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# DOCKET NO. 330-SE-0505

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PETITIONER

vs.

GREGORY-PORTLAND INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

## DECISION OF THE HEARING OFFICER

### **Procedural History**

The above-captioned request for due process hearing was filed with Texas Education Agency on May 31, 2005. Pre-hearing conferences convened by telephone conference call on June 24, 2005, and February 22, 2006, and the case was set for hearing on August 23-24, 2005, with a decision deadline of September 6, 2005. Numerous unavoidable delays associated with extensive discovery in the case, and the schedule conflicts of counsel and the Hearing Officer, caused the trial to be continued and the decision deadline extended multiple times. The evidentiary hearing convened on April 24-26, 2006, and testimony and exhibits received in evidence. The parties were ordered to present closing argument in written form and additionally to brief certain legal issues. The final briefing deadline was set for July 20, 2006, with a decision deadline of August 11, 2006. Counsel requested additional time for briefing, which request was granted, and the decision deadline re-scheduled to August 31, 2006. Owing to the volume of documentary evidence and depositions needing to be reviewed

in the case, counsel concurred in a further extension of the decision deadline to October 5, 2006.

## **Petitioner's Complaint and Relief Request**

Petitioner's initial request for hearing was not specific with respect to the nature of violations alleged nor the relief requested. A pre-hearing conference was held to discuss Petitioner's complaints and relief request, among other matters.

Petitioner in the pre-hearing conference alleged the following violations against the District:

1. Petitioner contends that student, a student with Autism, requires the specialized instructional program known as Applied Behavior Analysis (ABA).
2. Petitioner contends that the District refused to consider and provide the ABA program student's parents had been using in his home school.

Petitioner's request for relief, premised on a showing of violations as alleged, consisted of orders mandating the District to provide student with a private educational program that utilizes the ABA methodology, probably delivered in the home-school setting where student had been educated by his parents.

Following the initial pre-hearing conference and the parties' discovery, and at the second pre-hearing conference, Petitioner added an additional allegation of IDEA violation against the District, specifically that goals and objectives proposed by the District for student were not appropriate because they were not specific and measurable. Petitioner added a claim for relief in the form of public reimbursement for prior educational services provided for student at parent expense in the home school.

The following witnesses testified in the hearing for Petitioner: \*\*\* Parent, \*\*\* teacher and home-school instructor, \*\*\*, Ph.D., Psychologist, director of the TREAT program, and ABA expert;\*\*\*, Parent \*\*\*, Teacher and student's home-school instructor; \*\*\*, student's home-school instructor. The following witnesses testified for Respondent:\*\*\*, TREAT / ABA consultant and trainer;\*\*\*, Ed.D., Special Education expert; students, Ph.D., Psychologist and Licensed Specialist

in School Psychology; \*\*\*, Ph.D., Teacher, student's former classroom teacher;\*\*\*, Assistant Superintendent for the District.

## Findings of Fact

1. Student is at the time of the hearing an \*\*\* year-old student who has resided within Gregory-Portland I.S.D. at all relevant times. He has been diagnosed with Autism, Speech Impairment, and Mental Retardation. Tr. 22, R-10.
2. Student enrolled in the District's PPCD program on this \*\*\* birthday, in 2000, until August 2002. When he joined the PPCD program his special education eligibility was Speech Impaired. He demonstrated behavior difficulties considered at the time being due to hyperactivity and to difficulty comprehending situational requirements. Tr. 24-26; P-58.
3. Student worked on a variety of IEP objectives in the District's preschool program in 2000 and 2001. His IEP from October 2000 included approximately 36 objectives, of which student mastered about \*\*\*. R-26.
4. \*\*\*, Ph.D., a psychologist, evaluated student on 11.5.01, when student was \*\*\* years of age, upon referral from student's physician. Dr. \*\*\* interviewed student and his parents and administered the WPPSI-R, WRAT-3, PPVT-III, CARS, VABS, Children's Apperception Test, and other projective testing. R-10
5. Student was referred to Dr. \*\*\* because of his slow social, verbal, and intellectual development. Dr. \*\*\* testing yielded a full scale IQ score of \*\*\* and a PPVT standard score if \*\*\* (age equivalent \*\*\* months). Student. had no academic skills at that time and his adaptive skills were all low or moderately low, ranging from 1-0 to 2-4 age equivalents. Student's score on the CARS using his parents as informants resulted in a rating in the\*\*\* Range Dr. \*\*\* diagnosed student with Autistic Disorder and Mild Mental Retardation. R-10.
6. According to the report of student's parents to Dr.\*\*\*,student was then enrolled in public school and receiving speech therapy three to five times a week, and working in class on sorting things by color, shape, etc. R-10.
7. The District summarized student's student progress or mastery on objectives as of March 2002 nearing the end of the school year. Progress was classified in a ranking that reflected "no progress," "some progress," good progress," "almost completed," and "completed." R-25
8. Objectives that were "completed" at the percent mastery for achievement targeted in the IEP included the following:
  - a. follow rules in group games led by adult (80%)
  - b. cooperate with adult request (80%)
  - c. match picture to picture (80%)
  - d. vocalize five animal sounds (80%)
  - e. attempt to walk broad balance beam (80%)
  - f. walk 4" balance board (80%)
  - g. paste using 1 finger (80%)
  - h. wash hands and face (80%)
  - i. communicate with family - make a choice of 2 activities (80%)

