

**SPECIAL EDUCATION DUE PROCESS
HEARING DECISION
Parent v. Portland**

May 31, 1997

CASE NO. 97.022

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COUNSEL FOR THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Carol B. Lenna

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, 7207, et. seq., 20 USC, 1415 et. seq., AND IMPLEMENTING REGULATIONS.

On January 29, 1997, the Department of Education received a request for a Due Process Hearing from the parent, on behalf of his student. The family resides in Portland, Maine. The student currently attends a self-contained special education program at the Hall School in Portland.

The Pre-hearing Conference convened on February 28, 1997. The hearing in this matter was initially scheduled for March 7, 1997. School's attorney requested an extension due to a conflicting hearing previously scheduled. There was no objection from parent's attorney. The Hearing convened on March 27, 28, and April 17. Three hundred and seventy documents were entered into the record. Documents, which were jointly entered by the parties, are numbered 1 - 340. Additional documents entered by the parents are numbered P. 1 - P4, P. 16 - P.31.

Ten witnesses gave testimony at the hearing. Late on the last day of hearing, the parents wished to recall a witness for rebuttal who was unavailable that day. Rather than reconvene the parties for one rebuttal witness, it was agreed that rebuttal testimony by this witness would be provided by deposition. The Hearing Officer instructed the parents to provide the rebuttal deposition to the school and the Hearing Officer by April 29. The parties waived oral closing statements and requested an opportunity to submit written summations. The record remained open until May 12 for that purpose. At the request of the school's attorney, and with no objection from the parent's attorney, an extension for closing briefs was granted until May 18, 1997.

Following is the decision in this matter.

I. Preliminary Statement

The student is a x year old student who is identified as eligible for special education services under the category of multi handicapped. Student has been diagnosed with a Pervasive developmental disorder and a child with a disability on the Autism spectrum. Although student demonstrates some behavior characteristics of children with autism, there has been no definitive diagnosis of autism. Student also has a seizure disorder, which appears to be controlled by medication.

The student currently is placed in a self-contained classroom for multi handicapped children with significant language deficits located in the Hall School a public elementary school. Student's program focuses on increasing academic readiness skills and decreasing interfering behaviors. Student also receives speech and language instruction, physical therapy and occupational therapy from therapists who work with student within the classroom. Time with non-disabled peers is structured both in and out of the classroom. There is no specific program methodology employed in the classroom. Teachers describe the program as a language based curriculum using a variety of behavioral methods.

The student entered the Hall program in September 1994 from a local preschool program which uses an applied behavioral analysis or ABA approach.¹ Since that time the parents have made repeated requests to the school to employ the methodology used by the preschool. The parents state that the ABA program was highly successful for the student. They claim that student's rate of progress while in the public school has slowed, and in some areas regressed. They argue that the IEPs written for the student since 1994 do not comply with regulations and have not been appropriate to meet student's needs. They are requesting that the school establish and train staff to begin a program, which is based on the ABA methodology.

The school argues that the student is well placed in student's current program. They point out that the staff working with the student have extensive experience and expertise working with students with similar needs. The program, in the school's opinion, offers the student the intensity required to meet student's needs while offering student the opportunity to interact with non-disabled peers. They state that the approach favored by the parent is unnecessarily restrictive. The school argues that the student has made progress while in the public school program. They contend that the program is reasonably

¹ Throughout the hearing the teaching method used by the preschool the student attended in 1993-94 (and that preferred by the parent) was referred to interchangeably by the parties as applied behavioral analysis, discrete trial therapy, the May Center approach, and Lovaas/style method to describe an intensive intervention method used to teach autistic children which is based on the principle of operant conditioning. This decision will use the term applied behavioral analysis or ABA only.

calculated to provide the student with educational benefit in the least restrictive environment and therefore the methodology employed in the classroom is left to the discretion of the school.

