



The University of the State of New York

The State Education Department State Review Officer

No. 07-050

Application of a CHILD WITH A DISABILITY, by his 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:

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which failed to address their requests that respondent provide their son with 52 weeks per year of home-based applied behavior analysis (ABA) services and for their son's home-based ABA consultant's travel expenses for the 2006-07 school year. In addition, petitioners appeal that portion of the impartial hearing officer's decision that denied their request for prospective funding and/or direct payment for the costs of their son's home-based ABA and ABA consultant services for the 2006-07 school year. The appeal must be sustained in part.

At the commencement of the impartial hearing on January 16, 2007, the child was ten years old and attending Shema Kolainu, a center-based program, where he also received related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. pp. 1, 16, 29). At that time, the child also received home-based 1:1 ABA services, ABA consultant services, and the home-based related services of speech-language therapy and OT, pursuant to a pendency order dated October 16, 2006 (Tr. pp. 8-9; see IHO Ex. I at p. 3). The record indicates that the child has a seizure disorder and displays global deficits in all areas, which affect his behavior, communication, gross and fine motor skills, and his activities of daily living (ADLs) (Parent Exs. M at pp. 9, 11-14; O at p. 1; see Tr. pp. 165-66). The Commissioner of Education has approved Shema Kolainu as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.7). The child's eligibility for special education programs and services and classification as a student with autism are not in dispute in this appeal (8 NYCRR 200.1[zz][1]).

The record indicates that the child initially received early intervention services following a "major" seizure at the age of seven months (Tr. pp. 165-66). At the age of 18 months, he attended a center-based special education program and by the age of two, he received approximately 40 hours per week of ABA instruction (id.). In December 1998, a pediatric neurologist diagnosed "global language delays secondary to brain abnormalities and atypical autistic features" (Parent Ex. O at p. 1). At three years of age, the child attended preschool at Shema Kolainu for five hours per day and received home-based ABA services provided by a special education itinerant teacher (SEIT) (Tr. pp. 167-68). The child continued to receive home-based ABA services in subsequent school years, pursuant to either settlement agreements or impartial hearing decisions (Tr. pp. 168-69; see IHO Ex. I; Parent Ex. B).

On May 31, 2006, respondent's Committee on Special Education (CSE) convened to conduct the child's annual review and to develop his individualized education program (IEP) for the 2006-07 school year (Parent Ex. C at p. 1). The CSE recommended a 12-month program in a 6:1:3 special class at Shema Kolainu with related services, including a full-time 1:1 behavior management paraprofessional, individual PT two times per week for 30 minutes, individual OT two times per week for 30 minutes, and individual speech-language therapy three times per week for 30 minutes (id. at pp. 1, 16). In addition, the CSE recommended home-based OT and speech-language therapy (id. at p. 16-17). The CSE also recommended that the child receive ten periods per week of direct special education teacher support services (SETTS) in a separate location (id. at p. 1).

With respect to the child's academic performance and learning characteristics, the CSE documented that the child requested preferred items and activities using complete sentences, including autoclitics and qualifiers (Parent Ex. C at p. 3). The CSE also noted that instructors used a token economy system during direct instruction (id.). The CSE reported that the child exhibited an increase in his "in-seat" behavior during direct and group instruction, as well as requiring a lower level of social praise and reinforcement to respond (id.). The IEP indicated that the child exhibited great difficulty generalizing skills mastered in a 1:1 setting to a group setting (id. at p. 4).

In the area of the child's social/emotional performance, the CSE indicated that he maintained eye contact with instructors for five-minute intervals, delivered messages that included phrases to instructors in his classroom, and demonstrated improvement with transitions (Parent Ex. C at p. 4). The CSE developed annual goals and corresponding short-term objectives to address the child's needs in the areas of attention, expressive and receptive language, reading, and fine motor and gross motor skills (id. at pp. 8-12).

