

05-0511944

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

██████,

Petitioner,

v.

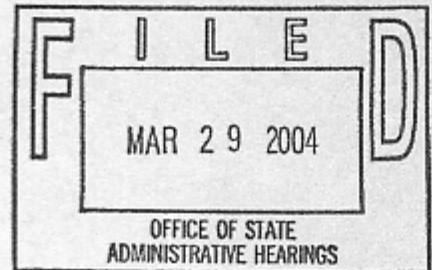
COBB COUNTY SCHOOL DISTRICT,

Respondent.

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Docket Number:

*OSAH-DOE-SE-0511944-33-CTC



FINAL DECISION

I. INTRODUCTION

This matter comes before this administrative court ("the Court") pursuant to a December 2, 2004, due process hearing request. Petitioner ██████ filed a Motion for Summary Determination alleging that Respondent Cobb County School District failed to provide Petitioner with an appropriate education. The Court denied the Motion for Summary Determination but made findings of undisputed material fact that would not be subject to further proof at a hearing in this matter. Petitioner then amended his due process hearing request to withdraw his IDEA claims and to proceed solely on the issue of whether Respondent breached an agreement entered into by the parties on March 17, 2004 by terminating services to ██████ at the ██████ Center on December 1, 2004. Specifically, the issue for determination by this Court is whether ██████ functional behavioral analysis at the ██████ Clinic was complete on December 1, 2004 when Respondent sought to transition ██████ back to the ██████ Psychoeducational Program run by Respondent. If the functional behavioral analysis was complete, Respondent did not have a duty to continue to provide ██████ with services at the ██████ Center. If the functional behavioral analysis was incomplete then Respondent has a duty under the Agreement to provide services at the ██████ Center until ██████ has received a functional behavioral analysis.

The administrative hearing was held on January 24 and 25, 2005, and additional testimony was taken by depositions that concluded on February 15, 2005. The record closed on March 10, 2005, with the filing of the parties' proposed findings of fact and conclusions of law and Petitioner's motion to exclude evidence and Respondent's response thereto.

II. FINDINGS OF FACT

A. The following are the findings of undisputed material fact from the Motion for Summary Determination that are not subject to further proof. Citations are omitted.

██████ is a ████████ boy with severe autism and obsessive compulsive disorder. He is non-verbal. He has attended school in the Cobb County School District ("CCSD") since third grade. During this time, he has been served in the ████████ Psychoeducational Program and he is eligible for special education services under the Individuals With Disabilities in Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.*

While the frequency and intensity of ████████ problematic behaviors have varied somewhat over time, the behaviors increased in the fall of 2003. CCSD and ████████ family disagreed as to the proper course of action to take at that time. Eventually, following mediation and subsequent negotiations, the Family and CCSD were able to enter into a joint settlement agreement. The agreement provided for, among other things, a functional behavioral assessment by Dr. ████████ of ████████, Inc. and placement of ████████ for extended school year services at the ████████ Institute.

Following execution of the Agreement, Dr. ████████ became unavailable due to a medical leave of undetermined length. In addition, CCSD reported that ████████ behavior had escalated in the bathroom and resulted in his placing his arms into the toilet, biting the splash guard on the toilet, biting through rolls of toilet paper, biting his hand and arms, and slamming his body into the bathroom stall doors. When CCSD suggested that an alternative individual be utilized instead of Dr. ████████ to fulfill the terms of the original Settlement Agreement, the Family requested that ████████ be placed immediately at the ████████ Clinic.

In negotiating new contractual terms, CCSD proposed that ████████ go to the ████████ Clinic for a *behavioral assessment*¹, as had been stated in the previous agreement.

██████ was placed under this agreement and IDEA at the ████████ Clinic on March 4, 2004. Specifically, in detailing the "frequency, scope, location and duration" of services that ████████ was to receive, the IEP indicates placement at ████████ clinic from "3/4/04 - 10/6/04."

At a meeting held on April 12, 2004, the committee agreed that ████████ ESY services were to be provided at the ████████ Clinic from "5/24/04 - 8/6/04," and from thereafter he would continue at ████████ until the fall of the 2004-2005 school year. ████████ placement "starts 3.4.04 and ends 10.6.04." IEP documents

¹ ████████ family insisted that the term be changed to *functional behavioral analysis*.
Exhibit J-126

developed on May 3, 2004, and June 23, 2004, continued to extend the services at ██████ through October 6, 2004.

