The University of the State of New York

The State Education Department
State Review Officer

No. 07-040

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

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 denied their requests to be reimbursed for their son's tuition costs and transportation costs at the Connecticut Center for Child Development (CCCD) and for extended day and weekend services for the 2006-07 school year and for summer 2007. Respondent cross-appeals from that portion of the impartial hearing officer's decision which declined to determine the student's residency. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the time the impartial hearing commenced on October 18, 2006, petitioners' son was seven years old and attending his third year at CCCD as a day student (Tr. pp. 44, 46, 66-67). He was also receiving extended day services provided at CCCD and weekend services provided at his home (Tr. pp. 64, 66-67, 237-39). CCCD is a special education school in Connecticut (Tr. p. 43), and 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 child is non-verbal and demonstrates behaviors which include self-injury, aggression, non-compliance, and bolting (Tr. pp. 46, 54, 194, 247; Parent Ex. H at p. 1). The student's eligibility for special education services and classification as a student with autism (34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]) are not in dispute in this appeal.

I will first address respondent's cross-appeal. In the instant case, the child's father testified that he maintains his residence of seven years in New York State (Tr. p. 69), and that petitioners have separated but did not have a formal or legal separation agreement (Tr. pp. 373-74, 380). During the impartial hearing, petitioners' counsel stipulated on the record that the child's mother

lives in Connecticut (Tr. p. 211). The child reportedly lives with both parents (Tr. pp. 70-71). The responsibility for offering a free appropriate public education (FAPE) to a student rests with the school district in which the student resides (Educ. Law §§ 3202[1], 4401-a, 4402[1][b][2]; see Application of a Child Suspected of Having a Disability, Appeal No. 02-072). In New York, a child's residence is presumed to be that of his or her parents or legal guardian (Appeal of Hutchinson, 42 Ed Dept Rep 310, Decision No. 14,865; Appeal of Vazquez, 42 Ed Dept Rep 245, Decision No. 14,841; Appeal of L.W., 41 Ed Dept Rep 372, Decision No. 14,717). The Regulations of the Commissioner provides that a board of education or its designee shall determine whether a child is entitled to attend a school district's schools, with an appeal from that determination to be made to the Commissioner of Education under Section 310 of the Education Law (8 NYCRR 100.2[y]; see Application of the Bd. of Educ., Appeal No. 00-038). There is no indication in the record that respondent pursued a determination of the student's residency pursuant to the procedures set forth in 8 NYCRR 100.2(y) (Tr. pp. 210-228). The record reveals that the impartial hearing officer noted on January 18, 2007 that respondent had not pursued a residency determination when it developed "suspicions" or concerns in December 2006 regarding whether the student was a resident of New York or Connecticut (Tr. pp. 221-228). I do not conclude from the circumstances in the instant case that the impartial hearing officer erred in suggesting to respondent that it should have pursued, or should pursue, the residency concern in another administrative forum, or that that she erred in declining respondent's request to subpoena evidence in order to develop the record to make a residency determination (Tr. pp. 210, 223-24, 227-28).

Petitioners' son has had a diagnosis of an autistic disorder from the time he was one and a half years old (Parent Ex. H at p. 1). In a January 2006 clinical evaluation report, petitioners' son was reportedly observed to have developmental delays in all areas, and was functioning within the mild range of mental retardation (id.).

In a private psychological update report dated May 5, 2006, petitioners' son was described as being completely non-verbal, with the exception of making repetitive and high pitched sounds (id. at pp. 1, 2). During the examination, the child engaged in stereotyped behaviors, which included repetitive hand movements and intense visual focus on both his hands and on edges or shadows (id. at p. 2). The child also demonstrated his ability to follow simple commands during the evaluation (id.). The private psychologist reported that the child does not exhibit friendship seeking behavior and withdraws or remains aloof in group situations (id.). She also determined that the child's motor skills were slightly delayed (id. at p. 1). The Gilliam Autism Rating Scale completed by the child's father on May 5, 2006 yielded an autism index of 87 (19th percentile), placing the child in the "Very Likely" range regarding the "probability of autism" (id.).

