

04-0421559

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

BRYAN COUNTY SCHOOL DISTRICT

Petitioner

vs.

~~XXXXXXXXXX~~,

Respondent

OFFICE OF STATE ADMINISTRATIVE HEARINGS
SEP. 16. 2004
DOCKET NO. OSAH-DOE-SE
0421559-15-TEATE

FINAL DECISION

I. INTRODUCTION

Petitioner Bryan County School District initiated a due process hearing request to determine the appropriateness of its proposed Individual Education Plan for ~~XXXXXXXXXX~~. The system has provided services to ~~XXXXXXXXXX~~ during this past year pursuant to an agreement reached through mediation prior to the beginning of the school year. (Exh. 8). After several IEP meetings, the system and the parents of ~~XXXXXXXXXX~~ (hereinafter referred to as "the parents") were unable to reach an agreement concerning the services to be provided to ~~XXXXXXXXXX~~. The system notified the parents and initiated the request for due process on June 22, 2004 (Exh. 36, p. 200).

The parents were notified of the system's request for a hearing and of the date and time for the hearing. Shortly before the date for the hearing, a problem developed with the well at the hearing location. The location was

changed to the Bryan County Courthouse and the parents were notified of the change in the hearing location, but the date and time remained the same. Attorney Jon Zimring of Atlanta made a limited appearance on behalf of the parents to determine if the issues could be resolved without the necessity of a hearing. The parties were unable to reach an agreement with the district and attorney Zimring notified this Court that neither he nor the parents planned to attend the hearing. The hearing proceeded as scheduled. Neither the parents nor a representative of the parents made an appearance on their behalf. The child continues to be served by the system pursuant to the agreement reached the previous year and under the provisions of "stay put." (T. 69).

At issue is the appropriate education to be provided for [REDACTED] by the Bryan County School District and whether the IEP developed by the system should be implemented on behalf of [REDACTED]. (T. 69).

II. FINDINGS OF FACT

[REDACTED] is a [REDACTED]-year old [REDACTED] who has been diagnosed as autistic.¹ (Exh. 4, p. 67). [REDACTED] became eligible for services from the district when he turned [REDACTED] on [REDACTED]. According to Becky Kelly, special education director for the Bryan County School District, [REDACTED] came into the system under less than ideal circumstances. (T. 40-41). Although the Chatham County Babies Can't Wait Program was required to notify the district of the child's planned entry into the district when he was two-and-a-half, they waited until March 28, 2003 to notify the district, and then the call came from the mother, not from the Babies Can't Wait Program. (T. 40-41). The information that the district received from Babies Can't Wait showed that the parents had been told that the school district would make it difficult for [REDACTED] to transition into the system

¹Dr. Chris Reeve, the district's autism consultant, defines autism as "... a spectrum disorder." (T. 15). It typically involves deficits in three primary areas. One is communication, with some students being completely non-verbal and others able to communicate but not make their needs known. Another area is social skills. Again, some students are completely withdrawn, others want to interact but do so in a manner considered strange or odd by non-autistic individuals. The third area is sensory, with some students having great difficulty keeping themselves adjusted to the environment. And they often have difficulty taking information they learn in one way and applying it in another way. (T. 16-17).

and there would be no available services. In addition, it was clear that [REDACTED] had failed to progress in the Babies Can't Wait program.²

As Ms. Kelly noted, the mother came into the system with only a few weeks, instead of the required six months, to transition. She came in with a bad opinion of the school district before she ever gave the system a chance to show what it could offer her child, and she came in convinced that a home program would be of greater benefit for her child, based on the failure of [REDACTED] to progress in the Babies Can't Wait program. (T. 43).

Despite the inadequate notice of [REDACTED]'s entry into the system, Ms. Kelly testified that the district worked very hard to have [REDACTED] evaluated and ready to enter the district by his third birthday. (T.43-44).³ The district was

²The Babies Can't Wait Team meetings documenting the child's lack of progress and the mother's dissatisfaction with the program were introduced as Exhibits 2 and 3.

