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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. [EDS8612-99](#)

AGENCY DKT. NO. 00-3241

E.B. AND P.B O/B/O H.B.

Petitioners,

v.

DEPTFORD TOWNSHIP BOARD OF EDUCATION,

Respondent.

Jamie Epstein, Esq., for petitioners

Raymond J. Zane, Esq., for respondent, (Zane and Lozuke, attorneys)

Record Closed: October 25, 2000 Decided: December 6, 2000

BEFORE, **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE

In this matter E.B. and P.B. the parents of H.B., seek various forms of educational relief from respondent, the Deptford Township Board of Education (hereafter Deptford). They seek an appropriate Individualized Education Program (hereafter IEP) placement, independent evaluation, supplemental aids, extended school year, free and appropriate public education, transportation reimbursement, comprehensive evaluation for physical therapy, compensatory education in the areas of speech therapy and occupational therapy, reimbursement for placement at the Goddard School for the school years 1998-1999 and 1999-2000, and reimbursement for an independent

evaluation performed by Dr. Edna Barenbaum.

PROCEDURAL HISTORY

This Special Education case arises under the Individuals with Disabilities Education Act (hereafter IDEA), 20 *U.S.C.A.* ? 1401 to 1482 (a). The 45 day time line began on October 12, 1999 after which the Commissioner of Education transmitted the matter to the Office of Administrative Law (hereafter OAL) as a contested case, pursuant to 20 *U.S.C.A.* ? 1415 and 34 *CFR.* ? 300.500 through 300.587. The Commissioner request that an Administrative Law Judge be assigned to conduct the due process hearing. The Director of the OAL assigned me to hear the case. [N.J.S.A. 52:14F-5\(o\)](#). This assignment occurred after the originally assigned judge the Honorable Robert Miller, became unavailable to continue with the matter. The first hearing date, which had been set before Judge Miller, was adjourned by him at the request of respondent in order to allow the respondent district the opportunity to conduct an evaluation of the child by its expert.

Subsequently, the matter was reassigned to me. On the next date of hearing, December 8, 1999 I continued the matter at hearing in order to enable the district to complete its evaluation by January 10, 2000 pursuant to the prior order of Judge Miller. Additional case management was conducted by me at that time with both counsel. The case commenced to be heard on February 1 and 2, 2000 at the OAL, Trenton, New Jersey. The next scheduled hearing dates of February 10 and 15 and March 1 were adjourned in advance at the request of petitioner's attorney, who was a litigant in a Superior Court matter before the Honorable John Fratto. The case was then heard on March 7, 2000. March 10, 2000, was offered as an additional day, but was rejected by respondent's counsel due to his unavailability. The case continued to be heard on March 14, 2000. The next scheduled hearing date of March 29, 2000 was adjourned in advance at the request of respondent's counsel, who was in trial before Superior Court Judge Diane Cohen. The matter continued and was heard on April 19 and 25, 2000, while the dates of April 4, 17, 19, and 26, 2000, were rejected by counsel due their respective unavailability. The next scheduled hearing date of April 27, 2000, was adjourned in advance at the request of respondent's counsel, who was appearing as Municipal Prosecutor at the Penns Grove Municipal Court at that time. The next scheduled hearing date of May 30, 2000 was adjourned at hearing after petitioner's attorney had notified me of his sudden illness immediately prior to the commencement of the hearing on that date. Respondent's counsel and his witness had appeared at the hearing site and were excused accordingly. The parties were also offered dates of July 12, 17 and 26, 2000, all which were rejected by both sides due to their

respective unavailability. The next scheduled hearing date of July 31, 2000 was adjourned in advance at the request of respondent's counsel due to his appearance before Superior Court Judge G. Thomas Bowen at the time. Although attempts were made by me to schedule additional dates in August and September to accommodate the parties, no dates could be made available due to the failure by petitioner's attorney to contact me in a timely matter relative to those scheduling efforts. Finally, the parties did appear and the matter was heard on the final date of October 25, 2000. The hearing record closed thereafter.

BASIC UNDISPUTED FACTS

H.B. is one of two children born to E.B. and P.B., her date of birth being November 4, 1994. She commenced her education with Deptford in February 1999 after she transferred from the Voorhees School District, where she had been enrolled in Gloucester County's Child Development Center since 1997. An IEP meeting was conducted by Deptford with H.B.'s parents on April 20, 1999, at which time an IEP was created for her to encompass the period between June 1999 and June 2000. (R-3) That IEP called for her placement on a daily split schedule at the (1.) Autistic and Preschool Handicapped (hereafter PSH) Program at the Gloucester County Special Services School District (hereafter GCSSSD) and (2.) Pine Acres School, which is a pre-school handicapped public school class in Deptford. The parents rejected the recommended programming and instead preferred other placement options, including her enrollment in a full day regular classroom setting. In addition, they requested the on-going use of Discrete Trial Therapies (hereafter DTT) in the school setting and after-hours at the family home. The District rejected their requests.

TESTIMONY OF THE WITNESSES

In addition to the above recited basic facts, the following represents additional testimony adduced from the eight witnesses who testified in this matter.

Janet W. Ulrick

Janet W. Ulrick is a Learning Disabilities Teacher/Consultant and case manager who has been employed by Deptford for fourteen years in its pre-school and elementary school programs. A graduate of Glassboro State College's graduate division as an education specialist (May 1992), she also received her masters degree and certification program in learning disabilities there in July 1986 (R-15). She possesses New Jersey professional certifications in the areas of Elementary

Education, Teacher Of The Handicapped, and Learning Disabilities Teacher/ Consultant. She also services as an adjunct professor at Rowan University, which employment she has held since September 1992.

She first met H.B. and her family on February 16, 1999 where, as H.B.'s new case manager, she reviewed all of the Voorhees school district background records relative to her. She then visited the Child Development Center in Washington Township, Gloucester County where H.B. had been placed by Voorhees, her former district, since 1997 and where she was then presently still being educated. Ulrich observed her in that setting and also spoke to Joann R. Walton, the speech therapist. H.B.'s regular classroom teacher, Margaret Daly, was not available on that date. Based upon that initial observation, as well as a review of those initial records, Ulrich felt that H.B. was appropriately placed at the time. She later met with H.B.'s parents and Margaret Daly at the Child Development Center on March 9, 1999, at which time she reviewed the child's current IEP with them. There were no changes in program considered by anyone at that time, according to Ulrich.

However, on March 13, 1999, the parents wrote to her and explained their preferences and ideas for other placement options and future plans for H.B. A series of phone calls ensued between Ulrich and primarily H.B.'s mother thereafter. As indicated hereinabove, the IEP meeting was convened by Deptford on April 20, 1999, which resulted in the creation of the IEP for H.B. (R-3). She understood that the parents' goal was to have H.B. attend a regular kindergarten class starting in September 2000, although the prior transfer records had noted the continuation of H.B.'s placement at the Child Development Center on an interim basis. The parents were not in total agreement with the proposed IEP based upon their prior demands. She felt that the parents were still looking for a private school setting which was still yet to be identified by them. It was her understanding that the parents probably would not agree to continuation at the Child Development Center for any appreciable further period of time.

The parents had also requested DTT services for their child in a letter to the district dated March 14, 1999 which was rejected by Deptford on March 30, 1999 by the district's Raymond L. Sherman, Director of Special Services (R-1) Subsequently, on April 26, 1999, Sherman wrote to the parents and noted their rejection of any extended school year program at the GCSSSD during the coming summer months. (R-5) On May 17, 1999, Ulrich wrote to the parents and invited them to visit the Pine Acres School, which was proposed to be an in-district half day daily placement for H. B. in one of 2 preschool programs located at the facility, one of which was a Special Education

Program and the other of which was a regular education pre-school program.(R-7). On cross-examination, Ulrich indicated that she had not had objection to having H.B. educated with the non-handicapped peers at Pine Acres School or to receive one-on-one instruction there. She conceded that her opinion regarding H.B. was based upon various teacher reports and not by any evaluation ever conducted by her at all. Further, she conceded that at the time the IEP conference was conducted Deptford still had no new records or reports regarding H.B. Instead, it had based its determinations only upon the reports and evaluations which had been completed by the prior district at Voorhees. In that regard, she understood that H.B.'s teacher at the Child Development Center had indicated that H.B. had some unspecified behavior problems which were nonetheless being managed and accommodated within the class room. As a result, she never alerted anyone to the need for any behavioral assessment by Deptford.

