



defendants had failed to offer N.B. a free and appropriate public education and that the Warwick School Department (Warwick) was required to reimburse N.B.'s parents for private school tuition for the period during which the administrative proceedings were conducted.

For reasons, hereinafter stated, the hearing officer's decision is reversed; the plaintiffs' application for attorneys' fees is dismissed and judgment will be entered in favor of the defendants on their counterclaim.

#### **Background Facts**

The facts gleaned from the administrative record are as follows. In June of 1996, N.B. was three years old and resided in Camden County, Georgia. At that time, he was diagnosed as suffering from autism, a neurological disorder that impairs the ability to communicate and to socially interact.

N.B.'s parents consulted Dennis B. Mozingo, a behavioral analyst at Florida State University who had a Ph.D. in psychology. Dr. Mozingo specialized in Applied Behavior Analysis ("ABA"), a method of educating autistic children that uses a stimulus-response-consequence model to reinforce appropriate behavior and discourage inappropriate behavior.

Dr. Mozingo recommended a course of home schooling utilizing an ABA program called Discrete Trial Training ("DTT").

In DTT, a trainer or teacher conducts a series of "trials" in which the child is repeatedly "prompted" and given an opportunity to respond. Appropriate responses are "rewarded" and inappropriate responses are corrected by repeating and possibly modifying the trial until a proper response is achieved. Generally, DTT trainers work one-on-one with the child. In the fall of 1997, N.B. was enrolled, briefly, in a pre-school program operated by the Camden County school system but his parents withdrew him because the school district refused to provide a DTT trainer. Instead, N.B.'s parents placed N.B. in a private pre-school program that allowed them to send a DTT trainer with him to class.

Dr. Mozingo monitored N.B.'s performance; but, in August 1998, Dr. Mozingo moved to Rhode Island and became the Director of Clinical and Educational Services at Pathways Strategic Learning Center ("Pathways"), an ABA-based program for developmentally impaired children at the Trudeau Memorial Center in Warwick. After Dr. Mozingo's departure, Dena Farbman-Page, another behavioral analyst, monitored N.B.'s performance in the Georgia pre-school program.

In September 1998, N.B. was enrolled at the Clark Elementary School in Camden County and an Individualized Education Program ("IEP") was developed for him. That IEP called for N.B. to be

placed in a regular kindergarten class staffed by teachers who were trained in DTT and used DTT techniques. The IEP also provided for one-on-one assistance from a DTT trainer on a part-time basis.

In the fall of 1999, N.B.'s parents visited Dr. Mozingo to discuss the special education options available to them in Rhode Island. Dr. Mozingo described the Pathways program, which taught groups of five to six autistic and otherwise developmentally impaired students in self-contained classrooms (Tr. II, 108:19-24; 109:1-3) where they received one-on-one instruction using the DTT method together with related services, as needed, from speech therapists and occupational therapists (Tr. III, 21-20). Dr. Mozingo told N.B.'s parents that Pathways would be appropriate for N.B.

Dr. Mozingo also told N.B.'s parents about another program for teaching autistic and developmentally impaired children that was offered at Warwick's Scott Elementary School (the "Scott School"). The Scott School program utilized the Treatment and Education of Autistic and Related Communication Handicapped Children ("TEACCH") method (Tr. XVIII, 81:7-10) which stresses a highly structured setting and performance of a series of predictable tasks (Tr. XIX, 26:3-5; 28:4-17). Like Pathways, the Scott School program taught groups of five to six students

in self-contained classrooms (Tr. XIX, 109:14-15) and provided them with related services, as needed, from a speech and language therapist (Tr. XIX, 108:19-20). The Scott School program also provided services from an occupational therapist. Tr. XIX, 108:19. Unlike Pathways, each Scott School classroom was staffed by a certified special education teacher and two aides who placed more emphasis on group learning (Tr. XIX, 109-111) and did not utilize DTT (Tr. VI, 44:1-4).

On March 30, 2000, N.B.'s mother informed the Warwick School Department that N.B.'s family was moving to Warwick and that N.B. would be ready to start school on April 11. She delivered several reports written by Farbman-Page, N.B.'s Camden County IEP, and various evaluations prepared by the Camden County School District (the "Evaluation Materials")<sup>2</sup>. N.B.'s mother also requested that an IEP meeting be scheduled as soon as possible.

On April 4, Kristin Greene, an Assistant Director of Special Education for the Warwick School District, scheduled an IEP meeting for April 13, 2000 and distributed copies of the Evaluation Materials to her staff to review before that meeting.

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<sup>2</sup>The Camden County documents included a Psychological Evaluation (Feb. 24, 1999); an Autism Eligibility Report (May 11, 1999); a Speech Language Impairment Eligibility Report (Dec. 16, 1999); and an Occupational Therapy Annual Review (Dec. 14, 1999).

Greene also wrote to N.B.'s mother requesting that she execute a release authorizing Warwick to obtain any remaining records from the Camden County School District. N.B.'s mother did not provide that release until April 18, 2000, after the IEP meeting.

On April 7, Kimberly Brennan, the teacher who ran the Scott School program, wrote to N.B.'s mother requesting a meeting with N.B. before the IEP meeting. That meeting never occurred because N.B.'s mother testified that she did not receive the letter until April 12, at which time it was too late to make the necessary arrangements. After reviewing the Evaluation Materials, Brennan, also, began working on a proposed IEP for the April 13 IEP meeting. At the April 13 meeting, N.B.'s mother was accompanied by a parent advocate from Families for Early Autism Treatment. The meeting lasted for three hours. It began as a Multidisciplinary Team ("MDT") meeting to determine whether N.B. was eligible for special education services in Rhode Island.<sup>3</sup> After eligibility was established, the rest of the meeting was spent discussing the proposed IEP which stated

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<sup>3</sup> An "MDT" is composed of various school officials, including a school psychologist, a special education administrator, and a special education teacher. See Rhode Island Regulations of the Board of Regents for Elementary and Secondary Education Governing the Special Education of Students with Disabilities (hereinafter "R.I. Regs."), One, V, 4.4.1.

that N.B. needed to learn in "small groups of 2-3 students or 1:1 teaching for new skills." The proposed IEP also called for placement in a self-contained special education classroom with part-time one-on-one instruction to be provided as needed and related services to be provided by a speech and language therapist, an occupational therapist, and the school psychologist. N.B.'s mother asked that the IEP specifically provide that DTT be utilized but Brennan declined, saying that the Rhode Island Department of Education ("RIDE") recommends that specific methodologies not be included in IEPs.<sup>4</sup> When the meeting ended, N.B.'s mother presented a typewritten letter that, obviously, had been prepared previously. That letter rejected the proposed IEP on the ground that N.B. needed intensive DTT training which the Scott School was not capable of supplying and it requested that Warwick pay for a placement at Pathways.