Petitioners' son attended CCCD for the 2004-05 and 2005-06 school years (Tr. p. 119). An impartial hearing regarding the child's placement for the 2005-06 school year was held on January 12, 2006 (IHO Ex. C at p. 2). By decision dated February 17, 2006, the impartial hearing officer found that: respondent failed to offer petitioners' son a FAPE for the 2005-06 school year; petitioners' placement of their son at CCCD was appropriate; petitioners' additional services were appropriate and necessary; and that there was no indication that petitioners failed to cooperate with the Committee on Special Education (CSE) (id. at p. 7).

Respondent's CSE convened to review the child's program on June 28, 2006 (IHO Ex. B at p. 1; Dist. Ex. 1 at p. 1). The child's father attended the CSE meeting in person, while the child's mother participated in the CSE meeting by telephone (Tr. p. 73). The June 28, 2006 individualized education program (IEP) recommended that the child be placed in a 6:1+1 special class in a

specialized school for a 12- month school year, to start on September 5, 2006 (IHO Ex. B at pp. 1, 2; Dist. Ex. 1 at pp. 1, 2). Individualized occupational and speech-language therapy were recommended for 30-minute sessions, three times a week (IHO Ex. B at p. 10; Dist. Ex. 1 at p. 14). Individualized physical therapy was recommended for 30-minute sessions, twice a week (id.). The June 28, 2006 IEP also recommended adaptive physical education in a 6:1+1 setting (IHO Ex. B at p. 5; Dist. Ex. 1 at p. 5). Academic management needs included the provision of a small class setting, and teacher prompts and redirection (IHO Ex. B at p. 3; Dist. Ex. 1 at p. 3). The June 28, 2006 IEP noted that the child required consistent structure and that his behavior required highly intensive supervision (IHO Ex. B at p. 4; Dist. Ex. 1 at p. 4). A behavioral intervention plan (BIP) addressed aggressive and self-injurious behaviors (Dist. Ex. 1 at p. 16). Respondent's school psychologist testified that petitioners objected to the CSE's recommended program during the CSE meeting and advised the CSE that the services their son was receiving at CCCD were appropriate (Tr. pp. 296-98). The Final Notice of Recommendation dated July 14, 2006 identified the child's placement as PS 94 at PS 361 (Dist. Ex. 2).

By due process complaint notice dated September 14, 2006, petitioners asserted that their son's June 28, 2006 IEP was defective, and requested an impartial hearing to obtain tuition reimbursement (Parent Ex. A at pp. 1-3).

The impartial hearing convened on October 18, 2006 and ended on February 14, 2007, after five days of testimony. By decision dated March 23, 2007, the impartial hearing officer found that respondent recommended an IEP which insufficiently addressed the child's significant behavioral needs (IHO Decision at p. 9). The impartial hearing officer determined that the recommended IEP failed to keep the child safe during the school day and failed to seek to ameliorate the behaviors which interfered with his learning (id.). She noted that the child required supervision during the entire school day in order to prevent his bolting, aggressive, and self-injurious behavior (id.). In order to learn, she concluded that the child's interfering behaviors needed to be addressed in a manner more intense and specific than described in the IEP with its BIP (id.). Notwithstanding testimony she found credible from a special education teacher/unit coordinator that it was possible to provide the child with a paraprofessional at PS 94, the impartial hearing officer noted that such intervention was not included on the IEP (id.). As a result, the impartial hearing officer found that the special education services offered by respondent were not appropriate to meet the child's special education needs (id. at pp. 9-10).

The impartial hearing officer also declined to award tuition reimbursement for CCCD, stating that the evidence did not demonstrate that the child made measurable progress while attending the program and that the placement was contrary to least restrictive environment (LRE) requirements (IHO Decision at p. 10). In addition, the impartial hearing officer denied petitioners' request for payments for extended day and home-based therapy and supervision because she determined that they were not educational services pursuant to the Individuals with Disabilities Education Act (IDEA) (id. at pp. 10-11). Despite having found that petitioners did not prevail with respect to the appropriateness of the private placement, the impartial hearing officer determined that the evidence did not permit her to make definitive findings with respect to whether equitable considerations supported petitioners' claims (id. at p. 11).