Further, when Deptford rejected the parents request for DTT's for H.B., she supported that decision based upon H.B.'s new teachers' assessments, especially the speech/language therapist who had disagreed with the use of 30 hours of DDT on a weekly bases since H.B. was apparently already making progress at the time. There was nothing in any of the reports supplied to her which suggested that H.B. had any problems at school which would warrant providing her with DTT's. She noted that if a child was not able to master goals and objectives or had significant behavior problems, evaluations and assessments may have been appropriate at the time. However, there were none ever brought to her attention which could not be handled in the classroom. As a result, no such additional evaluations were triggered by Deptford on H.B.'s behalf at the time.

However, on further cross-examination, Ulrich was referred the Voorhees IEP, dated May 13, 1998, which Deptford had relied upon in order to demonstrate the adequacy of its continued program on H.B.'s behalf (P-31). At page 5 of that IEP, it indicated that H.B. had received a specific behavior modification program and that her behaviors did interfere with her learning. However, no specific goals were set forth to deal with that identified problem. Thus, by adopting Voorhees's, IEP Deptford inherited known difficulties regarding behaviors relative to H.B.. Yet, Deptford's IEP failed to provide any applied behavior analysis or DTT for H.B. in its IEP. This occurred even though the parents had previously requested DTT. She conceded that the only reference to any such assistance was the use of individualized and small group instruction to assist H.B.

In any event, as a result of further discussions with P.B., who had finally identified an alternative

school placement, Ulrich agreed to apply for H.B.'s admission to the Baldwin School which contains a pre-school in a public school setting with a half day regular preschool program (P-21).

She acknowledged that as of April 13, 1999, Deptford became aware of the fact that P.B. had changed her daughter's educational program to reflect education within the school setting between the hours of 9 a.m. and 12 noon instead of 2 p.m. which had been set forth in H.B.'s IEP. However, notwithstanding that knowledge, Deptford failed to initiate due process in order to correct or change the IEP to reflect that modification by the mother. She also claimed that, although there was nothing in H.B.'s IEP to reflect the use of applied behavioral analysis, it was nonetheless used by the teaching staff. She admitted that she never visited the home to observe the implementation of DTT's. However, she indicated that she was never invited by the parents and had they done so, she would have accommodated any invitation. At the same time however, she did not even inquire as to who was performing the DTT's for H.B. in the home setting.

She recalled that, at some point, the parents did request an independent psychological evaluation to be performed by Dr. Edna Barenbaum (P-15). However, Ulrich did not believe that the psychological evaluation was necessary due to the fact that H.P. was progressing in school at that time. She noted, however, that the actual decision to deny that evaluation was made by Raymond Sherman, Director of Special Services for Deptford, even though there was no current psychological evaluation in H.B.'s file at the time. She nonetheless noted that a new reevaluation was planned to be performed before June 2000, since H.B. already turned 5 years old as of November 1999. As a result, any evaluations would be three years old by the time that a new evaluation would be completed on her behalf by Deptford. She observed, however, that H.,B. has been in a private school since September 1999 and that the District's IEP is still in place for her since Deptford is currently responsible for her IEP. Yet, no services have been provided for her in that private school. Nor has there been any updated learning or social evaluation done regarding her since Deptford does not pay for services where there are private placements.

As indicated here and above, the district had offered an extended school year for H.B., which was rejected by the parents in 1999 due to the fact that they opposed placement at the GCSSSD summer program. She recalled that the parents preferred an alternative program which included DTT's. Ulrich did not know whether that alternative program could follow the IEP's goals and objectives. Yet, she did not follow-up with any further inquiries to establish the correctness of that assumption. It was her recollection that the IEP team, except for the parents, had had concerns that

H.B. might regress unless she was provided with an extended school year. Yet, the district took no action to compel the parents to put H.B. in their summer program, notwithstanding those concerns. She nonetheless felt that the clash over the type of summer programming reflected what type of program would be correct for the child. Yet, the district failed to evaluate the alternative program in any form to establish or confirm its weaknesses, if any. Finally, since due process was initiated, Ulrich has had no further involvement with H.B. Further, since the child had been placed in a private school, she had no further direct contacts with her in that regard also.

Margaret E. Daly

Margaret E. Daly obtained her masters degree from Adelphi University in 1989 in the area of Early Childhood and Special Education. Since 1990 she has worked in the area of Early Childhood Development matters, including Autistic children. And, since 1994 to the present, she has been employed by the GCSSSD district where she is now the supervisor of programs relative to ten classrooms whose student population ranges between the ages of three and eleven years old. The disabilities include such issues as pervasive developmental disorder, autism and related disorders. There are presently 76 children in her program, which is located presently in Turnersville, New Jersey. She supervises 56 staff members including teachers and assistants. They include ten teachers, four speech therapists, a music teacher, physical education teacher, approximately thirty-eight assistants, various secretaries and other educational professionals who provide services in the daily curriculum. In her new role as supervisor at GCSSSD she has been out of the classroom environment since September 1999.

At GCSSSD, the staff employs the Picture Exchange Communication System (hereafter PECS) which is used to promote spontaneous language in autistic children and helps develop a functional curriculum for them. The program consists of six phases in the learning process. In her experience, she has observed that no two children are alike, although most have delays in communication in one form or the other. These include such actions as flapping in front of objects as well as a general lack of eye contact, among other reactions. The program engages in small group and large group therapies. However, at GCSSSD they have minimized one on one interactions because they do not believe that it reflects reality, which is consistent with group interactions. At the same time, she observed that the use of DTT's is only one component of applied behavioral analysis. It is employed along with other certain learning formats, incidental learning, as well as whole part task learning. Applied behavior analysis consists of a group of different types of strategies to help

children learn in a certain style.

H.B. was enrolled in her facility between November 1997 and June 1999. She had come from the Voorhees school district in 1997 at which time the GCSSSD implemented the Voorhees IEP which had been in place for 1997 - 1998. She then coordinated a new IEP with Voorhees in 1998, as well as a third one which was created by Deptford in April 1999. Testing was completed in April 1999 using the Hawaii Early Learning Profile. Progress reports were also prepared at that time to reflect her educational status (R-4). A review of those reports revealed that, as of that time, H.B. was six to twelve months delayed. Her fine motor development continued to be a weakness even though progress had been noted. Similarly, her social-emotional development had shown improvement but that area continued to be a weakness for her. For example, H.B. was unable to initiate interactions with peers unless they had something she wanted. Cognitive development continued to show strong and steady improvement, her knowledge of positional and directional concepts had improved, and she had learned to incorporate those concepts into her conversations. However, she still had difficulty attending to group lessons although it was noted at the time she was able to be redirected and motivated to participate and attend by having the use of a reward system. Self help skills also continued to improve at that time. Prior to H.B. being removed early at 12 noon by her parents, her regular school day was between 8:45 am and 2:15 pm, during which time she received occupational therapy and educational programming (specifically from Daly) as well as specialized learning in such areas as art and music. All parts of her typical day were data based and recorded at least twice a week. Since Daly had been H.B.'s teacher during the time of her enrollment at the GCSSSD, she was in a good position to evaluate her progress over time. Thus, when the progress reports were drafted in April 1999 she was satisfied that H.B. had registered significant growth in all areas as of that time. In fact, unlike prior testing which had been done in 1997, her progress results were not scattered. Daly helped to create the 1999-2000 IEP based in part upon all of those test results. She also noted that H.B. received a student recognition award based upon her performance over two years since her several initial delays had improved to such an extent that she could now move on to a regular education program. This was reflected in the proposed IEP in April 1999 (R-2). In fact, Daly was pleased that H.B. did not even experience an expected regression common to three and one half and four year old autistic children at the time.

She also noted that the proposed IEP regarding H.B.'s transition included a morning session at GCSSSD district in the upper level special education class as well as an afternoon session in-district at Deptford which included a shadowing of H.B. to allow a transition on a gradual basis.

She also observed the transitioning must be flexible and relate to the child's needs. The morning program which was offered consisted of a transitional primary program for children between the ages of four and half to six years old and included speech, occupational therapy and specialized programming to be provided by the special services school district. Those goals were discussed with the parents at the April 1999 IEP meeting but the parents did not automatically agree with the proposal.

At some point in February 1999, H.B.'s mother called Daly to discuss adding a home-based DTT program to be implemented by Partners in Therapy. At that time they reviewed H.B.'s program and progress. When P.B. advised that she wanted an extra ten hours per week of DTT's, Daly agreed that any ten hours would probably help, but she objected to any additional time. She indicated that she would never agree to 30 hours of DTT's per week for the child. It was her opinion that the IEP which was ultimately created for the child was appropriate for H.B. at the time.

At the same time, she acknowledged that there are no non-handicapped children in her school. Interactions with non-handicapped children are facilitated only in social environments. The IEP which had been in place at GCSSSD for 1998/1999 had no specific goals or strategies regarding the interaction with normal peers. When she reviewed the status of H.B. with P.B. in February 1999, none of the regressions which were noted were significant enough to warrant notifying Deptford, according to Daly. In fact, as of that date, H.B. was in the higher functioning level of her class at which point she began to be pulled out to a highest level class due to her frustrations with several of the lower level children in her initial class. She also acknowledged that the extra ten hours of DTT's would not hurt but would help augment skill development, while at the same time she noted that it would have nothing to do with any behaviors that she had which were reflected in a slight regression which had also been noted by Daly. Yet, H.B.'s slight regression did not warrant contacting the case manager at Deptford. H.B.'s social development during the period between 1998 and 1999 reflected goals which included appropriate play with other children as a prelude to interacting with adults. However, at that time she was not yet ready to do skills with regular children. By March 1999, Daly conducted a thirty day review regarding H.B. at which time she did not recall ever bringing up to the case manager (Ulrich) any regrets or concerns at that time. She also acknowledged that she never inquired regarding the status of the in-home DTT's other than to ask how she was doing, to wit she was told fine. She also acknowledged that she agreed with P.B. to allow the class day to be shortened in order to allow for the implementation for DTTs at home in the afternoon. She felt that it was a parent's prerogative and this was an appropriate agreement

to make. At the same time, she noted that the parents never requested her to provide transportation home early from that environment since it was not her duty. Rather, the district was responsible for providing that service for them if the parents notified the case manager of any transportation request.

While at GCSSSD, H.B. had a behavior modification program established for her which included a five token system on two levels, consisting of (1) reward achievements and (2) efforts to extinguish inappropriate behaviors, specifically aggression relative to her peers (P-31). The new IEP (R-3) also noted that H.B. was to get rewards although there were no specific plans there to implement the use of time outs or any other criteria.

The summer program which H.B. attended in 1998 at the Child Development Center contained more community trips than would have been scheduled during a school year. She acknowledged that since there was only a parking lot adjacent to the facility, there was very little extra outside activity at that location although small bucket water play might have been engaged in. That play did not replace the goals and objective in her IEP, however, which tended to be generalized in the community activity setting. She also understood that H.B. had been referred to a Pennsauken-based program but there were no openings for her there at the time. She was also not familiar with the workings of that program or its implementation of IEP goals and objectives.

Todd Harris, PhD.

Todd Harris, PhD., was determined to be an expert in the areas of educational psychology and autism after examination by both attorneys in this matter (R-14). He has provided consultation services for approximately two to three years to the Gloucester County Special Services School District as part of his employment with Pyramid Educational Consultants. In addition, he has maintained a private practice and has specialized in the areas of autism and pervasive development disorder.

He conducted an observation regarding H.B. on December 20, 1999, (resulting from ALJ Miller's order) at which he reduced those observations to a report dated January 9, 2000 (R-13). His observations included approximately 60 minutes in her preschool program and 90 minutes at home during the discrete trial drill instructions. He observed that in school she maintained solitary play skills but she did not maintain well and did not initiate skills. Nor did she engage in repetitive responses. She was not spontaneously communicative and needed prompts during and at the end of

the luncheon period. Although she adapted well to the social setting her need for constant prompting as well as her lack of self initiation were concerns to him. At home, there were some good drills administered to her and she was frequently successful although he observed that some of the drills seemed to teach more complex, responsive skills than were necessary. Instead, he felt that she should be encouraged to learn more initiative and basic skills which included simple directions while at the same time she should be able to learn more complex social skills. He was concerned that if the use of DTT's constituted the only lesson format, there would be a problem with skill generalizations. For example, her inability to wash her hands in a pre school setting was in contrast to her mother's observation that that technique had been successful at home. He was concerned that, since autistic children do not generalize well, H.B.'s problems transcended her two separate environments too significantly. In fact, he reviewed the data supplied by Partners in Therapy, which revealed that H.B. appeared to be less independent in January and February 2000 than she had been between October and December 1999. At the same time he agreed with H.B.'s mother that the next level of goals should include H.B.'s attendance in a regular Kindergarten class with specialized supportive staffing. However, at the same time he indicated that the use of an aide should be faded out over time in order to promote H.B.'s independence, particularly in the school environment.

Similarly, H.B. should be directed to seek independent skill development in the social skills area as well as self initiation in the expressive and receptive communication skills realms. In that regard, he felt that applied behavioral analysis should be administered across all settings using seven instructional components, the most critical of which involves generalization, which he deemed to be critical for her success. In addition he felt that parent training was very important in the process. As a result, he concluded that H.B. needed thirty hours per week in a structured educational environment which employed ABA strategies and which involved more social peer interactions with those who have better communication skills than she had been exposed to in the past. Based upon all of that, he felt that Deptford's IEP, which included a regular Kindergarten environment for half day, would be an appropriate program for her. At the same time, the morning session at the GCSSSD would be able to employ a general teaching strategy which included applied behavioral analysis and DTT's among other techniques. He cautioned that DTT's prompt dependency would not work well for H.B. under the circumstances. At the same time, he acknowledged that he did not strictly address the IEP in his report but rather he focused on strategies to assist her in her total skill development. He also conceded that when he observed H.B.

at the school setting that he did not see any DTT's implemented there.

When he first saw her at the school she was in a small group playing with blocks but he did not know if any of the other children were disabled or not. He nonetheless felt that it was best for her to have peers who had better social and communication skills around her in order to direct her toward proper conduct and skill development. He noted that, although H.B. did subsequently play in a large gross motor area and mostly without assistance, she did not interact with her peers there. At some point when she went on the play structure, the aide who assisted her backed off but then rejoined H.B. when she got off the equipment. Thereafter, he recalled that H.B. played with puppets and then Lego's. She then directed her attention to a book. While she was playing with the puppets she was called over by another girl and responded. But she only played independently with her. He did not see her maintain play interactions at that time and there was no reciprocal play generated by H.B. It was only after the aide prompted the social interaction between the two of them that H.B. responded more directly to the other girl. His concern was that he did not see a prompt strategy or reinforcement system used at this time at the preschool.

He noted that after he completed his report he had an opportunity to review the data and report supplied by Partners in Therapy. He admitted and agreed that Partners in Therapy data does reflect that certain independent skills were being worked on in the home environment. Overall, he felt that the reinforcement system which was employed in the home environment was done well, although he was still concerned that he did not see their worked on in the preschool setting at the Goddard School. Further, although Goddard did have data collected regarding generalization and maintenance strategies, he did not see any generalization strategy being employed by Goddard when he observed H.B. there.

Further, although DTT's were observed by him in the home setting, he was not aware of any other formats also being employed there. He was concerned that other formats should be the focus, including incidental learning, generalizations and chaining strategies. At the same time, he did observe individual teaching at Goddard and the small group settings which he witnessed did allow for small group instruction, although he did not see it actually implemented there. As a result, if H.B. was in a small group along with the other disabled children, she had to be provided with opportunities for a flexible program and an intensive program, including the collection of appropriate data to support the observations. Specialized services and related services could help her in that environment provided that the other children had good social skills. This would also

apply to the use of speech and language services which he felt would be beneficial for her.

Edna M. Barenbaum, PhD.

