The University of the State of New York

The State Education Department
State Review Officer

No. 07-014

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, Andrew J. Rauchberg, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Seton Foundation for Learning's Therese Program (Seton) for the 2006-07 school year. The appeal must be dismissed.

At the commencement of the impartial hearing on October 13, 2006, petitioners' son was six years old and attending the second grade at Seton (Tr. pp. 10, 12). The Commissioner of Education has not approved Seton as a school with which school districts may contract to instruct children with disabilities (8 NYCRR 200.1[d], 200.7). The child was diagnosed as having a Pervasive Developmental Disorder – Not Otherwise Specified (PDD – NOS) when he was approximately 20 months old (Tr. p. 13). He exhibits language, sensory motor, and perceptual deficits that affect his attention, behavior, communication, academic skills, and social skills (Dist. Ex. 2 at pp. 3, 4, 12). The child's eligibility for special education programs and services and his classification as a child with autism are not in dispute in this appeal (8 NYCRR 200.1[zz][1]).

A psychoeducational evaluation of the child was conducted on March 15, 2004 by one of respondent's school psychologists, when the child was four years and three months old and attending a 6:1+3 special class at the Association in Manhattan for Autistic Children, Inc. (AMAC) (Dist. Ex. 6). The evaluation was part of the child's transition from services under the auspices of respondent's Committee on Preschool Special Education (CPSE) to respondent's Committee on Special Education (CSE) (id.).

The psychologist administered the classroom edition of the Vineland Adaptive Behavior Scales (Vineland) and the Childhood Autism Rating Scale (CARS), and attempted to administer selected subtests of the Wechsler Preschool and Primary Scale of Intelligence – Revised (WPPSI-R) (Dist. Ex. 6 at pp. 1-2). The psychologist also completed a classroom observation and an interview with the child's teacher (Dist. Ex. 6 at p. 2). The psychologist reported that he was unable to obtain a true composite score from the administration of selected subtests of the WPPSI-R due to the child's delays in communication, cognition, and socialization, but the evaluator was able to identify specific behaviors and cognitive skills (id.). The child independently completed various bordered puzzles and a borderless puzzle of a car but required a primary food reinforcer in order to complete a borderless puzzle of a child's face (id.). The child was unable to point to various items in an array when given a description of the item (id.). Completion of the Vineland yielded an adaptive behavior composite score of 80, in the low average range, and standard scores of 77 in communication, 81 in daily living skills, 72 in socialization, and 105 in motor skills (id.). The child received a score of 33.5 on the CARS placing him in the mildly to moderately autistic range (id.).

Results of the psychologist's interview with the child's teacher revealed that the child exhibited poor eye contact but occasionally initiated attention from adults and peers (Dist. Ex. 6 at p. 2). The child imitated sounds, words, and movements, but had difficulty following two step directions (id.). The child often cried out in defiance or for no reason, often laughed inappropriately, exhibited difficulty sitting still or was "fidgety," exhibited difficulty transitioning from a desired activity and often cried or had a tantrum, and was unaware of danger (id.). The child responded to his name from a distance and was verbal but cried out in a tantrum if his nonverbal attempts to express a want or need were not immediately understood (id.). The psychologist also observed the child in the classroom during a 20-minute circle time activity (id.). The child was easily distracted and required verbal prompts for redirection but sat in his seat independently (id.). The child successfully placed cards on a board indicating his name and the date, identified numbers, and pointed to the days of the week, but he required prompting to clap hands (id.). The psychologist recommended a small self-contained class for the child to address his speech and language deficits, social skills development, and communication skills (Dist. Ex. 6 at p. 3).

As referenced in the child's April 25, 2005 individualized education plan (IEP), the child was evaluated in October 2004 with an assessment referred to in the record as the "Brigance Inventory" (Brigance) (Dist. Ex. 4 at p. 3). The child's decoding, reading comprehension, listening comprehension, writing, computation, and problem solving skills were all determined to be at the kindergarten/grade one instructional level (id.).

