

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

In Re: Middleborough Public Schools

BSEA #03-2915

DECISION

This decision is issued pursuant to 20 USC Sec. 1400 et seq. (Individuals with Disabilities Education Act), 29 USC Sec. 794 (Section 504 of the Rehabilitation Act); MGL c. 71B (the Massachusetts special education statute; "Chapter 766"); MGL c. 30A (the Massachusetts Administrative Procedures Act), and the regulations promulgated under these statutes.

On January 13, 2003, Parents filed a hearing request with the BSEA. A telephone conference with the Hearing Officer and representatives for both parties was held on February 4, 2003, and a Pre-hearing Conference on February 12, 2003. A hearing was held on March 28, April 9, May 12, May 16, and May 21, 2003, in Malden, MA before Sara Berman, Hearing Officer.¹ Those present for all or part of the proceeding were:

Student's father	
Student's mother	
Lynne Turner	Director, Pupil Personnel Services, Middleborough Public Schools
Molly Birkett	Psychologist, Middleborough Public Schools
Theresa A. Craig	Early Childhood Teacher, Middleborough Public Schools
Heidi King	Speech/Language Therapist, Middleborough Public Schools
Andrew A. Longoria	Behavioral consultant to Middleborough Public Schools
Sharon Parnes, M.D.	Student's treating physician, Morton Hospital, Taunton
Leslie K. Sutro	Behavioral consultant, May Institute
Shelley Greene	Educational Consultant, Advocate for Parents
Regina W. Tate, Esq.	Attorney for Middleborough Public Schools

The official record of the hearing consists of Parents' Exhibits 1 through 102, ; School's Exhibits 1 through 46² and approximately 15 hours of tape-recorded oral testimony and argument. The parties filed written closing arguments on May 27 and 28 2003. Parents filed a reply memorandum on June 9, 2003 and the record closed on that day.

¹ Both parties made one or more requests to postpone the hearing. In addition, there were several Hearing Officer initiated telephone conferences.

² Several exhibits were either withdrawn or excluded; therefore, there are gaps in the sequence of exhibit numbers.

ISSUES PRESENTED

This case involves a three-year-old child with disabilities who transitioned from Early Intervention (EI) to the Middleborough Public Schools in January 2003. At the time of this transition, Student was receiving approximately 15 hours per week of 1:1 instruction using the Applied Behavioral Analysis (ABA)/Discrete Trial Training (DTT) methodology. (ABA/DTT or ABA). The Parents appeal Middleborough's decision not to provide 1:1 ABA therapy under Student's IEP for January 2003-04. Parents also allege certain procedural violations by Middleborough, and seek reimbursement for ABA services that they have obtained privately.

The parties agree on Student's eligibility for special education,³ as well as on the general appropriateness of his preschool placement, but dispute whether Student requires ABA therapy in addition to his current services in order to ensure FAPE. The specific issues in the case are the following:

1. Whether Student requires 15 hours per week (or another amount) of ABA/DTT in addition to his current services in order to receive FAPE.
2. Whether Middleborough completed Student's initial evaluation, TEAM meeting, and IEP within the relevant timelines.
3. Whether Middleborough's decision to conduct an extended evaluation of Student complied with applicable regulations.
4. Whether Parents are entitled to be reimbursed for ABA training that they have obtained privately for Student from March 11, 2003 forward.

POSITION OF PARENTS

Student has a diagnosis of pervasive developmental disorder (PDD) that affects development of language, play and social skills. Evaluations as well as Student's prior success when he received ABA therapy via Early Intervention demonstrate his need for approximately 15 hours per week of intensive 1:1 ABA/DTT instruction in addition to his current preschool placement in order to address his PDD-related skill deficits. Because Middleborough's current IEP and placement do not include this necessary service, they do not provide Student with FAPE.

Further, Student showed signs of regression as a result of Middleborough's denial of ABA services. Parents should be reimbursed for the ABA services they obtained privately in order to return to his prior level of functioning.

³ The parties initially disagreed on aspects of Student's diagnoses, with the Parents taking the position that Student has PDD with associated language delays, and the school asserting that Student has serious speech/language delays but not necessarily PDD. The parties did not pursue this issue at hearing, however.

Finally, Middleborough committed procedural violations by failing to complete an adequate initial evaluation prior to Student's third birthday, and substituting an extended evaluation after Student turned three, as well as by determining Student's placement prior to his initial Chapter 766 evaluation.

POSITION OF MIDDLEBOROUGH PUBLIC SCHOOLS

The decision whether or not to use ABA/DTT with Student is one involving methodology; therefore, under federal and state law, this decision is Middleborough's alone to make, cannot be controlled by Parents, and is not properly the subject of a hearing.

Even if the Parents and/or the Hearing Officer could determine the methodology for educating Student, the evidence does not support the need for ABA and/or DTT in Student's case. Student's PDD diagnosis is questionable, but even if Student does have PDD, it does not automatically follow that he needs a particular methodology. In any event, Student has made consistent and excellent progress in Middleborough's program, and Parents' claims of the benefits of ABA/DTT, and the evidence does not support Student's regression in their absence.

Middleborough did not commit procedural violations that deprived Student of FAPE. Middleborough made appropriate initial assessments, convened the TEAM, and proposed an IEP prior to Student's third birthday, as required by the regulations. Further, the proposal for an extended evaluation complied with applicable regulations and was appropriate to further assess Student's needs.

Finally, since Parents did not request retroactive reimbursement for private ABA services as a claim for relief, the hearing officer may not consider granting such relief.

SUMMARY OF THE EVIDENCE

1. Student is a three year old child (d.o.b. 1/14/03) who lives with his parents and older brother in Middleborough. Parents, teachers, service providers, and evaluators all describe Student as happy, loving, and eager to learn. Student's cognitive and motor skills are average or above. (Mother, Father, Craig, S-42, 43)
2. Student has been diagnosed with receptive and expressive language delays that interfere with his ability to communicate at a level commensurate with his age and cognitive ability. Student also has been diagnosed with mild Pervasive Developmental Disorder (PDD) which impacts his communication, social, and play skills. (Mother, Parnes, S-8, 21, 22, 26-27, 42)
3. Parents first suspected that Student had a disability before his second birthday because they noticed that he spoke very little at home or at his daycare center (then, the BCBS Center for Children). Student's pediatrician remarked that Student should be talking more than he was. (Mother, Father) Parents further observed that although

Student had a large vocabulary of 30 to 40 words and could count to 15, he did not form phrases or use speech to communicate. Rather, Student would grunt to express his desires. (P-2, S-3)

