

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

D. R.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF HEALTH AND	)	
 &	)	Case No. 08-1025
	)	
	)	
Respondents.	)	
	)	

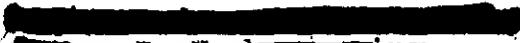
FINAL ORDER

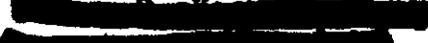
This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 20-21, 2008, and April 17, 2008, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

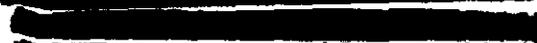
For Petitioner: D. R., pro se  
(Address of record)

For Respondent Department of Health:

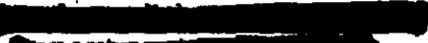
















For Respondent ( [REDACTED] )  
[REDACTED] Inc.:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

STATEMENT OF THE ISSUE

The issue in this case is whether the early intervention services provided to Petitioner, consisting in relevant part of 5-7 hours per week of behavioral intervention therapy, were adequate in light of Petitioner's unique developmental needs as a preschool child with autism.

PRELIMINARY STATEMENT

On February 12, 2008, Petitioner D. R.'s mother sent an email to an employee of the Department of Health, which provided in pertinent part as follows:

I would like to request due processing hearing for my child, [D. R.] The issue I am requesting to be addressed at said hearing is the provision of appropriate early intervention services.

The department forwarded this request for hearing to the Division of Administrative Hearings on February 26, 2008.

The matter was assigned to the undersigned administrative law judge, who promptly scheduled a telephone conference with the parties. The undersigned's immediate concern was to ascertain the specific state laws comprising the legal framework that would support this administrative proceeding.

Specifically, the undersigned wanted the parties to identify the state procedural and substantive laws governing this case. None of the parties was able, during the telephone conference, to give an informed response.

On February 29, 2008, the undersigned issued an Order to Show Cause, which directed each of the parties to file a memorandum, no later than March 10, 2008, containing citations to any and all state substantive and procedural law known or believed to provide the jurisdictional framework for this proceeding. In the meantime, the department and the Division of Administrative Hearings entered into an Administrative Law Judge Services Contract, effective as of March 5, 2008, whereby the Division of Administrative Hearings agreed to make its administrative law judges available to conduct hearings arising from disputes over the state's provision of early intervention services. The contract, which obligates the Division of Administrative Hearings to perform a hearing in this case whether or not it is authorized in law to do so, effectively made moot the undersigned's concerns regarding jurisdiction.

The final hearing took place on March 20-21, 2008, and April 17, 2008. Petitioner's mother appeared on Petitioner's behalf. Appearing on behalf of [REDACTED] [REDACTED] was [REDACTED]. The department was represented initially by [REDACTED].

and later by [REDACTED], although it elected not to be present at all times during the hearing.

Petitioner called eight witnesses. These were: [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]. Petitioner also introduced Exhibits numbered 1 through 15, inclusive, which were admitted into evidence.

[REDACTED] elicited testimony for its case from the witnesses that Petitioner presented and additionally called as witnesses: [REDACTED]

[REDACTED]

[REDACTED] and [REDACTED]. Additionally, the company offered Exhibits numbered 1 through 6, which were received in evidence.

The department did not introduce any evidence at hearing.

The final hearing transcript, comprising 6 volumes, was filed on May 16, 2008. Proposed Final Orders were due on May 27, 2008. At Petitioner's request, however, an Order on Supplemental Submissions was issued on June 2, 2008, which established a briefing schedule that ran through June 6, 2008. Each party (except the department) filed a Proposed Final Order, and the undersigned has considered the parties' respective submissions in the preparation of this Final Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2007 Florida Statutes.

FINDINGS OF FACT

1. Petitioner D. R. was diagnosed with autism in May 2007, at the age of 19 months. At all times relevant to this case, D. R. was less than three years old.