For the 2004-05 school year, respondent's CSE recommended, and the child attended, a 12-month school year kindergarten in a 6:1+1 special class for children with autism at respondent's P373R, a specialized instructional environment which contains five 6:1+1 classes specifically for children with autism spectrum disorders (Parent Ex. I at p. 1). While at P373R the child received related services of speech-language therapy and occupational therapy (Parent Ex. N at pp. 1, 13, 15).

Respondent's CSE convened on February 21, 2005 for the child's annual review and to develop his IEP for the 2005-06 school year when he would be in the first grade (Dist. Ex. 4). The

CSE again recommended, and the child attended, a 12-month school year program consisting of a 6:1+1 special class at respondent's P373R, with speech-language therapy and occupational therapy (Dist. Ex. 4 at pp. 1, 12, 14). It was determined that the child would not participate in state and local assessments due to his cognitive and adaptive behavior deficits and would instead be provided with alternative assessments by his teachers (Dist. Ex. 4 at p. 14). The IEP reflected that the CSE considered and rejected placement in general education with related services because the child's academic and social emotional skills and needs warranted a much smaller and more structured special class (Dist. Ex. 4 at p. 13). Regarding the child's academic and learning characteristics, the IEP stated that he was able to read many words by sight as well as simple stories from the Reading Milestones curriculum (Dist. Ex. 4 at p. 3). He was unable to answer simple questions without verbal modeling or visual supports and required the use of visual teaching aids for number concepts (id.). The child was described as delayed in his speech, social interest, and play skills (id.).

The child continued to attend respondent's P373R, and in January 2006 he reportedly walked away from his classroom group during toileting and entered another classroom (Tr. p. 156; Parent Ex. M at p. 1). The record reflects that on two additional occasions between January and April 2006 the child again separated himself from his classroom group (Tr. pp. 154-57). The record also reflects that petitioners dispute the facts related to these three incidents (Tr. pp. 341-43).

Respondent's CSE convened on April 11, 2006 for the child's annual review and to develop his IEP for the 2006-07 school year when he would be in the second grade (Dist. Ex. 2). The IEP stated that the child had made significant progress in reading and was reading at the Red Book #8 level one in the Reading Milestones curriculum (Dist. Ex. 2 at p. 3). The IEP indicated he was often able to answer simple "who," "what," and "where" questions related to the reading text, had started to generalize this knowledge to small group lessons, was able to add and subtract numbers to 10 with the use of a number line or blocks, and was beginning to be less dependant on the use of the manipulatives (id.). The IEP also stated that the child followed one-step directives, required verbal assistance or minimal prompting to complete most tasks, and was able to work in small groups with supervision (id.). The child reportedly had good fine motor skills and enjoyed drawing and coloring (id.). In the area of social/emotional performance, the IEP indicated that the child initiated interaction with his caregivers to express his needs and wishes; however, he did not interact with his peers, preferring parallel play during free periods (Dist. Ex. 2 at p. 4). He was reported to periodically engage in "testing behaviors," described as refusing to work or pushing a classmate and laughing inappropriately (id.). The child was described as aware of his surroundings and motivated to participate in high interest activities; however, when not actively engaged he reportedly demonstrated "out of bounds" behavior (id.). The IEP also stated that the child had walked away from his group during lunch periods and transitions (id.).

The April 11, 2006 CSE recommended continued placement of the child in a 12-month school year program consisting of a 6:1+1 special class in a specialized school (Dist. Ex. 2). The CSE also recommended related services of a half-time crisis management paraprofessional, speech-language therapy, occupational therapy, and counseling (Dist. Ex. 2 at pp. 1, 13, 15). The CSE further recommended that the child continue to participate in alternative assessments (Dist. Ex. 2 at p. 15). The IEP reflected that the CSE considered and rejected placement in general education with related services because the child's academic and social-emotional skills and needs

warranted a much smaller and more structured special class (Dist. Ex. 2 at p. 14). The proposed IEP contained goals and corresponding objectives to address the child's maladaptive behaviors and his needs in attending, language and communication, reading, and sensory motor and perceptual skills (Dist. Ex. 2 at pp. 6-12).

