

05-0528460

FILED

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

2006 JAN 31 P 11: 43

█, by and through his  
Parents, █. and █,  
Petitioner,

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

OFFICE OF STATE  
ADMINISTRATIVE HEARINGS

OSAH-DOE-SE-0528460-15-WJB

BRYAN COUNTY SCHOOL  
DISTRICT,  
Respondent.

FINAL DECISION

1. INTRODUCTION

Petitioner █. filed an administrative due process hearing under the Individuals with Disabilities Education Act (IDEA) on June 28, 2005. █ moved for partial summary determination on July 14, 2005. Respondent Bryan County School District (BCSD) responded and, after a reply, the Court entered an order on August 24, 2005, finding that there existed Undisputed Material Facts (UMF), but that other disputed facts required resolution.

The due process hearing was held in Richmond Hill, Georgia, on August 29, 2005, and continued on August 30, 2005, August 31, 2005, and September 1, 2005. Mr. Jonathan Zimring represented the Petitioner. Ms. Susan Cox represented the BCSD.

II. FINDINGS OF FACT

A. Background Facts

1.

Petitioner █. was born on █, █, and lives with his parents in Richmond Hill, Georgia, within the jurisdiction of the BCSD. █. is of school age and disabled within the

meaning of that term under IDEA (UMF).

2.

█████. was first served in a public educational program in the state of Washington. He was diagnosed as a child with a communication disorder and with autism. █████. received a program in Washington which provided him occupational therapy based upon limitations in fine-motor skills, and which addressed his significant delays in speech, language and communication and his significant cognitive delays. At first, he had difficulties in this program. Later, when he was thirty-one (31) months of age, he began an Applied Behavior Analysis (ABA) program. Several months later, this was changed to ABA and a Verbal Behavior (VB) program coordinated with inclusion and focusing on generalized and new skills. ABA therapy is a behavioral approach using a behavioral reward system. VB is a type of ABA discrete trial training directed to increase language and communication, and thereby to increase learning. (T. 134-135, Exhibits P4 through P12)

3.

An individualized education program (IEP) meeting was held the following spring, or approximately a year and a half after the initiation of the VB programs. School personnel identified that █████. "has made marked progress with this type of instruction and environment," addressing his ABA therapy. They identified increases in communication and his use of verbal approximations, and recommended continued verbal behavior therapy. (Exhibit P12, p. 95)

4.

█████. moved with his family on his father's transfer to ██████████ Bryan County, Georgia In the 2003-2004 school year and at the time of this hearing Petitioner was receiving an inclusion

program at ██████ School, in Savannah, Georgia, with transportation to and from that school and a 1:1 aide to facilitate inclusion. The school requires the use and availability of the aide. This is a half-day program, now five (5) days per week. He also receives related services including weekly occupational therapy and language therapy. He receives direct 1:1 ABA/VB therapy, in discrete trial training, using the Assessment of Basic Language and Learning Skills (ABLLS) grid as a development and criteria list for at least twenty-five (25) hours per week and, with adequate support and resources, up to forty (40) hours per week. (Exhibit P40 and P41)

5.

His parents have hired private therapists for the ABA program. The aide role is shared between his mother and therapists. His mother supplements the ABA/VB therapy with direct services each week and maintains the data on a daily and weekly basis. This is then reviewed by the ABA consultant. (T. 1430-1438)

**B. Mrs. ██████'s Contacts with the BCSD**

6.

In May of 2004, during the last week of school, Mrs. ██████ contacted Walt Barnes, the principal of the ██████ Primary School. Mr. Barnes gave Mrs. ██████ a tour of the school and put her in touch with the school secretary who gave her the enrollment information. (T.1046-1047)

7.

Until a child is enrolled in the District, a referral packet for special education services is not returned to the parent. As part of the enrollment process, the child must have a current Eye, Ear, Dental form, Georgia Form 3300, also known as the EED. This form was not returned to the

District until July 27, 2004. Until the EED was completed and returned, the child could not be considered enrolled in the District. (T. 156-159, 1047-1048)

8.