II. Allegations of Procedural Violations

1. Failure of the school to develop an initial IEP which was the basis for educational programming and placement. [MSER, Section 9.1]
2. Failure of the school to develop an IEP for the 1994-95, 1995-96 and 1996-97 school years which includes all the components required, specifically 1) a statement of student's present level of performance, 2) annual educational goals, 3) short term instructional objectives leading to each annual goal, and 4) a section describing the appropriate objective criteria...for determining...whether or not short term instructional objectives are being achieved. [Id., Section 9.3]

III. Issues for Hearing

1. Were the student's IEP's for the 1994-95, 1995-96, and 1996-97 school years reasonably calculated to provide student with educational benefit in the least restrictive educational environment.
2. If not, are the parents entitled to compensatory education including an IEP based on the ABA methodology with staff trained in this methodology?

IV. Findings of Fact

1. The student has a history of delays in social, communication, motor, and adaptive skill development. In addition, student has a history of a generalized seizure disorder which has impacted on student's ability to communicate effectively and has probably altered the natural sleep/wake cycle. Student exhibits a number of significant autistic features, including deficits in communication abilities, stereotypic and repetitive patterns of behavior, restricted quantity and quality of social interaction. Oral expression is limited. Student communicates through a mixture of signing, vocalizations and gestures. Student is toilet trained reliably for urination at school on a timed toileting program. Student does not remain accident free while outside of school. Student has mastered a pincer grasp and uses it in reliability in picking up small objects. Student wears a brace to assist student in walking with a heel-toe gait. Student has recently learned to ride a tricycle. Student does not play interactively with peers, but is observed to make frequent eye contact and vocalizations towards them. (Ex. 332, P. 2; Testimony: Parent, Vitali)

2. In October 1993 the parents contacted the school to inform the special services department of the student's approaching need for services from the school given her upcoming x birthday. (Exhibit 229)

3. An initial special education referral was made by the school November 23, 1993. During the winter of 1993 and spring of 1994 the parents and school had several meetings regarding the student's current preschool program and student's service needs. (Ex. 148, 150, 151, 152, 223, 225, 226, 228)

4. On May 9, 1994 an initial PET meeting was convened. Parents, school staff and staff from the student's preschool program attended. Minutes indicate the purpose of the meeting [was] to review the student's history, present skill levels and determine student's needs. The PET determined that the student required a full day, self-contained special education program to address needs in the areas of Communication, social/attending, gross and fine motor/sensory integration, self-care (including toileting), leisure/play, group activities, readiness/academics, [and] reduction of inappropriate behaviors. (Ex. 141)

5. An IEP also dated May 9, 1994 states that special education services will be self-contained and that student's annual educational goal is to [i]ncrease skills in the area of: communication, self-care, readiness, socialization, gross and fine motor. Under the short term objectives section of the document is written. To be determined in the fall 1994 PET. (Ex. 143-145)

6. The student continued in student's preschool program through the summer of 1994. On the first day of school, in September, student began to attend the self-contained special education class for multi handicapped students at the Hall school. On October 12, 1994, the PET met for the second time. The stated purpose of the meeting was to share progress to date, review specialist reports and establish IEP goals specific to student's needs. Diagnostic reports from the special education teacher, occupational therapist, physical therapist, speech therapist and the inclusion teacher were presented to the meeting. The student closeout report from the student's preschool was also given to the team. The PET determinations list OT, PT, APE, speech/language among others. An IEP was developed that date. Annual goals and short-term objectives are written in the document. (Ex. 112, 114, 125, 126, 128, 135, 138, 153)

7. In November 1994, and in March 1995, the student's special education teacher compiled narrative progress reports regarding the student's progress over the year. Much of the same information is included in the two reports, but differences noted from November to March are that the student's need for adult support to follow through with directions/task completion has decreased gradually. Student answers yes/no to questions with increasing consistency. Student's overall participation has shown an increase. Student's overall eye contact has improved. Behavioral incidences are significantly reduced from the Fall semester. The teacher summarizes the March report by saying that

the student has made gradual gains in all developmental areas. The balance of the November and March summary paragraph are the same, except that the teacher notes that the student demonstrates regression when not in the program or when the structure and routine is removed. (Ex. 103, 107)