By letter dated August 16, 2006, petitioners requested an impartial hearing alleging procedural and substantive violations in connection with their son's May 31, 2006 IEP, which resulted in a denial of a free appropriate public education (FAPE)¹ for the 2006-07 school year

¹ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(Parent Ex. A at pp. 1-3; see Parent Ex. C). Petitioners asserted that the May 31, 2006 IEP was "flawed" based upon the following reasons: the failure to consider assistive technology; the failure to offer parent training and counseling; the failure to conduct a Functional Behavioral Assessment (FBA) and develop a Behavior Intervention Plan (BIP); the failure to identify methods of measuring progress and the individual responsible for tracking the child's progress; the failure to contain appropriate, measurable goals and objectives; and the failure to offer ABA services or ABA consultant services (Parent Ex. A at pp. 2-3). Petitioners agreed, however, that Shema Kolainu was an appropriate placement for their son and that the behavior management paraprofessional and related services, as recommended in the May 31, 2006 IEP, were appropriate "components" of their son's educational programming (id. at p. 3). Petitioners contended that in addition to the services in the 2006-07 IEP, their son required a 12-month program, including the provision of home-based services during holidays, vacations, and weekends (52 weeks per year); 18 hours per week of home-based 1:1 ABA services; 12 hours per month of ABA consultant services;² five hours per week of home-based 1:1 speech-language therapy; and two 45-minute sessions of home-based 1:1 OT (id.; see Tr. pp. 16-29). Petitioners sought prospective funding and/or direct payment to the child's home-based service providers alleging an inability to fund the services and then seek reimbursement (Parent Ex. A at p. 3).

The impartial hearing occurred on January 16, 2007 (Tr. p. 1). At the outset of the impartial hearing, petitioners' attorney identified the issues presented and the relief sought (Tr. pp. 16-29). Both parties presented testimonial and documentary evidence (Tr. pp. 1-255; IHO Ex. I; Parent Exs. A-AA; Dist. Exs. 1-5). Pertinent to this appeal, petitioners asserted at the impartial hearing that their son required home-based ABA services for 52 weeks per year, including the provision of home-based ABA services on weekends, holidays and vacations. At the beginning of the impartial hearing, petitioners requested that if they prevailed, "the order of (sic) detail that services are to be provided for 52 weeks per year including weekends, vacations and school holidays because the service provider with which [the child's] family works, Yeled V'Yalda, will not provide services on those times unless an order specifically indicates as much" (Tr. p. 19).

The child's home-based ABA therapist testified that she worked with the child in both the community and at home (Tr. pp. 46-47). Specifically, she picked the child up from school and walked him home, during which time she worked on "transitioning" in stores and other places around the community as well as into the home (Tr. p. 47). She testified that "[w]e're targeting his ability to, you know, walk nicely with us and not to run ahead, not to open and close gates or to tantrum on the floor" (id.). She also testified that she worked with the child to wait in line at a cash register, hold hands crossing the street, and to wait while they talk to someone they meet (id.). The home-based ABA therapist further testified that in the child's home, she addressed cognitive skills, language skills, and the child's ADLs, such as washing his hands after using the bathroom, sitting at the table and eating with the family, using table manners, unloading

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

² At the impartial hearing, petitioners modified their request from 12 hours per month of consultant services to 8 to 10 hours per month (Tr. pp. 17-18).

groceries, taking out the garbage, and playing with his siblings and neighbors without constant prompting (Tr. p. 48).

The home-based ABA therapist opined that the child required ABA services "all of his waking hours" (Tr. pp. 57-58). She testified that the child cannot be left alone because "he does not know how to entertain himself or how to act appropriately on his own and he needs constant supervision and constant one-to-one attention in the ABA format meaning consistency and contingency" (Tr. p. 58). The home-based ABA therapist also testified that when the child had few days of vacation, "it's much harder for him" because he does not "have his schedule" (*id.*). She also testified that the child required home-based ABA services for 52 weeks per year because he would regress without the "constant ABA therapy," noting that the child "constantly needs to be on the go with the therapists" and "constantly being . . . reinforced with appropriate behaviors and . . . using a behavioral plan when needed" (Tr. p. 75).