2. On May 11, 2007, D. R.'s mother [REDACTED] contacted [REDACTED], which is a private, nonprofit corporation having its principal place of business in [REDACTED] Florida. At all times relevant to this case, [REDACTED] was under contract with the Florida Department of Health ("Department") to operate the [REDACTED] Early Steps Program. This local program is part of the statewide network known as the Early Steps System ("Early Steps").

3. Early Steps facilitates the delivery of services that the state provides to families with infants and toddlers (birth to 36 months) who have developmental delays or an established condition likely to result in a developmental delay. These "early intervention services" (a term of art) are offered free of charge to eligible residents pursuant to the Florida Infants and Toddlers Early Intervention Program, which the Department is authorized to implement and administer.

4. The Florida Infants and Toddlers Early Intervention Program is administered under state laws adopted to meet federal

requirements for delivering early intervention services to infants and toddlers with disabilities. These federal requirements are located in a subchapter of the Individuals with Disabilities Education Act ("IDEA"), which is commonly referred to as "Part C," and the regulations promulgated thereunder.

5. As an Early Steps contractor, [REDACTED] is responsible for coordinating with community agencies and other approved Early Steps providers for the delivery of needed supports and services to eligible recipients. Accordingly, upon being contacted by [REDACTED] [REDACTED] arranged for D. R. to be evaluated in the family's home. This visit took place on May 18, 2007, and began the process of developing an Individualized Family Service Plan ("IFSP") for D. R.

6. Meantime, D. R.'s parents decided, on their own, that D. R. should receive intensive behavioral intervention services through [REDACTED], which is a private provider of such treatment. Consequently, on May 31, 2007, [REDACTED] started providing D. R. with 10 hours per week of one-on-one, applied behavior analysis ("ABA") therapy, for which D. R.'s parents agreed to pay.

7. On June 14, 2007, two weeks after [REDACTED] had commenced providing the aforementioned "private-pay hours," [REDACTED] convened an IFSP meeting of D. R.'s multidisciplinary team (the "IFSP Team"), which consisted of D. R.'s parents and physician, [REDACTED]

personnel, and Early Steps providers identified as relevant in light of D. R.'s needs. The purpose of the IFSP meeting was to prepare an IFSP that would both establish developmental goals for D. R., based on the child's particular strengths and needs, and specify the appropriate services for providing D. R. a meaningful benefit in working to meet these goals.

8. The IFSP Team developed an IFSP that the participants believed was appropriate for D. R. The IFSP called for D. R. to receive a number of early intervention services, including speech therapy, occupational therapy, and—most important for this case—five hours per week of ABA therapy.

9. D. R.'s parents were satisfied with the early intervention services that D. R. would receive under the IFSP, but they were skeptical about the number of ABA therapy-hours. They did not think that five hours per week was enough, especially since one of the ABA therapy-hours would be delivered in a peer-group setting, meaning that only four hours per week would involve one-on-one contact with the therapist. The parents' reservations notwithstanding, on July 3, 2003, D. R. began receiving services under the IFSP. [REDACTED] continued providing the 10 weekly private-pay hours, which now supplemented the five "Part C hours" being delivered to D. R. at public expense.

10. The Early Steps-approved provider of D. R.'s Part C hours was [REDACTED]. D. R.'s parents were pleased with the quality of services that the [REDACTED] therapists provided during the summer of 2007, and they came to believe that D. R. was getting more benefit from the five weekly Part C hours he was receiving than the 10 private-pay hours. Then, their favorite [REDACTED] therapist moved out-of-state, and D. R.'s parents were somewhat disappointed with her replacement. In August 2007, D. R.'s parents decided to end their relationship with [REDACTED] and retain [REDACTED]—the Early Steps provider—to assume responsibility for the private ABA therapy that BAI had been giving D. R.

11. [REDACTED] was willing to do this, but only if [REDACTED] first performed an independent evaluation of D. R.'s needs using a testing instrument known as the Psychoeducational Profile Revised ("PEP-R"). D. R.'s parents agreed to pay [REDACTED] to perform the PEP-R on D. R. [REDACTED], one of [REDACTED] owners, tested D. R. on September 4, 2007.

12. Shortly thereafter, [REDACTED] written report of the PEP-R results (the "PEP-R Report") was provided to D. R.'s parents. The PEP-R Report concluded with certain recommendations, including the following:

Based on test findings and observations, it is recommended that [D. R.] begin receiving 7-10 hours per week of 1:1 behavioral

intervention in a high structured setting, in the form of discrete-trial training, provided by therapists trained in Applied Behavior Analysis (ABA) methods. It is also recommended that [D. R.] and his family continue receiving Early Steps, Part C services for family education and support.

13. D. R.'s parents understood the foregoing to mean that D. R. should begin receiving 7-10 hours per week of ABA therapy in addition to the 5 weekly Part C hours of such therapy (4 of which were one-on-one) that he was already getting. This was not an unreasonable reading of the report, given that as of the date of the PEP-R testing, as [REDACTED] knew, D. R. was receiving 5 Part C hours and 10 private-pay hours of ABA therapy each week, and that the purpose of PEP-R evaluation was to pave the way for [REDACTED] to replace BAI as D. R.'s private provider.

14. [REDACTED], however, had not intended to communicate such a message. She had meant to convey the idea that D. R. should receive 7-10 hours per week of one-on-one ABA therapy in total, together with other Part C services (for family education and support). This, indeed, is the notion that the PEP-R Report, on its face, most readily imparts; a reader having no knowledge that D. R. was already receiving, at the time of the report, 14 hours per week of one-on-one ABA therapy most likely would take [REDACTED] intended meaning.

15. Whatever its flaws in terms of clarity of expression, however, the PEP-R Report was not the last word on the subject

of [REDACTED] recommendations. To the contrary, it spawned a debate that continued through the final hearing in this case. D. R.'s parents, who were inclined before the PEP-R Report to believe that D. R. needed more ABA hours from Part C, viewed the report as evidence in support of their position, which they made known to [REDACTED] through a request for review and modification of the IFSP. Once D. R.'s parents made clear their interpretation of the PEP-R Report, [REDACTED] and her partners at [REDACTED] attempted, through many conversations, emails, and meetings, to explain to them that, in [REDACTED] opinion, D. R. needed 7-10 total hours per week of one-on-one ABA therapy. D. R.'s parents simply refused to accept this; they insisted that D. R. needed to have the ABA therapy-hours recommended in the PEP-R Report added to the hours specified in the IFSP, thereby increasing the number of hours provided at public expense.

16. [REDACTED] scheduled an IFSP meeting so that the team could consider the parents' views. Before the meeting, which was held on September 19, 2007, [REDACTED] <sup>parent</sup> searched online for information pertaining to behavioral intervention therapy and found articles which reinforced her opinion that D. R. needed many more hours of ABA therapy than the IFSP was offering. At the IFSP meeting, [REDACTED] <sup>parent</sup> urged the team to revise the IFSP to authorize 25 hours per week of ABA therapy for D. R.

17. The IFSP Team did not agree to quintuple the number of ABA therapy-hours in D. R.'s IFSP. [REDACTED] and her partner [REDACTED] who attended the meeting as members of the IFSP Team, were of the opinion (discussed above) that D. R. needed a total of 7-10 hours per week of ABA therapy. The undersigned infers that the opinion of the [REDACTED] principals, who were the experts on the subject of ABA therapy, must have carried great weight with the other members of the IFSP Team. Ultimately, the team revised D. R.'s IFSP to increase to seven the number of weekly ABA therapy-hours D. R. would receive, which was in line with the PEP-R Report (as interpreted by its author) and the opinion of the [REDACTED] therapists. (One of the therapy-hours, however, would continue to be provided in a peer-group setting.) <sup>Parent</sup> [REDACTED] "signed off" on the revised IFSP, but she did not agree that the number of ABA therapy-hours was sufficient, and she gave notice that she planned to request additional services via a due process hearing.