On appeal, petitioners assert that the impartial hearing officer: 1) ignored evidence of the child's progress at CCCD and from the extended day services the child received after school and on weekends; 2) applied erroneous and inappropriate standards with regard to the LRE; 3) erroneously equated therapeutic services with custodial care; and 4) failed to properly adjudicate

the child's pendency placement. Petitioners seek an adjudication of the child's pendency in addition to an award of tuition costs for the 2006-07 school year. In its cross-appeal and answer, respondent alleges that petitioners failed to demonstrate the appropriateness of the unilateral placement at CCCD asserting that the child had not made progress in three years.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482)[1] 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]).[2] 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];[3] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, at 419 [S.D.N.Y. 2007]).

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 instruction with sufficient support services to permit the child to benefit educationally from that instruction"

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[1] On December 3, 2004, Congress amended the IDEA; however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 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 the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

[2] 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]).

[3] 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

(Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 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]).

In its cross-appeal and answer, respondent does not appeal the impartial hearing officer's determination that it failed to offer petitioners' son a FAPE for the 2006-07 school year. Petitioners, therefore, prevail with respect to the first Burlington criterion for an award of tuition reimbursement. I must now consider whether petitioners have met their burden of demonstrating that the placement selected for the student for the 2006-07 school year was appropriate (Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). The private school placement 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 child's special education needs (Application of a Child with a Disability, Appeal No. 04-108; Application of a Child with a Disability, Appeal No. 01-010). 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 a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105). While evidence of progress at a private school is relevant, it does not itself establish that a private

placement is appropriate to meet a student's unique special education needs (Gagliardo v. Arlington Cent. Sch. Dist., 2007 WL 1545988 at *9). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65).

With respect to the child's private placement, I note that there is no dispute that the child requires a twelve-month program (Dist. Ex. 1 at p. 1). Rather, the issue is the appropriateness of petitioners' private placement. As noted above, petitioners' son exhibited aggressive and self-injurious behaviors (Tr. p. 194) and required 1:1 instruction (Parent Ex. H at p. 3) and speech-language therapy (Parent Ex. J). The placement included three components: CCCD for the school day (Tr. pp. 66-67, 114), an after school program which was located at and coordinated with CCCD (Tr. pp. 66-67, 199-202), and a weekend program which was administered at the child's home and coordinated with CCCD (Tr. pp. 200, 237-39).

During the impartial hearing, the CCCD chief executive officer (CCCD CEO) (Tr. p. 118), a certified behavior analyst (Tr. p.113), testified that CCCD is a school that works specifically with children with known or suspected autism spectrum disorders (Tr. p. 114). She stated that CCCD relies on evidence based factors which it interprets as applied behavior "analytical" (ABA) learning strategies (id.).

During the impartial hearing, the CCCD director of clinical services (director) testified that specialized training and experience were needed to be able to manage and modify behaviors such as those exhibited by petitioners' son (Tr. p. 46). In addition to behavior analysis training, the director stated that all CCCD staff members were certified in physical management training (id.). Staff, therefore, could protect the child from hurting himself (Tr. p. 47). The director testified that CCCD collected data on problem behavior all day to track the child's behaviors and modify CCCD procedures accordingly (id.). The components of the behavior modification protocol were developed by a team which included the special education teacher, behavior "analytical" staff, and classroom staff (Tr. p. 48). In order to ensure that the same protocols were used consistently, the special education teacher and behavior "analytical" staff rotated into the classroom (id.). In addition to using the least intrusive prompting necessary to promote the child's independence, teaching across environments was used to promote generalization (Tr. pp. 48-51).

The director testified that CCCD's full-time speech-language pathologist worked directly with the students and alongside the staff (Tr. p. 56). The speech-language pathologist had input into program development and was provided opportunities to train and work with the CCCD staff who implemented speech and language services throughout the day (id.). In her speech-language report dated July 18, 2006, the speech-language pathologist reported that CCCD put behavior plans in place to address "escape behaviors" with regard to the child's work habits (Parent Ex. J at p. 1). She noted that desk work was accomplished with frequent edible reinforcement (id.). The child's expressive language was limited to the sign for "eat," and pointing to wanted items (id.). He mastered Phase I of the Picture Exchange Communication System protocol and Phase II skill was emerging (id.). The speech-language pathologist reported that petitioners' son also demonstrated emerging skill in semantics by performing certain gross motor acts upon verbal command (id. at p. 2). Although she indicated that the child has not been observed to initiate greetings, the speech-language pathologist noted that the child was beginning to respond to greetings by waving his hand (id.). The speech-language pathologist also indicated that the child learned to imitate the speech sounds, "ah," and "m" (id.). Among other things, the speech-language pathologist recommended the consistent implementation of individually prescribed ABA methods (id. at p. 3).