On April 17, Greene wrote to N.B.'s parents informing them that Warwick would not agree to pay for a placement at Pathways because, in its judgment, the proposed IEP would afford N.B. a "free and appropriate public education" and Pathways did not offer an appropriate education in the "least restrictive

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<sup>4</sup>There is no evidence in the record that either confirms or contradicts that assertion.

environment".<sup>5</sup> Greene's letter also stated that the IEP team had relied on the Evaluation Materials provided by N.B.'s mother and it mentioned her failure to execute the release authorizing Warwick to obtain any additional documents from Camden County. Greene's letter concluded by advising N.B.'s parents of their right to a "due process" hearing. A copy of that letter is appended hereto as Exhibit A.

In a subsequent exchange of letters, N.B.'s parents listed what they viewed as deficiencies in the proposed IEP; reiterated their rejection of the proposed IEP and stated their intention to enroll N.B. at Pathways on May 3 and to file a request for a due process hearing if Warwick did not agree to a Pathways placement by then. Greene responded by suggesting a meeting to discuss the parents' concerns and, possibly, to schedule another IEP meeting. Eventually, everyone agreed that a second IEP meeting should be held on May 4.

At the May 4 meeting, both parties were represented by counsel. That meeting lasted for approximately three hours and focused on the concerns outlined in the parents' letters. Although Warwick agreed to adopt most of the features of the

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<sup>5</sup>The IDEA requires states to educate disabled students in the "least restrictive environment," and mandates that each disabled child be educated with non-disabled children to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A).

Georgia IEP, including a provision calling for one-on-one instruction, as needed, it refused to include a specific reference to DTT. As a result, the parties were unable to agree on an appropriate placement and school officials proposed to observe N.B. in a classroom setting at the Scott School and to reconvene the IEP team in June for the purpose of reevaluating the plan. N.B.'s parents rejected that proposal and, on May 8, they enrolled N.B. at Pathways without notifying Warwick.

On May 19, N.B.'s mother and Dr. Mozingo visited the Scott School and observed in Brennan's classroom for approximately forty-five minutes. Shortly thereafter, N.B.'s mother sent a letter thanking Greene for the opportunity to visit and suggesting that another visit be scheduled. However, neither party followed up on that suggestion.

#### **The Procedural History**

On September 6, 2000, N.B.'s mother requested a due process hearing pursuant to R.I. Regs., One, IX, 7.1 alleging that Warwick's proposed IEP did not provide N.B. with a "free and appropriate public education" (a "FAPE") and requesting a placement that included DTT. She also sought a "stay put" order designating Pathways as N.B.'s "then-current educational

placement" for the duration of the administrative proceedings.<sup>6</sup>

The hearing lasted for twenty days and included the testimony of nineteen witnesses and the presentation of seventy-nine exhibits. Much of the evidence consisted of testimony by Dr. Gary Mesibov, Warwick's expert witness, who testified that Warwick's IEP would have provided N.B. with a FAPE (Tr. XIX, 131:9-14), and Dr. Mazingo, the plaintiffs' expert witness, who testified that Warwick's IEP was inadequate because it did not provide for the use of DTT (Tr. I, 150-151).

On March 5, 2001, the hearing officer rendered a decision in which she found that Pathways was N.B.'s "then current educational placement." Hr'g Off'r's Decision (hereinafter "Dec.") at 31. She, also, deemed Warwick's proposed IEP "inappropriate," primarily, because of what she found to be "procedural violations by the school department" that "prevent[ed] the parents . . . from adequately participating in the formulation and development of . . . [N.B.'s] IEP." Dec. at 47-48. Finally, she found that Pathways was an "adequate substitute enrollment" for N.B. Dec. at 48.

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<sup>6</sup>The "stay put" provision of the IDEA states that a disabled child must remain in his "then-current educational placement" for the pendency of the administrative proceedings and any appeals taken therefrom. 20 U.S.C. § 1415(j).

Accordingly, the hearing officer granted the parents' request for a "stay put" order and decided that Warwick was obliged to reimburse the parents for Pathways tuition for the period beginning on September 21, 2000, ten days after Warwick received notice of the request for a due process hearing, and ending on March 5, 2001, the day the hearing officer's decision was rendered. Dec. at 47. She also directed Warwick to complete a full initial evaluation of N.B. within forty-five (45) days, presumably, in order to afford Warwick an opportunity to correct the aforementioned procedural violations. Dec. at 48. Reimbursement of N.B.'s parents for tuition expenses was postponed until completion of that evaluation or the expiration of the 45-day period, whichever occurred first. Dec. at 48.

The plaintiffs brought this action to recover attorneys' fees that they incurred in connection with the administrative proceedings. They rely on 20 U.S.C. § 1415(i)(3)(B), which allows an award of attorneys' fees to parents who prevail in IDEA proceedings.

Instead of conducting the further evaluation ordered by the hearing officer, Warwick elected to file a counterclaim challenging the hearing officer's decision. Meanwhile, Warwick has been paying the Pathways tuition charges incurred until that challenge is resolved as it is required to do under 20 U.S.C. §

1415(j).

### The Statutory Framework

The IDEA requires states receiving federal education funds to provide children between the ages of three and twenty-one who have disabilities with "a free and appropriate public education . . . designed to meet their unique needs." 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1). The statute defines a "free and appropriate public education" ("FAPE") *inter alia* as "special education and related services" that are provided "at public expense" and that meet federal and state standards.<sup>7</sup> 20 U.S.C. § 1401(8).

Courts have struggled to flesh out that rather cryptic definition and to strike a proper balance between, on the one hand, the goal of providing each handicapped child with an "appropriate" education; and, on the other hand, the practical difficulties in determining what is "appropriate" given the considerable expense involved in providing special services. See Colin K. v. Schmidt, 536 F. Supp. 1375, 1386 (D.R.I. 1982) (citing cases), aff'd, 715 F.2d 1 (1<sup>st</sup> Cir. 1983). The Supreme Court has described a state's obligation as something more than "furnishing handicapped children with only such services as are

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<sup>7</sup>States are free to establish standards that exceed the minimum level required by the IDEA. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 987 (1<sup>st</sup> Cir. 1990).

available to non-handicapped children" but something less than furnishing "every special service necessary to maximize each handicapped child's potential." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 198-99 (1982). More specifically, it has held that the "free and appropriate public education" requirement is satisfied if a state provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Id. at 203. Thus, while the education and services provided "must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level . . ." regardless of cost. Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993); see also Colin K., 536 F. Supp. at 1386 ("Whatever the precise definition of 'free appropriate public education' is, the term certainly does not mean the best education possible.").

The IDEA mandates that the contemplated education and services be provided in conformity with an individualized education program ("IEP"). 20 U.S.C. § 1401(8)(D). In effect, the IEP is the vehicle for providing a FAPE and states receiving federal IDEA funds are required to prepare an IEP for each eligible student. 20 U.S.C. § 1414(d)(2). The IDEA requires that each child be educated in the "least restrictive

environment" and that, "[t]o the maximum extent appropriate," the IEP must provide for educating "children with disabilities . . . [together with] children who are not disabled," 20 U.S.C. § 1412(a)(5), a practice called "mainstreaming." Roland M. v. Concord Sch. Comm., 910 F.2d 983, 987-88 (1<sup>st</sup> Cir. 1990).

