

Commonwealth of Massachusetts  
Massachusetts Department of Public Health

In Re: Abel<sup>1</sup> and Beacon Services

DPHEI-09/01

RULING ON MOTION TO STAY PUT

This matter comes before the Hearing Officer on the Motion of the Parents for enforcement of the child's "Stay Put" rights under Part C of the IDEA (20 U.S.C. 1439 (a) (7); 34 CFR 303.425) and BEACON Services' Cross-Motion for Clarification of its stay put obligations. On December 29, 2009, the Parents filed a request for an administrative hearing pursuant to 20 U.S.C. § 1431 and 801 CMR 1.00. The underlying dispute is one of treatment methodology: whether BEACON Services (hereinafter "BEACON"), an autism treatment provider that uses a strict ABA-only approach, can be required to provide those services alongside another autism treatment provider that uses a different treatment methodology when BEACON believes such "co-treatment" is ineffective and unethical? The immediate issue for resolution through the "Stay Put" Motions is whether BEACON may unilaterally terminate autism treatment services it had been providing to Abel through an accepted Individualized Family Service Plan (hereinafter "IFSP") while a due process hearing on the underlying issue is pending? In a conference call held on January 7, 2010 the parties acknowledged that only three weeks remained of Abel's eligibility for early intervention services and that the presenting issue could most expeditiously and efficiently be addressed through Motions rather than a full due process hearing. The parties waived immediate scheduling of hearing dates.

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<sup>1</sup> "Abel" is a pseudonym chosen by the Hearing Officer to protect the privacy of the family in documents available to the public.

A hearing on the "Stay Put" Motions was held on January 13, 2010, at the offices of the Massachusetts Society for Prevention of Cruelty to Children in Springfield, Ma. The Parents represented themselves and the child. Henry Clark, Esq. represented BEACON Services. In support of their Motion the Parents submitted Exhibits marked P-1 through P-13. In support of its Motion BEACON submitted Exhibits marked B-A through B-O, a written memorandum and proposed findings and order. Neither party presented witness testimony. Both parties made oral arguments. At the conclusion of the hearing, acknowledging that time was of the essence in this matter, the Hearing Officer issued an oral Ruling on the Motions: BEACON Services is obligated under the terms of Abel's current accepted IFSP and relevant statutory, regulatory, and contractual language to provide 20.0 hours of autism therapy services to him until the parents have withdrawn their consent to that service, a Decision has been rendered after an administrative hearing, or Abel has reached his 3<sup>rd</sup> birthday. To the extent that BEACON has unilaterally terminated IFSP services to Abel BEACON is in noncompliance with its statutory, regulatory, and contractual obligations under Part C of the IDEA. BEACON was ordered to immediately resume the autism therapy services outlined in Abel's IFSP and to continue those services at least until Abel reaches his 3<sup>rd</sup> birthday. The following discussion is intended to explain and expand upon that ruling.

## SUMMARY OF THE FACTS

Neither the facts pertinent to the resolution of the stay put issue, nor the procedural history of this appeal is in dispute and therefore may be briefly summarized:

1. Abel is a young child with a diagnosis of autism, a significant developmental disability. He is eligible to receive early intervention services under Part C of the IDEA until his 3<sup>rd</sup> birthday. Abel turns 3 on Jan. 27, 2010. (B-A).
2. The Massachusetts Department of Public Health (hereinafter "DPH") has primary responsibility for implementing the substantive and procedural provisions of 20 U.S.C. 8 1431-1445, also known as Part C of the IDEA. (Administrative Notice)

3. DPH has contracted with BEACON Services to provide specialized early intervention services to young children with autism. Through this contract BEACON Services agreed to comply with all statutory and regulatory obligations imposed by Part C of the IDEA as well as the Operational Standards of the Massachusetts Early Intervention System. In particular BEACON agreed to collaborate with Early Intervention programs and other service providers to meet the individual needs of each child it services. (B-N; see in particular: program narrative p. 2,3,7,9; scope of service amendment).

4 BEACON Services uses the treatment modality Applied Behavioral Analysis (hereinafter known as “ABA”.) exclusively. (B-O, B-E)

5. Both of Abel’s parents are trained in, and are current professional providers of, a variety of educational methodologies/intervention strategies designed for individuals with autism. These include ABA, RDI/Relationship Development Intervention and DIR/Floortime, among others. Abel has at least one sibling in the home with autism. (Parent, P-10).

