" throughout testing while noting that he displayed word finding difficulty in casual conversation but was "able to respond to questions without being tangential" (id. at p. 1).

Administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) revealed uneven cognitive development and identified the student's verbal reasoning skills as a relative weakness (low average range, 23rd percentile) and his processing speed as a significant strength (very superior range, 98th percentile) (Dist. Ex. 4 at p. 2; see Tr. pp. 1196-97). The test results yielded a full scale IQ of 100 (average range, 50th percentile), a result the evaluator characterized as representative of a midpoint in a "very atypical distribution of abilities" (id.). Academic achievement testing revealed that the student's reading, reading comprehension, and computational skills fell within the average range, while his spelling and writing mechanics (phoneme-grapheme associations) were impaired (Dist. Ex. 4 at p. 4). With regard to the student's attention as measured by the Connors Continuous Performance Test (CCPT), the private neuropsychologist observed that regardless of whether the student was on medication, the student's abilities to rapidly mobilize attention and to sustain attention fell in the average range, noting that while his medication significantly improved the student's attention span, working memory, and processing on formal test measures, it did not appreciably affect his ability to sustain attention over a period of time (id. at pp. 4-5).

Formal assessment of memory revealed that the student's verbal and nonverbal mnemonic processes were intact (Dist. Ex. 4 at p. 5). Testing revealed that the student displayed residual phonic awareness inefficiency and a "marked dysnomia" (id. at pp. 5, 9). The private neuropsychologist determined that the student's language comprehension and imitative speech fell within the low average range, and commented that these results were "poorer than expected based on his full scale IQ but consonant with his [low average] verbal reasoning skills" (id. at p. 5; see id. at p. 2). With regard to executive functions, the student presented with a significant impairment characterized by "initial inertia, deficient set flexibility, and perseveration of thought and action" (id. at p. 7; see Tr. pp. 1217-18).¹¹ The private neuropsychologist assessed the student's conceptualization, verbal and nonverbal fluency, and spatial planning as being relatively intact (Dist. Ex. 4 at p. 7). Projective testing involving unstructured material reflected the student's low self-esteem and "lack of expectation that he [would] perform in an outstanding manner," and the private neuropsychologist described him as "very dependent on external structure to organize the

¹⁰ The private neurological evaluation of the student does not indicate the precise date that it was created; however, the report does indicate that the testing of the student occurred on April 27, 2007 and May 4, 2007, and the impartial hearing officer ascribed the latter date to the report in the exhibit list attached to her decision (see Dist. Ex. 4 at p. 1; IHO Decision at p. 41).

¹¹ The private neuropsychologist explained "initial inertia" as "...the ability of an individual to quickly come to a conclusion as to what's happening ... the getting off the dime ..." (Tr. pp. 1217-18). The private neuropsychologist characterized someone with "deficit set flexibility" as "... an individual who takes some time in order to come up with a behavior or concept and once there he moves on ... and then shift[s] to another task or set" (id.). He explained "perseveration" as "... the repetition of a behavior that was appropriate in one circumstance but is no longer appropriate in [a] second circumstance" (Tr. p. 1218).

world around him," commenting that with minimal structure, he was socially capable, but "[w]ithout such structure and direction, he [had] difficulty grasping the needs and requirements to solve a given task and [had] difficulty determining the motivations and intents of others" (id. at p. 8).

In summary, the private neuropsychologist concluded that the student presented with a moderate developmental language disorder characterized by moderate to severe dysnomia and mild receptive and expressive components, a significant disorder in expressive writing, an ADHD, and an executive functions deficit (Dist. Ex. 4 at p. 9). Recommendations included a small class size (8:1) to sustain the student's selected attention and persistence on task; a "linguistic analysis"¹² approach to reading, spelling and writing to enhance the relationship of letter order and meaning in addition to letter order and phonics sounds; use of a structured and sequential multisensory approach in all academic subjects, with the student to be grouped with other students having similar cognitive abilities; special seating to enable the teacher to bring the student back to task and foreshadow instructional transitions within and between classrooms; use of a word processor for all written work and without penalty for spelling errors; and the appointment of a liaison, such as a school psychologist, between school personnel and the student's "home-based treatment team" (id. at p. 10; see Tr. pp. 1229-45).

On August 13, 2008, a subcommittee of the CSE convened for the student's annual review to develop an IEP for his eighth grade year (2008-09) (Parent Ex. F). In attendance were a CSE chairperson, a school psychologist, a regular education teacher, a special education teacher, and the parents; Kildonan's academic dean was invited to participate telephonically, but was unavailable to do so (id. at p. 6).

The August 2008 CSE subcommittee continued the student's classification as a student with a learning disability, and recommended a 10-month program consisting of an ICT class in a district middle school in a 12:1 setting for English, math, social studies, and science, and resource room in a 5:1 non-integrated setting twice per day; related services consisting of counseling, once per week for 30 minutes per session in a 1:1 setting; program modifications consisting of modified homework, refocusing and redirection, checking for understanding, spelling requirements waived, and use of a graphic organizer; assistive technology in the form of a word processor; additional support services for school personnel consisting of a behavioral intervention consultation between the student's teachers and either his counselor or the school psychologist, and a supportive behavior plan "to address [the student's] low self esteem, self management skills and organization;" testing accommodations consisting of a flexible setting, extended time (1.5), directions read and explained, questions read, and spelling waived; and an exemption from the requirement to learn a second language, on the ground that "[t]he student's disability aversely affect[ed] [his] ability to

¹² The private neuropsychologist explained the "linguistic analysis" approach as "... a way of analyzing the word so that you can get a good hypothesis as to what its meaning is even though you can't pronounce it" (Tr. pp. 1231-34).

learn a language" (Parent Ex. F at pp. 1-3).¹³ The August 13, 2008 IEP noted that "[t]he student demonstrate[d] a delay in language skills, reading comprehension, vocabulary, attentional difficulties and anxiety which inhibit[ed] progress in the general education curriculum and in formalized testing situations" (id. at p. 3). The CSE subcommittee also developed goals in the areas of study skills, reading, writing, and social/emotional/behavioral areas (id. at pp. 8-10). Comments included in the August 13, 2008 IEP advised that the parents rejected the IEP in favor of continuing the student's private placement at Kildonan (id. at pp. 1, 6).

The parents completed a district-generated triennial social history form on February 16, 2009 (Dist. Ex. 5). The parents advised that academically, their son "continue[d] to have academic success by receiving a program that address[ed] his individual needs" (id. at p. 1). Via responses to various checklists contained on the form, the parents reported that: the student received speech-language instruction using the Orton-Gillingham (O-G) methodology; he liked school; he had friends; he had appropriate peer interaction; he remembered school assignments; he completed homework assigned; he enjoyed reading; and his skills were improving (id. at p. 2). Behaviorally, the parents commented that their son: "often" learned responsibility; developed positive leadership characteristics; responded to structured situations; respected authority; showed distractibility and impulsive behavior "some" of the time; and "seldom" had discipline problems, showed aggression toward others, or appeared withdrawn or depressed (id.). The parents reported no significant family changes within the previous three years, but advised of an increase in the student's medication since his May 4, 2007 private neuropsychological evaluation (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 5 at pp. 2-3).