Edna M. Barenbaum, PhD., was determined to be an expert in the areas of psychology and special education at the due process hearing. She received her PhD. From Temple University in 1980 in the areas of Educational Psychology and Special Education (P-7). She currently serves as a full Professor at the Cabrini College where she teaches psychology. Prior to that teaching position, she coordinated the Special Education Department at Cabrini College for fifteen years in which capacity she worked with undergraduates in the field as well as serving on various boards both nationally and internationally. She is certified in the Commonwealth of Pennsylvania in the areas of Instructional II: Elementary Education, Special Education and Reading as well as Educational Specialist II-School Psychology. She also has supervisory certificates in the areas of Special Education, Elementary Education and Reading.

She evaluated H.B. on June 4, 8 and 18, 1999 at which time she performed a psycho-educational evaluation on H.B. (P-6). After having reviewed the Voorhees reports and the existing IEP, she was concerned that H.B. has never had a cognitive evaluation done. As a result, she did not have any specific benchmarks against which to gauge performance. Nor did H.B. ever have a behavioral assessment done in 1997. She visited the GCSSSD Program in the spring of 1999. She became concerned about that placement since she observed that H.B. was the highest functioning child in that environment. Other children in the program had fragile needs which pulled the teachers away from H.B. and towards them. There were even times when the teachers literally left H.B. alone and just walked away from her. When H.B. became aggressive and/or frustrated, they merely gave her books or computers and put her into her own isolated setting. She was concerned that this reinforced the negative behaviors. Then, after that strategy was completed, they attempted to pull her back into the regular setting. She was also concerned that the teachers did not work with her echolalia and hand flapping. Nor was H.B. given any opportunity to communicate with the other children in a social setting. She also observed that H.B. only received 90 minutes of language therapy per week. Her concern was that, based upon H.B.'s development to date, she needs a lot more language therapy in order to provide an essential environment for her. Further, she must be with non-disabled children as much as possible for the sake of herself as well as her family. She must be able to model well, engage and communicate in an appropriate realistic setting and then engage in a highly rich language environment in order to explain her verbalization

skills. Thus, although she was satisfied that GCSSSD teachers were very caring, they lacked the appropriate materials and goods to help her. As a result she saw major deficits in the learning style employed regarding H.B. there.

She also observed H.B. in her home environment which she found to be very loving and supportive as H.B. was exposed to her DTT program. She also had the opportunity to observe H.B. at the Goddard School in October 1999, at which time H.B. appeared to respond well to directions in a group setting. There she even volunteered to do the morning weather report, began to learn turn-taking and modeling, among other behaviors, was responsive and alert during a reading session, and even took the lead role regarding a class demonstration at the time. All of her actions were totally appropriate. Meanwhile, her aide remained in the background. Her play was parallel, although appropriate and she also showed great success in responding to the arrival of another child, although she did so without offering a greeting to the child.

Dr. Barenbaum reviewed the proposed IEP for H.B. and found that it lacked sufficient stimulation goals and objectives to assist H.B. Instead, H.B. needs a much more rigorous educational program than that which has been provided for her in the IEP. Further, although the IEP calls for the implementation of DTT's there were none noted in the school setting in the GCSSSD. Nor was parent training ever conducted at any time. She felt that training must be implemented immediately to assist the parents regarding their child. As a result, she concluded that H.B.'s current placement in the offered split session program would not be appropriate. H.B. also definitely needs the use of DDT's. Further, she should also have a physical therapy evaluate done in order to evaluate her gross motor problems and deficits. Further, she has an unmet need that must be evaluated, especially regarding the hand flapping which has been a continuing problem for her. Her educational plan should be a two step process. She immediately needs a highly structured intense training program in order to prepare her to enter a non- handicapped class setting after an initial transitioned period. In a regular case setting she will learn to model appropriate social and academic skills. For the following year, H.B. needs to be placed in a highly structured environment with a high student-teacher ratio in which she receives intensive individual instructions using applied behavioral analysis And, since she has made significant progress in her DTT training program, that program must be incorporated into her daily classroom training. Her overall conclusion was that the GCSSSD program fails to address the opportunities that H.B. needs in order to progress sufficiently well. The constant distractions and class limitations place an inappropriate strain upon the teaching staff relative to H.B.'s individual needs.

On cross-examination, Dr. Barenbaum conceded that she was not aware of Deptford's in-district program at the time, which would have placed H.B. in a one half day program in a specialized program there. However, she noted that H.B. would nonetheless need as much exposure to a regular environment as possible. Her conclusion was that the greater the time she spent in a regular environment, the better would be her achievement. In addition, she stressed that 40 hours per week of intensive DTT for two years would also be necessary in order to fully provide for H.B.'s growth at this time. This would consist of twenty hours of intensive training in school and twenty outside at a minimum. Her optimum program would be to have a regular program all day with normal children, as described by Dr. Barenbaum, in a regular class with specialized help as well as additional time at home in order to generalize in that environment. She also agreed that the one half day program five times a week plus additional afternoon training and DTTs each day would be an acceptable way to balance the educational needs of the child.

She noted that H.B. had progressed based upon her home training and DTT's for three months after she reviewed the notes from Partners in Therapy's Katheen Odri as well as the observations made by H.B.'s home trainer, Laura Oliver. Prior to that time, however, H.B. had regressed to babbling. Her successes since the inclusion of DDT's at home have made a significant difference in her progress. Further, she was extremely concerned that the type of class environment provided by the GCSSSD would not provide H.B. with an appropriate, realistic regular school setting which could assist her at this time since the autistic children there are not placed into regular classes. In addition, she recommended that H.B. receive a highly trained therapist in speech/language, that is to say, a person who possesses a masters degree in speech/language and who is otherwise state licensed or certified as a practitioner.

She also objected to the use of the Hawaii Test for H.B. since at the time of its administration to H.B., she was already then 4 years and 11 months old, which placed her well beyond the test age group of ages 1 through 3. As a result, it was her opinion that the child study team's reliance upon that testing data was inappropriate and inoperative under the circumstances. Similarly, it was her opinion that placement of H.B. in the autistic class at GCSSSD for one half day and the preschool handicapped class at Deptford for the remaining part of the day was inappropriate and wrong because children such as H.B. should not be placed in an autistic class whatsoever. Instead, the history of H.B.'s aggressions indicates an absolute need to have socialization in a main streamed environment to the extent possible. She noted that, in her visit to the Goddard School on October 20, 1999, H.B. still exhibited inappropriate behavior, although

diminished, and had begun to register some growth in expressive language, social and emotional development. This suggested to Dr. Barenbaum that the right setting shall definitely aid someone like H.B. better than an inappropriate autistic or segregated environment. As a result, she felt that H.B. would not benefit from a special education classroom in Pine Acres either. She recalled that previously, the GCSSSD program did not even have the appropriate educational materials for her and, further, even the use of the PECS system was not appropriate. By contrast, she believed that the Goddard School was an appropriate setting. At no time did she observe any harmful effects by H.B. interacting with the Goddard children.

Kathleen McCabe Odri

Kathleen McCabe Odri was found to be an expert in the area of autism after extensive examination by the attorneys in this matter. This was based upon the fact that she had thirteen years of specific, extended experience and demonstrated work involvement with children in the area of autism to such an extent that she had derived a high skill level in autism even though she has no specialized degree in autism. It was also noted that her masters thesis was in the area of autism. In addition, she had thirteen years of experience involving interventions and served over four at the Princeton Child Development Institute among other professional credits. She has served as a behavior consultant and president of the Partners in Therapy (hereafter PIT) since 1994, which consulting group has been engaged in consultative efforts in approximately six states.

Although sizable efforts were made at the hearing to discredit PIT due to its state license having lapsed for a period of time, I found that this did not diminish the credibility of this witness or her subordinate Nicole Swanfeld.

She supervises 70 plus employees and has approximately twelve to fifteen behavior consulting students for whom she facilitates training to assist her usual population which includes children who possess language and behavior disorders on the autism spectrum. Approximately 90 to 96 % of all of her agency work involves autistic children.