18. Beginning on or about September 17, 2007, then, D. R. began receiving seven hours per week of ABA therapy under his IFSP. At the same time, [REDACTED] replaced BAI as D. R.'s private provider of such therapy; in that capacity, [REDACTED] began providing D. R. 10 hours of services per week at the parents' expense, as a supplement to the Part C services that [REDACTED] was providing at public expense.<sup>1</sup>

19. D. R.'s parents continued to press for more hours, and as a result the relationship between them and [REDACTED] (and [REDACTED]) became strained. Hoping to avoid litigation, [REDACTED] scheduled a mediation conference between the interested parties, which was held on November 20, 2007. The parties quickly reached an impasse at mediation. Although the mediation did not help resolve the dispute over the number of ABA therapy-hours D. R. should receive, it did prompt [REDACTED] <sup>parent</sup> to terminate [REDACTED] as D. R.'s private provider. She also terminated the peer-group sessions, which accounted for one hour per week of D. R.'s Part C-provided ABA therapy. Consequently, effective on or about November 21, 2007, D. R. stopped receiving the 10 private-pay hours of ABA therapy that had been provided since May 31, 2007, and stopped attending the peer-group sessions that had been provided since July 3, 2007. D. R. continued to get (from [REDACTED] pursuant to the IFSP) six hours per week of one-on-one ABA therapy.

20. This situation lasted about one month. The IFSP Team assembled on December 22, 2007, for another IFSP meeting. D. R.'s father again argued for an increase in the number of Part C-provided hours of ABA therapy. Again the IFSP Team disagreed that a substantial increase in such hours would be appropriate for D. R. The IFSP was revised, however, to increase from six to seven the number of one-on-one hours of ABA

therapy D. R. would receive each week. Consequently, D. R. began receiving seven hours per week of one-on-one ABA therapy, which level of public services remained unchanged as of the final hearing.

21. In early 2008, D. R.'s parents arranged for D. R. to receive ABA therapy, on a private basis, from yet another provider, [REDACTED]. On February 4, 2008, [REDACTED] began providing D. R. 10 hours per week of one-on-one therapy, at the parents' expense. Thus, as of February 12, 2008, when D. R.'s mother filed a request for due process with the Department, D. R. was getting 17 hours per week of ABA therapy, seven of which were provided at public expense under Part C, and 10 of which D. R.'s parents were paying for themselves.

22. During the roughly eight-and-a-half months from May 31, 2007 to February 12, 2008, D. R. made substantial progress toward the goals set forth in the IFSP. It is undisputed (and proved, in any event, by the greater weight of the evidence) that D. R. received genuine, material benefits from the services he was provided, including the ABA therapy. To be sure, D. R.'s parents hoped that their child would show even more improvement during this period, and they firmly believe that, had more hours of ABA therapy been provided, D. R. would have advanced farther, but the fact remains that D. R. has

received meaningful benefits as a result of the early intervention services offered under the IFSP.

23. That D. R. received a substantial amount of private therapy in addition to the services provided under the IFSP raises the question of whether D. R. would have benefited meaningfully without the private-pay services. As it happens, the question can be answered fairly easily in this case because, for a period of about two-and-a-half months (from November 21, 2007 to February 3, 2008), D. R. received no private therapy. For nearly 30 percent of the time leading up to the due process request, D. R. received, at most, seven hours per week of ABA therapy.

24. What happened during this particular period? D. R. did not regress. D. R. did not plateau. D. R. continued, while receiving no more than seven hours per week of ABA therapy, to make progress, to receive meaningful benefits, to improve. At hearing, <sup>parent</sup> [REDACTED] attributed this to D. R.'s biomedical treatment, which consisted of taking nutritional supplements such as cod liver oil and Methyl-B12. While the undersigned does not doubt <sup>parent</sup> [REDACTED] sincerity in this regard, even she acknowledged (without prompting) that the use of nutritional supplements to treat autism is "controversial" (her word). No expert testimony of any kind was offered as to the efficacy of biomedical treatments for autism. In contrast, expert testimony

was elicited to establish that ABA therapy is effective in the treatment of autistic children; that fact, indeed, is not genuinely disputed. The evidence convinces the undersigned that D. R.'s continued improvement, even in the absence of private therapy, is largely, if not entirely, attributable to the early intervention services he was receiving under the IFSP.