- j. assist with clothing during toileting. R-25
9. As of March 2002, student had roughly 28 other IEP objectives that were not mastered, although on some of these, degrees of progress were noted. Some were objectives carried forward from the 2000 IEP. Student did not progress to mastery during the PPCD program on objectives concerning speech or ability to verbalize. With regard to objectives for pointing to pictures of named objects, naming objects by their sound, counting five objects, naming three shapes, naming five colors, identifying home objects, and using two-word sentences his progress was described as “some” or “good,” but not nearing completion of mastery for the objective. R-25; Tr. 29.
  10. Student's ARDC convened on May 1, 2002, for the purpose of reviewing assistive technology evaluation. At that time student was receiving 40 minutes per month of O.T. services, six one-hour sessions per year of in-home training, and six one-hour sessions per year of parent training. R-7, R-21
  11. Student's behavior plan at of May 1, 2002, concerned difficulty adapting to new situations, difficulty accepting responsibility for his own actions, and inability to communicate effectively. Parent behavioral concerns included social delay, short attention span, low frustration tolerance, and communication delay. Target behaviors for the BIP included following classroom rules, maintaining eye contact, following a toileting schedule during class time. Behaviors to decrease included pinching, screaming, and off-task behavior. R-7, R-21
  12. The behavior plan developed on May 2002 to address target behaviors to increase for student included a loose menu of approximately 17 different consequences that were available at the discretion of student's teachers or paraprofessionals. Similarly, 6 possible consequences for inappropriate behaviors were identified, again to be applied however the staff saw fit. R-7, R-21.
  13. At the time of this May 2002. ARDC meeting, IEP documentation did not reflect whether student had or had not made progress on any IEP objectives or behavior objectives in his BIP. R-7, R-21.
  14. The District submitted in evidence at hearing two sets of documentation for the May 2002 ARDC meeting. One of them contains evaluation codes on IEP objectives for the 2001-2002 school year that were entered in the IEP documentation on or after August 1, 2002, and others entered in January 2002. None of the evaluation codes reflect that student \*\*\* objectives as of the date on which the evaluation codes were entered. R-7, R-21
  15. Documentation from the May 2002 ARDC meeting did not reflect discussion of Dr. \*\*\*'s evaluation. Student's parents did not talk about private educational services or request public reimbursement of any private services from student's May 2002 ARDC. P-54.
  16. Student's parents found out about the TREAT program, based out of Houston, where children with Autism are taught with a specific technique referred to as discrete-trial applied behavior analysis (“ABA”). ABA techniques have a substantial history of research tending to establish their effectiveness with many children who have Autism. student's parents had student evaluated in Houston in June 2002 and subsequently opted for a home-based program from TREAT that provided an initial three-day training in August 2002 by a TREAT representative

- for student's parents and about fifteen other individuals whom the parents had enlisted as volunteers to work with student in his home school. The three-day TREAT training provided consisted of didactic information in the nature of an introduction to the theory of Autism and behavior therapy, demonstrations of the teaching methodology, guided practice by volunteers, and supervised practice by volunteers. R-36, P-21, P-69A-D.
17. Student's parents provided him with instruction at home using discrete-trial ABA methods taught by the TREAT staff, with continuing support from TREAT. They decided in August of 2002 to use this program with student instead of returning him to attend the public school. The parents felt that student stood to make more progress in the ABA program than he would make in the school district's program. Tr. 31-36.
  18. The TREAT representative from Houston provided follow-up trainings for the parents and volunteers in student's home school program on September 2002, January 2003, April 2003, July 2003, May 2005, and January 2005. Additional consultation took place in February 2006. P-59, P-61, P-62, P-63, P-65, P-66, P-68.
  19. In the three-day training volunteers were taught background information about Autism and then shown the techniques, which involve among other things breaking tasks down into small component steps and teaching and rehearsing each step repeatedly, providing reinforcement for correct performance. The trainer from the Houston program demonstrated the methodology to the volunteers, then observed and corrected while each volunteer practiced the techniques in role play, then actually working with student. Thereafter, the first six months of the home-based program was very intensive, with the primary representative from the Houston TREAT program making all-day site visits every four to six weeks for the first three or four months, interspersed with phone or email conferences and videotapes of teaching sessions. Thereafter, TREAT's representative faded out his involvement, tapering off to a one-day site visit every three months interspersed with phone and email conferences and videotapes of teaching sessions. R-36, R-38, P-69A-D.
  20. Student's parents videotaped various aspects of Treat's training of the parents and volunteers, and also taped ordinary instructional sessions with student to document behaviors and obtain input from the TREAT consultant about ABA methodology. P-62, P-63, P-65-69.
  21. Student's parents attended an August 2003 ARDC meeting with the District that convened on August 26, 2003, recessed, and re-convened and concluded on September 2nd. The District proposed IEP goals and objectives for student. that in some cases were continuations of prior objectives but also introduced new objectives. The ARDC also proposed a behavior program, related services including speech and OT, parent training, and in-home training. The District proposed a one-month transition to move student from the home-school environment to public school attendance. P-53.
  22. The District's ARDC notes reflect that ABA was mentioned as a methodology that student had been receiving, but did not document ARDC discussion concerning ABA methodology. The District's ARDC minutes document one

