

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

In Re: Nashoba Regional School District

BSEA #1304007

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 USC Sec. 1400 et seq., Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) and the Massachusetts Administrative Procedures Act (MGL c. 30A), as well as the regulations promulgated under these statutes.

On December 10, 2012 Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Nashoba Regional School District (Nashoba, NRSD, or School) was failing to provide the Student with a free, appropriate public education (FAPE). Specifically, Parents alleged that the Nashoba’s Links program, which comprises a substantially separate classroom plus supported inclusion in general education classes, could not provide the Student with the intensive ABA-infused and language-based program that Student needs to make effective academic, social or behavioral progress.

In their original hearing request, Parents sought an order from the BSEA directing Nashoba to fund Student’s prospective placement at a private special education school, Realizing Children’s Strengths (RCS) in Natick, MA. The School responds that Student has made significant progress in Nashoba’s program, and that RCS would be far too restrictive for Student.

The parties requested and were granted several postponements of the hearing date for good cause. On January 31, 2013, the original IEP at issue, which had covered the period from approximately January 2012 – January 2013, expired, and, shortly thereafter, NRSD issued a successor IEP covering the period from approximately February 2013 through January 2014, including the summer of 2013. In March, 2013 Parents requested and were granted leave to amend their hearing request to incorporate the portion of this successor IEP that covers February – June 2013 as well as the summer of 2013.

A hearing took place on March 22, April 2 and 3, and May 16 and 28, 2013 at the office of the BSEA in Boston, MA and at the office of Catuogno Court Reporting Service in Worcester, MA. Both parties were represented by counsel. Each party had an opportunity to examine and cross-examine witnesses and submit documents into the record. The record consists of Parents’ exhibits P-1 through P-23, School’s exhibits S-1 through S-61, tape-recorded testimony and argument, and the verbatim transcript created by the court reporters. At the parties’ request, the conclusion of the hearing was

postponed for submission of written closing arguments. Both briefs were received by July 5, 2013 and the record closed on that day.

Those present for all or part of the proceeding were the following:

Parents

Elaine Lord	Parents' advocate
Katherine Gamble. Psy.D.	Parents' private neuropsychologist
Kathleen Burek	Parents' private educational specialist, ICCD
Allison Genovese ¹	Clinical Director, RCS
Tracy Conte	Dir. of Special Education, NRSD
Allyson Gauthier Bell	BCBA, NSRD
Sean O'Shea	Student's elementary school principal, NRSD
Erin Elkins	Speech/language therapist, NRSD
Amy Maher	Interventionist, NRSD
Michael Davies	School psychologist, NRSD
Anne Neylon	Team chair, NRSD
Genevieve Steere	Student's special education teacher, 2012 – 2013
Holly Berry	Student's regular education teacher, 2013 – 2014
Sean Goguen, Esq.	Parents' attorney
Regina W. Tate, Esq.	School's attorney
Ken DeFraia	Court Reporter
Carol Kusnitz	Court Reporter
Jane Williamson	Court Reporter
Brenda Ginisi	Court Reporter
Sara Berman	Hearing Officer, BSEA

ISSUES PRESENTED

1. Whether the IEP and services for February 2013 to June 2013, through the summer of 2013, were reasonably calculated to provide the Student with FAPE.
2. If not, whether the IEP and services could be made appropriate;
3. If not, whether the Student requires a private day school placement at Realizing Children's Strengths (RCS) in order to receive FAPE.

POSITION OF PARENTS

Student has not made effective academic, emotional, social or behavioral progress with the IEP and placement provided and proposed by NRSD. In fact, while Student has made progress in some areas, Student's overall functioning has been on a slow decline for several years. Of particular concern are Student's lack of social skills and persistent self-directedness. She has no real friends, and interacts with toy vehicles as if they were

¹ Ms Genovese testified by speaker phone.

human. At the age of 11, she still requires much prompting and oversight for basic activities of daily living. She still has not acquired basic foundational skills for learning, including organizing her materials, attending to instruction, focusing on the tasks before her, and completing work according to directions. In large part, this skill deficit results from interfering behaviors including inattention, non-compliance, and distractibility, which NRSD has not adequately addressed via rigorous ABA-based interventions

Student has the capacity to make considerably more progress in all domains, but requires an educational program where she receives rigorous ABA-based instruction throughout the school day, both to reduce interfering behaviors and to teach necessary skills. Because Student's current program does not provide the amount, intensity, or consistency of ABA programming that Student needs, her autism-related behaviors continue to impede her academic and social progress, such that she is stagnating in some areas and losing ground in others. Additionally, NRSD's program does not provide Student with language-based instruction that effectively addresses her significant deficits in communication.