³Exhibit 4 is the arena assessment of [REDACTED] and Exhibit 5 is the speech assessment by the speech pathologist. The evaluation of [REDACTED] at the age of two years, eleven months, showed him to have been diagnosed with Pervasive Developmental Disorder (Autism Spectrum), Hypotonia, and Short Stature, along with ear infections, myringostomy tubes, and feeding difficulties. (P. 068). [REDACTED] was found to be functioning within the intellectually disabled range of ability according to the DP II. (P. 070). He has also experienced significant delays in the areas of communication, daily living, and socialization skills. (Exh. 4, P. 072).

unable to schedule the IEP meeting until the Friday before the child's third birthday. (T. 45). At the initial meeting, the parents insisted on videotaping the meeting, so the district also videotaped. (T. 46). Ms. Kelly was of the impression that the team and the service providers from the Babies Can't Wait Program agreed on the goals and objectives for [REDACTED], but they were unable to reach agreement with the parents as to the manner in which the services were to be provided. (T. 47). The mother insisted that the child be provided home ABA services⁴ at the district's expense in lieu of services to be provided by the district. (T. 47).

Since the parents and the district were unable to agree on the manner in which services were to be provided to [REDACTED], the parents were advised of their due process rights. The mother requested mediation and an agreement was reached through mediation as to how services would be provided to [REDACTED] for the 2003-2004 school year. (T. 47, Exhibit 8). Ms. Kelly testified that the system agreed to pay for some of [REDACTED]'s ABA services at home and in return the parents agreed to bring [REDACTED] to school for two mornings per week. Most of those two mornings were taken up with related services such

⁴According to Dr. Chris Reeve, the district's autism consultant, ABA is "applied behavior analysis" and includes a broad range of specific teaching strategies. (T. 18-21).

as speech, occupational therapy and physical therapy. That left the system only ninety minutes to work with [REDACTED], but Ms. Kelly agreed to the parents' proposal in part as a gesture of good faith, given the rocky start of the relationship, and in part to give the system an opportunity to learn more about [REDACTED] and his abilities and needs. (T. 48-49). In addition to the in-school services, the district also contracted with a local daycare center to allow [REDACTED] socialization opportunities with non-disabled peers. The system also sent a facilitator to help [REDACTED] integrate into the social setting. (T. 49).

The correspondence between the parents and the school district during the year⁵ demonstrates that the school year was not without some difficulties. The parents chose Tuesdays and Fridays as the mornings they would take [REDACTED] to school. However, that school does not have a speech pathologist on Fridays. That meant that [REDACTED] had to receive both speech sessions on Tuesday. The district offered to have [REDACTED] come to school a third morning or come early for his daycare services and receive his second speech therapy at that time, but neither alternative was acceptable to the mother⁶.(T. 51-52). The

⁵Exhibits 9 through 19.

⁶ Exh. 11 is the parents' letter, complaining about how related services are delivered and Exh. 10 is the system's reply letter.

district also felt that [REDACTED] was not making sufficient progress due to the limited time he spent at school. (T. 50).

Because of the difficulties associated with the IEP meeting during the previous school year, the district did not want to wait until the end of the year to hold the new IEP meeting. They started in February, trying to get the meeting scheduled. (T. 53; Exh. 20, 22). At the request of the mother, the initial meeting was held on March 26, 2004. (Exh. 21). Although much progress was made on the goals and objectives for [REDACTED], the meeting did not conclude that day. (T.55). The initial meeting was on a Friday, and it was continued to the following Monday afternoon. Again, although there was agreement on the goals and objectives, the parents were unwilling to commit to the district's proposal as to how the services were to be delivered. The parents wanted to continue the same schedule for the upcoming school year — home ABA services supplemented by two mornings per week at school. (T. 56). The district wanted the child served at school on a five-day-per-week basis. The parents asked for time to think about the services and stopped the meeting without coming to agreement. (Id.)

From a review of the IEP meeting videotapes and the minutes of the meeting, Ms. Kelly was of the opinion that the parents concurred with the goals and objectives, and they agreed on the amount of time it would take to

meet these goals, but they did not understand that to meet these goals, they would have to bring ~~books~~ to school every day. When they realized that was the outcome of the agreed-upon goals, they asked for time to think about the proposal. (T. 57).

However, the district found it very difficult to get the parents to return for the third meeting to try to reach an agreement. (T. 58, Exh. 29, 34). The parents would not meet on the dates proposed by the district and the mother requested a date after the school year was over and the faculty were out for the summer.(T. 59-60; Exh. 25-33). The district scheduled the meeting for May 25, 2004, a day when the faculty were still in session but also a day that was not the same date as a team meeting to accommodate the mother's earlier request not to have IEP meetings at the same time as team meetings. (T. 61; Exh. 30). The mother objected to this date, but Ms. Kelly testified that she felt the parents did not really want to meet.⁷ She told the mother that she had received three notices and the meeting would be on May 25, 2004. She told the mother she could fax any information to the meeting and this information would be considered, or she could participate by phone on a conference call.(T.