6. On March 10, 2009 an initial IFSP was developed for Abel. The IFSP provided for: a developmental playgroup 2.5 hours per week (outside home)

: occupational therapy - 1.0 hour per week (in home)

: developmental specialist - 1.25 hours per month (outside home)

: BEACON specialty services - 18 hours per week (in home)

There is no language in the IFSP stating the nature of BEACON’s “specialty services”. There is no language in the IFSP stating that BEACON would be the “sole” or “exclusive” service provider. The family consented to the proposed service plan and it was implemented. (B-A).

7. The IFSP was revised, with appropriate consent, on June 23, 2009. The revised IFSP provided for: in home developmental services - 2 hours per week

- : in home social work services - 2 hours per month
  - : in home Beacon Specialty services - 18 hours per week. (B-B)
8. On August 6, 2009, the IFSP was revised, with appropriate consent. The revised IFSP provided for
- : in home Beacon Services - 22.5 hours per week
  - : in home Beacon Services with supervision - 2 hours per month. (B-C)
9. Abel's IFSP was revised Nov. 18, 2009, with appropriate consent. The revised IEP provides for:
- : discontinuing the in home social work services
  - : changing the occupational therapy service provider and location
  - : adding twice weekly speech-language therapy to be delivered at Abel's daycare
  - : adding 2.5 hours once weekly of home services through REACH
  - : adding 5 hours twice weekly for REACH services at Abel's daycare
  - : continuing 18 hours per week of BEACON services at home
  - : continuing 2 hours per month of BEACON supervision at home. (B-D; P-12)
10. REACH is a provider of early intervention services which primarily uses the DIR/Floortime methodology of treating individuals with autism. (P-13).
11. On November 20, 2009 BEACON wrote to Abel's parents requesting that they discontinue the REACH/Floortime services they had agreed to in Abel's then most recent IFSP. BEACON asserted that the provision of ABA services was incompatible with concurrent provisions of services using the Floortime model. BEACON indicated willingness to increase its service hours to cover the hours being provided to Abel by the REACH therapists. BEACON warned that if the parents did not agree to designate BEACON as Abel's "sole autism service provider" it would "discontinue services effective 1/1/2010." Beacon did not notify the DPH Office of Early Intervention of its intention to unilaterally withdraw services to Abel. (B-E).

12. The Parents wrote back to BEACON on 12/8/09 stating that they wanted BEACON to continue to provide services to Abel, and requesting that BEACON do so. "We are requesting that your agency continue to fulfill the service provisions set forth in [Abel's]'s IFSP. (B-F)

13. Beacon responded to the Parent's request on 12/15/09:

It is our sincere hope that you choose to continue with BEACON, however it should be noted that the service end date of 12/31/09 remains in place. We have developed a transition plan which we will present to you by the end of this week. It is BEACON's intention to do everything necessary to ensure an appropriate transition to another service provider by this month's end. (B-G).

The "transition plan" developed unilaterally by BEACON was mailed to the Parents on 12/16/09. No notice was given to DPH. (B-H).

14. On 12/16/09 Abel's parents wrote to BEACON objecting to the unilateral termination of BEACON's services to Abel. They noted that BEACON had not obtained their consent to withdrawal of services, that BEACON had not requested a new IFSP meeting to discuss its proposed termination of services, and that BEACON's obligation to continue services until the parent(s) had agreed in writing to changes was noted on the IFSP form. The parents restated their intention to have Abel continue to receive BEACON services. (B-I)

15. Abel and his parents were out of town between 12/16/09 and 1/03/10 due to a death in the family. (Parent)

16. On December 29, 2009, the Parents filed a request for mediation and hearing with the DPH office Early Intervention Program Office. As part of the hearing request the Parents asked that BEACON continue to provide the ABA services outlined on Abel's IFSP as required by Early Intervention procedural safeguards. (B-J)

17. BEACON responded to the Parents' request on 12/30/09 stating that it would "rescind our termination date" and continue to deliver ABA services until January 27<sup>th</sup> only if REACH/Floortime were "suspended and not delivered" during that time. BEACON warned that without a commitment to discontinue other autism-related therapies it would not provide services to Abel "during the pending of your request for mediation and or a hearing on this matter". (B-K)

18. BEACON has not delivered any ABA services to Abel since 12/16/09. (Parent)

19. DPH assigned a Hearing Officer to this matter on 12/29/2009. Due to the parties' family obligations, travel schedules, and prior commitments, along with the winter holidays, immediate scheduling was problematic. (34 CFR 303.423) In a conference call held between the Hearing Officer, the Parent, and BEACON's attorney on January 7, 2010, the parties agreed that a ruling on the stay-put issue would sufficiently clarify the parties' respective obligations and expectations during Abel's three remaining weeks of EI eligibility and that resolution by way of a likely lengthy substantive hearing would not be necessary at this time. (Administrative Record)

