ABA2DAY Behavior Services (Offered in September 2012)

On September 1, 2012, upon Parents' request, Kara S. Schmidt, Ph.D., conducted an IU-funded IEE of G.K.'s cognitive ability using the *Differential Abilities Scales* ("DAS"), Second Ed,[69, 70] which resulted in revisions to the IEP, which became effective on September 20, 2012.[71] In the report, Dr. Schmidt noted that G.K. continued to meet the criteria for a diagnosis of Autistic Disorder based on impairments in social interaction, communication, behavioral inflexibility, and stereotyped repetitive verbalizations, and that G.K.'s symptoms of Autism were within the moderate to severe spectrum.[72] Dr. Schmidt's report specifically recommended that G.K.:

> [W]ould benefit from a program and setting that can address the learning, environmental and behavior needs of students with autistic spectrum disorders and emotional/behavior dysregulation. This should include typical peer models within inclusion environments as well as small group, individualized instruction as needed. All of his teachers, behaviors and therapists should be trained in ABA and research based invention/instruction for children with autism.[73]

Accordingly, the proposed short-term program consisted of time at *ABA2DAY Behavior Services* ("ABA2DAY") and included intensive, small group instruction and interaction with typical peers, as well as time at the Goddard School. Parents, however, rejected the proposal.[74] To justify their decision, Parents presented an October 3, 2012 letter from Goddard School staff to Defendant which essentially indicated that removing G.K. out of a "normally developing" preschool classroom and placing him in a classroom for autistic children would be detrimental to

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[69] DAS is a battery of cognitive and achievement tests that provide an in-depth analysis of a child's learning abilities.
[70] N.T. 935.
[71] *See* IU-34.
[72] P-1 at 6-8, 13.
[73] *Id.* at 13-14; N.T. 1200-01.
[74] Dft's Brief p. 19; N.T. 881, 1027-1028, 1422, 1426; P-31 p. 19; IU-35.

G.K.'s progress.[75] Parents were also concerned that Goddard staff lacked an appropriate background in special education, in providing services to students with autism, or in providing a behavior program.[76] Although the proposal for ABA2DAY was eventually withdrawn, making the recommended placement a non-issue, Parents failed to show, by a preponderance of the evidence, how Dr. Schmidt's short-term program was inappropriate and did not constitute an offer of a FAPE. Additional support stems from the fact that the recommended placement was supported by the IEE requested by Parents and the then behavior provider.

Potential Discoveries (Offered in October 2012; Commenced in February 2013)

Potential Discoveries is G.K.'s current service provider. A majority of ABA therapists who work for Potential Discoveries have a four-year college degree and are, or plan to be, in training to become a BCBA or BCABA.[77] To staff G.K.'s program, Potential Discoveries assigned two BCBAs, rather than the typical model of one BCBA/supervisor and one therapist.[78] When initially contacted in mid-October 2012, Potential Discoveries could only staff G.K.'s program three days per week. Thus, it was not until February 2013, when the program could be staffed five days per week,[79] that Potential Discoveries began providing services to G.K. Once services commenced, Parents were not satisfied with Potential Discoveries as a service provider based on G.K.'s increased behavior problems. Najah Dipaolo-Brown, M.Ed., BCBA, the owner of Potential Discoveries, testified that a spike in behaviors is not an unusual event when there is a change of providers or program location.[80] This opinion was supported by other behavior providers, including Plaintiffs' witness, Skye Pardini, clinical supervisor and ABA program and

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[75] P-3.
[76] N.T. 312-13, 319, 371-72, 379-80.
[77] N.T. 1239-40.
[78] *Id.* at 1279-80.
[79] *Id.* at 1330-31; IU-1 at 392.
[80] *Id.* at 1311-13.

behavioral consultant at Lovaas, who testified that at least two weeks are needed for most students to develop a relationship with a new therapist and another two weeks to implement the behavior plan and collect data, to determine overall effectiveness of the program.[81] Thus, a provider would have to be in place at least four weeks before a determination of whether the services provided were, in fact, effective.

