



State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

March 15, 2010

Holly Ruskin, Esq.
1308 Rosa L. Parks Boulevard
Nashville, Tennessee 37208

Michael R. Jennings, Esq.
326 North Cumberland Street
Lebanon, TN 37087

RE: In the Matter of: A.W. vs. Wilson County Schools Docket No. 07.03-102990J

Enclosed is an Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/abh
Enclosure

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

A. W.,
Petitioner

DOCKET NO: 07.03-102990J

v.

**WILSON COUNTY BOARD OF
EDUCATION,**
Respondent

FINAL ORDER

This matter came to be heard on November 19, 20 and 23, 2009, at the Wilson County Board of Education in Lebanon, Tennessee, pursuant to Tenn. Code Ann. §49-10-606 and Tennessee State Board of Education Rule No. 0520-1-9-.08. The Petitioner, A.W., was represented by Ms. Holly Ruskin of the Nashville bar. The Respondent, Wilson County Board of Education, was represented by Mr. Michael R. Jennings of the Wilson County bar.

The subject of this hearing is Petitioner's claim that she was denied a Free and Appropriate Public Education (FAPE) from the Respondent from the time that she became three years of age to August of 2009, the date when WCS began to provide services pursuant to a mediation agreement with Petitioner's parents. More specifically, Petitioner alleges that Respondent developed an Individualized Education Program (IEP) that proposed to place A.W. in a pre-existing, predetermined program without first considering A.W.'s unique needs or input from A.W.'s mother and private therapists. The Petitioner seeks reimbursement for Applied Behavior Analysis (ABA) services she contracted to be provided in her home during the interim between Petitioner's third birthday and the date on which services pursuant to the mediation agreement began.

After consideration of the record in this case, it is determined that Respondent Wilson County Board of Education did offer FAPE to Petitioner during the period at issue. The

Petitioner's request for reimbursement for alternative educational services is not well founded and is hereby DENIED. As Petitioner was not the prevailing party, no attorney's fees or prejudgment interest is awarded. This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Petitioner (AW) was born November 28, 2005. She seemed normal at birth and displayed normal developmental patterns until about ten months of age, when her parents began to notice developmental delays. AW's balance was off, and although she babbled, she did not communicate. Over time, her mother discussed her concerns about AW's development with AW's pediatrician, who made a referral to the Tennessee Early Intervention System (TEIS) on March 1, 2007.

2. By April 17, 2007, TEIS sent evaluators to visit the Petitioner, and set an Independent Family Service Plan (IFSP) meeting for June 6, 2007. The diagnosis making AW eligible for services was identified as developmental delay. At that meeting, the decision was made to provide occupational therapy, physical therapy and speech-language therapy to Petitioner at the offices of Lyttle-Fox Therapy in Mt. Juliet, Tennessee. AW's mother signed the documents agreeing to the IFSP.

3. A second IFSP meeting was held October 17, 2007 to conduct a six moth review. An evaluation of AW was performed on 4/3/08. An annual IFSP meeting was conducted on April 9, 2008.

4. On April 28, 2008, TEIS coordinator Laura McCorkle responded by e-mail to an April 25, 2008 message from Ms. W in which Ms. W announced her intention to take AW to Vanderbilt's Center for Child Development. Ms. W referenced six hours per week of ABA services being received by her nephew in Davidson County, whom she described as having very little delay but being autistic.¹ She expressed the opinion that AW's delay was severe enough that it ought to warrant ABA therapy or more therapy than AW was receiving. She stated she

¹ The nephew in question was receiving ABA services through Hope Behavioral Services from Justin Lane. Later, Mr. Lane, a contractor for behavioral therapy through Hope Behavioral Services in Davidson County, came to the Wilson County home of AW at the request of Ms. W. to discuss services for AW.

needed to know why AW should have to be autistic to qualify for ABA therapy, and considered such a requirement discriminatory, saying "just because they are Autistic should not mean they get more help than (AW)." Much of Ms. McCorkle's response is blocked by what must be post-it notes covering some of the text when copies of the message were made for exhibit purposes. In what is unobstructed, Ms. McCorkle asks whether the nephew is receiving his services through TEIS, and advises that she has not heard that a particular diagnosis automatically qualifies one for predetermined services. She then describes the process in which the TEIS team (including parents) receive evaluation information, and as a team, incorporate the recommendations into an IFSP that is individualized according to the needs of the child and family. She states: "when we determine the types and frequencies of services, *we look at how the service is supporting the goals that are written in the child's IFSP.*"

5. On June 26, 2008, Ms. W requested a new IFSP review from TEIS. A transition meeting was held on July 10, 2008 at AW's home. AW would become three years of age on November 28, 2008, and plans for a transition from TEIS to the Wilson County Schools (WCS) system needed to be made. Dawn Bradley, Local Educational Association (LEA) representative of WCS attended with Kellie Murray from Prospect Child Development Center and Carla Thomas, a TEIS coordinator. The notes of the transitional meeting record that the group reviewed the current services being provided (occupational therapy, physical therapy and speech/language therapy), procedural safeguards, and a review of possible options for the future, which included the LEA preschool classroom four days a week for three hours a day with transportation provided. TEIS committed to forward current assessments and evaluations of AW to WCS. The procedural booklet was given to the family, the questions of AW's mother were addressed, and Ms. W was encouraged to visit the WCS comprehensive development classroom (CDC). Ms. W. signed the Preschool Transition Form on July 10, 2008. On the same date, July 10, 2008, an updated IFSP was completed in which an additional hour of speech and language therapy was added "due to lack of progress" with AW's speech goals. Ms. W. could not recall whether she or the speech therapist initiated the increase in services. Ms. W testified that her only concerns at this point were about "language delay, lack of progress with her speech." However, shortly after this meeting, Ms. W asked Justin Lane to come to her house to evaluate AW for the purpose of receiving ABA therapy.

6. Justin Lane received a Master of Education degree in the Early Childhood Special Education and Behavioral Analysis Certification Program from Peabody College at Vanderbilt University in May of 2008. He sat for his BCBA certification examination on August 22, 2008. In order to sit for the certification examination, a candidate must have a certain number of hours of graduate credits in specific courses and 1500 hours of experience delivering ABA services. Mr. Lane's certification was effective August 31, 2008. Prior to becoming certified as a BCBA, he visited and consulted with Ms. W concerning provision of ABA services to AW in her home, as he had been providing to AW's cousin. Ms. W had been aware of Mr. Lane and the services he could provide as early as April of 2008.

7. ABA therapy is based on the research and theories of B.F. Skinner and others. There are a variety of methods under the ABA umbrella, including the work of Ivor Lovaas, discrete trial learning, incidental teaching and embedded instruction. ABA therapy does not work from an IEP. Its principles of formulating observable identifiable quantifiable, verifiable goals and measures of achievement of those goals are applicable to other methods of instruction and other forms of ABA therapy as well. Nonetheless, IEP goals for a year are not written in the same way ABA goals for a discrete task in a skill set are written. No reason was given to determine that discreet trials cannot be embedded in a therapy delivered to individual students in a comprehensive developmental classroom. Except for Ms. W's contention that a complete absence of distraction would be necessary for AW to benefit from therapy, there appears to be no other reason why the ABA therapy Mr. Lane has been providing could not be done in a classroom setting. Justin Lane and Ms. W both disputed whether ABA therapy as he practices it could be delivered in a program that also included occupational therapy, physical therapy and speech and language skills therapy. Yet this was the situation when Mr. Lane began providing services as part of the TEIS program, and not only was progress observed, but there was spillover benefit on the other therapies.

8. On August 14, 2008, Ms. W requested that TEIS convene a "meeting to discuss a more intensive therapy." In particular, she wanted TEIS to consider contracting with Justin Lane personally to provide services directly to AW at home. The request letter referred to lack of communication progress over a year and a half and a desire for a new approach. She expressed a desire to have as many sessions with Justin Lane as possible and the willingness to give up other private therapies to get sessions with Justin Lane. In her letter, she went on to say that AW

“needs all we can give her” and “is not ready for the county system.” The meeting was held on August 29, 2008, the same date Ms. W. contracted with Justin Lane to provide ABA services to AW in her home.

9. The result of the IFSP meeting was to approve adding six hours of in-home ABA therapy delivered by Justin Lane to AW’s therapy schedule. In the IFSP document that resulted from this meeting, there are a number of handwritten amendments: The page listing family resources, priorities and concerns substituted Dr. Olson, neurologist, for Dr. Anderson and listed safety for the first time as a family priority. The record had reflected that AW was in a Mother’s Day Out Program. But it was amended to say “no Mother’s Day Out Program.” (This represented a change. Ms. W explained that AW’s therapists at Lyttle-Fox felt that being exposed to peer modeling might help AW with her communication skills and speech.) Some of the goals and action steps on the 8/29/08 print-out were modified in handwriting, and new statements concerning the use of strategies for reinforcers and prompting were added, with a note that “strategies will be provided to the team.” Under the heading of Services, additions included “family training (goals 1-4,6), Hope Behavior Therapy, Justin Lane, 3 times weekly, 2 hrs, 8/29/08 – 11/27/08. Payor: Private Insurance/TEIS” and “Consultation, Prospect, Kellie Evins, 8/29/08 – 11/27/08. Payor :EIRA.” The notation of participants lists “Justine (sic) Lane by report”. This is marked out with the notation “error”. Justin Lane did not begin actual service delivery to AW until September 4 or 8, 2008. The new references to strategies to be provided to AW’s team of therapy providers, and to reinforcers and prompting suggest that, whether or not raised by a report delivered to the TEIS team from Justin Lane, utilization of some of the terms and concepts as used in ABA was discussed at the meeting. Contrary to the orientation of AW’s parents to obtain more and more ABA therapy hours in search of greater progress, Mr. Lane did not think it appropriate to predict how many hours of service per week would be necessary for AW.

10. On August 20, 2008, Dawn Bradley completed a form requesting permission for WCS to conduct evaluations of AW. Ms. W. signed the form signifying her permission for WCS to conduct an individual assessment of AW. The signed form was received back by WCS on August 28, 2008. AW’s parents were requested to return the transition referral packet by September 23, 2008.

11. Ms. W believes it was in September of 2008 when she called WCS to make arrangements to visit the CDC classroom. She recalls that she was told she could observe for only 15 minutes, because of restrictions pursuant to HIPAA laws. Whenever her visit occurred, she noted features of the classroom, including a loft area reached by stairs, that she considered serious safety hazards for AW, who liked to climb and showed no awareness of the safety consequences of jumping from high places. She also had concerns about the accessibility of objects that might pose hazards to AW because of her tendency to mouth or ingest everything and not recognize pain. Her conclusion was that the classroom was not a safe environment for AW.

12. In late September or early October of 2008, Ms. W requested a new TEIS meeting, which was set for October 9, 2008, to review the IFSP. The proposed participants were Kelly Murray, early intervention teacher Carla Thomas, the therapists from Lyttle-Fox, and Justin Lane. The notes from the meeting indicate that although Ms. W requested an increase in hours of therapy from Justin Lane and Hope Behavior Therapy, TEIS denied this because the number of hours AW was currently receiving had already resulted in "progress being made in a very short time." TEIS personnel committed to asking the Direct Service Manager for guidance with the request. The notes record that the transition process to WCS was discussed with Ms. W, and that the family will "continue the process to see what they have to offer." TEIS sent the current assessments, evaluations and plan to care to WCS for the purpose of facilitating transition services. Ms. W signed the Prior Written Notice document attesting that she received the notice and the copy of family rights, but the exhibit does not contain a page with her signature in agreement, although she testified that she was in agreement and that the comment by her name signifies that she was present and agreed. She had signed her agreement to prior IFSPs. Also on October 9, 2008, Ms. W signed an authorization for release of information about AW to WCS and an authorization to access her private insurance coverage "for payment of charges resulting from the provision of services listed above." These services included "speech, ot, pt, feeding, vision, hearing and Hope." After Ms. W learned that her private insurance, Blue Cross/Blue Shield did not cover ABA services, TEIS assumed the expense. Ms. W's private insurance did cover a percentage of the cost of occupational and physical therapy visits up to 20 visits per year per service. About October 1, 2008, Kellie Murray of Prospect Developmental

Services conducted a new developmental assessment of AW, comparing her performance on 4/3/08 with her performance on 10/1/08 across a number of goals and behaviors.

13. On October 3, 2008, Dr. Barbara Olson of Pediatric Neurology Associates wrote to Dr. Donna Lett, AW's pediatrician, concerning her neurological evaluation of AW. In this letter, she stated that AW continued to have significant delay in expressive and receptive language, showed a noticeable improvement in some skills after receiving ABA play therapy at home, puts everything in her mouth, climbs excessively, does not mind falling, feels no pain, and has poor social skills and eye contact, although this is improving. Dr. Olson notes Ms. W told her that a cousin has Asperger's syndrome and other relatives have ADHD. One relative is hypotonic. Dr. Olson concluded that AW "has symptoms entirely compatible with autism spectrum disorder. I am pleased to hear that she is making improvements with the new ABA therapy. Mother would like to receive therapy services through the school and supplement them as much as possible."