Mrs. [REDACTED] returned the necessary documents to enroll [REDACTED] on July 27, 2004, but she did not return the consent to evaluate at that time. That form was returned to the school on August 3, 2004. (T. 159-160, Exhibit R8, p. 164)

9.

[REDACTED] was evaluated by Laura Murphy, the school psychologist, Linda Cole, an Occupational Therapist, and Monica Kerr, a Speech Language Pathologist. These evaluations were completed by August 13, 2004. The evaluators for speech-language and occupational services found [REDACTED] eligible for these related services. (Exhibit R4, pp. 97-98, 106)

10.

The first IEP meeting was held on September 13, 2004. At this meeting Ms. [REDACTED] was asked to sign a consent to placement form even though the IEP had not been completed. The first meeting was continued at the request of Mrs. [REDACTED] so she could obtain additional evaluations of her son as well as bring in proposed goals and objectives for the IEP team to consider. Because of scheduling problems, the next IEP meeting was not held until October 6, 2004. Ms. Lynette Turns, the BCSD's teacher for autism who was given responsibility for drafting possible goals and objectives for [REDACTED] for the IEP meeting, did not receive the new information from Ms. [REDACTED] until the afternoon prior to the meeting. This IEP meeting ended with Mrs. [REDACTED] informing the IEP team members that she had decided to continue with her home program and to keep [REDACTED] in private school; therefore she would not be signing the consent to placement form which she had

again been asked to sign during this meeting. After the IEP meeting, Mrs. [REDACTED] did not get back in touch with the District until January, 2005. At that point, she asked Ms. Rebecca Kelly, the Director of Special Education Services for BCSD, to complete a Public Availability Statement for their TriCare Insurance coverage. ( T. 565-577, Exhibits R1, R2, R3 R.8, p. 175)

### C. Evaluations Performed by the BCSD

#### 11.

The certified school psychologist, Laura Murphy, who conducted the psychological evaluation of M. [REDACTED]. Mrs. Murphy was aware, from [REDACTED]'s background information, that he was autistic. Her evaluation was to determine where he was functioning, at that time, in order to assist the IEP team in developing its goals and objectives. Mrs. Murphy's test results indicated that [REDACTED] was moderately autistic. Mrs. [REDACTED] provided Mrs. Murphy's with copies of the evaluations performed on [REDACTED] while he was in Washington State. Mrs. Murphy's findings were commensurate with the reports provided to her by Mrs. [REDACTED] from Washington State. (T. 920-956, Exhibits R15, p. 188-194)

#### 12.

Ms. Monica Kerr, the speech evaluator, failed to include a speech evaluation report in the proposed IEP for Mrs. [REDACTED] to review; however, she did include an eligibility report finding that [REDACTED] was eligible for speech and language services, and that Mrs. [REDACTED] concurred with his eligibility. The eligibility report described the test results administered by Mrs. Kerr, her results, and her conclusions as to [REDACTED]'s special needs. ( Exhibit R4, p. 97-98)

13.

█. was given an Occupational Therapy (OT) Evaluation by Linda Cole, an Occupational Therapist. Ms. Cole prepared a written evaluation and discussed her findings with Mrs. █ at the September 13, 2004, IEP meeting. The proposed OT goals were discussed at the October 6, 2004 IEP meeting by Mrs. Turns. (Exhibits R1, pp. 6-8, R-2, pp. 64-66 and R4, pp. 106-108)

**D. Other Evaluations**

14.

Dr. █, █, █'s treating physician, prepared a report dated September 17, 2004, on █. which was provided to the IEP team by Mrs. █ Dr. █ recommended thirty to forty hours per week of ABA/VB therapy with extensive one-to-one training, inclusion with a one-to-one aide, continued speech therapy two to four hours per week, and occupational therapy of one hour per week Dr. █ also recommended that there be collaboration and consistency between home, ABA programs, school and speech therapies. His report concluded that "[█] has made improvements in many areas since starting the type of autism strategies listed above." (Exhibit P-38)

15.