The half-time crisis management paraprofessional and counseling services were initiated on April 24, 2006, and no further incidents of the child walking away from the classroom group occurred for the remainder of the school year (Tr. p. 174; Dist. Exs. 2 at p. 2; 3 at pp. 1-2).

The child's end of the year report card indicated that he demonstrated progress in his attending skills and behavior, use of the computer, social studies concepts, science concepts, and art skills (Parent Ex. H at p. 1). The child consistently exhibited the skills expected for first grade children in science and art (id.). All other skills and behaviors were below the expected standard (id.). Teacher comments indicated that the child was successful when he was focused and willing to work, and that his "out of bounds" behavior had improved in the spring term (Parent Ex. H at p. 2). He continued to need assistance developing play skills and maintaining focus during structured work times (id.).

By letter dated June 20, 2006 petitioners notified respondent that they were unilaterally placing their son at Seton effective July 1, 2006 and requested a related services authorization for counseling (Parent Ex. O at p. 1).

Petitioners filed a due process complaint on July 6, 2006, asserting that respondent "did not provide their son with an education that was challenging or appropriate" for his abilities (Parent Ex. O at p. 4). An impartial hearing convened on October 13, 2006 and was completed on November 30, 2006 after two days of testimony. The impartial hearing officer rendered her decision on December 29, 2006. She determined that respondent failed to offer petitioners' son a free appropriate public education (FAPE),[1] petitioners' private placement was inappropriate, and therefore they were not entitled to tuition reimbursement.

On appeal, petitioners assert that the impartial hearing officer erred when she determined that they failed to demonstrate that Seton was an appropriate placement for their son and that they were not entitled to tuition reimbursement. They request that a State Review Officer grant tuition reimbursement for the cost of Seton for the 2006-07 school year.

Respondent does not appeal the impartial hearing officer's determination that it failed to offer a FAPE to petitioners' son. Respondent asserts only that petitioners failed to demonstrate

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

(20 U.S.C. § 1401[9]).

that Seton was an appropriate placement for their son. Respondent requests that a State Review Officer dismiss the petition in its entirety.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[2] 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. 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;[3] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22). 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). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (see 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]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), 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]). The IDEA, however, does not require school districts to develop IEPs that maximize the potential of a student with a disability (Rowley, 458 U.S. at 197 n.21, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). 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], 300.116; 8 NYCRR 200.6[a][1]; see Walczak, 142

[2] The Individuals with Disabilities Education Act was amended by Congress on December 3, 2004, with the amendments becoming effective on July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

[3] 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.

F.3d at 132). The LRE has been described 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]).

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, 427 F.3d at, 192). 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 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 burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

The first step in a reimbursement case, the determination of whether the district offered a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]), need not be discussed in this case because respondent did not appeal the impartial hearing officer's determination that 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, petitioner has 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 services provided to the child by Seton for the 2006-07 school year were appropriate (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 Seton offered an educational program which met their son'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. 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]).

The executive director of Seton testified that the program is a program for school-aged children on the autism spectrum (Tr. p. 64). The program enrolls a maximum of six children and is staffed by a teacher, an assistant teacher, and "floaters" (Tr. pp. 64, 66). The program was started in September 2005 and had one child enrolled during the 2005-06 school year (Tr. p. 75). At the time of the impartial hearing, the program had four students enrolled, including petitioners' son, one of whom was not attending due to medical problems (Tr. p. 64).

