

Civil No. 11-1475 (GAG)

1 moving party’s case. Celotex, 477 U.S. at 325. “The movant must aver an absence of evidence to
2 support the nonmoving party’s case. The burden then shifts to the nonmovant to establish the
3 existence of at least one fact issue which is both genuine and material.” Maldonado-Denis v.
4 Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The nonmovant may establish a fact is
5 genuinely in dispute by citing particular evidence in the record or showing that either the materials
6 cited by the movant “do not establish the absence or presence of a genuine dispute, or that an adverse
7 party cannot produce admissible evidence to support the fact.” FED. R. CIV. P. 56(c)(1)(B). If the
8 court finds that some genuine factual issue remains, the resolution of which could affect the outcome
9 of the case, then the court must deny summary judgment. See Anderson v. Liberty Lobby, Inc., 477
10 U.S. 242, 248 (1986).

11 When considering a motion for summary judgment, the court must view the evidence in the
12 light most favorable to the non-moving party and give that party the benefit of any and all reasonable
13 inferences. Id. at 255. Moreover, at the summary judgment stage, the court does not make
14 credibility determinations or weigh the evidence. Id. Summary judgment may be appropriate,
15 however, if the non-moving party’s case rests merely upon “conclusory allegations, improbable
16 inferences, and unsupported speculation.” Forestier Fradera v. Mun. of Mayaguez, 440 F.3d 17, 21
17 (1st Cir. 2006) (quoting Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003)).

18 **II. Factual & Procedural Background**

19 PPR is a child diagnosed with severe autism. The DOE is a public division organized under
20 the laws of the Commonwealth of Puerto Rico in charge of public education. Co-defendant Rivera
21 is the former Secretary of Education of the Commonwealth of Puerto Rico and was responsible for
22 the administration and implementation of all programs of education for children within the
23 Commonwealth.

24 During the 2006-2007 school year, PPR was placed at the Instituto Modelo de Enseñanza
25 Individualizada (“IMEI”). During the school year, Plaintiff met with PPR’s teachers at IMEI. She
26 was informed that IMEI lacked the necessary tools to help PPR. As a result, PPR was removed from
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1 IMEI. Plaintiff contacted the DOE to discuss different placement and related services. The parties
2 were unable to reach an agreement for placement and related services, so Plaintiff filed an IDEA
3 complaint (Complaint No. 2007-107-031) (“First Complaint”). Following this complaint, the DOE
4 conducted an evaluation and prepared an Individual Education Plan (“IEP”).

5 On May 11, 2007, Administrative Judge Marie Lou De La Luz-Quiles produced a Resolution
6 and Order (the “First Resolution”) (Docket No. 11-1), which stated in pertinent part:

- 7 1. The Provisional Remedy is hereby granted to Student [PPR], so that he be
8 provided psychological therapy services by Behavior Analysis, Inc. to help
9 him in his educational program and guarantee that he receives a proper
10 education according to his needs.
- 11 2. The plaintiff must visit the Department of Education, 9th floor, Provisional
12 Remedies Office, and fill in all the corresponding documents.
- 13 3. The plaintiff must submit his psychological evaluation, along with all the
14 required documents, to the Department of Education, 9th floor.
- 15 4. The plaintiff must fill in the required form at the Provisional Remedies
16 Office and be advised of the entire procedure, as explained to him during the
17 Administrative Hearing

18 The captioned parties are hereby advised that the party adversely affected by
19 this Resolution may file a Motion for Reconsideration regarding the same
20 within a period of twenty (20) days after this Resolution has been filed in the
21 case docket.

22 On June 21, 2007, pursuant to the First Resolution, a signed contract between Plaintiff and Behavior
23 Analysis Inc. (“Behavior”) was provided to Defendant. Behavior is a Florida corporation that was
24 doing business in Puerto Rico and provides Applied Behavior Analysis (“ABA”) therapies.
25 Behavior evaluated PPR and concluded that he needed an intensive program of no less than twenty
26 ABA sessions per week, plus weekly evaluations.

27 On July 17, 2007, the DOE received the contract between Plaintiff and Behavior for the
28 provision of psychological services. In response, the DOE filed an Informative Motion and Request
for Clarification of Judgment (Docket No. 32-1) on the First Resolution. The DOE informed the
administrative judge that, according to the agreement, Behavior would provide their services
through Carlos A. Vazquez. The DOE’s motion further informed the administrative court that the
documents submitted by Plaintiff did not include evidence that Mr. Vazquez was licensed to practice
psychology in Puerto Rico, which is a requirement under Puerto Rican law. The motion further

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1 notified the administrative judge that the DOE sent a letter to Behavior on June 29, 2007, informing
2 it that the department could not approve the agreement.¹ Finally, the DOE requested that the First
3 Resolution be corrected to order that the psychological services be provided through a corporation
4 or psychologist certified to practice in Puerto Rico.