On July 23, 2004, ██████ staff reported that the home analysis under the agreement and IEP would begin on August 3, 2004 and continue on August, 10, 2004. The team discussed a full review of ██████ IEP and discussion of placement.

After the home visits in August of 2004, the Family and School District staff indicated that interruption of ██████ obsessive compulsive tendencies ("OCD") in the classroom and home environments were often precursors to his aggressive and self-injurious behaviors, as the School District had long believed. At that point, the analysis began to encompass tracking ██████ medications to assess what effect, if any, reductions or changes in medications had on his behavior.

An IEP meeting was held for ██████ on September 8, 2004. At this IEP, ██████ staff reported on ██████ progress. The Family and School District staff agreed that ██████ OCD behaviors seemed to be at the root of his self-injurious behavior and aggression, although ██████ self-injurious and aggressive behaviors were not present, ongoing or recent. ██████ staff indicated that the functional behavioral analysis was continuing on the OCD behavior in conjunction with the medication assessment. The committee developed goals and objectives for use in ██████ program. The committee then discussed ██████ placement.

Dr. ██████, the ██████ Director of Education, recommended that ██████ remain at the ██████ Behavior Center until such time as treatment was based on the complete functional analysis. The Cobb County IEP stated that ██████ was to transition to the ██████ placement on December 1, 2004. The Family (and Dr. ██████) objected to this placement.

The Family asked for another meeting on November 1, 2004 to review where ██████ was in order to better assess his ability to transition and to make any necessary arrangements. At the meeting, ██████ developmental pediatrician reported on the status of his medication, the process of altering medication, its potential impact on his behavior, and also on the need for stability.

On November 23, 2004, the Family requested an emergency IEP meeting to consider ██████ placement and assess the adequacy of transition plans. By agreement of the parties, services were resumed on December 7, 2004 while the Motion for Summary Determination was before this Court.

B. The following are Findings of Fact regarding the Amended Settlement Agreement (the "Agreement") dated March 17, 2005. (Joint Exhibit 73)

1. The paragraph of the Agreement that is in dispute reads as follows:

"The School District will provide for a functional behavioral analysis for ██████ at the

Center [REDACTED] Clinic full-day program beginning March 4, 2004. In addition to assessing [REDACTED] in the full-day program, the School District will provide for analysis by the [REDACTED] Center on the bus and in the home environments. The analysis will consider the effect, if any, of [REDACTED] medications. Both Parties agree to cooperate fully with the analysis, and will include each other as participants in all meetings and discussions regarding the analysis, and will provide each other all data and reports immediately upon availability. The School District will provide transportation to [REDACTED] during this analysis." (Joint Exhibit 73, paragraph one)

2. The term "functional behavioral analysis" appears to be regarded by experts as interchangeable with the term "functional behavioral assessment". According to Petitioner's expert, "The term 'analysis' in behavioral psychology is generally reserved for situations where one is testing the effects of certain variables, environmental variables, on behavior, where those variables are directly manipulated using what we call a single-case design procedure. So if we want to determine the effect providing attention following problem behavior has on that behavior, we would in certain circumstances deliver attention, in certain circumstances not deliver that attention, and then measure the differences in the rates of behavior. That would be called an 'analysis', where we're directly testing the effects of attention, among other variables. The term 'functional behavioral assessment' is the broader term, and it has been defined more in the education literature than the behavior analysis literature. But it involves basically about five steps that are usually involved in most problem-solving types of formats, where one collects some initial data on the problem and defines it, generates some hypotheses about what's contributing to the problem behavior, develops a plan to test those hypotheses, and uses that information to develop and test out an intervention, and then finally to integrate that into the child's program. And so 'functional behavior assessment', and sometimes people use the term 'functional behavior analysis' synonymous with that, is a broader term that includes both assessing the behavior in terms of its function, trying out different interventions, and then building that into the child's education plan." (Transcript pages 194-195)

3. However, the term "functional analysis" is defined as a component of a functional behavior assessment. (Transcript page 196) It was also defined by the same expert as one of three major types of functional behavior assessments.²

4. The [REDACTED] Center has done a functional analysis of [REDACTED] destructive behavior, a functional analysis of [REDACTED] obsessive compulsive behavior (OCB), and an analysis to