8. A progress summary report dated August 1995, describes the student's participation and progress in the summer program. The report notes that the student's vocalizations and word approximation attempts have increase [sic] and continues to be encouraged to use sign with student's vocalizations. Student is able to choose student's full name from a group of names...Student's gait is improving.... At free play...student remains at a parallel play level...[the student]'s eye contact and communicative interactions continue to increase...Student is able to undress independently with some assistance...Dressing has improved, but is often interfered with by distractibility and non-compliance...[the student] remains on a time toileting program of arrival, after snack, and before and after water time without incident...At meal times [the student] required supervision to reduce stuffing her mouth and to pace student's drinking. (Ex. 97)

9. In November 1995 the PET met for the annual review. In addition to the school staff and the parents, Ms. Christine Manley, the Director of the student's previous preschool program attended at the request of the parents. The parents presented a memorandum to the PET in which they analyzed their observations of the student's progress and/or regression in the various skill areas since beginning at Hall school. The minutes note that [f]ollowing the PET meeting Ms. Manley submitted a copy of her 11-16-95 observation at Hall School. [The parent] submitted a memorandum regarding [the student]'s progress...[The parents] will meet...with [the principal and speech therapist] to discuss these matters further. Neither the memo or classroom observation were discussed at the meeting and did not play a role in the development of the IEP. (Exhibit 63, 80, 89; Testimony Parent)

10. In the 1995-96 IEP Present Level of Educational Performance is described as pervasive developmental delays in all developmental/educational performance areas. The annual educational goals of the IEP state [the student] will continue to develop academic readiness skills, will continue to gain independence in the area of self care skills, will continue to improve language skills so that the student may utilize and participate in her educational program, will continue to acquire and consistently exhibit appropriate school behaviors... [will d]evelop...and maintain...the...physical potential for independence in all educationally related tasks, and finally will improve fine motor...skills...in order to enhance student's academic progress. Objectives are written for each of these goals. Each objective states that certain expected behaviors will have been achieved by 11/96. (Ex. 65-72, see also P-18)

11. A narrative progress report dated March 1996 was compiled by the special education teacher. The teacher notes that the student is encouraged to expand student's signed utterances and to pair them with vocalizations. The student still requires redirection and/or verbal cues to remain attending. [P]articipation and performance vary.... She is using some eye contact with peers. Student has improved in sitting upright in student's chair...student copies a horizontal and vertical line after one or two initial practices. Student demonstrates good effort and motivation in PT., student's gait and coordination continue to need work. An Extended Year Service Report dated August 1996 gives a list of the activities the student participated in during the extended year services but gives no progress information. (Ex. 57, 51)

12. The PET met on November 1 and again on November 26, 1996 to discuss the student's 1996-97 IEP. In preparation for this meeting a diagnostic report based on teacher observation was compiled by the special education teacher, occupational therapy, language therapist, and physical therapist. A memorandum of their observations of the student's progress was prepared by the parents. Minutes of the meeting, and a transcript from the parent's taping of the meeting, indicate that there was lack of consensus on the IEP goals and objectives and measurement of progress. The parents agreed with school staff that the student appeared to be making progress in some areas, but again expressed their concern that the student had failed to make progress in certain areas, and had regressed in others. After much discussion the IEP was modified by adding one objective which states that [g]iven a timed toileting program, [the student] will pair a signed verbal request when going to the bathroom.

Parents again stated their preference for the ABA method of instruction and asked the school to begin such a program. The PET deferred this decision to discussions between administrative staff and the parents. (Ex. 47, 43, 40, 37, 35, 22, 20)

13. In the fall of 1994, 1995, and 1996 the teaching staff completed a Battelle Developmental Inventory on the student. Raw scores and age equivalent scores are given for each of five major domains: personal-social, adaptive, motor, communicative, and cognitive; and a total score for all domains collectively. Results show that the student exhibited growth in all domains, although rate of growth decreased in all domains from 1995 to 1996. Total growth over the three years was 15 months, with 9 months growth the first year and 6 months the second. Teachers testified that they feel the Battelle assessments give an accurate reflection of the student's level of development. (Ex. 339, P. 16; Testimony: Vitali, James)

14. The school and the parents kept in frequent contact about the student's daily events through use of a parent-teacher notebook. A general description of the student's day or evening/weekend was shared, as well as events of notice. The parents related over 17

incidents of toileting accidents during out of school time. The notebook covers the period September 1996-January 1997. (Ex. 266-323)

15. The student's special education teacher, student's physical therapist, and student's current and past speech therapist all testified at the hearing. Each gave clear observations of the student's needs and concrete examples of progress student has made. (Testimony Vitali, Hansen, James, Clifford)

16. Both of the student's parents testified. Each gave clear descriptions of the student's skill acquisition while at student's preschool program. Each gave concrete examples of areas where they have observed the student to have limited progress or regression. (Testimony parents)

V. Conclusions

Did the school comply with procedures set forth in law?