- disagreement with the parents concerning the length of student's transition back to school and the use of a "shadow" from student's home-school program to accompany student and assist student with his transition. The parents requested beginning with delivery of services on the school campus for a portion of the school day with a gradual increase that would end up with student in a full school day. The District refused this portion of the parents' demands because of the state's prohibition against "dual enrollment," believing apparently that the transition schedule the parents proposed would implicate dual enrollment. P-53
23. Student's parents also had prepared a tape demonstrating student's instruction with the ABA methodology and documenting student's improvement with this methodology over the previous year, along with other materials about student's home program. The purpose of this material was to show the district what the parents had been doing and what they had been working on with student so the school could consider this information in planning student's program in school. The District's representatives at the ARDC refused to consider any information offered by the parent concerning student's home school program. They refused at the meeting convened on August 26th, and refused a second time when the parents attempted to have the ARDC consider this information on September 9th. The District has not subsequently offered to consider information from the parent regarding the ABA program for student, as used in student's home school program. Tr. 37-38.
  24. Student's ARDC that convened in August – September 2003 did not discuss any particular instructional methods or techniques that would be used in working with student. P-53.
  25. Student's parents following the fall 2003 ARDC meeting approached the District's administration in order to persuade the District to consider utilizing the home-school ABA program with student. The District told student's parents that the District would never even consider using an ABA program \*\*\*. Tr. 59-60.
  26. Student initially worked for about six hours daily in the TREAT program with the trained volunteers on a rotating schedule depending on each volunteer's availability. Eventually, though, most of the volunteers reached the limit of their availability to commit time working with student and so the amount of daily training had to be reduced. There was a period of several months when the TREAT programs were not implemented or were implemented only partially. Student's parents finally decided to hire one individual full time to work as student's trainer. R-36, R-38.
  27. Student's tasks in the TREAT program were selected from a workbook that had all of the programs contained in it. These were essentially the lesson plans for working with student in the TREAT program. Programs were identified for student to work on based on his mastery level, and the selection of programs was made by TREAT staff - primarily one TREAT therapist who worked consistently with student and the volunteer trainers. R-34, R-36, R-41.
  28. Essentially the TREAT program began working on student's learning readiness skills, including basic compliance, and then progressed to other, more advanced programs. There was a sequence or progression built in the program, and lesson plans for program activities. The TREAT program was more structured and

- intensive than what the public school proposed for student at the time student began in the TREAT program. R-34, R-39, R-40.
29. Dr. \*\*\* from the TREAT program completed a follow-up evaluation of student in July 2005. Results of several developmental measures were analyzed and compared to the student. had made progress, characterized this in terms of months of gain in developmental equivalence rather than in specific skills added. Administration of the CARS using appropriate methodology indicated reduction in the number of different Autism symptoms student displayed in July 2005 compared to the previous evaluation. P-19
  30. Dr. \*\*\* July 2005 evaluation reported raw-score changes on the VABS. While these do not identify the specific skills acquired, they do indicate areas of adaptive functioning where student made progress. Student's most significant gains were seen in the area of communication, with raw-score increases reflecting skills gained in both receptive and expressive functioning. Gains also were noted in social skills and daily living skills. P-19.
  31. Sometimes volunteers who worked with student had to bring their own children to sessions of working with student. and on those occasions the other children would either remain in the room or sometimes participate in the program, depending on the program content. This occurred on the average a couple of times per month. Sometimes having other kids in the room was distracting for student and sometimes not, but overall student's parents saw this as potentially beneficial because of their eventual goal of transitioning student back into a school environment. R-36, R-40.
  32. Having three or four other children present during student's instruction or down time probably would have been beneficial to student because of socialization. The discrete-trial ABA program student received through TREAT could have been implemented in a public school classroom, had the public school been willing to implement it. The TREAT program worked for student and he progressed showing mastery of skills in the program. And TREAT ABA-oriented programs are susceptible of being implemented and often are implemented in conjunction with other services such as speech therapy or assistive communication technologies where appropriate. R-33, R-39, R-40; Tr. 118-194.
  33. On a few occasions volunteers who worked with student were for personal reasons unable to work with student in the classroom set up at his parents' home, and so had to take him to their own homes or to a park to work with him. This adaptation was approved by student's parents and by the TREAT program on a limited basis, to help ensure that student was not conditioned to perform program activities just in one setting. R-36, R-38.
  34. Student did not get assigned grades as such for his work in the TREAT program. Instead, data were recorded in a notebook where his programs were listed and divided out, indicating the number of trials attempted on a particular task and out of those, the number where student performed the expected behaviors. Documentation, which usually required about two to five minutes per lesson, was done at the conclusion of the lesson while student was taking a break or working on something else. R-35, R-36, R-39, R-40, R-42.