Written reports from Ms. Kemper Todd, █'s inclusion teacher, and Ms. Jennifer Farris, the Lower School Head, at █ School, were available to the IEP team. They generally supported █'s inclusion and participation in all classroom activities, except for some of the academic work, his need for an aide, and his improved ability to participate in ordinary classroom instruction. Both of these documents note improvements he made over time and his lack of adverse behavior. (Exhibits P40 and P41)

16.

The assessment and progress report from the Speech and Hearing Center in Savannah described [REDACTED]'s speech and language services and concluded that he "continues to make steady progress on his communication skills." The recommendation was to continue to increase [REDACTED]'s functional verbal language. There was no recommendation that alternative communication systems be utilized. (Exhibit P42)

17.

Ms. Cherish Twiggs, an associate behavior analyst who has worked with [REDACTED] for a number of years, prepared a report dated September 25, 2004. She reported that [REDACTED] made progress in many areas within his formal program. She recommended consistency and coordination with teaching strategy between the school and home program. (Exhibit P43)

**E. Evaluations Since the Last IEP Meeting**

18.

Ms. Jean Godwin, a board certified associate behavior analyst, prepared an assessment and evaluation of [REDACTED] current through May, 2005. She observed [REDACTED] at home and at school and looked to get a measure of [REDACTED]'s skills. She reviewed his ABA program, instruction, and objectives and generally found that they were appropriate for him. She identified the progress [REDACTED] would make and had made in this program. Her recommendations were specific to the management of his ABA/VB program. (P58)

19.

Ms. LenEll Kelly, behavioral consultant at the Matthew Reardon Center, Savannah, Georgia, prepared an assessment and evaluation of [REDACTED] dated May 22, 2005. She conducted

observations in home-school settings, interviewed parents and therapists and reviewed reports. She also completed a behavioral assessment and behavior intervention plan and a report of the Vineland Adaptive Behavior Scales. After observing [REDACTED]'s participation in his school program, and his need for one-to-one therapy there, she determined that this is an appropriate learning environment because [REDACTED] appeared to be making progress in his ABA program. Ms. Kelly recommended thirty (30) hours per week of direct behavioral intervention in addition to the school-based program, one-to-one behavioral therapy, organized and trained and coordinated between environments. Additional language services were recommended. The provision of such services by behavior therapists and continued assessments of these needs were recommended. This report continued to document the appropriateness of the private services provided and [REDACTED]'s progress in such services. The behavioral assessment specifically addressed [REDACTED]'s functional and antecedent behaviors and the consequences necessary to impact those behaviors. It was developed through actual assessment, based on specific interventions and evaluation information, and described in detail the necessary interventions. (Exhibits P60, P61 and P63)

#### **F. Parental Notice**

20.

Prior to the first IEP meeting, Mrs. [REDACTED] received a written notice of the time, place, location, and purpose of the meeting. A brochure setting forth her parental rights was included with this notice. The minutes of the first meeting reflected that parental rights were offered and explained. Mrs. [REDACTED] was offered another copy of her parental rights at the conclusion of the October 6, 2004 IEP meeting. (Exhibits R4, p. 85 and R7, pp. 154-157)



## **G. The Proposed IEP**

### **21.**

The proposed IEP was presented to the mother at the October 6, 2004, meeting. In summary, it called for 30 segments of instruction per week to consist of 10 weekly segments of general education, 18.5 segments of self-contained instruction and .5 segments of occupational therapy. The proposed IEP stated that the IEP team would meet to consider Extended School Year (ESY) services by May 20, 2005. The IEP included a behavior intervention plan, but no functional behavior assessment. The plan listed the target behavior as "staying on task," and listed potential reinforcers as well as potential consequences. The proposed IEP also included a "Goals and Objectives/Benchmarks" section. This section had short term objectives in the areas of cognitive, adoptive, social skills, communicative skills, motor skills, language and articulation. The occupational therapy goals in the IEP were that [REDACTED] would independently grasp a pencil with the correct force and that he would correctly cut out three simple shapes with fewer than three cutting errors. (R-5)