1. Did the school fail to develop an initial IEP, which was the basis for educational programming and placement?

[T]he Maine Special Education Regulations are intended to implement the State's obligations under the federal Individuals with Disabilities Education Act [IDEA]...and implementing regulations. (MSER, Section 1.1) These regulations and Maine law (Title 20-A, Chapters 301, 302) entitles all school-age students with disabilities to [a]...free appropriate public education...[T]he education deemed appropriate for him/her must be defined in a written Individualized Education Program (IEP). The IEP is the basis for educational programming and placement of the student with a disability. (Id., 9.1)

In the fall of 1993, almost a full year before the student reached school-age x, student's parents contacted the school to notify them that their student, a student with substantial disabilities, would be entering the special education system in the fall of 1994. The school responded by meeting with the family and initiating a referral to the PET in November 1993. Correspondence between the family and the school continued into the spring of 1994. On May 9, 1994 the first PET meeting convened. The minutes of this meeting are brief, but a list of the student's current educational performance is given in the minutes, as well as a list of student's needs in broad skill areas. An IEP document was generated that date which states that the student will receive 16 1/2 hours a week of special education instruction in a self-contained program, with supportive services to be determined in fall Pet. One annual education goal is contained in the IEP. It states [i]ncrease skills in area of: communication, self-care, readiness, socialization, gross and fine motor.

One short-term objective is contained in the IEP. It states [d]ecrease inappropriate behavior - to be determined in fall 1994 PET. No other objectives are written. The fall PET did not convene until October 12, 1994, a full 6 weeks after the beginning of school. During that interim the student, for all practical purposes, had no IEP. The annual goal given in the May IEP is not individualized to the student's needs, but could easily be used to describe every entering kindergarten child during the 1994-95 school year. There are no short-term objectives as required by regulations.

Evidence makes it clear that the school and the parent began the student's tenure in public school with a disagreement over methodology, and that this discussion at the May PET very likely interfered with any consensus over the detail to be included in the IEP. However, the school was aware almost a year before the student was to enter school of her upcoming need for service. They were aware of student's needs through information from student's preschool instructor, relevant evaluations and an observation of student by the school in the early spring. Even without consensus of the detail required in the IEP the school had an obligation, at the very least, to define the education deemed appropriate and to then use this as the basis for educational programming and placement. If they were unable to achieve this in May, it was their responsibility to complete the process prior to October. The IEP document developed in May does not comply with regulations which require that there be a plan in place prior to placement. The IEP lacks specific goal statements which are individualized for the student, and IEP objectives which must be written before placement. (34 CFR, Part 300, Notice of Interpretations, II. IEP Requirements, Q. 42)

2. Did the school fail to develop IEPs for the 1994-95, 1995-96, and 1996-97 school years, which include components required, specifically?

1) a statement of students present level of performance, 2) annual educational goals, 3) short term instructional objectives leading to each annual goal, and 4) a section describing the appropriate objective... criteria...for determining...whether or not short term instructional objectives are being achieved?

The guarantee of equal educational opportunity entitles each student with a disability in the State to be provided with a free appropriate public education. This education includes special education and supportive services which...[a]re appropriate to the special needs of the student as defined in an individualized education program. (MSER, Section 1.3) Each Individualized Education Program shall contain the following components: ...a section identifying the student's present level of educational performance; ...[a] section describing the annual educational goals that the student may reasonably be expected to achieve during the effective dates of the [IEP] with the addition of special education and supportive services; ...[a] section describing the short-term instructional objectives leading to each annual educational goal; ...[a] section describing the appropriate objective criteria,

evaluation procedures and schedule for determining...whether or not the short term instructional objectives are being achieved... (MSER, Section 9.3, (A), (B), (C), (H))

No further interpretation of what each of these components is intended to mean in a child's program is explained in state law and regulations, however, a detailed analysis of congressional intent in regards to the various components and construct of the IEP is given in Appendix C of the federal regulations. (See 34 CFR, Part 300, Questions 36-60) Each of the items above is discussed individually in reference to these interpretations.

