

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

Case No.: IDPH-FY-08-12-038 / Salem School District

DECISION

I. Introduction

A Pre-hearing Conference was held on January 17, 2008 and a Pre-Hearing Order was subsequently issued. The issues in this case involve the appropriateness of the IEP as well as Parents' request for reimbursement for certain expenses for services including those of an ABA consultant, an occupational therapist and a request for compensatory education.

The Parents presented first by agreement of the parties. Parents' Exhibits are identified as ("P" and the School Districts' are identified as "SD").

II. Procedural Violations

There were no allegations of procedural violations in this case.

III. Discussion

The first witness for the Parents who testified telephonically was Raphael Castro who has a Ph.D in clinical psychology and is a pediatric neuropsychologist specializing in the autism spectrum. Dr. Castro first met the Student in 2006 when the Student was eighteen months of age. His first report is set out at SD 116 and his second at SD 121. These were generated in the spring and fall of 2006 respectively. The Student responded well to ABA discrete trial therapy and made significant strides. The Student was also introduced to interaction with typically developing children in an integrated setting. Discrete trials break down a typical task in to minute components with repetition and a systematic approach. By age three the Student was ready for incidental teaching. Dr. Castro's third report issued in June, 2007 is at SD 134. He

recommended that the Student be provided with occupational therapy and speech language therapy directly two times per week both individually and in a classroom setting. Dr. Castro also recommended that the Student continue with discrete trial therapy going forward. The Student has been receiving approximately twenty-five hours per week of intervention therapy for eighteen months. Dr. Castro also recommended that professionals working with the Student have extensive experience in ABA therapy. He recommended a full day year round program with thirty hours per week of ABA therapy, one half in discrete trial therapy and one half in incidental treatment. He further recommended that the Student be with typically developing peers as much as possible. Dr. Castro has not seen the Student since June, 2007.

On cross examination, Dr. Castro acknowledged that he is not a medical doctor and that he typically recommends ABA therapy for autistic children because it is very common for treatment of the disorder. It is proven to work also. He indicated that the Student has responded very well over the last eighteen months and that it would be difficult to say where the Student would stand on the spectrum of severity. Dr. Castro spend two hours with the Student for each of the three evaluation for a total of approximately six hours. Dr. Castro has not observed the Student in school and has not spoken to the District personnel. Dr. Castro acknowledged making recommendations and other due process hearing for similar periods of ABA therapy for similarly disabled children. It is his practices' goal to optimize the potential and development of students seen by his group.

Isis Lee testified as the Parent's second witness. She is currently working with the Student and is a high school graduate of two years of college education. She presently works one-on-one with the Student and the Student's preschool has done so as a paraprofessional since December, 2007. Her resume is at SD 271. She attended a four day workshop which address

teaching autistic students using ABA therapies and she also attended a behavior modification workshop and a social skills workshop. She works at the Endless Opportunities local preschool. She acknowledged that data collection sheets used by the prior aide (Jesse) are no longer being used.

On cross examination Ms. Lee indicated that she has experience working one-on-one with an autistic child for approximately one year in a town in Massachusetts. She has worked with autistic children in the SEED Program in District. In her opinion the Student does fairly well in the Endless Opportunities Preschool.

Jessie Reardon testified as the third Parent witness. Her resume is at P351. She is certified in ABA and will have Masters Degree upon completion of three more courses. She has previously been employed at the New England Center for Children and the Children's Pyramid. She was previously the Student's ABA therapist providing direct services five days per week, four hours per day and also worked as a consultant with respect to the Student's program. She indicated that she took data on everything that she did with the Student. The Student began with full-time ABA discrete therapy and transitioned to half time at home and half time at preschool and now is up to five days per week at the preschool (Endless Opportunities). Endless Opportunities is a mainstream preschool with six to ten students in the class in question. Ms. Reardon also worked with the Student on discrete trials after school hours. The Student mastered the program relatively quickly so it needed to be modified to provide new challenges. SD 48 describes Ms. Reardon's consulting work with the Student which was not at the request of the District. Three of her reports are set out at SD 161, 175 and 179 covering a period between August, 2006 and May 2007. Ms. Reardon indicated that the Student had a quick rate of learning and response to the ABA approach. SD 180, 181 and P 240 are documents evidencing