Ms. Mccabe Odri has known H.B. since March of 1999 at which time she became the child's consultant. She personally administered the DTT training and instruction in H.B.'s home environment during the time when H.B. was enrolled at the GCSSSD district, and at which time she concentrated on expressive and receptive language. Initially, H.B. was deficient in social skills. During the summer of 1999, H.B. started an inclusive education at a summer camp where

she got one to one shadowing there plus one to one after-school assistance. Commencing in September 1999, H.B. commenced to received one to one assistance in the same Goddard School in a quiet area. Initially H.B.'s parents received approximately five hours of initial training from PIT as a result of H.B.'s brother's individual education matter with PIT. As a result of that initial training, H.B.'s mother also did some training on her own daughter. However, commencing in May 1999, H.B. began to receive instructor intervention of approximately 20 to 25 hours per week. She now received 25 and 30 hours of DDT instruction at home during the week. McCabe-Odri noted that since P.B. was already so involved with her son, the extra strain on her teaching techniques regarding H.B. were inappropriately significant. H.B. also received a shadow in June 1999 because she had such skilled deficient across the board. As part of that shadowing process, goals are constantly reassessed every time she has a session. In addition, PIT and the parents meet with the consultant every four to six weeks. This is a team approach which attempts to keep all the participants on the same page.

The uniform system for data collection is made routinely in order to measure the mastering of skills. At the same time they also look for appropriate engagement of tasks by H.B. and attempt to assess the results derived from the classroom environment to see how well she was generalizing that environment. As a result, McCabe Odri has noted that H.B. has made great gains in receptive language. Her tantrum behaviors have been reduced. Further, she has acquired good skill acquisition regarding greetings to others and good generalization skills regarding colors, use of shapes, body parts, some calender activities as well as peer interactions. PIT has also amassed data in school in numerous growth areas as well as at home where they collect data in 27 specified areas. The use of a shadow in the Goddard School is meant to help her become independent as well as to help explain problems and minimize confusion by the child. In the process, this helps to encourage individualized motivations. In December 1999, the role of the shadow was shifted in order to allow H.B. to engage in more socialization.

McCabe Odri recalled that she had met the district's Dr. Harris at the family's home, at which time she supplied him with generalization data which he had requested. She noted, however, that the data was not supplied to him until after he had issued his report in January 2000 regarding the status of H.B. As a result, she was concerned that any of his conclusions may have been flawed and/or defective relative to the gains registered by H.B. in the DDT setting since they could not have been reflected in his report.

By contrast, McCade Odri has observed that H.B. has made progress across the board, her behavior issues have diminished and her cognitive successes have been established. It is her belief that the least restrictive environment at the Goddard School with good peer interactions has become an important ingredient in H.B.'s success.

On cross-examination she indicated that when PIT started its program with H.B. they did not evaluate her skill levels at that time. Instead, they evaluated her ability to handle certain skills and see whether she could handle them in a developmental curriculum. It is a PIT-created program which is individualized to the child. As a result, she can only afford opinions regarding specialized results based upon the individual drill results, even though she conceded that New Jersey refers to standardized test results to gauge progress. Further, she noted that H.B. is now at a pre-K level of development but she has not registered any standardized level of scores to date. She indicated that the three to four entry level therapists who work with H.B. include a Pennsylvania-Certified Special Education Teacher, a shadow student who is presently enrolled in special education curriculum at Rowan University, one instructor who is not a college student and one instructor whose a high school senior.

It was her opinion that H.B. should have a one to one support person trained in applied behavioral analysis in the regular education program due to her lingering deficits in expressive and receptive language. This is meant in order to support her based upon her skill acquisitions to date. She was concerned that the offer by Deptford to provide the, day placement at the Pine Acres School even failed to indicate the availability of a one to one support person (R-7)

Nicole Swanfeld

Nicole Swanfeld is a therapist employed by PIT who has been involved with providing DTT services for H.B. in her home environment as well as serving as a shadow for her at the Goddard School. She joined PIT in May 1999, and commenced her shadow duties with H.B. starting in September 1999, in order to provide H.B. with additional support in school and to work on drills in school as well as at home. She also consults with her fellow team members on a regular routine basis at scheduled team meetings regarding the levels of success registered by H.B. Initially she provided ten hours of DTT instruction per week which consisted of four hours in the summer school camp at Goddard and six at home. Since November 1999, she has provided services three days per week between the hours of 9 and 12:30 at the Goddard School and, in addition, provides

in-home services between 1 and 3:30 p.m. During that entire time she keeps data on worksheets which assist in the transitional concerns between the school and home environments. As a result of all the above, Swanfeld is very familiar with H.B.'s current educational programming in that she engages in between 25 drills and, 14 maintenance drills on a regular basis. She also concentrates her efforts in conversation drills with her. H.B.'s team meets every two weeks to review her needs and progress. Swanfeld is currently a senior in the special education program at Rowan University.

She noted that when she first started in her shadow responsibilities at the Goddard School, she sat right next to H.B. Now, however, she remains approximately three feet away in order to assist but not manage H.B.'s activities. She has observed that H.B. has become more responsive to her peers in a social environment and she can move freely and interact with her peers and act normal with them.

Early on, H.B. had a problem regarding touching her hair which was an inappropriate behavior according to the teachers' staff standards. That was noted as a problem also even though it did not bother the other children.

On cross-examination she acknowledged that she has had no prior experience with working with artistic children. After she received a one week of coaching and a three hour workshop with Kathleen McCabe Odri, she was immediately assigned to work with H.B. She then received six hours of observational training and then had four hours with H.B. under the guidance of a senior therapist. She is called a therapist by McCabe Odri in that she performs discrete trials, keeps data and consults with others. Her meetings with McCabe Odri last approximately two hours every two weeks at which time they discuss H.B. progress. H.B. is present at the time and drills are done in concert with them.

P.B.

P.B. is the mother of H.B. and she also testified in this matter. She reviewed the chronology of interactions she has had with the GCSSS District as well as Deptford since H.B.'s matriculation through the Deptford school system. The family moved to Deptford in early February 1999, at which time H.B. was slated to go into Deptford's preschool setting. It was during that time that she had over ten discussions with Deptford's Raymond Sherman. And was during her interactions with him in March 1999 that she asked for the use of DTTs concurrent with support from Margaret Daly at the GCSSS District, who had advised her that those services would benefit H.B. Although

she was making progress it was not the same rate she had registered the previous year, and, in addition, she noted that H.B. was beginning to manifest some behavioral problems. As a result, she invited Sherman to see H.B. at the home or at the Child Development Center. However, neither Sherman, Daly or Janet Ulrich from Deptford ever came to her home, despite her invitation. On March 26, 1999, Sherman responded to her request for DTT by rejecting that requested relief (P-22). Thereafter, she requested Kathleen McCabe Odri to come out to her home and evaluate H.B., as a result of which McCabe Odri told her that H.B. was a good candidate for DTT services.

Thereafter, on March 30, 1999, she asked Deptford to provide services for H.B. at the Baldwin School instead of the GCSSS District (P-20) since she understood that H.B. would receive DTTs at that school location. At that time Sherman told her that providing DTTs in a school setting might be possibility. It was for that reason that she encouraged them to check with the Baldwin School since H.B. would also be in a non-handicapped regular setting there educational.

At the same time, with the consent of Margaret Daly, she commenced her own home afternoon DTT training with PIT since the GCSSS district setting involved mostly play activity in the afternoon. The Child Development Center agreed that it would be okay to have the child removed at 12:00 as a result. However, at the transition transfer meeting, Janet Ulrich told her that she did not have the authority to make the change herself. Instead, Sherman told her to wait until the April 19, 1999 IEP meeting. However, on April 20, 1999, Sherman wrote to EB. and P.B. and advised them, in relevant part, that their request for a DTT program at home was denied and, as a result, Deptford would not reimburse them for the half day program that was recently started by them (R-2). She indicated, that Sherman never told her to stop the program and return H.B. to the Deptford school. Nor did he ever tell her that Deptford would file a due process action against them relative to that issue. Thus, the family has totally paid for all of the DTT training to this current time and which had commenced approximately March 28, 1999.

At the April 20, 1999 IEP meeting, Ulrich also told her that she could not make any changes in the draft which was presented to the family at that time. She advised her to speak to Sherman about any such changes. P.B. told the team that she disagreed with the proposed placement of her daughter at the GCSSS district's Child Developmental Center because H.B. would have no interaction with non-handicapped peers at that location, which was contrary to her best interests, and which was supported by the various professionals who had indicated the danger of such a placement. They also objected to Deptford's Pine Acres preschool handicapped program because,

even though H.B. would be provided with a shadow at that school, she was nonetheless to be placed in a multi-handicapped class there, which was also contrary to her need to have a regular class placement.

