



The University of the State of New York

The State Education Department State Review Officer

No. 07-020

Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

O'Connor & Golder, LLP, attorney for petitioners, Arthur J. Golder, III, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Huria S. Naviwala, Esq., of counsel

DECISION

Petitioners appeal from the parts of the decision of an impartial hearing officer which denied their request to be reimbursed for the costs associated with their daughter's home-based applied behavioral analysis (ABA) program, privately obtained parent counseling and training services, and privately obtained related services for the 2006-07 school year. Petitioners also appeal from the impartial hearing officer's decision regarding the child's pendency placement during this due process proceeding. The appeal must be sustained.

At the outset, I must address a procedural matter. Petitioners allege they were granted an extension of time to submit a memorandum of law to the impartial hearing officer, but that the impartial hearing officer rendered her decision prior to the expiration of the extended date and before submission of the memorandum. By electronic mail dated December 11, 2006, petitioners requested an extension of time from December 15, 2006 until January 31, 2007 to submit a post-hearing memorandum of law to the impartial hearing officer (Pet. Ex. 1). By

electronic mail dated December 11, 2006 the impartial hearing officer granted petitioners' request for an extension until January 31, 2007.¹ (Pet. Ex. 2). On January 9, 2007, approximately three weeks before the extended due date for submission of the memorandum, the impartial hearing officer rendered her decision. The impartial hearing officer stated in her decision that petitioners' counsel requested an extension until December 31, 2006 to file a "written closing statement" and that she did not receive any "written submissions" (IHO Decision at p. 2).² The impartial hearing officer was not required to grant an extension of the timeline to render a decision for the purpose of allowing submission of written arguments (8 NYCRR 200.5[j][5]). However, once the impartial hearing officer granted the extension she should have waited until the memorandum was submitted or until the extension date had expired prior to issuing her decision. In the circumstances herein, she erred by issuing her decision prior to the receipt of petitioners' closing written statement. I do not however find that the issuance of the impartial hearing officer's decision prior to receipt of petitioners' memorandum amounted to reversible error; petitioners have not alleged any resulting harm and petitioners were able to amply develop their arguments during the course of hearing.

At the commencement of the impartial hearing on October 12, 2006, the child was five years old and attending the McCarton School (McCarton) for the 2006-07 school year (Tr. p. 161). McCarton is a small private school for children who have a diagnosis of an autistic spectrum disorder (Parent Ex. 42). The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The child's eligibility for special education programs and classification as a student with autism (8 NYCRR 200.1[zz][1]) are not in dispute.

The child's prior educational history is described in Application of a Child with a Disability, Appeal No. 06-085, issued October 12, 2006, and will not be repeated in detail in this decision. Petitioners' daughter reportedly did not utter her first spoken word until the age of three (Parent Ex. 4 at p. 7). In summer 2004, the child's developmental physician and two private neurologists indicated that she met the criteria for a diagnosis of an autism spectrum disorder (Tr. p. 114). Petitioners enrolled their daughter at McCarton in October 2004 for the 2004-05 school year where she began receiving 20 hours of ABA services per week, an hour of speech-language therapy five days per week and an hour of occupational therapy five days per week (Parent Ex. 4 at p. 17).

¹ The length of the extension approved by the impartial hearing officer improperly exceeded the 30-day limitation provided for in the Regulations of the Commissioner of Education (8 NYCRR 200.5[j][5][i]). In addition, the date of the close of the hearing record was not properly noted in the hearing decision as required by regulations (8 NYCRR 200.5[j][5]). Also, the impartial hearing officer failed to make part of the hearing record the requests for an extension of the timeline to render a decision, the reasons for the extension, and the decision to grant the extension (8 NYCRR 200.5 [j][5][iv],[i]).

² In her decision, the impartial hearing officer mistakenly identified December 31, 2006 rather than January 31, 2007 as the date she approved for the submission of post-hearing written material.