4. A report from the BCBS Center covering the period August 2001 to February 2002, when Student was between 20 to 25 months old, stated that Student was trying to produce words, but had difficulty, and got upset if he could not express a problem verbally. He spent much time playing by himself but tried hard to play with others. On the other hand, the report stated that Student played very well by himself. He could recognize himself in a photo. He could participate in circle time. Cognitively, Student knew his gender, knew 1-3 body parts, was able to do puzzles, match colored shapes, and look at books. He needed help with imitation, following two-step directions, counting, and identifying weather and animal names or sounds. Socially, Student was able to share and to separate from Parents, and he did not bite or hit. He needed help with waiting his turn. In the area of self-help, Student was making progress in cleaning up his, was good at removing his shoes, and could put on his coat with help. He needed help with toileting. Student could feed himself with a spoon and drink from a cup. Student did well at large muscle activities. (P-1, S-1)
5. In late February 2002, when Student was 25 months old, Parents obtained an evaluation from the Step One Early Intervention program (Step One) in Quincy. The evaluation consisted of developmental/educational and speech/language assessments. The developmental assessment revealed that Student had age-appropriate cognitive, fine-motor and self-help skills. (P-2, S-3).
6. On the other hand, the speech language assessment showed that Student had mild to moderate language delay, with inconsistent responses to language. Receptive language was at the 19 month level, and expressive at the 20 month level. Student's first words were emerging; he was able to name four objects and two pictures. Recommendations included Parents' using visual cues, pictures, and gestures as well as other strategies designed to encourage Student's language development. (Father, P-3, S-2)
7. On February 27, 2003, Student was found eligible for Early Intervention (EI) services because of his language delays. Beginning in approximately March 2002, Step One began providing one hour per week each of speech/language therapy and developmental services. Services were delivered at the BCBS day care center. Step One also provided Parents with strategies to use at home to support Student's language development. (P-2, S-3, Mother, Father)
8. After beginning EI services, Student received an OT evaluation conducted by Step One as well as a second speech/language assessment at Morton Hospital in Taunton. Step One also referred Student for a developmental assessment by Sharon Parnes, M.D., a pediatric neurologist in Taunton.(P-5, 6, 7; S-6, 7, 9)

9. The Morton Hospital speech and language evaluation, conducted on March 28, 2002, showed that Student had delayed play skills, a moderate receptive language disorder, and a severe expressive language disorder. (P-5, S-6) Both receptive and expressive language skills were “solid” at the 9 to 12 month level, and were “scattered,” respectively, at the 12 to 31 month levels and the 12 to 15 month levels.⁴ Student mainly communicated with gestures, and occasional one-word approximations. He was able to use a limited number of words to communicate his needs and wants effectively. Student had reduced comprehension of commands/requests and various age-appropriate concepts. As for play skills, Student had diminished performance in imitation, exploration, and the concepts of causality and object permanence. (Id.) The Morton Hospital therapist recommended twice-weekly individual speech/language therapy for one hour per session, and once- weekly group language treatment for two hours, as well as strategies for the Parents to use at home. (Id.)
10. The OT evaluation, conducted by Step One in mid-April 2002, revealed some sensory integration difficulties and recommended various interventions to help Student organize his behavior. (P-6, S-7).⁵
11. During the summer of 2002, while on her summer break from school (Mother is a full-time student), Mother stayed home to work with Student on a full-time basis. Step One delivered its services at home instead of day care. Mother testified that she worked with Student all day, every day, implementing strategies that EI trained her to use. (Mother)
12. In late June 2002, Parents transferred Student to a different EI provider, Associated Human Services (AHS) in Taunton. Initially, AHS provided Student with one hour per week of speech/language therapy at home, two hours per week of group language therapy on AHS premises, and OT and speech/language consultation to Parents. (Mother, S-4)
13. On June 6, 2002, when Student was aged two years, four months, AHS referred Student to Sharon Parnes, M.D. for the developmental evaluation referred to in Paragraph 8, above. Dr.Parnes diagnosed Student with mild Pervasive Developmental Disorder. (P-7, S-8, Parnes) She based her diagnosis on a review of prior records and reports of Student’s history by Parents, as well as a physical examination and observation that showed decreased ability to use language, problems with social interactions, and some restriction in his range of activity, as shown by some fixation on particular rote activities, and thus met the diagnostic criteria for PDD. (Parnes; P-7, S-8) Dr. Parnes noted as positive signs that Student had developed improved eye contact and functional use of language in the speech therapy he had been receiving since February 2002 . She recommended speech therapy –which she termed “crucial”-- as well as OT and Applied Behavioral Analysis (ABA). Id.

⁴ Student was just over 26 months old at this time.

⁵ OT services are not a disputed issue.

14. Dr. Parnes is a board-certified pediatric neurologist. She has done additional coursework on PDD and autism spectrum disorder (ASD), and has evaluated and/or treated approximately 50 to 100 children with these disabilities. (Parnes)
15. ABA is a method of teaching skills or modifying behaviors that involves, among other things, breaking down a skill or behavior into its component parts and teaching the student each component until the student has learned the entire skill, then practicing the skill until the student can perform it independently and generalize it. (Sutro, Longoria). The ABA therapist records data showing whether or not the student is actually learning the skills being taught. (Id.) ABA is used to directly instruct people with PDD or ASD on skills that a person without ASD would learn automatically. (Parnes, Sutro, Longoria). Discrete trial teaching (DTT) is a type of ABA. ABA/DTT is typically intense and is taught one-on-one. (Id.)
16. Dr. Parnes testified that she recommends ABA for children diagnosed with autism spectrum disorders, including Student, because ABA is a research-based model of intervention that has proved to be an effective methodology for teaching skills to many such students. She testified that in general, ABA should be provided as soon as possible after a PDD diagnosis is made, and should be continued as long as it is helpful. In her view, ABA is not effective for every child with PDD or ASD and does not does not “cure” the core symptoms of these disabilities, but is the most effective intervention that she knows, and is, she testified, supported by empirical evidence of success. Dr. Parnes was not familiar with other methodologies or approaches for teaching children with PDD or ASD. (Parnes)
17. After Parents notified AHS of Student’s PDD diagnosis in June 2002, AHS assigned a service coordinator and began providing two hours per week of group speech/language therapy at the EI site until the end of the summer. Student was also receiving speech/language and OT. In late July 2002, AHS contracted with the May Institute, which began Student’s ABA services in early August 2002. (Mother). Student received daily therapy, which gradually increased to reach a total of 15 hours per week as of mid-November 2002. (Mother P-55) The focus of the ABA/DTT therapy was language and communication-related skills, including asking for help, indicating a want, responding to his name, etc. (Mother) Additional skills included motor imitation, block imitation, following directions, choice making, and destruction (dumping objects) (Mother, S-15)
18. By the end of the summer of 2002, Student was receiving 15 hours of ABA, one hour of home based speech/language therapy, 1 hour every two weeks of OT, and two hours per week in an integrated toddler group at the AHS site. The ABA therapist attended the toddler group sessions with Student. (Mother)
19. The ABA instruction was provided by therapists from the May Institute. Beginning in October 2002, Leslie Sutro, a pre-doctoral psychology intern with approximately

five years' experience providing direct and consultation services for children with autism spectrum disorders, began supervising Student's ABA therapists. (Sutro)