14. On November 5, 2008, at the request of Ms. W, physical therapist Kim Bush and occupational therapist Rachel Howard executed a brief joint statement that said "since (AW) began ABA therapy, we have seen an increase in verbalization, eye contact and attention to task during one to one treatment sessions. Progress continues to be made on a week-to-week basis in those areas." Neither Ms. Bush nor Ms. Howard was trained in ABA therapy. They could not attest to whether the results they were seeing came solely from ABA therapy or an interaction of that with other training of AW. Ms Bush did recommend that AW continue with her other therapies. She was confident WCS could fashion appropriate an appropriate program for AW. The statement was on plain paper, not letterhead, addressed to "To Whom It May Concern:" However, attached to it and copied superimposed on it was the business card of Sharon Lyttle and Nikki Fox, owners of Lyttle-Fox Therapy, whose signatures were not on the statement. Ms. W believes that she produced this statement at the first IEP meeting, which occurred on November 12, 2008. Prior to the IEP meeting, Michelle Hill, WCS occupational therapist, and Tammy Paulin, WCS physical therapist, asked to see AW to evaluate her.

15. Ms. W brought an advocate with her to the November 12, 2008 IEP meeting. She and the advocate arrived 45 minutes late. Because the other IEP team members had another IEP meeting scheduled after this one, they were unable to extend the length of AW's IEP meeting to make up the lost time. Ms. W. brought the statement she had requested from Ms. Bush and Ms.

Howard. She also brought a prescription pad form from Neurologist Dr. Olson which bore a handwritten statement that AW had autism spectrum disorder, and asked that that diagnosis of autism replace developmental delay. Prior to this time, the operating diagnosis for AW had been developmental delay.² That was the diagnosis on the evaluations from Prospect presented to WCS. WCS school psychologist Dr. Gary Sturgill discussed the necessity of documentation for the State Department of Special Education to recognize the proposed diagnosis of autism spectrum disorder for AW. He offered to perform an evaluation for that purpose. Ms. W. declined. She asked him for a recommendation for a private evaluation. He suggested the Vanderbilt Child Development Center. Ms. W. stated her intention to obtain an evaluation there.

16. Dr. Sturgill observed that Ms. W's advocate dominated the available meeting time with her presentation. The necessarily abbreviated meeting was taken up by the presentation of the advocate and the discussion regarding an evaluation to substantiate a diagnosis of autism. There was not sufficient time at this meeting to engage in much discussion of the draft IEP that had been prepared for discussion and consideration at that time. Ms. W was disappointed that the prescription pad statement was not considered sufficient by the other members of the IEP team to change AW's diagnosis merely by its submission. She was disappointed that her report that AW had made progress only with ABA therapy under Justin Lane did not lead other members of the IEP team to agree that continuing 1:1 ABA therapy in the home was preferable to any services delivered in a classroom. Ms. W testified that she was concerned that AW learns only with one-on-one training, and that other activity in the classroom would stop her from learning. She had confidence in the way that Justin Lane practiced ABA because she had seen improvement with his help. She did not consider use of ABA techniques, as described by Dr. Sturgill, when used in the school classroom "doing it in a way AW would understand." She indicated in testimony that she would have considered therapy with a different BCBA or someone trained by Justin Lane.

² Ms. W testified that she had at least two conversations with Dr. Sturgill before the date of the meeting in which she mentioned the new diagnosis of autism and the fact that AW was now receiving ABA therapy. She stated that he did not tell her in their telephone conversations that anything more than a handwritten note from Dr. Olson would be needed to change AW's diagnosis, although she did not testify to what information she actually gave Dr. Sturgill about Dr. Olson's documentation of this diagnosis. Ms. W recognized that an autism diagnosis could be relevant to getting the school system to provide the ABA services she felt were important for AW.

17. The proposed IEP prepared for discussion at the November 12, 2008 meeting was based upon the evaluations and information available to WCS at the time. Suggestions were that AW attend the developmental classroom for individualized instruction for three hours a day, four days a week. In addition, she could receive 2.5 hours per week of occupational, physical and speech and language therapy from therapists at the school. Because there was insufficient time, and because Ms. W. had brought up as a new issue a new proposed diagnosis for AW, the proposed IEP was not adequately discussed, no decisions were made about an IEP, and Ms. W. did not consent for the school to provide services according to any agreed-upon plan. While they waited for the evaluation at the Vanderbilt Child Development Center to take place, Dr. Sturgill encouraged Ms. W to bring AW to the CDC class on a part-time basis, one day a week, so that the teachers and other school staff could get to know her. Ms. W declined to bring AW to class at WCS. Ms. W testified she was disappointed that her request for the school system to hire a BCBA (Board Certified Behavioral Analyst) to provide 40 hours a week of ABA therapy for AW in her home instead of trying services in the WCS was not agreed upon at the meeting. She felt that because the school system did not acquiesce to her request, it failed to properly consider her request. She was also concerned that the school system did not appreciate the need for an adult to be dedicated to 1:1 monitoring of AW at all times to prevent her from ingesting something that might be dangerous for her or from having some other type of accident in the classroom. Ms. Carr had pointed out to her on her visit to the classroom that the loft area was gated to prevent children from having access unaccompanied. Ms. Carr had attempted to assure her that the staff at WCS could keep AW safe.

18. When the IEP meeting of November 12, 2008 was concluded, the intent was to reconvene on November 21, 2008. AW became three years old on November 28, 2008. By law, services through TEIS cease at the third birthday. It is expected that transition services through the local school system will begin at that time. However, the evaluation of AW at the Vanderbilt Child Development Center was not conducted in time for a meeting to consider the results of the evaluation by November 21, 2008. Dr. Cooper, who performed the evaluation and prepared the report, dated his report December 18, 2008. However, it was not received by WCS until January 12, 2009.

19. When WCS did not agree at the November 12, 2008 IEP meeting to provide ABA services through Justin Lane to AW in her home, Mr. and Ms. W made the decision to provide

the services privately. They initially contracted for 12-15 hours per week of ABA services from several different therapists³, all of whom billed through Hope Behavioral Therapy, and all of whom were directed and supervised by Justin Lane, when he was not providing the direct therapy. Mr. Lane testified to his recollection that AW received approximately 10 hours of ABA therapy per week from August of 2008 until the end of March, 2009, and then her hours were increased to 18-22 hours per week. The record is not definite on how many hours of therapy were received and when, but it is undisputed that the number of hours per week increased over time. Mr. Lane testified that he noticed a definite increase in AW's communication skills that paralleled the increase in weekly therapy. In contrast, Camille Pedone, an ABA therapist who began work with AW after mediation, noted that AW's performance was variable, rising and falling without a direct relationship to the number of hours per week of therapy received. By the time this matter was mediated in August of 2009, four different ABA therapists worked under Justin Lane's supervision providing ABA services to AW. Because of the expense of privately funding ABA services, particularly at the number of hours weekly Mr. And Ms. W thought important to maximize their daughter's ability to make the most progress she could, Ms. W testified that she was unable to continue physical, occupational and speech-language therapy. Although she had made it clear she was unwilling to bring AW to WCS for classroom services, and feared for AW's safety there, she was critical of WCS in retrospect for not urging her to bring AW for walk-in therapies or for declining to offer the same therapies at AW's home. She did not indicate when there would have been an opening in AW's schedule for these services. She had not expressed the same safety concerns when AW received therapy in the classroom at Lyttle-Fox, although the Lyttle-Fox therapists said there were hazards in the classroom that required them to be vigilant

