



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-071

### **Application of a CHILD WITH A DISABILITY, by her 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 request to be reimbursed for the costs of their daughter's privately obtained applied behavioral analysis (ABA) services, related services, ABA supervision, weekly ABA team meetings, ABA training for providers, and parent counseling and training for the 2006-07 school year. The appeal must be sustained in part.

At the commencement of the impartial hearing on February 15, 2007, the child was ten years old and attending third grade in a regular education classroom in one of respondent's schools (Tr. pp. 13, 31-34, 45; see Parent Exs. E at p. 1; H at p. 1). In addition to attending the regular education classroom, the child received 45 hours per week of 1:1 special education itinerant teacher (SEIT)<sup>1</sup> support services using an ABA/discrete trial teaching (ABA/DTT) approach, which was delivered by privately obtained providers (Tr. pp. 92, 583-84; see Parent Ex. LL at p.

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<sup>1</sup> Petitioners refer to their daughter's privately obtained instructors as "SEITs." However, the Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a **certified special education teacher** . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410[a][8]" (Educ. Law § 4410[1][k])(emphasis added). The child's "SEIT" who testified on behalf of petitioners at the impartial hearing was an ABA trained instructor, not a certified special education teacher (Tr. pp. 73-77). The record does not provide information regarding the level of training of the child's other "SEITs." Although petitioners mischaracterize the ABA trained instructor as a SEIT, I will continue to refer to the privately obtained ABA instructors as SEITs to remain consistent with the record and to avoid confusion in this decision.

26). The SEITs provided 1:1 full-time support to the child in her regular education classroom for approximately 35 hours per week and 1:1 instruction outside the classroom for approximately 10 hours per week (Tr. pp. 583-84). Outside the school setting, the child received individual speech-language therapy five times per week for 45 minutes per session and occupational therapy (OT) five times per week for 45 minutes per session through privately obtained therapists (Tr. pp. 235, 493, 514). The child has diagnoses of autoimmune neutropenia, sensory integration dysfunction, gross and fine motor delays, allergies, hypotonia, and pervasive developmental delays, not otherwise specified (PDD-NOS) (Parent Ex. I at p. 2). In addition, the child's medical conditions render her medically fragile with low stamina (*id.*). The child's eligibility for special education programs and services and classification as a child with an other health-impairment (OHI) are not in dispute in this appeal (8 NYCRR 200.1[zz][10]; Tr. p. 31).<sup>2</sup>

The most recent assessment of the child's cognitive functioning, using the Stanford-Binet Intelligence Scales--Fifth Edition (SB5), yielded scores in the average range for fluid reasoning, in the low range for quantitative reasoning and visual-spatial abilities, and in the very low range for knowledge and working memory (Parent Ex. BB at pp. 8-11, 19). Compared to her age cohorts, the child attained a full-scale IQ score of 71, a non-verbal IQ score of 82, and a verbal IQ score of 63 (*id.* at p. 8). Academically, the child demonstrated grade-appropriate decoding skills, but had difficulty with reading comprehension (*id.* at p. 11). Based on the results of standardized testing, the child's ability to solve written math facts fell in the "average" range and her math fluency and ability to apply mathematical concepts to word problems fell in the "low average" range (*id.* at pp. 12, 22). The child demonstrated weaknesses in writing fluency and graphomotor skills (*id.* at pp. 11-12; Parent Ex. K at p. 3). The child presented with severe delays in expressive, receptive, and pragmatic language skills, as well as in language content and language memory skills (Parent Ex. L at p. 6). In addition, she exhibited deficits in fine and gross motor skills, as well as significant sensory processing and modulation dysfunction (Parent Ex. K at p. 6). The child also exhibited some attending difficulties (Tr. pp. 131, 282). She was described as good-natured, sweet and responsive to people (Parent Ex. BB at p. 7).

By letter dated February 9, 2006, petitioners advised respondent's Committee on Special Education (CSE) Chairperson that they scheduled their daughter's annual evaluations and would be willing to provide respondent with a schedule to "observe, request specific tests and participate, if they wish" in the evaluations (Parent Ex. N at p. 2). Petitioners indicated their willingness to consent to further evaluations deemed necessary by respondent as long as they received prior written notice and were allowed to attend (*id.*).

On July 21 and 22, 2006, the child's private speech-language pathologist formally evaluated the child's language skills with the Clinical Evaluation of Language Fundamentals--Fourth Edition (CELF-4) (Parent Ex. L at pp. 1-2). The report indicated that at the time of the evaluation, the child received speech-language therapy five times per week for 45 minutes per session (*id.* at p. 1). The child attained a core language standard score of 52 (0.1 percentile) and index standard scores of 67 (1st percentile) in receptive language; 55 (0.1 percentile); in expressive language 66 (1st percentile) in language content; and 47 (< 0.1 percentile) in language memory (*id.* at p. 2). The evaluator reported that compared to the child's last evaluation, she demonstrated

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<sup>2</sup> The child's early educational history has previously been set forth in Application of the Bd. of Educ., Appeal No. 03-019; therefore, it will not be repeated here in detail.

improvement in her ability to follow directions, recall sentences, understand and express the relationship between words related by semantic class features, and name illustrations of people, objects and actions (id. at p. 4). The child experienced significant difficulty on a subtest requiring her to listen to spoken paragraphs and answer questions (id. at p. 5). According to the evaluator, the child had significant difficulty comprehending the main idea and details contained in a story and the sequence of a story, and making an appropriate inference regarding a story's content (id.). The evaluator also noted that the child demonstrated significant auditory processing problems, which impeded her ability to process, encode and retrieve auditory information (id. at p. 1).

In addition to the CELF-4, the speech-language pathologist administered the Receptive One-Word Picture Vocabulary Test (ROWPVT) and the Expressive One-Word Picture Vocabulary Test (EOWPVT) to assess the child's receptive and expressive vocabulary skills (Parent Ex. L at p. 4). Administration of the ROWPVT yielded a standard score of 77 (6th percentile), while administration of the EOWPVT yielded a standard score of 79 (8th percentile) (id.). The evaluator reported that the child's conversational speech was sometimes unintelligible to unfamiliar listeners (id. at p. 6). She noted that the child tended to speak at an extremely high rate of speed and garbled her words together (id.). She further noted that the child intermittently presented with some phonemic substitutions that were not considered age-appropriate errors (id.). According to the evaluator, the child presented with flat monotone intonation and had difficulty monitoring the volume of her voice (id.). She reported that over the past year, the child made significant progress in all areas of language, as well as in her ability to attend and focus for longer periods of time (id.). However, she also noted that the child continued to present with severe delays in expressive, receptive, and pragmatic language skills, as well as in language content and language memory skills (id.). The evaluator recommended continued individual speech-language therapy five times per week for 60-minute sessions, and opined that diminishing the child's services would cause a regression in the child's skills, thereby halting her progress (id.).

The child's private occupational therapist also conducted an evaluation in July 2006 to assess the child's progress and to make recommendations regarding her current therapy (Parent Ex. K). At the time of the evaluation, the child received OT five days per week for 45 minutes per session (id. at p. 1). To assess the child's sensory processing, fine motor and gross motor development, the therapist administered the Bruininks-Oseretsky Test of Motor Proficiency (BOT), the Beery-Buktenica Developmental Test of Visual-Motor Integration, 4th Ed. (VMI), and the Motor-Free Visual Perception Test, 3rd Ed. (MVPT-3) (id. at pp. 1-3). In addition, the child's mother completed the Sensory Profile Caregiver Questionnaire (id. at pp. 1, 5).

According to the occupational therapist, the child demonstrated the ability to copy geometric shapes of increasing complexity, but continued to pay little attention to detail (Parent Ex. K at p. 3). Although the child showed significant improvement in her grasping patterns, she primarily used a static tripod grasp, which affected her distal control ability (id.). The occupational therapist noted that, as evidenced by the child's scores on the MVPT and VMI, visual perception continued to be her greatest strength (id. at p. 4). On the BOT, the child attained a fine motor composite SS of 34, a gross motor composite SS of 30, and a battery composite SS of 32 (4th percentile for gross motor, upper-limb coordination, and fine motor skills) (id. at p. 3). As measured by the BOT, the child demonstrated significant deficits in gross motor development (id. at p. 7). The child's running speed and agility were described as "low" compared to other children her age, while her bilateral coordination and strength were characterized as "below average" (id.

at pp. 3-4). The occupational therapist noted improvement in the child's balance and strength (id. at p. 5). According to the therapist, the child demonstrated improvement in tasks that required coordinating movement patterns of both sides of her body, but only when the same side was synchronized (id.). The therapist noted that the child could not disassociate her upper and lower extremities (id.).

With regard to sensory processing, the therapist stated that the child was frequently distracted or had difficulty functioning in a noisy environment (Parent Ex. K at p. 5). The occupational therapist reported that the child continued to present with significant sensory processing and modulation deficits that affected every aspect of her daily routine, including her "endurance/tone, body position and movement, activity level, and emotional responses" (id. at p. 6). According to the therapist, the child was "often emotionally reactive, distractible and presents with poor frustration tolerance, particularly when presented with a novel challenging task" (id.). The child's occupational therapist reported that she required assistance with higher level self-care activities (id.). The evaluator noted that the child made clear functional gains and significant progress in areas addressed by OT during the past year, but that she still required a "significant amount of external support" (id.). She recommended continuing OT, six times per week for 60-minute sessions, and opined that the child would benefit from two additional 60-minute OT sessions at home to address age-appropriate self-care skills (id. at p. 7). The therapist also recommended that the child receive a physical therapy (PT) evaluation to determine the appropriate intervention warranted to address the child's gross motor deficits (id.).

The child's developmental pediatrician prepared an interim report of the child's progress, dated August 9, 2006, specifically for the child's August 10, 2006 CSE meeting (Parent Ex. H at p. 1). According to the pediatrician, the child made great advances during the past year and preliminary calculations showed that she advanced more than one year and four months during the same time period (id. at p. 6). The pediatrician reported that the child demonstrated increased ability in abstract reasoning, sense of humor, generosity, awareness of appropriate social expectations, willingness to please and achieve, willingness to utilize strategies such as slowing down to achieve a correct answer, tolerance of various sensory challenges, and improved print handwriting (id.). She reported that during the 2005-06 school year, the child demonstrated more sophisticated use of language beyond simple 2-step conversational exchanges and simple observations (id. at p. 4). She also stated that the child's increased auditory processing skills directly correlated with her decreased self-stimulatory behaviors (id.).