The RCS program would provide the Student with the intensive, ABA-based behavioral and instructional intervention that she needs to both to reduce the autism-related behaviors that preclude academic and social growth commensurate with her potential, and to learn skills she needs to function in school and in the community.

POSITION OF SCHOOL

At all relevant times, Student's IEP and services have been individually tailored to meet Student's complex needs and enable her to make effective progress, and have been adjusted regularly to address Student's evolving needs as well as Parents concerns. Student has made significant, even notable, progress in the Links program, in light of her complex and significant disabilities. Indeed, until the 2012 -2013 school year, when Parents rejected the IEPs that are the subject of this hearing, Parents have accepted virtually all of Nashoba's previous IEPs for Student—as well as her continuous placement in the Links program. Nashoba's program has provided Student with focused, specialized, ABA-based instruction and interventions, as well as related services such as speech/language therapy and counseling, delivered by professionals with knowledge and experience in teaching children on the autism spectrum. Additionally, Student has increased greatly her ability to participate in supported inclusion opportunities, which she enjoys and from which she benefits. The Parents' proposed placement at RCS is far too restrictive for Student. Student has demonstrated by her performance that she does not require a segregated setting that uses a total ABA approach, with no inclusion opportunities.

FINDINGS OF FACT

1. Student is an eleven year old child who lives with her Parents within the district served by NRSD. Student has received special education services from the NRSD since she aged out of Early Intervention (EI) and entered a District special

education preschool program at the age of 3. Except for a brief period at a different NRSD preschool, Student has attended the Mary Rowlandson Elementary School from that time forward. Student has participated in the Links program, which, for Student, is a partial inclusion placement entailing part of each day in a special education classroom serving children with a variety of disabilities, and part of the day in the general education classroom, with support. (Parent)

2. Student is described as a wonderful, funny, smart, creative, and very engaging child. Student loves doing artwork and building things, and enjoys music. Outside of school, Student has participated in many activities obtained by her Parents, including therapeutic horseback riding, skiing (she is a Black Diamond skier), and Unified Sports League² baseball, soccer, basketball and tennis, as well as theater and gymnastics. Student also participates in private counseling and social skills instruction. (Mother)
3. Student has a longstanding diagnosis of Pervasive Developmental Disorder-Not Otherwise specified (PDD-NOS) and also has been diagnosed in the past with Obsessive Compulsive Disorder (OCD). Student's disabilities have a significant impact on her attention, language and communication skills, and social skills. As is the case with many children with PDD or autism, Student is described as very "self-directed." Specifically, Student becomes very focused on following her own agenda of preferred activities, as opposed to cooperating with the another person, such as a teacher instructing her to perform an academic task or Parents directing her to do homework. Student has a repertoire of behaviors that interfere with her academic and social functioning, including non-compliance, off-task and perseverative behavior, miming, scripting, and, sometimes, bolting. Student is highly focused on toy vehicles, and often becomes off task because she is occupied with thinking or talking about, or playing with, a toy truck or car. While Student does interact with adults and peers, she does not have truly reciprocal relationships with other children, and, according to Mother, doesn't really understand what a friend is. (Mother, Gamble, P-4)
4. Student's cognitive and academic skills have been assessed multiple times over the years, both by Nashoba staff and by outside evaluators. Parents have shared nearly all outside evaluation reports with Nashoba for consideration by the Team. (P- Student has been very difficult to test accurately because of her self-directedness— she often has had difficulty even engaging in the testing process. In general, however, testing has indicated that Student's cognitive skills range from well below age norms to average. Academic skills were also variable, with some skills in the average range (e.g., basic reading, some math problem solving skills) and others below average (e.g., reading comprehension).
5. In the summer of 2005, when she was approximately three years old, Student received her first private neuropsychological evaluation by Dr. Katherine Gamble,

² The Unified Sports League is affiliated with Special Olympics.