## **H. Methodology**

### **22.**

The proposed IEP presented to Mrs. [REDACTED] does not specify the methodology to be used by the teachers in educating [REDACTED]. BCSD uses what is classified as an "eclectic system" in which the teacher chooses among eleven different methodologies to meet the needs of the various autistic students. The ABA/VB is utilized extensively but not exclusively. This system was set up for BCSD in conjunction with a program at Nova Southeastern University headed by Dr. Christine Reeve. (T 560-561, 577)

During the IEP sessions Mrs. [REDACTED] asked what exactly what methodology would be used on her son. At one point the answer from Monica Kerr was "whatever one works." Mrs. [REDACTED] repeatedly asked why BCSD would not use the ABA/VB methodology exclusively with her son since it would be consistent with the instruction he had been receiving and had proven to be effective with him. Ms. Kelly answered this question during the second session by saying "this is a public school and we use a lot of different methodologies for a lot of different children." (Exhibit R2, P.55) During her testimony, Ms. Kelly stated that BCSD simply could not offer the "one method" program to any of its special education children because of state and federal education requirements applicable all students. (T.194).

#### **I. Goals and Objectives**

23

Some of the goals and objectives set forth in the IEP fail to have measurable criteria and fail to establish a baseline so that improvement can be monitored. For example, the language goal in the IEP is that "[REDACTED] will increase pragmatic language skills." Also, some goals are inappropriate because they call for [REDACTED] to master skills he already has. (T. 311- 312)

#### **J. ESY Services**

24.

The proposed IEP stated that the need for ESY services would be considered by the IEP team May 2005. The IEP team deferred making a decision on ESY services because it wanted to determine, after [REDACTED] began school, what critical needs could be worked on during extended

school year services. If it appeared that that such a need existed, the team could reconvene at any time. (T. 224-227, Exhibit R5, p. 115.

#### **K. Functional Behavioral Assessment**

25.

The IEP team did not conduct a functional behavioral assessment plan on [REDACTED], prior to developing the functional intervention plan because data on how [REDACTED] behaves at home or in a private setting would have limited use in predicting how he will behave in a public school classroom. (T. 228-230)

#### **L. Parental Counseling and Training Services**

26.

During the IEP process parental counseling and training services were not offered to Mrs. [REDACTED] as a related service. It was the conclusion of the IEP team that such services were not needed since Mrs. [REDACTED] already had extensive knowledge and training in the field. (T. 1207-1208, Exhibit R5)

#### **M. Assistive Technology Assessment**

27.

BCSD did not conduct an assistive technology assessment prior to the IEP. The proposed IEP stated that [REDACTED] would use assistive technology devices such as a picture schedule and a communication notebook. The BCSD concluded that such devices did not require an assistive technology assessment. Once [REDACTED] was being served in the classroom the staff would be able to come in to perform a more comprehensive assessment to determine the best way to enhance his classroom performance. He could then receive additional technological support if needed. (T. 232 and 595, Exhibit R5, p. 119)

#### **N. Notice to Parent of Reasons for IEP**

28.

At no time during the IEP sessions was Mrs. [REDACTED] given written notice by the IEP team referencing all the factors (evaluation, procedure, test, report etc.) which led the team to conclude that the program set forth in the IEP is more appropriate than the one she was suggesting. (T. 252-253)

#### **O. Request for an Independent Educational Evaluation (IEE)**

29.