On March 25, 2009, the district forwarded correspondence to the parents requesting execution of a release to obtain the student's academic records and testing information from Kildonan in advance of his annual review meeting (Parent Ex. C). The parents responded on March 29, 2009, enclosing with their correspondence an executed release and a copy of the evaluation report from the student's May 4, 2007 private neuropsychological evaluation (Parent Exs. A; B).

On April 13, 2009, the district forwarded to the parents a "draft" IEP in advance of the student's annual review, which was scheduled for April 21, 2009 (Dist. Ex. 10). The draft IEP, advance-dated "April 21, 2009,"¹⁴ continued the student's classification as a student with a learning disability, and recommended a 10-month program consisting of an ICT class in a district high school in a 12:1 setting for English, social studies, and science, "special education support, delivered in a non-integrated setting in [m]ath,¹⁵ and resource room services in a 3:1 non-integrated

¹³ The August 13, 2008 IEP indicated that the CSE subcommittee previously conducted a program search for in-district and out-of-district placements based upon the student's language-based learning disability and his anxiety associated with school attendance (see Parent Ex. F at p. 6). The IEP further noted that the student's parents declined to participate in the intake process at two out-of-State schools that expressed interest in enrolling the student, because in the case of both schools, residential placement was not acceptable to them and, in the case of one of the schools, they felt that the profile of the student population and the instructional programming offered were inappropriate for the student (id.).

¹⁴ To avoid confusion, I refer to this IEP as the "draft IEP" for the purposes of the instant appeal.

¹⁵ The draft IEP did not specify the setting of the special math class (see Dist. Ex. 10 at p. 2; see also Tr. pp. 370-76).

setting once per day focusing on reading and writing skills, and in a 5:1 non-integrated setting once per day focusing on organizational skills; related services consisting of individual counseling, once per week for 30 minutes per session focusing on "anxiety management and transitional issues" associated with the student's entry into high school; program modifications consisting of modified homework, refocusing and redirection, checking for understanding, spelling requirements waived, use of a graphic organizer, preferential seating close to the instructor and away from distractions, class notes provided upon the student's request, a routing sheet, and home-school communication (teachers to communicate weekly with parents regarding the student's progress); assistive technology in the form of a word processor; additional support services for school personnel consisting of quarterly team meetings with the parents to "coordinate efforts regarding student's transition" to high school and a supportive behavior plan "to address [the student's] low self esteem, self management skills and organization;" testing accommodations consisting of a flexible setting, extended time (1.5), directions read and explained, tests read, spelling waived and use of a word processor and calculator; and removal of the student's exemption from the second language requirement (*id.* at pp. 2-6; *see* Parent Ex. H). The draft IEP contained 15 annual goals in study skills, reading, writing, math, and social/emotional/behavioral areas (Dist. Ex. 10 at pp. 7-10).

The draft IEP noted that the student "demonstrate[d] characteristics of a learning based language disability that interfere[d] with his ability to read and write" and "present[ed] with deficits in executive function[s] that impede[d] his ability to independently implement compensatory strategies" (Dist. Ex. 10 at p. 4; *see also* Parent Ex. H). Academically, the draft IEP cited the student's cognitive abilities as falling within the low average range, referencing his performance during the May 4, 2007 private neuropsychological evaluation (Dist. Ex. 10 at pp. 4-5; *see* Dist. Ex. 4; Parent Ex. H). In math, although his knowledge of basic math facts was deemed "adequate," the draft IEP cited "inconsistencies with all calculations that require renaming or regrouping" and characterized his math reasoning abilities as "struggles with recalling and applying basic multiplication and division facts and procedures, working with fractions, decimals, and solving multi-step problems" (Dist. Ex. 10 at p. 5; *see also* Parent Ex. H). The draft IEP reflected that the student's spelling skills were "borderline" and "well below grade level expectations" (*id.*).

With respect to social/emotional development, the draft IEP again referenced the May 4, 2007 private neuropsychological evaluation when discussing the student's low self-esteem and expectations of his own performance, particularly within the district setting, and commented that his "[p]revious history in elementary school within district suggest[ed] he experienced school related anxiety" (Dist. Ex. 10 at p. 6). The draft IEP recommended the implementation of a "transitional support plan along with counseling supports ... to help him acclimate to a new school environment and develop the requisite coping strategies" (*id.*).

On April 14, 2009, the district conducted a two hour classroom observation of the student in his 1:1 reading instruction and physical science (totaling eight students) classes at Kildonan (Dist. Ex. 6; *see also* Dist. Ex. 7 at p. 3). The observation report checklist indicated that with regard to his classroom management, the student did not exhibit difficulties in following classroom procedures or with organizational skills, did not appear distractible, and did not exhibit impulsive behavior; he did exhibit the ability to work independently and did seek teacher assistance in an appropriate manner (*id.*). Socially, the checklist indicated that the student exhibited appropriate relationships with peers and teachers (*id.*). Academically, the student did not exhibit difficulties with visual perceptual motor tasks, following verbal directions, or expressive language, and he

exhibited appropriate responses in group discussions and adequate knowledge in academic skills observed (id.).

On April 15, 2009, the district's school psychologist conducted a psychoeducational reevaluation of the student to determine his individual needs, educational progress, ability to benefit from regular education programs, and continued eligibility for special education and related services (Dist. Ex. 7 at p. 1; see Tr. pp. 477-501). In a resultant report, the school psychologist supplemented the classroom observation report (see Dist. Ex. 6) by adding that during the 1:1 tutoring session with the student's reading instructor, he observed that the student wrote the alphabet, reviewed "v-v," and "v-c-e" blends and corresponding rules, spelled to rule, defined root words with various prefixes/suffixes, wrote sentences from dictation, practiced reading about current events with guidance from his 1:1 tutor, and outlined a five-paragraph essay (Dist. Ex. 7 at p. 3). During the individual tutoring session, the school psychologist characterized the student as "focused and engaged in all of the presented activities" and noted that despite the student's initial nervousness in the school psychologist's presence, he eventually relaxed (id.). During the rules review and spelling drills, he reported that the student and his 1:1 tutor "worked steadily and at a swift pace," observing that the student "accepted correction when he made errors and at times self-corrected when he caught himself misspelling a word" (id.). During the oral reading activity, the school psychologist opined that the student's reading fluency appeared "labored at times, but he persisted and demonstrated comprehension after completing the first [current events] article;" however, when presented with a second article, he observed that the student "appeared noticeably fatigued, made more errors, and was unable to demonstrate [an] understanding of what he read" (id.). Toward the end of the tutoring session, the student transitioned to work on a five-paragraph essay about a sports figure, which he outlined using a computer software program, and spent a few minutes brainstorming ideas before class ended (id.).