The record shows that the child has language, sensory motor, and perceptual deficits that affect his attention, behavior, communication, academic skills, and social skills (Dist. Ex. 2 at pp. 3, 4, 12). The Seton program does not offer speech-language therapy, occupational therapy or counseling (Tr. p. 74). I note that petitioners' child receives private speech-language therapy and private counseling paid for by respondent through a related services authorization (RSA), as well as private speech therapy paid for by petitioners (Tr. pp. 350-52, 353). At the time of the impartial hearing he was not receiving occupational therapy, although the record reflects that petitioners have requested an RSA for occupational therapy (Tr. p. 349-350). The program's executive director also testified that Seton does not adhere to any specific instructional methodology for children with autism, but that an applied behavior analysis (ABA) approach is used if appropriate (Tr. p. 72). The direct supervisor of the Seton program testified that the criteria for determining use of ABA strategies with a child is based on whether the child comes in to the program having been taught that way, and if so, Seton would continue the use of the methodology (Tr. p. 116). The direct supervisor of the program testified that the program employs a "generalized teaching" methodology in the classroom, which she described as learning through games and activities as well as use of structured lessons on academics (id.). The classroom teacher testified that she does "a little bit" of discrete trial training with the children, but she does not collect data (Tr. pp. 325-26).

The child was accepted for enrollment in the Seton Program following a full day visit to the classroom in May 2006 (Tr. pp. 81, 356, 360). Both the classroom teacher and the direct supervisor of the program testified that no formal evaluation, screening instrument, or rating scale was used to determine the child's appropriateness for the classroom (Tr. pp. 92-93; 324). The direct supervisor testified that the classroom teacher used the Brigance as a reference; however, the teacher did not complete the protocol, calculate scores, or use the Brigance as a direct evaluation tool (Tr. pp. 92-93). The classroom teacher testified that she made sure the child could speak, she "saw how his emotions were," and she gave him some math and reading from the Reading Milestones curriculum (Tr. p. 324). She was unable to state the criteria for admission into the Seton Program (id.).

The child's classroom teacher at Seton testified that the children begin the school day with one-to-one instruction in the Reading Milestones curriculum (Tr. p. 310). Floater teacher aides work individually with the children for one hour with oversight by the classroom teacher (Tr. pp. 105-06, 312; Parent Ex. W at p. 17). The children participate in a daily morning circle at which time they practice their prayers, calendar skills, and telling time (Tr. p. 311; Parent Ex. W at p. 17). The classroom teacher testified that she incorporates individual goals for each child, such as eye contact and speaking in full sentences, within the circle activity (Tr. p. 310). Math instruction

occurs daily, but gym, social studies, health and safety, computers, science, and art are rotated through the week (Tr. p. 311; Parent Ex. W at p. 17). She also testified that approximately 40 minutes per week is spent on religious education, consisting of approximately 8 minutes per day during morning circle in addition to one half hour per week and "every now and then I will incorporate it in … depending on the holidays" (Tr. pp. 328-330; Parent Ex. W at p. 17).

I am not persuaded by the record before me that Seton is appropriate to meet the special education needs of petitioners' child. The child has a history of difficulty in social skills and initiating social interaction with his peers, of exhibiting inappropriate behavior, and of inattentiveness (Parent Exs. N at p. 4; M at pp. 4, 6, 7, 10; Z at p. 3; Dist. Exs. 2 at p. 4; 4 at p. 3; 6 at p. 2). Respondent's school psychologist, who had worked with the child for the prior two years, testified that it is important for petitioners' son to be in a class with children who are higher functioning than he is, as this type of grouping provides the child with good role models (Tr. pp. 300-01). He opined that the probability of petitioners' son following appropriate behaviors modeled by other children increased with more students in the class (Tr. p. 301). The record reflects that all three of the children in the Seton program exhibit maladaptive and self-stimulatory behaviors, as well as difficulty interacting with their peers (Parent Ex. U). According to Seton's class profile the child cries, bangs on the desk, and angrily gets upset when he is unable to express his wants or needs; does not interact with the other children during recess; hits classmates when he is unable to express himself; and exhibits self stimulatory behavior during circle time (Parent Ex. U at p. 1). The record contains insufficient evidence of the strategies employed by Seton to address his specific deficits in socialization, behavior, and attention. Moreover, the record reflects that the program does not offer speech-language therapy, occupational therapy or counseling and that the child is receiving these services at public expense (Tr. pp. 74, 349-52). In the absence of these related services, which are provided at public expense, the Seton program is unable to meet a significant portion of the child's identified needs. Even with these services, the program is not appropriate.