[D]eterminations about the content of the statement [of the child's present levels of educational performance] are matters that are left to the discretion of participants in the IEP meetings. However, the statement should accurately describe the effect of the child's disability on the child performance in any area of education that is affected... (Q. 36. Emphasis added.) The present levels of educational performance in each of the student's IEP for 1994, 1995, and 1996 respectively state that: [the student] has significant delays in the areas of language, fine and gross motor skills; the student] has pervasive developmental delays in all developmental educational performance areas; and [the student] continues to demonstrate pervasive developmental delays in all areas. While these statements give a sense of the degree of the student's disability, they do not appear to meet the intent that this section of the IEP give the reader an accurate description of the effect this will have on the student's performance. That the student has a pervasive developmental delay does not describe student's present performance in self-care, communication, academic readiness nor gross and fine motor skills. Without a clear statement of where student begins the year, it is not clear how annual goals and short-term objectives will result in growth.

[A]nnual goals and short term instructional objectives...provide a mechanism for determining...whether the anticipated outcomes for the child are being met...whether the placement and services are appropriate to the child's special learning needs...[and provide] a way for the child's teacher(s) and parents to be able to track progress...(Q. 37) The annual goals...are statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period . (Q. 38. Emphasis added.) In each of the IEPs under review the annual goals sections contain broad statements relating to the various skill areas being addressed, e.g., [the student] Will continue to acquire and consistently exhibit appropriate school behaviors in all school settings; [the student] will continue to gain independence in the area of self-care skills; [the student] will continue to develop academic readiness skills. While these statements do reflect discussions at the IEP Meeting as the broad areas in which the student requires interventions, as statements of annual goals they do not comply with the standard in that they do not provide a descriptive statement of what might be expected as an outcome in each of these areas for the year. Again, it is difficult to assess progress if there are not specific annual benchmarks.

Short term instructional objectives...are measurable, intermediate steps between the present levels of educational performance...and the annual goals...The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals. [O]bjectives are used to ...describe what a given child is expected to accomplish within a particular area within some specified time period, and..To determine the extent that the child is progressing toward those accomplishments... IEP objectives provide general benchmarks for determining progress...over an extended period of time (e.g., an entire school quarter or semester). (Q. 39) The evaluation procedures and schedules...must be...clearly linked to the objectives. (Q. 54)

In each of the student's IEP all objectives are written with an annual end date. They are in fact more closely related to an annual educational goal than a short-term instructional objective. They are not written in such a way as to serve as milestones for measuring progress. In the 1996 IEP a typical objective under the goal develop academic readiness skills states that [g]iven a variety of instructional activities, [the student] will match upper/lower case letters with 100% accuracy as measured by periodic review by 11/97. The entering skill level under this objective is not known, nor is the projected skill level. Is student to know all upper and lower case letters at 100% accuracy, or 100% of selected letters? If only some, which ones? It is impossible to know from reading the objective what criteria is expected for the student to have met the objective.

The student's teachers give good descriptions of skills that the student has and they make clear statements of the progress they have observed. However, during the three years in the program, there is not a description of where student begins the year. The goals are not stated terms of expected annual outcomes. And because the objectives are not written in measurable terms it cannot be concluded that the student has made progress toward meeting the goals and objectives in student's IEP. It is entirely possible that the student has continue[d] to develop academic readiness skills. But regulations require that that goals be individualized to the student's needs for academic readiness and stated in such a way that it is clear to the reader if, or what, progress has been made toward that end. In order to make that determination objectives must make clear the steps, which will lead, to meeting the goal.