⁷Exh. 29 is the "Contact Log" for ~~books~~ and contains entry concerning contacts with the parents. The entry on 2/29/04 has this note: "Parent stated that she did not feel that another meeting would be beneficial in resolving the remaining issues in ~~books~~'s IEP."

62-63). The mother did not attend, did not fax any material, and did not call. (T. 63, 64). From the IEP meetings, it was clear that [REDACTED]'s parents wanted to continue with the schedule of services already in place. The mother had made inquiries as to how "stay put" worked. It was Ms. Kelly's opinion that the parents did not want to try to reach agreement, but wanted to force the system into providing the same services through "stay put." (T. 64).

The system went ahead with the IEP meeting as scheduled. The meeting was videotaped and the materials sent to the parents the next day. (Exh. 36, 37). On June 21st, the district received a letter from the parents stating that if the system would not continue with the home ABA services, it needed to seek due process. (T. 65; Exh. 35). There was also an issue with the parents over compensatory services during the summer. The system did not feel it needed to offer compensatory services because it offered extended year services during the summer, which services the parents declined on behalf of [REDACTED] (T. 66, 67).

At the May 25, 2004 IEP meeting, the team members reached consensus that [REDACTED] could best be served by coming to school every day and participating in a wide variety of services so that he could meet the goals and objectives agreed to by the parents. (T. 66; Exh. 23). The system felt strongly

that more time at school was best for [REDACTED] and it filed for due process to have its IEP approved for [REDACTED] for the 2004-2005 school year. (T. 69).

In support of its position, the system offered the testimony of its autism consultant, Dr. Chris Reeve, and school personnel involved in recommending services for [REDACTED]. Dr. Reeve is the Director of the Autism Consortium at Nova Southeastern University. (T. 12). She has a PhD in Clinical Psychology and a Master's in Clinical Psychology from the State University of New York at Stony Brook. Her bachelor's degree is from Duke University and she did her pre-doctorate internship at the University of North Carolina at Chapel Hill. She has extensive experience in working with autistic children and with school systems in providing services to autistic children. (T. 13). She qualified as an expert witness in the field of educational programs for autistic children. (T. 18).

Dr. Reeve has worked directly with the Bryan County program since 1999. She has provided extensive training for the school personnel and has developed the program for the Bryan County students. She has created a demonstration classroom which allowed the Bryan County teachers to put the recommendations into practice and then receive feedback on how the services were delivered. (T. 14-15). In addition to her general consulting work, Dr. Reeve has worked directly with the teachers and staff providing services to [REDACTED] to address his specific needs. (T. 15).

Starting in November, Dr. Reeve visited [REDACTED]'s classroom once a month. She also met with the parents, the home team, and the classroom team, in an effort to coordinate the two programs. She did a lot of training for [REDACTED]'s teachers, set up a teaching plan and data sheets, based on his IEP. She also worked with his teachers in coming up with the best types of instruction that would lead to the best results for this child. Sometimes she worked with [REDACTED] directly; sometimes, she coached those working directly with [REDACTED] (T. 25-26).

Dr. Reeve related that research on autistic children indicates it is important for them to be engaged in intensive instruction for as many minutes as possible during the day. (T. 22). The program at Bryan County is designed to provide instruction at that level. It is also designed to offer a variety of approaches to dealing with autism, based on the individual child. (T. 23). Dr. Reeve also felt that it is very important for a four-year-old to be working on preparation for school skills. And he needs to be practicing those skills in the environment where he is going to be using those skills. That environment is school and those skills are hard to replicate in a home setting. (T. 23-24). It is also important that the child be able to generalize his or her skills. That is, a child who learns to count with jelly beans also has to be able to count with gum drops. (T. 24).

Through her working with the parents and the home team, Dr. Reeve became familiar with the home ABA program advocated by the parents. Dr. Reeve described it as a program based on the verbal behavior model of applied behavior analysis. (T. 26). It uses direct instruction of drilling vocabulary and understanding what objects are, with incidental teaching of being able to sabotage situations so that he needs to communicate his needs in some way. (T. 27).