The statute further requires that an IEP be developed by an IEP Team consisting of the parents, the special education teacher, designated specialists, and a representative of the local school district. See 20 U.S.C. § 1414(d)(1)-(3). The IEP Team must consider the strengths of the child, the concerns of the parents, and the results of the child's most recent evaluation. 20 U.S.C. § 1414(d)(3). The IEP must contain, *inter alia*, a statement of the student's present levels of performance; a statement of measurable annual goals, including benchmarks or short-term objectives; and a statement of the special education and related services and supplementary aids and services to be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(i)-(iii).

In addition to preparing an IEP that satisfies the IDEA's substantive requirements, the state or local school district must comply with various procedural safeguards that are designed to ensure, among other things, that the child's parents or guardians have a meaningful opportunity to participate in the

process. See generally 20 U.S.C. § 1415. Those safeguards include requirements that the parents be afforded an opportunity to inspect relevant records; obtain an independent educational evaluation; and present complaints regarding their child's placement. 20 U.S.C. § 1415(b). If the parents and the state or the local school district agree on the content of the IEP, the child is placed in accordance with the IEP. If the parents disagree with the proposed IEP, no placement can be made. 34 C.F.R. § 300.505(a)(1)(ii); R.I. Regs., One, IX, 4.2.2.

Parents who challenge their child's IEP are entitled to an "impartial due process hearing" that is conducted by an educational hearing officer designated in accordance with state law. 20 U.S.C. § 1415(f). After the due process hearing is completed and any applicable administrative appeals are exhausted, an aggrieved party may bring a civil action in the district court which is empowered to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(A)-(B).

Here, as previously stated, N.B.'s parents brought this action for attorneys' fees and Warwick counterclaimed seeking to overturn the hearing officer's decision.

#### **Standard of Review**

The IDEA provides that, when an action is brought in the

District Court, the Court:

- (1) shall receive the records of the administrative proceedings;
- (2) shall hear additional evidence at the request of a party; and
- (3) basing its decision on a preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(B)(i)-(iii).

The review conducted by the District Court must be "independent" but "something short of complete *de novo* review." Roland M., 910 F.2d at 987 (citations omitted). In contrast to other types of administrative appeals, the Court is not required to accept the hearing officer's findings simply because they are supported by substantial evidence in the record. Town of Burlington v. Depart. of Educ. for the Commonwealth of Mass., 736 F.2d 773, 792 (1<sup>st</sup> Cir. 1984), aff'd, 471 U.S. 359 (1985). Rather, the District Court must render a "bounded, independent decision[]--bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." Id. at 791-92.

However, in doing so, the District Court must recognize "the expertise of the administrative agency" and give "due weight" to the agency's decision. Roland M., 910 F.2d at 989

(citations omitted). The degree of deference and the weight accorded to agency findings "will vary, depending on whether the court is reviewing procedural or substantive matters and whether educational expertise is essential to the administrative findings." Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch., 208 F.3d 560, 566 (6<sup>th</sup> Cir. 2000). The "precise degree of deference due [administrative] findings is ultimately 'left to the discretion of the trial court.'" G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 946 (1<sup>st</sup> Cir. 1991) (quoting Burlington, 736 F.2d at 792).

In rendering a decision, the District Court must consider both the "substantive goals" of the IEP and the "procedural guarantees" regarding the manner in which it is formulated. Roland M., 910 F.2d at 990. Accordingly, two questions must be asked:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. (quoting Rowley, 458 U.S. at 206-07).

In any event, "[t]he ultimate question . . . is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.'" Id. (quoting Burlington, 736 F.2d at 788).

## Analysis

### I. Tuition During the Administrative Proceedings

#### A. The "Stay Put" Provision

The hearing officer's decision requiring Warwick to reimburse N.B.'s parents for Pathways' tuition between September 21, 2000 and March 5, 2001, was based, in part, on her finding that Pathways was N.B.'s "then current placement" within the meaning of the IDEA's "stay put" provision. The "stay put" provision is set forth in § 1415(j) which provides:

[D]uring the pendency of any [administrative or court] proceeding[] conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j) (emphasis added).

The manifest purpose of the "stay put" provision is to prevent a child's education from being disrupted while disputes regarding the adequacy of the child's IEP are being resolved. See Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3<sup>rd</sup> Cir. 1996). The "stay put" provision functions as a type of "automatic preliminary injunction" that preserves the child's placement at the time that the IEP is challenged.

Michael C. ex rel. Stephen C. v. Radnor Township Sch. Dist., 202 F.3d 642, 650 (3<sup>rd</sup> Cir. 2000) (quoting Drinker, 78 F.3d at 864). It prevents the school district from unilaterally changing the child's placement during the pendency of review proceedings. Id.

While the "stay put" provision does not prevent parents from enrolling their child in a private school without the school district's consent, it means that, if they do so, they act at their own risk. Burlington, 471 U.S. at 373-74 ("[P]arents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk."). Thus, parents who unilaterally choose to educate their child at a private school, while challenging a proposed IEP, are not entitled to reimbursement for tuition expenses incurred during the pendency of the administrative proceedings unless the private school was the child's "then-current placement", 20 U.S.C. § 1415(j); or the parents succeed in their challenge to the IEP, Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635, 641 (9<sup>th</sup> Cir. 1990) (If parents prevail in administrative proceedings, school district must pay for tuition expenses incurred prior to decision but, if school district prevails, parents are not entitled to

reimbursement). In order to succeed in challenging an IEP, the parents must establish that the IEP fails to provide a FAPE and that the private placement was appropriate. Florence County Sch. Dist. No. 4 v. Carter, 510 U.S. 7, 15 (1993) (Parents are entitled to reimbursement if the court "concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act.").

An administrative decision that a unilateral private school enrollment was appropriate constitutes the state's "agreement" to that placement for purposes of the "stay put" provision. Burlington, 471 U.S. at 372; Susquenita Sch. Dist. v. Raelee S. ex rel. Heidi S., 96 F.3d 78, 83-84 (3<sup>rd</sup> Cir. 1996). Accordingly, such a decision establishes the private school enrollment as the child's "then-current placement" and makes the school district responsible for any subsequent tuition expenses unless and until a court decides otherwise. Raelee S., 96 F.3d at 84; Clovis Unified Sch. Dist., 903 F.2d at 641; Bd. of Educ. of Montgomery County v. Brett Y., 959 F. Supp. 705, 710 (D. Md. 1997) ("[O]nce parents receive a state administrative decision that the offered public placement was inadequate and their unilateral private placement was appropriate, the private placement becomes the 'current educational placement,' and the school system is financially responsible for the cost of that

placement during the pendency of the underlying litigation.") (citations omitted). Moreover, the school district is not entitled to recover those expenses even if it eventually prevails.