20. BEACON declined to participate in mediation in lieu of in or in advance of the Hearing on the Motions for "Stay-Put." (Administrative Record)

## LEGAL FRAMEWORK

The Individuals with Disabilities Education Act ("IDEA") Part C. establishes a comprehensive system to deliver strategic early intervention services designed to meet the developmental, therapeutic, and educational needs of children from birth to three years old who have identified disabilities. 20 U.S.C. § 1431-1444. As a corollary to those Parts of the IDEA which govern the provision of educational services to school and transitional aged students with disabilities, primary responsibility for implementation of

the federal statute has been delegated to the states. Massachusetts has created a comprehensive early intervention system which is administered and supervised by the DPH. Massachusetts has not issued its own Early Intervention regulations. Instead it uses the federal statutory and regulatory language to govern Early Intervention program compliance. (20 U.S.C. §1431-1444 and 34 CFR 300.000 et seq.) It has also developed a comprehensive program plan entitled ‘Early Intervention Services Operational Standards’. All early intervention programs, service providers, and contractors are expected to be familiar with and to comply with the Operational Standards. The IDEA Part C, the federal early intervention regulations, and the Massachusetts Early Intervention Operational Standards, are all designed to ensure that supportive disability-related services identified as necessary for a child and agreed to by the child’s family, are provided. To ensure that the IDEA’s goal of “family driven” services is met, explicit procedural safeguards are set out in the relevant federal statute, the implementing regulations, and the Massachusetts operational standards. These safeguards are meant to protect and support the family. There are only very rare references to the “rights” of other participants, such as service providers, in the procedural sections.

At issue in this matter are two interdependent statutory and regulatory sections: parental consent and stay put. Part C of the IDEA requires that states safeguard

...the right of the parents to determine whether they, their infant or toddler, or other family member will accept or decline any early intervention service...without jeopardizing other early intervention services.

20 U.S.C. §1439 (a) (3) ( emphasis added.)

The statutory language is mirrored in the federal implementing regulations at 34 CFR 303.405. The Massachusetts Early Intervention Operational Standards contain nearly identical language requiring the DPH to ensure

...that, parents of a child eligible under Part C are given notice that they may determine whether they, their child, or other family members will accept or decline any early intervention service under this Part in accordance with these due process procedures and may decline such a service after first accepting it, without jeopardizing

other agreed upon early intervention services under this part.

#### Appendix B: A4

The Massachusetts standards further provide that written parental consent must be obtained: before a change in identification, placement, evaluation, assessment, or reduction in services or change in type of services. Appendix B: VI A3. See also: 20 U.S.C. §1439 (a) (6). There is no statutory, regulatory or operational standard provision concerning provider consent to deliver, change or terminate any early intervention services.

Similarly, the Part C language concerning the provision of early intervention services to children while there is a disagreement between the parents and the state early intervention program or any early intervention service provider, borrows heavily from the well-established “stay put” clause in the IDEA Part B governing services to school and transitional age students with disabilities. 20 U.S.C. §1439 (b) “Services during Pendency of Proceedings” provides:

During the pendency of any proceeding or action involving a complaint by the parents of an infant or toddler with a disability, unless the state agency and the parents otherwise agree; the infant or toddler shall continue to receive the appropriate early intervention services currently being provided.

See also 34 CFR 303.425. Compare 20 U.S.C. 1415 (j).

This “stay put” provision appears in two places in the Massachusetts Operational Standards:

c. During the pending process of appeal or mediation, the child and family shall be entitled to those services which are currently being provided, or if initial services, are not in dispute. If there is a dispute between agencies or providers as to payment for early intervention services provided under the IFSP, the Department shall ensure the provision of services without Charge until the dispute is resolved.

#### IX A.c.

and

#### D. Status of Child During Proceedings

1. During the pendency of any administrative or judicial proceeding

involving a request for a due process hearing under section IX. B. and C. (CFR 303.420), unless the public agency and parents of a child otherwise agree, the child must continue to receive the appropriate early intervention services currently being provided.

#### IX D.

The procedural framework of early intervention service delivery guarantees that parents will decide in all instances and at all times which services their children will receive from publicly funded early intervention programs. Nowhere in the pertinent statute, the regulations, or operational standards is there any reference to termination of services by a provider absent parental consent.

#### DISCUSSION

In asserting that BEACON may not terminate the services listed on Abel's IFSP without their consent, the Parents rely on the plain statutory and regulatory language. Their reliance is well placed. The "stay put" directive could scarcely be more clear. Here BEACON has been listed as a specialty service provider consistently since March, 2009, on at least four sequential versions of Abel's IFSP. There has been appropriate written consent to provision of BEACON's services on each IFSP. BEACON has provided the listed services without seeking clarification of or relief from its role as part of Abel's early intervention team through an IFSP, complaint or appeal process. When BEACON notified the Parents that it would cease services to Abel it did not seek their consent to a reduction or change in its service. It sought instead their capitulation to its demand that they withdraw consent to another service the IFSP team had determined to be appropriate for Abel. It therefore failed to fulfill its statutory, regulatory, and contractual obligation to provide appropriate prior written notice of a proposed change in service. 34 CFR 303.403. While BEACON has framed the issue in this matter as a professional and/or ethical stance on competing methodologies, BEACON's most significant professional obligation with respect to its service provision to Abel is compliance with the statutory, regulatory and contractual obligations it undertook when it began working with Abel through the publicly funded early intervention program. When

BEACON signed on with the state to provide early intervention services, it agreed to comply with all pertinent governing regulations and procedures. (B-N) It certified that it was aware of, and would comply with, the procedural safeguards afforded to parents under Part C of the IDEA. BEACON's contract with Massachusetts does not set out any exclusions or limitations on its compliance with statutorily mandated procedures.<sup>2</sup> It does not contain an "escape clause" allowing BEACON to unilaterally terminate services to an individual client for any reason. Furthermore Abel's IFSP does not contain any language limiting or excusing BEACON's compliance with universal procedural safeguards for the child and family.

Massachusetts Early Intervention procedures, consistent with IDEA Part C language and its implementing regulations, permit the parents, not the service provider, to consent or decline consent to a change in service provision. No change in early intervention services to which the parents have previously consented can be made without the prior written consent of the parents. There is no exception for strongly held beliefs, professional disagreements, or predictions of ineffectiveness. Here BEACON did not obtain the parental consent required in advance of terminating previously agreed upon services to Abel, a violation of its contractual and statutory obligations pursuant to Part C of the IDEA.

BEACON also has failed to fulfill its clear "stay put" duty to provide early intervention services to Abel while there is an ongoing dispute about the nature and extent of its service obligations under Abel's current IFSP. Abel's most recent IFSP developed in November, 2009 provides for 20 hours of BEACON services. The parents have consented to that IFSP. Their consent has not been withdrawn. No other subsequent IFSP has been proposed. After BEACON notified them of its intent to unilaterally terminate services the parents filed for a due process appeal. Consistent with 20 U.S.C. §1439 (b) and 34 CFR 303.425 the November, 2009 IFSP therefore lists the early intervention services to which Abel is entitled until all due process events have occurred and a Decision is reached. Nevertheless BEACON ignored the parents' clearly stated requests on December 8, 2009, December 16, 2009, and December 20, 2009 that it continue to provide the treatment services and hours on Abel's IFSP. BEACON ignored

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<sup>2</sup> On the contrary, please refer to ¶3 infra.

the January 8, 2010 advice of the Early Intervention Program Director responsible for coordinating Abel's services that BEACON was required to implement the services listed on Abel's November, 2009 IFSP pending resolution of the dispute over methodologies. It is important to note that BEACON took these actions concerning Abel despite a pointed June, 2009 directive from the Massachusetts DPH Early Intervention Offices that BEACON comply with its obligations in other matters to provide prior written notice, obtain prior written parental consent to service changes and continue disputed IFSP services pending resolution of due process complaints. See B-O

BEACON presented several creative, though not persuasive, arguments in support of its position that it need not provide early intervention services that conflict with its professional standards even during the pendency of dispute resolution proceedings. First BEACON asserted that the IFSP that governs its "stay put" obligations to Abel is the initial IFSP developed in March, 2009. (B-A) BEACON argues that under the terms of that IFSP BEACON is the "sole and exclusive" early intervention provider. I do not agree. First, the IFSP says no such thing. Neither the word "sole" nor "exclusive" appears in the IFSP and BEACON is listed along with four other direct early intervention providers on page 6 of the service delivery plan. Second each successive IFSP to which there is appropriate consent adds to or supercedes the previous IFSP. The most recent IFSP for which there is consent is dated November 18, 2009. (B-D) It is that IFSP which gave rise to the dispute between the parties and that IFSP to which Abel's stay put rights attach.

