



The University of the State of New York
The State Education Department
State Review Officer

No. 07-026

**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 petitioner, Christina D. Thivierge, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Janice Casey Silverberg, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which sua sponte questioned the student's classification, directed respondent to fully evaluate the student and reconvene a Committee on Special Education (CSE) to review the evaluations and reconsider the student's classification, and ordered respondent to continue to reimburse petitioners for the costs of their son's nine hours per week of home-based applied behavioral analysis (ABA) services until such time that respondent's CSE reconvened to recommend services, but failed to directly address petitioners' request for 12 hours per week of home-based ABA services, one hour per week of home-based speech-language therapy, the provision of 12-month services, and reimbursement for petitioners' out-of-pocket expenses for the costs of these home-based services for the 2006-07 school year, including summer 2006. The appeal must be sustained in part.

At the commencement of the impartial hearing on January 9, 2007, the student was 11 years old and attending the Reece School (Reece), where the student was placed in an 8:1:1 special education class in a 12-month program (Tr. pp. 3, 89-90; Parent Exs. B at p. 1; C at p. 1). The Commissioner of Education has approved Reece as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). Although the impartial hearing sua sponte questioned the student's classification in her decision, the student's classification and eligibility for special education programs and services as a student with an emotional disturbance (ED) were not disputed by either party during the impartial hearing and are not disputed by either party in this appeal (8 NYCRR 200.1[zz][4]).

At the time of the impartial hearing, the student received related services of individual and

group counseling, individual and group occupational therapy (OT), and individual and group speech-language therapy pursuant to his 2006-07 individualized education program (IEP) (Dist. Ex. 1 at p. 17). He also received nine hours per week of privately obtained home-based ABA services and one hour per week of privately obtained home-based speech-language therapy (Tr. pp. 13, 44, 94).

In April, May and June 2005, a private evaluator conducted a psychological re-evaluation of petitioners' son (Parent Ex. E at p. 1). The report noted that as a young child, the student exhibited delayed language development, ritualistic behaviors and difficulties with sensory integration (*id.*). According to the report, the student was privately evaluated in 1997-98, and referred for continued early intervention assessment and treatment (*id.* at pp. 1-2). The student was diagnosed with pervasive developmental disorder, not otherwise specified (PDD-NOS), and he received home-based speech therapy, physical therapy (PT), and OT (*id.* at p. 2). During the 1999-2000 school year, the student attended a special education preschool center with a "full range of therapeutic services" (*id.*).

The psychological re-evaluation report noted that in September 2000, the student aged out of the preschool center and enrolled in an elementary school for children with special needs (*id.*). At that time, the student continued to receive speech therapy and OT, and he also received "12 hours of a home-based therapeutic program" (*id.*). According to the report, the student "progressed so well . . . he was quickly transitioned to [the school's] most challenging and least restrictive classroom" and petitioners were "encouraged to seek a more challenging academic program" for their son since he demonstrated "so much potential" (*id.*). The report further noted that the student then applied and "successfully transitioned to the Reece School" (*id.*). At the time of the report in 2005, the student attended Reece and continued to receive "supplemental speech and language therapy, as well as home-based ABA therapy" (*id.*). The report indicated that the student "continue[d] to demonstrate significant progress with his pragmatic language skills, socialization abilities, and age appropriate behaviors" (*id.*). Petitioners sought the private psychological re-evaluation to assess their son's then current "cognitive and academic functioning" (*id.*).

For the 2005 re-evaluation, the evaluator administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), selected supplemental tasks of the WISC-IV Integrated Battery (WISC-IV Integrated), and the Wechsler Individual Achievement Test, Second Edition (WIAT-II) to the student (*id.* at pp. 3-7, 10-11). To further assess the student's difficulties with attention and concentration, petitioners completed the parent form of the Behavior Rating Inventory of Executive Function (BRIEF) (*id.* at pp. 5-6, 11). Petitioners also completed the parent form of the Behavior Assessment System for Children-Second Edition (BASC-II) for the evaluator to more fully understand the student's "emotional life" (*id.* at pp. 6-7, 12). Petitioners and the student's home-based teachers provided information about his deficits in activities of daily living on the Adaptive Behavior Assessment System-Second Edition (ABAS-II) (*id.* at pp. 7, 12).

Administration of the WISC-IV yielded the following composite scores (CS): verbal comprehension, CS 83 (13th percentile); perceptual reasoning, CS 88 (21st percentile); composite working memory, CS 80 (9th percentile); processing speed, CS 85 (16th percentile); and a full scale IQ score of 80 (9th percentile) (*id.* at pp. 3-6, 10). The evaluator characterized the student's WISC-IV scores as within the low average range of intellectual functioning (*id.* at p. 3). The

evaluator noted, however, that the student's full scale IQ score was "appreciably higher than it was during former evaluations, reflecting [the student's] improved attention, concentration, and task persistence" (id.).

To further assess the student's cognitive functioning, the evaluator administered selected supplemental tasks of the WISC-IV Integrated, including the verbal domain process subtest, perceptual domain process subtest, and working memory domain process subtest (id. at pp. 3-6, 10-11). The WISC-IV Integrated is a battery of tests designed to accommodate the special needs of a neurologically challenged child population by providing accommodations, such as extra time to complete a task and multiple-choice response formats (id. at p. 3). The evaluator opined that although the student's performance on the WISC-IV Integrated showed improvement compared to his performance on the WISC-IV, the student continued to exhibit deficiencies in understanding social norms, processing visually presented information when constrained by time and visual motor dependence, lapses in concentration, and difficulties with processing and decoding complex orally presented information (see id. at pp. 3-5).

To assess the student's academic achievement, the evaluator administered the WIAT-II, which yielded the following scaled scores (SS): word reading, SS 92 (30th percentile; grade equivalent 3.2); reading comprehension, SS 69 (2nd percentile; grade equivalent 1.6); pseudoword decoding, SS 95 (37th percentile; grade equivalent 2.9); numerical operations, SS 75 (5th percentile; grade equivalent 2.5); and spelling, SS 92 (30th percentile; grade equivalent 3.2) (id. at pp. 6, 11). The evaluator opined that the student's scores varied and generally fell below expectations given his chronological age (id. at p. 6). The evaluator also noted, however, that although the student performed below grade level, he "[was] certainly progressing academically" (id.).

Petitioners' responses to the BRIEF parent form reflected deficits in the student's ability to self-evaluate his own cognitive abilities (metacognition) and in his ability to plan and organize effectively (executive functions) (id. at pp. 5, 11). The results also reflected the student's difficulties with shifting cognitive sets, initiating new tasks or activities, working memory, self-monitoring, and planning/organization abilities (id. at p. 5). The re-evaluation report noted that in general, the student's executive functioning difficulties might interfere with his ability to achieve academically at a level commensurate with his cognitive potential and suggested the necessity for continued remediation in these areas (id. at p. 6). The report indicated that the student would continue to benefit from a highly structured classroom setting with clear rules and directives, from supportive therapeutic interventions, and from assistance with shifting contingents and sets, topics of interest, or areas of activity (id.).

Petitioners' responses to the BASC-II parent form reflected that petitioners' perceptions of their son were similar to the evaluator's own observations of the student (id.). Specifically, petitioners perceived the student as displaying some atypical behaviors regarding his narrow topics of interest, his tendency toward social withdrawal in certain peer situations, and his attention difficulties (id. at pp. 6, 12).

Petitioners and the student's home-based teacher completed the ABAS-II parent and teacher rating forms, yielding scores consistent with the impaired range on all activities of daily

living skills with particular difficulties noted in community use, home living, health and safety, self-care, and self-direction (id. at pp. 7, 12).

In the report, the evaluator described the student as "polite and highly cooperative," as well as able to demonstrate age-appropriate social awareness and relatedness despite continued difficulties with pragmatic language skills (id.). The report further described the student as having "presented with euthymic mood and affect" and "no evidence of depression or anxiety" during the re-evaluation (id.). In addition, the report indicated that the student continued to make strides with social engagement and that his thinking appeared to be clear and goal oriented, with no evidence of psychotic ideation (id.).

The evaluator concluded that overall the student possessed low average to average cognitive abilities with a history of developmental, expressive and receptive language difficulties, and social skills deficits (id. at p. 7). He noted significant weaknesses in the student's complex language decoding and expression, processing speed, and executive functioning skills (id.). The re-evaluation report indicated that emotionally, the student made strides regarding age-appropriate behavior and socialization, but that he continued to exhibit difficulties with attention, idiosyncratic topics of interest, and rigidity of thinking (id.). The evaluator described the student's adaptive life skills abilities as significantly deficient (id.).