20. Ms. Sutro testified that Student had an extremely good, response to ABA. She stated that, on the average, Student achieved independence in a skill only one month after the skill was introduced. She further testified that Student's eye contact and attending skills increased; thus, his learning opportunities increased because he was less distracted. (Sutro) Parents observed improvement in Student's ability to maintain eye contact, pay attention, follow directions, engage them in conversation, and play with toys in addition to trains, on which he had a tendency to fixate. Father testified that Student's personality began emerging. (Father) After a six month⁶ follow-up visit on December 11, 2002, Dr. Parnes' Pediatric neurology clinic note recounted Parents' report that ABA had been a "miracle" for Student, resulting in improved language with two word phrases, and good understanding of language. (S-20) She observed that in her office, Student made some eye contact, could identify facial expressions, and was able to speak conversationally with some echolalia. By report and observation, Student still was weak in creative play, needed scripts for social situations, flapped his hands or arms when excited, and insisted on certain routines. Dr. Parnes concluded that Student had made significant developmental progress "attributable to a very good response to ABA." (Id.) Dr. Parnes also stated that Student possibly would do better with more ABA, and that he might outgrow his PDD features, fully or in part, with intensive treatment. Id. Dr. Parnes testified that as of the December 11 visit, Student still had some features of PDD. (Parnes)
21. In early September 2002, Mother returned to school and Student returned to daycare, this time at the Mulberry child-care program. The May Center shifted Student's ABA services from home to the day care center. Student stopped attending the toddler group because Mother's school schedule prevented her from bringing him there. Student continued to receive one hour per week of home-based speech/language therapy.
22. In mid-November, 2002, AHS increased Student's weekly hours of ABA therapy from about 11.5 to 15. (Mother, S-7)
23. Student was to "age out" of EI on his third birthday, January 14, 2003. In preparation for Student's transition to public school at age three, Mother referred Student for a Chapter 766 evaluation in letters to Middleborough dated June 12, and July 10, 2002. The letters mentioned Student's diagnosis of PDD and speech/language delays, and also listed Student's EI services, including ABA. P-8, P-9, S-9. A third referral letter was sent by Student's EI service coordinator on July 15, 2002. (P-10, S-10) Middleborough's special needs coordinator acknowledged the referral request(s) in a letter to Parents dated July 22, 2003. The letter also indicated that the referral had been forwarded to Molly Birkett, Middleborough school psychologist. (P-11, S-11)

⁶ The six months is from the date of diagnosis, June 2002. Student had been receiving ABA for about 4.5 months when Dr. Parnes saw him on December 11, 2002.

24. The next contact between Middleborough and Parents was on or about October 28, 2002 when Student was screened by Middleborough school psychologist Molly Birkett using a tool entitled "Comprehensive Identification Process," (CIP) which is a screening tool used for children aged 2.5 to 5.5 to identify those who should be further evaluated. (P-50, S-15) According to the CIP, Student performed fine motor, cognitive/verbal, and gross motor activities at age level such that no further evaluation was warranted. However, because Student had previously-identified language delays and possible sensory integration issues, Ms. Birkett's screening report recommended further cognitive, speech/language and OT evaluation of language delays and possible sensory difficulties. *Id.* Finally, the report stated the following:

There was no evidence in [Student's] behavior or in information gathered that ...he would be unable to learn in the Early Childhood program at the Lincoln D. Lynch School. It is anticipated that he will be successful in the integrated classroom program which provides much structure, consistent routines, a home component, and behavioral support...designed to assist in the acquisition of communication, social skills, and academic readiness. (*Id.*)

25. According to Middleborough's "Team evaluation Summary Sheet," Middleborough had received Student's referral on November 20, 2002 and received consent to evaluate Student on November 22 and 25, 2002. (P-60) Student's formal evaluation took place during November and December 2002 and consisted of a developmental history, educational status, and teacher assessments. (S-17) Additionally, Dr. Parnes had written a brief summary of Student's progress since beginning ABA. (P-66, S-20) Psychological, speech/language, and OT assessments were consented to but not performed until February and March 2003, after Student had started preschool.

25. The teacher assessment consisted of a December 2002 observation from the Mulberry childcare center, where Student had been enrolled since September 2002. According to this report, Student had good gross motor skills, and emerging skills in toileting, coloring, line imitation, and cutting. In the emotional/social domains, Student showed emerging skills in greeting others, selecting his activities, and learning others' names. In the cognitive area, Student knew most colors and shapes, could sort and classify, and was beginning to learn the concept of "one," and had emerging skills including anticipating a routine, knowing his age and gender, and following two-step directions. (P-64)

26. The May Center submitted a "Transitional Report," dated 12/16/02, by Lorianne Baker and Leslie Sutro. The report stated that Student made "great" progress in a short time, but needed further instruction in the identified skill areas (attending, social and language skills). As of the transitional report, Student consistently responded to hearing his name with eye contact, had generalized this skill to preschool staff, and had improved in this area at home. With respect to receptive language, Student was

able to follow eight one-step directions, and was working on 2 step directions, and was learning to identify action words. Expressively, Student could use two to four word phrases to ask for more, to stop an activity or to ask for help. He could greet others with cues, and spontaneously greeted familiar people. He could choose between two activity choices and answer five social questions, identify emotions given photos, and could identify 10 action words. Socially, Student had “incidentally” learned motor imitation with songs, and had learned to wait his turn for toys. Academically, he could copy two to five block structures. Student had not dumped objects since November, and made a low number of attempts to leave the area. In sum, Student was engaging, looked at books with peers, greeted others, waited for turns, and received hugs. He worked best one-on-one with few distractions, and learned well in the DTT sessions. He did best with visual supports.. The May Center recommended a consistent program that 1) uses an ABA “model of instruction” for pre-academic, social and communication goals 2) includes typical peers. Additional recommendations were to “consider” both a parent training component and a full-day, full year program.(P-69, S-21; Sutro)