Based on her familiarity with both programs – the eclectic approach offered by the school district and the home-based ABA program – Dr. Reeve was asked her opinion about which type of services would best serve ██████████ during the 2004-2005 school year. Dr. Reeve was of the opinion that ██████████ is at a crucial point in his development. He needs to work on his communication skills with his peers. He needs to practice his skills in a group setting. (T. 28). She recommended that he be gradually worked in to the regular education setting, with intensive staff support, going from a smaller group setting to a larger group as he develops the necessary skills to transition. (T. 29).

In the words of Dr. Reeve:

I think ██████████'s needs can best be met by a combination of school programs that provide a self-contained structure group-type of environment, as well as some one-on-one teaching and directed

instruction in that setting, as well as an opportunity to generalize those skills with typical kids. I think the setting he would be best served in, the setting he can be served in, is the school environment.

(T. 29).

Dr. Reeve specifically addressed the parents' request that ██████ be served at school only two mornings per week. It is Dr. Reeve's opinion that ██████ needs the consistency of being served at school on a five-day-a-week basis. In Dr. Reeve's opinion, the days that ██████ is out of school could cause him to lose skills in the interim. (T. 30).

The system also introduced the testimony of Sandra Boring. Ms. Boring is the Autism Resource Coordinator for the district, among other positions. (T. 70-71). Ms. Boring was involved in training and collecting data from the inclusionary services provided to ██████ at the local daycare. (T. 72). The data collected on ██████ involved his social interactions with other children at the day care. (T. 73; Exh. 49). As shown on page 312 of the exhibit, ██████'s initial social interactions, when he was only at the day care two afternoons a week, were very low. (T. 75). By page 316, when ██████ was at the daycare for four afternoons per week, his social interactions were much higher. (T. 76).

Ms. Boring attributed the increase in interactions to the consistency and repetition of coming four days per week. According to Ms. Boring, consistency and repetition are particularly important for autistic children, who do not often generalize the skills they learn in one setting to another setting. (T. 76).

Ms. Boring was involved in meeting with the parents, both as the autism coordinator and in the IEP meetings. She related that the parents' concern seemed to be that [REDACTED] needed to develop the necessary skills for school in the home setting, and then bring those skills to school when he had mastered those skills. (T. 77). In Ms. Boring's opinion, [REDACTED] can best be served by having him in school to develop the necessary skills to succeed in school. Ms. Boring knew, from the data collected, that [REDACTED] had trouble sitting still in small groups and was having problems generalizing his skills in the classroom setting. According to Ms. Boring, he could best develop those skills in the classroom setting, not at home. (T. 78).

In addition to [REDACTED] having difficulty using skills developed at home in the school setting, the data also indicated a problem with dependency. Rather than have other children push him on the swing, [REDACTED] consistently preferred to be pushed by the adult parapro assigned to him at the daycare. [REDACTED] was more comfortable with and therefore dependent on this individual, which

dependency limited his social contacts with his peers. Ms. Boring stated that the system had re-worked its program to rotate its paraprofessionals so that [REDACTED] would not be as dependent on one individual and could generalize his skills with different individuals. With the home services advocated by the parents, [REDACTED] is served by only one provider. The home services cannot provide the necessary rotation of personnel in the manner that the school can. (T. 79-80).

Ms. Boring acknowledged that the parents could be frustrated over what they viewed as [REDACTED]'s lack of progress at school. The parents reported that [REDACTED] could master certain skills at home, with the same provider, but could not repeat that mastery at school. (T. 80). When an autistic child receives services from a variety of providers, it takes him longer to master those skills. But once they are embedded, they can be crossed over to other environments and lead to long-term success. One of [REDACTED]'s problems is his inability to sit still and focus. Although he can focus better at home, in a one-on-one environment, he needs to be able to focus at school, where there are always distractions, if he is going to be successful through the twelfth grade. (T. 81).

In Ms. Boring's opinion, if [REDACTED] remains on the same schedule he had last year, at school only two mornings per week for related services and served primarily at home, he will not be ready for kindergarten next year. (T. 83). If he is in school on a daily basis, he can start out in the pre-k program for five

minutes, or for how ever long he can stay without becoming overly distracted. The next day, he can try to stay for seven minutes. The time he spends in pre-k can be individualized, based on his progress. That kind of consistent reinforcement cannot be offered to [REDACTED] if he is only in school for two mornings per week. (T. 84).