A psychoeducational evaluation of the child was conducted on December 2, 2004 by the McCarton Center (Parent Exs. 4 at pp. 17-21; 20 at pp. 4-8). Administration of the Stanford-Binet Intelligence Scales, Fifth Edition (Stanford-Binet) in December of 2004 yielded a nonverbal IQ score (and percentile) of 87 (19th), and a verbal IQ score of 63 (1st), and a full scale IQ score of 74 (4th) (Parent Exs. 4 at p. 21; 20 at p. 8). The evaluators recommended that petitioners' daughter receive 20 hours per week of ABA at McCarton, 20 hours per week of home-based ABA, seven hours of speech-language therapy per week, five hours of occupational therapy per week, three hours of physical therapy per week and three hours of parent counseling and training per week (Parent Ex. 4 at pp. 20-21). A preschool social history conducted on February 28, 2005, when the child was three years five months old, indicated that she was able to follow simple directions with minimal prompts, but that she was nonverbal and not able to demonstrate the ability to understand "wh" questions (id. at p. 7).

Petitioners' daughter remained at McCarton for the 2005-06 school year. A private psychologist observed petitioners' daughter at McCarton on November 15, 2005 (Parent Ex. 44 at p. 1). The private psychologist indicated the child had limited eye contact, demonstrated no spontaneous verbal behavior, and did not interact with peers unless engaged in an instructional activity that included interaction prompted by the teacher (id.). For the 2005-06 school year, petitioners' daughter received a 12-month educational program, which included at-home services and related services (Application of a Child with a Disability, Appeal No. 06-085).³

The child's private physical therapist completed a physical therapy progress report on April 24, 2006 (Parent Ex. 33). The private physical therapist indicated that when she started working with the child in June 2005 the child was ambulatory, but was unable to stand and kick a ball, throw the ball over her head, jump in place, pedal a tricycle, and run (id. at p. 1). The private physical therapist further indicated that the child could not ascend or descend stairs using alternating feet and was falling down a lot of times throughout the day (id.). The child also needed assistance with activities of daily living (ADL) skills such as dressing, toileting, feeding and bathing (id.). The private physical therapist noted that the child had made "some progress" in areas such as being able to pedal a bike with minimal assistance to maintain her balance and required minimal assistance with her ADL skills, but that she still could not walk on uneven surfaces, climb over obstacles, or negotiate ladders and steps using alternating feet (id.). The private physical therapist recommended continuing 60-minute sessions of individual physical therapy three times per week (id. at p. 2).

Respondent's Committee on Special Education (CSE) met on May 11, 2006 (Parent Ex. 7). For the 2006-07 school year, respondent's CSE recommended that petitioners' daughter be classified as a student with autism and that she be enrolled in a 12-month kindergarten program in a special class in a specialized school with a student to staff ratio of 6:1+1 (id. at p. 1). In addition, the CSE recommended that the child receive 30 minutes of individual occupational

³ Application of a Child with a Disability, Appeal No. 06-085, issued October 12, 2006, upheld petitioners' appeal and granted their request for reimbursement for the costs of privately obtained services during a portion of the 2004-05 school year, summer 2005, and for a portion of the 2005-06 school year.

therapy five times a week, 30 minutes of individual physical therapy four times per week, and 30 minutes of individual speech-language therapy seven times per week (id. at p. 13). The CSE also recommended that the child be provided with a "transportation paraprofessional" and that the child be transported in an air-conditioned bus (id.). On the child's individualized education program (IEP), the CSE indicated that she required an assistive technology device (id. at p. 1).

The private psychologist again observed petitioners' daughter at McCarton on May 26, 2006 (Parent Ex. 60 at p. 1). The private psychologist indicated that he had observed her previously in November 2005 (Parent Ex. 60 at p. 1; see Parent Ex. 44 at pp. 1-4). He noted that, in November 2005, the child displayed limited eye contact and social skills, and that she did not initiate social behavior (Parent Ex. 60 at p. 1). He further noted that, during his previous observation, petitioners' daughter did not demonstrate spontaneous verbal behavior and had motor-skill related deficits in following directions (id.). The private psychologist opined that the differences he observed during this observation, which was six months later, were "dramatic" (id.). He noted that during the evaluation on May 26, 2006 petitioners were with their daughter and that there had been a "clear positive change in reciprocal interactions" between the child and petitioners (id. at p. 1). However, the private psychologist noted that the child's verbal prosody was still lacking, her verbal behavior remained flat without affect, and that she was still not demonstrating spontaneous verbal behavior (id.). The private psychologist opined petitioners' daughter required highly individualized instruction to receive educational benefit (id. at p. 2).