25. The bottom line is that the provision of seven (and even six) hours per week of one-on-one ABA therapy, while perhaps less than the optimal number of such hours, was, in fact, sufficient to confer upon D. R. a meaningful developmental benefit.

#### Ultimate Factual Determinations

26. D. R.'s IFSP, as originally designed in June 2007, and as later modified in September and December 2007, being reasonably tailored to fit D. R.'s particular developmental needs, was appropriate, both facially and as implemented, to the purpose of providing D. R. with a sufficient number of hours per week of ABA therapy to confer a meaningful benefit.

27. The preceding finding, which is outcome determinative, is based on direct and circumstantial evidence. The direct evidence includes the PEP-R Report, which was discussed above, as well as expert testimony offered at hearing, which the undersigned has found to be credible and persuasive. The circumstantial evidence concerns D. R.'s actual performance,

which, as found, reflects the receipt of a meaningful benefit, even (and especially) in the absence of private therapy.

CONCLUSIONS OF LAW

28. Pursuant to an Administrative Law Judge Services Contract ("Contract") entered into between the Department and the Division of Administrative Hearings ("DOAH") as of March 5, 2008, DOAH has made the undersigned administrative law judge available to conduct the instant proceeding and enter a "final written decision" on the merits. Because the undersigned, as a full-time administrative law judge, is fulfilling a contractual obligation of his employer, it is unnecessary to decide (and no opinion is expressed concerning) whether DOAH has personal and subject matter jurisdiction in this proceeding.<sup>2</sup>

29. Part C of the IDEA, 20 U.S.C. § 1431 et seq., comprises federal policies with regard to the provision of funds to the states for purposes of establishing and implementing programs for infants and toddlers with disabilities. To receive federal grants for these purposes, a state must develop a "system" for providing early intervention services, a system which must conform to a comprehensive set of federal requirements. See 20 U.S.C. § 1433. These requirements are set forth not only in the IDEA itself, but also in the relevant federal regulations. See 34 C.F.R. § 303.1 et seq.

30. The Department is authorized to implement and administer the Florida Infants and Toddlers Early Intervention Program, which program is intended to be eligible for funding under Part C of the IDEA. See § 391.308, Fla. Stat. The undersigned is not aware of, and the parties have not identified, any Florida statute or Florida rule prescribing the procedural and substantive law applicable to disputes arising from the Department's administration of the Florida Infants and Toddlers Early Intervention Program.

31. The IDEA defines "early intervention services" as developmental services that:

- (A) are provided under public supervision;
- (B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees;
- (C) are designed to meet the developmental needs of an infant or toddler with a disability, as identified by the individualized family service plan team, in any 1 or more of the following areas:
  - (i) physical development;
  - (ii) cognitive development;
  - (iii) communication development;
  - (iv) social or emotional development; or
  - (v) adaptive development;
- (D) meet the standards of the State in which the services are provided, including the requirements of this subchapter;
- (E) include--
  - (i) family training, counseling, and home visits;
  - (ii) special instruction;
  - (iii) speech-language pathology and audiology services, and sign language and cued language services;

- (iv) occupational therapy;
- (v) physical therapy;
- (vi) psychological services;
- (vii) service coordination services;
- (viii) medical services only for diagnostic or evaluation purposes;
- (ix) early identification, screening, and assessment services;
- (x) health services necessary to enable the infant or toddler to benefit from the other early intervention services;
- (xi) social work services;
- (xii) vision services;
- (xiii) assistive technology devices and assistive technology services; and
- (xiv) transportation and related costs that are necessary to enable an infant or toddler and the infant's or toddler's family to receive another service described in this paragraph;