² "there are three major types of FBA's [functional behavioral assessments]: a. *Indirect assessments*, in which rating scales, interviews or questionnaires are used to estimate the frequency or severity of the problem in different environmental contents; b. *Direct assessments*, in which the problem behavior is directly observed and counted in various environmental situations; and c. *functional analysis*, in which environmental events hypothesized to influence problem behavior are systematically introduced and withdrawn under highly controlled conditions, as the behavior is directly observed and counted." (Emphasis supplied) (Transcript page 204; Exhibit P-8)

determine if the destructive behavior and OCB behaviors are interrelated. (Transcript pages 209-210)

5. Although Respondent's expert, a former ██████ Center employee, has observed that the ██████ center does conduct functional analyses of out-patients without treating the patient, the overwhelming evidence in this case is that ██████ evaluation at the ██████ Center would involve a treatment component. (Transcript pages 130; 213-216; Exhibit R-10)

6. At the time of the hearing of this matter in January 2005, the ██████ center had completed ██████ analyses, developed treatments for his destructive behavior, OCD and PICA. The ██████ Center was "at the point of trying to schedule generalization trips to the home and the school to train his parents and train his teachers and school personnel and then to refine those. Typically, we will spend the last several weeks or a month trying to make sure that the treatment is going to work in the natural environment...And then we make minor adjustment, when necessary, based on that." (Transcript pages 224-225) Petitioner argues that his medical assessment will take another two or three months to complete. (Transcript, page 184) However, this contention is unpersuasive as it conflicts with the ██████ Center's own evidence, set out above, which this Court finds to be trustworthy and persuasive.

7. Much testimony was produced about the understanding of various persons about time limitations for the completion of the functional behavioral analysis at the ██████ Center. However, the Agreement clearly contains no reference to any time limitations. The IEP from March 4, 2004 forward indicated that ██████ placement at ██████ ██████ clinic extended from "3/4/04 - 10/6/04." (Joint Exhibits 69, 78, 81, 86, 96) However, 10/6/2004 was the date of ██████ next IEP. (Joint Exhibit J-69) The linkage of the IEP date of 10/6/04 with the intention of the parties to terminate services at ██████ on that date was not supported by persuasive evidence. Therefore, the limitation on services is that the functional behavioral analysis be complete rather than a time limitation.

III. CONCLUSIONS OF LAW

1.

The issue to be decided by this court is whether ██████ functional behavioral analysis at the ██████ Clinic was incomplete or was completed on December 1, 2004 when Respondent sought to transition ██████ back to the ██████ Psychoeducational Program. If the functional behavioral analysis was completed, Respondent did not have a duty to continue to provide ██████ with services at the ██████ Center. If the functional behavioral analysis was incomplete, Respondent has a duty under the Agreement to provide services at the ██████ Center until ██████ has received a functional behavioral analysis. Petitioner specified that the issue submitted is a simple question of contract law, and does not involve the Individuals With Disabilities in Education Act ("IDEA").

2.

In order to determine if the functional behavioral analysis was completed, the meaning of that term must be ascertained. Although Respondent argues that the functional analysis required by the Agreement does not include a treatment component, this argument is without merit. The overwhelming evidence of the plain meaning of the term "functional behavioral analysis" is that the term includes assessing the child's behavior in terms of its function, trying out different interventions, and then building the successful interventions into the child's education plan. It has long been held in Georgia that where the language in a contract is "plain and unambiguous, the court must afford its literal meaning despite a party's contention that he understands the contract to mean something else." Sofran Peachtree City v. Peachtree City Holdings, 250 Ga. App. 46, 50 (2001) There is no need to construe the meaning of functional behavioral analysis, as its meaning is plain and unambiguous.

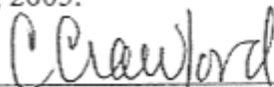
3.

Petitioner has shown by a preponderance of the evidence that, although [REDACTED] received a functional behavioral analysis at the [REDACTED] Center, the analysis was incomplete on December 1, 2004. The analyses and treatment components developed by the [REDACTED] Center were complete at the time of the hearing of this matter on January 24 and 25, 2005, and a transition period of up to one month was necessary to transition [REDACTED] back to services at the School District.

IV. DECISION

In accordance with the above Findings of Fact and Conclusions of Law, Respondent shall take all necessary action to comply with the Agreement and shall provide services to [REDACTED] by the [REDACTED] Center while he transitions back to services at the School District. To the extent Respondent stopped paying for [REDACTED] Center services to [REDACTED] during the pendency of this action, Respondent shall reimburse [REDACTED] for such [REDACTED] Center services paid by [REDACTED] or his parents during the cessation of services.

SO ORDERED, this 29th day of March, 2005.



Catherine T. Crawford
Administrative Law Judge