Instead, the parents indicated they wanted continuation of the one to one discrete trial therapies. They also objected to the Child Developmental Center for a third year since they wanted H.B. to move on. She was now the oldest child in that setting by that time. Thus, although in the earlier years she has had good role models, she had outgrown the advantages of that program. They also requested Deptford to provide them with transportation to their home from the GCSSSD school. Deptford had only provided transportation to the school on a daily basis. The parents also stressed at that a typical peer setting in a non-handicapped classroom was necessary since H.B. had acted out aggressively in response to her handicapped classmates at the Child Developmental Center when they had failed to react well to her there.

P.B. also expressed concern and upset regarding a photo which was taken of her daughter and placed on the cover of a publicity brochure for the Child Development Center without the parent's permission. The GCSSS District utilizes an authorization form (P-34) for that purpose. However, neither she nor her husband ever signed any such authorization or were even offered it to be signed at any time. She subsequently found out about the picture on the brochure after its release. She was initially embarrassed about not having known about it and then upset because she had never been consulted. She indicated that she would never had signed it because she preferred to protect the privacy of her daughter and her family at all times. This was not done and it made her even less comfortable with the adequacy of the Gloucester County placement at the time.

She was also concerned about the fact that, although Raymond Sherman was advised by the family's attorney on May 3, 1999, that all future communications would be directed only through him (P-19), Sherman nonetheless wrote to them directly on May 14, 1999 about tuition issues, with a carbon copy of that letter being sent to the petitioner's attorney (P-17). She was surprised that Sherman failed to respond to that request to deal only through their attorney from that point forward.

Subsequently, Sherman maintained additional direct contacts with her, notwithstanding the family attorney's instruction to the contrary. Sometime during the summer of 1999, she received a phone call from Sherman at which time he asked her what was going on with H.B. since he knew they

were going to due process at some point. He also wrote to her on August 23, 1999 about an issue involving H.B. Further, in September 1999, at a meeting which Sherman held with the parents regarding H.B.'s brother, he asked her to remain after that meeting and talk about H.B. At that time he discussed going to mediation and about her attorney wanting to go to court to get reimbursed for his services. In addition, Sherman wrote to the family directly again on October 27, 1999 (R-12) with a carbon copy to the family's attorney once again.

Regarding the extended school year program in 1999, the parents rejected the proposed summer placement at the GCSSS district because they wanted a typical program for their daughter as opposed to the isolated programming which was in place at the Child Development Center (P-20). As a result they enrolled her in the Goddard School during the summer of 1999 and coupled that daily program with DTTs at home, including Saturday training. The parents also received DTT training from PIT through that process. After the success which was generated by H.B. during the summer period, the parents decided to keep her at the Goddard School which she has continuously attended on Mondays, Wednesdays and Fridays between 9:00 a.m. and 1:00 p.m. with a shadow present. At Goddard, H.B. is one of ten children in the class. H.B. is the only disabled child there. Deptford does not provide any transportation to or from that facility, which is located approximately twenty minutes away in Washington Township, Gloucester County. On cross examination she acknowledged that, should H.B. be placed in the regular education segment of the Pine Acres School program, they nonetheless do not like the class size, which Janet Ulrich described as containing approximately 15 children, because, as the only classified child in that class, they fear that she could become lost in so large a group. She expressed her concerns to the team at the IEP meeting and reminded them that she preferred to have a ten child class, if all possible. The special education alternative at Pine Acres would also fail to provide her with an appropriate typical peer setting and would be tantamount to a similar type of isolation which H.B. had experienced at the Child Development Center.

Raymond L. Sherman

Raymond L. Sherman has served as Deptford's Director of Special Education for a period of time. He reviewed a chronologically of interactions he had with H.B.'s parents commencing with the child's enrollment at Deptford on February 16, 1999 (P-29). He acknowledged that at some point he had received a request to direct all communications through the office of the parent's attorney and that he had no reason to disregard that request. Yet, he carbon copied the parents as well as

their attorney in a letter directed to the Office of Special Education Programs on August 3, 1999 (R-10). It is also noted that he never disputed the P.B.'s claim that he had other written and/or verbal communication with P.B. after he was instructed to direct all future communications only to the parents' attorney. It is also noted and it is curious that a careful review of his written chronology (P-29) reveals that he never recited any of his letters directed to the parents or any of the other verbal communications testified to by P.B. in this matter. The only reference to any of the above was his August 3, 1999 letter (P-29 at page 127).

Sherman also indicated that sometime in the spring 1999, he became aware that the parents were being allowed to remove H.B. from the Child Development Center earlier in the day than the program called for. However, he did not initiate any change in the IEP to reflect the earlier removal time. He stated that the District only reacted after the fact and that there was no request made by the parents to have a change made.

He was also asked about the letter which the parents sent to him on April 11, 1999 (P-20) in which they set forth their preferences regarding the administration of discrete trial drills as well as their preference to have the child enrolled at the Baldwin School. He responded that the letter was vague and that it did not require any change in the child's program. It was only on April 26, 1999, that he advised the parents to go for emergency relief or due process if they disagreed with the IEP. It was not the District's responsibility to pursue those remedies since their IEP was already in place. As a result, he stood by his IEP and all of its elements by his staff.

Regarding the transportation reimbursement, he felt that since it had not been requested by the parents, it was not provided. But he admitted that the parents were never advised specifically about it.

He also admitted that no related services have been provided to H.B. at Goddard school since the creation of the April 1999 IEP, even though the related services of speech and language could have been provided to her since then. Further, he indicated that Deptford does not believe that PIT is qualified to provide DTT services to autistic children.

Mr. Sherman was also called on surrebuttal to explain the distinction between the two classes which would be in place for H.B. at the Pine Acres School. The regular pre-school handicapped class would provide her with a one-on-one aide. However, the special education class, which he, for the first time, described as the at risk class would have no one-on-one aide available for H.B.

When asked what at risk referred to, he indicated that it meant those students who scored a little bit below average.

LEGAL ANALYSIS

The above-recited testimonies must be assessed in conjunction with the undisputed facts cited at the beginning of this Decision as well as with the various and numerous documentary proofs submitted in this matter. The paramount issue is whether or not the April 20, 1999 IEP created by Deptford for H.B. has been reasonably calculated to provide her with a free and appropriate public education in the least restrictive environment. As a back-drop to that analysis, I have had the opportunity to examine and thoroughly consider all the proofs presented in this matter, both testimonial as well as documentary, within the context of the applicable law and regulations to be applied in this matter.

Under the Individuals with Disabilities Education Act (hereinafter IDEA) [20 U.S.C.A. ?1400](#) *et seq.*, disabled children are entitled to a free and appropriate public education (hereafter FAPE). Federal case law interprets that statutory right as a guarantee of a basic opportunity. In the leading case of *Board of Education of Hendrick Hudson Central School District v. Rowley*, [458 U.S. 176](#), 102 F2d. 3034 (1982), the United States Supreme Court held that the state satisfies the requirement of a free and appropriate education by providing personalized instruction with sufficient supportive services to permit the child to benefit educationally. In the case of *Polk v. Central Susquahana Intermediate Unit 16*, [853 F 2d 171](#), (3rd Cir. 1988), the Third Circuit held that children with special needs are entitled to receive education which confers upon them meaningful educational benefits and the term benefit refers to something more than a trivial advancement. Such instructions and services must be provided at public expense and must meet the State's educational standards.

In 1998, the New Jersey Department of Education updated its prior regulations, previously found at *N.J.A.C. 6:28-1.1 et seq.*, pertaining to students with disabilities which, in particular part, stated that the role of special education in New Jersey is to [ensure that all students with disabilities as defined in this chapter . . . have available to them a free, appropriate public education as that standard is set under the Individuals with Disabilities Education Act (IDEA) [20 U.S.C.A. ?1400](#) *et seq.*] *N.J.A.C. 6A:14-14.1(b)1.11*. Moreover, the State regulations mandate, at *N.J.A.C. 6A:14-14.1(b)2* that the purpose of special education is to ensure that students with disabilities are

educated in the least restrictive environment.