In a progress report summary for the June 23 - September 27, 2006 reporting period, the CCCD associate behavior analyst reported that petitioners' son mastered objectives for spontaneous eye contact and tolerating tooth brushing (Parent Ex. G at p. 1). He demonstrated satisfactory progress toward mastering objectives regarding responding to greetings, playing with toys, matching identical objects, making spontaneous requests, tolerating medical checkups, making choices, reducing the number of times he fell to the floor, and vocal and motor imitation (id.). The child's rate of skill acquisition was noted to be variable and/or slower than anticipated for his remaining objectives (id.).

The CCCD CEO testified that petitioners' son had a very difficult time learning, but was making progress which was meaningful for his functioning level (Tr. p. 138). Similarly, the director concluded that CCCD was an appropriate component of the child's educational program and that that the child made slow but meaningful progress (Tr. pp. 52, 60-61).

The CCCD director testified that, in order to obtain a meaningful rate of acquisition, petitioners' son needed to have the CCCD experience coupled with additional services after school and instruction across environments and individuals (Tr. p. 62). Similarly, the CCCD CEO testified that the after school programming was appropriate and necessary for petitioners' son (Tr. p. 133). She stated that this was not a "boilerplate" recommendation (id.). Rather, the child's learning was "pretty fragile" and additional services were necessary for him to learn and maintain the skills over time (id.).

Turning to a review of the after school program, I note that the behavioral analyst who provided direct instruction for petitioners' son at CCCD during the day, also provided supervisory and behavioral consultation services after school (Tr. pp. 192-93). During the impartial hearing, she testified that petitioners' son definitely needed the extended day program (Tr. p. 193). In addition to identifying his severe problematic behaviors, she stated that the child needed structured time to remain safe (Tr. p. 194). The after school staff members collected data on the child's safety directions, independent eating, spontaneous eye contact, and toileting (Tr. pp. 196-97). The behavioral analyst testified that petitioners' son made progress in the after school program by learning a new safety direction, eating with a fork, responding to his name under varying circumstances, and becoming more independent with the toileting chain (Tr. pp. 197-98). The behavioral analyst stated that, if "left to his own devices," petitioners' son would engage in stereotypy, would not be safe, and would not make meaningful progress (Tr. pp. 198-99). The behavioral analyst additionally testified that the after school program was an appropriate component of his educational day (Tr. p. 199) and that the child was making meaningful progress at his functional level at the after school program (Tr. pp. 199-200). During the impartial hearing, the CCCD director also testified that petitioners' son received a meaningful educational benefit by receiving additional ABA support services from the after school personnel and recommended that he continue to attend the program (Tr. p. 54).

With respect to related services, the record does not show that CCCD provided occupational or physical therapy to address the child's needs in these areas. The fact that these related services were not provided is not necessarily dispositive in this case of whether or not the private school's educational program was inappropriate because the child derived benefits from the program in significant special education need areas.

The record shows that the child is challenged by significant deficits in expressive, receptive, and pragmatic language as well as aggressive and self-injurious behaviors (Tr. pp. 46,

138, 194, 248; Dist. Ex. 1 at pp. 4, 6; Parent Ex. J at p. 2). The child's program at CCCD addressed these primary needs, focusing on the child's communication and language deficits and on ameliorating the aggressive and self-injurious behaviors, which interfere with his ability to learn (Tr. p. 56; Parent Exs. E at p. 1; J at pp. 1-2). In addition, although the record does not show that CCCD provided occupational therapy or physical therapy to the child, the record reveals that CCCD addressed the child's deficits in his activities of daily living (ADL) skills and that several of the child's classroom goals and objectives, such as riding a bicycle, riding a scooter, and motor imitation, also focused specifically on his gross motor and fine motor needs (Parent Ex. E at p. 1; see Dist. Ex. 1 at pp. 6-7). Given the nature and extent of the child's disabilities, petitioners' son derived educational benefits in primary and other need areas from the instructional program provided by CCCD. The benefits were derived from the specialized behavioral techniques and individualized instruction which he received at CCCD. Moreover, given the severity of the child's needs and the appropriateness of the substantive program, I decline to find the placement inappropriate on LRE grounds.