The evaluator recommended continued enrollment in a 12-month program consisting of a small, supportive, language-based academic environment with children of commensurate cognitive abilities and areas of relative difficulties (id. at p. 7). The evaluator also recommended continued individual and group speech-language therapy in school two to three times per week, as well as one hour per week home-based speech-language therapy to promote generalization while minimizing extra pullouts from the classroom (id. at p. 8). In addition, the evaluator recommended OT at school with a growing focus on activities of daily living, 12 hours per week of home-based ABA programming to assist with treatment generalization and consolidation of skills, and recreational group activities to increase the student's range of interests and to develop age appropriate socialization skills (id.). The evaluation report indicated that all therapeutic interventions should attempt to incorporate life skills training to foster the student's independence (id.).

On March 17, 2006, respondent's CSE convened for the student's annual review and to prepare the student's IEP for the 2006-07 school year (Dist. Ex. 1 at pp. 1-2). The CSE recommended that the student attend a 12-month program at Reece in an 8:1:1 classroom (id.). The CSE recommended individual and group counseling, individual and group OT, and individual and group speech-language therapy (id. at pp. 1-2, 17). The CSE also recommended special education transportation on an air-conditioned mini-bus (id. at p. 1). The IEP included testing accommodations, such as a flexible schedule, flexible location, questions read aloud, answers recorded in any manner, use of a calculator, use of arithmetic tables, and directions read aloud to student (id. at p. 17).

By letter dated June 27, 2006, petitioners requested an impartial hearing (Parent Ex. A at p. 1). Petitioners alleged that respondent failed to offer their son a free appropriate public

education (FAPE) ¹for the 2006-07 school year and sought tuition reimbursement related to the program and services, including summer services, offered for the 2006-07 school year (*id.*). In their impartial hearing request, petitioners asserted both procedural and substantive violations as a basis for the denial of FAPE and as a proposed resolution, petitioners requested 12 hours per week of home-based ABA services and one hour per week of home-based speech-language therapy for the 2006-07 school year, including summer 2006,² as well as tuition reimbursement for the costs of the home-based services (*id.* at pp. 2-3). Petitioners' request for an impartial hearing noted that they did not contest the student's placement at Reece, the special education transportation, or the related services as set forth in the March 17, 2006 IEP (*id.* at p. 2).

Petitioners attached a copy of an impartial hearing officer's statement of agreement and order, dated February 1, 2001, to their request for an impartial hearing (Parent Ex. A at pp. 6-8). The statement of agreement and order directed, in part, that the student continue to receive one hour per week of home-based speech-language therapy and 12 hours per week of 1:1 home-based ABA services for the 2000-01 school year (*id.* at p. 8). Petitioners claimed that this statement of agreement and order constituted the student's last agreed upon program (*id.* at p. 1).³

The impartial hearing occurred on January 9, 2007 (Tr. p. 1). At the impartial hearing, respondent conceded that it failed to offer the student a FAPE for the 2006-07 school year (Tr. pp. 5, 11). Petitioners presented documentary and testimonial evidence (Tr. pp. 11-117; Parent Exs. A-F). Respondent, who was not represented by an attorney, cross-examined petitioners' witnesses and entered the student's March 17, 2006 IEP into evidence (Dist. Ex. 1).

At the impartial hearing, the student's home-based ABA teacher testified that she provided nine hours per week of home-based ABA instruction to the student during the 2006-07 school year (Tr. pp. 43-44, 47, 49). She has provided home-based ABA instruction to the student for the past four years (Tr. p. 47). Referring to the nine hours per week of home-based ABA instruction, the home-based ABA teacher testified that "right now, at this time, based on his needs, the hours that he's receiving now is sufficient for him" (Tr. pp. 50-51, 54). She testified that she worked on the

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]).

² At the impartial hearing, petitioners noted that their request for tuition reimbursement included summer 2006, and not summer 2007, which was mistakenly set forth in their letter of June 27, 2006 (Tr. pp. 5-7).

³ It should be noted, however, that the record in this case is extremely sparse and lacks any information regarding respondent's CSE and its recommendations for the student between the order, dated February 1, 2001, and the present impartial hearing request.

student's receptive and expressive language deficits, communication skills, pragmatic language skills, socialization and conversational skills with peers, peer interaction, leisure skills, listening skills, reading comprehension, writing skills, penmanship, math skills, and independent living skills (Tr. pp. 13-22; Parent Ex. C at pp. 1-2). She further testified that she met the student's needs by breaking tasks down into manageable steps for him (Tr. p. 22). She opined that "with the ABA services, the school placement, and his speech and language services, he has made gains in his goals, the academic goals, the independent living goals. And you know, without the ABA program, he will regress" (Tr. p. 24).