The totality of the administrative record compels this Court to find, as did the Hearing Officer, that Defendant provided appropriate services and a FAPE to G.K. The record supports a history of Defendant's affirmative responses to Parents' concerns as well as accommodations and offers of other appropriate service providers. This Court finds no reason to overturn the assessment made by the Hearing Officer, *i.e.*, that Defendant fulfilled its obligation to appropriately place G.K. and provide appropriate services to G.K., thereby offering G.K. a FAPE. Therefore, as to Plaintiff's challenge to the Hearing Officer's decision that G.K. was not denied a FAPE, Plaintiffs' motion is denied.

II. Parents' Participation in Developing and Implementing G.K.'s IEP

Plaintiffs argue that the Hearing Officer (1) improperly created and applied a standard for parental participation in the development of G.K.'s IEP that violated Parents' rights to such participation under the IDEIA, and (2) erred in ruling that Parents engaged in inappropriate conduct that purportedly interfered with the implementation of G.K.'s IEP. Plaintiffs argue that they, and particularly Mother, lawfully participated in the development of G.K.'s IEP and merely sought information related to their legitimate concerns as to its implementation. Plaintiffs assert that Defendant's contentions of parental overreaching are incorrect, exaggerated, and inconsistent. For example, at one point, Damian Johnston, the IU Supervisor of Special

[81] *Id.* at 215, 472-73, 723-25, 1246-47, 1624, 1627-28.

Education, criticized Mother of too much communication;[82] at another point, Nicole Irvin, an IU case manager, criticized Mother of not enough.[83] Parents insist that they acted appropriately (a) when accepting and actively working with the providers offered by Defendant, (b) by never demanding that Defendant maintain Lovaas as the service provider (as the Hearing Officer noted that Parents "dropped their demand that the [IU] maintain Lovaas"), and (c) in not insisting that other providers follow Lovaas methods. To validate this argument, Plaintiffs rely on the aforementioned 16-point action plan discussed and agreed to at the May 2012 meeting with Clarity. In addition, Plaintiffs argue that no witness indicated what is "typical," or whether there is any such standard as to the amount of communication that would be "typical," and Defendant did not present evidence to support the claim that Parents interfered with the implementation of G.K.'s program by merely asking for information. Defendant disagrees and contends that Parents' conduct went beyond the active participation permitted in an IEP process and, further, that a philosophical difference of opinion over methodology is not sufficient to establish that a provider is not appropriate. Defendant contends that Parents' resistance to the service providers was based on misapprehension of the methodology used.

There is no need to reiterate the evidence from the administrative record. Suffice it to say, however, this Court finds that the Hearing Officer applied the correct standard of review under the IDEIA and the case law governing parental participation in the IEP decision-making process. Undisputedly, the IDEIA provides extensive procedural protections to the parents of disabled children, including their participation in the development of the IEP and the right to review all relevant school records. 20 U.S.C. §1415(b)(1); *Nathan F. ex rel. Harry F. and Amy F. v. Parkland Sch. Dist.*, 2004 WL 906219, at *4 (E.D. Pa. Apr. 27, 2004); *see also Honig v. Doe*,

[82] *Id.* at 1558.
[83] *Id.* at 1436.

484 U.S. 305, 311 (1988) (recognizing "the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness"). The applicable law does not permit parents to usurp the school district's role in selecting its staff to carry out the IEP's provisions. *Rowley*, 458 U.S. at 209 (quoting S.Rep. No. 94-198, at 12, U.S. Code Cong. & Admin. News (1975)). "[A]lthough parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it." *K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist.*, 806 F. Supp. 2d 806, 829 (E.D. Pa. 2011) (citing *Kasenia R. ex rel. M.R. v. Brookline Sch. Dist.*, 588 F. Supp. 2d 175 (D. N.H. 2008)). Nor, as stated, do Parents have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *J.E.*, 834 F. Supp. 2d at 246 (citing *Rowley*, 458 U.S. at 199); *see also Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 885 (D. Minn. 2003) ("The fact that the Slamas were not allowed to choose every facet of their daughter's education was not, however, a denial of FAPE . . . no parent of a public school child – whether the child is disabled or not – is entitled to select every component of the child's education.").