then of the Integrated Center for Child Development (ICCD).³ (P-7F). Dr. Gamble's report relayed the concerns of Student's preschool teacher with Student's inattentiveness, distractibility, not initiating peer interactions with language, attempts at bolting, and preoccupations with fans and toilets, and need for frequent prompts. (P-7F)

6. Dr. Gamble administered standardized tests which indicated that Student's nonverbal skills were generally average. Verbal skills were also average, although Student's ability to actually use the language she knew was in the "borderline" range. Dr. Gamble felt that due to Student's difficulty with attending to and cooperating with testing, that these scores might underestimate her ability. Student's daily living and self-care skills were delayed, as was her safety awareness. Student's social skills were also delayed, and Student did not seem motivated to interact with other children. Dr. Gamble concluded that Student met the criteria for a diagnosis of PDD/NOS. (P-7F)
7. Dr. Gamble recommended placement in a full-day, full-week behaviorally-based program designed for children with PDD, and including a minimum of 20 hours per week of 1:1, discrete trial training (DTT) pursuant to an ABA approach. Dr. Gamble stated that the DTT sessions should focus on foundation skills for learning, including attention and following directions, "in order for her to benefit from any educational setting." The DTT should also address all areas of Student's skill deficits, including play, self-care, and communication. Finally, Dr. Gamble recommended some inclusion opportunities, with measureable goals for Student's inclusion time, and a home program. (P-7F)
8. For the 2005-2006 school year, Student continued to attend the NRSR integrated preschool that she had attended the prior year, in a class with ABA technicians, overseen by a BCBA. Student received approximately 7.5 hours per week of in-class DTT, as well as school-based and private speech therapy, and school-based occupational and physical therapy. She also attended a summer program operated by NSRD. (P-7E)
9. Dr. Gamble evaluated Student a second time in June 2006. Based on testing, observation, and discussions with Parents and NDRD staff, Dr. Gamble found that Student had experienced a dramatic increase in atypical behaviors, including elaborate rituals, and potentially-injurious self-stimulatory behaviors. Student's social skills also remained about two years below age level. She did not engage in reciprocal play with other children. On the other hand, Student still showed essentially average cognitive abilities, improved language use, some increase in foundation skills for learning (e.g., attention, following directions), and improved daily living skills. (P-7E) At this time, Dr. Gamble recommended a full-time hybrid school program, with half of the day in a specialized classroom and half in a regular classroom with an ABA-trained aide to facilitate social interactions, a summer program and a home component. Dr. Gamble recommended at least 2.5

³ Dr. Gamble now is in private practice. (Gamble, Burek)

hours per day (i.e., 12.5 hours per week) of DTT focusing on functional language, social and behavioral goals.

10. Dr. Gamble's third evaluation of Student took place in September 2007, when Student was 5 years, 7 months old. This evaluation revealed that Student had made minimal progress in all domains such that standardized cognitive scores had declined. Additionally, Student had become more withdrawn, spent much time conversing with imaginary friends, and was increasingly preoccupied with perseverative interests. Student had begun to refuse saying certain words that she knew. She now reportedly met some diagnostic criteria for OCD and Selective Mutism. Dr. Gamble recommended continuing in an intensive ABA-based program, with at least 2 hours per day of DTT instruction, reduction of inclusion time to 1 hour per day, and the addition of consultation time with a BCBA with expertise in OCD and complex PDD. (P-7D)
11. Dr. Gamble's fourth evaluation, conducted in September 2008, when Student was nearly 7 years old, documented growth in many areas, including spontaneous language, higher-level reasoning, academic, adaptive and play skills (she could engage in cooperative play) and reduction in self-injurious behavior and "banned words." Student still had behaviors that interfered with learning, including inattention, perseveration, and non-compliance, and her minimal progress in these areas interfered with what her teachers described as otherwise "solid" academic skills. Dr. Gamble recommended that Student spend at least half of every day in a specialized ABA classroom, with no more than a few hours of inclusion. She recommended that an ABA aide support Student in the general classroom, and also recommended continuation of ABA practices (e.g., data gathering, behavioral criteria) in the inclusion classroom.⁴ (P-7C)
12. Dr. Gamble repeated the recommendation for at least 2 hours per day of DTT, with a focus on foundational skills, and at least 4 hours per week of a home component consisting of parent training and direct instruction, all overseen by a BCBA. (P-7C)
13. During the period referred to in Paragraphs 8 through 12, above (the 2005-2006 school year to the beginning of the 2008 – 2009 school year, i.e., preschool through first grade), Student attended Nashoba's Mary Rowlandson Elementary School in a partial inclusion program, with support from an ABA aide, small group instruction in reading and math, speech therapy and consultation from a BCBA, as well as a summer program. Parents had accepted all IEPs for this period. (Mother, P-7B)
14. In January 2010, Nashoba issued an IEP for the 2009 – 2010 school year (Grade 2). This IEP contained goals in school behavior (i.e., reduction of interfering behaviors), communication, academics, and social skills. The service delivery grid called for behavioral and OT consultation in Grid A, 4 hours per day of supported inclusion for academics in Grid B, and one hour per day of academics, as well as OT, social skills instruction, and speech therapy in Grid C. Parents fully accepted