35. Student's parents and volunteers who worked in the TREAT program kept detailed records of all interactions with student, including records demonstrating the percentage of trials that student completed successfully in each program activity. P-24-28.
36. Physical restraint was not used with student in the TREAT program. Student's parents and volunteer instructors did administer corporal punishment, even though corporal punishment was not an approved technique in the TREAT program. On one occasion his parent became frustrated with student's oppositional behavior and "popped" him, referring to the use of corporal punishment in the nature of a spank with the hand. This had some effect in reducing the behavior. On other occasions student was pinched on the elbow as a consequence for his pinching of his parent and other instructors in the same manner. Student's pinching remained a serious problem. One of student's volunteer instructors, a certified teacher, utilized the pinch-back consequence and found it effective to stop student's pinching. Others did not use it. R-35, R-36, R-40; Tr. 440-441.
37. Student's parents used corporal punishment for teaching purposes themselves, and permitted other instructors to use corporal punishment with student as a consequence for more serious behaviors such as kicking, hitting, spitting on other people, or being physically aggressive or intrusive. The corporal punishment condoned by the parents generally was limited to spanking on the leg or bottom, slapping or spanking on the hand or face, and pinching student's elbow. R-33, R-36, R-38, R-41, R-42.
38. Some volunteer instructors who worked with student believed in the use of corporal punishment and others did not. Corporal punishment was used in the school district, and had some effect in reinforcing teachers' authority, but no one recalled if corporal punishment was used with student when he was attending school. The use of corporal punishment with student in his home school program appeared to be the only area where teachers or trainers consistently deviated from the TREAT program. The use of corporal punishment for problem behaviors by some volunteer instructors and not by others caused inconsistency in program for dealing with such behaviors, particularly pinching. R-35, R-38, R-40, R-41.
39. The TREAT trainer from Houston sometimes recommended that programs in which student was not making progress be put on hold temporarily until the trainer could visit, observe and suggest a modification. R-35, R-38, R-42.
40. In January 2005 the parents questioned whether to continue student in the TREAT program or go with a public school program. The parents understood from Dr. \*\*\* that the TREAT program was designed to be a three-year program, and that time had passed. Also the parent was not seeing progress on student's part in January 2005. Many volunteer therapists had dropped out or were preparing to drop out of the program because of time demands, so student was getting less instruction than previously. Student had shown dramatic progress early in the implementation of the TREAT program, but there was less progress after direct TREAT involvement was reduced, and after problems arose in having people to consistently implement the program. P-46, R-35, R-38; TR. 78-84.
41. Two professional educators participated as volunteers in student's ABA home-school program including a volunteer with a graduate degree and special

education training. Both educators believed that the TREAT program was appropriate for student and that student. made progress with the ABA methods used. Likewise, the District's principal expert witness Dr. \*\*\* testified that overall student made progress and received educational benefit in his home school using the ABA methodology under TREAT's direction. Student's former teacher in the District's PPCD program met student's mom socially on one occasion, and was invited to observe and did observe student in briefly working in his home-school program, and was positively impressed how instructional tasks had been set up for student Tr. 97-117, 364, 401, 440-448.

42. The goal of student's parents has always been for student to get back in the public school system, ideally full time in regular classes. The parents feel, however, that the District has not supported their goals or their views regarding student's needs. R-36.
43. Student's parents approached the District about extended year services and enrolling student in school in spring 2005. At an ARDC meeting on May 25, 2005, the District developed the following objectives for ESY:

<b>ESY Objectives</b>
Write name, familiar sp words, attention to size, spacing, spelling & form of letters.
Hold pencil in correct position.
A through F – maintain snds to letters
Name letters of alphabet – upper case
Name letters of alphabet – lower case
Recognize numbers [illegible] to 50
Recognize numbers 50 to 100
Behavior – refrain from inappropriate behaviors such as pinching others and eating of inedible things
Socialization skills – sit with others for longer period of time
Use appropriate greetings and farewells
Clearly articulating rejection of objects of actions (no thank you, stop it please etc.)
Identify randomly presented consonant letters
Verbally produce the sounds represented by the consonant letters
Match consonant letters to appropriate picture representing the sound – a/apple, b/ball etc.

44. The District in that May 2005 ARDC meeting also developed annual IEP objectives with the anticipation that student would return to school in fall 2005. The following are examples of these objectives, which include roughly six additional pages of objectives including objectives for speech therapy. Student's parents rejected these objectives proposed by the District. R-14.

Pre- Kindergarten developmental skills:

<b>Annual IEP Objectives</b>
Demonstrate directional concepts; prepositions
Name or identify likes and differences in objects
Play singing games
Use 4-6 word sentences
Repeat 3 single digits
Classify by size, shape, color etc.
Identify common objects by their silhouette, sound, use
Follow safety rules; care of self, clean-up area, return items, with prompts
Match animal with their home
Accept adult authority
Use "K" sound
Use "Y" sound
Use "G" sound
Participate in the Pledge of Allegiance
Identify or point to the world globe
Walk safely to destination
Follow rules with little understanding of why
Perform assigned task until timer rings – teacher pre-set
Focus attention on one item when fantasy is interrupted
Discriminate same or different word pairs

45. Many objectives contained in this proposed IEP were not measurable, in the sense that it would not be possible to rate, nor for any two people to agree, whether student had met the objective or not. This is facially apparent, and also supported by the testimony of Dr. \*\*\*, a special education expert. R-14; Tr. 346.
46. The District noticed the student's parents of this May 2005 ARDC meeting, indicating that the purpose of the meeting was to transfer student back to attendance in the District. Student was considered a transfer student because he had been home schooled, even though he resided within the District. Notes of deliberations of this meeting refer to observations of student conducted pursuant to assessment "in progress," however the record contains no assessment data, no parent consent for assessment other than the consent signed in 2000, and no record documenting that the District had undertaken any testing or observation of student in the time frame of the May 2005 ARDC meeting. The only documented observation was that undertaken on April 3, 2006, in which the District's testifying expert observed the classroom and resource room in which the District would have provided student's instruction had he enrolled, and observed aspects of student's instruction in the TREAT program. R-14.
47. In the May 25, 2005, ARDC, student's parents requested among other things that the District provide student. with a full-day private school placement, which the District refused. R-14.