Based on the information before me, I find that petitioners have met their burden of proof of demonstrating that the CCCD and the after school programs offered specifically designed services to meet their son's unique special education needs for the 2006-07 school year (see Gagliardo, 2007 WL 1545988, at *9; Frank G., 459 F.3d at 365).

With respect to the weekend ABA program, I agree with the impartial hearing officer's decision to deny reimbursement for the cost of services (IHO Decision at pp. 10-11), but for different reasons. Although the impartial hearing officer determined that the weekend services that petitioners' son received were not educational (id.), the record reveals that petitioners' son received both custodial and educational services. The extent to which petitioners' son received each of these services is unclear in the record.

One of the child's weekend behavioral therapists testified that she provided behavior therapy to petitioners' son from July 2006 through the end of November 2006 for six hours per weekend day at the child's home with his father (Tr. pp. 236-39). She stated that she implemented the child's program by providing services representative of school programming and functional work in the home, such as targeting mealtimes, toileting, outings, and remaining with the therapist rather than running away (Tr. p. 238). In her fall 2006 progress report, the weekend behavioral therapist indicated that the overriding focus of the child's therapy was to increase his communication skills in his home environment, and to decrease the behaviors that were counterintuitive to effective communication (Parent Ex. S at p. 1). She reported that the child's frustrations over his inability to communicate were manifested as aggression and self-injurious behavior (id.). The child's father testified that the problem behaviors exhibited most by his son on the weekend included mouthing dangerous objects, flooding the bathrooms, and "bobbing back and forth" while looking at shadows and overhead lights (Tr. pp. 352-53). He further testified that when his son received weekend therapy in addition to his program at school, his son progressed very quickly, but without the weekend therapy his son regressed a "little" (Tr. p. 351).

The weekend behavioral therapist testified that on a typical weekend session, she would arrive at approximately 10:00 a.m. and sometimes the child would need to eat breakfast and get dressed (Tr. p. 258). She stated that if he needed to get dressed, she would assist him with selecting clothes and with dressing (Tr. p. 259). She further testified that a significant amount of time was spent taking petitioners' son to the bathroom every 30 minutes, at which time she also taught him appropriate bathroom skills and hand washing (id.). She indicated that she provided the child with

instruction for some of his programs, including his school goals of matching and sorting objects (Tr. pp. 259-60). Following lunch, she took the child on community outings to the park or the playground where he was able to observe typically developing children playing and talking and she tried to get him to parallel play with these children (Tr. pp. 245, 252). She also testified that she took petitioners' son to stores to try to learn how to shop correctly, but that she primarily worked on having the child remain with her while on the outing (Tr. p. 245). When they returned, she continued with the child's toileting schedule and program instruction (Tr. p. 259).

I will now address the manner in which the child's educational needs were addressed by petitioners' weekend placement. The weekend behavioral therapist reported a decrease in the number of incidents of aggression during her sessions from an average of thirteen times per six-hour session in September to one or two incidents per session in November and a drop in the incidence of self-injurious behavior from an average of five events per session in September to zero occurrences in November (Parent Ex. S at p. 1). Nonetheless, both the weekend behavioral therapist and the CCCD director testified that without weekend therapy petitioners' son would regress (Tr. pp. 64, 257), which the CCCD director stated would result in "high rates" of stereotypic, aggressive, and self-injurious behavior when he returned to school on Monday (Tr. p. 64). However, this is not supported by the record. The child's weekend behavioral therapist testified that she provided behavior therapy to petitioners' son from July 2006 through the end of November 2006 (Tr. p. 237). A review of the program data collected by CCCD staff from March 27, 2006 through October 15, 2006 reveals that the child did not typically exhibit aggressive and self-injurious behaviors on the day immediately following a weekend or an extended vacation and that he had only exhibited aggressive and self-injurious behaviors on 9 of the 24 days that immediately followed a weekend or an extended vacation (Parent Ex. E at pp. 64-66, 68-70). I note that these nine days were both prior to and concurrent with his receipt of weekend services (Tr. p. 237; Parent Ex. E at pp. 64-66, 68-70). The data further reveals that the child more often exhibited an increased frequency of aggressive and self-injurious behaviors in the middle of the school week (Parent Ex. E at pp. 64-66, 68-70).