⁴ In this report and subsequent reports through 2010, Dr. Gamble stated that many of her recommendations might already be in place. (S-7)

this IEP. (S-6) Quarterly progress reports indicated that Student was making progress towards achieving IEP goals. Student continued to have interfering behaviors, but many of these (e.g., swearing, bolting, noises) had diminished greatly. (S-8)

15. In March and April, 2010, Dr. Gamble conducted another evaluation of Student, who was 8.5 years old and in Grade 2. Based on testing and interviews with family and school providers from Nashoba, Dr. Gamble concluded that Student had made good progress in behavior, social skills, and expressive language, as well as daily living skills. Student was much more engaged and cooperative than she had been previously. Dr. Gamble's (as well as Parents' and Nashoba's) major concerns were with Student's difficulties with functional language, attention, executive functioning, and general academic performance. Student's learning continued to be affected by self-directedness, distractibility and ritualistic behaviors. (S-9)
16. In her 2010 report, Dr. Gamble recommended a third grade placement (for 2010-2011) in a small, substantially separate language-based classroom that used ABA methodologies across the curriculum, including data collection. The classroom should be headed by a special education teacher with the support of an ABA trained classroom aide. Dr. Gamble stated that Student's program should be supervised by a BCBA who would consult closely and regularly with Parents and all personnel who worked with Student to ensure implementation of behavioral strategies, to analyze data, and make program adjustments. She felt that Student still needed at least 2 hours per day of both DTT and "naturalistic" ABA interventions, as well as a home program and summer services. (S-9)
17. In November 2010, the Team issued an IEP continuing Student's placement in the partial inclusion program at the Mary Rowlandson School for the first part of third grade, from November 3, 2010 to February 4, 2011, at which time Student's three year re-evaluation was to take place. (S-13)
18. Like prior IEPs, this IEP had goals in school behavior, communication, academics (reading and math), and "social." (S-13)
19. The "Current Performance Levels" set forth in the IEP stated that in the realm of behavior, Student "continues to engage in low rates of behavior with the use of a self-monitoring checklist and a behavior plan." While Student still showed some non-compliance, refusal to speak, non-interfering motor stereotypy, refusal to speak, or refusal of banned words, these behaviors were brief and infrequent as measured by data collection, with non-compliance being the most frequent. (S-13)
20. In the area communication, the IEP stated that Student usually responded to greetings, statements and questions, often with gestures. She occasionally initiated greetings, and started conversations with familiar adults and children. Student could follow multistep directions, but required prompting to stay on task and finish. Academically, Student could read grade-level stories and answer questions in writing, with prompting to use full sentences and correct grammar. In math,

Student understood basic math concepts at a second grade level, but needed prompting to understand math language and problem solving. (S-13)