The pediatrician opined that the "[i]ntensity of instruction and therapeutic intervention" continued to be necessary in order for the child "to solidify gains and build appropriately upon them" (Parent Ex. H at p. 6). Subject to a final examination and the review of additional data, the pediatrician recommended that the child receive a continuous 12-month, 52-week program of intervention, including socialization in a mainstream setting with 1:1 support by a SEIT from her home-based providers; 1:1 UCLA-model ABA/DTT for a minimum of 45 hours per week; three hours per week of parent training; increased time in the mainstream setting; six hours per week of 1:1 speech-language-oral-motor therapy; seven hours per week of 1:1 OT; four hours per week of 1:1 PT; three hours per week of music therapy; staff training; weekly interdisciplinary team meetings between the child's therapists and parents; meetings between the child's ABA/DTT supervisor, classroom teacher, and parents; and test accommodations, including additional time and rewording of directions (id. at pp. 7-9). The pediatrician expressed concern that the child had

not received any PT services for over three years (id. at p. 5). She included the following diagnoses in her report: PDD-NOS; auditory processing disorder; hypotonia; language disorder (expressive, receptive, and processing); delayed fine/gross motor skills and motor planning deficits; sensory integration dysfunction; and oral-motor impairment (id. at p. 9).<sup>3</sup>

On August 10, 2006, respondent's CSE convened to conduct the child's annual review and to develop her 2006-07 individualized education plan (IEP) (Parent Ex. E at p. 1). The IEP indicated that by teacher estimate, the child's decoding, comprehension, math calculation, and problem solving skills were all within the average range (id. at p. 3). The IEP also noted that it was difficult to assess the child's comprehension of text (id.). The child was described as having positive peer relationships, but also some difficulty regulating acting out behaviors (id. at p. 4).

The CSE continued the child's OHI classification and recommended placement in a regular education classroom with a full-time 1:1 behavior management paraprofessional, individual speech-language therapy seven times per week for 30 minutes per session, individual PT five times per week for 30 minutes per session, and individual OT six times per week for 30 minutes per session (id. at pp. 1, 18). The CSE also recommended adapted physical education, testing accommodations and a modified promotion criteria, and attached a behavior intervention plan to the IEP related to the child's acting out behaviors (id. at pp. 1, 4-5, 18-19). Goals and objectives addressed the child's weaknesses in academics; expressive, receptive, and pragmatic language; auditory processing; eye-hand and fine-motor coordination; handwriting; and body awareness (id. at pp. 6-15). By letter dated August 10, 2006, petitioners requested a PT evaluation of their daughter (Parent Ex. II).

By letter dated August 29, 2006, petitioners acknowledged receipt of respondent's Final Notice of Recommendation (FNR), dated August 15, 2006, and thanked respondent for the explanation at the CSE meeting regarding why it "cannot authorize [the child's] current program that includes applied behavioral analysis, supervision, and related services that take place outside of the mainstream public school" (Parent Ex. G). Petitioners noted that in order to maintain the level of their daughter's progress made during the 2005-06 school year, they would implement a program for the 2006-07 school year (September 1, 2006 through August 31, 2007), which would include the following components: 45 hours per week of ABA services delivered by a SEIT; six hours per week of speech-language therapy; six hours per week of OT; three hours per week of PT; 104 hours per year of ABA training; 18 hours per week of ABA team meetings; five hours per week of ABA supervision (including transportation and related costs); and summer placement in a mainstream setting (id.). Petitioners' letter indicated they would seek reimbursement for the costs of their daughter's program (id.).

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<sup>3</sup> By September 6, 2006, the child's developmental pediatrician and her psychologist completed their formal evaluations and prepared an updated report, which petitioners entered into the record at the impartial hearing (see Parent Ex. BB). It should be noted that the updated report included recommendations identical to those contained in the interim report, dated August 9, 2006 (compare Parent Ex. BB at pp. 16-18, with, Parent Ex. H at pp. 7-9). In addition, the updated report contained recommendations for specific curricula for comprehension skills, 1:1 instruction in mathematical computation and applied math skills, repeated rehearsal and active processing to learn new information, and classroom breaks to help the child organize herself and to provide sensory breaks (see Parent Ex. BB at p. 17).

By due process complaint notice dated September 1, 2006, petitioners requested an impartial hearing (Parent Ex. A). Petitioners amended and further particularized their initial due process complaint notice by letters dated October 9 and November 25, 2006 (see Parent Exs. B-C). Petitioners alleged that respondent failed to offer their daughter a free appropriate public education (FAPE)<sup>4</sup> for the 2006-07 school year as a result of procedural and substantive violations contained in the August 10, 2006 IEP (Parent Exs. B at p. 2; C at pp. 2-3). Petitioners sought reimbursement and prospective relief for the services they provided to their daughter during the 2006-07 school year and summer 2007 (Parent Exs. B at pp. 1-2; C at pp. 1, 3-4).<sup>5</sup>

On the first day of testimony at the impartial hearing, respondent conceded that it failed to offer the child a FAPE for the 2006-07 school year (Tr. pp. 1, 47, 64-65, 132). Respondent argued that petitioners' placement of their daughter in a regular education classroom, "with or without a paraprofessional or a SEIT," was not an appropriate placement for the child, and therefore, petitioners' case under the second prong of the Burlington/Carter tuition reimbursement analysis must fail (Tr. pp. 47-48; see Tr. pp. 190-92, 271-80, 282-83, 285-89). Both parties presented testimonial and documentary evidence (Tr. pp. 1-726; Dist. Exs. 1-10; Parent Exs. A-LL). The impartial hearing concluded after five days of testimony on April 2, 2007 (Tr. pp. 1, 154, 220, 261, 431).

At the impartial hearing, petitioners presented one of the child's privately obtained SEITs to testify (Tr. pp. 73-151). In addition to a Bachelor's degree in psychology, the SEIT was working toward a Master's degree in psychology with a concentration in ABA (Tr. pp. 73-74). She worked with children on the autism spectrum for approximately 13 years and received training in various ABA models (Tr. pp. 74-75). She had worked with petitioners' daughter for 4 1/2 years (Tr. p. 89).