[W]here the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local educational agency is estopped from obtaining reimbursement for the time period . . . covered by the state agency decision and order.

Burlington, 736 F.2d at 800-801.

In this case, the hearing officer's finding that N.B.'s "current placement" during the period between September 21, 2000 and March 5, 2001 was Pathways and her findings that Warwick had failed to offer a FAPE and that the Pathways placement was appropriate are based on errors of law and are contrary to the preponderance of the evidence.

B. N.B.'s "Then Current Placement"

As already noted, the IDEA's "stay put" provision applies to a child's "then-current placement." Under the IDEA, an educational placement does not occur unless it is made in accordance with applicable state procedures. Michael C., 202 F.3d at 651. Consequently, when an existing placement is terminated, the "stay put" provision does not apply until a new

placement is established which, ordinarily, requires the consent of all concerned. As the Third Circuit has said:

[W]hen a parent unilaterally removes a child from an existing placement determined in accordance with state procedures, and puts the child in a different placement that was not assigned through proper state procedures, the protections of the stay-put provision are inoperative until the state or local educational authorities and the parents agree on a new placement. Only once state authorities and parents have reached such agreement does a "then-current educational placement" come into existence.

Id. (citing Raelee S., 96 F.3d at 83).

That principle is equally applicable where a child is removed from an existing placement in State A and relocated to State B. In such cases, a new placement must be made in accordance with State B's procedures and the IEP previously established in State A does not automatically continue in effect. Id. In the words of the Office of Special Education Programs ("OSEP"), which is charged with principal responsibility for administering the IDEA<sup>8</sup>:

[T]he State B school district must determine, as an initial matter, whether it believes that the student has a disability and whether the most recent evaluation of the student conducted by the school district in State A and the State A school district's IEP meet the requirements of [the IDEA] as well as the educational standards of State B.

OSEP Policy Memorandum 96-5, reprinted in 24 Indiv. Disabil. Educ. L. Rptr. 320 (U.S. Dept. of Educ. Dec. 6, 1995)

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<sup>8</sup> 20 U.S.C. § 1402(a).

(hereinafter "OSEP Mem. 96-5").

Put another way, unless and until State B and the parents agree on an IEP, the child has "no 'then-current educational placement' in [State B] and the stay-put provision provides no relief for him." Michael C., 202 F.3d at 651. Absent such an agreement, the child, generally, should be placed in a regular educational program until an agreement is reached or administrative review proceedings are completed. OSEP Mem. 96-5.

In this case, the hearing officer recognized that the Georgia IEP did not establish N.B.'s "then-current placement." Dec. at 24-25. Nevertheless, she based her determination that Pathways was N.B.'s "then current placement" on the finding that, while it did not "reflect[] in all respects, the Georgia IEP," it reflected it "more fully" than did the Scott School placement. Dec. at 31. More specifically, her decision states that "[i]nasmuch as the program at Pathways reflects more fully the Georgia IEP, it shall be considered the stay-put educational placement of the student . . . ." Dec. at 31. Thus, contrary to both the case law and the OSEP policy memorandum, the hearing officer, in effect, did treat the Georgia IEP as establishing N.B.'s "then-current placement" in Rhode Island.

This Court finds that, in so doing, the hearing officer

erred and that N.B. had no "current placement" during the pendency of the administrative proceedings. Accordingly, whether N.B.'s parents are entitled to reimbursement for Pathways tuition during that period turns on whether the proposed IEP provided a FAPE; and, if—it did not, whether Pathways was an appropriate placement.

## II. Whether Warwick Provided a FAPE

### A. The Alleged Procedural Violations

As already noted, the IDEA contains various procedural requirements designed to ensure that a child's parents have a meaningful opportunity to participate in formulating the child's IEP. In this connection, the Supreme Court has said:

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process [citation omitted], as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, 458 U.S. at 205-206.

An IEP may be found deficient if the procedural requirements are not observed. See Roland M., 910 F.2d at 994. However, procedural violations are grounds for rejecting an IEP only if there is "some rational basis to believe that [the] procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to

participate in the formulation process, or caused a deprivation of educational benefits." Id. (citations omitted). Mere technical violations are not sufficient. Burilovich, 208 F.3d at 566; Scituate Sch. Comm. v. Robert B., 620 F. Supp. 1224, 1228-29 (D.R.I. 1985), aff'd 795 F.2d 77 (1<sup>st</sup> Cir. 1986) (holding that technical violations did not invalidate a proposed IEP because the violations did not rise to a level that deprived the parents of meaningful participation in development of the IEP); see also Roland M., 910 F.2d at 994 ("[P]rocedural flaws do not automatically render an IEP legally defective.").

In this case, the plaintiffs claim that Warwick committed ten procedural violations. The hearing officer properly rejected three of those claims but did not explicitly rule on all of the remaining claims, individually. Dec. at 31-44. Rather, for reasons that are not entirely clear, she concluded that there were some procedural deficiencies that in their "totality . . . go beyond mere technicality in this case and indicate that an individual assessment of the child's needs was not completed and the parents were not given adequate opportunity to review the child's previous IEP with the district." Dec. at 44. The alleged deficiencies that she discussed in reaching that conclusion may be summarized as follows:

1. Warwick's alleged violation of 20 U.S.C. § 1415(b)(1) in failing to afford N.B.'s parents an opportunity to participate in "placement" meetings held before the first IEP meeting on April 13. Dec. at 32.
2. Warwick's alleged violation of R.I. Regs., One, IX, 5.1.2, 5.1.3 in failing to sufficiently explain the reasons for rejecting the proposed Pathways placement and failing to adequately identify the evaluations relied upon in rejecting that placement. Dec. at 33-34.
3. Warwick's alleged failure to complete N.B.'s evaluation before proceeding with an IEP meeting. Dec. at 35-36.
4. The IEP Team's alleged violation of 34 C.F.R. § 300.552 by preparing an IEP without adequate knowledge of N.B. and his needs. Dec. at 37-40.
5. Warwick's alleged violation of "Appendix A" [sic] to 34 C.F.R. § 300.26 in failing to "discuss" DTT methodology at the IEP meeting. Dec. at 40-44.

The Court will address those alleged violations in turn.

1. Participation in the "Placement" Meetings

Section 1415(b)(1) requires a school district to afford "an opportunity for the parents of the child with a disability to . . . participate in meetings with respect to the identification, evaluation, and placement of the child." However, that does not

mean that school officials are prohibited from discussing a child's placement outside of the parents' presence. The purpose of this provision is to prevent school officials from making decisions without considering the parents' views. Accordingly, school district staff are permitted to formulate evaluations, findings and recommendations in preparation for an IEP meeting as long as they do not predetermine the child's placement. 34 C.F.R. Pt. 300, App. A, No. 32 (2000).