20. A second IEP meeting was scheduled for February 18, 2009. A new IEP document was proposed to be used as a springboard for discussion and decision, which reflected incorporation of information and recommendations in Dr. Cooper's long awaited evaluation, was distributed. Justin Lane, who had been providing ABA therapy in varying intensities to AW for between five and six months, attended the meeting and shared a document of proposed goals for AW's IEP and copies of the data sheets compiled during the therapy he supervised or provided

³ Originally, through TEIS, AW received six hours of ABA therapy per week. On October 9, 2008, TEIS denied an increase in hours per week of ABA therapy because the existing number of hours of therapy were producing demonstrable results.

directly. Based upon Dr. Cooper's evaluation, the IEP team added the diagnosis of autism spectrum disorder to the IEP. The WCS members of the IEP team interpreted some of the goals listed by Mr. Lane as being substantially similar to goals already incorporated in the proposed IEP. They agreed to adopt the remainder of the goals and measures proposed by Mr. Lane. Ms. W and Mr. Lane disputed the view of the other team members that the team had properly understood and adopted Mr. Lane's list of proposed IEP goals, and questioned whether other goals, viewed by the rest of the team as already included, properly addressed those goals as Mr. Lane proposed them. The IEP team is charged with stating long term goals for the period of a year. Mr. Lane presented discrete, individual task goals. He explained how ABA goals needed to be written in a style that is very specific as to the particular behavioral response to be trained, what the standard for success would be and how response would be measured. The hierarchy of behaviors related to particular skills was not delineated in his sample goals. Most likely, the current daily goal for therapy sessions on particular skill set and the projected goals for a year would not be identical. The disjunction between the two perspectives was not successfully resolved. In addition, WCS proposed to incorporate philosophy and practices of ABA in their educational instruction for AW in the CDC classroom. Dr. Sturgill, the classroom teacher Brooke Carr, and others who would be involved in AW's educational programming and instruction professed to have some training, experience and/or knowledge of discrete trial learning, incidental learning and embedded instruction, all procedures used in the context of ABA. They represented themselves as able to provide services that incorporated ABA procedures to benefit AW.

21. Dr. Sturgill has a Doctorate of Philosophy Degree from Peabody College at Vanderbilt University and a Master of Arts from East Tennessee State University. His Master's level training included the use of ABA therapy with autistic children. His Master's thesis was an ABA study. Dr. Sturgill supervises discrete trial learning and use of the Eden curriculum in the CDC classroom. He is able to review daily data as needed, and does so several times a week. He has confidence in the fidelity of procedure used by the teachers and aides in the classroom. The teachers monitor and maintain fidelity on the educational assistants.

22. A number of Wilson County educators who participated in the IEP meetings and/or would be working with AW in therapy have had training and experience in implementing various principles of ABA therapy. Brooke Carr is a teacher in the WCS. During the 2008-2009

school year she taught a preschool Special education class with three, four and five year old children. She has training in teaching children with autism, including the TRIAD conference at Vanderbilt University, training in the Eden curriculum that deals with autism, and training in a sensory Processing disorder Conference. Representatives of TRIAD came to her classroom to observe her implementing techniques of ABA therapy. Wanda Brewer, an educational assistant, attended the same training as Brooke Carr. Another educational assistant, Olivia Kemp, was trained by Brooke Carr on the Eden method and discrete trials. Krista Bright is a speech-language pathologist employed by the Wilson County School system. She has had training in working with children with autism including professional development courses, TRIAD training and other training evens that incorporate all of the treatment methodologies. Camille Pedone is an independent contractor with Beacon Behavioral Consultants who has been working with AW since September of 2009. Ms. Pedone has observed Justin Lane and two therapists working under his supervision work with AW in her home. Ms Pedone is a Board Certified Behavior Analyst. Wanda Brewer has worked for the Wilson County school system for 17 years. She has received discrete trial training, training in ABA therapy an in the Eden program. She is implementing ABA in the classroom, supervised by Brooke Carr and in 2009-2010 by Brooke Stemmer. Ms. Carr provided extensive monitoring and feedback.

23. There was consensus among some members of the IEP team that Wilson County schools was prepared to provide services that would lead to educational benefit for AW. Michelle Hill, occupational therapist who provides services to students of WCS, did not think that AW necessarily needed a 1:1 dedicated aide. She felt there were enough adults in the classroom to ensure that at all times there would be someone who could be available to watch after her safety. Ms. Hill has had some ABA training and uses the principles in her therapy sessions. She has worked with approximately 1000 students in the Smith County and Wilson County School Systems. In addition, she serves as the Director of Empower Me day camp for children with disabilities, 60 % of whom have diagnoses of autism. She is also one of two contacts for the Middle Tennessee Autism Society.

24. Brooke Carr attended all there IEP meetings. She does not recall Ms. W stating a concern that AW have someone with her 100 % of the time, or that an educational assistant needed to be specifically assigned to AW. Ms. Carr was confident that AW could be kept safe. She has taught children with autism and with pica. Ms. Carr recalls that the use of ABA therapy

and specific goals recommended by Justin Lane were discussed. Ms. Carr did not consider suggesting that a BCBA be brought in because she felt capable of using ABA techniques herself to work with AW. Brooke Carr prepared the original draft IEP for AW based upon the speech, occupational and physical therapy evaluations and information from TEIS. Krista Bright also did not recall a dedicated aide for AW as a major point of discussion. She also believed she was capable of implementing ABA principles in her therapy.

25. Ms. W did not consider this information as an adequate grasp of or substitute for the ABA services she requested through Justin Lane in her home. She told the IEP team that ABA from Justin Lane was “the one therapy” that was working for AW. As explained by Mr. Lane, in order to be effective, ABA therapy must be programmed and supervised by a BCBA, must be rigorously and exactly administered according to the service delivery protocol designed by the BCBA, and must be regularly monitored to prevent “drift” by overlapping sessions wherein the BCBA observes the ABA therapist and corrects any variation from protocol. Moreover, if someone not supervised by the BCBA mimics the protocol in a less than completely faithful manner, the resulting variation in reinforcement patterns or what cues are used or response is expected can damage the effectiveness of the ABA training by the ABA therapists by promoting negative learning examples which must be “unlearned.” Ms. W and Mr. Lane expressed concerns about drift and fidelity of delivery between the services Mr. Lane was providing and what WCS personnel might do in a broader context of seeking to deliver educational services through their understanding and use of ABA theory and techniques.⁴ They considered the ABA-related Eden curriculum (which employs discrete trial learning), use of which was proposed by WCS, as inadequate or inappropriate for AW’s needs. Discrete trial learning and the Eden curriculum were in use in the CDC classroom during the 2008-2009 academic year, when AW would have been a student if she had begun services through WCS after her third birthday.