27. Student’s initial TEAM meeting was held on December 19, 2002. In addition to Parents and Middleborough’s evaluators and service providers (school psychologist Molly Birkett, speech/language pathologist Heidi King, preschool teacher Theresa Craig), two representatives from AHS and three from the May Institute also attended the meeting. (S-24, P-65)
28. At the TEAM meeting, Parents submitted a letter dated December 18, 2002 from Dr. Parnes. In this letter, Dr. Parnes reiterated Student’s progress and good response to ABA and recommended continuation of Student’s then-present level of services, including 15 hours per week of ABA to support progress and avoid regression. (S-22, P-70) Mother testified that the TEAM “set aside” both this letter from Dr. Parnes as and the May Center transitional report of December 16, 2002, because Mother had not submitted the materials three days prior to the TEAM meeting. Mother further testified that she asked the TEAM about ABA services, and was told that ABA strategies were used in class, but that the 15 hours of individual ABA therapy would not be provided. (Mother)
29. On January 2, 2003, Middleborough issued an IEP, a proposal for extended evaluation, and a “Notice of School District Refusal to Act” with respect to ABA services.
30. The IEP describes Student as having developmentally appropriate cognitive skills, but also as having an intense (10 to 12 month) delay in speech and language related to a diagnosis of PDD, as well as “limited” interactions with peers. This IEP contained three goals related to speech/language, peer interaction, and self help skills, and offered a total of 5 hours of service per week, consisting of two, 2.5 hour sessions in an integrated preschool at the Lincoln D. Lynch (LDL) School, with pull-out speech therapy for one half hour of each session. (P-76, S-25, S-26)

31. The extended evaluation plan proposed to further assess Student's need for additional behavioral interventions, the appropriateness of the LDL preschool, and the need for sensory integration, academic or home services. (P-78-79, S-27) Parents ultimately accepted the extended evaluation proposal after initially rejecting it. (Id., Mother)
32. Middleborough's Notice of Proposed School District Action/Declines to Act stated that Middleborough was refusing "requested services," and referred to the 15 hours of ABA therapy requested by Parents. (S-28, P-82) This Notice did not specifically state a reason for this refusal. Rather, the Notice summarized the IEP services offered by the TEAM, and stated, in essence, that further evaluations would be conducted to determine if additional services were needed. Id.
33. At Parents' request, Middleborough convened an additional TEAM meeting on January 8, 2003 to revisit the issue of ABA services and review Dr. Parnes' December 18 letter. Parents continued to advocate for individual ABA therapy. Middleborough indicated that the special education teacher would provide about two 10 to 15 minute sessions of ABA per day to small groups and that generally the needs that had been addressed via ABA would be addressed in the classroom. (Mother, S-31, 32) At the conclusion of the January 8 meeting, the parties still disagreed on the ABA issue; however, Parents and the classroom teacher had agreed to collaborate on revised goals and benchmarks, which were developed during January and subsequently. (Mother, Craig, S-31, 32, 33)
34. On January 9, 2003, Parents partially rejected the proposed IEP, stating that "15 hours of intensive 1:1 ABA therapy utilizing the Discrete Trial Teaching method have been omitted⁷." but accepted the IEP goals and objectives, as well as the LDL preschool placement. (P-75, 77, 81; S-25, 26, Parents)
35. Meanwhile, while the TEAM process was underway, Student was receiving daily 1:1 ABA services⁸ as well as about three additional hours per week of speech/language therapy from Morton Hospital and the EI provider.⁹ Parents also continued to use recommended strategies at home. (Mother, Father)

⁷ As additional reasons for the partial rejection, Parents stated that they felt the goals were incomplete in scope, some benchmarks were inappropriate, and that there had been "selective and incomplete evaluation reporting."

⁸ By November 2002, Student was receiving 15 hours per week of ABA therapy.

⁹ These are approximate totals. The amount and location of various services were adjusted and modified throughout the period covered by this Decision, based on updated evaluations, changes in child care arrangements and providers, the switch from Quincy to Taunton EI, and the addition of ABA services. For example, as stated previously, Mother took Student out of day care and worked with him at home during the summer of 2002, and AHS (Taunton EI); consequently, most EI services were delivered at home during that period, except for a center-based toddler group for speech/language therapy. ABA services started at home in August 2002. Starting in September 2002, when Mother returned to school full-time, Student attended the Mulberry day care center for five to ten hours per day, and discontinued the toddler group. ABA services were delivered at the Mulberry center when Student was there, or at home during Mother's school vacations when she kept Student at home. (Mother) Beginning in December 2002, Student began to receive two hours per week of private speech/language therapy at Morton Hospital in addition to his

36. Student experienced several changes around his third birthday in mid-January 2003. First, his EI services, including ABA, stopped abruptly, without a “tapering” period. (Mother, Father) During the same month (January 2003) Student changed from the Mulberry to the Peanut Gallery child care center. Although Student was familiar with the Peanut Gallery because his brother attended there and Student had visited many times, he had never actually been enrolled. (Id.) On the other hand, Student’s private speech/language therapy from Morton Hospital continued. (Mother, Father)
37. Parents observed that shortly after Student’s third birthday, Student appeared to be regressing. His hand-flapping behavior increased, and his eye contact and response to being spoken to decreased. He was less compliant and required more prompting to attend or respond to Parents. Mother recalls that she brought this regression to Middleborough’s attention, but is not sure whether she did so at a meeting with School staff, or at the Pre-Hearing Conference. (Mother, Father)
38. On or about February 1, 2003, Student started preschool at the Lincoln D. Lynch (LDL) preschool pursuant to the accepted portions of his IEP. (He did not start in January because of the change in daycare arrangements.) He initially attended for two half-days per week, increasing to four mornings per week after the pre-hearing conference in February 2003. (Mother, Craig)
39. At the time of hearing, there was a total of fifteen children in Student’s preschool classroom, seven who were typically developing and eight (including Student) with disabilities. There were three 3-year-olds (including Student), all with disabilities; two 4-year-olds, one with a disability; and ten 5-year-olds, three with disabilities, seven typically developing. The diagnoses included Down syndrome (one three-year-old), intensive language delays and head trauma. All ten five-year-olds were to graduate to kindergarten at the end of the 2002-03 school year. (Craig)
40. The classroom is staffed by Ms. Theresa Craig (who is both a certified special needs teacher and licensed speech/language therapist and has prior experience teaching children with ASD) along with two aides. (Craig) Ms. Craig testified that the preschool curriculum encompasses expressive and receptive language skills, as well as associated skills such as following instructions and interacting socially. She further testified that an ABA-type methodology is incorporated into the curriculum to teach specific skills such as turn taking, usually in small groups. (Craig)
41. Ms. Craig testified that Student was and is a “shining star” in his preschool class, who fits in well, is “driven to learn” and learns quickly, and has made steady progress ever since he joined the class. As of the hearing date, Student could play with other children, and maintain good eye contact. He knew numbers, colors, ABC’s and generally had preschool academic skills that met or exceeded expectations for his age. Student had weaknesses in the social domain in that he needed help not to be overly

other services. As discussed below, in January 2003, Parents transferred Student from the Mulberry child care center to a family day care placement called the Peanut Gallery. (Mother, Father)

involved in his own agenda, as well as to change activity. He had improved in this area and in language pragmatics, however, and as of the hearing date could have conversations involving five to six turns, responded to other children, and was working on initiating social interactions. Fine motor skills were also progressing. (Craig).