Under [20 U.S.C.A. ?1412\(5\)\(b\)](#), the IDEA has created a statutory preference for educating disabled children in the least restrictive environment. That is to say, procedures have been established to ensure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from their regular education environment occurs only when the nature or the severity of the disability is such that education and regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Over time, that concept has evolved into and has become known as inclusion as articulated in the seminal case of *Oberti v. Board of Education of Clementon*, [995 F 2d 1204](#) (3rd Cir. 1993). In order to determine the least restrictive environment, the District is duty-bound to evaluate the continuum of educational options based upon the appropriateness of programs offered in each of those spheres. Thus, if two programs were found to be appropriate, most often the less restrictive environment must prevail. However, if a less restrictive environment is not appropriate for the child, then it fails to meet the basic flow of opportunities mandated under FAPE. See also *Ridgewood Board of Education v. N.E.*, No. 98-6276 (3rd Cir. 1999) [HTTP://laws, findlaw.com/uscircis/3rd/992108P.htm1](HTTP://laws.findlaw.com/uscircis/3rd/992108P.htm1).

In that regard, I have had a thorough opportunity to review and assess the arguments raised by both sides relative to the needs of H.B. in this matter. As a prelude to that discussion, I concur with the closing statement made by respondent's counsel relative to the Court's obligation to assess the alternative programs and assess the various experts' reports relative to the child in question. In that regard, I thoroughly considered the width and breath of the testimony offered by Dr. Harris and Dr. Barenbaum in this matter and, as I found, both were uniquely qualified to speak regarding their respective expertise herein. Overall, I **FIND** that Dr. Barenbaum had the benefit of a greater opportunity to interact with the child's total educational setting than had Dr. Harris, who was severely limited in his ability to make similar more extensive determinations due to the time constraints placed upon him. As such, while I found him to be highly credible in his own right, I nonetheless was constrained to afford him somewhat diminished weight versus the testimony adduced from Dr. Barenbaum, who had the greatly opportunity to focus in more extensively into the discrete trial programming which H.B. has received to date. Interestingly enough, however, even Dr. Harris acknowledged the usefulness and utility of discrete trial training, as well as training for the parents. As a result, I do not find there to be a sizable dispute between then relative

to reliance upon and usefulness of discrete trials for H.B.

Rather, I **FIND** that, although they differed regarding the placement options (noted as follows) they consistently supported the need for discrete trials made in H.B.'s transfer IEP which was created by Deptford on March 9, 1999 (P-31) (at a time when she had been in the Deptford District for a few weeks.) The information which was recommended by the Voorhees Child Study Team in that transfer IEP indicated that [H.B.] requires individualized instruction using discrete trial and applied behavioral analysis in order to meet IEP goals and objectives. Placement in an autistic preschool handicapped program is appropriate for [HOB.] at this time. (P-31 at p. 2). The parents initiated their individualized efforts to explore the implementation of discrete trials for their daughter, which were then instituted on March 20, 1999 through Partners in Therapy. Immediately thereafter, on April 11, 1999, I **FIND** that the parents timely notified Deptford of their efforts and preferences in that regard. After having thoroughly scrutinized and considered that letter, I cannot agree with Raymond Sherman's assessment that its terms were vague in any form whatsoever. Rather, the parents clearly articulated a proposed plan. And, in deference to Deptford, I **FIND** that specific, timely efforts were properly initiated by Deptford to explore the Baldwin School as a possible placement for H.B. It is only regrettable that the Baldwin School failed to have a place readily available at that time.

What is most curious, however, is that barely five weeks after the interim IEP was created by Deptford, and further, only seven days after the parents' letter was received by Deptford, it offered to the family an IEP on April 20, 1999, which, in relevant part, failed to either endorse or explain away the previous identified need for discrete trials for H.B. Instead, the proposed IEP stated she requires individualized and small group instruction using PECS and verbalizations in a well-structured classroom that utilizes a behavioral modification system. (R-3 at p 2). After having carefully considered the quantum of evidence presented in that regard, I failed to find any appropriate rationale to justify the deletion of the previous call for discrete trials or any reference to any current psychological evaluation as part of that IEP. This is exacerbated by the fact that apparently no psychological evaluation was even done in 1997 upon which the Deptford district could rely prior to any additional formalized evaluation being done by it at some later date. As a result, I **FIND** that, absent any other proof to the contrary, the proposed IEP was immediately flawed in that it failed to adequately articulate any reason to disregard the call and need for discrete trials. In the process, I **FIND** that the fact that Deptford was not individually

professionally equipped to introduce discrete trials for H.B. at the time did not alter its responsibility regarding its implementation. The parents had a right to expect an appropriate program which incorporated discrete trials. Thus, when they initiated those efforts themselves and timely notified the District of their intention in that regard, the District was in a position to challenge those efforts by way of due process or to accede to the request and compensate the family for those services commencing with the inception of that program.

After having considered all the proofs submitted in that regard, I **FIND** that the discrete trials have had a positive impact upon H.B. at a most crucial time in her life and that their continuation is currently mandated in both the school environment as well as the home environment. Thus, to the extent that H.B. had only received approximately one half of the optimum amount of weekly discrete trials recommended by Dr. Barenbaum, H.B. has nonetheless already recorded progress. This is to be encouraged. Whether the amount of the programming should rise to the Barenbaum optimum level remains to be seen. Although an increase may be tested at this time, caution must be taken to ensure that the child is not so overly saturated with DTTs that she becomes grossly fatigued by such efforts. I **FIND** that the DTT programming must strike a reasonable balance between her ability to withstand such rigorous training and her ability to recoup and get refreshed over the short and long haul. At the same time, however, I am mindful of the critical need to frontload as much positive DTT programming as soon as possible in order to hopefully trigger positive responses from this child. It is evident that this is a most critical time that she must be reached educationally by whatever reasonable means and any lost time shall only constitute a disservice to her. The use of DTTs to date appears to have contributed to that success, no other viable proofs having been presented to the contrary.

The involvement of Partners in Therapy appears to have played the singular most positive role in that regard, particularly the actions and interventions of Kathleen McCabe Odri, who has supervised H.B.'s DTT program, as well as Nicole Swanfeld, who appears to be a talented rising professional. Any administrative and or licensing concerns which Partners in Therapy may have had did not diminish or dilute the quality of services it has provided for H.B.

At the same time, I **FIND** that the proofs also amply support the concern of both the district and the parents that behavior modification is essential in order to intercept what appears to be increasing bad behaviors by her. And it is that concern regarding bad behaviors which lends itself to disqualifying the GCSSSD District's Child Development Center class for H.B. at this time. I

also **FIND** that, although it was apparently an appropriate placement for her for a period in her life, she has nonetheless outgrown that educational setting and that her maxed-out age in a class to which she would be assigned under the proposed IEP would be inappropriate for her given the undisputed reports of negative behaviors generated by her in that class environment. Thus, although I **FIND** that Deptford's announced intentions were well placed in attempting to provide a transitional base for H.B., her maturation and growth have propelled her into receiving different needs which cannot be appropriately met by the CDC at this time. And I so **FIND**.

In addition, I **FIND** that the segregated, isolated nature of the self-contained class at the CDC is not a productive, positive, appropriate environment for H.B. Rather, I **FIND** that the relevant proofs demonstrate that H.B. needs to be included in as normal a class environment as possible in order to provide her with age appropriate, normal peers who can hopefully more realistically and appropriately channel her energies and educational challenges in a positive fashion. That being the case, I **FIND** that one of the two proposed alternative placements at the Pine Acres School would be totally inappropriate, to wit, the Special Education class which was identified by Mr. Sherman as being the at risk class. This will not serve H.B. and her educational needs in any realistic form whatsoever. And I so **FIND**. H.B. needs a more positive, peer-level base from which to draw experiences than that which can be provided in the at-risk class. By contrast, the regular education preschool handicapped class at Pine Acres appears to have been reasonably designated and geared to provide such services for H.B., provided that it can meet the discrete trial needs of the child in that setting. It was suggested that a ratio of 15 student to two teachers would not meet the discrete trial needs of H.B. However, I have not been provided with specific proofs to convince me that Deptford could not otherwise provide such services in that type of population. If, however, Deptford is unable to so provide such services there then the only alternative is to seek a placement which does in fact allow for that to occur during the school day on a routine bases. Deptford should be permitted a limited opportunity in order to scrutinize it's abilities in that regard and then convene a new IEP meeting with the parents in order to either establish the appropriate program in place for the complete school day there or locate an alternative placement which meets the child's educational need, including the implementation of the discrete trials in either setting as indicated hereinabove.