the data collected by Ms. Reardon for the incidental therapy that was provided. She is involved in the transition from Early Opportunities to the SEED Program. Meagan Proulx took over for Ms. Reardon due to Ms. Reardon's pregnancy in the fall of 2007. Ms. Proulx had no prior ABA training and very little experience. Ms. Proulx worked with the Student for thirty-four days and promptly resigned. Ms. Reardon was hopeful that Ms. Proulx would work out well as her replacement, but this did not occur due to the abrupt resignation. Isis Lee then stepped in. P229 is a set of Management Guidelines put together by Ms. Reardon for individuals working with the Student at the SEED Program. Ms. Reardon also put together a typical schedule for the Student which is set out at P 231. She also created a Behavior Chart which is set out at P 234. In her opinion by December, 2007 the Student was making excellent progress overall but social skills with peers were a problem. P 432 is a document referencing the observations Ms. Reardon did on January 24, 2008 with the Student. She noticed that there was a lack of prompting by the therapist for social interaction. In her opinion the Student is with all disabled children in the Seed Program and this is not appropriate or helpful. Ms. Reardon reviewed certain data from the District which is set out at SD 299 and felt that it was very confusing and difficult to work with. P 340 is a report of an observation done by the Birch Tree Center and Ms. Reardon was in agreement with the findings of that report. She felt that the Student is losing skills that the Student had when the Student was working with Ms. Reardon. She agreed with the recommendations of the Birch Tree report set out at P 345. With respect to the Parents' exceptions to the most recent IEP she was in agreement that the lack of one-on-one work with a qualified backup is a problem with the IEP. There is also insufficient supervision of the one-on-one aide and consults should occur at least three hours per week. She disagreed with numerous

aspects of the Behavior Plan set out at SD 114. Ms. Reardon billed at \$25.00 per hour for her ABA therapy work and \$75.00 per hour for consultation.

On cross examination Ms. Reardon agreed that she is not a board certified behavior analyst and that her work with the Student counts toward her 1,500 hours of necessary field work for her certification including the data collection. Ms. Reardon further acknowledged that she did not provide her data collection logs (P 238 - 308) to the School District because the Parents asked her not to. Essentially, she indicated that she prepared those documents for the Parents for purposes of this hearing. She also agreed that the District did not ask her to train Ms. Proulx or Isis Lee but that the Parents had asked her to provide that training. She indicated that she and the District could not agree on a rate of compensation for her to continue as a consultant.

The Mother testified as the next witness. She indicated that the Student's early childhood development was "fine." The family began to notice odd behaviors including fanning, wheeling around and spinning around behavior. The Student was evaluated at fifteen months and the physician told the family to keep an eye on things. At eighteen months an autism check list was completed and supported a possible diagnosis of autism. The family was then referred to doctor Castro and contacted Early Intervention. The diagnosis was then confirmed. The Student began receiving twenty hours per week of ABA therapy in the home with additional hours from another therapist. The Student was also receiving speech, language and occupational therapy and the Student responded well. According to the Mother language "exploded" and the Student was able to imitate gross motor skills and begin to point at things. By November, 2007, the Student was ready for preschool with adequate supports. Endless Opportunities was chosen as a result of referrals from people known to the family and the Student began two days per week and then increased to three days per week. In the Mother's opinion the Student did well at Endless

Opportunities. Ms. Reardon continued to provide service for eight hours per week at home to supplement the Endless Opportunities program. There was also a private ABA therapist on Saturdays and a play group over the summer of 2007. There was a full OT Evaluation and weekly services began in June, 2007. Dr. Castro wanted speech language services to continue.