42. Ms. Craig did not notice Student to regress between January and March 2003, when Student had no ABA services. She also did not note any increase or change in the rate of Student's progress after March 2003, when private ABA services began again. Rather, Ms. Craig testified that Student had made steady, consistent progress since starting at the preschool. Ms. Craig had reviewed Student's records from EI, but had not met Student before his third birthday, and so did not personally observe him either before or during the time he was receiving ABA through Early Intervention. (Craig)
43. In February and March 2003, after Student began preschool, Middleborough conducted psychological, speech/language, and OT evaluations, and also arranged for a behavioral observation by a contracted consultant.
44. The psychological evaluation, conducted by school psychologist Molly Birkett, consisted of formal testing, performed in February 2003, as well as classroom observations, conducted in February and March. Ms. Birkett's report describes Student as having developmental delays, with uneven cognitive development, as well difficulty with receptive and expressive language and adaptive functioning (ADLs and social skills) (S-42) On the WPPSI-R,¹⁰ Student achieved low average verbal scores and high average performance scores. No full scale score was computed because it would not accurately reflect Student's profile, given the large difference between verbal and performance scores (Id.) Student's scores on the AGS Early Screening profiles ranged from average to well above average in the cognitive and language domains, with strength in verbal concepts; these scores were pulled up by Student's strength in school readiness tasks (e.g., identifying numbers, shapes and letters), as well as by the test structure, which called for Student to answer certain questions by pointing rather than by generating a verbal response. On the other hand, on the Vineland Adaptive Behavior Scales, for which Mother was the informant, Student's overall score was "moderately low," in the 3d percentile overall, with specific areas of weakness in socialization ("moderately low"), communication ("low/mild deficit"), and ADLs ("Low, mild deficit"). (S-42) The psychological evaluation report recommended continuing the current preschool placement to address communication, socialization, and daily living skill deficits, and to use Student's strength in the visual domain to help him learn other skills. (S-42)
45. The speech/language evaluation, conducted on March 3, 2003, showed that Student had progressed since the March 2002 Morton Hospital evaluation in (a) sound production (from a "severe phonological disorder" per Morton Hospital to normal sound production for age); (b) receptive language, (from moderately delayed to

¹⁰ Wechsler Preschool and Primary Scale of Intelligence-Revised

within the average range) and (c) expressive language (from “severely” to “mildly to moderately delayed”). The evaluator found that Student also had maintained or improved the skills addressed in the December 2002 Transition Report from the May Center. Student showed no observable regression in eye contact, following directions, or sorting pictures, and showed improvement in identifying action words. He continued to have difficulty with answering questions in the context of conversational turn-taking. The evaluator recommended continued speech/language therapy twice weekly, addressing the same language objectives as previously and possibly adding some objectives. (S-41)

46. Student was observed in his classroom on several occasions during February and March 2003. As part of her psychoeducational assessment, Ms. Birkett observed Student in his classroom on February 3, February 26, March 10 and March 13, 2003. (S-42; Birkett) During the first observation, Student played independently on the playground, and responded appropriately to teacher redirection. During snack time, his behavior was similar to that of the other children. Student did not interact with peers during this observation. (S-42) During the second observation, about two weeks later, Student transitioned appropriately from speech therapy to his classroom, correctly answered questions about whether characters in a story were “happy” or “sad,” engaged in symbolic play, and followed classroom routines. He watched another student but did not play with him, and protested when his teacher attempted to join Student at play and change the play somewhat. (Id.)
47. During Ms. Birkett’s March 10 observation, Student used 5 and 6 word sentences, initiated interactions with teachers and classmates, shared information and toys, asked for help, and played cooperatively with peers. (Id.)
48. On March 13, Ms. Birkett observed Student ask for help, participate in class activities, and make transitions without difficulty. He played with another child and once tried to grab a truck from him, but then imitated the aide’s modeling of how to ask for a turn. He attended well to a story and tried to finish sentences in the story during pauses. (S-42, 43)
49. Student’s teacher, Ms. Craig, observed Student in his daycare setting in early March 2003, and found that Student was functioning in a group of fifteen to 20 children. Student did not interact much with his peers during her observation, preferring to play with a toy train. Ms. Craig offered support to the daycare teacher, but the latter responded that Student was doing well. (Craig)
50. In addition to the observations by Ms. Birkett and Ms. Craig, Student also was observed by two behavioral specialists to address the need for ABA services.
51. The first such observation was conducted on February 3, 2003 by Andrew Longoria, from the May Institute in Chatham, MA. Mr. Longoria has a background in behavioral interventions, including ABA, for persons with PDD and autism spectrum disorder, and provides consultation services to Middleborough. (Longoria, S-44) Mr.

Longoria's report indicates that during the observation, Student's activities and responses were "significantly close to age...and setting appropriate." The report recommended continued placement in the integrated preschool classroom. The report did not recommend specific behavioral strategies as Mr. Longoria could not identify behaviors that would warrant them. Rather, Student's behavior was not problematic, and class routines, rules and expectations were sufficient to manage it. (Longoria, P-102, S-37)

52. Mr. Longoria testified that the goal of his observation was to determine if Student had disruptive or interfering behaviors, because he understood that this is what Middleborough wanted him to do. (Longoria). Mr. Longoria did not recommend ABA services because Student behaved well, and responded appropriately to the existing classroom structure and expectations. He did not assess whether ABA was appropriate to teach Student attending, language, or social skills because this was not the purpose of his observation. (Longoria)
53. Leslie Sutro, who had supervised Student's ABA therapy while he was in EI, conducted the second observation on March 13, 2003. Ms. Sutro observed Student for about 1.5 hours on what teachers told her was a typical day. She noted that the classroom was appropriately organized with clearly defined centers, visual supports, and transitional cues, and that Student was comfortable in the classroom, followed class routines easily, had no interfering behaviors, made transitions well, and used many toys. (Sutro, S-46, P-92)
54. She noted also, however, that Student was less independently compliant than others in the class, requiring multiple verbal and gestural prompts to complete tasks about 50% of the time, where other students generally complied independently about 80% of the time. Student also was more frequently off task (not attending) than his peers, and also had difficulty interacting with other children and using spontaneous language. (S-46, P-92) Ms. Sutro compared Student's incidence of off task behavior (about 35%) with that of all other peers in his class, not just the other three year olds. (Id., Sutro)
55. When asked about comparing Student's attending level at age 3 to that of five-year-old classmates, Ms. Sutro explained that she was concerned that Student's lapses in attending caused him to lose intensive learning opportunities from teacher instruction that he needed because his PDD. I infer from this testimony that Ms. Sutro thought the issue was not whether Student's inattention was comparable to that of other children his age, but, rather, whether and how this inattention deprived him of the direct instruction made necessary by his PDD. (Sutro).
56. Ms. Sutro observed that Student engaged in parallel or proximate play (rather than interactional play) about 80% of the time, as opposed to 20% of the time for Student's classmates. Ms. Sutro testified that even correcting for age differences, Student has play skill deficits that warrant direct instruction. (Sutro)