The child's home-based ABA therapist testified that since September 2006, the child learned "phenomenal amounts" of sight words and he improved his language skills to articulate full sentences using "five to ten words in a sentence" (Tr. pp. 69-70). She also testified that the child's play skills with siblings and other friends improved drastically, he took turns, he engaged in spontaneous greetings, and he asked other people to play with him; however, the child still required supervision to ensure that his interactions were appropriate (Tr. pp. 70-71). Additionally, she testified that the child's ADLs improved, noting his ability to sit and eat with his family with improved table manners, his ability to open buttons and dress himself, and his ability "to prepare the meals" and "unpack [food] orders" (Tr. p. 71). She also testified that the child's hand biting, tantrums, and obsessive behaviors decreased tremendously and that he was more open to listening to adults and following through with commands (Tr. pp. 71-72, 79).

The child's home-based ABA consultant, who supervised the child's home-based ABA providers, also testified at the impartial hearing (Tr. pp. 90-135). She testified that the child required home-based ABA services for 52 weeks per year because he exhibited behavioral issues "across the board," meaning at school, at home, or at the park (Tr. pp. 121-22). She noted that "it's important to have some consistency throughout all of that" and "even across weekends, summer vacations, all of those things" (Tr. p. 122). When asked if the child regressed when he did not receive services, the home-based ABA consultant testified that she never conducted a regression analysis, and she did not observe regression because she did not think that the child ever had a "big break" in services (*id.*).

The child's mother also testified at the impartial hearing (Tr. pp. 205-37). She testified that her son could now set the table for dinner and complied "much better" (Tr. p. 214). She noted that the child increased his independent play, could "go from one toy to the next" if there were four toys in a room, and he could watch a video for 20 to 30 minutes with a sibling (Tr. pp. 213-14). The child's mother further testified that because she is at home when the child receives his home-based ABA services, she observed the providers and could "carry over" what she observed to assist her son with "peer play and waiting behavior and anything else they do" (Tr. pp. 207-08). She testified that she knows how the child's ABA therapists address his behavior in the community and that she is able to do it when she has to take him out (Tr. p. 216). She indicated that the child's progress made him more independent and that "[h]is down time is so

much more manageable and he is able to help out around the house and do a lot more" (Tr. pp. 217-18). She also noted that it is harder for the child to stay on task when "he gets . . . too many hours off" (Tr. p. 219).

By decision dated April 2, 2007, the impartial hearing officer determined that petitioners met their burden to establish that respondent's May 31, 2006 IEP failed to offer the child a FAPE (IHO Decision at pp. 4-6). In his decision, the impartial hearing officer concluded that while the child received services in school, the evidence demonstrated that he also required "additional ABA services outside of the classroom" (*id.* at p. 6). The impartial hearing officer noted that although respondent offered ten hours per week of SETSS services, the child required "a more intensive approach and the continuity that can only be delivered by home-based ABA therapy" (*id.*).

The impartial hearing officer also found that petitioners met their burden to establish the appropriateness of the home-based services obtained for their son, including the 18 hours per week of 1:1 ABA services and eight hours per month of ABA consultant services (IHO Decision at p. 6). The impartial hearing officer found that the child should continue to receive the ABA services as set forth in the pendency order, and "to the extent that said services have not been paid, that [respondent] provide reimbursement for such services in the amounts billed to [petitioners], not exceeding eighteen hours of home therapy per week and eight hours of ABA consultation per month" (*id.*).

The impartial hearing officer ordered the following: "Upon verification of proof of payment by [petitioners], [respondent] shall reimburse [petitioners] for ABA services up to, but not exceeding eighteen hours per *month* for ABA therapy provided through [the private provider] and eight hours per month of ABA consultation services through the [private provider]" (IHO Decision at p. 7) (emphasis added).

On appeal, petitioners assert that the impartial hearing officer's order contained a typographical error pertaining to the level of weekly home-based ABA services and seek to correct that error. In addition, petitioners seek review of two issues, which they contend the impartial hearing officer failed to address: the provision of home-based ABA services for 52 weeks per year, including weekends, holidays, and vacations; and travel expenses for the child's home-based ABA consultant. Petitioners also seek to review and reverse the impartial hearing officer's denial of their request for prospective funding for services. As relief, petitioners seek an order directing the following: (1) the child receive 18 hours per week of home-based ABA services and eight hours per month of home-based ABA consultant services; (2) the child's home-based ABA services should be awarded on a 12-month basis, for 52 weeks per year, including weekends, holidays, and vacations, from September 2006 through August 2007; (3) travel expenses for the home-based ABA consultant; and (4) that respondent directly and prospectively fund the child's home-based ABA services and that direct/prospective payment must be issued for all home-based ABA services provided during the pendency period, regardless of when such services were billed.