(F) are provided by qualified personnel, including--

- (i) special educators;
  - (ii) speech-language pathologists and audiologists;
  - (iii) occupational therapists;
  - (iv) physical therapists;
  - (v) psychologists;
  - (vi) social workers;
  - (vii) nurses;
  - (viii) registered dietitians;
  - (ix) family therapists;
  - (x) vision specialists, including ophthalmologists and optometrists;
  - (xi) orientation and mobility specialists; and
  - (xii) pediatricians and other physicians;
- (G) to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate; and

(H) are provided in conformity with an individualized family service plan adopted in accordance with section 1436 of this title.

20 U.S.C. § 1432(4).

32. The IDEA prescribes the minimum components that a state's system for the delivery of early intervention services must contain. These components include:

(2) A State policy that is in effect and that ensures that appropriate early intervention services based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families . . . .

(3) A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability in the State, and a family-directed identification of the needs of each family of such an infant or toddler, to assist appropriately in the development of the infant or toddler.

(4) For each infant or toddler with a disability in the State, an individualized family service plan in accordance with section 1436 of this title, including service coordination services in accordance with such service plan.

20 U.S.C. § 1435.

33. A participating state's system must provide that each eligible infant or toddler and his family are entitled to receive:

(1) a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs;

(2) a family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler; and

(3) a written individualized family service plan developed by a multidisciplinary team, including the parents, as required by subsection (e), including a description of the appropriate transition services for the infant or toddler.

20 U.S.C. § 1436(a).

34. The requisite IFSP must contain:

(1) a statement of the infant's or toddler's present levels of physical development, cognitive development, communication development, social or emotional development, and adaptive development, based on objective criteria;

(2) a statement of the family's resources, priorities, and concerns relating to enhancing the development of the family's infant or toddler with a disability;

(3) a statement of the measurable results or outcomes expected to be achieved for the infant or toddler and the family, including pre-literacy and language skills, as developmentally appropriate for the child, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the results or outcomes is being made and whether modifications or revisions of the results or outcomes or services are necessary;

(4) a statement of specific early intervention services based on peer-reviewed research, to the extent practicable, necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering services;

(5) a statement of the natural environments in which early intervention services will appropriately be provided, including a justification of the extent, if any, to which the services will not be provided in a natural environment;

(6) the projected dates for initiation of services and the anticipated length, duration, and frequency of the services;

(7) the identification of the service coordinator from the profession most immediately relevant to the infant's or toddler's or family's needs (or who is otherwise qualified to carry out all applicable responsibilities under this subchapter) who will be responsible for the implementation of the plan and coordination with other agencies and persons, including transition services; and

(8) the steps to be taken to support the transition of the toddler with a disability to preschool or other appropriate services.

20 U.S.C. § 1436(d). Parents must give informed written consent to the proposed IFSP before services may be provided thereunder.

20 U.S.C. § 1436(e).

35. As the U.S. Ninth Circuit Court of Appeals explained in Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999):

An appropriate early intervention program "does not mean the absolutely best or potential maximizing" services for the child. Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987) (internal quotations omitted) (reviewing special education placement of grammar school child with disabilities). The states are only obligated to provide "a basic floor of opportunity" through the IFSP, individually designed to provide a

developmental benefit to the infant or toddler with a disability. See id.

36. Adams arose from circumstances bearing some resemblance to the facts of the instant case. The issue in Adams was whether the state had provided adequate early intervention services to a two-year-old with autism. In relevant part, the infant's IFSP offered 12.5 hours per week of behavioral intervention therapy. His parents, however, having independently investigated available therapies for autism, believed that their child would benefit most from 40 hours per week of one-on-one ABA therapy using a methodology known as "discrete trial training" ("DTT"). (The program outlined in the IFSP called for the substantial use of DTT, but other approaches were authorized as well.) Id. at 1146-47. The parents accepted the services afforded under the IFSP but supplemented them privately with an additional 12.5 hours per week of intensive, one-on-one behavioral therapy. Id. at 1147.