Lynette Turns, [REDACTED]'s teacher, testified that the schedule for the previous year did not give her sufficient time to work with him on his skills, after he received all of his related services. (T. 87). She had other three-year olds in their program, and while each child is different, [REDACTED] did not make the progress that the children who were in school every day made. (T. 88).

The parents sent data sheets showing vocabulary and activities mastered by [REDACTED] at home. In February, Ms. Turns repeated these words and activities with [REDACTED] in the school setting. As shown by Exh. 42, [REDACTED]'s mastery in the school setting was far below his reported mastery at home: gross motor skills were only 59%; fine motor, 84%; receptive action , 85%; receptive identification, 51%; imitation, 80%, and preposition, 0%. Ms. Turns attributed the difference in results to [REDACTED]'s inability to transfer his skills from one setting to another. (T. 89).

According to Ms. Turns, the only way to improve [REDACTED]'s ability to generalize his skills is to work with him in a variety of settings – small groups,

different providers, and different settings. She did not have that opportunity with [REDACTED] when he was only school for two mornings per week and had much of that time devoted to his related services. (T. 90).

Additionally, when [REDACTED] was instructed at school, the parents insisted that all of that time be in a one-to-one setting. Ms. Turns felt that as an autistic child, it was important that [REDACTED] have interaction with his peers and that he be taught in a variety of settings. (T. 90-91). She feels her opinion is reinforced by the success [REDACTED] had at the daycare when he attended four afternoons per week as opposed to only two times per week. (T. 93).

Although Ms. Turns acknowledged the parents' concerns that [REDACTED] acquire certain skills before coming to school, and that as an autistic child, those skills will have to be taught, she felt [REDACTED] could best acquire those skills in school. She agreed that he would need to be transitioned into attending five days per week, but she felt that with a gradual increase, he could be able to attend five days per week. Ms. Turns also noted that since [REDACTED] has returned to school this year that he has regressed from the point he left at the end of the previous year. (T. 92).

The last witness for the district was Jenny Williams, who is the speech pathologist who worked with [REDACTED]. It was Ms. Williams' opinion that [REDACTED] needed additional time in speech, from sixty minutes to ninety minutes per

week, and that those services be provided over several days, not just on one day per week. She also felt he should be exposed to a variety of settings and a variety of instructors. (T. 96).

Ms. Williams attended team meetings with the parents. She said the parents were concerned that [REDACTED] was much slower in mastering his goals in the school setting. (T. 97). However, the home setting did not involve using his skills in a variety of settings and with a variety of instructors. (T. 97-98). When a child is asked to develop skills in a variety of settings, with different instructors, the progress is slower. However, in the long run, the skills developed in a variety of settings can be generalized and are of more benefit to the child. (T. 100).

As Ms. Williams observed, [REDACTED] learns well in a one-to-one setting, but he does not learn as well in a group, or with a new instructor, and is easily distracted. With these deficits, it will be difficult for [REDACTED] to demonstrate his knowledge in a regular classroom. But other children have come into the program with similar deficits and the instructors employ different techniques to increase students' abilities in a variety of settings. Ms. Williams worked at the summer camp for autistic children. The three and four year olds in the camp, initially, were not able to attend for and participate in a group setting. By the end of the camp, they were able to sit and work for approximately an

hour. (T. 100). Although the IEP recommended that [REDACTED] attend the summer camp, his parents chose not to have him attend. (T. 101).

Because [REDACTED] was in school for only two mornings per week during the previous year, the instructors could not consistently employ the techniques and strategies used in the summer camp program and with students who attend every day. [REDACTED]'s inability to focus and follow instruction slowed down his progress with his communication skills. (T. 101).

Ms. Williams concurred that the best way for [REDACTED] to make progress is for him to be in school all day for five days per week. As she put it, "[t]he generalization of skills doesn't happen if you just do it intermittently." (T. 102).

According to Ms. Williams, although the parents agreed at the IEP meetings as to the goals and objectives for [REDACTED], they could not agree on the delivery of services. They wanted the home services to continue as they had the year before. The team members felt strongly that [REDACTED] could not meet the objectives if he were primarily instructed at home. (T. 103).