The administrative record further supports the Hearing Officer's finding, by a preponderance of the evidence, that Parents' conduct interfered with the implementation of G.K.'s IEP. Examples of such interference include, *inter alia*: Parents' insistence that all other providers replicate Lovaas services; Parents' behavior which caused service providers to be frequently concerned with scheduling and staffing;[84] Parents' confrontational and threatening tactics that caused Clarity to abruptly cease providing services as of August 15, 2012;[85] and Parents' attitude which rendered Potential Discoveries unable to staff G.K.'s program beyond

[84] *See id.* at 1270, 1710-13.
[85] Decision 18.

three days a week in October 2012 because staff members who were available refused to work with Mother.[86] In addition, Mother's acceptance to "back off" and not "micromanage" after the agreed-upon May 2012 16-point action plan with Clarity staff strongly suggests that Parents, particularly Mother, overstepped bounds. Finally, while Parents claim that they did not reject Keppley as G.K.'s service provider, the record reflects that they resisted methods of service delivery and staffing, or staff training, that deviated in any respect from those of Lovaas.

As an additional example of obstructive conduct, Mother testified as to her perception of the difference between ABA therapy and a VB-based program, *i.e.*, former based on scientific research, the latter based on the philosophical writings of B.F. Skinner (and, therefore, different from ABA).[87] The Hearing Officer weighed Mother's testimony against the testimony of several qualified behavior experts, who opined Mother was misguided; *to wit*: Clarity owner, Kathleen Bailey Stengel, characterized VB as "under the guise of Applied Behavior Analysis;" Ms. Keppley explained that VB is "under the umbrella of Applied Behavior Analysis" and that "a provider who is providing a Verbal Behavior is providing ABA;"[88] and Potential Discoveries owner, Ms. Dipaolo-Brown, described ABA as "a global umbrella. And underneath that is what's called verbal behavior" and that "[i]t's all under Applied Behavior Analysis," working on the same skill set as that used in other types of ABA.[89] The Hearing Officer noted that while certain aspects of VB instruction are not part of Lovaas' methods, Parents' misconception of the differences between ABA and VB provided no justification for Parents to disapprove of the delivery of VB methodology to G.K.

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[86] IU-1 at 394.
[87] N.T. 191, 836-37, 1038; Decision ¶44.
[88] N.T. 617, 693-94, 796, 845.
[89] *Id.* at 1240-42; 1362.

The Hearing Officer also considered another form of Mother's additional disruptive conduct; *to wit:* telling providers that they would fail ("There were several times that she said . . . if you don't provide the same services for my child, you will fail, you will fail, you will fail.");[90] alleging that providers altered G.K.'s data ("Obviously due to my questioning it's obvious there seems to be a gap in data collection or should I say the lack there of.");[91] using foul language towards providers ("This is BULL SHIT and I'll let the lawyer address both girls ABA experiences.");[92] accusing providers of fraud ("THIS IS FRAUD! How can we believe anything that Clarity has given us.");[93] accusing providers of lying ("Due to her lying to my face on one occasion which i [sic] verified the conversation with Melissa before i [sic] assumed anything and then she lied in writing about the amount of time spent with my son. . . .");[94] threatening to seek disciplinary action against providers;[95] attacking the professionalism of staff ("GOOD LUCK WITH YOUR LIES MEREDITH AND KATHLEEN & you may want to review the guidelines your both supposed to follow!!!!!!");[96] engaging in a verbal altercation with a provider; and recording a meeting with a therapist without consent. Clarity, after it withdrew services, was compelled to contact its counsel to send Parents a cease and desist letter, an action eliciting a comment from Ms. Johnston (IU's Supervisor of Special Education) that she had "never seen anything like it."[97] Upon consideration of all the evidence and testimony, the Hearing Officer concluded that Parents' conduct was beyond any typical, zealous advocacy contemplated in IEP

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[90] *Id.* at 1639-41.
[91] P-5 at 1-2; P-14 at 3-4, 7; IU-1 at 138; IU-1 at 3737-42; N.T. 65, 1409, 1685-87.
[92] IU-1 at 404.
[93] P-14 at 5; IU-1 at 697.
[94] IU-1 at 1467-69.
[95] *Id.* at 1480-81.
[96] *Id.* at 404.
[97] IU-31; N.T. 1713, 1179.

development and implementation under the IDEIA. This conclusion is supported by the administrative record.