The SEIT testified that during the 2006-07 school year, the child worked on the same tasks as the other children in her classroom (Tr. pp. 111, 126-27). She described interventions she used to assist the child with staying on task, including rehearsing teacher directions, writing things down, and looking for environmental cues (Tr. pp. 106-07). According to the SEIT, the child had a large repertoire of language but weaknesses in her grammar, syntax and auditory comprehension (Tr. pp. 111-12). To assist the child with comprehension, the SEIT testified that she questioned the child along the way and underlined words for the child (Tr. pp. 112-13). She reported that the child's home-based instruction included programs related to reading comprehension, such as a

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<sup>4</sup> 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][D]).

<sup>5</sup> It should be noted that at the time of the impartial hearing challenging the child's 2006-07 IEP, petitioners were still involved in an impartial hearing challenging the child's 2005-06 IEP, which was finally resolved on or about March 16, 2007 (Tr. p. 380).

main idea program, a program that worked on the format of testing, and a language matrix program that targeted increasing language receptively and expressively (Tr. pp. 113-15; Parent Ex. KK at pp. 2, 45-51, 54-57, 76-82). As a supplement to the child's school-based program, the SEIT worked on a conditional instructions program, which added more conditions to general instructions; a conversation program, which targeted the child's ability to stay on topic; an inferencing program, designed to address the child's difficulty with cause and effect relationships; listening comprehension; and strategies for seeking information (Tr. pp. 119-20; Parent Ex. KK at pp. 2, 20-23, 24-27, 43-44, 52-53). The SEIT testified that she pulled the child out of the classroom for instruction when she needed additional time to complete a task (Tr. pp. 122-24). She further testified that since the child had difficulty sitting for a long period of time, it was good for her to have breaks and that the child performed better after having a chance to move around (Tr. pp. 122-24). She reported that the child was on par with the other children in her regular education classroom in terms of decoding and computer use (Tr. pp. 127-29). She also reported that the child could follow class routines, although more slowly due to distractions, and the child demonstrated the same frequency of inappropriate behaviors as the other children in the classroom (id.).

In terms of following instructions given to the class, the SEIT developed targets and reinforcement systems that were designed to provide support to the child in the areas of recalling and following through with instructions (Tr. p. 129). With regard to academic support in the classroom, the SEIT modified materials for the child and provided her with additional repetition (Tr. p. 145). In the case of new concepts, the SEIT would break the concept down and provide the child with additional practice (id.). She would also make note of the new concept for the child to work on at home (id.). The SEIT noted that an overlap existed between the child's school-based and home-based math and reading programs (Tr. p. 146). The SEIT noted that during the 2006-07 school year, she faded out some prompts and transferred some of the prompts to the child herself (Tr. p. 105).

One of the child's privately obtained speech-language pathologists also testified for petitioners (Tr. pp. 224-56). She provided therapy to petitioners' daughter for 2 1/2 years (Tr. pp. 227-28). She and two other therapists worked with the child on developing her expressive and receptive language skills, pragmatic language skills, auditory processing, articulation and voice processing (Tr. p. 230). The therapist testified that the child mastered goals in each of these areas (Tr. pp. 233-34). She testified that during the 2006-07 school year, the child received five 45-minute sessions of individual speech-language therapy per week, and she believed that the current level of services was appropriate and resulted in progress (Tr. pp. 235-42). The therapist testified that her background in ABA assisted her work with the child (Tr. pp. 237-38). She reported that an overlap existed between the speech-language therapists' goals and ABA instructors' goals, and she noted that the child attained those goals because she worked with numerous service providers over numerous environments (Tr. p. 256).

Petitioners also presented one of the child's privately obtained occupational therapists as a witness (Tr. pp. 490-517). In addition to a Bachelor of Science degree in OT, she also had special certification in sensory integration therapy (Tr. pp. 490-91). The therapist reported that the child's handwriting was often illegible due to the size and spacing of the child's letters, her impulsivity, and the amount of force she elicited on the pencil (Tr. p. 498). She stated that in OT, she and the child's other privately obtained occupational therapists worked with her to slow down and to become aware of the force she exerted on a pencil (id.). During the 2006-07 school year, she and

the other occupational therapists provided five 45-minute sessions of OT per week (Tr. pp. 493, 512-14). The therapist opined that the current level of OT was appropriate and produced demonstrable progress in many areas, including her fine motor skills, her ability to generalize, her ability to sustain attention for longer periods of time, her increased awareness of her environment, her increased ability to follow directions, her improved modulation ability, and her improved ability to control her movement patterns (Tr. pp. 498-504, 514).

Additionally, the occupational therapist testified that she worked to improve the child's modulation; strengthen her core muscles; improve her motor planning; address the child's fine motor skills as they related to handwriting; and worked with the child's parents to set up a sensory diet for the child at home so that she could continue to participate in activities outside of the clinical setting (Tr. p. 506). The occupational therapist noted that the child sought out other children during therapy sessions, and the therapists would allow for peer interaction when working on functional activities (*id.*). The therapist testified that she also worked with the child on the modulation of sensory input, self-care skills, postural control, motor planning and bilateral coordination, and fine motor and graphomotor efficiency (Tr. pp. 507-09). According to the therapist, during the 2006-07 school year, the child's penmanship became more legible, and she was less frustrated completing art projects (Tr. p. 510). The child also improved her ability to engage physically and socially in games, such as dodge ball (Tr. p. 511). The occupational therapist also testified that because the child had not received any PT, she modified the OT skills to address some of the child's PT skills (Tr. p. 496). The therapist reported that during the 2006-07 school year, the child also improved her ability to transition from the waiting room to the therapy room without impulsivity and improved her safety awareness (Tr. p. 502). She noted improvement in the child's awareness of her environment, auditory processing, and modulation (Tr. p. 503).

Petitioners also testified at the impartial hearing (Tr. pp. 396-428, 548-696, 700-02, 705-17). The child's mother testified that the SEITs worked on approximately 17 programs with the child (Tr. pp. 597-98; *see* Parent Ex. KK). The child's "how do you know" program addressed making inferences and interpreting interpersonal cues (Tr. pp. 598-99). She testified that her daughter mastered numerous conditional contingencies contained in her conditional instructions program (Tr. p. 600). She stated that, in the broadest sense, the SEITs' support allowed her daughter to meaningfully participate in the regular education classroom activities (Tr. p. 606). This included reinforcing the child for things she was doing well, helping the child to understand when the teacher's instructions pertained to her and when they were directed at someone else, and working with the child on classroom skills, such as where to hang her backpack (*id.*). The SEITs developed a program to assist the child with distinguishing relevant versus irrelevant information when listening to classroom instructions (Tr. pp. 607-10). According to the child's mother, the SEITs directed the child to task in the classroom if she was not paying attention, clarified work instructions, and taught the child concepts required to complete class work (Tr. pp. 611-12). She also reported that the SEITs worked on the child's target programs, which assisted in generalizing her skills (Tr. p. 674). The child's mother also noted that the SEITs prompted the child to complete her homework and, when necessary, provided substantive teaching of actual academic materials (Tr. p. 675).

The child's mother testified that her daughter began receiving special education programs and services through early intervention in November 1999, at two years of age (Tr. p. 614). The child's services included ABA services, PT, OT, and speech-language therapy, which were all



provided in a home-based program (Tr. pp. 614-15). The child's mother testified at length regarding the child's services since 1999 and noted that she has continued to receive ABA services and related services since that time (Tr. pp. 615-52).

For the 2006-07 school year, the child's mother testified that her daughter had received five 45-minute sessions of OT per week, five 45-minute sessions of speech-language therapy per week, and 45 hours per week of SEIT support divided between the school-based and home-based programs (Tr. pp. 579-80, 584-85). She reported that her daughter did not receive any PT during the 2006-07 school year (Tr. pp. 579-80). With respect to the provision of five hours per week of ABA supervision, the child's mother testified that they did not replace the "official supervisor" and therefore, there was no ABA supervisor during the 2006-07 school year (Tr. p. 581). In addition, she noted that the SEITs received very little, if any, training during the year (Tr. pp. 581-82). She also testified that during the 2006-07 school year, the ABA team meetings occurred weekly for approximately two to three hours and included all of the child's service providers (Tr. pp. 582-83).

In addition to cross-examining petitioners' witnesses, respondent presented the school psychologist and the child's third grade regular education teacher as witnesses (Tr. pp. 157-217, 265-377). Respondent's school psychologist testified that the child's SEITs constituted a "big part" of her academic program and were "pretty involved" in the classroom (Tr. pp. 173-74). She observed the SEITs break down the child's lessons to help her focus and answer questions (Tr. p. 174). She also observed that the child required SEIT support regarding her social interactions with her peers and for redirection to some tasks (Tr. p. 185).

The child's third grade regular education classroom teacher also testified, and she noted that the 2006-07 school year was the first time that she worked with a SEIT in her classroom (Tr. pp. 268-69). She testified that she saw the role of the SEIT in the classroom "as more of a teacher to the student and they will modify the lessons that I teach in the classroom and work with the student in any way that they can to make sure that the student understands and is able to complete the task" (Tr. p. 269). The teacher noted that as "the standards became a lot more difficult" during the school year, the child began to struggle (Tr. p. 273). In particular, she noted her concerns regarding the child's socialization and her inability to complete her academic work independently (Tr. pp. 283-74). Following the January 2007 report card, she participated in a team meeting with petitioners to discuss the child's progress and "gather strategies" to continue to work together to further support the child (Tr. pp. 290-91, 296). She testified that the child performed second grade level work and that she was not the "lowest academic performer" in the teacher's third grade class (Tr. pp. 366-74). In addition, she acknowledged that the child made some meaningful progress in socialization during the 2006-07 school year (Tr. p. 350).

In a decision dated May 25, 2007, the impartial hearing officer concluded that based upon the lack of evidence of academic progress, the inappropriate grouping pursuant to 8 NYCRR 200.6(a)(3)(i) and least restrictive environment (LRE) considerations, petitioners failed to establish the appropriateness of the privately obtained SEIT home-based and school-based services under the second prong of the Burlington/Carter tuition reimbursement analysis (IHO Decision at p. 18). In particular, the impartial hearing officer found that neither the testimonial nor the documentary evidence established that the child made academic progress during the 2006-07 school year and further, that the evidence did not demonstrate that the child made academic progress independent of the 1:1 SEIT (id. at pp. 16-18).

The impartial hearing officer also concluded that the evidence failed to establish that the child was appropriately grouped, pursuant to 8 NYCRR 200.6(a)(3)(i) (IHO Decision at pp. 17-18). According to the decision, "students with disabilities placed together for purposes of special education shall be grouped by similarity of the individual needs according to four criteria: academics, social development, physical development and management needs" (*id.* at p. 18). The impartial hearing officer determined that the evidence did not demonstrate that the child was appropriately grouped, either academically or in educational achievement, in the regular education class, and further, that the child had no academic peer in the regular education setting (*id.*).