As Ms. Williams pointed out, state and federal mandates require that children demonstrate on standardized tests what they can do. If [REDACTED] doesn't learn to demonstrate his skills in a school setting, his one-on-one knowledge learned at home will not be effective for him. If [REDACTED] continues to be served primarily at home, Ms. Williams has grave concerns that he will

not be ready for kindergarten next year, where he must demonstrate his skills with peers, and not just in a one-to-one setting. (T. 104).

Based on this evidence, I find as follows:

1. [REDACTED] was born on [REDACTED] and is presently [REDACTED] years old. Based on his evaluation at age two years eleven months, [REDACTED] at the age of two years, eleven months, has been diagnosed with Pervasive Developmental Disorder (Autism Spectrum), Hypotonia, and Short Stature, along with ear infections, myringostomy tubes, and feeding difficulties. (Exh. 4, P. 068). [REDACTED] was found to be functioning within the intellectually disabled range of ability according to the DP II. (Exh. 4, P. 070), and he has experienced significant delays in the areas of communication, daily living, and socialization skills. (Exh. 4, P. 072).
2. [REDACTED] became eligible for special education services through the Bryan County School District when he turned three. (T. 40).
3. From the beginning, the parents and the system differed over the best way to provide services for [REDACTED] (T. 46; Exh. 7).
4. The parents did not want [REDACTED] instructed in a special education setting. They requested that he be instructed at home, using the ABA program initially implemented through Babies Can't Wait, and that he be otherwise instructed with normally developing peers. (Exh. 7, p. 090).

5. The district requested that its personnel be given the opportunity to instruct [REDACTED] in a school setting. When the parties could not agree as to how services were to be implemented, the parents requested due process. (Exh. 7, p. 086; T. 47).
6. The parties reached an agreement as to services to be provided to [REDACTED] through mediation. (T. 47; Exh. 8). The mediation agreement provided, in part, that [REDACTED] would receive at-home ABA services, partly funded by the school district. [REDACTED] would also be served at school for two mornings per week, for four hours each day. Two hours would be using one-on-one ABA services; the remaining time would be for related services of Occupational Therapy and Speech Therapy. In addition, [REDACTED] would participate in an inclusionary program at a local day-care at least two afternoons per week. (Exh. 8, p. 092).
7. [REDACTED] was served by the school district pursuant to this agreement for the 2003-2004 school year. (T. 48-49).
8. Beginning in February, 2004, the district began attempting to schedule the IEP meeting to develop the goals and objectives for the 2004-2005 school year. (T. 53, Exh. 20, 22).
9. I find that the parties met on March 26, 2004 and March 29, 2004, but that they were unable to reach an agreement at those two meetings. The

parents requested an adjournment at the end of the March 29, 2004 meeting. (Exh. 23, p. 154, 156).

10. I find that the parties were able to agree on the goals and objectives for ██████████ for the upcoming school year. (T. 55). However, the parties were not able to agree on the manner in which those services were to be implemented. (Exh. 23, p. 156).
11. I find that the parents wish to continue the same schedule used during the 2003-2004 school year, with the majority of his services provided at home and with him at school only two mornings per week. The parents believe that ██████████ needs to develop his skills at home and then be allowed to generalize those skills at school. (Exh. 23, p. 156).
12. I find that the school system personnel are aware of and acknowledge the parents' concerns. (T. 68; 77; 92; 97). It is their professional judgment, however, that ██████████ can best be served at school on a five-day-a-week basis. (T. 69; 78; 90-91; 102) Their opinion is shared by their autism consultant, Dr. Chris Reeve. (T. 30).
13. I find that after it became clear to the parents that the system would not agree to continue to serve ██████████ according to the IEP presently in place, they stopped cooperating with the district to complete the IEP so as to trigger "stay put." (T. 64; Exh. 24, 25, 28, 29)

14. I find that the parents were notified of the final IEP meeting date as follows:

- On April 1, 2004, Ms. Kelly wrote to the parents and suggested that the IEP meeting be reconvened on April 20, 2004. (Exh. 24).
- On April 16, the parents wrote and asked that the meeting be rescheduled to a later date. (Exh. 25).
- On April 23, 2004, the parents were notified of a proposed meeting on May 3, 2004. (Exh. 26). The parent notified Jenny Williams on April 29, 2004 that she would not attend and did not feel another meeting would be beneficial.
- On May 3, 2004, the parents were notified of a proposed meeting on May 12, 2004. (Exh. 27, p. 186)
- On May 9, 2003, the parents were notified of a proposed meeting on May 22, 2003. (Exh. 32)
- The parents requested that the meeting be rescheduled for May 27, 2004. (*Id.*).
- The system responded that May 26, 2004 was the last day for teachers for the school year and the staff members would not be available on that date. The meeting was rescheduled for May 25, 2004. (Exh. 30; Exh. 33).