According to the reevaluation report, the school psychologist then observed the student transition to his physical science class, "adequately" settle in for class, and casually converse with another student (Dist. Ex. 7 at p. 3). After hearing the teacher's discussion for the plan for the class that day, the student gathered his needed materials, worked with a partner by dividing tasks and working steadily, and demonstrated complete understanding of the assignment, explaining the task in detail to the school psychologist (id.).

The school psychologist also recounted his interview with the student's 1:1 reading instructor, who informed him that she had worked with the student for two years and described the student as less anxious and more comfortable with her this year as compared to the previous year (Dist. Ex. 7 at p. 3). The 1:1 reading instructor opined that the student's low vocabulary skills interfered with reading fluency and comprehension, but noted that he demonstrated an interest in nonfiction, especially sports figures, which the 1:1 reading instructor used as a means to introduce the student to current events (id.). The school psychologist also conversed with the student's physical science teacher, who apprised him that the student took his school performance "very seriously," and described him as "conscientious" and hard-working, readily asking for help when he did not understand the content of what he read (id.).

The school psychologist administered the Wechsler Abbreviated Scale of Intelligence (WASI) to the student, which yielded cognitive ability scores within the low average range¹⁶ (Dist. Ex. 7 at pp. 4, 7). The student's results on the Wechsler Individual Achievement Test, Second Edition (WIAT-II) indicated low average performance in reading, borderline math skills, and extremely low written expression abilities (id. at p. 7). Based upon his assessment of the student's executive functions, the school psychologist concluded that the student's difficulties with organization, problem analysis, and inability to execute problem-solving strategies independently appeared to affect all academic areas negatively (id.).

The school psychologist advised that the results of the psychoeducational reevaluation established that the student remained eligible to receive special education and related services as a student with a learning disability (Dist. Ex. 7 at p. 7). The results of the reevaluation prompted the school psychologist to recommend special education supports to develop reading and writing strategies and to improve the student's study skills; multisensory instruction; preferential seating to help him sustain attention and to persist with tasks; access to a word processor as needed throughout the day and for lengthy assignments; and use of visual and graphic organizers to externally structure and organize the student's writing (id. at pp. 7-8).

On April 21, 2009, the CSE convened for the student's annual review to develop an IEP for the student's ninth grade year (2009-10) (Dist. Ex. 3; Parent Ex. D). In attendance were the district director of pupil services (director) (who served as CSE chairperson), school psychologist, special education coordinator, special education teacher, regular education teacher, guidance counselor, and the student's parents; Kildonan's academic dean participated telephonically (Dist. Ex. 3 at p. 6; Parent Ex. D at pp. 6-7).

The April 21, 2009 IEP noted that Kildonan's academic dean advised the CSE that the student "[was] doing well passing all of his grades," but also "commented on the student's math needs, including basic calculations, number lines, and estimation skills" (Dist. Ex. 3 at p. 6; see also Parent Ex. D at pp. 7-9). With regard to ELA, Kildonan's academic dean advised that while comprehension and reading aloud remained difficult for the student, the school "noted a sense of academic maturity over the past year" and opined that "[t]he small class size and [O-G] program ha[d] been helpful to the student" (Dist. Ex. 3 at p. 6; see also Parent Ex. D at pp. 9-11). Meanwhile, the school psychologist offered input based upon his psychoeducational reevaluation and classroom observation of the student, adding that the student's overall scores on standardized testing, including reading, writing comprehension, and decoding "plotted in the average to low average range" and that his math scores "were in the borderline range;" the student's written expression scores were assessed as "extremely low and an area to focus on" (Dist. Ex. 3 at p. 6;

¹⁶ The April 15, 2009 psychological reevaluation report included results of previous testing of the student commencing with March 2001 (Dist. Ex. 7 at p. 2). Discrepancies specific to the student's cognitive levels were noted among the various assessment results obtained between March 2001 and April 2007 (id.). The student's private neuropsychologist explained that the difference in cognitive scores achieved on the WASI versus the WISC-IV was a function of the construction of the tests (Tr. pp. 1259-61). He noted that the WASI used only 4 of 11 subtests of the WISC-IV and did not include subtests for working memory or processing speed (Tr. p. 1260). Consequently, the student's average range standard score for the working memory index and high superior standard score for the processing speed index contributed to the student's average full scale IQ on the April 2007 WISC-IV, in comparison to the April 15, 2009 WASI, after which the student's full scale IQ was assessed in the low average range (see Tr. p. 1261; Dist. Exs. 4 at p. 2; 7 at pp. 2, 4).

see also Parent Ex. D at pp. 17-23). The April 21, 2009 IEP also noted the parents' corroboration that the student was performing well academically at Kildonan and their opinion that its O-G methodology was effective for their son, and expressed their concern that "the emotional stress of having the student transition from Kildonan to [the district high school] would increase the student's anxiety levels and seriously disrupt the student's educational continuity and progress already gained at Kildonan" (Dist. Ex. 3 at pp. 6-7). A comment on the IEP advised that the CSE relied upon an August 13, 2008 health examination record (Dist. Ex. 8), the February 16, 2009 triennial social history (Dist. Ex. 5), the April 14, 2009 classroom observation (Dist. Ex. 6), and the April 15, 2009 psychoeducational reevaluation (Dist. Ex. 7) in developing the April 21, 2009 IEP (Dist. Ex. 3 at p. 7).

The April 2009 CSE recommended continuing the student's classification as a student with a learning disability, and, consistent with the draft IEP, recommended a 10-month special education program consisting of an ICT class in a district high school in a 12:1 setting for English, social studies, and science, a 15:1+1 special class in math, and resource room services in a 3:1 non-integrated setting once per day focusing on reading and writing skills and in a 5:1 non-integrated setting once per day focusing on organizational skills; related services consisting of individual counseling, once per week for 30 minutes per session focusing on "anxiety management and transitional issues" associated with the student's entry into high school; program modifications consisting of modified homework, refocusing and redirection, checking for understanding, spelling requirements waived, use of a graphic organizer, preferential seating close to the instructor and away from distractions, class notes provided upon the student's request, a routing sheet, and home-school communication (teachers to communicate weekly with parents regarding the student's progress); assistive technology in the form of a word processor; additional support services for school personnel consisting of quarterly team meetings with the parents to "coordinate efforts regarding student's transition" to high school and a supportive behavior plan "to address [the student's] low self esteem, self management skills and organization;" testing accommodations consisting of a flexible setting, extended time (1.5), directions read and explained, tests read, spelling waived and use of a word processor and calculator; and removal of the student's exemption from the second language requirement; the 15 annual goals in study skills, reading, writing, math, and social/emotional/behavioral areas contained in the April 21, 2009 IEP and the coordinated sets of transition activities recommended were also consistent with those set forth in the draft IEP (compare Dist. Ex. 3 at pp. 1-9, with Dist. Ex. 10 at pp. 2-10; see Tr. pp. 269-70, 294, 668-69, 904; Parent Exs. D at pp. 27-35; H).