48. Review of videotapes showing student at work on various tasks confirms the testimony of the certified teachers that worked with student. In the ABA program, to the effect that that student's ability to engage in tasks and the scope and complexity of his learning activities have advanced with use of the ABA program. Progress is apparent from the tapes themselves but also was noted by Dr. \*\*\*, who also reviewed them. P-73, P-74, P-69, P-71; Tr. 274-285, 321-377.
49. For the time period actionable in this case, and indeed since 2002 with some interruptions, student has received services under the general direction of the TREAT program utilizing the ABA model. While the data recording system is not fully evident from the evidence in the record, it is evident that detailed daily records were maintained on student's behavior and his response to interventions. P-24, P25, P26, P27, P5-16.
50. The consistency in implementation of the ABA program with student decreased, following the reduction of direct involvement of TREAT staff, and \*\*\* in particular, with student's home-school instructors. 274-285, 321-377.
51. TREAT representatives including Dr. \*\*\* who had evaluated student on multiple occasions believed that discrete-trial ABA methodology was helpful and brought about progress for student. Neither of the District's principal expert witnesses at trial, Dr. \*\*\* and Dr. \*\*\* contradicted; neither testified that ABA methodology is inappropriate for student. However Dr. \*\*\* in particular expressed concern about the implementation of student's current program in the home setting with no access to peer interactions or related services. Dr. \*\*\* never actually saw student, but Dr. \*\*\* had made a detailed observation and reviewed many parent-generated videotapes of student's instruction. Tr. 285-377, 274-285, 321-377.
52. ABA methodology is one appropriate set of strategies for instructing student. It is the only strategy as of now that student, a very severely disabled child, is familiar. Although student's trial with the TREAT implementation of the ABA program has run considerably longer than is typical for children with Autism utilizing this methodology in the TREAT program, Dr. \*\*\* recommended continuing it with \*\*\*. P-19.

## Discussion

Generally speaking, IDEA entitles every child with a disability to receive individualized instruction along with sufficient related and supportive services to permit the child to benefit from the instruction. 20 U.S.C. 1412(a)(1); *Board of Education v. Rowley*, 458 U.S. 176 (1982). IDEA also mandates procedural safeguards to ensure that parents can participate meaningfully in development of an individualized education plan (IEP) for the child. 20 U.S.C. 1414(d); *Rowley, supra*; *Honig v. Doe*, 484 U.S. 305 (1988). The Fifth Circuit in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997), offered

guidelines to gauge IDEA compliance. The child's IEP must be designed specifically for the child's unique needs, must be individualized based on assessment and performance, and must be supported by services that permit the child to receive meaningful benefit from instruction. The IEP must be delivered in the least restrictive environment (LRE), and in a collaborative and coordinated manner by the key "stakeholders." A school district's proposed IEP is presumed to be appropriate. A parent who challenges the IEP must prove by a preponderance of evidence that the IEP was not developed according to procedural requirements, or that the IEP failed or would fail to provide a free and appropriate public education in the least restrictive environment. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983). Hearing officers strictly scrutinize the record for procedural defects that caused a loss of educational opportunity for the student, or that infringe the parents' opportunity to participate in the IEP process. *Adam J. v. Keller I.S.D.*, 328 F.3d 804, 39 IDELR 1, 103 LRP 18199, (5th Cir. 2003); *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990); *Roland M. v. Concord School Comm.*, 910 F.2d 983 (1st Cir, 1990).

### **District Compliance with Procedural Requirements**

The issue of District compliance with IDEA procedural mandates is analyzed first, and in this instance is governed by the decision in *Deal et al. v. Hamilton County Board of Educ.*, 392 F.3d 840 (6th Cir. 2004). The Deal court's interpretation of IDEA requirements for development of an appropriate IEP are not at odds with interpretations articulated in Fifth Circuit decisions concerning the sort of IEP errors and omissions that merit relief. Despite having narrowed the scope of substantive and procedural errors that entitle aggrieved parents to IDEA relief, the Fifth Circuit has maintained concern about one particular IDEA procedural safeguard. That is, the requirement that parents of eligible students be afforded the opportunity to participate in developing their child's IEP, and that school districts ensure that parents are "active participants [whose] recommendations and requests in both programming and placement decisions" reflect "collaborative efforts between [the] parents and school." *Houston ISD v. Bobby*

*R.*, 200 F.3d 341 (5th Cir. 2000). The requirement of parent participation has otherwise been phrased in terms of IDEA's assurance that parents have the right to actively participate in the crafting of the IEP, and that their opportunity to participate in the IEP formulation process not be "seriously infringed," or that the violation not cause "substantive harm to the child or his [sic] parents." Adam J., *supra*, and see cases cited therein.

Student's parents testified most credibly regarding the response they encountered from the District in August and September 2003 when they attempted to present the District's ARDC representatives with information about what was going on with student in his home school using ABA methodology following his withdrawal from public school. The information brought by the parents was rejected by District ARDC representatives owing to the District's pre-determination that student would not be provided with ABA methodology in school. The greater weight of evidence establishes that the District never offered to consider ABA programming for student in any action that it took up to the time of the due process hearing. In 2005, the District proposed an IEP that was not based in input from the parents or individualized attention to student. There is not evidence that any school official acting in an official capacity observed student at home, reviewed parent records about student's TREAT program, or sought to evaluate student, in connection with that May 2005 proposed IEP.

The inference is difficult to escape, that the District, beginning at least in 2003, made an administrative pre-determination to distance itself from ABA methodology and as a result shut student's parents out. This was not the sort of minor procedural glitch that hearing officers typically excuse. Compare *Lundvall v. Board of Educ. of Anne Arundel County*, 44 IDELR 61 (D. MD 2005) with *In re Wisconsin State Educ. Agency*, 106 LRP 2147 (SEA WI 1005). The District's own principal expert witnesses at hearing never maintained that discrete-trial ABA methodology was inappropriate for student. At any rate, this pre-determination in the instant case had the effect of excluding student's parents from the IEP process, first in 2003 ARDC meetings, then throughout the intervening years,

and finally in an ARDC meeting in spring 2005 when the District presented draft objectives that were unrelated to any current assessment of student despite student's availability, and omitted to address instructional strategies despite parent request for the ABA method. Treating student as a "transfer" student at that ARDC meeting, even if technically correct, was in some sense disingenuous. Student was well known to the District, resided within the District's jurisdiction at all relevant times, and was potentially accessible to the District to assess, had the District been willing to give student's parents some hearing about his program. So in sum, the District's conduct of excluding the parents from the IEP process by refusing to consider parent proposals and materials from student's ABA program constituted a per se violation of student's right to a free appropriate public education. *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992). The issue here is not so much the appropriateness of ABA methodology as the District's persistent refusal to hear what the parents had to say about it.

#### **Appropriateness of Proposed IEP Objective**

Even if it were necessary to consider specifically the appropriateness of student's proposed IEP objectives from May 2005, see *W.G.*, *supra*, the facts and testimony show that too many of objectives were not measurable, and not based on current data that was potentially available to the District. Student did not move to the District from another city. He resided within the District, and was owed certain duties, and could have been evaluated and attention given to the extensive ABA data that his parents maintained, for the purpose of formulating transition goals and objectives. The evidence does not help to explain why this was not done; the evidence supports an inference that the District's resistance at that time to considering any information generated from the home-school ABA program kept the District from considering the extensive data available or otherwise evaluating student prior to developing objectives. So the IEP itself was not appropriate by virtue of vague objectives and objectives unrelated to current data about student's present levels of performance.

#### **Petitioner's Claims for Reimbursement**

Petitioner has requested retrospective reimbursement for services purchased for student in connection with the TREAT program and for services of student's private therapist for last year, who took over after the volunteer program ceased to function well. Petitioner's request involves an essentially equitable determination. With respect to the request for reimbursement of retrospective services, Respondent has observed in regard to this claim that IDEA requires parents who intend to enroll their child in a private educational placement and seek public reimbursement to give the school district notice of their intention. They may notify the school district at the last ARDC meeting before removing the child from public school, or otherwise, but not less than ten business days beforehand. 34 C.F.R. 300.403(d); 20 U.S.C. §1412(a)(10)(C)(iii) In this case student's parents removed him from school following his participation in the District's PPCD program. They notified the District of their intention to enroll student in a private program, but did not notify the district that they intended to claim public reimbursement for costs associated with the private program. IDEA purports to give hearing officers some latitude in such situations, to either deny or reduce subsequent reimbursement claims.

An IEP rejection is legally different from a demand for reimbursement, and there is authority for the view that congress, in including the cited section, intended to require from parents a definitive rejection of the IEP and demand for reimbursement. *Loren F. v. Atlanta I.S.D.*, 349 F.3d 1309 (11th Cir. 2003). While it does not appear that the Fifth Circuit has squarely addressed the issue, most courts have denied reimbursement when the parent fails to comply fully with the notice requirement. *Schoenbach v. District of Columbia*, 309 F.Supp. 71 (D.D.C. 2004).

Respondent raised a variety of issues with respect to the private school program that affect the analysis of what appears essentially to be an equitable determination. Respondent strenuously argues that the ABA program offered in student's home school was inappropriate and for that reason reimbursement must be denied. In most respects Respondent's arguments are not convincing.

For example Respondent contends that the TREAT program did not address student's inappropriate behaviors with any systematic behavior plan, but then even Respondent acknowledges that the TREAT program utilized the systematic approach of extinction, or planned ignoring, to deal with misbehavior. One may argue if this was appropriate, but it is wrong to state that the TREAT program had "no" systematic plan for addressing inappropriate behaviors. Respondent also challenges the fact that student's home school program did not offer related services. Petitioner answered this challenge with testimony to the effect that student's skill levels at least when he began the home-school program were not developed to the point where speech therapy would have been beneficial, and that occupational therapy basically had no value and simply duplicated other instructional programs. The District pointed out testimony from various experts, including one of student's own volunteer instructors, to the effect that speech therapy can be beneficial. But there is really no convincing evidence that either speech therapy or occupational therapy is a necessary related service for student. There is not current assessment indicating that these related services are necessary for student to receive meaningful benefit and therefore I cannot say the parent's private program is inappropriate for excluding them.

Evidence from data maintained by the parents, videotapes of student's performance, and scores from the VABS, the closest to a skill-based assessment procedure used with student, does support the conclusion that student received benefit, and more likely than not, substantial educational benefit, in the home school program using ABA methodology of the TREAT program. None of the experts who examined tapes and records of student's ABA program were able to testify that he did not receive educational benefit, and the District's principal expert testified that he did. Testimony that standard scores did not show student keeping up with expected progression for normal children reflects a misuse of test data and is not material on the issue of whether he acquired particular competencies. The fact that certain instructional programs in the private program had to be changed or put on "hold" for various reasons does not negate benefit.

IDEA allows public schools the latitude to modify the scope and sequence of the curriculum for students with disabilities; indeed, this is what IDEA requires of public schools. Local education agencies receiving IDEA funds must utilize appropriately qualified personnel, but the absence of such personnel did not deny student educational benefit in the home school, as Respondent notes in closing. And the use of corporal punishment at home is a dubious attack on the private program, where public schools permit corporal punishment. Again, the use of such techniques with student is a question of appropriate methodology, concerning which currently the District has provided only post-hoc opinions made for the purpose of litigation by experts with little knowledge of student's individualized needs, and the Petitioner has taken a generalized position that they are inappropriate.

Respondent raised issues regarding to the consistency of programming in the home school, including consistency in the application of behavior consequences, and these do raise legitimate concerns. And Respondent's prevailing argument arises from IDEA's mandate of providing educational services in the least restrictive environment. That is a feature of an appropriate educational program that the home school, as implemented by student's parents, fell short. The point is not that student has a large family or sees other kids in church. A school district could not use those facts to defend an educational placement that is too restrictive, and Petitioner likewise cannot rely on them to defend a program that, from an educational standpoint, has student educated effectively in isolation from peers. This is not an appropriate case for retrospective reimbursement, both because of limitations inherent in the program, and because of the parents' omission to provide notice required by IDEA.

Petitioner also seeks prospective reimbursement for future private home schooling of student using the ABA program. Because of the issue of least restrictive environment previously noted, this is not the appropriate prospective relief. To obtain prospective reimbursement for private services the law requires a parent making such a claim to establish that the private school program is

appropriate, and that the school district is unable to provide an appropriate program. *Florence County School District Four v. Carter*, 114 S.Ct. 361, 20 IDELR 532 (1993). The home school is not the least restrictive environment, given ample testimony that appropriate methodology for student can be implemented in the public school. And the District has not been shown incapable of providing an appropriate program – at least not with the implementation of appropriate orders and with a reasonable transition plan.

### **Appropriate Relief**

Methodology choice ordinarily occupies a specialized territory where hearing officers are usually not well-positioned to contribute much in the determination of free appropriate public education. However, there are situations where the choice of methodology is so essential to the reasonable likelihood of a student's future progress that it becomes legally material. Here, student has been exposed only to the ABA methodology every since his parents withdrew him from school.

There is no credible testimony that ABA methodology is inappropriate for student, and considerable testimony that he has benefited from use of the methodology in his home school program – testimony coming from professional educators on both sides of this contest. And Dr. \*\*\* who has had far more contact with student than any of the District's trial experts believes ABA continues to be an appropriate methodology for student. The District has apparently sought to avoid any involvement with the ABA program, and thus student so far has had no transition opportunity involving any use of ABA programming. I am concerned, given the nature and severity of student's conditions, that a transition to school attendance will be more complex and potentially damaging to the District's efforts to re-integrate student without maintenance of his current instructional strategies involving discrete-trial ABA. I also am concerned about the lack of any showing of a competing research-based instructional strategy reasonably contemplated by the District to afford benefit to this very involved student.

There appears little dispute but that student's parents have been seeking, and student in fact needs, a program of gradual transition back into the public school

setting, which is the least restrictive environment. Petitioner brought no evidence relative to the proposition that student can only be educated in the home-school setting. There was considerable testimony to the contrary. But discrete-trial ABA instruction is a methodology that must be implemented by the District in student's transition from home school to public school attendance. It is not necessarily the only methodology, nor necessarily one appropriate for use with student permanently, assuming other techniques prove successful. But I find for now it is an essential part of student's transition, and beyond his transition, of course, to the extent it continues to produce results.

It is unclear from testimony at this point whether ABA methodology became less effective for student in the home school in early 2005 because of the reduction of professional involvement by TREAT staff in the homebound program, or because student's developmental needs have changed to the point that it is no longer appropriate for him. That is an important question and one that the District must answer, in the future, given the obligation of school districts to demonstrate with solid evidence the effectiveness of chosen instructional strategies. To date, the District has not proposed any specific strategies for working with student, much less one like discrete-trial ABA which has research-based support. Unfortunately, neither did Petitioner propose in the alternative a remedy involving any particular transition schedule. Court decisions are not helpful; insofar as they are relevant, they address needs of students quite different from student See *S.A. v.*

*Riverside-Delanco School Dist.*, 45 IDELR 215 (D. N.J. 2006). I will order what I believe the evidence shows to be necessary, and must entrust the parties and the ARDC to introduce changes as the need for change becomes apparent.

## **Conclusions of Law**

1. Gregory-Portland I.S.D., as a local education agency and political subdivision of the State of Texas, is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student resides in Gregory-Portland I.S.D., and Gregory-Portland I.S.D. must offer student a free, appropriate public education in the least restrictive environment.

3. Gregory-Portland I.S.D. denied student's parents the opportunity to participate fully in the development of student's IEP, and for that reason denied student a free appropriate public education.
4. Gregory-Portland I.S.D. developed a proposed IEP for student for the 2005-2006 school year that was overly vague and was not individualized, and was therefore inappropriate.
5. Gregory-Portland I.S.D. is obligated to transition student back to school attendance from his current home-school setting using proven appropriate instructional strategies including discrete-trial applied behavior analysis for the 2006-2007 school year.
6. The Orders herein satisfy the District's obligation to provide compensatory services for denial of a free, appropriate public education to student.

## **Orders**

I have reviewed the District's transition plan and interventions that were proposed as the result of efforts to resolve this matter, and I find many of those to be appropriate, with certain modifications as well be noted in the following Orders.

Therefore, in consideration of the foregoing,

IT IS ORDERED that Gregory-Portland I.S.D. do the following:

1. Provide student with a one-on-one classroom paraprofessional for the 2006-2007 school year who has received training in Autism and at least 15 hours of training in the theory and implementation of discrete-trial ABA intervention. The paraprofessional will be involved in all aspects of student's transition to public school and will provide individualized instruction for student in school including one-on-one discrete-trial training as appropriate to facilitate student's transition.
2. Conduct, beginning immediately, an evaluation of student's present behavioral competencies relative to the general education curriculum and develop a set of measurable goals and objectives based on current assessment. This evaluation will be completed as soon as possible, and will be followed by an ARDC or pre-ARDC meeting, that includes student's parents, to identify initial classroom objectives for student.
3. Enroll student at \*\*\* School under a plan to integrate him in school over a 12-week period starting with one hour per day for two weeks and increasing by one hour per day every other week until he is attending school full time. The plan to integrate student into school attendance will follow assessment and identification of appropriate goals and objectives. Student's re-integration in the school setting may be accelerated, relative to the requirements of this Order, with prior mutual written agreement of the parties.
4. Implement the goals and objectives identified through current assessment, utilizing discrete trial training as appropriate, or another research-based

- instructional strategy that has demonstrated success in teaching skills to children with Autism.
5. Provide training for student's teachers as necessary to implement identified research-based strategies.
  6. Provide speech therapy services in a minimum amount of 300 minutes per six weeks by a speech pathologist who has training concerning children with Autism and familiarity with behavioral strategies utilized with such children.
  7. Conduct, during the first 30 days following student's beginning of any attendance in school, an assessment to determine student's need for occupational therapy services, and provide such services as may be approved by student's ARDC.
  8. Conduct, during the first 30 days following student's beginning of any attendance in school, a full assistive technology assessment with recommendations by a qualified A.T. specialist having familiarity and prior experience working with children who have Autism, and implement such recommendations as are approved by student's ARDC.
  9. Make available one hour per day of in-home training during the first six-weeks after student begins attending school, reduced to two hours per week during the second six weeks, and thereafter one hour per month.
  10. Provide parent training for a minimum of six one-hour sessions per year including specific training in any research-based methodology utilized by the District with other than discrete-trial ABA training.
  11. Provide appropriate Extended Year Services for student during summer 2007 as determined appropriate by student's ARDC.
  12. Provide special transportation for student including for ESY services, to include behavior support as determined necessary by student's ARDC.
  13. Provide a structured class schedule reflecting minimal unstructured time, paraprofessional support during transitions, and an individualized behavior intervention plan to address off task behaviors, pinching, and pica that utilizes an identifiable research-based methodology effective for children with Autism.
  14. Provide student's parents with weekly IEP progress reports that contain evidence demonstrating student's performance on IEP and behavior objectives during the week.

IT IS FURTHER ORDERED that any and all other or additional relief requested by Petitioner herein is DENIED.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).

SIGNED this 12th day of September 2006.

JAMES N. HOLLIS

SPECIAL EDUCATION HEARING OFFICER  
FOR THE STATE OF TEXAS

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## DOCKET NO. 330-SE-0505

B/N/F\*\*\*&\*\*\*

PETITIONER

vs.

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT  
RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

### SYNOPSIS OF DECISION

**ISSUE:** Whether the District provided student's parents with appropriate procedural safeguards.

**CITATION:** 34 C.F.R. 300.344

**HELD:** For the Parent. The District pre-determined that it would not utilize or consider parent information concerning the parents' home school program involving ABA methodology.

**ISSUE:** Whether the District failed to offer student appropriate instruction.

**CITATION:** 34 C.F.R. 300.347

**HELD:** For the Parent in part. The District failed to afford any consideration to an appropriate research-based instructional strategy proposed by the parents. However Petitioner failed to show that the strategy preferred by the parents is the only such strategy that may be effective for student.

**ISSUE:** Whether Petitioner is entitled to reimbursement for the costs of private schooling.

**CITATION:** 34 C.F.R. 300.403

**HELD:** For the District. Petitioner failed to provide required notice to the District when student was withdrawn from school that Petitioner would be requesting reimbursement for private school services.