Petitioners visited the recommended public school placement on June 26, 2006 and notified respondent by letter that they rejected the placement (Parent Ex. 11).

A speech and language progress report from McCarton was completed July 2006 (Parent Ex. 24). Speech-language therapy goals included improving receptive language skills, language comprehension, expressive language skills, oral-sensory skills and speech motor planning skills for increased intelligibility and increased feedings skills; expanding receptive and expressive vocabulary and play skills; and facilitating interactions with peers (id. at p. 1). The child's speech-language therapy was also focused on utilizing a "DynaVox" augmentative communication device as a functional and reliable means for facilitating her verbal communication (id.). The report noted that although the child had demonstrated progress, she continued to have difficulty with receptive and expressive language skills, social and pragmatic skills, and motor speech production skills (id. at p. 3). The speech-language pathologist recommended continuation of 60-minute sessions of speech-language therapy five times per week and an additional three 60-minute sessions per week outside of school (id.). The speech-language pathologist indicated that the child should be provided with opportunities to generalize her expressive vocabulary skills through the use of her augmentative communication device across a variety of situations (id.). She further recommended that the child continue to receive PROMPT (prompts for restructuring oral motor phonetic targets) therapy to improve the child's production with speech sounds (id.).

By due process complaint notice dated July 12, 2006, petitioners informed respondent that they enrolled their daughter in McCarton for the 2006-07 school year, and requested an impartial hearing for the purpose of obtaining an award of tuition reimbursement and reimbursement for costs associated with their daughter's home-based ABA services, privately

obtained parent counseling and training services, and privately obtained related services for the 2006-07 school year (Parent Ex. 1 at pp. 1-3).

An occupational therapy progress report from McCarton was completed July 13, 2006 (Parent Ex. 29). The child was receiving 45-minute individual sessions of occupational therapy on a daily basis at McCarton (id. at p. 1). McCarton's occupational therapist administered the Peabody Developmental Motor Scales - Second Edition (PDMS-2), a standardized test that measures gross and fine motor skills of children from birth to seven years old (id.). The evaluator reported that the PDMS-2 was administered to the child in a "non-standardized manner, using a great deal of visual demonstration, encouragement and structured sensory breaks...to facilitate the manifestation of the targeted motoric skills, while isolating all the variables such as ability to comprehend and follow verbal directions" (id.). Although improvements were demonstrated in pre- and post-testing, the child still demonstrated below average functioning (id. at p. 2). McCarton's occupational therapist focused on improving the child's motor planning skills, trunk control, body awareness and balance for improved negotiation throughout her environment (id. at p. 3). McCarton's occupational therapist recommended 45-minute sessions of individual occupational therapy five times per week (id. at p. 5).

An educational progress report from McCarton was completed on July 14, 2006 (Parent Ex. 21). The ABA therapist indicated in the report that petitioners' daughter received 20 hours of center-based ABA services, with one hour of occupational therapy daily and one hour of speech-language therapy daily at McCarton (id. at p. 1). In addition, petitioners' daughter also attended a private preschool three afternoons a week with the therapist's support (id.). The report noted that the child learned "best" in a structured one-to-one situation, with continuous interaction, positive reinforcement, redirection and adult prompting to remain focused and on task (id.). The child demonstrated delays in play, social interaction, adaptive behaviors, and significant delays in communication (id.). She had difficulty due to her varying attention, lack of compliance, and activity level, which affected all areas and required adult intervention to focus her attention (id.). The child was very rigid and non-compliant, which led to crying, verbal protests and hitting (id.). She had a behavior plan that addressed non-compliant behavior in school and at home (id.). The child required prompting and redirection to remain with her group (id.). She was not able to process language and follow directions at the same rate as her peers (id.). However, petitioners' daughter was able to follow three-step receptive instructions, individually and in a group (id. at p. 2). The child was able to independently acknowledge her peers and teachers by saying "yes" with the person's name and was able to use a DynaVox augmentative communication device to form three to four word phrases (id. at pp. 2-3). However, the child was not able to independently make a request (Tr. p. 45) and was not able to successfully use the DynaVox in social interactions with her peers without prompting (Tr. p. 98).

Updated psychological testing of the child was conducted on August 8, 2006 when she was four years nine months old (Parent Ex. 20 at p. 1). Re-administration of the Stanford-Binet yielded a nonverbal IQ score (and percentile) of 96 (39th), a verbal IQ score of 102 (55th), and a full scale IQ score of 99 (47th) (id.).

An impartial hearing commenced on October 16, 2006 and concluded on November 16, 2006, after three days of testimony. At the impartial hearing, petitioners presented testimony from ten witnesses, including professionals and individuals involved in either assessing or providing services to the child. Petitioners submitted 68 exhibits. Respondent called no witnesses to rebut petitioners' evidence about the appropriateness or level of the privately obtained services. For documentary evidence, respondent submitted one 2-page exhibit (Dist. Ex. A). The impartial hearing officer rendered a decision on January 9, 2007. The impartial hearing officer found that respondent failed to offer a free appropriate public education (FAPE)⁴ to petitioners' daughter for the 2006-07 school year (IHO Decision at p. 9). The impartial hearing officer also determined that McCarton was an appropriate placement for petitioners' daughter (id. at p. 10). She determined that the services that McCarton provided for the child, including speech-language therapy, occupational therapy, and one hour per week of parent counseling and training were appropriate for the child (id. at pp. 10-11). However, the impartial hearing officer determined that the private services selected by petitioners, which were in addition to the services provided by McCarton for the 2006-07 school year, were not appropriate (id. at pp. 11-12). The impartial hearing officer determined that equitable considerations supported petitioners' claim for reimbursement regarding their request to be reimbursed for their daughter's tuition costs at McCarton (id. at p. 12). The impartial hearing officer, therefore, awarded tuition reimbursement for McCarton, but denied petitioners' request to be reimbursed for the costs associated with their daughter's home-based ABA services, privately obtained parent counseling and training services, and privately obtained speech-language and physical therapy services for the 2006-07 school year (id. at p. 13). In addition, the impartial hearing officer determined that the placement offer on child's May 2005 IEP (see Parent Ex. 13) constituted her pendency placement (IHO Decision at p. 13).

Petitioners contend on appeal that the privately obtained home-based ABA services, the two hours of additional privately obtained parent counseling and training services, and the privately obtained speech-language therapy and physical therapy services for the 2006-07 school year were appropriate. Petitioners also contend that the impartial hearing officer erred in her pendency determination.

Preliminarily, I must note that respondent has not appealed from the portion of the decision of the impartial hearing officer which found that respondent did not offer the student a FAPE and ordered reimbursement petitioners for their daughter's tuition costs at McCarton for the 2006-07 school year (see IHO Decision at p. 13). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. §

⁴ The term "free appropriate public education" means special education and related services that -
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

300.514[a]; 8 NYCRR 200.5[k]; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Having failed to appeal from that portion of the impartial hearing officer's decision, respondent is bound by that portion of the decision (Application of a Child with a Disability, Appeal No. 04-100; Application of a Child with a Disability, Appeal No. 04-018; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-097; Application of a Child with a Disability, Appeal No. 01-096; Application of a Child with a Disability, Appeal No. 00-057).

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17;⁵ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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 parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]; Frank G. 459 F. 3d. at 363). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first

⁵ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

instance had it developed a proper IEP" (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148[c]).

The first step is to determine whether the district offered to provide a FAPE to the student (see M. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

Both the Supreme Court and the Second Circuit have noted that the IDEA does not, itself, articulate any specific level of educational benefits that must be provided through an IEP (Rowley, 458 U.S. at 189; Walczak, 142 F.3d at 130), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, a school district satisfies the FAPE standard "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130; see also Perricelli, 2007 WL 465211, at *15), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of a Child with a Disability, Appeal No. 07-008, Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029; Application

of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The first step in a reimbursement case, the determination of whether the district offered a FAPE to the student, need not be discussed in this case because respondent did not appeal the impartial hearing officer's determination that a FAPE was not offered. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Therefore, petitioners have met the first Burlington/Carter criterion.