5 On September 21, 2007, Administrative Judge Marie Lou De La Luz-Quiles produced a
6 second administrative resolution nunc pro tunc (“Second Resolution”) (Docket No. 32-2) clarifying
7 the First Resolution ordered on May 11, 2007. The Second Resolution stated that the therapy
8 services which were alluded to in the First Resolution are behavioral modification therapies using
9 the ABA method. The resolution further stated that Plaintiff must submit the assessment performed
10 by Behavior and all supporting documents to the 9th floor of the DOE. A hearing was held on
11 October 11, 2007 to clarify this matter. At the hearing, both parties were requested to submit briefs
12 supporting their corresponding positions. On October 24, 2007, the DOE filed a memorandum of
13 law (Docket No. 32-3) explaining its reasons for denying future and past payment of the ABA
14 services provided by Behavior. Plaintiff never submitted a brief of her own. PPR began receiving
15 ABA therapy from Behavior in October of 2007 at Plaintiff’s expense.

16 On July 8, 2008, Administrative Judge Marie Lou De La Luz-Quiles issued a third resolution
17 nunc pro tunc (“Third Resolution”) (Docket No. 32-4) in response to the DOE’s submitted brief.
18 Plaintiff never received notice of the Third Resolution.² The Third Resolution denied Plaintiff’s
19 request for the payment of the ABA behavioral therapy and held in pertinent part that the DOE was
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22 ¹ The letter also stated that DOE was denying payment for these services because Plaintiff
23 had not followed the administrative judge’s order to deliver PPR’s psychological assessment to the
24 DOE.

25 ² In her complaint, Plaintiff alleges she never received notice of the Third Resolution. The
26 order states that it was sent by mail to the claimant (Plaintiff). However, because the court is
27 analyzing the present motion under a Rule 56 standard, it takes the pleadings in the light most
28 favorable to the non-moving party.

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1 not obligated to pay for the ABA services provided by Behavior because (a) the DOE did not agree
2 to provide psychological services through Behavior; rather, it agreed to provide psychological
3 therapy services through the provisional remedy mechanism, and (b) regardless of Plaintiff's
4 position, it was impossible for the DOE to pay for Behavior's therapy services as Carlos Vazquez,
5 the person providing the therapies, was not licensed to practice psychology in Puerto Rico. The
6 Third Resolution provided a twenty day window in which the aggrieved party could file a motion
7 for reconsideration and a thirty day window in which to appeal the decision to the Puerto Rico Court
8 of Appeals. No further action was taken based on the First Complaint.

9 On April 16, 2010, Plaintiff filed a new administrative complaint (Complaint No. 2010-114-
10 018) ("Second Complaint") requesting placement for PPR and reimbursement for the cost of the
11 ABA therapies for the previous years. An agreement was reached on PPR's school placement;
12 however, no agreement was reached regarding the reimbursement of the ABA therapies. On August
13 12, 2010, the DOE filed an informative motion (Docket No. 32-5) explaining its position regarding
14 reimbursement of the ABA therapies and requesting that the administrative judge deny the request
15 for reimbursement. Plaintiff submitted her position on September 30, 2010. On January 7, 2011,
16 Administrative Judge Amelia M. Cintron Velazquez issued a fourth resolution and order ("Fourth
17 Resolution") (Docket No. 32-6) stating that the administrative judge lacked jurisdiction to hear the
18 issues raised regarding the DOE's failure to comply with the resolutions issued under the First
19 Complaint. The Fourth Resolution also ordered: (1) the payment of educational services at the
20 Colegio Pilimar for the 2010-2011 school year; (2) that the psychological evaluation, occupational,
21 educational, and speech and language therapies will be processed and issued through the DOE; and
22 (3) that the behavior modification and occupational therapies will be offered as a provisional
23 remedy.

24 On January 26, 2011, Plaintiff submitted a motion for reconsideration (Docket No. 29-1) of
25 the Fourth Resolution. In response, Administrative Judge Amelia M. Cintron Velazquez issued a
26 fifth resolution ("Fifth Resolution") (Docket No. 11-2) on February 28, 2011 granting Plaintiff's
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1 motion for reconsideration. The Fifth Resolution held that the administrative judge had jurisdiction
2 under IDEA to award remedies regarding the reimbursement for educational and other related
3 services of the past two years. The administrative judge also found that the DOE was bound to pay
4 for the ABA services because it did not request an amendment to the First Resolution until June 17,
5 2007, which fell outside of the twenty day period to file a motion for reconsideration. Therefore,
6 according to the administrative judge, the First Resolution became binding. Administrative Judge
7 Amelia Cintron Velazquez ordered the DOE to reimburse Plaintiff the costs of the therapies
8 provided by Behavior beginning in April 16, 2008 and to continue to pay for future services until
9 such services were provided by the DOE.