The hearing officer found that an April 4, 2000 Warwick staff meeting "may have been" a "placement meeting" to which N.B.'s parents had to be invited (Dec. at 32), but that finding is contrary to the evidence. The hearing officer based that finding on the testimony of Ms. Brennan who stated, "[i]t was my understanding that [N.B.] was coming to my classroom so we would see him on April 13<sup>th</sup>, the day of the IEP meeting." Tr. VI, 37:2-4. The hearing officer interpreted that statement to mean that Ms. Brennan believed that N.B. actually would be enrolled in her class on April 13; and, therefore, that a placement decision had been made. That interpretation is at odds with both Ms. Brennan's words and her testimony about what she expected to happen on April 13. It is clear that Ms. Brennan knew that the purpose of the April 13 meeting was to formulate an IEP and that N.B. was coming to her class before the meeting

solely for the purpose of assisting school officials in assessing his needs prior to preparing the IEP. Tr. VI, 37:11-13.

Furthermore, Ms. Greene testified that at the April 4 meeting, she simply distributed copies of the evaluation materials and told her staff to read through them and to use them in "developing their goals for the IEP." Tr. VII, 172:1-5. There is no evidence that N.B.'s placement even was discussed at the April 4 meeting. In short, the preponderance of the evidence is that the April 4 meeting was not a placement meeting in which parental participation was required.

## 2. Parental Notice Requirements

Rhode Island regulations require a school district to notify a student's parents when the district rejects a placement proposal made by the parents. R.I. Regs., One, IX, 4.1. That notice must contain an explanation of the reasons for rejecting the proposal, R.I. Regs., One, IX, 5.1.2, and must specify the evaluations upon which the district relied, R.I. Regs., One, IX, 5.1.3.

On April 17, Ms. Greene sent a letter responding to the demand made by N.B.'s mother at the April 13 meeting that N.B. be placed at Pathways. The letter stated that Warwick would not pay for a Pathways placement because, in Warwick's view, the

proposed IEP, a copy of which was enclosed, provided N.B. with a FAPE and Pathways did not provide a FAPE "in the least restrictive environment." The letter also stated that, in deciding to reject Pathways, Warwick relied on the Georgia evaluation materials provided by N.B.'s mother. Id. That letter was followed by an exchange of correspondence in which both sides further explained their respective positions and, then, by a second IEP meeting on May 4 during which the parents' concerns were discussed.

The hearing officer found that the April 17 letter did not state Warwick's reasons for rejecting a Pathways placement with the degree of particularity required by the Rhode Island regulations. That finding overstates what the regulations require and ignores the circumstances surrounding the letter.

The regulations do not specify the degree of particularity with which the school district must explain its reasons for rejecting a proposed placement. They merely require the school district to state "why the school district . . . refuses to take the action" and to provide "a description of each evaluation procedure, test, or report the school district uses as a basis for the . . . refusal." R.I. Regs., One, IX, 5.1.2, 5.1.3. The purpose of these requirements is to enable the parents to understand the basis for rejection and to discourage arbitrary

action by the school district. See Scituate, 620 F. Supp. at 1228-29. Those purposes were served, here.

Greene's April 17 letter was sent after the April 13 meeting during which the parties discussed, at considerable length, their respective positions regarding N.B.'s placement. Further communications with respect to N.B.'s placement took place during the parties' subsequent correspondence and during the second three-hour IEP meeting on May 4 which focused specifically on the concerns expressed by N.B.'s parents. Moreover, the April 17 letter identified the documents on which Warwick based its decision as the Georgia evaluations. Clearly, N.B.'s parents were familiar with those documents because the documents had been provided by N.B.'s mother. Therefore, under these circumstances, the notice requirements and the purposes that it serves were satisfied.

### 3. Warwick's Alleged Failure to Evaluate N.B.

The hearing officer found that Warwick violated the IDEA's procedural safeguards by conducting the April 13 IEP meeting without having sufficient evaluative data. She cited Ms. Greene's testimony that "[Warwick] didn't have a complete social [history] and . . . didn't have a complete psychiatric review," and item 13 (Present Levels of Performance) of the April 13 IEP which stated that N.B.'s "'present levels of performance' [were]

unknown at [that] time." Dec. at 35-36.

Although the hearing officer did not identify the statutory provision or regulation upon which her finding was based, she, presumably, was referring to 20 U.S.C. § 1414(c)(1)(A) which requires a school district to review existing evaluative data before formulating an IEP. But that is precisely what Warwick did. The record indicates that school officials reviewed the evaluation materials supplied by N.B.'s mother. Warwick was forced to rely on those materials because N.B.'s mother provided only eleven days notice of her intent to enroll N.B.; she requested an IEP as soon as possible on the ground that N.B. was regressing outside of the school setting; and she initially refused to execute a release permitting Warwick to obtain all of the records relating to N.B.'s Georgia placement. Therefore, Warwick cannot be faulted even if the evaluation data was incomplete.

The hearing officer also appears to suggest that Warwick committed a procedural violation by not developing an "interim" IEP and implementing a "temporary" placement pending completion of the initial evaluation process. See 34 C.F.R. Pt. 300, App. A, No. 14 (2000). However, while Warwick did not specifically denominate the IEP that it prepared as an "interim" IEP, school officials did propose to observe N.B. in a classroom setting and

to reconvene the IEP Team in June for the purpose of completing a more comprehensive evaluation. Tr. VI, 121:8-16 (Brennan); Tr. VIII, 17:2-15 (Greene); Resp.'s Ex. 15 (MDT Conf. Report (Apr. 13, 2000) (recommending that the IEP Team reconvene in June 2000 to review N.B.'s IEP)), a proposal that was rejected by N.B.'s parents.

In any event, it clearly would have been futile for Warwick to propose an interim IEP. Rhode Island regulations require a school district to obtain parental consent before implementing a placement. See R.I. Regs., One, IX, 4.2. Here, as evidenced by the typewritten letter that N.B.'s mother delivered to school officials at the April 13 meeting and the letter that she later sent to Greene, N.B.'s mother had made it clear that she would not accept any placement other than Pathways.

4. The IEP Team's Alleged Lack of Knowledge about N.B.

Implicit in the IDEA's "procedural" requirement that a school district evaluate a child before preparing and IEP, 20 U.S.C. § 1414(a)(1), is the requirement that school officials have some knowledge about the child. Indeed, regulations promulgated by the Department of Education provide that members of the IEP Team must be "knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. § 300.522(a)(1).

The hearing officer questioned whether Warwick was "knowledgeable" about N.B. because school officials did not meet him before preparing his proposed IEP. However, while a personal meeting is desirable it is not required by either the statute or the regulations. Nor is a personal meeting necessarily a *sine qua non* for ascertaining a child's educational needs. Such knowledge may be gleaned from other sources such as test results, expert evaluations and discussion with the child's parents. See Carroll v. Capalbo, 563 F. Supp. 1053, 1058 (D.R.I. 1983) (in evaluating a child, school district may rely on evaluations done by a psychiatric hospital and school officials need not perform the evaluations themselves).