57. Ms. Sutro recommended continuing Student's current placement in the LDL integrated preschool class, together with "on-going direct instruction based on a model of [ABA]...to target the identified skill deficits. Such instruction would help maximize the number of learning opportunities presented to [Student] giving him the necessary rehearsal and repetition that would promote skill acquisition." (S-46, P-92)
58. Ms. Sutro testified to two reasons for recommending continued ABA. The first was Student's prior success. The second was that current scientific research demonstrates that ABA/DTT are appropriate methodologies for children with PDD, and that in children under five years old, the best outcomes (measured by improved adaptive functioning, cognitive ability, behavioral flexibility, language, and reciprocal social interaction) are associated with over two years of ABA treatment. Since Student has PDD and has done well with ABA/DTT, he should continue for as long as he benefits. (Sutro)
59. Dr. Parnes saw Student for a follow-up visit on March 26, 2003, and testified that in the "snapshot" of this single visit, Student no longer met the criteria for PDD and had made "outstanding" progress. She recommended, however, that Student continue to receive ABA services to prevent relapse because the core symptoms of PDD/autism spectrum disorder may not be "cured" by ABA. (Parnes) On cross-examination, Dr. Parnes testified that she could not rule out the possibility that interventions other than ABA (speech therapy, OT, other EI services) were the reason for Student's progress, and that he would have made progress even without ABA. Dr. Parnes also stated, however, that the only way to determine the role played by ABA would be to provide the therapy and then withhold it, assess whether or not Student regressed; then re-institute the ABA and measure whether he recovered from prior regression, if any—an experiment that would be too disruptive to Student. (Parnes)
60. On or about March 11, 2003, Student began receiving two, three hour sessions per week of home-based ABA services at private expense. Father testified that Student's attending and language skills began to return after three hours of private ABA. (Father)
61. Student was not receiving private ABA instruction when Mr. Longoria observed him on February 3 and Ms. Birkett saw him on February 3, 26 and March 10. He resumed ABA two days before Ms. Birkett's and Ms. Sutro's observations of March 13 (so that he would have had one or two sessions) and two weeks (about four sessions totaling 12 hours) before his March 26 visit with Dr. Parnes. As of these dates, Student was receiving 18 total hours of service per week, comprising 10 hours per week of integrated preschool (including 2 hours per week of speech/language therapy) and eight hours of private services (six and two hours, respectively, of ABA and speech/language therapy.)
62. The record contains no evidence about the content of the private services or Student's progress with those services, other than Father's brief testimony that Student

recovered from regression after starting private ABA sessions. Moreover, there is no evidence of whether or not Middleborough considered reports from the private providers, or whether Parents have asked Middleborough to do so.

FINDINGS AND CONCLUSIONS

Based on the evidence presented at the hearing, as well as the applicable law, I conclude that Middleborough's IEP and services are reasonably calculated to provide Student with a free, appropriate public education. Parents did not show by a preponderance of evidence that Student needs an additional 15 hours per week of ABA/DTT therapy in order to receive FAPE. I find further Middleborough did not commit procedural violation that deprived Student of FAPE; hence, Parents are not entitled to any compensatory relief. My reasoning follows.

Legal Framework

The FAPE Standard

The parties do not dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, G.L. c. 71B ("Chapter 766"). Therefore, Student is entitled to a free appropriate public education (FAPE) as defined in federal and state law.¹¹

The IDEA defines FAPE as special education and related services that (A) are provided at public expense and under public control; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary, or secondary school education; and (D) are provided in conformity with an properly developed IEP. 20 USC Sec. 1401; 34 CFR Sec. 300.13.

Federal courts have interpreted FAPE to mean an IEP and services that provide "significant learning" and confer "meaningful benefit" on the student via "personalized instruction with sufficient support services to permit the child to benefit educationally." Hendrick Hudson Bd. of Education v. Rowley, 458 U.S. 176, 188-9, 203 (1992); *see also* Burlington v. Mass. Dept. of Education, 736 F.2d 773, 788 (1st Cir. 1984). The IEP must be tailored to the unique needs of the disabled child, and must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the educational and personal skills identified as special needs." 34 C.F.R. 300.300(3)(ii); Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993), citing Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) and Burlington, 736 F.2d at 788.

¹¹ For an exhaustive review of the FAPE standard, see *Arlington Public Schools*, BSEA No. 02-1327 (Crane, July 23, 2002)

The IDEA does not require districts to maximize a student's potential, but rather to assure access to a public education and the opportunity for meaningful educational benefit. Lenn, 998 F.3d at 1091; G.D. v. Westmoreland School District, 930 F.2d 942 (1st Cir. 1991) On the other hand, some federal courts have held that "effective results" and "demonstrable improvement" should be measured in light of the student's individual potential. See, e.g., Houston Independent School District v. Bobby R., 200 F.3d 341 (5th Cir. 2000).

The Massachusetts special education statute defines FAPE as "special education and related services ...consistent with ...[the IDEA]...and which meet the education standards established by statute or...regulations..." G.L. c. 71B, Sec. 1. The Massachusetts Department of Education (DOE) has interpreted the state standards referred to in the statute to include not only the special education regulations but also the state curriculum frameworks, such that all Massachusetts public school students, including those with disabilities, are entitled to the opportunity to learn the material encompassed by these frameworks. See Massachusetts DOE Administrative Advisory SPED2002-1: Guidance on the change...from "maximum possible development" to "free appropriate public education" ("FAPE"), Effective January 1, 2002 (November 20, 2001) ("DOE Advisory")

Under both federal and state law, FAPE requires schools to educate eligible students in the least restrictive environment, i.e., to the extent appropriate, with children who do not have disabilities. 20 U.S.C. 1412(5)(A). Finally, FAPE also entails complying with the procedural requirements of the IDEA. A school district that violates a student's procedural rights under federal or state law may be liable for compensatory services where "procedural inadequacies [have] compromised the pupil's right to an appropriate education ... or caused a deprivation of educational benefits." Roland M., 910 F.2d at 994 (citations omitted). Thus, for example, "a procedural default which permits a disabled child's entitlement to a free and appropriate education to go unmet for two years constitutes sufficient ground for liability under the IDEA." Murphy v. Timberlane Regional Sch. Dist., 22 F.3d 1186, 1196 (1st Cir. 1994). On the other hand, technical or de minimis violations that do not deprive the child of FAPE do not entitle parents to compensatory relief. Id.