21. In the social domain, Student had shown progress in that she could self- calm throughout the day, without becoming agitated if she had to wait or join an activity that she had not chosen. She regularly greeted adults and showed interest in other people. Student's goal in this area was to broaden social skills with peers, practice techniques for tuning out distracting, and redirect herself from perseveration or hyperfocus. (S-13)
22. The service grid in this IEP was similar to the grid in prior IEPs, and provided for consultation to Parents and staff by the behaviorist and occupational therapist (Grid A), and academic and social skills instruction in the general classroom (Grid B), and academics, speech-language therapy, and counseling in a separate setting (Grid C) (S-13)
23. Parents fully accepted this IEP on December 27, 2010.
24. Meanwhile, in October, November and December 2010, Nashoba conducted a three-year re-evaluation consisting of psychological, academic achievement, speech/language and occupational therapy assessments. (S-14 – 18)
25. The psychological evaluation, which consisted of the WISC-IV and the WRAML indicated "borderline" or below average range in all areas cognitive functioning and memory, with some variability in subtest scores. This represented a decline from the "average" scores that Student had obtained in 2007. The evaluator cautioned that the scores may have been an underestimate of Student's ability, in light of Student's difficulty with attention and lack of familiarity with the tester. (S-16)
26. Student's academic achievement, as measured by the WIAT, fell in the "Below Average range for Oral Language, and "Average" for Total Reading, Written Expression, and Mathematics. Within these categories, Student achieved "Below Average" scores in the subcategories of Word Reading, Oral Reading Fluency, and Reading Comprehension, as well as in math problem solving and math fluency. (S-17)
27. The speech-language assessment revealed that Student had scattered language skills, with strengths in the areas of expressive vocabulary and semantics, and weaknesses in receptive vocabulary. The OT evaluation revealed some sensory and visual motor weaknesses that might require accommodations for written work. (S-14 – 15)
28. The record does not appear to contain a new IEP covering the period from February 2011 through February 2012.
29. Dr. Gamble conducted her sixth neuropsychological evaluation of Student in April 2011, in the spring of Student's third grade year when she was about 9 ½ years old. At that time, Student was still enrolled in the LINKS-II program, attending a

general education program with the support of a 1:2 trained aide, with pullouts for language arts, math, speech therapy, social skills work with the school counselor, and a facilitated weekly “lunch bunch.” Student’s IEP also called for BCBA consultation with the classroom teacher and with parents, as well as a summer program. (P-7A)

30. Parents reported to Dr. Gamble that Student had made good progress during 2010 – 2011, in that she was using more expressive language, and was more socially connected than she had been previously. She engaged in virtually no self-injurious behavior, and did much less bolting, yelling, and non-compliance. On the other hand, Student continued to engage in behaviors such as scripting, insisting that questions be answered a certain way, and becoming fixated on alarm systems. Student was distractible and could not stay focused on homework. Student’s teacher reported to Dr. Gamble that while Student was “delightful,” imaginative and funny, she continued to have behaviors that interfered with learning (inattention, perseveration), needed much prompting to get through tasks, and had reduced social skills. (P-7A)
31. During testing, Dr. Gamble observed that Student was much more cooperative with testing than she had been in prior years, so that results could be considered valid. This evaluation revealed that Student had made gains in the areas of cooperation, behavioral control, and use of expressive language. Although she presented as being more socially engaged than in the past, quantitative testing indicated that she had made minimal gains since 2010. Her interpersonal skills measured at a 5 year 7 month level, and her play skills were at a 4 year old level. Student continued to have problematic levels of ritualistic behaviors that interfered with learning and caused a decline in her receptive language scores. Student was displaying executive functioning and language-based difficulties, as well as a continuation of attention problems. Dr. Gamble had overall concern regarding Student’s minimal gains since 2010, and the increasing gap between her skills and those of her age-peers. (P-7A)
32. Dr. Gamble made essentially the same recommendations as she had in prior years, for a substantially separate special education program, based on ABA principles, with a behavioral, ABA-based approach to academic, social, and communication goals, including discrete trials and “naturalistic” ABA, a home behavioral component, limited inclusion with support of an ABA-trained aide, and supervision and consultation with a BCBA. (P-7A)
33. In October 2011, the Team convened and developed an amendment to Student’s IEP for February 2011 – February 2012, adding an hour of pullout academic instruction and providing for flexibility in provision of social skills instruction. (S-27) The record does not contain a copy of the IEP to which the amendment was attached. This amendment was never signed. (S-27)
34. In mid-December 2011, Parents secured an observation of Student’s regular and special education classrooms by an educational specialist employed by ICCD, Ms. Kathleen Burek. After observing Student in several settings and speaking with

School personnel, Ms. Burek made numerous recommendations, including that Student be provided with a 1:1 ABA-trained aide, a systematic method of data collection for behavior and academics a comprehensive diagnostic reading assessment, facilitation of interaction with female peers and training for teachers and aides. (P-2)