Under the circumstances, there exists no reason for this Court to depart from the Hearing Officer's credibility determinations and/or conclusions that Parents' participation in the development, and conduct in the implementation, of G.K.'s IEP went beyond what they were entitled to under the IDEIA. Therefore, Plaintiffs' motion on this issue is denied.

III. Remedies

Under the IDEIA, a court may award whatever relief "[it] determines is appropriate," 20 U.S.C. §1415(e)(2), including an award of attorney's fees, reimbursement for any private educational placement, and compensatory education. *D.S.*, 602 F.3d at 564 (citing *A.W.*, 486 F.3d 791, 802 (3d Cir. 2007 (*en banc*); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1034 (3d Cir. 1993)). Here, Plaintiffs seek reimbursement for services they unilaterally obtained to assure the uninterrupted implementation of G.K.'s IEP during the period of June 2012 through February 2013. Specifically, Parents seek reimbursement for services (1) provided by Lovaas: (a) in early August 2012 when Clarity withdrew its services, (b) informally for a brief period with Kepply,[98] and (c) after Keppley's services ended in October, through February 11, 2013, and prior to Potential Discoveries becoming G.K.'s primary ABA provider; and (2) for services offered by Clarity and Keppley that Parents claim were deficient. Excluding the times the Hearing Officer deemed Parents to have interfered with the implementation of G.K.'s IEP, the Hearing Officer actually provided for the relief Plaintiffs seek; *to wit*:

> Because the gaps in services that occurred between the late summer of 2012 and February 2013 are attributable to parental interference and attempts to exercise control over the details of the delivery of services beyond the participation rights parents have under IDEA, Parents [sic] *full* costs for providing replacement services during that period will not be reimbursed. Nevertheless, because the IU

[98] N.T. 433-34.

> was still required to provide services at all times, and *because Parents arranged for services to maintain the Child's ability to make progress, the IU will be required to reimburse Parents for any costs Parents have paid, or owe, up to the amount the IU would have paid its current service provider for the same number of hours that Parents replaced.* The IU is not required to reimburse Parents for any day during any such period when Child was absent from school, or did not receive services for some other reason, regardless of Parents' obligation to pay for any such days. The IU is not required to pay for any hours that Parents' provider collected data or delivered services for any period when the IU had a provider under contract with staff available to provide services.[99]

The Hearing Officer further ordered:

> [T]o the extent there are hours of service required by the Child's IFSP/IEP that were not provided by the IU-EI program at such times as it did not have a contracted provider in place prior to February 8, 2013 regardless of the reason, and to the extent there is not current agreement between the parties for payment of those hours, *the IU shall reimburse Parents for the unpaid service hours in accordance with the payment terms specified in its contract with the current provider of ABA/behavior support services, notwithstanding Parents' cost to replace those services.* Payment shall not be made for any hours that Child was absent from preschool or otherwise did not receive services from a provider engaged by Parents.[100]

When fashioning discretionary equitable relief under the IDEIA, courts must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. *Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993) (quotation marks omitted). In this Court's opinion, the Hearing Officer correctly weighed Defendant's obligation to provide appropriate services to G.K. under the IDEIA, the brief lapses in services, and the reasonableness (or the lack thereof) of Parents' conduct, to determine an appropriate remedy for Clarity's withdrawal of services on August 15, 2012, and Parents' provided-for services by Lovaas the time between termination of Keppley's services and before commencement of Potential Discoveries' services.

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[99] Decision 20 (emphasis provided).
[100] Decision (Order) 20-21 (emphasis provided).