The issue of an IEE first arose during the first IEP meeting on September 13, 2004, when Mrs. [REDACTED] expressed concern over the results of the District's evaluations and findings and stated that she wanted the IEP to look at some independent evaluations of her son. In the minutes of the meeting Mrs. [REDACTED] made the following notation: "Parent will follow up to get an independent psychological, speech, and/or OT evaluation reviewed by all those involved in developing the present levels of performance & in developing the IEP." Mrs. [REDACTED] did not state during the September 13, 2004, meeting that she wished the school district to pay for these assessments. (T. 66-67, R1, pp. 4-6, R4, p.86) Prior to the second IEP meeting on October 6, 2004, Mrs. [REDACTED] made a formal written request for an IEE. Mrs. Kelly did not see the letter until the day before the meeting, and, thus, had no time to respond. Mrs. Kelly discussed the request at the IEP meeting with Mrs. [REDACTED], and explained the District's position that its evaluations were sufficient and that it would not pay for an IEE unless ordered to by an administrative law judge after a due process hearing. She further explained the filing of a due process request would result in a "stay put" without [REDACTED] receiving any services. Mrs. Kelly offered to go back to her office and file a due

process request that day, but she urged Mrs. [REDACTED] to put the IEP in place and then the due process hearing procedure could take place with her son receiving services in the interim through "stay put." Mrs. [REDACTED] agreed to put aside her request at least temporarily. Mrs. [REDACTED] never repeated her request for an IEE during the remainder of the IEP meeting. (T. 188-191, Exhibit R-2, pp. 28-33)

#### **P. Request for reimbursement**

#### **30.**

In this action Mrs. [REDACTED] is seeking, among other items, reimbursement for expenses of transportation, a one-to-one aide, tuition in the inclusion program, private therapists, occupational therapists, and coordinating and training meetings. This Administrative Law Judge finds that such services are important components in a program which has given [REDACTED] a reasonable and adequate opportunity to make educational progress and has allowed for such progress. (T.1430-1449, Exhibit P73).

### **III. CONCLUSIONS OF LAW**

#### **A. General Law**

#### **1.**

The pertinent laws and regulations governing this matter include the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. 300 *et seq.* and Ga. Comp. R & Regs. at Chapter 160-4-7 (DOE Rules). IDEA 1997 was reauthorized in 2004, with its reauthorized portions to become effective in July 2005. The relevant events in this case all occurred while the provisions of IDEA 1997 governed.

#### **2.**

Georgia Regulations place the burden on the school districts to show that an IEP is appropriate

and that it provides a free appropriate public education (FAPE). DOE Rule § 160-4-7-.18(8). The United States Supreme Court has recently held in *Schaffer v. Weast*, No. 04-098-54 \_\_\_ U.S. \_\_\_ (November 12, 2005) that, because the IDEA is silent as to which party has the burden of proof, courts should use the default rule of requiring the party seeking relief to bear said burden. Because the issue of whether individual states may override the default rule was not before it, the Supreme Court declined to rule on this issue. In this case, the hearing was held under the assumption that the Georgia Regulations would control the burden of proof and that BCSD would, therefore, have the burden of proving its IEP was appropriate and that it provided FAPE. For this ALJ to change the burden of proof at this stage would be unfair to the Petitioner. This ALJ thus rules that the burden of proof remains with the BCSD.

3.

█ has a right to FAPE. 20 U.S.C. §1401(a)(18)(1997); GDOE Rule § 160-4-7-.04(a)(2000); *Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982). "The fundamental objective of the IDEA is to empower disabled children to reach their fullest potential by providing a free education tailored to meet their individual needs." *Cory D. v. Burke County Sch. Dist.*, 285 F. 3d. 1294 (11<sup>th</sup> Cir. 2002). FAPE is accomplished through the timely implementation of an IEP tailored to meet the needs of each particular child. *Loren F. v. Atlanta Independent Sch. Sys.*, 349 F.3d 1309 1312-13 (11<sup>th</sup> Cir. 2003); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 654 (11<sup>th</sup> Cir. 1990).

4.

To determine whether a student has been denied FAPE the Supreme Court has developed a two-part test:

First, has the state complied with the procedures set forth in the Act? And second, is the individual education program developed through the Act procedures reasonably calculated to enable the child to receive educational benefits?

*Rowley*, 458 U.S. at 206-07.

5.