The weekend behavioral therapist and the CCCD director also both testified that petitioners' son needed additional therapy on weekends for the purpose of generalization (Tr. pp. 64, 252-53). The record reflects that programs for dressing, vocal imitation, toy play, matching and sorting identical objects, motor imitation, toileting, hand washing, and tooth brushing were implemented concurrently by the child's school program at CCCD and by his weekend behavioral therapist (Parent Exs. E at pp. 1, 11, 14-15, 19-20, 28-29, 55-56, 87-92, 94-95, 102-05, 108, 122-23; P at pp. 1-6, 9-12, 18-21, 32-34, 41-45, 68-72, 81-83, 91-94, 103-115). In her progress report, the weekend behavioral therapist reported that petitioners' son exhibited steady progress in the areas of responding to his name, following directions, matching and sorting identical objects, making requests by pointing or signing "all done," gross motor imitation, potty training, verbal imitation, toy play, and self-help and that since September, he had acquired four new imitation targets (Parent Ex. S at pp. 1-2). She also reported that his recurring behaviors included bolting, falling to the floor, and mouthing (id.). A CCCD progress summary for the period June 23, 2006 through September 27, 2006 indicates that the child demonstrated satisfactory progress with objectives related to playing with toys, matching identical objects, spontaneous requests, vocal imitation, and a reduction of falling to the floor (Parent Ex. G at p. 1). However, the child's rate of skill acquisition has been "variable and/or slower than anticipated" with objectives related to sorting identical objects, following directions, following safety directions, reduction of mouthing, independent urination, independent hand washing, eating, and dressing (id.). I note a degree of

disparity between the weekend behavioral therapist's progress report and the CCCD progress summary, and assign more weight to the CCCD assessment of the child's progress, due to the amount of time petitioners' son receives services from CCCD staff.

A review of the program data collected by CCCD from March 27, 2006 through October 15, 2006 as well as the program data collected by the weekend behavioral therapist reveals that the child's acquisition of new skills and his retention of previously mastered skills is extremely variable regardless of the provision of weekend services. The record does not demonstrate that the weekend program successfully contributed to the child's generalization of skills.

Moreover, the weekend behavioral therapist testified that the weekend services that she provided petitioners' son optimized his entire program (Tr. p. 261), and that the "more therapy that he could get the better" (Tr. pp. 267-68). However, respondent is not required to maximize the child's potential (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Based on the above, petitioners have not proved their claim, and reimbursement of weekend provider service costs for the 2006-07 school year is denied.

The final criterion for an award of tuition reimbursement is that the parent's claim be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]); see Carter, 510 U.S. at 16). A review of the record reveals that petitioners attended and participated in the June 28, 2006 CSE meeting and cooperated with respondent's CSE in the preparation of their child's IEP (Tr. p. 73; Dist. Ex. 1 at p. 2). The CCCD principal and two CCCD therapists also attended the June 28, 2006 CSE meeting (id.). In addition, the record also shows that the child's mother and the CCCD principal visited the school recommended by respondent, albeit a secondary location (Tr. pp. 84, 178-80; Parent Ex. I). In the absence of any other equitable factor, I find that petitioners' claim for CCCD tuition reimbursement and related after school services, including reasonable transportation expenses to and from CCCD, is supported by equitable considerations. As discussed above, petitioners' claim for reimbursement of weekend provider service costs for the 2006-07 school year is denied.

I have reviewed petitioners' remaining contentions and find them to be without merit.

Lastly, I note if respondent has concerns regarding the child's residency that it may pursue the matter in accordance with 8 NYCRR 100.2(y).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it denied petitioners reimbursement for the costs of their child's tuition at CCCD and after school program for the 2006-07 school year and summer 2007; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioners for the costs of their child's tuition at CCCD and after school program for the 2006-07 school year and summer 2007 upon petitioners' submission of proof of petitioners' payment for such expenses; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioners' reasonable transportation costs for the 2006-07 school year and summer 2007 for transporting the child to and from CCCD upon petitioners' submission of proof of petitioners' payment for such expenses.

Dated: Albany, New York
July 16, 2007

PAUL F. KELLY
STATE REVIEW OFFICER