35. In her testimony, Ms. Burek stated that during her 2011 observation, she did not observe data collection, did not observe Student interacting with peers, and did not observe a systematic writing program in place for Student (Burek)
36. On January 30, 2012, the Team convened for an annual review and to consider the April 2011 report by Dr. Gamble and the observation report by Ms. Burek. On February 6, 2012, the Team issued an IEP for January 31, 2012 – January 31, 2013. With some adjustments, this IEP called for essentially the same configuration of services as prior IEPs and continued Student’s placement in the Links program. (S-27) The IEP was revised in May 2012 to include additional statements from the Parents. In May 2012, Parents accepted the services in the IEP but rejected the IEP as insufficiently intensive for Student.
37. Student’s behavior had deteriorated beginning in the spring of 2011, and continued to be problematic during 2011 – 2012. Student was physically restrained on a few occasions. (Mother, O’Shea, P-23) Parents became increasingly dissatisfied with Student’s progress from 2011 forward, including decline in test scores, persistence of behavioral issues, academic struggles, and Student’s increasing unhappiness at attending school and doing homework. Initially, Parents sought revisions to the existing IEPs and in-district services, including addition of a 1:1 aide, or transfer to another in-district program. Both requests were denied. (Parent, P-14)
38. Between December 2011 and late November 2012, Parents investigated several Chapter 766-approved private special education schools, with the help of their educational advocate and Ms. Burek. Parents visited RCS in June 2012, and after consultation with Ms. Burek, decided that RCS appeared to be a good fit for Student. (P-14)
39. Parents requested the hearing in this matter in December 2012, seeking placement at RCS.
40. As stated above, Student’s IEP issued in February 2012 expired on January 31, 2013. Parents partially rejected the successor IEP in February or March 2013. For the portion of this IEP that covers the remainder of 2012-2013 school year and summer 2013.

School’s Program

41. At all relevant times, Student has been enrolled in the Links program at the Mary Rowlandson Elementary School, in a partial inclusion program consisting of a substantially separate classroom for students with a variety of moderate to severe

disabilities paired with a grade level general education program. Instruction is individualized, driven by the IEPs and needs of particular students. The classroom is staffed by a special education teacher and teaching assistants. A district-wide BCBA, Allyson Bell, consults with the classroom for 1.5 days per week, and further support is provided by Dr. Frank Robbins, who has an extensive background in education of children on the autism spectrum.

42. During the 2012-2013 school year, the Links classroom served a total of 9 students who had diverse disabilities, including Down syndrome, autism, a chromosomal disorder, and brain injury, but similar needs for support and instruction in behavior, life skills, academics, social skills and language. Students receive both individual and group instruction, and move in and out of the classroom according to their individual schedules. (Steere)
43. During 2012-2013, Student was in the Links classroom for reading, language arts and math, and in the mainstream fifth grade class for homeroom (known as "Advisory), science, social studies, and technology. Student also attended mainstream classrooms for art, music/band, and physical education. Student received related services, including speech/language therapy, and social skills instruction and counseling (individual and small group). Student attended extra-curricular activities before and after school, including a theater class and exercise class. Student was accompanied by a 1:1 or 1:2 paraprofessional during all mainstream activities (Steere) For the most part, Student participated in inclusion activities, enjoyed them, and did not have significant behavioral problems. (Steere)
44. In general, Student's teachers and service providers believe she has made effective progress within the Links program. Student's special education teacher, for 2012-2013, Ms. Genevieve Steere, testified that Student made behavioral and social progress during that year. She interacted with other children and had "friends" in the class, defined by Ms. Steere as sharing snack, being mutually respectful, and, in the case of one child, showing particular interest and concern. (Steere)
45. On the other hand, Dr. Gamble and Ms. Burek, both of whom observed Student in her classrooms in both 2011 and 2013, felt that the program did not provide Student with the intensive and consistent ABA programming that Student required for both behavioral and instructional purposes. (Gamble, Burek)

Program Proposed by the Parents

46. The Parents seek placement for Student at Realizing Children's Strengths (RCS) in Natick, MA. RCS is a private, Chapter 766 approved day school which serves 36 children ranging from age 3 to 22 who are on the autism spectrum or who have similar disabilities. RCS is an ABA based program. Specifically, this means that every IEP goal and objective for each student has an ABA program, including a data collection method, written for it. Instruction is provided by behavior therapists who also record data, and is overseen by special education teachers and BCBA's.