In its answer, respondent does not oppose petitioners' request to correct the typographical error contained in the impartial hearing officer's decision, noting that respondent has continued

to fund and provide 18 hours per *week* of ABA services, as opposed to the 18 hours per *month* set forth in the order, and additionally, has continued to fund and provide the eight hours per month of home-based ABA consultant services. Respondent also claims that it has continued to fund the 18 hours per week of home-based ABA services and the home-based ABA consultant's services during the entire pendency of this due process proceeding, and therefore, petitioners' request for prospective and/or direct payment to the child's ABA service providers is now moot. In addition, respondent asserts that petitioners failed to sustain their burden to establish that the child requires home-based ABA services for 52 weeks per year, including weekends, holidays, and vacations, and that as a matter of law, the school year runs from July 1 to June 30, and therefore, any request for summer 2007 services is premature because the 2006-07 IEP only considered services to be provided through the end of the 2006-07 school year, which does not include summer 2007. Finally, respondent contends that petitioners failed to sustain their burden to establish their inability to pay for the home-based services, and as such, the impartial hearing officer's denial of prospective and/or direct payment to the child's service providers should be upheld.

Before moving on to the review of petitioners' issues on appeal, I will address petitioners' first contention that the impartial hearing officer's decision contained a typographical error regarding the level of weekly home-based ABA services. As respondent did not oppose petitioners' request to correct the impartial hearing officer's order, I will modify the impartial hearing officer's decision order to reflect that respondent must provide 18 hours per *week* of home-based ABA services instead of the 18 hours per *month* of home-based ABA services.

I will also address petitioners' request on appeal that the child's home-based ABA services be provided from September 2006 through August 2007, which necessarily incorporates a request for the provision of home-based services during summer 2007, as noted in respondent's answer. Respondent argued in its answer that the child's 2006-07 IEP did not consider summer 2007 services because as a matter of law, the school year runs from July 1 through June 30, and thus, petitioners' request for summer 2007 services is premature. I agree with respondent. The child's IEP is required to be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b]; N.Y. Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[d][2][xi], [f]). The CSE must determine a child's need for extended school year services (ESY) (34 C.F.R. § 300.106[a]; see 8 NYCRR 200.6[j][1]). Based upon the record, respondent's CSE had not yet conducted its annual review for the child's educational program for the 2007-08 school year, which began on July 1, 2007 (N.Y. Educ. Law § 2 [15]) and which would address, if necessary, the child's need for ESY during summer 2007 in the 2007-08 school year. Thus, petitioners request for home-based ABA services during summer 2007 is denied as premature (see Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 00-006).

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)³ is to ensure that students with disabilities have available to them a free

³ Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, et. seq.]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to the IDEA 2004, unless otherwise specified.

appropriate public education (FAPE)(20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S.Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];⁴ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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 in adequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' 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]). 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 instance" had it offered the child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The first step in analyzing a tuition reimbursement claim is to determine whether the district offered to provide a FAPE to the student (Mrs. 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]). Pursuant to the IDEA, when procedural violations are 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 child, or (c) caused a deprivation of education 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., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 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]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized

⁴ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, 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, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

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 ensure an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of a Child with a Disability, Appeal No. 07-054; Application of the Bd. of Educ., Appeal No. 07-028; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S.Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Initially I note that neither party appealed the impartial hearing officer's findings of fact and conclusions of law that petitioners sustained their burden to establish that respondent failed to offer the child a FAPE for the 2006-07 school year, which constitutes the first prong of the Burlington/Carter tuition reimbursement analysis. It is well settled that an impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determination that petitioners sustained their burden to establish that respondent failed to offer their son a FAPE for the 2006-07 school year is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; 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 established the first prong of the Burlington/Carter tuition reimbursement analysis, I now move on to determine whether petitioners met their burden under the second

prong of the Burlington/Carter tuition reimbursement analysis to establish the appropriateness of the provision of home-based ABA services for 52 weeks per year, including weekends, holidays, and vacations, for the 2006-07 school year (Burlington, 471 U.S. 359). In order to meet this burden, a parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that the private school offered an educational program that was appropriate for the child's special education needs (Walczak, 142 F.3d at 129; see also Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192).