⁴ It is relevant to note that Mr. Lane’s major professor at Peabody is the director of the TRIAD Program (The Treatment and Research Institute for Autism Spectrum Disorders), one specific purpose of which is to partner with school districts to provide training and direct consultation in state-of-the-art behavioral and educational assessment and intervention strategies for school personnel and community professionals serving students with autism spectrum disorders. Their school-based consultation is intended to help school teachers and administrators develop and evaluate programs, policies and procedures regarding the proper education of students with autism.

26. On April 1, 2009, Pediatrician Donna Lett prepared a letter stating that AW requires constant supervision because she is very active and can climb anything. The letter also stated that AW might try to eat anything she touches, and concludes that AW has a diagnosis of pica "which is often found in children with autism. She is medically fragile due to her pica and requires constant supervision to avoid injury."

27. At some point after receiving this diagnosis, Ms W asked Dr. Sturgill to provide ABA therapy at home for AW as a medically fragile, homebound student. Dr. Sturgill declined, referring to the Department of Education Rules that define eligibility for homebound placement. Homebound placements are meant to be temporary and shall not exceed 30 days duration. TN State Board of Education, Division of Special Education Rule 0520-01-09.07(3). Section 2(b) of the same Rule requires that the IEP team shall consider a medical homebound placement only upon certification by a licensed doctor of medicine or osteopathy that a child with a disability needs a homebound placement, is expected to be absent from school due to a physical or mental condition for at least (10) consecutive school days and that the child can receive instruction in a homebound placement without endangering the health of personnel providing it. Students placed in homebound placements are to be returned to a less restrictive environment as soon as possible. Ms. W's request did not fit this category, despite the statement of AW's pediatrician that because of her pica diagnosis, AW should be considered medically fragile. It should be recalled that under the IDEA, the school system has an obligation to place students in a setting for educational services that is the least restrictive environment in which services can be safely and appropriately delivered. That is, services should be delivered in the environment that is both feasible to provide an educational benefit and most similar to that in which developmentally typical peers are educated. In Wilson County, that environment for AW is the CDC.

28. On April 29, 2009, a third IEP meeting was convened at the request of Ms. W to discuss AW's recent pica diagnosis and the safety concerns associated with PICA. Ms. W recalls she had expressed reservations about AW's physical safety at WCS previously, and had not been reassured by statements that though a 1:1 aide dedicated only to AW might not be provided, some adult in the classroom would be responsible for watching AW at all times, even if it was not always the same adult. Kimberly Bush, Lyttle-Fox physical therapist, who provided services to AW at the Lyttle-Fox classroom, noted that one did have to keep watch on AW, but she was able to manage AW's pica behavior and other safety concerns in the classroom there,

and thought it could be managed at WCS also. The members of the IEP team who attended the April 29 IEP meeting considered the issue under discussion whether AW should have ABA therapy in the home or whether WCS could provide adequate ABA therapy in the classroom. In their recollection the safety issue from the pica diagnosis did not loom as large as an issue. The important issue was whether WCS could provide acceptable ABA services. The individuals who would be providing services directly to AW were confident that they were prepared to do so. Members of the IEP team who were there to represent non-special education functions, such as the assistant principal and regular kindergarten teacher, listened to the discussion, acknowledged the greater expertise of their special education colleagues on this question and agreed with their colleagues' assessments.

29. Ms. W did not concur with the special educators on the IEP team. She continued to think as she had thought since first hearing about Justin Lane and his practice of ABA therapy, that his methods were the only procedures that had or could give AW a chance at progress or prevent regression of what she had accomplished.⁵ She was unwilling to rely upon the personnel of WCS to provide the level of services she most wanted for her daughter. When the IEP team did not adopt her request to have private ABA therapy in her home, Ms. W declined to sign the IEP on April 29, 2009. She then filed a due process request on May 21, 2009.

CONCLUSIONS OF LAW

1. The IDEA requires Respondent Wilson County Board of Education to provide FAPE in the "least restrictive environment" to all students with disabilities who are in need of special education and related services. 20 U.S.C. §1400 *et seq.*; TN State Board of Education, Division of Special Education Rule Chapter 0520-1-9. This shall be done by developing an IEP that is "reasonably calculated to confer educational benefit" to the students. *See Bd. of Educ. of the Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176 (1982). As the Supreme Court concluded in *Rowley*, "If these requirements are met, the State has complied with the obligations

⁵ In fact, even Justin Lane noted regression frequently when AW did not have ABA therapy over weekends, holidays or any other breaks in service, regardless of the number of hours of therapy per week she had been receiving. Camille Pedone noted that AW's progress and retention went up and down on a regular basis, unrelated to the intensity of therapy to maintain performance. There is reason to believe that even with Justin Lane performing ABA therapy that there are limits to what additional hours of therapy can accomplish and that not as much training is being inculcated and generalized as might be thought.

imposed by Congress and the courts can require no more.” 458 U.S. at 207. The law does not require the Respondent to maximize the Petitioner’s educational benefits, or to guarantee that she reach a specific level of academic achievement. Rowley, at 197. The Sixth Circuit has held that this means “[t]he statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children.” Renner v. Board of Educ. v. Public Schools of City of Ann Arbor, 185 F.3d 635, 644 (6th Cir. 1999). *See also*, Doe v. Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993).

2. The IDEA, at 20 U.S.C. §1414(d)(1)(A) requires that an IEP include, among other things, (1) a statement of the child’s present levels of educational performance; (2) a statement of measurable annual goals; (3) a statement of the special education and related services and supplementary aids and services to be provided to the child that, to the extent practicable, are based on peer reviewed research; (4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the nonacademic and extracurricular activities; (5) a statement of how the child’s progress toward the annual goals will be measured; and (6) a statement of how the child’s parents will be regularly informed of their child’s progress. These “are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused.” Cleveland Heights-University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 398 (6th Cir. 1998). Petitioner’s proposed IEP contains all these elements.

3. In Rowley, the Supreme Court developed a two-prong test for determining the appropriateness of a proposed IEP. First, the IEP must be substantively appropriate by offering goals and objectives that are “reasonably calculated to provide educational benefit” to the child. Second, the procedural safeguards of the Act must be provided to the parents, including the right to participate in the development of the IEP and to receive notification and explanation of their rights. The Court has interpreted the IDEA’s “free appropriate public education” obligation to require local school systems to develop IEPs that are “reasonably calculated” to provide educational benefit to a child. Rowley, at 203-204. While the educational benefits accruing to the child must be “meaningful,” there is no requirement that the program provide the maximum benefit or the best available program. Rowley, at 200-201.

4. The Petitioner has the burden of proving by a preponderance of the evidence that her IEP was inadequate and that she has not been offered FAPE from the Respondent. The U.S.

Supreme Court held in Schaffer v. Weast, 546 U.S. 49 (2005), that the burden of proof is on the party “seeking relief.” In the instant case, the Petitioner has challenged the proposed IEP developed over February 18, 2009 and April 29, 2009, and intended to be implemented in Wilson County’s CDC classroom at West Elementary School as inadequate to provide FAPE. In the alternative, the Petitioner requests a determination that the April 29, 2009 IEP would have placed Petitioner in a pre-existing, predetermined program without first considering Petitioner’s unique needs and input from Petitioner’s mother and private therapists and that Petitioner should therefore receive reimbursement for cost of the private in-home 1:1 ABA therapy program selected instead by Petitioner’s mother for services to Petitioner from November 28, 2008 until August 2009 (when WCS began serving AW through an agreement reached in mediation), at a cost reported to be \$16, 852.50.⁶

5. Rowley, which requires that the IEP be reasonably calculated to provide an educational benefit to the child, also held that a school district has discretion to use whatever methodology will allow a child to receive an educational benefit. The gist of Petitioner’s case is that when Wilson County Schools did not accede to Ms. W’s request that the IEP approve exclusive private in-home ABA therapy from Justin Lane for Petitioner at WCS expense because AW had shown some progress under TEIS services once this therapy was added, WCS denied Petitioner FAPE, denied her parents meaningful participation in the IEP process and predetermined the appropriateness of an existing placement without considering Petitioner’s unique needs. Petitioner’s arguments are not persuasive. The preponderance of the evidence supports a determination that WCS did offer Petitioner an IEP that constituted FAPE, that her parents were accorded the opportunity for meaningful participation in the IEP process, and that Petitioner’s unique needs were given consideration and addressed in the IEP.

6. The IEP of April 29, 2009 provided FAPE. The IEP prepared for discussion on February 18, 2009 formed the departure point for discussion on April 29, 2009. That IEP reflected the discussions of the February 18, 2009, IEP meeting attended by ABA therapist Justin Lane. The IEP team adopted goals brought by and proposed by Justin Lane. It incorporated and considered implications of the autism diagnosis and evaluation conducted by Dr. Cooper. It provided for the use of ABA principles and techniques, among other methodologies, by

⁶ Although Petitioner presented post-hearing documents attesting to the total cost of ABA services by all providers during this period, the amount was not proven at hearing. As the Petitioner is not being awarded reimbursement in this Order, the matter of the precise amount actually expended is moot.

classroom teachers and aides. The IEP team agreed that someone needed to monitor AW for pica incidents at all times, but differed from the parent in proposing that the same person might not discharge this responsibility during the entire day. The IEP's goals, including those on the proposal brought by Justin Lane, addressed Petitioner's level of development and unique needs for instructional content and methodology. It offered APA methodologies, but not in as rigid and restricted form as implemented by Justin Lane. It contemplated an ABA collaboration with ACBA Justin Lane, but an actual ABA program for AW was never shared by Lane with the IEP team. The IEP provided appropriate educational instruction in a less restrictive environment than private in-home therapy would do. It provided related services of physical therapy, occupational therapy and speech/language therapy not available to the Petitioner in the home. It provided peer modeling opportunities in the classroom. It made provision for Petitioner's safety in the classroom.

7. Petitioner does not agree that the IEP provided FAPE because much of the education is delivered in the Wilson County CDC classroom, methodologies other than the specific form of ABA Petitioner has been receiving were proposed for use, and the services were not to be delivered in Petitioner's home, which Petitioner's mother considered a much safer environment for Petitioner because of her pica and her lack of appreciation of danger when climbing and one in which distractions could be severely limited. The IEP also failed the approval of Petitioner's mother because it was not a continuation of the in-home ABA services by Justin Lane that Petitioner had received at her mother's request from TEIS. The record is clear that even before ABA therapy was presented as a request at an IFSP meeting, JBA therapy from Justin Lane was specifically what Ms. W wanted.

8. The IEP meetings afforded Petitioner's mother the opportunity for meaningful participation in the IEP process. The preponderance of the evidence is that IEP team did not predetermine what educational instruction was available in WCS and then assign that to Petitioner without consideration of her unique needs. Ms. W's concerns for therapy were heard at all three IEP meetings. Failure to adopt her proposal uncritically does not constitute a lack of meaningful participation. Ms. W's participation could as easily be described in the manner she describes WCS, that she had predetermined what therapy would be acceptable and would only consider in-home ABA therapy with Justin Lane. The IEP team considered her concerns about safety and her conviction that ABA therapy as practiced by Justin Lane was the only therapy that

was effective with her daughter. The IEP sought to provide effective therapy through use of accepted methodologies of ABA principles and practice, while also providing a less restrictive environment, a selection of needed related services, safety precautions, peer interactions as modeling, and a less restrictive environment for her instruction.

9. Petitioner's unique needs were considered and addressed in the IEP. The short and long term goals in the IEP reflect consideration of the evaluations, therapy reports and the input in IEP meetings. Being served in a classroom setting where there are other children does not indicate a lack of consideration of the student's unique needs if the student has an education program designed for his or her specific level of development, method of learning and educational goals.

10. When an IEP targets the child's unique needs, is administered by qualified personnel, and is implemented based on accepted principles in the field of autism education, the school system does not violate the IDEA when it denies a parent's request for an ABA-based autism program. Joshua A. v. Rocklin Unified School District, 52 IDELR 64 (9th Cir. 2009). It has been established that the IEP targeted AW's unique needs. The record also establishes that the personnel of WCS who were to implement the IEP were qualified personnel, and the program they proposed to implement was based upon accepted principles in the field of autism education, including principles and methodology of ABA as promulgated by the TRIAD program.

11. Parents of students with disabilities, including students with autism spectrum disorder, cannot dictate the instructional methodology that is used by a school district to implement an appropriate IEP. See Lachman et al v. Illinois State Board of Education, 441 IDELR 156, 853 F.2d 290 (7th Cir. 1988) In Lachman the Court found that "Rowley leaves no doubt that parents, no matter how well motivated, do not have a right under the act to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a disabled child".

