IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

THE BOARD OF EDUCATION
OF THE COUNTY OF KANAWHA,

Plaintiff,

v. CIVIL ACTION NO. 2:99-0609

MICHAEL M., a minor,
STEPHEN M. and TERESA M.,
Parents of Michael M.,

Defendants.

MEMORANDUM OPINION AND ORDER

In an earlier status conference, the court bifurcated this action. First, the Board of Education of the County of Kanawha ("Board") bore the burden of proving that Michael's individualized education plans ("IEPs") were reasonably calculated to provide him a free appropriate public education under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. Second, if the Board failed to meet its burden, the parents could recover reasonable costs associated with Michael's supplemental home-based program if they could prove that it was appropriate under the IDEA. On April 26, 2000, the court determined that the Board failed to meet its burden under stage one of the process and ordered the parties to brief the stage two issue. *See Board of Educ. of Co. of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D. W. Va. 2000) (Goodwin, J.). The question before the court is whether the supplemental home-based program, which uses the Lovaas methodology, that the parents established for Michael was appropriate under the IDEA.

I.

The facts and procedural history in this case are well known to the parties and need not be restated here. For a detailed account of the facts and procedural history, the reader is referred to this court's April 26, 2000 Memorandum Opinion and Order. *Id.*

At stage one of the litigation, the Board offered mere conclusory statements regarding the IEPs, and at times, offered expert testimony that even conceded that the IEPs were inadequate without the supplemental home-based program. *Id.* at 610-11. In stark contrast, at both stages of the litigation, the parents offered expert witness testimony that provided detailed examples of the type of instruction that Michael requires in light of his academic, behavioral, and social deficiencies. In addition, the parents' experts documented Michael's success in the supplemental home-based program, testified that his success was directly attributable to the discrete trial training ("DTT") under the Lovaas methodology, and provided examples of the direct nexus between the program and his progress.

Susannah Poe, a psychologist with the West Virginia University Affiliated Center for Developmental Disabilities and an expert in the area of autism, testified that Michael moved from a non-communicative child to a child able to work quietly, answer questions, and focus on the tasks assigned to him. Much of the progress was made between March 1996 and September 1998 when Michael only participated in the home-based program. Poe opined that even after Michael began participating in both the Board's IEPs and the supplemental home-based program, his success was directly attributable to the DTT he received in the home-based program. She testified that the progress was a documented fact exhibited in data collected each day during Michael's DTT. She further testified that Michael continues to need the home-based program to

progress academically and socially, and stated that Michael would likely not be able to maintain his progress if the home-based program were eliminated.

Gretchen Lovett, Ph.D., a child psychologist who has worked with Michael since his diagnosis with autism, also testified that Michael's scores on various psychological and intelligence tests steadily improved through his participation in the home-based program. It was her expert opinion that the dramatic changes were a direct result of the DTT he received in the home-based program, both during the time when he participated only in the home-based program and after he added the Board's IEPs to his learning. She testified that the Lovaas program was a reasonable and proven methodology, and opined that Michael continues to need the intensive one-to-one instruction that the home-based program provides.

Lisa Kaye, the Lovaas workshop consultant who has worked with Michael since June 1998, testified that the goal of the DTT is to integrate Michael into a regular education setting. Based on her experience with autistic children, it was her opinion that Michael is not able to fully learn from his environment unless he continues in the home-based program. She also testified that Michael's home-based program was necessary through May 2001, and that his public education must be coordinated with at least fifteen hours of one-to-one instruction per week until that time. It was her experience that similar children regressed when their DTT programs were discontinued for a period of time, and she cited to a study conducted by the creator of the Lovaas methodology that children who participated in the Lovaas program lost the majority of their significant gains when the program was terminated prematurely.

The Board offered no substantive response in rebuttal. As the court stated in its previous Memorandum Opinion and Order, the bar is neither high nor difficult to leap. *See id.* at 606-08. Instead, the Board offered only skimpy conclusions and quibbles over perceived evidentiary and

procedural flaws in the parents' presentation. Even now, instead of pointing out substantive rebuttal testimony from the administrative hearing, the Board - in its five page reply brief - takes the curious position that the parents must also affirmatively prove that Michael's IEPs were not appropriate because the Board failed to meet its substantive burden at stage one of the litigation.[1]

This court stated that the IEPs may have been sufficient under *Rowley*, but that the Board simply failed to offer sufficient proof. *Id.* at 610. Its failure to offer proof to meet the minimal standard does not somehow require the parents to finish the task that was specifically assigned to the Board. Such an interpretation would effectively undermine the reason for placing the stage one burden of proof on the Board in the first place.