The Mother first contacted the District in the summer of 2006 and then again in November, 2006. The Mother observed the SEED Program in November, 2006. The first team meeting occurred in April, 2007 and the second in May, 2007. The Parents wanted all evaluations completed prior to the next meeting which was set for July 2007 (SD 28). At that time, the District felt that all it needed was an academic evaluation. P 321 begins a series of records of contact logs between the Mother and the District. The third meeting took place in early August, 2007 and the plan was to meet in September to develop the IEP. The District suggested the SEED Program for the Student, however, the Mother was concerned that there was no opportunity for interaction with non-disabled peers and the District has no public preschool. P 322 is a record of a conversation between the Mother and Rachel Borge of the District that took place in August, 2007. The Mother wanted the District to accept Dr. Castro's recommendations and Ms. Borge indicated that she would share them with the team and get back to the family. The next meeting occurred on September 12, 2007 (SD 33) and a draft IEP was presented to the family. The Mother felt that it was not comprehensive enough, had no direct related services, and no discrete one-on-one ABA trials. The draft IEP set out at SD 35-A had never been seen by the Parent before the exchange of exhibits. The Mother did not agree with the offered IEP (P 64 going forward), and prepared a letter of exceptions and went over each of those in her testimony. The Mother testified that the District never offered OT or speech language therapy in the SEED Program prior to the inception of this hearing. She notified the

District that the Parents would seek to have the services they felt were necessary provided privately and would seek reimbursement from the District. The Parents continued to have those services provided and want to be reimbursed. SD 40A is another draft IEP that had never been seen by the Parents prior to the exchange of exhibits. The next meeting occurred on October 6, 2007. The Parents brought advocates with them and an IEP was offered (P 96). The Parents issued another exception letter again, notifying the District that they would be seeking reimbursement for their expenses in obtaining services privately. (SD 43). The Mother felt that the replacements hired for Ms. Reardon were inadequately trained to provide the necessary services for the Student. At the time that Ms. Reardon was still working with the Student prior to her leave for pregnancy and attempting to train Ms. Proulx the Parents were paying Ms. Reardon privately. SD 44A is yet a third draft IEP that the Mother claims to have never seen prior to the exchange of exhibits. The Mother had a discussion with a behavior analyst, Tom Benjamin in October, 2007, but he was unable to provide appropriate time to work with/consult with the Student's educators due to other commitments. Subsequently, Ms. Borge provided yet another draft IEP to the family (SD 54A) and a meeting was held on November 9, 2007. At that meeting a Behavior Plan was not addressed. On November 25, 2007, the Parent found out by e-mail that Ms. Proulx had abruptly resigned. As it turned out Ms. Proulx had notified the District of her resignation on November 13, 2007, but the family was not notified until her resignation was effective. Yet the District allowed Ms. Proulx to continue to work with the Student and be trained by Ms. Reardon whom the Parents were paying. SD 87 is correspondence from the Parents to the District from early December, 2007 asking that the District look to the Birch Tree Center for assistance given that Ms. Reardon had stopped working due to her pregnancy. The next draft IEP which was considered to be the final offer by the District was provided to the

Parents and again the Parents listed their exceptions and indicated their intention to seek reimbursement. SD 89 is correspondence from Patricia Stone refusing to pay for services that the family was requesting reimbursement for. The Mother did an observation of the Student and was subsequently told by the District that she would not be allowed to observe any further. P 340 is the Birch Tree report and their recommendations were similar to those previously made to the team including the ABA discrete therapy and incidental teaching at Endless Opportunities. On January 16, 2008 the Parents submitted a list of exceptions. The Mother then testified regarding the relief being sought as a result of what she believes to be an appropriate IEP offered by the District.

On cross examination the Mother acknowledged that the Child's Pyramid evaluation of May 5, 2007 (SD 187), indicated that the Student's skills all appeared to be age appropriate and that the Student at that time was not eligible for OT or speech language therapy. The Mother indicated that she disagreed with the Child's Pyramid report and requested a revision of the report yet did not notify the District of this request and Children's Pyramid in fact did revise the report. The Mother indicated that she has not received reimbursement from her insurance company for Ms. Reardon's services.

The Father then testified. He indicated that he spoke to Rachel Borge regarding the transition once the Student turned three years of age. He was concerned that there was no overlapping transition of providers between Ms. Reardon and Ms. Proulx so that family paid Ms. Reardon to continue to provide services and is seeking reimbursement for that. (SD 40). The Father was very concerned when Ms. Proulx abruptly resigned and did not believe that there was anyone properly trained to provide the ABA services. With respect to the Birch Tree report the parties were in agreement that Birch Tree would do an evaluation and issue a report. The Father

went ahead and contacted Birch Tree to try to expedite the report and evaluation and was successful. Birch Tree's bill is approximately \$1,250.00 for the report and the District has refused to pay the bill so that the Parents are seeking reimbursement. The Father also indicated that the family did not want to provide Ms. Reardon's data sheets to the District because the District was unwilling to pay for her services and in addition, all of the data sheets have been at the Endless Opportunities school since Ms. Reardon left, and the District never asked to see the data. The Father then outlined the reimbursement being sought with respect to Ms. Reardon totaling approximately \$8,600.00. There were also expenses for the occupational therapist of approximately \$960.00 which when added to the Birch Tree report total approximately \$10,900.00.

The Parents rested at the conclusion of the Father's testimony.

Rachel Borge, Assistant Director of Student Services testified as the first District witness. Her resume is at SD 254 - 256. She supervises and coordinates the preschool program including the SEED program. All students in the SEED program are identified with educational handicaps. She indicated that the staff at the SEED program are familiar with the ABA principles. Ms. Borge first met the family in the fall of 2006 and the Mother wanted to observe the SEED program and did so in November. The Mother felt that the SEED program was not appropriate for the Student as of that time due to some acting out behavior that she observed by a child in the program. The District received a referral from the Children's Pyramid (early intervention provider) (SD 178), as the Student was approaching three years of age and a referral meeting was set up. The Children's Pyramid report (SD 187), indicated that the Student's skills are in the average range in many areas. Based on that report Ms. Borge felt that the Student would not need a great number of services and the team felt that it had a good picture of the Student except

for the required academic assessment. That assessment disclosed that academic skills were at or above average for age level. Meagan Proulx had worked in the SEED program and had experience working with autistic children so Ms. Borge felt that Ms. Proulx could work well with this Student. She further indicated that a transition plan from preschool is not customary and that she did not envision the quantity or sheer volume of data that Ms. Reardon was compiling. At the October 5, 2007 team meeting a new draft IEP was prepared and the team agreed to do some updated evaluations for speech language and OT (SD 206 and 212), and the team met in early November to review these and look at another draft IEP. Ms. Borge went over the six exceptions to the proposed IEP and disagreed with each of them. She felt that the Student is doing well in the SEED program. With respect to the failure to retain Ms. Reardon, it was Ms. Borge's position that Ms. Reardon wanted more compensation than she was worth and she also felt that Ms. Reardon was too close to the Student so as to create the appearance of a conflict of interest. With respect to the Birch Tree evaluation, it was Ms. Borge's position that the Parents somehow improperly contracted with Birch Tree for the evaluation and report issued creating the insinuation that the District should not be responsible to pay for the Birch Tree expense.

On cross examination Ms. Borge agreed that the Student cannot receive ABA training in a group setting with non-disabled peers in the SEED program. She further acknowledged that the Behavior Plan was not attached to the IEP that was sent to Parents though it was subsequently provided (approximately three weeks later). She further acknowledged that there is no plan for incidental ABA trials in the IEP. Ms. Borge has not done an observation of the Student and the draft IEP did not include the recommendations of the Parents. In addition, the paraprofessional servicing the Student lacks necessary ABA incidental therapy skills/experience.

Tom Benjamin, Consulting Behavioral Analyst testified as the next witness for the District. It was his position that Jill Carney at the SEED program was qualified to provide discrete trial training and has been doing so for seven years. Mr. Benjamin did not make any recommendations to the team, though he testified that the Student belongs in a mainstream preschool. He indicated that the Data Collection Sheets collected by Ms. Reardon were not necessary and that those typically used by Jill Carney at SEED are more useful.

On cross examination Mr. Benjamin acknowledged that he works almost exclusively to school districts, has not been involved in preparing a Behavior Plan, that he has never seen the Student in a group setting, and that he has not worked with Isis Lee.

Michelle Bragdon, Occupational Therapist for the District testified as the next District witness. She devotes approximately half of her time in district working at the SEED program. She is familiar with ABA though not trained in it and she knows the Student who came in for an evaluation. She recommended consult services in this case and she observed the Student at the Endless Opportunities program. She was looking for an additional OT evaluation because she felt that the other OT evaluations were conflicting. She wrote the motor skills goal in the proposed IEP. She felt that the OT goals in the proposed IEP were appropriate. She currently works one-on-one with the Student each week and the Student is also in a group.