"The [IDEA] contains a detailed procedural component." *Manecke v. Sch. Bd. of Pinellas Cty, Fla.*, 762 F.2d 912, 917 (11<sup>th</sup> Cir. 1985). The "elaborate and highly specific procedural safeguards embodied in IDEA is the mechanism from which a substantively appropriate education results." *Rowley*, at 205-06. The test under *Rowley, supra*, is not only whether any procedural due process violations occurred, but whether any such violations affected [REDACTED]'s substantive educational rights. A procedural violation that does not impact [REDACTED]'s education in a substantive way is not a denial of FAPE. *Doe v. Alabama State Dept. of Education*, 915 F.2d 651, 661 (11<sup>th</sup> Cir. 1990); *Adam J. v. Keller Independent Sch. Dist.*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003).

**B. Procedural Issues**

**1. Timeliness**

6.

Pursuant to Georgia DOE Rule 160-4-7.07, when a parent signs a consent for initial evaluation during the summer vacation period, the school district has 90 days from the receipt of the parent's consent to get an IEP in place. The BCSD received Mrs. [REDACTED]'s consent to evaluate on August 3, 2004 before school started on August 6, 2004. The BCSD thus had until November 1, 2004 to get an IEP in place. Under the circumstances the BCSD acted in a timely fashion in holding the IEP meetings.

## **2. Notice of IEP Meeting and Rights**

7.

DOE Rule § 160-4-7-.09(4)(a)(1) requires that the parent be included in the IEP Committee meeting. Section (5) addresses notice to the parent and requires that the meeting be held at a mutually agreeable time and place. The invitation to the meeting must indicate the purpose, time, and location of the meeting and who will be in attendance. The parent must also be informed of his or her right to invite others to the meeting. I find and conclude that this information was provided to Mrs. [REDACTED] in an appropriate manner. DOE Rule § 160-4-7-.05(5) requires that a parent receive notice of his or her rights under the IDEA. I also find and conclude that this information was provided to Mrs. W. in an appropriate manner.

## **3. Requirements of an IEP**

8.

The Petitioner has alleged that the IEP process in this matter violated numerous federal and state laws and regulations as well as BCSD's own special education manual. When examining these allegations, the first question is whether a violation has occurred. I do not find that such violations occurred when Mrs. [REDACTED] was not offered parental counseling and training, when the IEP plan developed a behavior intervention plan without conducting a functional behavior assessment, or when an assistive technology assessment was not conducted prior to the IEP meeting.



9.

The IEP process does not have to be perfect. As was stated above, a procedural violation that does not affect a student's education in a substantive way is not a violation of FAPE. I find that BCSD did violate DOE Rule § 160-4-7-.08 by deferring a decision as to whether ESY would be offered to [REDACTED] but this procedural violation did not affect his education in a substantive way.

**4. Completion of IEP Before Placement**

10.

The placement determination follows the development of the complete IEP as part of IDEA statutory scheme aimed at individualization. "Because the regulations require an individual program and placement based on each child's individual needs rather than a categorical assessment of the child's disabilities, the placement may not be made before the IEP is completed." *Corey H. v. Board of Education of the City of Chicago*, 995 F.Supp. 900, 906 (N.D. Ill. 1998).

There is a limited exception to the rule that a final IEP must be developed before placement. Interim IEPs may be developed to assist a public agency in determining the appropriate placement of a child. In such instances the school district must (1) set out the specific conditions and time lines for the trial placement; (2) ensure the parents agree to the interim placement before it is carried out; (3) set forth specific time lines for completing the evaluation, finalizing the IEP, and determining the appropriate placement for the child; and (4) conduct an IEP meeting

to finalize the IEP. *Letter to Saperstone*, 21 IDELR 1127 (1994). It is clear from the record in this case that the BCSD was not following the above procedure to develop an interim IEP. Instead BCSD presented the IEP to MRs. [REDACTED] as a final IEP.

Creation of an IEP for placement purposes must include the full development of goals, objectives and services. *See Michael Livingston v. DeSoto County Sch. Dist.*, 782 F.Supp 1173, 1177 (N.D. Miss. 1992). In this case, the record is clear that the BCSD attempted to get Mrs. [REDACTED] to sign a consent to placement form before the IEP was fully developed. This was attempted both the September and October IEP meetings. This procedural violation had a substantive effect on the Petitioner's right to receive FAPE.