Instruction is provided primarily on a 1:1 model; however, students also have group and natural environment instruction. A variety of methodologies within the ABA approach are used, including DTT and errorless teaching. Students are grouped by age, skill levels, and communication needs. Programming is year-round, with a brief break in the summer. (Genovese)

FINDINGS AND CONCLUSIONS

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, G.L. c. 71B (“Chapter 766”). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to her unique needs and potential, and is designed to provide ‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); North Reading School Committee v. BSEA, 480 F. Supp. 2d 489 (D. Mass. 2007); citing Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

While Student is not entitled to an educational program that maximizes her potential, she is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. See Bd. of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176, 201 (1982), Town of Burlington v. Dept. of Education, 736 F.2d 773, 789 (1st Cir. 1984); D.B., et al v. Esposito, et al., 675 F.3d 26, 34 (1st Cir. 2012)

Whether educational benefit is “meaningful” must be determined in the context of a student’s potential to learn. Rowley, *supra*, at 202, Lessard v. Wilton Lyndeborough Cooperative School District, 518 F.3d 18, 29 (1st Cir. 2008); D.B. v. Esposito, *supra*. In cases where a student’s potential to learn is difficult to determine because, for example, the student’s disability is complex and not fully understood, or the student has communication deficits or behaviors that interfere with his or her ability to express thoughts, it is still possible to “assess the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence.” D.B. v. Esposito, *supra*.

Education must be provided in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359 (1985).

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to change the status quo. In the instant case, as the moving party challenging the School’s proposed

IEP and seeking to change Student's placement, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that Nashoba's IEP and services are not appropriate, i.e., are not reasonably calculated to provide Student with FAPE. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

The parties substantially agree on Student's profile. Student has many strengths. She is smart, funny, creative, and imaginative. She has some relatively strong academic skills. There also is no dispute that Student's ability to learn is significantly impaired by distractibility, self-directedness, perseverative and/or compulsive behaviors. Student has difficulty with language, functional communication, and perspective-taking. She does not appear to have truly reciprocal friendships, at least not in school. While her decoding skills are fairly good, she struggles with reading comprehension.

Parents argue that Student has not made effective educational progress because Nashoba has not provided her with the highly specialized, intensive, individualized ABA programming that has been recommended by Dr. Gamble over the course of 7 years. Parents rely primarily on the reports and testimony and report of Dr. Gamble and Ms. Tubbs, who believe that Student's current program lacks the intensity and consistency of ABA programming that the Student requires to make meaningful progress. Parents point to Dr. Gamble's documentation of a downward trend in Student's cognitive and behavioral performance as evidence of inadequate programming.

On the other hand, Nashoba argues that at all relevant times, its IEPs and services have been individually tailored to meet Student's needs, and that she has, in fact, made significant progress in light of her potential. Nashoba points to Student's developing academic skills, her growing capacity to participate in mainstream activities, her improved level of interpersonal and social engagement, and radical decline in maladaptive behaviors. Nashoba asserts that given the complexity and extent of Student's disabilities, it would not be realistic to expect her to "catch up" with typical peers at this time. Nashoba further argues that a segregated, strict ABA program like RCS would be overly restrictive for Student.

Based on the evidence, I find that the Parents have met their burden of demonstrating that Student's current IEP and placement do not provide Student with a sufficient amount or intensity of consistent data-driven ABA services to effectively address the behavioral and attentional issues that interfere with Student's academic, and social progress.

Notwithstanding progress, Student's autism-related behavioral and social skills deficits still significantly interfere with her acquisition of both academic and social skills. The testimony and reports of Dr. Gamble and Ms. Burek to this effect, as well as their detailed testimony and reports stating that the Links program, as constituted when they observed it, was not addressing Student's behavioral needs with the rigor, intensity or consistency that she requires, are persuasive and credible.

Finally, Student's Parents have provided her with supplemental services and enrichment activities. It is impossible to determine how much of Student's progress is attributable to the additional services her Parents have provided for her.

The record supports that Student needs a significantly more rigorous and data based, ABA-infused program in light of the complexity of her disabilities. The record does not indicate that Nashoba is capable of changing its program to meet this need. On the other hand, the record supports the conclusion that RCS is capable of meeting Student's needs.

ORDER

Nashoba shall immediately effect Student's placement at RCS, if she is accepted there and there is an available opening, or at a comparable ABA-based placement if Student cannot be placed at RCS.

By the Hearing Officer:

Sara Berman

Date: August 14, 2013