The impartial hearing officer also determined that although the regular education setting was the "least restrictive environment" for the child, "if the student received her academic program solely from her ABA SEIT she is in the most restrictive environment as her class consisted of herself" (IHO Decision at p. 18). She concluded that the evidence did not demonstrate that the child required such a restrictive environment (*id.*).

Based upon the foregoing conclusions, the impartial hearing officer denied petitioners' request for reimbursement for the costs of 45 hours per week of 1:1 ABA services delivered by the privately obtained SEITs, 18 hours per week of ABA team meetings, 104 hours per year of ABA training, and five hours per week of ABA supervision (IHO Decision at p. 18). In addition, the impartial hearing officer concluded that petitioners' request for reimbursement for the costs of their daughter's privately obtained related services must also fail because the record did not establish how the child progressed, and petitioners failed to sustain their burden under the third prong of the Burlington/Carter analysis to demonstrate that equities favored their position (*id.* at pp. 18-19). The impartial hearing officer noted that petitioners did not cooperate with respondent because they did not consider receiving related services through respondent's own providers (*id.*).

On appeal, petitioners assert that the impartial hearing officer erred in finding that petitioners failed to sustain their burden to establish the appropriateness of the privately obtained SEIT services for their daughter for the 2006-07 school year and denying their request for reimbursement for the costs of their daughter's 45 hours per week of 1:1 ABA services delivered by the privately obtained SEITs, 18 hours per week of ABA team meetings, 104 hours per year of ABA training, and five hours per week of ABA supervision. Petitioners contend that the impartial hearing officer failed to apply the appropriate legal standard to determine whether the services obtained were appropriate to meet the child's special education needs, arguing that the services must be "'reasonably calculated' to enable the child to receive educational benefits" and that the "determination of appropriateness is linked to the question of whether the [services are] 'likely to produce progress, not regression'" (Pet. ¶¶ 2, 5-6). In addition, petitioners contend that the impartial hearing officer ignored compelling evidence of the child's progress, and misapplied the grouping requirements in the regulations and LRE considerations to the facts of this case. Petitioners also contend that the impartial hearing officer erred in her determination that petitioners failed to cooperate with respondent regarding the provision of related services and thus, denied reimbursement for the costs of the child's related services during the 2006-07 school year.

Respondent asserts in its answer that petitioners' placement of their daughter in a regular education classroom with 1:1 SEIT support was not appropriate to meet the child's needs and was overly restrictive. In addition, respondent contends that equities do not favor petitioners' case because they failed to cooperate when they did not consider using respondent's related services

providers. Respondent requests that petitioners' appeal be dismissed and that the impartial hearing officer's decision should be upheld in its entirety.

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 free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];<sup>6</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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, 419 [S.D.N.Y. 2007]).

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]).

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<sup>6</sup> 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.

As noted above, respondent conceded that it failed to offer the child a FAPE for the 2006-07 school year at the impartial hearing, thereby conceding the first prong of the Burlington/Carter tuition reimbursement analysis (Tr. pp. 47, 64-65, 132; IHO Decision at pp. 15-16). Respondent does not appeal any portion of the impartial hearing officer's decision. It is well settled that 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[j][5][v]). Consequently, respondent's concession that it failed to offer the child 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 with a Disability, Appeal No. 07-070; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

Having established the first prong of the Burlington/Carter tuition reimbursement analysis, I must now determine whether petitioners met their burden under the second prong of the Burlington/Carter tuition reimbursement analysis to establish the appropriateness of the services obtained for their daughter for the 2006-07 school year (Burlington, 471 U.S. 359). In order to meet this burden, a parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; see Burlington, 471 U.S. at 370), i.e., that the private services addressed the child's special education needs (see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112, 115 [2d Cir. 2007]; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]; Walczak, 142 F.3d at 129; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

Based upon a review of the record and contrary to the impartial hearing officer's determinations, I find that petitioners sustained their burden to establish the appropriateness of the following special education programs and services obtained for their daughter in the 2006-07 school year: 45 hours per week of 1:1 ABA services delivered in the home-based and school-based programs by the privately obtained SEITs, and the privately obtained related services consisting of five 45-minute sessions per week of speech-language therapy and five 45-minute sessions per week of OT.

The record demonstrates that the while the child received varying amounts of ABA services, speech-language therapy, and OT since 1999, she continued to receive these same services in both the home-based and school-based programs, she continued to make progress, and the ABA services, speech-language therapy and OT continued to meet the child's special education needs (Tr. pp. 614-52; Parent Exs. D; H-I; K-M; Z; BB-DD; KK). Evaluations conducted by the child's private services providers, as well as report cards from the child's second grade regular education teacher, indicated that during the 2005-06 school year the child made progress in a regular education classroom supported by a full-time 1:1 SEIT, OT, and speech-language therapy (Parent Exs. H; K; L; CC). An end of the year report generated by the child's second grade regular education teacher indicated that the child read on grade level but that it was difficult to assess her comprehension of text (Parent Exs. M; CC at p. 1). She also reported that the child demonstrated grade level math skills, and in writing, demonstrated the ability to apply material that she had researched (Parent Exs. M; CC at pp. 1-2). According to the teacher, the child did not respond well to changes in her routine and needed constant refocusing and reminders as to which topics and activities were appropriate for school and which were appropriate for home (Parent Ex. M).

She opined that the child was able to function in a regular education classroom with close 1:1 supervision (*id.*). The child's final report card for second grade indicated that the child met most grade-level standards for reading and math, and all of the grade-level standards for writing (Dist Ex. 2 at p. 1; Parent Ex. CC at p.1). The report card also indicated that the child had made progress in her ability to demonstrate appropriate writing habits, develop a topic, use her understanding of letter/sounds relationships to spell new words, and use multiple strategies to solve math problems (Parent Ex. CC at p. 1).

Petitioners provided their daughter with essentially the same program during the 2006-07 school year. The services addressed the child's areas of need, including reading and reading comprehension; expressive, receptive, and pragmatic language skills; auditory processing; fine and gross motor coordination; handwriting; and body awareness. In addition, petitioners' documentary evidence demonstrates that the child mastered numerous programs developed by her SEITs during the 2006-07 school year (Parent Ex. KK at pp. 21, 25, 29, 44, 47, 49-50, 53, 55, 59, 62-63, 70, 74, 77-78, 86, 93, 104). The child's January 2007 progress report indicated that the child performed below grade-level standards in reading, specifically in her ability to read appropriate texts and show evidence of understanding the texts; in writing, specifically in her ability to effectively implement the steps of the writing process and use appropriate revision strategies; and in mathematics, specifically in her ability to use data to analyze, infer and predict (Parent Ex. Z at pp. 2-4). The child's ability approached grade-level standards in the following areas: demonstration of appropriate reading habits; use of appropriate strategies to figure out new words; demonstration of appropriate writing habits; demonstration of appropriate use of writing mechanics; investigating, describing and reasoning about geometric relationships; and communicating mathematical thinking coherently and clearly (*id.* at pp. 2-3). The report indicated that the child met grade-level standards with regard to using appropriate spelling conventions, understanding the relationship between numbers and number systems, and applying and adapting appropriate strategies to solve problems (*id.*). The child's teacher reported that the child sometimes shared information and opinions in discussions, listened well and responded appropriately, used independent work time well, and participated in class discussions (*id.* at p. 4). The teacher commented that, at times, the child's work with her private instructor inhibited the child's ability to develop peer relationships because she was removed from the classroom for redirection and/or modifications to her work (*id.*). She also noted that it was important for the child to be independent and indicated that she would like her to rely less on her private teacher and more on her classroom teachers and peers (*id.*). In further support of the conclusion that the services obtained by petitioners were appropriate to meet their daughter's special education needs, the child's June 2007 third grade progress report noted demonstrable progress in the child's reading, writing, and ability to work independently during the 2006-07 school year (Pet. Ex. B at pp. 2-4). Therefore, I find that petitioners sustained their burden under the second prong of the Burlington/Carter tuition reimbursement analysis for the above-mentioned services, and they are entitled to reimbursement for these services for the 2006-07 school year.

I do not find sufficient support in the record, however, to conclude that petitioners sustained their burden to establish the appropriateness of 18 hours per week of ABA team meetings, 104 hours per year of ABA training, PT, and five hours per week of ABA supervision. Contrary to petitioners' request for reimbursement for ABA team meetings, the record establishes that during the 2006-07 school year, the child's SEITs met between 18 to 24 1/4 hours per month for ABA team meetings and not 18 hours per week (Parent Ex. LL at pp. 26, 39, 52, 65, 78, 91, 138-39).

The record contains sufficient evidence to conclude that weekly ABA meetings did occur, although not at the frequency requested by petitioners, and that the SEITs used this time to evaluate the child's program, discuss the child's progress, and to implement new goals and targets. Therefore, I find that petitioners sustained their burden to establish the appropriateness of the ABA team meetings that did occur under the second prong of the Burlington/Carter reimbursement analysis, and thus, petitioners are entitled to reimbursement for their out-of-pocket expenses incurred for the 18 to 24 1/4 hours per month of ABA team meetings.

With respect to petitioners' request for 104 hours per year of ABA training and reimbursement for those services, I decline to award reimbursement. I note that the record does not establish that any of the child's SEITs actually received the 104 hours of training. The record shows that only one of the child's SEITs attended any type of training, totaling approximately 24 hours during the 2006-07 school year but does not establish what that training entailed or how it benefited the child (Parent Ex. LL at pp. 52, 65, 78, 91). Therefore, I find that petitioners have not sustained their burden to establish the appropriateness of 104 hours of ABA training for the 2006-07 school year under the second prong of the Burlington/Carter tuition reimbursement analysis, and thus, are not entitled to reimbursement.

The record also fails to establish that five hours of ABA supervision occurred on a weekly basis (Tr. pp. 581; see Parent Ex. LL at pp. 26, 39, 52, 65, 78, 91). As noted above, the lead SEIT attempted to take on some of these responsibilities, but the record does not sufficiently demonstrate additional ABA supervisory responsibilities, other than leading the team meetings. The record does not contain evidence that petitioners sustained any out-of-pocket expenses for ABA supervision. In addition, the record does not contain sufficient evidence to demonstrate that petitioners required parent training and counseling for their daughter to receive educational benefits from her special education programs and services, that petitioners obtained parent training and counseling during the 2006-07 school year, or that petitioners sustained any out-of-pocket expenses for parent training and counseling. Thus, petitioners failed to sustain their burden to establish the appropriateness of five hours per week of ABA supervision and parent training and counseling under the second prong of the Burlington/Carter tuition reimbursement analysis and are not entitled to reimbursement for these services.