10 On March 8, 2011, the DOE moved for reconsideration (Docket No. 32-7) of the
11 administrative judge's ruling in the Fifth Resolution. In light of this request, the administrative
12 judge held a hearing on April 5, 2011 to determine whether or not the court had jurisdiction to enter
13 the Fifth Resolution requiring the DOE to comply with the First Resolution. Administrative Judge
14 Amelia Cintron Velasquez issued a sixth resolution ("Sixth Resolution") on April 30, 2011 granting
15 the DOE's motion for reconsideration and holding that the administrative judge did not have
16 jurisdiction to order enforcement of the First Resolution. The Sixth Resolution also ordered the
17 closing of the Second Complaint filed by Plaintiff.

18 Plaintiff filed the instant complaint (Docket No. 1) on May 20, 2011 seeking: (1) a
19 declaration that the administrative judge's Sixth Resolution was null and void and the DOE failed
20 to comply with IDEA's procedural requirements; (2) reimbursement of the out-of-pocket costs for
21 the ABA services; and (3) punitive and compensatory damages.

22 **III. Discussion**

23 The court considers Defendants' motion for summary judgment (Docket No. 74) and
24 Defendants' motion to strike Plaintiffs' opposing statements of fact (Docket No. 87).

25 A. IDEA

26 The court **GRANTS** Defendants' motion for summary judgment. (Docket No. 74.) The
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1 “Individuals with Disabilities Education Act (IDEA) leaves to the States the primary responsibility
2 for developing and executing educational programs for handicapped children, but imposes
3 significant requirements to be followed in the discharge of that responsibility.” Schaffer v. Weast,
4 546 U.S. 49, 52 (2005). The state educational agency must establish and maintain the necessary
5 qualifications to ensure that the personnel tasked with carrying out services are appropriately and
6 adequately prepared and trained, and ensure that those personnel have the content, knowledge, and
7 skills to serve children with disabilities. 20 U.S.C. § 1412(14)(a).

8 As previously stated, in accordance with IDEA, personnel qualifications of an agency must
9 also be consistent with all state-approved or state-recognized certification, licensing, registration,
10 or other comparable requirements that apply to the professional discipline in which those personnel
11 are providing special education or related services. 20 U.S.C. § 1412(14)(a)(b). Educational
12 agencies must further ensure that related services personnel who deliver services in their disciplines
13 or profession have not had certification or licensure requirements waived on an emergency,
14 temporary, or provisional basis. 20 U.S.C. § 1412(14)(a)(b). IDEA’s provisions allow agencies to
15 provide the best services and personnel for the child’s well-being, as well as prevent the funding of
16 illegal operations in violation of federal and state statutes.

17 The First Resolution states that the parties stipulated to payment and reimbursement for
18 “psychological therapy services.” (Docket No. 11-1 at 1.) Plaintiff, however, proffers no evidence
19 that Vazquez is a certified psychologist in Puerto Rico. This court cannot order the DOE to pay for
20 “psychological therapy services” provided by a company whose practitioner is not licensed to
21 practice psychology in Puerto Rico. P.R. LAWS ANN. tit. 20 § 3203. This offends the Act to
22 Regulate the Practice of the Profession of Psychology, which governs the field of psychology in
23 Puerto Rico. P.R. LAWS ANN. tit. 20 § 3201, et seq. Only those authorized by the Board of
24 Examiners of Psychologists can practice psychology in Puerto Rico. P.R. LAWS ANN. tit. 20 § 3203.
25 Furthermore, the unauthorized practice of psychology is a felony in this jurisdiction. P.R. LAWS
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1 ANN. tit. 20 § 3221.¹ The DOE cannot be liable for reimbursing an unlicensed psychologist for the
2 practice of psychology.