If parents of an eligible disabled child can prove that their district's IEP and services does not provide FAPE, they may be reimbursed for the costs of unilaterally obtaining a private program or services, if they also can prove that the private services are appropriate. 20 USC Sec. 1415 (d)(2)(H), School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359, 369-70 (1985). Thus, if a school offers inappropriate services that do not provide FAPE, the school may be required to reimburse a parent for the costs of a unilateral placement or services that are appropriate, i.e., that are "appropriately responsive to [a student's] special needs;" so that the student can benefit educationally. Matthew J. v. Mass. Dept. of Education, 989 F. Supp. at 387, 27 IDELR 339 at 343-344 (1998), citing Florence County School District Four v. Carter, 510 US 7, 13 (1993); Doe v. West Boylston School Committee, 28 IDELR 1182 (D. Mass., 1998); In Re Gill-Montague RSD, BSEA #01-1222 (Crane, August 2001).

Discussion

Here, the parties are in substantial agreement as to Student's profile,¹² and also agree that Student is thriving in Middleborough's integrated preschool program. The only substantive dispute is whether Student needs an additional 15 hours per week of ABA/DTT training to receive FAPE. If Middleborough's program is appropriate without the addition of ABA services, the inquiry stops. If not, then the issues are (a) whether Middleborough must provide such services prospectively, and (b) whether Parents are entitled to reimbursement for the private ABA services because they were obtained in the face of an inappropriate IEP and also were/are reasonably tailored to meet Student's special educational needs.

A threshold issue raised by Middleborough is whether a BSEA hearing officer has the authority to consider whether ABA services are necessary to provide FAPE. The School argues that this is purely a question of methodology, that the choice of educational methodologies belongs solely to the school, and cannot be dictated by Parents or a hearing officer. See *Written Closing Argument of the Middleborough Public Schools*. I disagree because Middleborough's argument carries a general principle too far. It is true that courts generally have held that educators, rather than courts, hearing officers or parents, should choose the methodology for delivering IEP services. In Rowley, for example, the Supreme Court stated the following:

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

458 U.S. at 207, 102 S.Ct. at 3051. In another leading decision, Lachman v. Illinois State Board of Education,¹³ the Seventh Circuit stated 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 their handicapped child."¹⁴ See also Roland M., 910 F.2d at 993; Renner v. Board of Education of the Public Schools of the City of Ann Arbor, 185 F.3d 635, 645 (6th Cir. 1999).

¹² The evidence reveals possible difference of opinion among individuals as to whether Student's diagnosis should be "PDD" or "developmental delays" in language and socialization. (Parnes, Birkett) However, this dispute was neither reflected in Student's IEP nor developed at the hearing.

¹³ 852 F.2d 290, 296 (7th Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 308, 102 L.Ed.2d 327 (1988)

¹⁴ *Id.* at 297

Courts' deference to schools' choices of methodology appears contingent on their conclusion that the IEP is appropriate, however. For example, in T.H. v. Bd. of Educ. of Palatine Comm. Consol. Sch. Dist. 15,¹⁵ the court stated that "[I]f the school district's IEP is not substantively appropriate, Lachman is irrelevant." *Id.* In that case, the court upheld the parents' home-based ABA/DTT program because the IEP had not worked for the child in the past, was not tailored for children with autism, and was not sufficiently individualized for the particular child. *Id.* Further, the court found that district staff were "uncomfortable" with ABA/DTT as a methodology, but could not articulate their own preferred approach or methodology.¹⁶

Additionally, courts seem to address ABA/DTT differently from other methodology disputes. In numerous cases courts have held that there is a "window of opportunity" for children with PDD/autism spectrum disorders to develop language and behavioral skills. If the evidence—including expert testimony-- shows that ABA/DTT is necessary for FAPE during that window, courts have ordered schools to provide it. See, e.g., T.H. v. Palatine, *supra*.

In this case, it is appropriate for me to consider whether or not the Student requires ABA services in addition to those he is receiving through his current IEP. The dispute here is not over a choice between ABA and some different methodology for teaching Student. Rather, the ABA at issue here is a discrete service. The party's disagreement on whether Student needs this additional service is no different than a dispute over whether a child needs, e.g., speech therapy or reading services to receive FAPE. Parents claim no difficulty with the methodologies used in the preschool and do not attempt to dictate how Middleborough teaches Student. Rather, Parents claim that the IEP will not provide FAPE unless supplemented with 15 hours per week of ABA services. Further, the School does not claim that a methodology other than ABA/DTT must necessarily be used, but only that the current IEP and placement already provide FAPE, and no additional services are required.

The record establishes that Student is a wonderful, bright, happy, loving child who is eager and "driven" to learn. Despite diagnoses of mild PDD, significant language delays or disorders, and difficulties with socialization and play, Student has made progress in virtually every setting or program in which he has been placed. At the BCBS child care program, Student worked hard to communicate and learn self-help skills, even before he started receiving services. Student had a very positive response to speech/language therapy from the EI program. (Parnes) He also responded to the strategies that his parents used at home to assist his language development. (Parents)

¹⁵ 30 IDELR 764 (N.D. IL 1999)

¹⁶ See also, Logues v. Shawnee Mission Public School Unified School District No. 512, 959 F.Supp. 1338 (D. Kans. 1997) (Evidence showed that a hearing impaired student progressed with a total communication teaching approach and the IEP was appropriate. Even though parents preferred an oral approach, the court did not question the school's choice of methodology because it was used in the context of an appropriate IEP.

Further, the uncontested evidence shows that Student benefited from the ABA services he received from early August 2002 to mid-January 2003. Parents, Dr. Parnes, and Ms. Sutro testified credibly that Student became more attentive, and more available for communication, and that some of his PDD/ASD traits began receding. (Parents, Parnes, Sutro) Student began engaging Parents in interactions, and Parents felt his personality was emerging. Because Student had so benefited from his EI services, including ABA, he entered Middleborough with fewer delays and problems than he had previously displayed.¹⁷ The evidence does not “prove,” empirically, that the ABA per se is the major or only reason for Student’s progress between August 2002 and January 2003, as opposed to the other EI services he also was receiving (including Parents’ hard work to teach and implement language strategies at home) or even the dramatic increase in total direct service from about two hours weekly to seventeen¹⁸ hours. The record does show, however, that Student made gains during the time he was receiving ABA.¹⁹ (Parents, Parnes, Sutro)

Having established that ABA benefited Student while he was in EI, the next question is whether he continues to need ABA to make meaningful progress within the meaning of the IDEA. There are several factors to consider in answering this question. First, there is the issue of whether Student regressed because he lost ABA services. Parents testified that after his third birthday, Students began to regress to earlier behaviors. He increased hand flapping, became less attentive, had more difficulty making eye contact, and was less compliant. Parents had to increase prompting to keep Student engaged. (Father) Dr. Parnes also testified that Student’s language quality had diminished “somewhat.” (Parnes)

While I credit Parents’ and Dr. Parnes’ testimony as to their own observations of regression, I cannot conclude from this evidence alone that loss of ABA per se caused it. When Student turned three he precipitously lost 17 hours of services per week, 15 of which were taken up by ABA. These 15 hours of ABA constituted nearly 79% of Student’s 19 total hours of weekly service.²⁰ Student also changed daycare providers at this time. (Mother) It would not be surprising if Student had regressed somewhat. It is unclear, however whether the regression was related to the loss of the ABA methodology, the loss of so many hours of service regardless of methodology, or a combination of these and other factors.