Turning to the second prong of the Burlington/Carter analysis, it must be decided whether petitioners have met their burden of demonstrating that the private services provided to the child for the 2006-07 school year were appropriate (Frank G., 459 F. 3d. at 364; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], cert denied, 532 U.S. 942, 121 S. Ct. 1403, 149 L.Ed.2d 346 [2001]; Application of a Child with a Disability, Appeal No. 02-111; Application of a Child with a Disability, Appeal No. 95-57). In order to meet that burden, petitioners must show that the private services met their daughter's special education needs (Burlington, 471 U.S. at 370; M.S., 231 F.3d at 104-05; Application of a Child with a Disability, Appeal No. 02-111). "The test for the parents' private placement is that it is appropriate, not that it is perfect" (Matrejek v. Brewster Cent. School Dist., 2007 WL 210093, at *3 [S.D.N.Y. Jan. 9, 2007], citing M.S., 231 F.3d at 105; W.S. ex rel. C.S. v. Rye City Sch. Dist., 454 F.Supp.2d 134, 139 [S.D.N.Y. 2006]). The private school need not employ certified special education teachers, nor have its own IEP for the student (Application of a Child with a Disability, Appeal No. 02-111). While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Petitioners contend that denying reimbursement for the home-based ABA services was "against the weight of the evidence" (Pet. ¶ 4). I agree. The child's home-based ABA program consists of two components, one in which she attended the International Preschool, which is described as "typical" preschool with regular education peers, with a 1:1 ABA provider, and a second component where she received 1:1 services at home (Tr. pp. 60-61; 289). Petitioners' daughter attends McCarton until 1:00 p.m. after which she attends the International Preschool, where she was in an integrated classroom with non-disabled peers (Tr. pp. 58-59). McCarton's educational director (Tr. p. 29) testified that when petitioners' daughter was learning a new routine, was in a new situation and was interacting with children, she needed an intensive level of supervision (Tr. p. 60). McCarton's educational director stated that it was difficult for petitioners' daughter to attend and learn new information, especially conceptual information (Tr. p. 51). The child needed to be taught how to transition because she was a very perseverative child who would play with the same materials in the same repetitive fashion (Tr. p. 55). She needed concepts taught to her incrementally, using repetition (Tr. p. 51). McCarton's educational

director indicated that home-based ABA provided a behavioral structure to prevent perseverative play (Tr. p. 65). Petitioners' daughter is accompanied to the International Preschool by a McCarton ABA therapist who provides shadowing, prompting, and support (Tr. pp. 60-61). The private ABA therapist works with petitioners' daughter at the International Preschool until the end her school day at 4:30 p.m. assisting the child with integration and participation in the classroom and providing support with social skills, language play skills, daily living skills, gross motor skills, fine motor skills and academic skills (Tr. pp. 61; 329-30).

Another private ABA therapist provides at-home ABA therapy services to petitioners' daughter (Tr. p. 289; see Parent Ex. 41 at pp. 4-5). The private at-home ABA therapist testified that she performed ABA programming she developed with her supervisor at McCarton (Tr. p. 289). Programming included life skills training, communication, and play skills (Tr. pp. 289-90). The private at-home ABA therapist testified that she recorded data on all of these programs and was trying to help the child gain more independence (Tr. p. 289; Parent Exs. 58, 59). The child needed assistance to focus on the task at hand and pay attention to relevant information in the environment (Tr. p. 290). The private at-home ABA therapist indicated that when she started working with petitioners' daughter, the child needed hand-over-hand prompting to get dressed, but now she was almost completely independent with her dressing skills (Tr. p. 291). The therapist noted that there was a lot of carryover of programming at McCarton, the International Preschool, and the home (id.). The private at-home ABA therapist testified that she ensured consistency in the levels and the types of prompting used in the three settings and that communication, cooperation and overlap of programs was facilitated through data taken in the home and collaboration with the other ABA providers (Tr. pp. 293-94). Petitioners' concerns regarding their interaction with their daughter and her siblings were also addressed by the at-home ABA provider (id.). I find that petitioners have demonstrated, given the development of the impartial hearing record and the un rebutted evidence contained therein (see Tr. pp. 102, 237, 340-41), that the privately obtained home-based ABA therapy services were appropriate to meet their daughter's special education needs.