3 The court does not render judgment on whether behavioral modification therapy constitutes
4 an “experimental” form of treatment falling outside the auspices of “psychological” treatment as
5 ordered by the DOE in the First Resolution. That is a question outside the bailiwick of this court.
6 Whether the DOE approves of behavioral modification therapy as a remedial measure for IDEA-
7 qualified children and permits those certified in that particular field to engage in its practice in
8 Puerto Rico is the Commonwealth’s prerogative. In contrast, to reiterate, the First Resolution
9 granted reimbursement and payment for “psychological therapy services” by Behavior. (Docket No.
10 11-1 at 1.) Whether Puerto Rico requires its behavioral modification therapists to be certified in
11 psychology is within its province. What is clear is that the administrative court granted
12 reimbursement for “psychological therapy services.” (Id.) Because the practice of psychology
13 requires certification, and Vazquez lacks such certification, the DOE’s position is justified. While
14 the court recognizes that behavior modification therapy may be effective and beneficial to thousands
15 of children, the court simply cannot condone reimbursement for funds specifically allotted for
16 “psychological therapy treatment” for services rendered by a therapist not licensed to provide
17 psychological therapy treatment..

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20 ¹ Any person convicted of practicing the profession of psychologist illegally in violation of the
21 provisions of this chapter shall be guilty of a felony and, upon conviction, shall be punished by a fine
22 of not less than one thousand dollars (\$1,000) or more than five thousand dollars (\$5,000), or
23 imprisonment in jail for a term of not less than one (1) month or more than two (2) years, or both
penalties, [at] the discretion of the court.

24 By petition of the Board, the Secretary of Justice of Puerto Rico shall request an injunction to
25 prevent the person charged with practicing psychology in the Commonwealth of Puerto Rico
26 illegally, from continuing the practice of said profession until the charges are resolved. P.R. LAWS
ANN. tit. 20 § 3221.

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1 Defendant contends that Plaintiff's response in opposition to their uncontested facts failed
2 to properly identify or provide supporting documents and/or affidavits in the record and failed to
3 raise triable issues of material fact. (Docket No. 87.) Such statements, Defendants contend, must
4 be stricken from the record. (Docket No. 87.)

5 According to Rule 56(c)(1) of the Federal Rules of Civil Procedure, a party asserting that
6 a fact cannot be or is genuinely in dispute must support the assertion by "citing to particular parts
7 of materials in the record, including depositions, documents, electronically stored information,
8 affidavits or declarations, stipulations (including those made for purposes of the motion only),
9 admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not
10 establish the absence or presence of a genuine dispute." FED. R. CIV. P. 56(c). The court need only
11 consider the cited materials. FED. R. CIV. P. 56(c). If a party fails to properly support or address
12 another party's assertion of fact, the court may consider the fact undisputed for purposes of the
13 motion and grant summary judgment if the motion and supporting materials show that the movant
14 is entitled to it. FED. R. CIV. P. 56(e).

15 Pursuant to Local Rule 56, an opposing statement of material facts "shall admit, deny or
16 qualify the facts supporting the motion for summary judgment." L.Cv.R. 56(c) (D.P.R. 2009). To
17 properly assert undisputed facts or controvert them in a statement of material facts, each statement
18 must be supported by a record citation. L.Cv.R. 56(b)(e) (D.P.R. 2009). "An assertion of fact set
19 forth in a statement of material facts shall be followed by a citation to the specific page or paragraph
20 of identified record material supporting the assertion." L.Cv.R. 56(e) (D.P.R. 2009). A statement
21 properly cited shall be deemed admitted unless properly controverted. L.Cv.R. 56(e) (D.P.R. 2009).
22 "The court may disregard any statement of fact not supported by a specific citation to record
23 material properly considered on summary judgment. The court shall have no independent duty to
24 search or consider any part of the record not specifically referenced in the parties' separate statement
25 of facts." L.Cv.R. 56(e) (D.P.R. 2009).

26 Many of Plaintiff's opposing statements come close to falling short of Rule 56(c)(1) of the
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1 Federal Rules of Civil Procedure and Local Rule 56, including Plaintiff's responses regarding
2 Defendants' statements numbered 4, 10, 14, 15, 16, 17, 18, 22, 23, 24, and 30. Moreover, Plaintiff
3 could craft her statements of uncontested facts more effectively to conform with Local Rule 56(e).
4 Examples include numbers 8, 12, 19, and 25. However, Plaintiff has offended neither local nor
5 federal rules. Accordingly, the court **DENIES** Defendants' Motion to Strike Plaintiff's opposing
6 statements of fact. (Docket No. 87.)

7 **III. Conclusion**

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9 For the foregoing reasons, the court **DENIES** Defendants' motion to strike (Docket
10 No. 87) and **GRANTS** Defendants' motion for summary judgment (Docket No. 74).

11 **SO ORDERED.**

12 In San Juan, Puerto Rico this 15th day of January, 2013

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14 *s/ Gustavo A. Gelpi*

15 GUSTAVO A. GELPI

16 United States District Judge
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