Some objectives do list a means for measurement other than observation, such as [g]iven counting activities, [the student] will give a requested number of objects to match a numeral 1-10 consistently as measured by periodic charting by 11/97. Again, however, it is not clear if the student is expected to match objects to all numerals 1-10, or selected numerals, and with what levels of proficiency. Charts relating to this or other objectives were not entered into evidence (parents testified that they were not aware that such charts had been done) so it cannot be concluded that progress has objectively been measured toward meeting these objectives.

There is an over-reliance on anecdotal descriptions by the school without any clear milestones to indicate gains or lack of gains. The school may be tracking progress based on objective measurement, but this was not evident. This is not meant to say that the parent's preference for the level of charting in the ABA method is required. Rather that the school must clearly show if and to what extent, a child has, moved from the starting point in an IEP objective. Teacher observation is a valid tool in determining progress, but it must be coupled with some more objective form of displaying that progress.

The one objective measure that the school has used over the last three years is the Battelle Developmental Inventory. This teacher scored assessment is based on observed skill acquisition of the student in five component categories: cognitive, communication, motor, adaptive, and personal-social. The school points to this document as concrete proof that the student has made progress while in student's present program. That is true, but the rate of growth has decreased over the three year period, in the most dramatic instance a 2 month growth over the past year in receptive language, a relative area of strength for [the student]. (See Ex. 41)

In this case the annual use of a Battelle Developmental Inventory is certainly one instrument which can be used to meet this standard. However, it must be tied to some annual expectation, and a series of short-term statements which staff will employ to try to meet that expectation. In this case the student's stated age equivalent scores showed a significant decrease in rate of growth from 1995 to 1996. Yet, there is no indication that this information was used to alter the approach or significantly alter the stated goals and objectives or teaching approach from one IEP to the next.

The reporting procedure employed by the school is to give a narrative report on a quarterly basis. These reports do not go through each objective, but give a general overview of the student's progress that quarter. A reading of these reports from November 1994 through the most recent on in March 1996 gives the reader the impression that the student has acquired some skills and has increased student's ability to participate in the classroom. It is also clear from reading the reports and listening to student's teachers testimony at the hearing that these professionals have a good sense of the student and feel strongly that the student has made progress over the past three years. According to the learning strategist who worked with the student for two years the staff met continuously to plan and update activities. Teaching themes and concepts were predetermined and planned across all activities and progress toward goals were determined within that context. She used the example of a fall theme, which used apple paired with the color red and other such teaching activities, which followed the theme.

However, nowhere in the file was evidence presented to determine, within such a context what the student was expected to learn or if the student gained the concepts being taught. If such teaching activity expanded the student's repertoire of concepts, that information is not given in a quantitative fashion. Sorting/matching, quantitative concepts,

same/different, recognition of letter and related objects, recognition of numerals and matching to same number of items are all activities that the student has apparently been involved in over the past three years in student's academic readiness. Documentation of concrete growth in these areas is not given in the documents, nor apparently do parents feel that they received this information. In contrast it is clear from the material from the student's preschool program exactly what skills the student has acquired and to what level of proficiency and reliability. This is not to say that the regulations require this level of specificity and record keeping. But somewhere in between is a place where goals and objectives provide a mechanism for determining whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program).

3. Did the school include the parent as a member of the PET?

This issue was not raised as a procedural violation by the parents. The parents were in attendance at every PET and from the record actively participated in the discussions. They made their preference for a program using the ABA methodology known, and requested that the school employ this methodology for the student. The school was under no obligation to adopt this methodology. Questions of methodology are clearly left to the school.

However, [e]ach Pupil Evaluation Team shall include the following members...the student's parent(s)... (MSER, Section 8.6) (Emphasis added) Congress sought to protect individual children by providing for parental involvement in the development of...the child's individual education program (Rowley, 3051) ... [IDEA] emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. (Town of Burlington v. DOE, Commonwealth of Massachusetts, 471 US 359, 367-68 (1985))

In November 1995 the parents took time to write and present to the PET a detailed and cogent memo of their observations and impressions of the student's progress. While it may have been tied to a request for ABA methodology does not make it any less valid than observations of the student's progress by other team members. To have not allowed the PET to review and use the information for consideration by the PET in determining programming goals and objectives is in violation of the intent of parent participation in the process.