12. There are numerous cases that find a school system's IEP appropriate without the inclusion of an intensive ABA program for the child at home. In Brown v. Bartholomew Consolidated School Corporation, 43 IDELR 60 2005 WL552194 (D. Ind. 2005), the District's IEP was found appropriate for a kindergarten aged student with autism, even though it did not provide him with his parents' preferred methodology-at home, one-to-one ABA instruction by trained ABA instructors. The Court found that the District was not required to adopt the parents'

preferred program because there was no evidence that their chosen methodology was the only one that would provide him an educational benefit. While the Court found the student progressed through his at-home ABA instruction, that fact alone does not establish that ABA was the only way for him to be educated nor did it establish that it was unreasonable at the time the District created his IEP “to suppose that he could receive meaningful educational benefits from this program that did not include ABA”. Or, as applied to the instant case, that he could receive meaningful educational benefits from a program that combined some elements of ABA training with additional methodologies.

13. In Michael J. v. Derry Township School District, 45 IDELR 36 (M.D. Pa. 2006), a case where the child was receiving an intensive ABA program at home, the Court found that the goals and objectives of the school district’s IEP were appropriately designed to provide the student with a meaningful educational benefit and that the goals and the objectives were developed based on evaluations, assessments, parental input, and observations of the student (in the instant case by his various therapists). In addition, the techniques, which included some ABA techniques, used to implement the IEP were reasonably calculated to provide the student with an education that would help him meet his goals and objectives. Similar to the instant case, the IEP also placed the student in the least restrictive environment to meet his needs, giving him the opportunity to interact with non-disabled peers, as opposed to a more isolating home based program.

14. In J.P. v. West Clark Community Schools, 38 IDELR 5, 230 F. Supp. 2d 910 (S.D. Ind. 2002), the Court was not convinced that the ABA/discrete trial training approach was the only appropriate methodology for teaching the student. There, as in the case of A.W., the school district demonstrated a willingness to incorporate ABA and discrete trial methods into its teaching plans and demonstrated flexibility by adding more hours and communication goals to the child’s program.

15. In Renner v. Board of Education of the Public Schools of Ann Arbor, 30 IDELR 885, 185 F. 3d 635 (6th Cir. 1999), the Court found that the IEP team appropriately incorporated discrete trial instruction into a comprehensive curriculum and determined that the parents could not prescribe their desired methodology. In Renner, the Court found that the expert used by the parents prescribed to only one methodology. This is similar to the testimony that has been heard in support of A.W.’s position, specifically the testimony of Justin Lane and Hunter Gast.

16. While there was a great deal of testimony about the different teaching methods available, and whether they had been peer-reviewed, at least one Court has found that a school district has the right to choose among methodologies, whether peer-reviewed or not, for educating children with autism. Encinitas Union School District, 5 ECLPR 117 (SEA Cal. 2008)

17. In upholding a school district's IEP, a Court has found that a school district must have a person knowledgeable about the child's disability present at the IEP meeting, but is not required to have present an expert in a parent's chosen methodology. Dong v. Board of Education of Rochester Community Schools, 31 IDELR 157, 197 F. 3d 793 (6th Cir. 1999) In Dong, similar to the case to be decided, the school district's psychologist, speech pathologist and teacher had attended workshops, were generally familiar with the various methodologies employed with children with autism, and had direct experience working with children with autism.

18. There was abundant proof presented in this hearing that the professionals in the Wilson County School system who would be working directly with A.W., had attended numerous workshops, including the extensive TRIAD training, were familiar with different methodologies employed with children with autism and had direct experience working with children with autism.

19. When a parent requests a particular methodology, it has been held that a school system does not need to compare the qualifications of its staff with that of the parents' chosen private providers; rather, the school district must show that its staff is trained and qualified to implement the child's educational program. G v. Fort Bragg Dep. Schs, 40 IDELR 4, 343 F. 3d 295 (4th Cir. 2003)

20. The IEP teams are not required to name a particular brand of instructional methodology in an IEP even though the parents may desire a specific methodology and may have independent evaluators who recommend it for the student. The test is still this: "whether the student's program is designed to confer an educational benefit". See Shakopee Indep. Sch. Dist., 52 IDELR 210 (SEA MN 2009)

21. Courts have repeatedly rejected the notion that ABA-based programs are the only acceptable method of educating children with autism. Freemont Unified School District, 49 IDELR 114 (SEA CA 2007)

22. While Brooke Carr and Wanda Brewer had clearly received extensive training in principles of ABA therapy, Olivia Glodowski-Kemp, when first employed after the Fall Break in October, 2008, had not had such training. Ms. Carr and Ms. Brewer provided on-the-job training for her and worked with her in a classroom setting. Special Education personnel do not need to have training with regard to each disability identified in the IDEA in order to satisfy the IDEA's personnel requirements. The fact that a Special Education teacher had implemented a seven year old's IEP for three months without receiving training in autism did not make a Wisconsin District liable for denial of FAPE. See Boyceville Community School District, 48 IDELR 297 (SEA WI 2007) In that case, the Administrative Law Judge found that the parent did not provide any evidence showing that the teacher was unable to teach the child effectively.

23. There is no established methodology for educating children with autism. A district is free to apply any methodology that will allow a child to receive an educational benefit. See Long Beach Unified School District, 49 IDELR 210 (SEA CA 2008)

24. A.W. also attempted to show that school system professionals predetermined an IEP for A.W. by bringing a draft IEP to the IEP team meeting and communicating by e-mail among themselves what might be appropriate to include in an IEP. case law does not support such a determination. School systems are permitted to discuss a child's Special Education needs, as well as potential services and placements, in advance of an IEP meeting. However, their employees must arrive at the meeting with an open mind and consider the parents input. See T.P. and S.P. ex rel S.P. v. Mamaroneck Union Free School District, 109 LRP 5967 (2d Cir. 2009) See also Ms. C. ex rel N.L. v. Knox County Schools, 315 F.3d 688 (Circ. 2004). Petitioner's contention rests on an interpretation that when some IEP members testified that after hearing the discussion, they agreed with their colleagues who had more experience, they were failing to give appropriate consideration to the information Ms. W. brought to the meeting. Their testimony does not communicate that they merely abdicated their responsibility as members of the committee to consider all input, just that in considering it, they gave more weight other professional expertise of their colleagues than to Ms. W's preference for ABA as practiced by Justin Lane only in her home with Justin Lane or a similarly credentialed BCBA.

25. Interestingly, the Court in the T.P. case found that the parents of a kindergartner with autism could not prove that the school district predetermined their son's IEP merely by

showing that the district denied their request for in-home ABA services. The Court found that the IEP incorporates several of the parents' recommendations. When these facts are compared with the facts in A.W., the T.P. case appears to be directly on point.

26. Where the IEP team thoroughly discussed the child's placement in services at the IEP meeting with the parent, the district's Director of Pupil Services expression of an opinion about a child's placement prior to an IEP meeting did not mean that the district predetermined placement. Solana Beach School District, 49 IDELR 237 (SEA Cal. 2008)

27. To establish predetermination, the parents must show that the district was unwilling to consider other placements. H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (9th Cir. 2007, unpublished) In the instant case, not only did the district argue that it could provide ABA related therapy through its' classroom personnel, the district pointed out that in-home placement was not the least restrictive environment and did not afford the Petitioner with peer modeling or opportunities to interact in a small group context.