37. Eventually, the parents sought to recover from the state the expenses they had incurred in connection with the private tutoring. They requested an administrative hearing, which resulted in a decision in favor of the state. Next, the parents brought suit in the federal district court, which likewise ruled that they were not entitled to reimbursement. Id. at 1148.

38. On appeal, the circuit court found fault with the district court's analytical approach, writing:

The district court stated that it was "virtually impossible to determine whether [the child] would have received a meaningful benefit towards his overall development," because the IFSP was supplemented by private tutoring. . . . We hold that such a finding was clearly erroneous.

Instead of asking whether the IFSP was adequate in light of the [child's] progress, the district court should have asked the more pertinent question of whether the IFSP was appropriately designed and implemented so as to convey [the child] with a meaningful benefit. We do not judge an IFSP in hindsight; rather, we look to the IFSP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the child] with a meaningful benefit. Cf. Gregory K., 811 F.2d at 1314: ("We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide [the child] with educational benefits.") While separate findings as to the independent effectiveness of the private tutoring and the public services may shed light on the adequacy of the early intervention services, such evidence is not outcome determinative:

Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . An individualized education program ("IEP") is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.

Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (citations omitted) (reviewing the appropriateness of educational services for a school-age child). Thus, we examine the adequacy of [the child's] IFSPs at the time the plans were drafted.

Id. at 1149. The appellate court found that the IFSP was sufficient to confer a meaningful benefit upon the child and, accordingly, affirmed in large part the district court's judgment in favor of the state.<sup>3</sup>

39. The court in Adams laid down the rule of decision applicable here, namely, that the test for determining the legal sufficiency (or "appropriateness") of an IFSP is whether, at the time the IFSP was drafted, the goals, supports, and services prescribed therein were reasonably calculated to confer a meaningful developmental benefit. D. R. argues that, in applying the Adams rule, the undersigned must not take into account D. R.'s actual progress, for that, D. R. contends, would amount to judging the IFSP in hindsight, which is not to be done. D. R. frames this argument as an appeal to fairness: if an IFSP is not to be deemed inappropriate based on the recipient's poor performance, then neither should an IFSP be found appropriate on the basis of the recipient's good performance.

40. This is a good argument, persuasive to a point, but it would read too much into Adams to conclude that the court

forbade consideration of actual performance. The court in Adams formulated the test for determining the adequacy of an IFSP; it did not purport to place restrictions on the evidence that might be probative of facts demonstrating the IFSP's compliance or noncompliance with the test. Nor, more specifically, did the Adams court deem evidence of actual performance irrelevant or inadmissible. To the contrary, the court acknowledged that, even though such evidence would not be "outcome determinative," "findings as to the . . . effectiveness of the . . . public services may shed light on the adequacy of the early intervention services[.]" Id. at 1149. In addition, the court quoted with approval the U.S. Third Circuit Court of Appeals' observation that an individualized education plan (which is analogous to an IFSP) cannot "'be judged exclusively in hindsight.'" Id. (quoting Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (emphasis added). This latter point strongly implies that hindsight can be used in conjunction with other means of judging an IFSP.

41. So, D. R. is correct insofar as Petitioner asserts that the legal sufficiency of an IFSP does not depend on how effective (or ineffective) the plan turned out to be. This corollary to the "Adams test," which test relegates actual effectiveness to a secondary role, reflects the common wisdom that even the "best laid plans" sometimes go awry, just as ill-

conceived plans occasionally lead to success. That said, however, in determining whether an IFSP, at the time it was written, was reasonably calculated to confer a meaningful benefit, it is reasonable to consider facts concerning how well the plan worked, or conversely how it failed, for such facts are relevant indicators of the plan's merits, as a matter of common sense and logic. See MM v. School Dist. of Greenville County, 303 F.3d 523, 532 (4th Cir. 2002) (trial court, which was assessing the adequacy of an IEP, erred in failing to consider and accord weight to student's actual educational progress).