On April 24, 2009, the parents forwarded correspondence to the district director reiterating that they had "serious concerns" about and objected to the program recommended by the district in the April 21, 2009 IEP, but added that "... we would welcome any other program suggestions that would duplicate what [the student] is currently receiving" (Dist. Ex. 11). They also maintained that the student's "current academic program ha[d] been meeting his educational and emotional needs" and expressed disagreement with the findings of the school psychologist after the student's psychoeducational reevaluation, advising that "[w]e are seeking to have an independent evaluation done at public expense" (id.). The district responded on June 22, 2009, granting the parents' request for funding for an independent evaluation of the student, and inviting the student to attend an upcoming orientation program at the district high school for the upcoming 2009-10 school year (Dist. Ex. 12; see Dist. Exs. 3 at p. 5; 10 at p. 6; 14). On July 6, 2009, the parents rejected this invitation on their son's behalf, and reiterated their request for the district to "duplicate a program,

in [d]istrict, like the one he is currently receiving and deriving educational benefit from" (Dist. Ex. 15).

On August 4, 2009, the private neuropsychologist, who had previously evaluated the student in May 2007, conducted a neuropsychological reevaluation of the student (Dist. Ex. 9; see Tr. pp. 1246-53). The private neuropsychologist noted that the student exhibited "significant improvement in his ability to sustain attention and steady improvement in academic skills," resulting from a stimulant medication¹⁷ he was taking (Dist. Ex. 9 at pp. 1-4). Updated academic achievement testing administered in May 2009 revealed increases in reading comprehension relative to the student's same-age peers as compared to October 2007, and placed him within the average range; math and spelling, however, remained relative weaknesses (Dist. Ex. 9 at pp. 1-2; see also Tr. pp. 1246-47). With regard to executive functions, formal testing revealed that the student performed in the high average to superior range with respect to his abilities to "abstract an operating principle, maintain that principle as long as it's effective, and shift to another principle when appropriate;" overall, the private neuropsychologist concluded that the student presented with "a mild to moderate executive dysfunction, characterized by mild to moderate set rigidity with intact conceptualization, verbal and nonverbal fluency, inhibition, and spatial planning" (Dist. Ex. 9 at pp. 3-4; see Tr. pp. 1247-48). In summary, the private neuropsychologist concluded that the student had improved since the May 2007 neuropsychological evaluation, but still demonstrated deficits in mathematical calculations and reasoning, spelling, and written expression, and recommended that the student continue his placement at Kildonan, from which he opined the student derived academic benefit (compare Dist. Ex. 4, with Dist. Ex. 9 at p. 4; see Tr. pp. 1330-33, 1337-50, 1356-61).

By correspondence dated August 14, 2009, the parents advised the district that they rejected the special education program and related services embodied in the April 21, 2009 IEP and intended to re-enroll the student at Kildonan for the 2009-10 school year and seek reimbursement for the student's tuition from the district (Dist. Ex. 13).

Amended Due Process Complaint Notice

On March 16, 2010, the parents filed an amended¹⁸ due process complaint notice alleging that: (1) the April 2009 CSE predetermined the April 21, 2009 IEP, issuing an IEP essentially duplicative of the student's 2008-09 IEP; (2) the April 2009 CSE failed to obtain the student's current educational records from Kildonan, despite being furnished with a release to do so by the parents in advance of the April 2009 CSE meeting, and that its failure resulted in the April 2009 CSE developing the student's IEP with virtually no current information or understanding of the student's present levels of performance; (3) the April 21, 2009 IEP did not reference any peer-reviewed research or identify any peer-reviewed instructional protocol; (4) the April 2009 CSE unilaterally removed the student's exemption from taking a second language; (5) the April 2009 CSE failed to discuss the student's annual goals and objectives, and the study skills, reading, and transitional goals set forth in the April 21, 2009 IEP were inadequate; (6) the April 2009 CSE was improperly constituted, as it did not include a regular education teacher who might be responsible

¹⁷ The hearing record suggests that this medication addressed the student's ADHD (see Tr. pp. 1055-57; Dist. Exs. 5; 8).

¹⁸ The hearing record does not contain a copy of the original due process complaint notice.

for implementing the student's IEP for the 2009-10 school year; (7) these deficiencies rendered the April 21, 2009 IEP a nullity, and deprived the student of a free appropriate public education (FAPE) for the 2009-10 school year; and (8) the student progressed at Kildonan, which the parents maintained "offer[ed] him a program that [met] his needs and [enabled] him to benefit from an appropriate education" (Dist. Ex. 1 at pp. 6-9; see Parent Ex. F). The parents sought an order from an impartial hearing officer reimbursing them for tuition at Kildonan for the student's 2009-10 school year (Dist. Ex. 1 at p. 10).

The district responded on March 18, 2010, countering that: (1) the April 2009 CSE did not predetermine the final version of the student's April 21, 2009 IEP; (2) the April 2009 CSE received and considered all relevant information in the development of the student's IEP, including input from the parents and Kildonan's academic dean; (3) the April 2009 CSE was not required to identify the specific methodologies to be used in a recommended class; however, the April 21, 2009 IEP did in fact specify that "[i]nstruction should be presented in a multisensory fashion;" (4) the class sizes recommended in the IEP were appropriate to afford the student a reasonable educational benefit in the least restrictive environment (LRE); (5) the recommended program, services, and goals set forth in the April 21, 2009 IEP differed from those in the student's 2008-09 IEP and were reasonably calculated to afford the student a meaningful educational benefit; (6) the April 2009 CSE discussed the removal of the student's exemption from a second language requirement; (7) the study skills goal contained in the April 21, 2009 IEP which addressed self-advocacy in the student's use of his assistive technology was appropriate; (8) the reading goals contained in the April 21, 2009 IEP appropriately addressed the student's reading needs, and the April 2009 CSE was not required to identify the specific methodology to be used in addressing them; (9) the April 21, 2009 IEP appropriately included a coordinated set of transition activities for the student; and (10) the April 2009 CSE was duly constituted, and even assuming it was not, its composition did not result in the loss of an educational opportunity for the student (Dist. Ex. 2 at pp. 2-3; see Dist. Ex. 3 at pp. 3-4).¹⁹

Impartial Hearing Officer Decision

An impartial hearing convened on April 19, 2010²⁰ and concluded on September 28, 2010, after nine days of testimony. On December 6, 2010, the impartial hearing officer issued a decision determining that: neither the April 2009 CSE's failure to incorporate specific peer reviewed research into the April 21, 2009 IEP, nor its removal of the student's second language exemption,

¹⁹ The hearing record reflects that the CSE reconvened on March 18, 2010 for the purpose of reviewing the private neuropsychologist's report from his reevaluation of the student on August 4, 2009 (Parent Ex. E; see Tr. pp. 348, 350-56; Dist. Ex. 9). There is no indication in the hearing record that the March 2010 CSE generated an IEP after this meeting.

²⁰ There was a nine month delay from the date that the impartial hearing officer was appointed to this case on July 10, 2009 to the commencement of the impartial hearing on April 19, 2010; this delay was not explained in the hearing record. The impartial hearing officer is reminded that both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]).

in and of themselves, constituted denials of a FAPE; the April 2009 CSE did not predetermine the April 21, 2009 IEP; the failure to include a duly qualified regular education teacher on the April 2009 CSE was inconsistent with State regulations and, when considered together with the other procedural violations alleged, irrevocably infringed on the parents' opportunity to meaningfully participate in the development of their son's IEP; the hearing record established that the April 2009 CSE did not discuss the student's goals and objectives, and that the goals and objectives contained in the April 21, 2009 IEP were developed by two individuals with minimal or no personal knowledge of the student and his present levels of performance, and this deprived the parents of an opportunity to meaningfully participate in the development of their son's IEP and rendered it impossible to reasonably address the issue of whether the student's goals could be met in an ICT class setting; the hearing record lacked sufficiently specific evidence demonstrating either how the district's ICT classes would address the student's language-based learning disability, and his severe dysnomia, executive functions, and expressive writing deficits, or how the two daily resource room classes would have compensated for the student's educational and cognitive deficits; the parents met their burden of proving that Kildonan was an appropriate placement for the student for the 2009-10 school year; and equitable considerations did not preclude an award of tuition reimbursement to the parents (IHO Decision at pp. 25-30, 33-35). The impartial hearing officer granted the parents' request for tuition reimbursement for the student's 2009-10 school year at Kildonan (*id.* at p. 35).

Appeal for State-Level Review

The district appeals, alleging that the following impartial hearing officer determinations were erroneous: (1) that the April 2009 CSE was improperly composed; (2) that the April 2009 CSE developed the student's annual goals in the absence of any current information regarding the student's present levels of performance, and that this alleged deficiency deprived the student of a FAPE; (3) that the April 2009 CSE's alleged failure to discuss the student's goals at the April 21, 2009 CSE meeting deprived the student of a FAPE; (4) that the April 21, 2009 IEP failed to provide the student with instruction in small, structured classes; and (5) that the parents met their burden of proving that Kildonan was an appropriate placement for the student during the 2009-10 school year.

The parents answer, contending that the impartial hearing officer correctly determined the following: (1) that the district failed to offer the student a FAPE for the 2009-10 school year; (2) that the April 2009 CSE developed the goals and objectives contained in the April 21, 2009 IEP without information relative to the student's individual needs or present levels of performance; (3) that the April 2009 CSE was improperly constituted; and (4) that the parents met their burden of proving that Kildonan was an appropriate placement for the student during the 2009-10 school year.

Applicable Standards

At the outset, a procedural matter must be addressed. I note that the parties did not appeal the impartial hearing officer's determinations that the lack of references to specific peer-reviewed research in the April 21, 2009 IEP and the removal of the student's exemption from taking a second language did not, by themselves, rise to the level of depriving the student a FAPE for the 2009-10 school year, that the April 2009 CSE did not predetermine the student's April 21, 2009 IEP, and that equitable considerations did not bar the parents' claim for tuition reimbursement. 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[j][5][v]). Accordingly, these aspects of the impartial hearing officer's decision have become final and binding upon the parties.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

The impartial hearing officer determined that many of the procedural deficiencies alleged by the parents, when considered individually, did not compromise the district's obligation to offer the student a FAPE (IHO Decision at p. 30). However, relative to the alleged absence of a regular education teacher of the student at the April 2009 CSE meeting, the CSE's alleged preparation of the student's goals and objectives absent updated academic data from Kildonan, its alleged failure to discuss the draft goals during the CSE meeting, and its alleged failure to furnish Kildonan's academic dean with a copy of the draft IEP during the CSE meeting, the impartial hearing officer found that "in aggregate, this constellation of deficiencies fundamentally compromised the integrity of the CSE process" (id.). I will now consider whether these alleged deficiencies

compromised the development of an appropriate IEP for the student and deprived the student of a FAPE for the 2009-10 school year.

Composition of the April 2009 CSE

Turning first to the issue of the composition of the April 2009 CSE, a district's CSE must include not less than one regular education teacher of the student if the student is, or may be, participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate," participate in the development of the IEP of the student, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

In the instant matter, the hearing record demonstrates that the April 2009 CSE included a regular education teacher who normally taught 10th, 11th, and 12th grade classes, and, according to the testimony of the district's special education coordinator,²¹ would not have been assigned to teach the student during the 2009-10 school year (Tr. pp. 82-84, 909-10; Parent Ex. D at p. 3; see Dist. Ex. 3 at p. 6). However, according to the district director and the special education coordinator, the attending regular education teacher was a "highly experienced general education teacher [having] taught many inclusion classes" (Tr. pp. 82-85, 909-10). I am not persuaded by the evidence that the attendance of the regular education teacher, in this circumstance, comported with the requirements of federal and State regulations (8 NYCRR 200.3[a][1][ii-iii]; see 34 C.F.R. § 300.321[a][2-3]; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 09-137; Application of the Dep't of Educ., Appeal No. 08-105). However, administrative hearing officers are constrained by federal and State regulations from finding that a procedural violation rose to the level of a denial of a FAPE unless the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or 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]; A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Notwithstanding that the April 2009 CSE was not properly constituted, I find that the hearing record does not demonstrate that the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Here, the parents do not allege any specific harm caused by the procedural error, only that the CSE was

²¹ During the impartial hearing, the district special education coordinator advised that she was unfamiliar with State and federal regulations requiring that the regular education teacher in attendance at the CSE meeting be a teacher who is or may be responsible for administering a portion of the student's IEP (Tr. p. 910; see 20 U.S.C. § 1414[d][1][B][ii]; 34 C.F.R. § 300.321[a][2]; IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

not properly constituted (see A.C., 553 F.3d at 172; Matrejek, 471 F. Supp. 2d at 419).²² Additionally, a review of the hearing record indicates that the parents were afforded the opportunity to meaningfully participate in the review process, ask questions to which the other CSE members responded, and express their opinions as to the appropriateness of the recommended program for their son, and, during the impartial hearing, expressed satisfaction with the level of time and effort accorded to them by the CSE in the development of the student's April 21, 2009 IEP (see Tr. pp. 1418-19; Dist. Ex. 3 at pp. 6-7; Parent Ex. D). Therefore, I find that the hearing record contains insufficient evidence to conclude that the failure to include a regular education teacher who would implement the student's 2009-10 IEP at the April 2009 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Dep't of Educ., Appeal No. 10-073; Application of the Bd. of Educ., Appeal No. 10-022; Application of a Student with a Disability, Appeal No. 09-137; Application of the Dep't of Educ., Appeal No. 08-122; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student with a Disability, Appeal No. 08-064; Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). I caution the district, however, to ensure that it complies with the regulatory requirements pertaining to the participation of the appropriate regular education teacher member at CSE meetings.

Sufficiency of the April 21, 2009 IEP

Based upon an independent review of the evidence contained in the hearing record, I disagree with the impartial hearing officer's determination that the district did not sustain its burden to establish that it offered the student a FAPE during the 2009-10 school year. As noted above, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][1], [a][2], [a][4]; 8 NYCRR 200.4[d][2][i], [2][iii], [2][v]; Tarlowe, 2008 WL 2736027, at *6).

With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). The CSE is required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]). Incumbent with that duty is the mandate that the IEP "shall report the present levels of academic achievement and the functional performance and indicate the individual needs of the student." (8 NYCRR 200.4[d][2]; see 20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320 [a][1]). Moreover, a CSE is required to "consider" information about the student provided to, or by, the parents (8 NYCRR 200.4[f][2][ii];

²² It is well settled that although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Perricelli, 2007 WL 465211, at *1). The IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Application of a Student with a Disability, Appeal No. 10-095; Application of a Child with a Disability, Appeal No. 07-139).

Therefore, as part of the CSE's review, a CSE must consider an evaluation report submitted to the CSE by a parent, provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider private evaluation reports, it is not required to follow their recommendations (*see, e.g., Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). In determining whether a CSE adequately "considered" a private evaluation report, in the absence of a statutory or regulatory definition, the Second Circuit Court of Appeals has looked to the plain meaning of the term (*T.S. v. Bd. of Educ.*, 10 F.3d 87, 89-90 [2d Cir. 1993] [finding that an evaluation report was adequately "considered" when it was read by the director of special education, portions of the report were read and summarized for the CSE, and the CSE minutes showed discussion about the issues raised in the report]). In developing the recommendations for the IEP, the CSE must consider "the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessment programs; and any special considerations" (8 NYCRR 200.4[d][2]; *see* 34 C.F.R. § 300.324[a]).

Present Levels of Performance

With respect to the student's present levels of performance, the April 21, 2009 IEP noted the cognitive and academic achievement results of the student's May 4, 2007 private neuropsychological evaluation, academic achievement testing administered in March 2008,²³ and academic and cognitive achievement test²⁴ results reported by the school psychologist in his April 15, 2009 psychoeducational evaluation report (Dist. Exs. 3 at p. 4; 7 at pp. 1, 5; *see* Parent Ex. D at pp. 17-23). The April 21, 2009 IEP commented that the scores obtained during the April 15, 2009 psychoeducational evaluation were "consistent with previous testing over the past two to three years" (Dist. Ex. 3 at p. 6).

Academically, the April 21, 2009 IEP reported that the student exhibited low average overall reading abilities specific to sight words, comprehension, and decoding, noting that although the student could generally decode well enough to read a word correctly, if his initial attempt to decode a word was unsuccessful, he did not spontaneously implement word attack strategies (Dist. Ex. 3 at pp. 3-4). Relative to reading, the April 21, 2009 IEP commented that the student did not independently implement strategies to glean information from text, required external cues to utilize context clues, and struggled with identifying stated detail, predicting events and outcomes, and recognizing implied cause and effect when reading grade level texts (*id.*). It described the student's knowledge of basic math facts as adequate, but qualified that he demonstrated inconsistencies with

²³ The March 14, 2008 administration of the WIAT-II yielded standard scores of 127 in oral expression, 106 in oral language composite, 69 in spelling, and 53 in reading comprehension (Dist. Ex. 3 at p. 4).

²⁴ The April 21, 2009 IEP ascribed a date of March 16, 2009 to the WIAT-II test results; however, the hearing record suggests that these results were obtained during the April 15, 2009 psychoeducational evaluation conducted by the school psychologist (*compare* Dist. Ex. 3 at p. 4, *with* Dist. Ex. 7 at pp. 1, 5). The hearing record does not explain this discrepancy.

all calculations requiring renaming or regrouping (id.). Comments on the IEP observed that the student's math difficulties arose from his declination to solve problems he perceived as challenging and from his difficulties with organization and execution of multi-step calculations (id.). The IEP cited the student's struggles with recalling and applying basic multiplication and division facts and procedures, working with fractions, decimals, and solving multi-step problems (id.). In spelling, the April 21, 2009 IEP assessed the student's spelling skills as falling within the borderline range and well below grade level expectations, compromised by his difficulties with contractions, silent letters in the medial position of words, and homonyms (id.). In writing, the IEP suggested that the student's organizational difficulties, spelling errors, and difficulties with capital letters and punctuation affected his written expression (id.).

In the area of social/emotional development, the April 21, 2009 IEP again referenced the May 4, 2007 neuropsychological evaluation report, which documented the student's low self-esteem and his lack of expectation of his own performance, and his need for external structure to organize the world around him and to determine the motivations and intents of others (Dist. Exs. 3 at p. 5; 4 at p. 8). It suggested that based upon his history, the student experienced school-related anxiety in district settings, noting the marked diminution of his anxiety during his 2008-09 school year at Kildonan (Dist. Ex. 3 at p. 5).

With regard to the student's social needs, the April 21, 2009 IEP recommended the implementation of "a transitional support plan along with counseling supports" to assist the student in acclimating to the high school environment and to develop coping strategies (Dist. Ex. 3 at p. 5). Furthermore, the hearing record demonstrates that the district invited the student to participate in a summer orientation program for students preparing to enter the district high school, and that the April 21, 2009 IEP afforded the student 1:1 counseling sessions once per week to address his transition needs, and provided for written reports to be forwarded to and conferences to be conducted with the student's parents four times during the school year (see Tr. pp. 73, 982; Dist. Exs. 3 at pp. 5, 7; 14; Parent Ex. D at pp. 29-31). These recommendations offered by the April 2009 CSE would have been particularly crucial for the student in light of his previous history of anxiety in district settings, as noted by the district director, who acknowledged "[n]inth grade is a critical time for students, particularly those who have not been familiar with what we are offering" (Tr. p. 74).

In the area of management needs, the April 21, 2009 IEP noted that "[t]he student require[d] special education services and instruction in an integrated setting to be successful in mastering content area instruction;" integral components of this recommendation included a word processor, "specialized" seating near the teacher, the transitional support plan discussed above, and "specialized instruction in reading, study/organization skills, written expression, and spelling (Dist. Ex. 3 at p. 5). The district director identified the purpose of the recommended literacy resource room as helping students develop strategies to successfully complete work in their other classes while advancing their reading skill acquisition (Tr. pp. 387-88). He explained that teachers working in the reading resource room implemented a variety of programs, but that no particular program or methodology was specified on the April 21, 2009 IEP because "[n]o one program is the answer for all kids" (Tr. pp. 319-20; see Tr. pp. 315-27; Dist. Ex. 3 at pp. 1-7; Parent Ex. D at

pp. 46-47).²⁵ He also revealed that that he personally requested the creation of this resource room class specifically for the student, as it did not exist prior to the April 21, 2009 CSE meeting (Tr. pp. 978-79, 1012-13). I note also that the private neuropsychologist acknowledged that the program modifications contained in the April 21, 2009 IEP would have addressed the student's problems with executive functions (Tr. pp. 1325-30; see Dist. Ex. 3 at pp. 2-3).

The evidence contained in the hearing record establishes that the April 2009 CSE relied upon an August 13, 2008 health examination record (Dist. Ex. 8), the February 16, 2009 triennial social history (Dist. Ex. 5), the April 14, 2009 classroom observation (Dist. Ex. 6), and the April 15, 2009 psychoeducational reevaluation (Dist. Ex. 7) in developing the April 21, 2009 IEP (Dist. Ex. 3 at p. 7). Additionally, although the parties do not dispute that the April 2009 CSE did not possess the student's current educational records and test results from Kildonan at the time of the CSE meeting (see Tr. pp. 196-99, 231-34, 238-41, 243, 252-55, 296-97, 304, 539-42, 619-24, 761, 897-98, 1101-03), the hearing record demonstrates that Kildonan's academic dean provided the CSE with a verbal update on the student's current progress, based in part upon his discussions with the student's math teacher and language training tutor at the school (Parent Ex. D at pp. 7-13; see Tr. pp. 92-93, 297-300, 667-68; Dist. Ex. 3 at p. 6), and that the school psychologist, during his psychoeducational reevaluation of the student, spoke with the student's teachers at Kildonan about the student's current educational performance (Tr. pp. 501-02; see L.K. and A.K. v. Dep't of Educ., 2011 WL 127063, at *7 [E.D.N.Y. Jan. 13, 2011]; Connor v. Dep't of Educ., 2009 WL 3335760, at *5 [S.D.N.Y. Oct. 13, 2009]).²⁶ Furthermore, district witnesses maintained that the CSE possessed sufficient evaluative information from the telephonic participation of Kildonan's academic dean relative to the student's present levels of performance to proceed with the student's annual review (see Tr. pp. 255, 261-62, 304, 539-42, 939-42, 951).

In conclusion, I determine that the evidence contained in the hearing record demonstrates that the April 21, 2009 IEP accurately reflected the student's present levels of performance and areas of need in reading, math, spelling, writing, executive functions, and anxiety as described in the August 13, 2008 health examination record, the February 16, 2009 triennial social history, the April 14, 2009 classroom observation, the April 15, 2009 psychoeducational reevaluation, and the information provided by Kildonan's academic dean during the April 21, 2009 CSE meeting (see O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998]; Application of the Dep't of Educ., Appeal No. 07-120; Application of the Bd. of Educ., Appeal

²⁵ Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of a Student with a Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

²⁶ The district director advised that he reviewed the student's 2008-09 IEP in an effort to familiarize himself with programs proposed for the student prior to the 2009-10 school year, and the hearing record identifies the 2008-09 IEP as one of the documents relied upon by the April 2009 CSE in developing the draft IEP for the student's 2009-10 school year (Tr. pp. 158, 194, 644-45, 708, 728-30, 735, 847-48, 870-74; see Parent Ex. F).

No. 04-031). I will now examine the issue of whether the goals contained in the April 21, 2009 IEP were linked to these areas of need.

Goals

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

The April 21, 2009 IEP included a total of 15 goals,²⁷ including: two social/emotional/behavioral goals related to the student's needs in coping and requesting assistance, three study skills goals related to the student's needs in organization, attending, and self advocacy; three reading goals related to the student's needs in comprehension and vocabulary; three writing goals related to the student's needs in editing, structure and organization, and punctuation; and four math goals related to the student's needs in calculations, fractions, and multi-step (Dist. Ex. 3 at pp. 7-9). Each goal contained a specific evaluation criterion, evaluation procedure, and an evaluation schedule (id.; see 8 NYCRR 200.4[d][2][iii][b]).

The school psychologist advised that he drafted the social/emotional/behavioral goals included in the April 21, 2009 IEP, with significant reliance upon the May 4, 2007 neuropsychological evaluation conducted by the private neuropsychologist (Tr. pp. 542-49, 556-57, 583-84, 587; see Dist. Exs. 3 at p. 9; 4; 10 at p. 10). The district special education coordinator and resource room teacher collaborated to draft the student's goals in study skills, reading, writing, and math (Tr. pp. 642-43, 658, 662, 706, 729-30, 880-81, 947); both acknowledged that they relied upon the student's 2008-09 IEP²⁸ and the May 4, 2007 neuropsychological evaluation report from the private neuropsychologist while developing the student's goals (Tr. pp. 644-45, 708, 728-30,

²⁷ The hearing record reflects that these goals carried over unchanged from the draft IEP (compare Dist. Ex. 3 at pp. 7-9, with Dist. Ex. 10 at pp. 7-10; see also Tr. pp. 294, 731). It is not impermissible for school district personnel to draft goals prior to a CSE meeting (Application of a Child with a Disability, Appeal No. 06-111; Application of a Child with a Disability, Appeal No. 06-106; Application of a Child with a Disability, Appeal No. 05-087; Application of a Child with a Disability, Appeal No. 02-029; Application of a Child with a Disability, Appeal No. 01-073; see also Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; W.S. ex rel. C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006] [a school district should not be precluded from suggesting an outcome at a CSE meeting]; see Application of a Child with a Disability, Appeal No. 07-030). As previously discussed, the record reveals that the CSE reviewed evaluative reports to determine the student's needs and develop goals to meet the student's needs.

²⁸ Selected goals in the 2008-09 IEP targeted the student's: recognition and understanding of vowel teams making the long vowel sound; consonant digraphs in isolation and in words; vowel digraphs in words; accurate spelling of word endings and vowel team words; ability to write three paragraphs about one subject; ability to write a five paragraph essay; self-identification of two strengths and weaknesses; discussion of ways in which a person's self-concept affects behavior; self-identification and discussion of instances of anxiety experienced from academic situations; and identifying and implementing methods of dealing with anxiety (Parent Ex. F at pp. 8-10).

735, 847-48, 870-74; see Dist. Ex. 4; Parent Ex. F). Both also maintained that notwithstanding the lack of the student's current educational records and test results from Kildonan, they possessed sufficient information to draft meaningful goals, and that the goals drafted were indeed appropriate given the student's needs (see Tr. pp. 662-66, 670, 668-69, 721-23, 761, 939-42). The district special education coordinator also acknowledged that some of the drafted goals were taken from a pre-drafted computer database (see Tr. pp. 731-33, 735, 848-49; see Tr. pp. 439-40). However, such practice does not by itself render an IEP deficient, unless it prevents the CSE from tailoring such goals to appropriately address the unique educational needs of an individual student (see M.H. and E.K. v. Dep't of Educ., 712 F. Supp. 2d 125, 153-55 [S.D.N.Y. May 10, 2010]).

The hearing record also establishes that there was neither any discussion by the April 2009 CSE about the goals developed for the draft IEP, nor any objections to said goals voiced by the parents either prior to or during the April 2009 CSE meeting (Tr. pp. 101-02, 409, 411-12, 425, 438-39, 558, 601, 627, 669-70, 908, 1125, 1416-18; see Parent Ex. D). However, the lack of discussion about the goals during the April 2009 CSE meeting did not, by itself, render the goals deficient, considering that the parents received the draft IEP in advance of the CSE meeting and, according to the evidence contained in the hearing record, were afforded the opportunity to meaningfully participate in the review process (see Bougades v. Pine Plains Cent. Sch. Dist., 2009 WL 2603110, at *6 [S.D.N.Y. Aug. 25, 2009]; E.G. and M.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388-89 [S.D.N.Y. March 16, 2009]).