Plaintiffs object to the Hearing Officer's consideration of the reasonableness of their conduct, and cite to *Warren G. ex rel. Tom G. v. Cumberland County School District* for the proposition that the reasonableness of the parties' conduct is not to be considered in reducing the amount of reimbursement. 190 F.3d 80, 86 (3d Cir. 1999) ("The conduct of parents should not be permitted to defeat the purpose of the Act, and the remedial power of the court should not be interpreted to further such an end."). However, Plaintiffs' reliance on *Warren G.* is misplaced since Congress, in 1997, amended the IDEIA to provide that "[t]he cost of reimbursement . . . may be reduced or denied – upon a judicial finding of unreasonableness with respect to action taken by the parents." 20 U.S.C.A. §1412(1)(10)(C)(iii)(III)); *see also* 34 C.F.R. § 300.148(d)(3); *Warren G.*, 190 F.3d at 86 n.3. In *Warren G.*, the Court considered parents' conduct during a time period that pre-dated the 1997 IDEIA amendment, thus, this case is inapposite. Therefore, based upon the amendments of 1997, the Hearing Officer correctly considered the arguments made regarding Parents' conduct from June 2012 through February 2013, and properly accounted for it when determining what Defendant is obligated to pay Plaintiffs.[101]

Defendant, however, argues that Plaintiffs are not entitled to *any* reimbursement for the services rendered by Lovaas during the relevant time period because Plaintiffs fail to establish that utilizing Lovaas as a service provider, was appropriate. In support, Defendant quotes: "[R]eimbursing parents for expenses incurred from placing their child in private school is 'appropriate' relief when a court has found that the public school placement was inappropriate and that the parents' private placement was appropriate." *Sch. Comm. of Town of Burlington,*

[101] In light of the 1997 amendment, this Court disagrees with the Hearing Officer's evaluation that "the objective reasonableness of Parents' words and actions in certain situations or whether some individuals were exceptionally sensitive to conduct that others might not mind is irrelevant," (Decision 15), since, under the IDEIA, this consideration is relevant in limiting reimbursement.

Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 370 (1985); *see also* 34 C.F.R. §300.148(c) (agency may be required to reimburse parents for cost of a private placement if it is found that there was no offer of a FAPE and the placement is appropriate).

The Third Circuit has broadly interpreted the term "appropriate," and has "discern[ed] nothing in the text or history suggesting that relief under IDEA is limited in any way, and certainly no 'clear direction' to rebut the presumption that all relief is available." *Bucks Cty. Dept. of Mental Health/Mental Retardation v. Pa.*, 379 F.3d 61, 67 (3d Cir. 2004) (*citing W.B.*, 67 F.3d at 494). Based upon case law and the facts in this case, this Court agrees with the Hearing Officer and finds the Plaintiffs are entitled to an appropriate reimbursement of expenses for the period Defendant had no service provider in place; *i.e.*, when Clarity abruptly withdrew its involvement on August 15, 2012, and when Potential Discoveries could not staff G.K.'s program from October 2012 to February 2013. Defendant's obligation is to provide for services under the IDEIA and it cannot allow a lapse in the implementation of G.K.'s IEP to occur. Thus, it is appropriate that Defendant be directed to reimburse Parents for the expenses they incurred in ensuring uninterrupted implementation of G.K.'s IEP.

In arguing that Lovaas was an inappropriate provider, Defendant claims that G.K. made no significant progress yet cites to no reports to support its contention prior to the relevant time period.[102] Thus, Defendant has failed to show by a preponderance of the evidence how the Hearing Officer's decision to order reimbursement was in error. Further, the Hearing Officer excluded the time periods for which Defendant was not obligated to provide reimbursement; *i.e.*, when G.K. was absent from school or when data was collected by someone other than a contracted service provider. Under these circumstances, this Court finds that Parents' utilization

[102] Defendant claims that G.K. made no significant progress while Lovaas was the sole service provider, despite the availability of Lovaas Quarterly Reports from April 25, 2011, July 20, 2011, August 28, 2011, and September 15, 2011. IU-6; IU-9; IU-10; IU-12.