There is no indication that this information or the subsequent progress memo prepared by the parent in November 1996 resulted in any consideration by the PET of the student's IEP goals and objectives. The only exception is the addition of an objective in the 1996 IEP that [g]iven a timed toileting program [the student] will pair a signed verbal request when going to the bathroom. This is a curious addition since an earlier objective in the same IEP states that [g]iven a timed toileting program [the student] will maintain student's

success by remaining accident free 100% of the time... Coupled with the fact that the student has achieved student's accident free timed toileting objective since early in 1995 and that the parents have voiced repeated concerns about student's toileting regression at home it is difficult to conclude that the school has seen the parent as an equal participant in the process.

Were the student's IEP's for 1994-95, 1995-96, and 1996-97 reasonably calculated to provide the student with educational benefit in the least restrictive environment?

[An] inquiry [regarding the appropriateness of a student's program]...brought under [IDEA] is twofold. First, has the [school] complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the act's procedures reasonably calculated to enable the child to receive educational benefits? (Board of Education v. Rowley, 102 S. Ct. 3034, 3051 (1982))

While much of this hearing was spent arguing the preference of the ABA methodology in teaching autistic children, I make no decision about the relative merits of the ABA method over any other method, nor does special education law. Rather, what this hearing must decide is whether the school failed to comply with procedures to develop its program for the student. Once a court determines that the requirements of the [law] have been met questions of methodology are for resolution by the states. (Id. 3052)

Preferences for one instructional approach over another could easily mire parents and schools into lengthy legal and philosophical battles well beyond reason at the risk of a child's program. It is for this reason that the courts have deferred the methodology question to schools. However, in having this control over methodology, schools have a responsibility and obligation to document progress and lack of progress made by the student using the methodology they have chosen. Short-term objectives tied to the selected methodology must have standards of measure to make this determination. It is not enough when there is a disagreement over methodology for schools to simply assert by teacher observation that progress toward the stated objectives are being met. I cannot conclude from the evidence that the IEP developed by the school complied with procedures for the reasons discussed earlier.

[T]he importance Congress attached to...procedural safeguards cannot be gain said. It seems...no exaggeration... that Congress placed every bit as much emphasis upon compliance with procedures...as it did upon the measurement of the resulting IEP against a substantive standard. This is not an issue of IEP form over substance. It is impossible to tell on an annual basis or from one year to the next from these documents if the student has made progress. If one relies only on the Battelle Inventory, there is progress but it has decreased dramatically from 1994-95 to 1995-96. If one relies only on observed progress the school convincingly cites specific areas where growth has occurred and the parent cites equally convincingly specific areas where a lack of growth or regression has

occurred. In the absence of solid, reliable objective data conclusions regarding growth or lack of growth cannot be determined with certainty. Therefore no conclusions that the student's program has afforded student's educational benefit can be made.

The staff at the Hall school present themselves as highly professional experienced teachers. I have no doubt that the classroom is a well-run positive environment for the students there. However, the regulations governing the special education process make clear that the procedures for describing and evaluating such a program for each child are equally important to the activities, which occur there. The parents are entitled to know what outcomes are expected and how those outcomes will be assessed on an annual basis. That has not occurred in this case.

An IEP is the foundation of a child's special education program. As much care in its development must be present as in the development of the day to day instruction. How can we know if progress is made if we are unsure what progress we hoped to make. There must be a beginning before we can know if we've arrived. Because the school hasn't proved that progress occurred, it cannot be concluded that the program afforded the student with educational benefit. In the absence of such benefit, the parents are entitled to the methodology they prefer.

VI. Order

The school shall convene a PET within 45 calendar days of the receipt of this decision to develop an IEP for the student which states present levels of educational performance, annual educational goals, and short-term instructional objectives with objective measurement criteria. Further the school shall have in place by September trained staff which can deliver this IEP using the ABA methodology or find an appropriate program to which the student can be tutored. This order to provide the student with ABA methodology is in effect for one year only. The PET shall reconvene in September 1998 to develop and IEP which determines placement for the student for the 1998-99 school year.

Carol B. Lenna
Hearing Officer