In any event, the evidence shows that once Student began preschool in early February, he quickly made progress in all areas of need. For example, the speech/language evaluation of early March 2003 (before Student resumed private ABA

¹⁷ Of course, this is one of the purposes of the Early Intervention program.

¹⁸ Nineteen hours as of late December 2002, when private speech therapy started.

¹⁹ As stated in the Summary of Evidence, above Dr. Parnes testified that she could not rule out that the other interventions (speech therapy, OT) caused Student’s improvements, and that the only way to tease out the role of ABA per se would be to eliminate ABA from the service package, watch for regression, then, if regression occurs, restore ABA services and measure recoupment. Dr. Parnes stated that such an experiment would be too disruptive to Student. (Parnes)

²⁰ This total of 19 hours per week comprises 15 hours of ABA, approximately 2 hours of other EI services, and 2 hours of private speech therapy.

services) showed that Student had maintained or increased language skills from December 2002.

In addition, Student's teacher, Theresa Craig, found the Student has made steady, consistent progress since he entered preschool, with no acceleration in the rate of progress after starting private ABA in mid-March. Ms. Birkett's testimony and reports also indicate that Student's language and socialization skills grew steadily from the time he started at preschool.

I also credit Father's testimony that he observed Student returning to his former level of attentiveness and engagement once Parents started private ABA therapy. However, Father's conclusions were not corroborated by the School's evaluations, or by the testimony of Student's teacher and school-based service providers. Finally, the record contains no reports or testimony from either the Morton Hospital speech therapist or the ABA provider on whether they felt Student regressed after January 14 (something the private speech therapist could have addressed), and whether and to what extent he recovered after private services started. Other than commenting generally that Student improved with private ABA, Parents did not testify about the goals Student was working on or how he was responding to ABA (or speech therapy).

Taken as a whole, the record shows that Student made meaningful progress in all identified areas of need, including language and social skills, in Middleborough's program, both while he was receiving private ABA and when he was not, with no objectively verified difference in rate of progress when he started the supplemental ABA services. Parents presented no persuasive evidence to the contrary.

Parents' witnesses testified generally that ABA/DTT is a preferred methodology for teaching children who have been diagnosed with PDD both because it is effective, because a student's progress with his/her goals can be objectively tracked, and because it prevents relapse of core symptoms of PDD that are not "cured" even though they may not be less evident at a given time. (Parnes, Sutro) Neither of these witnesses was persuasive as to Student's individual need for additional ABA therapy at this time, as neither established that Student was not making meaningful progress in Middleborough's program or that his IEP and services were otherwise inappropriate.²¹ (Parnes, Sutro) Notably, Parents' witnesses did not testify that Student had a limited "window of opportunity" for learning that could only be taken advantage of with ABA services, in contrast to the Palatine case cited above.

As discussed above, Student has made steady, meaningful progress in his current placement ever since he enrolled. He made such progress both before the addition of ABA services in mid-March 2003 as well as after those services started.

²¹ I gave little weight here to the testimony of the school's behavioral consultant, Andrew Longoria, because Mr. Longoria did not assess the possible benefit of ABA in light of language and socialization goals. Rather, as stated above, Mr. Longoria evaluated whether Student required additional interventions such as ABA for disruptive behavior, something that neither party has viewed as a serious issue.

Based on the foregoing, I find by a preponderance of credible evidence that the program and services of the Middleborough Public Schools are appropriate, and have provided Student with FAPE, and that the Parents have not proved by a preponderance of evidence that an additional 15 hours of outside ABA/DTT is necessary for FAPE.

In so finding, I note again that no evidence was placed in the record about the private ABA and speech therapy. I was unable, therefore, to consider the impact of the private services on Student's progress. It is only logical that an additional 8 hours per week of services (six of ABA and 2 of speech/language) would impact Student, although, again, Ms. Craig noticed no change in Student's rate of progress after private services started. On the other hand, it is nearly impossible to tease out the role of the private services in the overall success of Student's program. Should either party wish to revisit this issue, they may request a TEAM meeting to consider the information provided by one or both service providers.

Reimbursement

Because Middleborough has offered an appropriate program for Student, Parents are not entitled to reimbursement for private ABA services; therefore, I will address neither the appropriateness of these services nor whether Parents had properly made a claim for reimbursement.

Procedural Violations/Compensatory Services

Parents assert that Middleborough failed to evaluate Student or generate an IEP within the time lines set forth in special education regulations, unlawfully pre-determined Student's placement before referring him for initial evaluation, conducted an inadequate evaluation, and then improperly used the device of an extended evaluation for assessments that should have been done as part of the original evaluation. Based on the evidence, these assertions lack merit. First, Middleborough evaluated Student, found him eligible, and issued an IEP in time to start special education services by his third birthday as required by 34 CFR 300.121(c) and 603 CMR 28:04(1)(d). Second, while the LDL preschool was mentioned as a possible appropriate placement by one individual, Molly Birkett, prior to the full evaluation, there was no official TEAM determination of placement until after evaluation. Even if the LDL placement had been improperly predetermined, this did not deprive Student of FAPE, as the LDL preschool placement is appropriate. Third, the initial evaluation was appropriate. State regulations encourage the use of current and appropriate EI assessments whenever possible to avoid duplicates testing. 603 CMR 28.04(2)(a). Middleborough's reliance on reports from EI at the initial TEAM meeting was entirely appropriate. The extended evaluation was entirely appropriate as it allowed the School to evaluate Student in the context of a preschool placement.

I conclude that there were no procedural violations resulting in a denial of FAPE, and, therefore, Parents are not entitled to compensatory services.

CONCLUSION

I conclude that Middleborough's IEP and placement for January 2003 through January 2004 are appropriate, as they offer Student FAPE. Happily, Student has made steady, meaningful progress in the School's program. Middleborough did not commit any procedural violations that would entitle Parents to compensatory relief. Further, because Middleborough's proposed placement and services are appropriate, I do not reach the issue of reimbursement for private services.

As stated above, there was no evidence presented regarding the private services, other than Father's statement that Student recouped skills when private ABA started, and the teacher's testimony that she noticed no difference in Student's rate of progress after private services began. If Parents wish to have Middleborough consider reports of private service providers, they may request a TEAM meeting for this purpose.

By the Hearing Officer:

Sara Berman

Date