Here, the documents submitted by N.B.'s mother contained evaluations performed by professionals in virtually all of the fields in which N.B. had special needs and Ms. Brennan and Ms. Greene testified that they read those materials before the April 13 meeting. Tr. VI, 38:13-17 (Brennan); VII, 171:5-6 (Greene). In addition, Warwick officials had lengthy discussions with N.B.'s mother on two occasions. Thus, they had ample opportunity to become knowledgeable about N.B. and his special education needs.

Moreover, under the circumstances, it is difficult to fault school officials for not personally meeting with N.B. because

they did request an opportunity to do so prior to the April 13 meeting but N.B.'s mother stated that she did not receive the request far enough in advance to make the necessary arrangements.

Finally, the hearing officer's suggestion that Warwick improperly relied on the Georgia evaluations is inconsistent with her finding that Pathways was N.B.'s current placement because it more closely conformed to the Georgia IEP. It, also, is contrary to both the holding in Carroll and the admonition in OSEP Policy Memorandum 96-5 that, among other things, the school district in a state to which a child relocates "must determine . . . whether the most recent evaluation of the student conducted by the school district in [the child's former state]" meets applicable requirements. The hearing officer purported to distinguish Carroll for reasons that this Court does not find convincing. See Dec. at 28-29.

5. Warwick's Alleged Failure to Discuss DTT

The hearing officer appears to have found that Warwick violated the IDEA's procedural requirements by failing to discuss DTT at the IEP meetings and by failing to include it in N.B.'s IEP.

However, the failure to include DTT in the IEP bears more on the substantive merits of the IEP than on the adequacy of the

procedures followed in preparing it because the omission of DTT from the IEP would violate the IDEA only if DTT methodology was necessary to provide N.B. with a FAPE. On the other hand, if the IEP Team was required to discuss DTT, its failure to do so would be a procedural violation whether or not DTT had to be included in the IEP.

The procedural safeguards established by the IDEA are set forth in 20 U.S.C. § 1415. As already noted, those safeguards are designed to ensure that parents have a full opportunity to participate in the development of an educational program for their children. Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 58 (1<sup>st</sup> Cir. 2002); Scituate, 620 F. Supp. at 1229-30. The relevant safeguards in this case consist of requirements that the parents be afforded an opportunity to inspect relevant records; to participate in meetings with respect to the identification, evaluation, and placement of their child; to obtain an independent educational evaluation; and to present complaints regarding their child's placement. 20 U.S.C. § 1415(b).

An obligation on the part of school officials to, at least, consider parental views is implicit in the requirement that parents have an opportunity to participate in the process of evaluating and placing their child. Indeed, § 1414(d)(3)(B)(i)

expressly requires a school district to "consider" "educational strategies," when appropriate. However, the IDEA does not identify any specific matters that must be "discussed" at an IEP meeting.

In concluding that Warwick was required to discuss DTT and to include it in N.B.'s IEP, the hearing officer relied on Attachment 1 to the Department of Education's amendments to 34 C.F.R. Parts 300 and 303 that were published in the Federal Register in 1999. Attachment 1, which the hearing officer erroneously referred to as "Appendix A," contained the Department's responses to comments received with respect to the proposed amendments that were published in 1997 when the IDEA was amended.

More specifically, the hearing officer cited the following passage in Attachment 1 explaining why the Department amended the regulation defining "specially designed instruction" to include a requirement of "adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction . . . ," 34 C.F.R. § 300.26(b)(3) (emphasis added), and why the Department had rejected suggestions that the term "methodology" be omitted from the definition<sup>9</sup>:

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<sup>9</sup> The definition of "specially designed instruction" may affect what must be included in an IEP because 20 U.S.C. § 1414(d)(1)(A)(iii) mandates that an IEP include the "special

With regard to the definition of "specially designed instruction," some changes should be made. The committee reports to . . . [the 1997 amendments to the IDEA] make clear that specific day-to-day adjustments in instructional methods and approaches are not normally the sort of change that would require action by an IEP team. Requiring an IEP to include such a level of detail would be overly-prescriptive, impose considerable unnecessary administrative burden, and quite possibly be seen as encouraging disputes and litigation about rather small and unimportant changes in instruction.

There is, however, a reasonable distinction to be drawn between a mode of instruction, such as cued speech, which would be the basis for the goals, objectives, and other elements of an individual student's IEP and should be reflected in that student's IEP, and a day-to-day teaching approach, i.e., a lesson plan, which would not be intended to be included in a student's IEP.

. . .

In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP.

Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, Attachment 1, 64 Fed. Reg. 12406-01, 12552 (Mar. 12, 1999) (hereinafter "Attachment 1").

The hearing officer found that the choice between DTT and

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education" services being provided; and, § 1401(25), in turn, defines "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability . . . ."

TEACCH involved "much more than a day-to-day teaching approach" (Dec. at 41) and suggested that it involved the selection of a "foundation strategy" (Dec. at 42). The hearing officer, apparently, equated that "strategy" with a "methodology" that was an integral part of N.B.'s education. Accordingly, she concluded that school officials on the IEP Team were required to "discuss" DTT. As evidence that Warwick had violated that requirement, the hearing officer cited testimony by Ms. Brennan and Ms. Hackett--an Assistant Director of Special Education--that the Rhode Island Department of Education had informed them that "methodology" need not be included in the IEPs. Dec. at 41. This Court disagrees with the hearing officer's findings and conclusions for several reasons.

For one thing, Attachment 1 is not a definitive statement of the law. At most, it is an "interpretative rule" or "policy statement" that is entitled to deference only to the extent that it is persuasive. Unlike "legislative" rules that are made pursuant to the exercise of delegated law-making power and that "create[] new rights, assign[] duties, or impose[] obligations, the basic tenor of which is not already outlined in the law itself," interpretative rules are "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers,'" and are merely a

“clarification or explanation of an existing statute or rule.” La Cosa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1<sup>st</sup> Cir. 1992) (citations omitted). The distinction is important because legislative rules are subject to the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553(a)-(c), and are given effect unless they are “arbitrary or capricious in substance, or manifestly contrary to the statute,” United States v. Mead Corporation, 533 U.S. 218, 227 (2001). Interpretative rules, on the other hand, are exempt from the notice and comment requirements and generally are entitled to deference only to the extent that they are persuasive. Navarro v. Pfizer Corp., 261 F.3d 90, 98-99 (1<sup>st</sup> Cir. 2001).