Consistent with the findings in the re-evaluation report, the home-based ABA teacher testified that the student was "definitely making steady gains in his academic goals, as well as some independent living goals" being worked on at home (Tr. p. 13; see Parent Ex. E at pp. 6-8). She also testified regarding her hourly fee, which petitioners paid directly to her (Tr. pp. 24-25).

The student's mother explained in her testimony that although the private evaluator had recommended 12 hours per week of home-based ABA services, she has been unable to secure another ABA provider to fulfill the 12 hours per week and thus, the student only received nine hours per week of home-based ABA services for the past two years (Tr. pp. 97-98, 101-02). She testified that over time, her son's level of ABA instruction has decreased from 40 hours per week to 20 hour per week, and finally, to the recommended 12 hours per week (Tr. pp. 101, 108-12). For the past two year, however, her son received the current level of home-based ABA instruction of nine hours per week (Tr. pp. 107-08). The student's mother acknowledged that the student "made a lot of progress on an academic basis" (Tr. p. 91). She testified that she paid the home-based ABA teacher and home-based speech-language therapist out-of-pocket and, over the past four years, has continued to receive the same amount of partial reimbursement from respondent for her out-of-pocket expenses (Tr. pp. 98-99; see also Parent Ex. F at pp. 1-25).

Regarding the student's progress, the student's mother attributed the home-based ABA program as responsible for the student's ability to read a book at home, for his ability to purchase an item that costs less than one dollar in a store, and for his developing ability to have a conversation with her (Tr. pp. 96-97).

By decision dated February 5, 2007, the impartial hearing officer questioned, sua sponte, the student's ED classification and directed respondent to conduct a "full evaluation" of the student to "determine classification and incorporate the information from [the student's current ABA provider] and [the student's private psychologist]" (IHO Decision at p. 4). The impartial hearing officer also directed respondent to convene a CSE meeting within 45 days of the date of the decision to review the results of the evaluation and to "determine the type of services, the number of hours and the provider" (id.). The impartial hearing officer directed respondent to continue to pay for the student's nine hours per week of home-based ABA services until such time that respondent made a recommendation of services (id.).

Petitioners appeal the impartial hearing officer's decision asserting that she erred in sua sponte challenging the student's ED classification because neither party raised it as an issue to be determined at the impartial hearing. In addition, petitioners assert that the impartial hearing officer erred in awarding tuition reimbursement for only nine hours per week of home-based ABA

services instead of the requested 12 hours per week, and that the impartial hearing officer's decision failed to address petitioners' request for the 12 hours per week of home-based ABA services, one hour per week of home-based speech-language therapy, the provision of 12-month services, and tuition reimbursement for the same.

Respondent asserts in its answer that petitioners failed to demonstrate that the requested 12 hours per week of home-based ABA services was appropriate to meet the student's special education needs, and further, that petitioners cannot demonstrate that three additional hours per week of home-based ABA services, beyond the nine hours per week that the student currently receives, is required to meet the student's special education needs. Respondent argues in its answer that petitioners' appeal should be dismissed to the extent that they seek an additional three hours per week of home-based ABA instruction beyond the student's current level of nine hours per week of home-based ABA instruction.

Respondent also asserts that the impartial hearing officer properly directed respondent to fully evaluate the student and reconvene a CSE meeting to reconsider appropriate services to provide the student with a FAPE. With respect to petitioners' request for one hour per week of home-based speech-language therapy, respondent contends that the request should be dismissed because the impartial hearing officer directed respondent to re-evaluate the student's special education needs. Respondent requests a dismissal of petitioners' appeal and to sustain the impartial hearing officer's decision and order.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. 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;⁴ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v.

⁴ 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.

Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP" (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148[c]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

As noted above, respondent conceded that it failed to offer the student a FAPE for the 2006-07 school year at the impartial hearing, thereby conceding the first criterion of the Burlington analysis (Tr. pp. 5-6). Respondent does not appeal from the impartial hearing officer's decision. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, respondent's concession that it failed to offer the student a FAPE for the 2006-07 school year, as incorporated into the impartial hearing officer's decision, is final and binding (Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

I must now consider whether petitioners met their burden of establishing the appropriateness of the home-based ABA instruction and home-based speech-language therapy services (Burlington, 471 U.S. 359). In order to meet this burden, a parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that the private school offered an educational program that was appropriate for the child's special education needs (Walczak, 142 F.3d at 129; see also Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192).

Initially, I agree with petitioners' assertion that the impartial hearing officer's decision failed to address petitioners' request for 12 hours per week of home-based ABA services, one hour per week of home-based speech-language therapy, the provision of 12-month services, and reimbursement for petitioners' out-of-pocket expenses for the costs of these home-based services for the 2006-07 school year, including summer 2006. With respect to the student's home-based ABA services, I find that although the record does not contain sufficient evidence to establish the appropriateness of petitioners' requested 12 hours per week of home-based ABA instruction or reimbursement for the same, the record does contain sufficient evidence to establish the appropriateness of the student's current level of nine hours per week of home-based ABA instruction. Both the student's mother and his home-based ABA teacher testified about the student's progress attributed to the current level of home-based ABA services, the nature and substance of the home-based ABA services, and how those services address the student's special

education needs and provide the student with educational benefit. In particular, testimony revealed that the student received home-based ABA instruction to address his receptive and expressive language deficits, communication skills, pragmatic language skills, socialization and conversational skills with peers, peer interaction, leisure skills, listening skills, reading comprehension, writing skills, penmanship, math skills, and independent living skills (Tr. pp. 13-22; Parent Ex. C at pp. 1-2). The home-based ABA teacher testified that she used ABA techniques to break down tasks into manageable steps for the student (Tr. p. 22). She also testified that without the home-based ABA services, the student would regress (Tr. p. 24). The record also contains sufficient evidence to conclude that the student's home-based ABA instruction continued throughout summer 2006 and that he received educational benefit from this instruction as well (Tr. pp. 25-26, 109-12; Parent Ex. F at pp. 2-4).

In addition to the above, respondent set forth in its answer that the record indicates a "general agreement by the parents, the psychologist and the ABA provider that the student is making progress with the nine hours of ABA services he has been receiving for the past year" (Answer ¶ 61). Moreover, respondent points to neither documentary nor testimonial evidence in the record as a basis to warrant a further reduction in the student's current level of nine hours per week of home-based ABA instruction or as a basis to deny petitioners' request to be fully reimbursed for their out-of-pocket expenses for these services. Based upon the record, I find that petitioners are entitled, therefore, to full reimbursement for their out-of-pocket expenses, upon submission of proper proof of payment, for the costs of nine hours per week of home-based ABA services for the 2006-07 school year, including summer 2006.

Regarding petitioners' request for one hour per week of home-based speech-language therapy, I find that the record does not contain sufficient evidence about the nature and substance of the home-based therapy, what special education needs were being addressed by the home-based therapy, or whether the student achieved any educational benefit from the home-based speech-language therapy, and thus, fails to establish the appropriateness of these additional home-based services. In addition, the record indicates that the student's home-based ABA teacher addressed the student's various speech-language and communication needs within the services she provides to the student (Tr. pp. 14-15, 17). Based upon the record evidence, petitioners are not entitled to one hour per week of home-based speech-language therapy or tuition reimbursement for the one hour per week of home-based speech-language therapy.

Finally, I agree with petitioners' claim that the impartial hearing officer erred in this case in sua sponte questioning the student's classification in her decision. The record establishes that neither party raised the student's ED classification as an issue before or during the impartial hearing. Furthermore, the record also establishes that the impartial hearing officer's challenge to the student's classification did not manifest itself during the impartial hearing, but in her decision, which deprived both parties of the opportunity to address the impartial hearing officer's concerns with testimonial and/or documentary evidence during the impartial hearing. Having determined this, however, I do not find it unreasonable for respondent's CSE to include a discussion of the student's classification when it reconvenes to discuss the completed evaluations ordered by the impartial hearing officer in her decision.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED, that respondent shall fully reimburse petitioners for their out-of-pocket expenses for the costs of their son's nine hours per week of home-based ABA instruction for the 2006-07 school year, including reimbursement for the costs of the student's home-based ABA instruction for summer 2006, upon submission of proper proof of payment for these services.

Dated: **Albany, New York**
 May 10, 2007

PAUL F. KELLY
STATE REVIEW OFFICER