Based upon a review of the record and as discussed below, I find that petitioners failed to establish the appropriateness of the provision of home-based ABA services for 52 weeks per year, including weekends, holidays, and vacations, for the 2006-07 school year. In particular, the record does not sufficiently support petitioners' arguments that the child will regress or that he will not continue to make progress if he does not receive home-based ABA services for 52 weeks per year. The testimony offered through the child's home-based ABA therapist and the ABA consultant is conclusory and lacks any objective evidence or data to support petitioners' claims. In addition, the record is unclear as to whether the child currently receives home-based ABA services for 52 weeks per year, including weekends, holidays, and vacations.

In addition, petitioners' documentary evidence fails to sufficiently support petitioners' arguments. As set forth at the beginning of the impartial hearing, petitioners requested that if they prevailed, that "the order of (sic) detail that services are to be provided for 52 weeks per year including weekends, vacations and school holidays because the service provider with which [the child's] family works, . . . , will not provide services on those times unless an order specifically indicates as much" (Tr. p. 19). Petitioners submitted into evidence a previously determined and unappealed impartial hearing officer order, dated February 14, 2006, which ordered, among other things, that the 18 hours per week of home-based ABA services "*may* be given on holidays and during weekend hours as long as they do not exceed 18 hours per week" (Parent Ex. B at p. 14)(emphasis added). Notably absent from this decision, however, is a finding that the child required home-based ABA services for 52 weeks per year or an order directing respondent to provide the home-based ABA services for 52 weeks per year (see id. at pp. 1-14).

In general, petitioners' evidence suggests that they may require assistance in the supervision and custodial care of their son during the school year when he does not receive educational services. During the impartial hearing, I note that petitioners stated that they did not want their son placed in a residential setting, which led them to request an extensive level of home-based ABA services (Tr. pp. 18, 181-82). However, there is no indication in the record that this child's supervision and custodial care on the weekends, holidays, and vacations must be provided in the form of home-based 1:1 ABA services. If petitioners require assistance to provide supervision and custodial care of their son when he does not receive home-based 1:1 ABA services, I encourage them to utilize the resources through respondent's CSE and/or Shema Kolainu with the help of a social worker or a case manager to research available respite, residential habilitation, or other services and funding which may be available through the New York State Office of Mental Retardation and Developmental Disabilities or New York City agencies that could provide support services with trained providers for the child when he is not receiving educational services.

Having determined that petitioners failed to sustain their burden under the second prong of the Burlington/Carter tuition reimbursement analysis, the necessary inquiry is at an end (see Mrs. C., 226 F.3d at 66; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-030).

Finally, I will address petitioners' claim that the impartial hearing officer's failed to address their request for the home-based ABA consultant's travel expenses for the 2006-07 school year. After reviewing the record, I find that the evidence presented supports petitioners' claim. The ABA consultant credibly testified that she travels from her home to petitioners' home in order to observe the home-based providers, provide supervision and feedback to the home-based providers, to coordinate the school-based and home-based programs, and to allow time for parent training (Tr. pp. 94-98, 121, 127). In addition, petitioners presented documentary evidence regarding the amount of the travel expenses, which was not challenged by respondent at the impartial hearing or in its answer (Parent Ex. W). Thus, I will direct respondent to reimburse petitioners, upon presentation of proper proof of payment, for the ABA consultant's travel expenses for the 2006-07 school year.

I have considered petitioners' and respondent's remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision and order is modified to the extent that it contained a typographical error regarding the level of weekly home-based ABA services, which is modified to reflect an award of 18 hours per week of home-based ABA services; and

IT IS FURTHER ORDERED, that respondent is directed to reimburse petitioners for the costs of the home-based ABA consultant's travel expenses for the 2006-07 school year upon submission of proper proof of payment by petitioners.

Dated: Albany, New York
July 30, 2007

PAUL F. KELLY
STATE REVIEW OFFICER