Next, the Board misreads the court's earlier Order. That opinion does not stand for the proposition that progress is never an indicator of whether an IEP or a supplemental program is appropriate under the IDEA. The court specifically stated that "progress *may* be an indicator [of appropriateness]," but that it is ultimately irrelevant whether the child did in fact make progress pursuant to a school district's IEP, a standard that is extremely helpful to school districts. *Id.* at

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[1]In addition, the Board filed a motion for the court to hear additional evidence regarding stage one of the litigation. Although the IDEA clearly allows for courts to hear additional evidence, at the request of any party, that evidence should have been submitted before this court's decision regarding the stage one issue. The Board does not get two "bites of the apple." To the extent that the Board argues that it was unaware of the case *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999), and that it relied on an erroneous assumption of its evidentiary burden, that argument is rejected. This court cited to *Adams* merely as an example that the key inquiry is whether the IEP is reasonable at the time of its creation, a standard which is extremely beneficial to school districts because the IEP does not ultimately have to prove successful. That standard was set forth prior to *Adams* and is consistent with the purposes of the IDEA. Moreover, under any standard of evidentiary proof, what the Board has offered in this case is insufficient. Conclusory opinions without specific examples or support is insufficient; It was obvious that progress, alone, is insufficient proof when the child has participated in two programs and the school district makes no attempt to discern the benefits of one from the other. Accordingly, the Board's motion for the court to hear additional evidence regarding stage one of the litigation is **DENIED**.

609 (emphasis added). Here, the parents have offered expert testimony that establishes a direct nexus between the supplemental home-based program and the progress. In fact, much of the progress was during the over two years in which Michael only participated in the home-based program. Moreover, the parents offer concrete expert testimony regarding the appropriateness of the Lovaas methodology used in the home-based program. In stark contrast, during stage one of the litigation, the Board offered expert testimony that Michael made progress without attempting to discern whether the benefits were attributable to both programs in conjunction or whether a sufficient level of benefits were attributable solely to its own IEPs. In that situation, progress becomes less useful as an indicator of whether a program is reasonably calculated to provide a free and appropriate public education. More importantly, the Board offered insufficient expert testimony regarding the appropriateness of the methodology set forth in its IEPs.

II.

The administrative hearing officer ordered the Board to reimburse the parents for the following costs related to the home-based program:

(1) $6,349.15 for costs incurred in calendar year 1997;
(2) $17,504.20 for costs incurred in 1998;
(3) Costs due on or after March 23, 1999 upon a showing of the proper documentation; and
(4) Prospective reimbursement for:
    (a) 15 hours of home therapist services at a rate not to exceed $15 per hour;[2]
    (b) Consultation services from a qualified provider at a rate not to exceed $60 per hour, plus expenses, and $800 for a workshop day;
    (c) $52.50 per year for supplies; and
    (d) Long distance phone charges incurred with the Lovaas consultant.

[2]The Board has the option of discounting up to five hours of the home-therapist services if it provides comparable services at the school.

She ordered the prospective reimbursement to continue through the end of the 2000-2001 school year and ordered the Board to provide extended school year to Michael for the summers of 1999 and 2000. In reaching this conclusion, the administrative hearing officer evaluated the evidence submitted and required the parents to demonstrate by tangible means that the expenses submitted were actually incurred.

The court conducted an independent review of the record, while giving deference to the findings of the administrative hearing officer. *See Kirkpatrick v. Lenoir Co. Bd. of Ed.*, 216 F.3d 380, 384-85 (4th Cir. 2000). Upon consideration, this court concludes that the expenses listed above are reasonable costs that may be recovered by the parents. Accordingly, the parents are awarded, and the Board is **ORDERED** to reimburse and pay, the following costs:

(1) $23,853.35 for costs incurred in calendar years 1997 and 1998;
(2) Costs due on or after March 23, 1999 through the date of this Order upon a showing of the proper documentation as set forth in the administrative hearing officer's order; and
(3) Prospective reimbursement as set forth by the administrative hearing officer.

During earlier status conferences, the Board agreed to make certain payments to the parents to resolve preliminary injunction motions filed by the parents. Those payments should be deducted from the overall costs recoverable by the parents.

III.

For the reasons discussed, the court finds that the supplemental home-based program that the parents established for Michael was appropriate under the IDEA. In addition, the parents may recover the reasonable costs as provided by this Order. The Board's motion for the court to hear additional evidence regarding stage one of the litigation is **DENIED**.

The court **DIRECTS** the Clerk to forward a copy of this Order to counsel of record and all unrepresented parties.

ENTER: August 21, 2000

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE