



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-107

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the portion of a decision of an impartial hearing officer which denied their request to be reimbursed for the cost of their son's home-based special education services and related services for the 2008-09 school year. Respondent (the district) cross-appeals from the portion of the impartial hearing officer's decision which awarded the parents reimbursement for the cost of their son's tuition at the McCarton School (McCarton) for the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time that the impartial hearing convened in August 2008, the student was attending a center-based program at McCarton, participating in one additional individual private occupational therapy (OT) session, and receiving home-based applied behavioral analysis (ABA) therapy and parent training and counseling services through the Center for Autism and Related Disorders (CARD) (Tr. pp. 551-52; Parent Exs. D; G; U). McCarton has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

With regard to the student's educational history, the student began attending McCarton in 2005 after the parents moved into the district (Tr. p. 451; Dist. Ex. 5 at p. 1). A psychological evaluation of the student was conducted by a school psychologist for the Committee on Preschool Special Education (CPSE) in 2005 (*id.*). According to the school psychologist, the

student had reportedly received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) in 2004, and the student also received treatment related to diagnoses of colitis and "partial simple seizures" (id. at p. 2). The evaluation report noted that the student presented with limited communication skills and that he made frequent eye contact but did not maintain it (id. at pp. 2-3). The evaluator attempted to administer the Stanford-Binet Intelligence Scales, Fifth Edition (SB5), but was unsuccessful due to the student's limited engagement (id. at p. 3). The student's adaptive behavior was assessed based on his mother's responses to the Vineland Adaptive Behavior Scales-Survey Interview Form, Second Edition (Vineland-II) and the direct observation of the school psychologist (id.). As measured by the Vineland-II, the student's overall adaptive skills fell within the "low" range (id. at pp. 3-5).

The student continued attending McCarton and receiving home-based services from CARD for the 2006-07 and 2007-08 school years (Tr. pp. 544-45; Parent Exs. D; E at pp. 3-4; I at p. 1; Dist. Ex. 4 at p. 1).

On June 5, 2008, the Committee on Special Education (CSE) met to develop an individualized education program (IEP) for the student for the 2008-09 school year (Parent Ex. C). The June 2008 CSE meeting was attended by a school psychologist who also acted as district representative, a district special education teacher, an additional parent member, and the student's father (id. at p. 2). The student's "occupational therapist/head teacher" and speech-language therapist from McCarton participated in the CSE meeting by telephone (id.). The June 2008 IEP indicated that the student could demonstrate on task behavior for up to 60 seconds, complete an 8 piece puzzle, match 10 identical objects, and match five non-identical objects (id. at p. 3). The June 2008 IEP also noted that the student maintained variable eye contact, continued to exhibit severe expressive and receptive language delays, was able to imitate the first sounds of almost all words, and could follow one-step directions in the context of his daily routine, but was not yet able to follow two-step commands (id.). Socially, the student showed interest in engaging adults and showed occasional interest in his peers (id. at p. 4). The student demonstrated the ability to engage in group play activities with peers, and during circle time he could raise his arm and vocally approximate the words "my turn" (id.). The June 2008 IEP noted the student's history of seizures, colitis, need for toilet training, and his dietary restrictions (id. at p. 5). According to the June 2008 IEP, the student continued to have difficulty with sensory processing, had made gains in gross motor skills and, with regard to fine motor skills, he was working on functional shoulder, arm and hand control for greater success in tasks such as prewriting (id. at p. 6). The June 2008 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with related services consisting of an individual behavior management paraprofessional, OT, physical therapy (PT), speech-language therapy, and a toileting paraprofessional (id. at p. 22).

In a due process complaint notice dated June 27, 2008, the parents, through their attorney, alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 and 2008-09 school years (Parent Ex. A).¹ The parents asserted that: (1) the district failed to include a regular education teacher and an "educational evaluator" at the June 2008 CSE meeting; (2) the district failed to consider assistive technology; (3) the district failed to conduct an appropriate functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP); (4) the district failed to offer parent training and

¹ The parents subsequently withdrew their claims regarding the 2007-08 school year (Tr. pp. 85-86; Parent Ex. F).

counseling; (5) the annual goals and short-term objectives in the student's IEP were ambiguous or not objectively measurable; (6) the district did not provide a specific placement recommendation that was developed with the parents' participation at the CSE meeting; (7) no appropriate placement and program was offered by the district; and (8) the parents did not receive a final notice of recommendation (FNR) for the 2008-09 school year (*id.* at pp. 2-3).² For relief, the parents requested that the district reimburse them for the costs of tuition for the student to attend McCarton for the 2008-09 school year, "supplemental ABA and other services," as well as parent training and counseling services (*id.* at p. 3).

An impartial hearing convened in August 2008 (Tr. p. 3). In an interim decision dated August 29, 2008, the impartial hearing officer determined that while proceedings were pending, the parents were entitled to reimbursement, upon proof of payment, for the costs of tuition at McCarton, the private OT services that had not been reimbursed by the parents' insurance, and the home-based ABA services provided by CARD (IHO Interim Decision at pp. 3-4). The impartial hearing concluded in June 2009, after testimony by nine witnesses was taken and 37 exhibits were entered into evidence (Tr. pp. 1-897; Parent Exs. A-BB; Dist. Exs. 1-10).³ During the course of the impartial hearing, the district conceded that it did not offer the student a FAPE for the 2008-09 school year (Tr. p. 396). In a decision dated August 13, 2009, the impartial hearing officer noted the district's concession and determined that the parents established that McCarton was appropriate for the student's needs, that they timely notified the district of their intention to place the student at McCarton,⁴ and that equitable considerations supported the parents' claims for tuition reimbursement (IHO Decision at pp. 15, 17-19). However, the impartial hearing officer rejected the parents' claims for the private OT services, home-based ABA therapy, and parent training and counseling services (*id.* at pp. 16-17, 19).

The parents appeal, contending that the impartial hearing officer erred in determining that the parents were not entitled to the private OT services or CARD's home-based ABA therapy and parent training and counseling services. The parents noted that staff from CARD worked with the student primarily on skills that he uses at home and that those skills need to be taught in the environment where they normally occur. Without the additional services from CARD, the parents contend that the student would likely regress and that he would possibly have to enter a residential program. For relief, the parents request that a State Review Officer annul the portion of the impartial hearing officer's decision that denied them relief and seek a reimbursement award of one hour per week of private 1:1 OT services, 23 hours per week of individual home-based ABA therapy for the student, and three hours per week of parent training and counseling services.

² With the exception of the parents' allegation regarding the FNR, it is unclear whether the allegations in the parents' due process complaint notice refer to the 2007-08 IEP, the 2008-09 IEP, or both (*see* Parent Ex. A at pp. 2-3).

³ The impartial hearing officer marked one exhibit, a compact disc, for identification as Parent Ex. BB, but declined to admit or consider the disc as evidence and it was not included in the hearing record (Tr. p. 596). The parents' closing brief was also identified in the hearing record as "Parent Exhibit BB." For the purpose of this decision, I will refer to the parents' closing brief as Parent Exhibit BB.

⁴ The impartial hearing officer noted that the school year at McCarton for which the parents sought reimbursement began on September 2, 2008 and the parents had provided notice of their intent to place the student there on July 31, 2008 (IHO Decision at p. 18; *see* Parent Ex. G).

In its answer, the district rejects the parents' claims on appeal and requests that a State Review Officer affirm the portion of the impartial hearing officer's award which denied the parents reimbursement for the privately obtained services. Among other things, the district asserts that the parents have received nearly all of the relief they sought for the 2008-09 school year because the district was required to reimburse the parents pursuant to pendency and that the parents' reimbursement claims for these services are moot. According to the district, the only live claim remaining is the parents' request for reimbursement for the parent training and counseling services from CARD. The district also cross-appeals the impartial hearing officer's award of tuition reimbursement at McCarton arguing that equitable considerations did not favor the parents because they did not provide timely notice of their decision to enroll the student at McCarton and obtain supplemental services from CARD.⁵ The district seeks a determination that: (1) the petition is "moot in most respects," (2) the parents failed to establish that the services provided by CARD were appropriate, and (3) annuls the portion of the impartial hearing officer's order that found that equitable considerations supported the parents' claim.

In the parents' answer to the cross-appeal, they deny the district's allegation that their claims with respect to the private OT and home-based ABA services are moot and its argument that equitable considerations should preclude the parents' reimbursement claims. The parents also attach three documents to their answer to the cross-appeal as additional evidence to support their claims. In a reply to the parents' answer, the district objects to the parents' submission of additional evidence and requests that the documents not be considered.

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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 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

⁵ The district does not cross-appeal the impartial hearing officer's determination that McCarton was an appropriate placement for the student.

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

At the outset, a procedural matter must be addressed with regard to the parents' submission of additional evidence with their answer to the cross-appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case the three documents submitted by the parents were all available at the time of the impartial hearing and none of them are necessary in order to render a decision in this case. Accordingly, I decline to consider them.

With respect to the merits of the parties' claims and the impartial hearing officer's determination that the district failed to offer the student a FAPE, I find that the district conceded, both at the impartial hearing and on appeal, that it did not offer the student a FAPE for the 2008-09 school year (Tr. pp. 396; Answer ¶ 10). Consequently that issue has been resolved in the parents' favor and is final and binding upon the parties.

Turning next to the district's contention that the case has been rendered largely moot because the parents have received most of the relief they sought pursuant to pendency, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a

Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, there is no longer any live controversy relating to the parties' dispute over reimbursement for the costs of tuition at McCarton, the home-based ABA therapy, or the private OT services. I find that even if I were to make a determination regarding whether the unilateral placement at McCarton, the home-based ABA therapy, and the OT services obtained by the parents were appropriate, in this instance, it would have no actual effect on the parties. With the exception of the claim for parent training and counseling that the parents received from CARD, which is addressed below, the parents obtained an order directing reimbursement for the McCarton placement, the individual private OT session, and 23 hours of ABA services throughout the 2008-09 school year by virtue of pendency (IHO Interim Decision at pp. 3-4; Parent Ex. E at pp. 17-18, 20; Answer ¶ 56).⁶ For the same reason, the district's cross-appeal alleging that equitable considerations do not support the parents' reimbursement claims for McCarton, the home-based ABA therapy, and the OT services is also no longer in controversy. A State Review Officer is not required to make a determination that is academic or which will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Additionally, the exception to the mootness doctrine does not apply here as I do not find this matter to be one of the limited situations that are capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; Lyons, 461 U.S. at 109 [1983]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

⁶ Although the parents allege a general denial that these claims are moot by virtue of pendency, they do not offer any reasons for their position (see Answer to Cross-Appeal ¶ 30).

Accordingly, the parents' reimbursement claims for the student's home-based ABA therapy and OT services, as well as the district's cross-appeal, need not be further addressed here and will be dismissed as moot.⁷

With regard to the parents' remaining reimbursement claim for private home-based parent training and counseling services obtained from CARD, private placement services must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-

⁷ When the impartial hearing convened in August 2008, the impartial hearing officer noted that the merits of a case should be resolved within a few months and should not typically last for an entire school year or longer (Tr. pp. 46-47). In this case, the impartial hearing was not convened for nearly seven months after the impartial hearing officer's interim decision was issued and the district raised this as an issue in March 2009 (Tr. p. 84; IHO Interim Decision at p. 5). Furthermore, the impartial hearing officer indicated during the final day of the impartial hearing in June 2009, that the delay had been so long that he did not recall why it had occurred (Tr. p. 893). 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]). I remind the impartial hearing officer and both parties in this matter that it is incumbent upon an impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

"(a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties" (8 NYCRR 200.5[j][5][ii]).

The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts . . . or other similar reasons" (8 NYCRR 200.5[j][5][iii]).

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

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

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

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

In this case, the impartial hearing officer did not specifically address the parents' request for parent training and counseling services except to state his determination denying the parents reimbursement for three hours per week of parent training and counseling services offered through CARD (IHO Decision at p. 19). The hearing record indicates that parent training and counseling is offered by both McCarton and CARD (Tr. p. 517; see Parent Ex. E at p. 17). The student's father testified that he attended many of the clinics offered by McCarton, but that he is unable to regularly attend home-based meetings offered by CARD and, therefore, the student's mother typically attends the CARD meetings (Tr. pp. 518, 530, 792). A senior supervisor from CARD testified that the student receives 17 hours per week of services from an ABA therapist and 6 hours per week of supervisory services from a managing supervisor (Tr. pp. 724-25). The managing supervisor testified that CARD requires someone from the home to be present while the CARD staff works with the student and that the student's mother often participates during the student's lesson (Tr. pp. 587-88). The managing supervisor indicated that "team meetings" are conducted every other week for two hours in which she, the other ABA therapist, the senior supervisor, the student, and one of the parents participate to ensure consistency in the delivery of the student's therapy (Tr. pp. 547-49, 551, 670).⁸ The managing supervisor testified that she

⁸ The student's father indicated that training services from CARD ensured consistency between the student's ABA programs (Tr. p. 518).

spends some of the time during the team meetings analyzing the student's data and that a lot of the parent training occurs while going through the student's programs because "his parents are always home" and "they are here and they see what we're doing. So the carry over happens right then" (Tr. pp. 551-52).⁹

The documentary evidence from CARD contained in the hearing record consists of several quarterly reports and billing statements (Parent Exs. T-V; AA at pp. 2-11); however, these documents do not further describe the parent training and counseling services that the parents receive. I also note that the managing supervisor from CARD testified that the two-hour bi-weekly team meetings, at which she provides parent training and counseling, are included in the six hours per week of supervision allocated to the student's case (Tr. pp. 551, 671-72).¹⁰ The senior supervisor testified that she works with the student once per month, but sometimes more, "depending on the schedule" (Tr. p. 708-09; 712). Although the senior supervisor described that she reviews data during her direct contact hours with the student, develops the curriculum for the student and is responsible "for giving the direction of his programs," she testified that she is not responsible for the day to day scheduling of the student's program (Tr. pp. 733-35). The hearing record does not indicate whether she provides parent training and counseling. In view of the forgoing evidence, I find that parent training and counseling services from CARD appear to occur during the bi-weekly team meetings and while the student is receiving his home-based ABA therapy and the parents have not satisfied their burden to establish that they are entitled to reimbursement for three hours per week of parent training and counseling over the 23 hours of CARD services for which they have already obtained the interim pendency order directing reimbursement. Accordingly, I decline to award the three hours of additional parent training and counseling services and, consequently, I find there is no need to modify the impartial hearing officer's decision.

I have examined the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
December 8, 2009**



**PAUL F. KELLY
STATE REVIEW OFFICER**

⁹ The senior supervisor also testifies that she reviews the student's ABA data (Tr. pp. 711-12; 730-31; see e.g., Parent Ex. W).

¹⁰ The hearing record does not indicate whether the bi-weekly meeting is included in the ABA therapist's 17 hour-per-week schedule (see Tr. p. 725)