- The parent requested, on May 19, that the meeting be rescheduled for May 24, 2004. The system notified the parent that it was too late to move the meeting again, but invited the parent to submit information for the team to consider by fax. (Exh. 31). The system also advised the parent that she could call and participate by conference call. (Exh. 34). The parents did not participate by phone or by fax. (T. 63, 64).
15. I find that the parents were afforded due process and every opportunity to meet with the school system to finalize the IEP. I find that when it became clear to the parents that there would be no agreement to continue the home ABA services, the parents saw no reason to participate further in the process so that "stay put" would be invoked. (Exh. 28, 29, 35).
 16. I find that the school system timely sought due process; that the parents were notified of the time, date, and place of the hearing and chose not to attend.
 17. I find that the school system has made a persuasive case for why [REDACTED] should be served at school instead of at home. Although [REDACTED] may show greater mastery of his skills at home, in a one-on-one setting, with

the same instructor, I find that he is unable to generalize those skills in the school setting. (T. 89, Exh. 42).

18. I find that [REDACTED]'s difficulties in focusing and attending in a group setting cannot be overcome by additional at-home instruction. I agree with the district's autism consultant, Dr. Chris Reeve, that [REDACTED]'s needs can best be met by a combination of one-on-one and group instruction in a variety of settings but in the school environment. (T. 29).
19. I find that the IEP proposed by the team at the May 25, 2004 meeting can effectively meet the goals and objectives for [REDACTED] and that a continuation of his services under last year's mediation agreement does not provide [REDACTED] with a free and appropriate public education that best meets his needs.
20. I further find that the IEP proposed that [REDACTED] be transitioned into the five-day-a-week program through the summer camp program offered by the district as extended year services. (Exh. 23, p. 158). Since [REDACTED] did not participate in the summer camp program, I concur with the district's staff that [REDACTED] will have to be transitioned into the program on a gradual basis. I decline to specify the rapidity at which he should be transitioned, since that will depend entirely upon [REDACTED] and how he reacts to the services offered.

21. I therefore concur with the district's request that it be relieved from "stay put" and that its IEP be implemented as the manner and means by which services shall be provided to [REDACTED] for the 2004-2005 school year.

III. CONCLUSIONS OF LAW

The school district seeks due process concerning a dispute with the parents over [REDACTED]'s proposed IEP. *See, e.g., Yates v. Charles County Board of Education*, 212 F. Supp. 470 (D. Md. 2002); 34 CFR § 300.507(c)(4); State Department of Education Rule 160-4-7-.18(d).

The district bears the burden of establishing that the proposed IEP is appropriate and provides for a free and appropriate education. *See T.R. ex rel. N.R. v Kingwood Tp. Bd. Of Educ.*, 32 F. Supp. 2d 720, 132 Ed. Law. Rep. 337 (D.N.J.). *See also Loren F. Ex rel. Fisher v. Atlanta Independent School System*, 349 F.3d 1309 (11th Cir. 2003).

The school district contends that its proposed IEP provides the minor child with a free and appropriate public education in the least restrictive environment. 34 CFR § 104.33; 104.34; *Board of Education v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C. § 1412(a)(5). The parents disagree with the district's proposed school-based services and seek to have their autistic child served primarily with ABA services provided at their home by an outside consultant.

Since the parents disagree with the district's proposed IEP, the child is presently served under the IEP from the previous year under "stay put." 34 CFR § 300.514(a); 34 C.F.R. 300.8, 300.500(b)(1), 300.514(a), (b); 20 U.S.C.A. 1415(j). See also *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686, 1 A.D.D. 333, 43 Ed. Law Rep. 857 (1988).

Two issues are relevant to a judicial review of a challenged IEP: (1) whether the school system complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits, *Board of Educ. v. Rowley*, 458 U.S. 176 at 206-207, 102 S.Ct. 3034 at 3051 (1982); accord *Mrs. B. V. Milford Bd. Of Educ.*, 103 F.3d 1114 at 1120 (2nd Cir. 1996).