In analyzing whether a rule is legislative or interpretative, the starting point is the agency’s own characterization of the rule. Metropolitan Sch. Dist. v. Davilla, 969 F.2d 485, 489 (7<sup>th</sup> Cir. 1992); see also Warder v. Shalala, 149 F.3d 73, 80 (1<sup>st</sup> Cir. 1998). Here, it is not clear that, at most, the Department of Education intended Attachment 1 to be an “interpretative rule” or a “policy statement.” In fact, it could be argued that Attachment 1 was something less than that. Attachment 1 was one of three documents appended to the amendments that finally were adopted. In contrast to the other two documents, Appendices A and B, that were labeled

"Notice of Interpretation," Attachment 1 was labeled merely as an "Analysis of Changes and Comments." Furthermore, Attachment 1 was not included when the final regulations were printed in the Code of Federal Regulations but Appendices A and B were included. The fact that the Attachment draws on the legislative history of Pub. L. 105-17<sup>10</sup> and the case law construing it is a further indication that the Department, itself, viewed the attachment as no more than an interpretative rule or a policy statement because those are "the classic tools . . . an agency[] relies upon to determine the meaning of a statute [or regulation]." Metropolitan, 969 F.2d at 490.

Classifying Attachment 1 as nothing more than an interpretative rule or policy statement also is supported by several decisions holding that similar statements made by the Department in opinion letters responding to questions regarding the IDEA were interpretative in nature. Id. at 490-94 (opinion letter stating that the IDEA requires school districts to continue services for disabled children who are expelled); Raymond S. v. Ramirez, 918 F. Supp. 1280, 1295 (N.D. Iowa 196) (opinion letter stating that school districts may access funds from parents' insurance policy to pay for special education services); Michael C., 202 F.3d at 649 (policy memorandum

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<sup>10</sup> Pub. L. 105-17 contains the 1997 amendments to the IDEA.

stating that receiving state in interstate transfer situations is not required to adopt the sending state's IEP).

To the extent that Attachment 1 is construed to mean that parents must be given an opportunity to present their views regarding the need to include particular teaching methodologies in a child's IEP and that school officials must listen and consider those methodologies, this Court finds Attachment 1 to be persuasive. Construed in that manner, it is consistent with both the procedural requirements contained in 20 U.S.C. § 1415(b)(1) that are designed to afford parents a meaningful opportunity to participate in the process, and the requirement in 20 U.S.C. § 1414(d)(3)(B)(i) that the IEP Team "consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address . . . [negative] behavior."

On the other hand, if Attachment 1 is construed to require that the pros and cons of specific teaching methods be debated at IEP meetings, this Court does not find it to be persuasive. Such a requirement would go well beyond both statutory requirements and the intent expressed by Congress when it amended the IDEA in 1997.

While the IDEA requires school officials to "consider" strategies to be used in educating a handicapped child, when

appropriate, 20 U.S.C. § 1414(d)(3)(B)(i), it does not contain any requirement that strategies or anything else be debated at IEP meetings. See Westmoreland, 930 F.2d at 947 (school officials' review of written independent education evaluation (IEE) constituted sufficient "consideration" of the IEE). Indeed, while the legislative history to the 1997 IDEA amendments, which is referenced in Attachment 1, states that a "discussion" of teaching methodologies may be "appropriate," it indicates that such a discussion is not required:

The Committee [on Education and the Workforce] intends that, while teaching and related services methodologies or approaches are an appropriate topic for discussion and consideration by the IEP Team during IEP development or annual review, they are not expected to be written into the IEP. Furthermore, the Committee does not intend that changing particular methods or approaches necessitates an additional meeting of the IEP Team.

H. R. Rep. No. 105-95 at 101 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 99.

Even assuming, arguendo, that Warwick's failure to engage in a debate about the necessity of DTT violated some requirement that it "discuss" DTT, the violation was only a technical violation because it did not deprive N.B.'s mother of her right to meaningfully participate in the process of developing an IEP. N.B.'s mother spoke, at length, to the school officials on the IEP Team about the appropriateness of DTT and her desire for a

placement at Pathways. Tr. IV, 36-38; V, 125-126. In addition, she presented documents supporting her position. School officials listened to what she had to say (Tr. VIII, 27:22-24), reviewed the materials that she had submitted (Tr. VII, 171:5-20), and attempted to address the concerns that she expressed with respect to the adequacy of the proposed IEP and where N.B. would be placed (Tr. VIII, 28:5-24). Consequently, any failure by Warwick to engage in a debate regarding specific methodologies before the defendants had a chance to observe N.B. in a classroom setting does not alter the fact that N.B.'s parents were afforded an ample opportunity to meaningfully participate in the process by presenting their views regarding DTT and having their views considered by school officials. While the plaintiffs are entitled to substantively challenge the determination by school officials that the Scott School placement offered a FAPE, nothing further was required procedurally.

B. Substantive Adequacy of the IEP

In order to satisfy the IDEA's substantive requirements, an IEP must be designed to provide the child with "educational benefit." The test is not whether the IEP would "achieve perfect academic results" or whether it is "better or worse" than a proposed alternative. Roland M, 910 F.2d at 992-93.

Rather, the test is "whether [the IEP] was 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law." Id. at 992 (citations omitted).

As already noted, in determining whether an IEP is substantively adequate, the Court must give "due weight" to the findings of the administrative hearing officer. Id. at 989. The amount of weight that is "due" depends on the circumstances. See Westmoreland, 930 F.2d at 946.

Here, the hearing officer devoted very little attention to the substantive merits of Warwick's IEP because she found that procedural violations "invalidated [the plan] without reference to its substantive merits"; or, at least, "shifted to the school district . . . the burden of proof on the adequacy of the IEP." Dec. at 44. Thus, the hearing officer's discussion of the proposed IEP consists of approximately one page in which she rejects Dr. Mesibov's testimony that a Scott School placement would have been appropriate on the ground that Dr. Mesibov had not personally met N.B. or his parents and he did not observe Ms. Brennan's class until several months after the IEP was prepared. Dec. at 44-45. Therefore, the hearing officer concluded that Warwick had failed to prove "that the IEP program suggested for [N.B.] would have afforded him a FAPE." Dec. at 45.

After reviewing the administrative record, this Court finds, based on the preponderance of the evidence, that Warwick's proposed IEP satisfied the substantive requirements of the IDEA because it was reasonably calculated to provide N.B. with educational benefit. The reasons for that finding are as follows.

Dr. Mesibov testified that the Scott School was an appropriate placement for N.B. (Tr. XIX, 131:9-14) and that N.B. did not need DTT to make educational progress (Tr. XIX, 136:5-14). Dr. Mesibov arrived at those conclusions after reviewing the Georgia data and IEPs, the Pathways progress reports and the testimony of the other witnesses (Tr. XIX, 75:19-24), and after observing Ms. Brennan's classroom for 3½ hours (Tr. XIX, 108:9-10). He opined that the Scott School would have supplied N.B. with sufficient one-on-one attention to permit him to acquire and reinforce new skills (Tr. XIX, 136:5-14) and that it would have afforded N.B. an opportunity to interact with his peers (Tr. XIX, 130:19-24), something in which N.B. had shown an interest while in Georgia (Tr. XIX, 88:18-24). Dr. Mesibov also testified that the Scott School provided supplementary services targeted to N.B.'s individual needs. Tr. XIX, 132:2-16. Although Dr. Mozingo testified that N.B. needed DTT to make educational progress and that N.B. would regress at the Scott

School (Tr. I, 150-151), this Court finds Dr. Mesibov's testimony more persuasive for several reasons.