I note that the April 21, 2009 IEP lacked spelling goals, despite the fact that the district resource room teacher acknowledged the student's "pronounced deficit" in spelling during the impartial hearing, which is amply demonstrated by the evidence contained in the hearing record, including the draft IEP, which described the student's spelling skills as "borderline" and "well below grade level expectations" (Tr. pp. 785-91; see Tr. pp. 301-03; Dist. Exs. 3 at pp. 7-9; 4 at pp. 4, 9; 10 at pp. 5, 7-10; Parent Ex. H). However, consistent testimony from the district director, special education coordinator, and resource room teacher confirmed that the CSE would conduct a 30-day review after the start of the 2009-10 school year, adjust to the student's IEP as necessary, and the resource room teacher expressed confidence that she could have met all of student's identified needs in the ELA resource room (Tr. pp. 103-04, 303, 634, 643, 646, 671, 724-25, 788).

Based upon the foregoing, I conclude that the evidence contained in the hearing record demonstrates that, with the exception of the lack of spelling goals (a deficiency that could have been addressed during the 30-day review meeting or during a quarterly meeting with the parents during the course of the school year), the annual goals contained in the April 21, 2009 IEP were objectively measurable; consistent with his needs and abilities as described in the August 13, 2008 health examination record, the February 16, 2009 triennial social history, the April 14, 2009 classroom observation, the April 15, 2009 psychoeducational reevaluation, and the information provided by Kildonan's academic dean during the April 21, 2009 CSE meeting; and the goals were designed to meet the student's needs resulting from the student's disability and to enable the student to be involved in and make progress in the general education curriculum (O'Toole, 144 F.3d at 701).

Appropriateness of the District's Recommended ICT Placement

Both the district coordinator of special education and the resource room teacher (who would have been the student's special education teacher for both the ELA ICT class and the literacy

resource room) provided consistent descriptions of the core subject ICT classes offered at the district high school (Tr. pp. 649, 651, 712-13). Both witnesses explained that ICT classes at the high school consisted of a content area teacher and a special education teacher who planned and taught lessons collaboratively; on some occasions, the content area teacher presented material and concepts, while on others, the special education teacher would do so (Tr. pp. 649-52, 712). Although the special education teacher was charged with the primary responsibility for providing special education students with IEP-driven modifications, accommodations and supports in the integrated setting, both teachers in the ICT classroom were trained to work together as a team and both were able to accommodate students with their necessary supports (Tr. pp. 650, 713). All ICT classrooms utilized computers tied into large screen televisions, a Smartboard, and a white board in the delivery of instruction (Tr. pp. 108, 110, 651). The hearing record characterized instruction as "multisensory" or "multimodal," in which kinesthetic, visual, audio, and hands-on activities were offered to students, repetition was "built in," and the special education teacher modeled skills for the students (Tr. pp. 386, 649, 651-52, 716-17). The ICT classes featured flexible small group instruction designed to afford students differentiated instruction and opportunities for cooperative learning experiences (Tr. pp. 109, 649, 651, 716). Vocabulary review and repetition assisted students experiencing difficulty learning new vocabulary (Tr. p. 649). Both witnesses agreed that had the student attended the recommended program for the 2009-10 school year, the team approach utilized by the ICT classes at the district high school would have addressed his reading difficulties, and that the special education teacher would have provided him with the supports he needed to receive an educational benefit in the classroom (Tr. pp. 652, 817). The district coordinator of special education advised that such supports would have included vocabulary review, use of flashcards, use of context clues, assisting the student with easier texts if necessary, and implementation of a variety of methodologies to help the student comprehend material (Tr. p. 653).

With regard to the recommended 15:1+1 special class for math, the district coordinator of special education opined that the smaller class ratio in conjunction with the topics covered were appropriate for the student, considering both what the student had already accomplished in math and what he still needed to accomplish prior to transitioning to algebra (Tr. pp. 653-54). I note also that the hearing record indicates that there was a full time special education teacher assigned to the recommended 15:1+1 math special class, and that at the time of the impartial hearing, only eight students were enrolled in the class (Tr. p. 107; Dist. Ex. 3 at pp. 1, 6).

The district director explained that generally, resource rooms provided pre-teaching and re-teaching, to give a student a "leg up" in terms of learning expectations (Tr. p. 387). Consistent with this testimony, the hearing record reflects in the literacy resource room, the student's special education teacher in the ELA ICT class would have been his literacy resource room teacher, thereby providing instructional consistency specific to the content material and the student's individual reading and writing skills needs (Tr. pp. 654-55, 817). The literacy resource room teacher would have had access to every textbook that the student used, as well as access to easier texts as needed (Tr. p. 388). Furthermore, the ELA special education teacher would have been the student's "IEP holder," advocating for the most demonstrably effective methods for instructing the student as she collaborated with his other teachers (Tr. p. 711).

Based upon the foregoing, I conclude that the evidence contained in the hearing record established that the district's recommended educational program was reasonably calculated to enable the student to receive educational benefits for the 2009-10 school year.

Conclusion

After reviewing the hearing record, I disagree with the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year. I find that the evidence contained in the hearing record supports that the April 2009 CSE accurately identified the student's areas of need based upon information gathered from the August 13, 2008 health examination record, the February 16, 2009 triennial social history, the April 14, 2009 classroom observation, and the April 15, 2009 psychoeducational reevaluation, input from the parents, and information contributed by Kildonan's academic dean at the April 21, 2009 CSE meeting. In addition, the April 21, 2009 IEP contained meaningful and objectively measurable annual goals to address the student's identified areas of need. Weighing the evidence presented, I find that the CSE appropriately recommended an ICT class for the student, and that the evidence supports a finding that the district sustained its burden to establish that the special education programs and services in the April 21, 2009 IEP, and the recommended ICT class, would have addressed the student's needs in the LRE, that the recommended special education programs and services were reasonably calculated to enable the student to receive educational benefits, and thus, that the district offered the student a FAPE for the 2009-10 school year (see Tr. pp. 122-23, 300-01, 378-80, 405-06, 421-22, 515-16, 521-23, 627-28, 630-31, 648-50, 652-62, 670-73, 710-11, 725, 1542-43, 1553-55, 1558-59, 1563, 1572-73, 1581-82, 1586).

Having reached this determination, it is not necessary to reach the issue of whether Kildonan was an appropriate placement for the student and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated December 6, 2010 is annulled to the extent it determined that the district failed to offer the student a FAPE for the 2009-10 school year and awarded the parents reimbursement for the student's tuition at Kildonan for the 2009-10 school year.

Dated: Albany, New York
March 7, 2011

JUSTYN. P. BATES
STATE REVIEW OFFICER