As the Supreme Court noted in *Rowley*, Congresses' emphasis in IDEA upon full participation of concerned parties throughout the development of the IEP, together with the requirement for federal approval of state and local plans, reflects a conviction that adequate compliance with the procedures prescribed would in most cases assure much, if not all, of what Congress wished in the way of substantive content is in an IEP. *Board of Educ. v. Rowley*, 458 U.S. at 206-207, 102 S.Ct. At 3051.

I find that, as required by 20 U.S.C. § 1415, the parents were provided with due process and numerous opportunities to participate in formulating

~~3220~~'s IEP. I find that when the parents realized the district would not agree with their request for their child to be primarily served at home, they chose to make it too difficult to schedule the final IEP meeting so as to invoke "stay put" for their child. I find that the parents' failure to attend the final IEP meeting was not a violation of due process but an outcome of their desire to invoke "stay put" and continue with the services previously provided by the district.

The remaining legal issue in this case is whether the services proposed by the district will meet the child's educational needs pursuant to 34 CFR § 300.347 and related provisions, as opposed to the parents' requests for ABA home services and limited time at school.

The IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP. The Supreme Court, however, has specifically rejected the contention that the appropriate education mandated by IDEA requires states to maximize the potential of handicapped children. *Id.* at 197. The purpose of the act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside, *Id.* at 192, 102 S.Ct., at 3043; *accord: Luncenford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577 at 1583 (D.C.Cir. 1984). Because public resources are not infinite, federal law does not secure the best education money can buy; it calls upon government more

modestly, to provide an appropriate education for each disabled child, *Luncenford* at 1583. Plainly, however, the door of public education must be opened for a disabled child in a meaningful way. *Board of Educ. v. Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3043-44. This is not done if an IEP affords the opportunity for only trivial advancement. *Mrs. B. v. Milford Bd. Of Educ.*, 103 F.3d at 1120. An appropriate education under IDEA is one that is likely to produce progress, not regression. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248.

When a court conducts an independent review of a challenged IEP, it must examine the record for any objective evidence indicating whether the child is likely to make progress or regress under the proposed plan, *Mrs. B. v. Milford Bd. Of Educ.*, 103 F.3d at 1121 (citing *Board of Educ. v. Rowley*, 458 U.S. at 203, 207, S.Ct. at 3049, 3051).

In the case at hand, the only objective evidence concerning [REDACTED]'s progress or lack of progress under last year's IEP is the evidence presented by the district. I find, however, that ample evidence exists that the IEP proposed by the district will provide [REDACTED] with a free and appropriate education. In fact, the evidence presented indicates that [REDACTED] is not well served by his at-home ABA program. Although he may have demonstrated mastery of skills in the home setting, he has not been able to generalize those skills to the school

setting. (Exh. 42, T. 89). I find that the district's proposed program, which incorporates a variety of educational techniques in a variety of settings, will better prepare ██████ for kindergarten next year than a continuation of his schedule from the previous year. *Cf. Burke County Bd. of Educ. v. Denton By and Through Denton*, 895 F.2d 973, (CA.4.N.C., 1990); *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119, 126 Ed. Law Rep. 54 (2d cir, 1998). Not only does the district's plan provide opportunities for ██████ to develop the necessary skills for him to transition to kindergarten, it does so in the least restrictive environment. *Cf. Kerkam by Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 67 Ed. Law Rep. 454 (D.C. Cir. 1991).

I conclude that the IEP proposed by the school district is appropriate and should be implemented for the 2004-2005 school year. I further conclude that the district is relieved of the requirements of "stay put" and that it can begin to serve the child pursuant to its IEP. Since ██████ is only ███ years old, the parents are not required to avail themselves of the services proposed by the district. But the district is relieved of any further obligation to provide services to ██████ pursuant to last year's IEP and shall be allowed to implement its proposed IEP in providing services to ██████ for the 2004-2005 school year.

IV. DECISION

The IEP proposed by the district shall be implemented for ~~2004~~ for the 2004-2005 school year. The district is directed to transition ~~6000~~ into a five-day-a-week program, based on his progress and abilities. The district is specifically relieved from any further obligation to provide compensation to the parents for their home-based ABA services and from providing any other services not included in the present IEP.

SO ORDERED, this the 16th day of September, 2004.


STEVEN W. TEATE
Administrative Law Judge