#### **5. Prohibition against predetermination**

##### **11.**

"Predetermination" of the IEP is the failure to fully consider a child's program or placement because of the resistance to change or alter the existing program. It violates the right of parent participation and individual consideration. *Deal v. Hamilton County Sch. Dist.*, 392 F.3d 840 (6<sup>th</sup> Cir. 2004). After carefully considering the evidence in this case, I have concluded that the representatives of the BCSD had predetermined to place [REDACTED] in the existing eclectic program which they had developed with the assistance of the Nova Southern University because there was little evidence in the transcripts of the IEP meetings of a willingness by the representatives of BSCD to seriously consider the alternative methods or programs suggested by the parent. BCSD appears to be very proud of the overall accomplishments of its program. There is nothing wrong with such pride as long as it does not work to blind one to other possibilities. This is another

serious procedural violation which denied ██████ FAPE.

#### **6. Measurable goals requirement**

##### **12.**

An IEP must have measurable criteria in goals and objectives. 34 C.F.R § 300.347(a)(2)(1999); GDOE Rule 160-4-7-.09(6)(a)(3)(2000):

A statement of measurable annual goals including benchmarks or short term instructional objectives to enable the student to be involved in and progress in the general curriculum and to meet other educational needs resulting from the disability.

*Id.* The United States DOE explained:

Measurable annual goals, including benchmarks or short-term objectives, are critical to the strategic planning process used to develop and implement the IEP for each child with a disability.

34 C.F.R. Part 300, App. A (1999) (IDEA 1997).

Even some of the Respondent's own witnesses admitted in their testimony that some of the goals and objectives of ██████'s IEP failed to have such measurable goals and objectives. This was a serious procedural violation and denied ██████ FAPE.

#### **7. Specification of methodology**

##### **13.**

If the proposed IEP is reasonably calculated to provide the child with educational benefits parents may not compel a school district to provide a specific program or specific methodology. *Rowley*, 458 U.S. 208. However the school district must provide specialized instruction to meet the unique needs of a child with a disability and must adopt the content, methodology and delivery of instruction to address these needs. It must therefore set forth in the IEP with

specificity the content and methodology it intends use to provide services to the child. 34 C.F.R. §300.26(a)(3). The IEP in the present case failed to inform Mr. [REDACTED] of said content and methodology. This omission was a serious procedural violation and denied [REDACTED] FAPE.

#### **8. Parental Notice of Reasons for IEP**

##### **14.**

During the IEP process parents are entitled to written notice of each factor (evaluation, report, test, record, report etc.) which caused the IEP team to select one program of education over another program suggested by the parents. 34 C.F. R. § 300.503 (b). Mr. [REDACTED] in this case received no such written notice and this was a serious procedural violation which affected [REDACTED]'s right to receive FAPE.

#### **9. The Right of Independent Evaluation or IEE**

##### **15.**

Pursuant to 34C.F.R. § 300.502, a parent has a right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, When a parent requests an IEE a school district "must, without unnecessary delay" either (1) initiate a due process hearing to show that its evaluation was appropriate or (2) ensure that an IEE is provided at a public expense.

##### **16.**

In this particular case I do not find that BCSD had an obligation to provide Mrs. [REDACTED] with an IEE at public expense. It is true that she made a written request for an IEE just prior to the October IEP meeting; however, she did agree during this meeting to set aside the request to see if agreement could be reached on services she would allow her son to receive from BCSD during

the pendency of due process hearing. If Mrs. [REDACTED] still wished BCSD to pay for such an IEE after she had rejected their offer of services and terminated the IEP meeting, she had the obligation to renew her request. This she failed to do.

### C. Substantive Test of the IEP

17.