Petitioners also contend that the impartial hearing officer erred in not ordering reimbursement for the two hours of parent counseling and training per week that they obtained in addition to the one hour per week that was being provided by McCarton. The impartial hearing officer determined that there was "no doubt" that petitioners benefited "tremendously" from three hours of parent counseling and training per week (IHO Decision at p. 12). State regulations provide that provision be made for parent counseling and training to parents of children with autism for the purpose of enabling parents to perform appropriate follow-up intervention activities at home (8 NYCRR 200.1[kk], 200.13[d]). The private psychologist testified that petitioners' daughter was not able to "generalize" her skills and that her learning was very "specific" (Tr. p. 223). The private psychologist testified that the conditions under which the child is trained would reflect the conditions under which she would perform later (id.). Petitioners' daughter utilizes the home-based ABA services for follow-up intervention activities at home to generalize the skills acquired at McCarton in the home environment (Tr. pp. 334-35). The child's mother testified that petitioners received the type of parent training that would ensure that they utilize the same follow-up intervention activities at home (Tr. pp. 373-75). For example, the child's mother described a "behavior plan" for tantruming being in place for the child in which petitioners implemented the same type of prompting used by school personnel

(Tr. pp. 374-75). Under the circumstances of this case, where the unrebutted testimony of petitioners identified a need for the additional two hours of parent training (Tr. p. 386, see also Tr. 206-07), and given the impartial hearing officer's finding that petitioners benefited from the three hours of parent counseling and training (see IHO Decision at p. 12), I find that the additional two hours of parent training and counseling were appropriate to meet petitioners' daughter's special education needs.

Petitioners also contend that the impartial hearing officer's denial of reimbursement for the at-home related services of speech-language therapy and physical therapy was "against the weight of evidence." With respect to speech-language therapy, respondent contends on appeal that petitioners should not be reimbursed for additional hours of at-home speech-language therapy because the additional hours of services are "beyond what is necessary" for the child to "make some measurable educational progress" (Answer ¶ 65). However, respondent did not present this argument at the impartial hearing, did not rebut petitioners' experts (Tr. pp. 353-55) and provided no witnesses, testimony or documentary evidence showing that the additional hours of at-home speech-language therapy were not necessary.

The McCarton speech-language pathologist indicated that although the child had demonstrated progress, she continued to have difficulty with receptive and expressive language skills, social and pragmatic skills, and motor speech production skills (Parent Ex. 24 at p. 3). The McCarton speech-language pathologist recommended continuation of speech-language therapy five times per week and an additional three sessions per week of speech-language therapy outside the school setting (Parent Ex. 24 at p. 3; Tr. p. 353). She testified that petitioners' daughter needed the additional at-home speech-language therapy services because her poor speech motor skills, articulation problems and unintelligibility made her very difficult to understand (Tr. pp. 354-55). She recommended that the child continue to receive PROMPT training to help with speech production because petitioners' daughter needed to restructure her oral muscular phonetic targets in order to improve her speech-sound production and motor planning (Parent Ex. 24 at pp. 2-3; Tr. 349). The McCarton speech-language pathologist opined that if articulation, clarity and motor exercises were not utilized outside of the school setting, the child would lose social opportunities because her peers would not understand her (Tr. p. 355).

Petitioners' daughter uses a DynaVox augmentative communication device because her speech cannot be understood by others (Tr. pp. 96-97). The McCarton speech-language pathologist programs the DynaVox by adding items to expand the child's vocabulary (Tr. p. 98). The McCarton speech-language pathologist opined that it was important for petitioners' daughter to have opportunities to generalize her expressive vocabulary skills through the use of the DynaVox across a variety of situations (Parent Ex. 24 at p. 3). The record reflects that the DynaVox is an integral part of petitioners' daughter's day (Tr. p. 98).

The at-home speech-language pathologist testified that she made regular visits to McCarton for joint therapy sessions with the child's school speech-language pathologist and collaborated on expanding and modifying the child's objectives (Tr. p. 314). The at-home speech-language pathologist indicated that the two therapists discussed the child's progress in both settings to determine how they could carry over skills (id.). She further testified that the child's significant motor impairment, which affects her ability to speak clearly, needed "intense

work" (Tr. p. 317). The services at McCarton focused primarily on language and communication with peers, while the intensive at-home speech-language therapy services addressed the child's motor needs related to speech production (*id.*). At the impartial hearing, respondent did not rebut the evidence that these services were needed. I find that petitioners have demonstrated that, under the circumstances of this case as presented by the impartial hearing record, the privately obtained speech-language therapy services were appropriate to meet their daughter's special education needs.