42. Consider the facts of this case. As D. R.'s actual progress demonstrates, D. R. was provided a meaningful benefit. Unlike the situation in Adams, moreover, it was relatively easy here to make independent findings as to the effectiveness of the public services because, for a significant portion of the time in question, D. R. made substantial progress while receiving no private tutoring. Therefore, D. R. either received a meaningful benefit from the services provided pursuant to an appropriate IFSP that was reasonably calculated to confer such benefit, or D. R. received a meaningful benefit from the services provided pursuant to an inappropriate IFSP that was not reasonably calculated to confer a benefit

43. Either of the foregoing input/outcome associations is logically possible, of course. They are not, however, equally

likely. A good result is more likely to happen, after all, because of an appropriately designed plan than *in spite of* a poor plan. This is because, in the former situation, the plan facilitates the desired outcome, so that the outcome is consistent with the input, whereas in the latter situation, the plan *is an obstacle that must be overcome* to achieve the desired outcome, so that the outcome is inconsistent with the input.

(Were this not so, then testing the appropriateness of an IFSP by determining whether it was reasonably calculated to confer a meaningful benefit would be senseless. For that matter, if a bad plan were as likely as a good one to produce good results, why would anyone bother wasting time drafting a good plan?)

44. Thus, it is both reasonable and permissible (though not mandatory) to infer, from the fact of a good outcome (such as, in this case, the receipt of a meaningful benefit), that the plan which was followed in attaining the outcome was, more likely than not, appropriately designed, rather than inappropriately designed. The positive outcome, in other words, is some evidence, albeit circumstantial evidence, that the plan was appropriate. Naturally, other facts might dilute, rebut, or nullify this inference—just as they might corroborate, reinforce, or strengthen it.

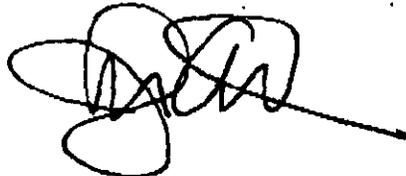
45. Here, the undersigned considered D. R.'s actual progress as some evidence supporting the finding that the IFSP

was appropriate when drafted. This circumstantial evidence was not, however, outcome determinative. There was also direct evidence concerning the IFSP's appropriateness, with which the inference arising from D. R.'s actual progress was consistent. Ultimately, the direct and circumstantial evidence worked together to produce in the undersigned's mind the determination that, in fact, the IFSP, when drafted, was reasonably calculated to provide D. R. a meaningful developmental benefit.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that D. R.'s IFSP was legally appropriate.

DONE AND ORDERED this 1st day of July, 2008, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of July, 2008.

ENDNOTES

<sup>1/</sup> [REDACTED] thus was providing several hours per week of ABA therapy in excess of its own recommendation, as set forth in the PEP-R Report. The parents wanted the additional hours and were willing to pay for them, and [REDACTED] would not refuse to provide the services.

<sup>2/</sup> The Notice Regarding Judicial Relief appended hereto conforms to the provisions of the Contract respecting the parties' judicial remedies. The undersigned expresses no opinion as to whether the notice correctly states the parties' rights under the law. Each party is urged to follow its own counsel in this regard.

<sup>3/</sup> The court reversed the judgment in part on a separate issue, holding that the state inappropriately had reduced the child's hours of therapy during the summer months to accommodate the vacation schedules of his providers. Thus, the court remanded the case to the trial court for a determination of the amount of reimbursement due to the parents for expenses incurred during the summer months. Id. at 1151.

COPIES FURNISHED:

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NOTICE REGARDING JUDICIAL RELIEF

According to the Administrative Law Judge Services Contract under which this proceeding was conducted, this decision and its findings are final. Making reference to 20 U.S.C. § 1439(a) (1) and 34 C.F.R. § 303.424, the contract provides further that any party aggrieved by the findings and decision herein shall have the right to bring a civil action with respect to the administrative complaint in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.