After the review of the procedural violations, the second prong of the *Rowley* case is whether the IEP which was developed was reasonably calculated to enable a child to receive educational benefits. *Rowley*, 458 U.S. at 206-207. While the Petitioner contends that ABA is the only appropriate, scientific-validated program for children with autism, The parties presented conflicting expert evidence on this topic. It is not necessary to resolve this issue in order to decide the case before me. For purposes of this case, I have concluded that the IEP was not reasonably calculated to enable [REDACTED] to receive educational benefits, not because it did not rely exclusively on the ABA/VB methodology as requested by Mrs. [REDACTED] but because it was not specific enough in its methodology and goals and objectives.

### D. Reimbursement

18

A parent may object to FAPE and later seek public financial responsibility for the placement under DOE Rule Section 160-4-7-.03 (referencing 34 C.F.R. § 300.403(b)) and Section 160-4-7-.15(2). Reimbursement is proper if the school district has not made FAPE available to a student in a timely manner and the private placement is appropriate. Section 160-4-7-.15(2)(a)(2). The "private placement may be found to be appropriate by an ALJ . . . even if it does not meet the state standards of education provided by the state or LSS." Section 160-4-7-.15(2)(a)(3). For the

reason stated above I find that FAPE was not provided [REDACTED] by BCSD in a timely manner. I also find that the Petitioner has presented convincing evidence the private placement was appropriate.

19.

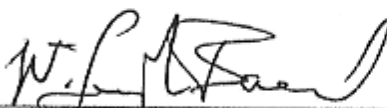
Pursuant to 20 U.S.C. § 1412 (a)(10)(C)(iii)(I)(aa)-(bb) an ALJ may limit or deny reimbursement for private placement if a parent did not adequately place the school district on notice of his/her intention to hold the district responsible for her private placement services or otherwise acted unreasonably. Reimbursement may not, however, be limited or denied if compliance would result in physical or serious emotional harm to the child; the school prevented the parents from complying; or the parents had not received notice of the potential consequences of non-compliance. 20 U.S.C. § 1412(a)(10)(C)(iv) In this case I have concluded limitation of reimbursement is appropriate under the facts before me. At the conclusion of the last IEP meeting, although Mrs. [REDACTED] certainly stated she did not think that the proposed IEP was appropriate, she failed to notify BCSD, either in writing or otherwise, that she intended make the BCSD financially responsible for [REDACTED]'s private placement until she filed the due process hearing request on June 28, 2005. Mrs. [REDACTED] failed to set out a compelling reason for such a delay in notifying the BCSD of her intention to seek reimbursement until many months after the last IEP. I also conclude that none of the factors set forth in 20 U.S.C. § 1412(a)(10)(C)(iv) is present in this case which would prevent such a limitation of reimbursement. Under these circumstances, I find that the BCSD should only be required to reimburse M.W.'s parents for expenses incurred the current 2005-2006 school year.

#### IV. DECISION

Bryan County School District failed to offer █████ a free and appropriate public education as required by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* This ALJ orders, as the sole relief provided the Petitioner in this matter, reimbursement to the parents of █████ for the expenses of the following: (1) up to 25 hours per week of discrete trial direct ABA/VB Therapy plus bi-weekly meetings and quarterly training sessions to coordinate such services (2) transportation expenses to and from M.W.'s inclusion program at the rate of \$.32 per mile, (3) the expenses of a one-to-one aide in the inclusion program (if the person is a third party) for the time he is there, (4) tuition paid for the inclusion program, and (5) one hour per week of occupational therapy. To be reimbursed by BCSD these expenses must occur during the 2005-2006 BCSD public school year. This ALJ further orders, to the extent that there is any discrepancy in those amounts, that the reimbursement rates sought in exhibit P73 of hourly rates and training rates are necessary, appropriate, reasonable and subject to reimbursement, as to each therapist.

This Administrative Law Judge denies each and every request for relief not granted above. This includes the request for reimbursement for the evaluations performed by Dr. Lund and Ms. Kelley.

Issued this the 31<sup>st</sup> day of January, 2006.

  
\_\_\_\_\_  
W. Joseph Baird  
Administrative Law Judge