28. Researching placement options prior to an IEP meeting does not mean that predetermination has occurred. The district is required to determine if there was an appropriate public school placement before agreeing to private placement. Schoenbach v. District of Columbia, 46 IDELR 67 (D. D.C. 2006)

29. School officials are permitted to form opinions and compile reports prior to IEP meetings, as long as an meaningful IEP meeting is subsequently conducted where various options are discussed and considered. E.W. v. Rocklin Unified School District, 46 IDELR 192 (E.D. Cal. 2006)

30. The IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions. The fact that a parent's

suggestions are not accepted and incorporated into the IEP does not necessarily constitute a violation of the IDEA. L. M. v. Hawaii Department of Education, 46 IDELR 100 (D. HAW. 2006)

31. The right of parental participation is not violated where teachers and staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made. N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003). School officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind. Doyle v. Arlington County School Board, 806 F. Supp. 1253, 19 IDELR 259 (E.D. Va. 1992).

32. At all times relevant herein, the parents of A.W. have declined to cooperate with the school system by allowing them to implement an IEP. They have refused to sign a proposed IEP, even after the goals suggested by their expert, Justin Lane, were incorporated. And, while not technically before this Hearing Officer for consideration, at the time of the hearing of this matter, they had not signed the IEP which specifically included modifications they had suggested.

33. In Colbert County Board of Education v. BRT, by and through her mother and next friend, Theresa T. Cagle, 51 IDELR 16, U.S. District Court (N.D. Alabama 2008), the Court held that an Alabama school district could not be found liable for failing to provide IDEA services because the parents' refusal to consent relieved the district of liability for any FAPE violation. While the Court acknowledged the parents' belief that the proposed IEP was inappropriate, the Court found that a district cannot implement a proposed IEP without the parents' consent. If a parent refuses to consent to the provision of services or does not respond

to the district's request for consent, the district does not commit a FAPE violation by failing to provide those services.

34. Likewise, the parents' request to recover the costs of their son's home-school program was denied in Astourian v. Blue Springs R-IV School District, 50 IDELR 282, U.S. District Court, (WD Missouri, 2008). In support of its decision, the Court pointed out that the parents participated in all of the child's IEP meetings, the IEP included observations by the parents' consultant and the district allowed the consultant to observe the student in class. The school district offered the child FAPE and the parents were not entitled to reimbursement. In Astourian, the Court further found that the IDEA does not require that progress be attained in a certain time frame as every child progresses at a different rate. In the instant case there is evidence that even with intensive ABA therapy, Petitioner's progress has waxed and waned.

35. The case of Sytsema v. Academy School District No. 20, 50 IDELR 213, 538 F.3d 1306 (10th Cir. 2008) is almost exactly on point. The 10th Circuit concluded that the parents' withdrawal from the IEP process made any procedural violation by the district harmless. The Court found that a procedural violation of the IDEA is actionable only if it results in substantive harm. The 10th Circuit found that the parents withdrew from the IEP process when they learned that the district intended to deliver services in an integrated preschool environment. U.S. Circuit Judge David M. Ebel wrote "the parents made this decision in spite of the fact that the district had not yet finalized its offer for educational services". The parents' decision to continue the child's home-based program effectively terminated the IEP process. The parents of A.W. have acted almost identically to the facts contained in Sytsema. However, there is no procedural violation before this Hearing Officer.

36. The district was not required to reimburse the parents of a five-year old child with autism for additional hours of ABA therapy in the home in J.A. and E.A. ex rel M.A. v. East Ramapo Cent. Sch. Dist., 52 IDELR 196 (S.D. N.Y. 2009). The Court found that the district does not have to show that it offered the amount or type of services that would maximize a child's potential. It is sufficient that the district offered a program which was reasonably designed to enable the child to reap an educational benefit.

37. In Tarlowe v. New York City of Education, 50 IDELR 186 (S.D.N.Y. 2008), the Court denied the parents of a kindergartner with autism's request to recover the costs of their son's private placement concluding that the district offered the child FAPE. There, the Court found that the IEP contained fourteen annual goals, each of which had 2 to 4 short term objectives. While the goals themselves are generally stated, they contain sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration and percentage of accuracy required for progress.

38. The Petitioner is not entitled to any attorney fees, costs and/or pre-judgment interest. As noted previously, the burden of proof is, and remains at all times, on the Petitioner. The Petitioner has carried their burden on no issue in this matter. The Petitioner has proven no procedural violation by the school system and, even if they had, their withdrawal from the IEP process negates any procedural violation that may have occurred.

39. It is apparent in the record that AW's parents have devoted their energies to obtaining for her as much of the specific therapy that appears to have had the most visibly beneficial impact on her performance as they could obtain in the effort to help AW progress as far and as quickly as possible. Certainly when first begun, ABA therapy directed by Justin Lane increased AW's attention span, eye contact and responsiveness to cues and reinforcement so that, utilizing these skills, she could achieve and demonstrate improvement on other tasks and in other therapies as well. The other therapists not only remarked on the amount of direct progress that

resulted from the ABA therapy sessions, but how they were able to utilize these newly acquired skills to make more progress on their own therapeutic goals. This finding, taken together with the observation of variability in performance not being well correlated with number of hours of therapy per week, confirms the importance of an IEP broader than strictly ABA therapy.

40. The Wilson County School System did offer a free appropriate public education to Petitioner. While it is understood that Petitioner's parents were acting in what they considered to be Petitioner's very best interests, Petitioner's decision to decline the services of Wilson County Schools and to undertake exclusive intensive private ABA therapy was a choice made by Petitioner's parents and does not compel Wilson County Schools to reimburse Petitioner for the cost of that therapy. It was Petitioner's parents, from their first request for ABA services from Justin Lane, who were predisposed to consider only the therapy that had been recommended to them by a relative, and when that therapy succeeded in providing a new measure of progress, only that therapy they considered the most effective therapy available. The record reveals there were limitations to progress with the chosen therapy, and a lack of proof that the IEP team's recommendations would not have afforded Petitioner with a free appropriate public education that is reasonably calculated to provide an educational benefit. The Petitioner has failed to establish by a preponderance of the evidence that she was denied FAPE by the Respondent or that the Respondent denied Petitioner's parents meaningful participation in the development of Petitioner's education. As the Petitioner has not prevailed, Petitioner is not entitled to retroactive reimbursement, attorney's fees or prejudgment interest.

This Initial Order entered and effective this 15th day of March 2010.



Margaret R. Robertson
Administrative Judge

15th Filed in the Administrative Procedures Division, Office of the Secretary of State, this
day of March 2010.



Thomas G. Stovall, Director
Administrative Procedures Division

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.