Turning to petitioners' request for reimbursement of PT services, the record demonstrates that the child did not receive PT during the 2006-07 school year and respondent has conceded that it did not offer a FAPE to the child (Tr. pp. 47, 64-65, 67, 132; Parent Ex. H at p. 5). Petitioners wrote to respondent's CSE to request a PT evaluation in August 2006 (Parent Ex. II). However, it appears from the hearing record that no PT evaluation was performed by respondent nor did petitioners obtain a private PT evaluation. Therefore, the record does not contain any information regarding the child's needs in this area. Furthermore, the record does not contain any evidence that petitioners privately obtained PT services during the 2006-07 school year or sustained any out-of-pocket expenses for PT services. Thus, petitioners failed to sustain their burden to establish the appropriateness of PT services under the second prong of the Burlington/Carter reimbursement analysis and are not entitled to reimbursement.

Finally, in addition to finding that the services obtained by petitioners were appropriate to meet their daughter's special education needs, I must disagree with the impartial hearing officer's conclusions that the child was inappropriately grouped for the purposes of special education

instruction under 8 NYCRR 200.6(a)(3) and that the regular education classroom with the 1:1 SEIT support did not meet the IDEA's LRE requirements.

In this case, respondent attempted to portray the full-time 1:1 SEIT support in the regular education classroom as the primary setting in which the child received her instruction. In particular, respondent adduced testimony that the 1:1 SEIT operated independently of and did not communicate with the child's regular education teacher, and that the child required a great deal of prompting and support from her SEIT in order to socialize with peers and complete tasks (Tr. pp. 183-85, 190-92, 276-79, 283-85). Based upon these facts, the impartial hearing officer concluded that the child was not appropriately grouped by similarity of individual needs and that the child had no academic peer in the regular education setting (IHO Decision at pp. 17-18). The impartial hearing officer also concluded on these facts that the child, with the 1:1 SEIT in her regular education classroom, constituted a class that "consisted of herself" and thus, violated the IDEA's LRE considerations.

The IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). A FAPE must be provided to a child with disabilities in the "least restrictive setting consistent with the child's needs" (see Perricelli, 2007 WL 465211 at \*1, citing Walczak, 142 F.3d at 122, 132). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115[a]; see 8 NYCRR 200.6). In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Walczak, 142 F.3d at 122). The Court in Walczak further noted that even when mainstreaming is not a "feasible alternative, the statutory preference for a least restrictive placement applies" (Walczak, 142 F.3d at 132, citing Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both state and federal regulations require that when considering a placement in the LRE, school districts place the child as close to his or her home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource

room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]; see 8 NYCRR 200.6[a]).

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]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). 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).

Based upon the evidentiary record, I find that the impartial hearing officer erred in her conclusions regarding grouping and LRE considerations. The record demonstrates that the child was not "grouped" with other special education students; rather, she was placed in a regular education classroom and provided supplemental services in conjunction within her regular class placement. The evidentiary record establishes that the child's full-time 1:1 SEIT functioned to support the child in her regular education classroom and that the SEIT's support allowed the child to be satisfactorily educated alongside her nondisabled peers. In this regard, the 1:1 SEIT services, in addition to the speech-language therapy and OT, met the IDEA's LRE requirements by allowing the child to remain in a regular education classroom. The record does not suggest that, at this time, the child requires separate schooling or removal from the regular educational environment due to the nature or severity of her disability, such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Moreover, the record establishes that the child regularly advanced from grade to grade in a regular education classroom with the support of a 1:1 SEIT and related services. In addition, the child's placement in a regular education classroom enabled her to receive educational benefits in connection with her socialization and behavioral issues. Therefore, I find that the child's placement in a regular education classroom with the support of a full-time 1:1 SEIT did not violate either the grouping requirements or the IDEA's LRE requirements.

I turn now to whether petitioners' claim is supported by equitable considerations, the third criterion for an award of reimbursement. As already noted, the impartial hearing officer found that petitioners did not cooperate with respondent because she concluded that they did not consider receiving related services through respondent's providers (IHO Decision at pp. 18-19). The hearing record shows that petitioners did consider receiving related services through respondent's providers. The child's mother testified that she received a message from respondent's school psychologist that speech services may be available through respondent's provider for the 2006-07 school year (Tr. pp. 164-65, 566). The child's mother testified that she tried to reach respondent's psychologist by phone, however, her call was not returned (Tr. pp. 566-67). The child's mother further testified that she asked the CSE if related services could be provided by respondent after school, but those requests were denied (Tr. pp. 669-670). Furthermore, the child's mother testified that the school had not offered her related service authorizations (RSAs) to receive the services through respondent's approved providers for the 2006-07 school year (Tr. pp. 670, 695). Based on a review of the record, I decline to uphold the impartial hearing officer's determination as the evidence is not sufficient to show that petitioners' failed to cooperate.



**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED**, that the impartial hearing officer's decision is annulled to the extent that it found that petitioners' privately obtained services of 45 hours per week of 1:1 ABA services delivered in the home-based and school-based programs by privately obtained SEITs, five 45-minute sessions per week of speech-language therapy, five 45-minute sessions per week of OT, and 18 to 24 1/4 hours per month of ABA team meetings were not appropriate and denied petitioners' request to be reimbursed for the costs of these services during the 2006-07 school year; and

**IT IS FURTHER ORDERED**, that respondent shall reimburse petitioners, upon petitioners' submission of proper proof of payment, for the costs of 45 hours per week of 1:1 ABA services delivered in the home-based and school-based programs by the privately obtained SEITs, five 45-minute sessions per week of speech-language therapy, five 45-minute sessions per week of OT, and 18 to 24 1/4 hours per month of ABA team meetings, if such costs have not yet been reimbursed.

**Dated:**           **Albany, New York**  
                      **August 24, 2007**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**