In support of their assertion that Seton is an appropriate placement for their son, the child's mother testified that the child has made progress since he started at Seton, especially academically (Tr. p. 356). She also testified that the child's level of work has improved, he is able to answer more questions, and he is now reading loudly (id.). She further testified that their son has made progress in his social skills as well (Tr. p. 367). They further testified that he has become more verbal with other children, he participated in games at his own birthday party, and he has started to develop a relationship with his sister (id.).

The child's classroom teacher testified that the child has made progress in the program at Seton (Tr. p. 317). She stated that he is speaking more, "has come far" academically, participates frequently throughout the school day, and can work independently (Tr. pp. 315, 317). She also testified that the child had not required development of a behavior plan nor had he wandered away from the group (Tr. pp. 315-16).

Although the record contains testimony that the child demonstrated progress at Seton, the record does not contain any objective evidence such as standardized test scores, progress reports, teacher reports, or any measurable data supporting the parents' and teacher's statements regarding the child's progress. The record also does not sufficiently demonstrate with any specificity that the child is progressing. For example, the child's teacher testified that he can work independently,

yet the Seton class profile indicates that the child does not work on academic tasks independently (Parent Ex. U at p. 2). In addition, although the child's teacher testified that the child never wandered, the record shows that the child's classroom consisted of a 1:1 student to staff ratio (Tr. pp. 64, 66). The record suggests, that increased supervision provided both at the public and private school accounted for the reduction in the child's wandering. Petitioners have not shown that the elimination of the child's wandering was due to progress in the child's functional abilities as a result of the private placement.

In addition, although specific instructional levels for the students in the Seton program were not included in the record, a narrative description of the children provided in the class profile generally indicates that the children have differing skills in reading, math, and cognitive concepts (Parent Ex. U at pp. 1-4). The record reflects that petitioners' son receives individual instruction in the Reading Milestones curriculum; however, there is no information in the record that identifies the activities presented or instruction provided to address the child's individual needs during group instruction such as math, science and social studies (Tr. pp. 310, 312). I note that the program's class profile indicates that the child does not work on academic tasks independently (Parent Ex. U at p. 2). Moreover, although a private placement is not required to use or develop an IEP, I note that the math goals developed by the child's classroom teacher include addition and subtraction using a number line, skills identified as strengths on the April 11, 2006 IEP developed by respondent and skills that the child's mother testified that her son had already mastered (Tr. p. 374; Dist. Ex. 2 at p. 3). Based upon the evidence contained in the record, I find that petitioners failed to meet their burden to establish that the educational services obtained for their son at Seton were appropriate. Although the record provides general information about Seton, the record contains insufficient information regarding the educational services provided to petitioners' son or how the educational services meet the child's special education needs. Additionally, although petitioners contend that the child is not currently in need of ABA instructional strategies, I am not persuaded based on the evidence in the record that Seton could adequately evaluate his need for ABA or any other instructional or behavioral strategy if it should be necessary in the future.

In light of the evidence in the record, I find that petitioners have not met their burden with respect to the second Burlington/Carter criterion. Therefore, I need not reach the issue of whether equitable considerations support petitioners' claim for reimbursement, the third criterion in the Burlington/Carter analysis (Burlington, 471 U.S. at 374; M. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16; Application of a Child with a Disability, Appeal No. 07-015, Application of a Child with a Disability, Appeal No. 05-117).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 11, 2007

PAUL F. KELLY
STATE REVIEW OFFICER