With respect to the at-home physical therapy services, the private physical therapist testified that she was working on improving the child's motor development, physical condition, endurance and balance (Tr. p. 364). She indicated that when she started working with petitioners' daughter in June 2005, the child was ambulatory, but unable to stand and kick a ball, throw the ball over her head, jump in place, pedal a tricycle, and run (Parent Ex. 33 at p. 1). The child also fell frequently and could not go up or down stairs using alternating feet (*id.*). Petitioners' daughter also needed assistance with ADL skills such as dressing, toileting, feeding and bathing (*id.*). The private physical therapist testified the child had made some progress in all areas and was now able to stand and kick a ball, throw a ball over her head, jump in place and run for a distance but she opined that the child required more development to perform at a level commensurate with children in her age group (*id.*). I find that petitioners have demonstrated that, under the circumstances of this case, the privately obtained physical therapy services were appropriate to meet their daughter's special education needs.

Accordingly, based upon my review of the impartial hearing record, I find that petitioners have prevailed with respect to the second Burlington/Carter criterion for an award of reimbursement for their daughter's privately obtained home-based ABA services, the two hours of additional privately obtained parent counseling and training services, and the privately obtained speech-language therapy and physical therapy services for the 2006-07 school year.

The final criterion for an award of tuition reimbursement is that petitioners' claim is supported by equitable considerations (Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], *aff'd*, 2006 WL 2334140 [2d Cir. 2006]; Frank G., 459 F.3d at 363-64). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Voluntown, 226 F.3d at 68; *see Carter*, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], *citing Town of Burlington v. Dep't of Educ.*, 736 F.2d at 773, 801-02 [1st Cir. 1984], *aff'd*, 471 U.S. 359 [1985]). With respect to equitable considerations, a parent may be denied tuition reimbursement upon a finding of a failure to cooperate with the CSE in the development of an IEP or if the parent's conduct precluded the CSE's ability to develop an appropriate IEP (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 86 [3rd Cir. 1999]; *see Application of the Bd. of Educ.*, Appeal No. 04-102; Application of the Bd. of Educ., Appeal No. 04-026).

In addition, the reasonableness of the cost of services that a parent has obtained is to be considered in determining whether equitable considerations support the parent's claim for tuition reimbursement (Carter, 510 U.S. at 7). Where the costs of private services are excessive, an impartial hearing officer may limit a parent's claim for tuition reimbursement (Application of a Child with a Disability, Appeal No. 06-004; Application of a Child with a Disability, Appeal No. 00-060; Application of a Child with a Disability, Appeal No. 97-10; Application of a Child with a Disability, Appeal No. 96-8).

The impartial hearing officer found that petitioners cooperated with respondent's CSE and that although the tuition cost of McCarton was an equitable "concern," the impartial hearing officer did not find it to be a reason for a finding that equitable considerations would not support petitioners' reimbursement claim (IHO Decision at pp. 12-13). Respondent has not appealed from this determination. In addition, neither at the impartial hearing nor on appeal has respondent argued or attempted to demonstrate that reimbursement should be denied or limited based on equitable grounds. In the absence of any other equitable factor, I find that petitioners' claim for reimbursement for their daughter's privately obtained home-based ABA services, the two hours of additional privately obtained parent counseling and training services, and the privately obtained speech-language therapy and physical therapy services for the 2006-07 school year, is supported by equitable considerations.

In light of the foregoing, I need not reach petitioners' contention regarding their pendency claim (see 34 C.F.R § 300.518 [d]; 8 NYCRR 200.5[m]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent indicated; and

IT IS FURTHER ORDERED, consistent with this decision, that respondent shall reimburse petitioners for the cost of the child's privately obtained home-based ABA services, the two hours of additional privately obtained parent counseling and training services, and the privately obtained speech-language therapy and physical therapy services for the 2006-07 school year.

Dated: Albany, New York
May 7, 2007

PAUL F. KELLY
STATE REVIEW OFFICER