At the same time, although I **FIND** that the parents exercised appropriate and reasonable discretion in placing their child at the Goddard School, which reflects a better student to teacher

ratio in a regular education peer level setting for H.B., I am nonetheless without sufficient proofs to determine whether or not the Goddard School is the only appropriate placement for H.B. henceforth. If Deptford can create the appropriate in-district Program, the placement should be preferred as being least restrictive. This is not to say, however, that the parents should not be reimbursed for their cost of educating their daughter at the Goddard School up through this time. Rather, the reverse must be the case given the apparent adequacy of that program and their timely and responsible efforts to notify Deptford of their alternative placement since the summer of 1999 and up through this present time. And I so **FIND**.

I, also **FIND** that the parents should be compensated for the independent evaluation conducted by Dr. Edna Barenbaum, which request was summarily denied by the district without any application for due process by it. I also **FIND** that the district should provide compensatory education in the areas of speech therapy and occupational therapy for, as conceded by Raymond Sherman, those services could have been provided for the child by Deptford but, for whatever reason, were not. I also **FIND** that the parents are entitled to transportation reimbursement from the GCSSSD to their home from March 23, 1999 until the termination of that placement in June 1999 as well as all transportation costs to and from the Goddard School since the child's matriculation there. This reimbursement shall occur and continue for so long as the child remains at the Goddard School and unless an alternative and/or full day program in district is provided for H.B. in a regular education, peer appropriate group setting. And, as found hereinabove, that placement shall include, incorporate, and execute an appropriate discrete trial therapy plan, along with the program maintained by Partners in Therapy during the after-school hours and on Saturdays for the benefit of H.B. The Child Study Team shall immediately coordinate its efforts in order to establish the DTT program with Partners in Therapy as soon as possible. Training for the parents must also be initiated to prepare them to be part of that comprehensive process.

Reimbursement to the parents for enrollment of the daughter at the Goddard School reflects the parents' correct determination to enroll their child in an education program which, at least on its face, has provided H.B. with a fully integrated day program and after-school DTT training at a time when the program offered by the district failed to adequately address or specifically delineate the parameters of the identified need for applied behavioral analysis programming and the documented need for DDTs across the board. I **FIND** that there is sufficient evidence to conclude that H.B. has benefited from her placement at Goddard and that, as a result, reimbursement there

shall continue unless and until a suitable in-district full day program and DTT-home coordinator program as set forth hereinabove, is created for H.B. by the district.

It is to be noted and I **FIND** it disturbing that the district apparently allowed certain conditions to exist which detracted from a wholesome, positive approach being taken on behalf of H.B. at the outset of her matriculation in the Deptford district. I am particularly concerned that the district, for whatever reason, failed to respect the request of the parents to have their attorney act as their spokesperson/representative. Instead, the district continued to include the parents in the loop despite their request to the contrary. Further, I **FIND** that the district abdicated its responsibility when it failed to initiate due process when appropriate changes were made in the child's program. All of the above apparently occurred at a time when the district otherwise had available to it the services of their fully competent and capable attorney, whose earlier intervention in the process could have intercepted and defused what ultimately became a series of misdirections and misinformation by the district relative to this child. In the process, I **FIND** that the district should have been more responsive to the expressed needs of the parents and by failing to do so, the district exacerbated and heightened the level of tensions unnecessarily. This was most glaringly evident when Raymond Sherman indicated and acknowledged that occupational therapy and speech language therapies were not provided for H.B. even though they could have been so provided at the time. These times are most precious and critical for this child. As a result, the district must initiate efforts in order to accommodate the needs of this child as soon as possible.

I also **FIND** it most disturbing and troubling that the GCSSSD's Child Development Center failed to protect the privacy interests of H.B.'s family when, without their consent or acquiescence, it published H.B.'s picture on the front of a brochure which was circulated to its constituency. I **FIND** this to be a glaring violation of H.B.'s interest. Thus, it is no wonder that H.B.'s mother experiences upset and embarrassment and, in all probability anger, in reaction to that callous and totally uncalled-for action by that receiving district. This did not help to establish a positive link between the needs of the child and the efforts by Deptford to try to address her then current needs. Such actions in disregard of privacy rights cannot be allowed to ever happen again. Deptford is cautioned to take remedial action with reference to its receiving district to insure complete compliance of federal privacy rights of its students henceforth.

The parents also raised an issue regarding the issue of a physical therapy evaluation. After having considered all of the proofs and arguments advanced in that regard, I **FIND** a paucity of

proofs to support the need or right to order any comprehensive evaluation for physical therapy at this time. However, the district is encouraged to initiate such an evaluation if the circumstances and more informed proofs demonstrate the need for such services.

In the final analysis, it is anticipated and hoped that this district and this family will reestablish a positive level of communications so that the future matriculation of H.B. in this district can proceed unencumbered and in accordance with a positive, successful format geared to her success. For there is no doubt that, with a proper and cooperative channeling of educational resources to assist this child, she shall be best positioned to be educated by the district in a meaningful and productive way so as to insure, to the extent possible, her opportunities for growth and development.

CONCLUSION AND ORDER

Based upon all of the foregoing, I **CONCLUDE** that, notwithstanding its various efforts to accommodate the needs of the child, Deptford has, for the reasons stated hereinabove, failed to provide H.B. with a meaningful education by a preponderance of the credible evidence. At the same time, however, I do not conclude that there was any intentional effort to disregard her rights. Rather, based upon the transitional nature of the child from one district into another, as well as the timing within which all the forces were brought to bear in that regard, there remained a singular misidentification of the needs of this child at a time when the parents fashioned an alternative program which appeared to attempt to address those problems more directly.

It is **ORDERED** that the district shall create a full day in-district program in a peer appropriate and age appropriate environment in a regular education class which shall include specific goals and objectives and which shall incorporate applied behavioral analysis and discrete trial therapies in class as well as after school, which program involving the applied behavioral analysis and discrete trial techniques shall be coordinated with the Partners in Therapy program. The district shall be responsible for reimbursing H.B.'s family for all costs incurred to date with reference to Partners in Therapy, as well as any and all future costs generated with Partners in Therapy as part of that programming, including parent training.

It is also **ORDERED** that until such a time as a full day in-district program is created as indicated here and above, H.B. shall be permitted to remain at the Goddard School so long as it remains educationally appropriate, all services for which since the date of her initial enrollment

there in in the summer of 1999 through and including the point of her reintroduction into the in-district Deptford system, shall be borne by the district.

It is also **ORDERED** that the district shall reimburse the parents of H.B. for all transportation costs incurred by them for her during her period of matriculation at the Gloucester County Special Services School District as well as all transportation costs to and from the Goddard School.

It is also **ORDERED** that the district shall provide compensatory education in the areas of speech therapy and occupational therapy to H.B. from the point that she enrolled in the Goddard School thence and for all times that she was not otherwise given any such services by the district.

It is also **ORDERED** that the district shall reimburse Dr. Edna Barenbaum for the costs of her independent evaluation completed on behalf of the H.B. in this matter. It is also **ORDERED** that the request for a comprehensive evaluation for physical therapy is denied.

It is also **ORDERED** that the parents shall submit an itemized list of all their reimbursable lists to the District within thirty days of the date of this decision. The District shall reimburse them for all of the costs so ordered within thirty days of it's timely receipt of those billings.

This decision is final pursuant to [20 U.S.C.A. ?1415\(i\)\(1\)\(A\)](#) and [34 CFR 300.510](#) (1999) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a district court of the United States. [20 U.S.C.A. ?1415\(i\)\(2\)](#), [34 CFR 300.512](#) (1999). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

DATE **JOHN R. FUTEY, ALJ**

mamf

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