On cross examination Ms. Bragdon indicated that she has not consulted with the staff at Endless Opportunities because there is no signed IEP.

Aida Couture testified as the next District witness. Her resume is at SD 262. She has been in district approximately twenty-nine years and provides the speech and language services for the SEED program. Doing about twenty-five percent of her average week and has been involved with the Student since September, 2007. She proposed a consult for the speech

language therapist and believes that the consult only would be sufficient. She recommended an evaluation of the Student and she felt that the Parents and the team were not on the same page with respect to the issue of the speech language being consult versus one-on-one. She performed an unannounced observation of the Student and Endless Opportunities and later did a formal observation. She agreed that some direct speech services would be appropriate for the Student. She felt that the Student's language skills were in the average range though pragmatics were more questionable. She felt that the speech language goals and objectives in the IEP were appropriate and she defined the Student's deficits as being mild.

Patricia Stone, Director of Student Services testified as the final witness for the District. She attended the November 9, 2007 meeting as well as the resolution meeting and did an informal observation of the Student at SEED and is familiar with the Endless Opportunities preschool program. She also has reviewed Dr. Castro's reports and felt that the Student's scores were generally in the average range and that the Student's disabilities are mild. The main issues for the Student at the SEED program are social pragmatics. With respect to the District's decision not to hire Ms. Reardon, Ms. Stone indicated that Ms. Reardon lacked sufficient experience and seemed to be more of an advocate for the Parents.

IV. Request for Findings of Fact and Rulings of Law

The District did not submit any numbered Requests for Findings of Fact. The Parents submitted extensive and excessive Request for Findings of Fact. They are ruled upon as follows:

Requests No. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 69, 70, 71, 72, 73, 75, 76, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, and 97 are granted. No. 98 is denied. All other Request are neither granted

nor denied, though to the extent that they are inconsistent with the Decision below are deemed to be denied.

The Parents submitted Request for Rulings of Law. They are ruled upon as follows:

Rulings Nos. 1, 2, 4C, 5, 6, and 8 are granted. Rulings No. 3 is neither granted nor denied. Rulings Nos. 4A, B and D, 9, 10 and 11 are denied. With respect to Rulings No. 7 that request is granted, except for the Request that the Hearing Officer award interest at the rate of eight percent per annum for the private ABA services.

The School District's Request for Rulings of Law are ruled upon as follows:

Rulings Nos. 10, 11, 12, 15, 19, 25, 30, 31 and 32 are denied. Ruling No. 24 is neither granted nor denied as is Ruling No. 14, all other Rulings are granted.

V. Decision

The Hearing Officer is unable to agree with the Parents that compensatory education services are called for in this case and the request for compensatory education services is denied. The Hearing Officer is in agreement with the Parents that the IEP's presented by the District for inadequate to provide FAPE. The Student's ABA discrete trial services will be provided in a one-on-one setting at the SEED program for a minimum of one hour per day and will not be accompanied by any generalization time in the SEED classroom. The family gave adequate and sufficient notice of its request for reimbursement on numerous occasions as a result of the insufficient IEP's offered by the District and the Parents are entitled to reimbursement for the private ABA services provided by Ms. Reardon in the amount of \$8,668.00, and the occupational therapy services in the amount of \$960.00 and the cost of the Birch Tree Center Outreach program observation and report in the amount of \$1,250.00.

VI. Appeal Rights.

If either party is aggrieved by the Decision of the Hearing Officer set forth above, either party may appeal this Decision to a Court of appropriate jurisdiction. The Parent has the right to obtain a transcription of the proceedings from the Department of Education. The District shall notify the Commission of Education when either the District or the Parent seeks judicial review of the Decision.

VII. Statement of Compliance with ED-1128.22 (b).

If neither party appeals this decision to a Court then the District shall within ninety (90) days provide to the Office of Legislation and Hearing (Department of Education) and the Hearing Officer a written report describing the implementation of this Decision and provide a copy to the Parents. If the Parents do not concur with the District's report, the Parents shall submit their own report through the Commission of Education.

SO ORDERED.

Dated: March 10, 2008

By: John P. LeBrun, Esquire
Hearing Officer