BEACON also argues that the IFSP process is constitutionally flawed as it does not fully include the early intervention service providers in the substantive development process and fails to afford the service providers procedural due process. The statutory scheme approved by the U.S. Congress, and the federal regulations and state operational standards which implement it, grants comprehensive enforceable due process rights to families using publicly funded early intervention services. By contrast procedural guarantees afforded to service providers are considerably weaker, though not entirely absent. There are rational reasons supporting the legislature's choices in this regard: promotion of early education and therapy for children with disabilities, strengthening family skills and advocacy; providing balance to systems weighted toward "experts";

consistency of approach with related due process protections. 20 U.S.C. § 1431. The existence of a rational basis for differing treatment of participants in early interventions programs defeats BEACON's constitutionally based challenges to the federal regulations and state operational standards at least at this juncture. BEACON did not offer any plausible argument to support application of a stricter standard of review.

BEACON contends that the professional and ethical standards developed by its umbrella training and licensing organizations, the Behavior Analyst Certification Board ("BACB") and the Association of Professional Behavior Analysts ("APBA"), do not permit it to deliver ABA services to clients who receive concurrent treatment/therapy for autism that adheres to a non-ABA approach. BEACON argues that requiring it to do so would put BEACON providers in the untenable position of violating the ethical strictures of their own licensing organizations. BEACON analogizes its position to that of a health care provider who may invoke a religious exemption to avoid participating in a procedure proscribed by her religion. I do not think this analogy is apt. Applied Behavior Analysis is not, as far as I know, a religion entitled to significant constitutional protections. A science, if it is one as ABA adherents claim, is not entitled to similar standards of constitutionally based deference.

Finally BEACON argues that providing ABA alongside other autism treatment approaches dilutes the efficacy of ABA. This argument goes to the merits of the dispute between BEACON and the Parents, or perhaps more broadly between BEACON and other autism treatment providers and early intervention programs. The argument is not immediately relevant to the determination of the parameters of Abel's "stay put" services. I note, however, that nowhere in BEACON's argument was there a reference to Abel's individual circumstances, or to a determination of what would be the best course for him as a unique child in a unique family. These considerations are required when proposing any action involving early intervention services (B-O; B-E). BEACON's arguments relied instead on guidelines, studies and academic research developed by other providers about other children.

None of Beacon's arguments provides a sufficient basis to excuse it from its statutory and contractual obligation to provide the specialty services to which the parents

consented as memorialized on the most current IFSP pending resolution of the ongoing dispute concerning appropriate methodology.

## CONCLUSION AND ORDER

After careful consideration of the facts and arguments presented by the parties, I find that Abel is entitled to receive, and BEACON Services is required to provide, 20 hours of specialty services per week consistent with the Individualized Family Service Plan to which the Parents consented in November, 2009 and with the plain language of 20 U.S.C. 8 1439 (b). I further find that BEACON Services has deliberately disregarded its statutory, regulatory and contractual obligation to continue to provide IFSP services to which Abel's parents consented pending final resolution of a due process appeal.

Therefore, the Parents' Motion for Enforcement of Abel's Stay Put Rights is GRANTED and the following Orders are entered:

1. BEACON Services shall immediately resume service delivery to Abel consistent with the IFSP developed and agreed to in November, 2009.
2. BEACON Services shall propose a plan to provide compensatory services to Abel to address all the service hours to which Abel was entitled since November, 18, 2009 but were not delivered by BEACON. The compensatory plan must be developed and delivered to the Parents for their review and consent no later than January 25, 2010. Should the Parents disagree with the proposed compensatory plan the parties shall submit it to the Hearing Officer for a determination of compliance with this Order.
3. BEACON shall provide a copy of all its service records concerning Abel to the Parents at no expense to them. (Massachusetts Early Intervention Operational Standard VII) Records to be produced include, but are not limited to, all assessments, data sheets, correspondence, graphs, progress notes, supervision notes, planning sheets, attendance and billing documents, and any other documents referring to Abel and his family with the exception of those covered

by attorney-client privilege. BEACON shall deliver Abel's records to the Parents no later than February 1, 2010, and shall certify that the documents represent a true and complete copy of all non-privileged records it possesses concerning Abel.

4. The Parties shall submit written status reports on January 25, 2010. The status reports shall include:
  - 1) a statement concerning compliance with this Order;
  - 2) a statement indicating whether the underlying dispute has been resolved and /or withdrawn;
  - 3) a minimum of five mutually acceptable dates for a hearing on the merits, if necessary.

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Date

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Lindsay Byrne, Hearing Officer