First, Dr. Mesibov's credentials are more impressive than Dr. Mozingo's and he appears to be more objective. Dr. Mesibov is a licensed, board certified, clinical psychologist with extensive experience in the education of autistic children. Tr. XIX:3-18. In addition, he is a widely-recognized expert in the field and he has testified as an expert witness in a number of cases. Tr. XIX, 18:17-20; see also Renner v. Bd. of Educ. of Pub. Sch. City of Ann Arbor, 185 F.3d 635, 644 (6<sup>th</sup> Cir. 1999). Dr. Mesibov, also, is the director of the TEACCH program conducted by the State of North Carolina and he has lectured extensively on both the TEACCH and DTT methods of educating autistic children. Tr. XIX, 7-10. Furthermore, he has published numerous papers in peer-reviewed journals about various methodologies for educating autistic children and he is the editor of the Journal of Autism and Developmental Disorders. Tr. XIX, 11-12, 15. On the other hand, although Dr. Mozingo appears to be a well-qualified behavioral psychologist, his credentials are not as impressive as Dr. Mesibov's and his background is essentially limited to DTT. Tr. I, 14-21. Indeed, he, understandably, appears to be an advocate for DTT, in general, and the Pathways program that he directed, in

particular. Tr. I, 150:21-24; 151:1-17. Unlike Dr. Mesibov, Dr. Mazingo is neither licensed nor board certified. Tr. I, 160:6-7; 161:21-22. Moreover, he has not published any articles about autism in peer-reviewed journals (Tr. I, 164:21-23) and has not testified as an expert on autism prior to this case (Tr. II, 138:5-8).

Second, Dr. Mesibov's opinion that the Scott School program would have educationally benefitted N.B. is buttressed by the record of success that Warwick has had in helping autistic children and by the testimony of school department personnel. The individuals most directly involved in the program included Dr. Champagne, who has more than twenty-two years of experience as a school psychologist and who has been board certified since 1984 (Tr. XII, 91-92, 97, 99); Marianne Fung, a licensed occupational therapist with more than fifteen years of experience (Tr. XVII, 45-47); and Kimberly Brennan, a certified special education teacher who has served in that capacity for some time and who has participated in numerous special education training sessions run by the Rhode Island Department of Education, including workshops focusing on the education of autistic children (Tr. VI, 20-22). They were part of a staff that the hearing officer, herself, described as "well-trained and caring educators." Dec. at 42. Dr. Champagne testified at

some length about how Warwick's program had reduced aggressive behavior by autistic children and helped them to obtain communicative skills which, in some cases, enabled them to be mainstreamed into regular classrooms. Tr. XII, 131:18-23; 132:3-19. Ms. Brennan and Ms. Rose, Warwick's speech and language pathologist, testified that all of the autistic children in the Scott School program had made significant progress. Tr. XVIII, 11:15-17 (Brennan); Tr. XVI, 11:14-16 (Rose).

Third, Dr. Mozingo, himself, conceded that DTT is not the only way to educate autistic children. Tr. I, 170:13-24; 171:1-2. That concession is supported by several decisions referring to both TEACCH and DTT as accepted methodologies for educating autistic children and citing a lack of consensus within the medical and educational communities as to which is more effective. Renner, 185 F.3d at 646; Dong v. Bd. of Educ. of Rochester Community Sch., 197 F.3d 793, 803-804 (6<sup>th</sup> Cir. 1999); J.P. ex rel. Popson v. West Clark Community Sch., 230 F. Supp. 2d 910, 939 (S.D. Ind. 2002); Pitchford ex rel. M. v. Salem-Keizer Sch. Dist. No. 24, 155 F. Supp. 2d 1213, 1230-32 (D. Or. 2001). Dr. Mozingo, also, acknowledged that N.B. has many characteristics typical of other autistic children (Tr. II, 19:9-14) and that the Scott School program has many features

that are effective, or even necessary, in educating autistic children. In particular, he mentioned the importance of a "structured" classroom in which autistic children can "learn to perform across different environments" (Tr. I, 177:15-18) and the daily teaching schedule (Tr. I, 178:14-23).

Indeed, there are many similarities between TEACCH and DTT, and the Scott School program proposed for N.B. incorporates some of the DTT techniques deemed, by Dr. Mazingo, as most important to N.B.'s educational progress. For example, the proposed IEP called for a significant amount of one-on-one behavioral instruction. In fact, the amount of one-on-one instruction provided in a typical TEACCH-based classroom (i.e. approximately 1/4 of the school day) is comparable to what had been provided to N.B. in Georgia. Tr. XIX, 121:11-17. Moreover, Ms. Brennan testified that, although the Scott School does not use DTT specifically, "when [she] teaches one-to-one with a child, [she] does stimulus response, reward kind of modalities, and takes data on the individual and how they're doing with that goal that [they're] working on." Tr. VI, 44:1-15.

Finally, the hearing officer's reasons for discounting Dr. Mesibov's testimony do not withstand scrutiny. While the fact that Dr. Mesibov did not personally meet with N.B. and his parents may be a factor to consider, it is not a ground for

rejecting his testimony. As previously stated, while a meeting with the child is desirable, it is not absolutely required in order to evaluate the child when recent evaluations made by qualified individuals have been reviewed. Here, Dr. Mesibov thoroughly reviewed the Georgia evaluation materials provided by N.B.'s mother as well as N.B.'s Pathway's progress reports and the testimony of other witnesses. Moreover, the fact that Dr. Mesibov's 3½ hour observation of Ms. Brennan's class did not occur until several months after N.B.'s IEP was prepared has little significance inasmuch as there is no indication of any interim changes in the manner in which the class was conducted. Furthermore, Dr. Mozingo's opinion that Scott School was not a proper placement was also based, in part, on a forty-five minute observation of Ms. Brennan's class that did not occur until after the proposed IEP had been prepared.

In short, the evidence shows that the Scott School placement would have provided N.B. with a FAPE.<sup>11</sup>

### **Conclusion**

For all of the foregoing reasons, this Court finds, based on the record evidence, that Warwick fulfilled its obligation

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<sup>11</sup>Because Warwick's IEP would have provided N.B. with a FAPE, the Court need not address whether Pathways would have been an appropriate alternative placement. See Carter, 510 U.S. at 15 (parents only entitled to reimbursement if IEP does not provide a FAPE and if private placement is appropriate under the IDEA).

under the IDEA to offer a free and appropriate education for N.B. Therefore, the hearing officer's decision is reversed; the plaintiffs' claim for attorneys' fees is hereby dismissed and the Clerk is directed to enter judgment in favor of Warwick on its counterclaim.

By Order,

\_\_\_\_\_  
Deputy Clerk

ENTER:

\_\_\_\_\_  
Ernest C. Torres  
Chief United States District Judge

Date: