

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

Student G. Doe

v.

Cumberland School Committee

DECISION

Held: Student Doe's parents will not be in violation of Rhode Island's compulsory attendance law for removing their son one (1) hour before the end of each school day so that he may receive three hours per day of intensive, home-based Applied Behavior Therapy "ABA" therapy. Student Doe's ABA services have been certified as medically necessary by his treating physicians and district officials acknowledge that, at this time, such services are medically necessary for him. Evidence in the record demonstrates that at this stage in his development, Student Doe must be released from school at 2:15 p.m. so that his three (3) hours of ABA therapy can be provided to him at home and at a time when he is not too fatigued or hungry and can, therefore, benefit from this therapy. The Cumberland School Department shall continue to cooperate with Student Doe's parents to facilitate his early release from school during the 2013-2014 school year.

DATE: December 4, 2013

Travel of the Case:

On August 15, 2013 Student Doe's parents filed with Commissioner Deborah A. Gist an Appeal and Request for an Interim Protective Order so that their son could continue to be released at 2:15 p.m. each school day so that he could receive ABA therapy at home starting at 3:00 p.m. and ending at 6:00 p.m. The district had notified the parents by letter dated June 6, 2013 that their request for continued early dismissal was denied because:

1. The information did not substantiate that this is a medically necessary treatment.
2. The information did not substantiate that the treatment could only be provided during school hours.
3. The information provided did not provide a specific start and end date of the treatment.

In his letter, Superintendent Philip D. Thornton expressed a hope that Student Doe's parents would be able to work out a schedule with the ABA service provider that did not overlap with school hours. (Pet. Ex. 1) The Superintendent indicated that the parents could appeal his decision by contacting the Rhode Island Department of Education.

By agreement of the parties, hearing on both the interim order request and the appeal were deferred until September 6, 2013 and concluded on September 9, 2013. The record in this matter closed on October 23, 2013 when written briefs were submitted. Both the Petitioners and the Cumberland School Department have indicated that their proof on the issues in this case is complete and have requested that the Commissioner's decision be a final one rather than an interim resolution. It was also agreed that until the Commissioner issues her decision, Cumberland will permit this student to be released from school at 2:15 p.m. each day.

Jurisdiction to hear this matter arises under R.I.G.L. 16-39-1.

ISSUE

Does Student Doe's need for Applied Behavioral Analysis (ABA) therapy, which his doctors have certified as medically necessary, require that the Cumberland School Department release him from school early each day?

Findings of Relevant Facts:

- Student G. Doe is nine (9) years old and currently is in the third grade in the Cumberland school system. He lives with his parents and his sister. At age three, Student Doe was diagnosed with autism and he currently has an Individualized Education Program (IEP) that provides him with special education and related services. Pet. Ex.1 and 7.
- Since the age of four, Student Doe has received intensive, one-on-one, home-based ABA therapy, first at a level of forty (40) hours per week and gradually decreasing to fifteen (15) hours per week. Tr. Vol. I, pp. 93 and 97; Pet.Ex.3.
- When he attained age six (6) the district permitted him¹ to have a reduced school week so that he could receive all of the hours for which he was approved to receive ABA therapy, thirty-two hours per week. He attended three (3) out of the five (5) mornings of kindergarten during the 2010-2011 school year. Tr. Vol.I, pp. 97-100.
- In July of 2011, shortly before he began first grade, Student Doe's ABA therapy services were reduced to twenty-eight (28) hours per week. During the 2011-2012 school year he was released from first grade at 2:15 p.m. even though the regular elementary school day ended at approximately 3:00 p.m. He then received a three (3) hour block of ABA therapy from 3:00 p.m. to 6:00 p.m. Tr. Vol. I, pp. 100-102. Pet. Ex.3; Student Doe continued to receive ABA services during the summer of 2012. Tr. Vol. I, p. 102.

¹At that time Cumberland school officials were similarly concerned about the compulsory attendance issues raised by the parents' request for a modified kindergarten schedule, but after discussions with RIDE staff, Student Doe was permitted to attend kindergarten three mornings per week. Tr. Vol. I, pp. 97-99; Vol. II, pp14-15.

- In July of 2012 Student Doe’s ABA therapy services were reduced to fifteen (15) hours per week. During the 2012-2013 school year he was released from second grade at 2:15 p.m. even though the regular elementary school day ended at approximately 3:20 p.m. He then received a three (3) hour block of ABA therapy from 3:00 p.m. to 6:00 p.m. Tr. Vol. I, pp. 107-108; Pet. Ex.3.
- Despite the three (3) successive school years in which Student Doe’s academic schedule has been reduced, Student Doe has made documented progress in both oral reading and comprehension, written language and made significant gains in math. Pet. Ex. 7. Tr. Vol. II, pp. 11-13.
- After inquiring as to the process to be followed for Student Doe’s early release during the subsequent school year, Mrs. Doe was advised in mid-May that the Superintendent would consider written requests for early dismissal “in cases of a medically-required treatment which can only be provided during school hours”.² The letter, from the Deputy Director of Special Education, Fred Schockaert, directed Mrs. Doe to send her request for early dismissal with medical documentation specifying a) that the request is based on a medically required treatment; b) that the treatment can only be provided during school hours (specify start and end time and which day(s) of the week); and c) start and end date of the treatment.³ Pet. Ex. 1; Tr. Vol. I, p.113.
- On or about May 29, 2013 Mrs. Doe submitted a written request for Student Doe’s early dismissal and attached a letter from his pediatrician supporting his continued release from school at 2:15 so that he could attend his ABA (therapy) through the end of the 2013-2014 school year. Pet. Ex. 1.
- On June 6, 2013 Superintendent Philip D. Thornton wrote that he had to deny the request for early dismissal because:

² The May 14, 2013 letter from Mr. Schockaert explained that early release was no longer considered an IEP matter, but rather a compulsory attendance issue.

³ In an email on May 14, 2013, Mr. Schockaert explained that the new procedure had been put in place because of an increase in requests for early dismissal as a result of the R.I. General Assembly passage of the ABA health insurance bill (R.I.G.L. 27-20.11-1 et seq.) that mandated insurance coverage for various treatments for Autism spectrum disorders, including applied behavior analysis, provided that such treatment “is at all times medically necessary and appropriate”.

1. The information provided does not substantiate that this is a medically necessary treatment.
 2. The information provided does not substantiate that the treatment can only be provided during school hours.
 3. The information provided does not provide a specific start and end date of the treatment. Pet. Ex. 1.
- Prior to the beginning of this school year Student Doe’s parents obtained additional documentation from his treating physician at the Neurodevelopmental Center of Memorial Hospital of Rhode Island, indicating that his current protocol and intensity of ABA therapy were medically necessary.⁴ This doctor’s letter dated July 12, 2013 also supported the parents’ request for a continuation of the intensity of the ABA services, based on Doe’s positive response and the progress he has made. Pet. Ex.1.
 - Student Doe’s current schedule provides him with thirty (30) minutes to “unwind” and have a snack after he returns home from school at approximately 2:30 p.m. each day and before he begins his ABA therapy at 3:00 p.m. Tr. Vol. I, pp. 118-119. This schedule also permits him to receive this therapy in the three (3) hour blocks of time five (5) days per week that have been found to be the level of “intensity” that is medically necessary for him (Pet. Ex. 1 letter of Dr. Viren D’Sa dated July 12, 2013) and at the minimum intensity recommended by his ABA treatment consultant, Robert Kidd (Tr. Vol. I, pp. 58-60).
 - Student Doe’s current schedule of ABA therapy incorporates frequent performance breaks to maximize his attention and concentration, but even so, his persistence and ability to respond start to dwindle as the session goes on. He becomes more fatigued and hungry. Tr. Vol. I, pp. 60-63; 120-123.
 - Student Doe’s mother’s opinion is that he is most receptive to his ABA therapy with his current early dismissal at 2:15 p.m.; she is unsure as to whether a

⁴ Counsel for the Cumberland School Department found the July 12, 2013 from Student Doe’s doctor sufficient to establish that “the ABA (therapy) is medically necessary as described by him” and so stipulated at the September 6, 2013 hearing. Tr. Vol. I, pp. 7 and 109.

dismissal time of 2:25 p.m. would alter his routine and ABA-therapy schedule in such a way that it would be equally beneficial to him. She finds that “he gets exhausted” and has difficulty “making it” until the end of the current three hour block of therapy at 6:00 p.m. Tr. Vol. I, pp. 124-127.

- Superintendent Thornton testified that he would defer to Student Doe’s parents as to how much time he needs to unwind from the time he gets home to the time he begins his ABA services. Tr. Vol. II, p. 92. The Superintendent also testified that he did not have any knowledge, other than through Mrs. Doe’s testimony, as to when in point of time Student Doe became so hungry that he was no longer receptive to therapy. Tr. Vol.II, pp. 94-95. He indicated his agreement with the notion that there is a “point of diminishing returns” when one is attempting to teach a young child who is becoming fatigued. Tr. Vol.II, p.95.

Positions of the Parties:

The Petitioners

In her brief, counsel for the Petitioners asserts that Student Doe’s daily receipt of ABA therapy has been shown to constitute good cause for his dismissal at 2:15 p.m. instead of at 3:20 p.m. each school day. The Petitioners acknowledge that Rhode Island’s compulsory attendance law requires that every child between the ages of 6 and 18 attend school “during all the days and hours that the public schools are in session...” They note, however, that there is a relevant exception to such attendance if the parent (or other person having control of the child) shall prove:

that the physical or mental condition of the child was such as to render his or her attendance at school inexpedient or impracticable... then attendance shall not be obligatory...R.I.G.L. 16-19-1.

It is Student Doe's medical condition, autism, and the ABA therapy that is necessary to treat it, that makes his attendance at school beyond 2:15 p.m. both inexpedient and impracticable.

The record here establishes not only that Student Doe's ABA therapy is medically necessary, but that he must receive this therapy each week for a total of fifteen hours in three-hour blocks of time. The evidence is that "routine" (i.e. non-emergency) therapy is available from his provider only during the school week. The evidence further establishes that at this stage in his development, Student Doe cannot benefit from ABA therapy after 6:00 p.m. because he becomes too hungry and fatigued by this time each school day. At his age, he also needs approximately thirty (30) minutes to rest at the end of his school day before beginning his ABA therapy. These facts, taken together, render his attendance in school after 2:15 p.m. both "inexpedient" (defined as inadvisable or inconvenient) and "impracticable" (defined as impractical or unwise). Stated another way, the record establishes that there is good cause for Student Doe to be released at 2:15 p.m. each day and Cumberland's opposition to such request, in light of the proof in this case, is an unreasonable exercise of its discretion.

The Petitioners point out that Cumberland has largely discounted the educational benefits of Student Doe's ABA therapy, despite the fact that it has contributed significantly to many areas of his educational progress, both academic and functional. His progress has been measured and is documented in his current IEP. Nonetheless, Cumberland's school officials refuse to recognize the value of ABA therapy to Student Doe, and so from their perspective, Student Doe's early release marks the end of the time during which he is "exposed to teaching and learning". This position is unreasonable, especially if one considers the fact that many courts have ordered school districts to provide, or provide reimbursement for, ABA therapy based on its educational benefits. Its proven effectiveness was the basis for the General Assembly's 2011 decision to mandate coverage for ABA therapy, along with other services to children with autism through the age of fourteen (14).

Student Doe's early release will cause him to miss a portion of the school wide "reading intervention" program and written language activities in the afternoon. Even so,

there is no basis on which to infer that his progress in reading and written language will be adversely affected. Per his IEP, Student Doe will continue to receive a full hour and a half every day of “explicit individual and small group reading instruction” as well as small group instruction in writing three days per week. Both of these classes are conducted by his special education teacher and are held in the morning. This instruction, together with focused work on reading and writing skills during his daily one-on-one ABA therapy sessions, has produced significant progress in reading, written language, as well as math.

As for the district’s concern that Student Doe will miss required instruction in science, counsel for the Petitioner argues that rather than pointing to this as a reason to deny his request for early release, school officials should be putting their energies into finding an alternate means of providing him with this instruction. A disabled student’s medical needs (in this case the need for ABA therapy from 3:00 p.m. to 6:00 p.m. each day) prevent him from being in school when the “Gemsnet” science program is taught. Under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §504, school officials are required to develop an alternate means of providing this instruction to him as a “reasonable accommodation”. Student Doe is thus entitled to have the “Gemsnet” science program that his classmates receive at the end of the school day delivered to him at some other time-perhaps even incorporated into his morning reading and writing program.

If Cumberland develops a plan to accommodate Student Doe’s need for flexible and individualized delivery of science instruction, concerns that he might otherwise miss the “building blocks” that are essential to his grasp of future science concepts will be addressed.

School officials have expressed concern that Student Doe’s continued early release so that he can receive medically-required treatment could, if it persists, lower his scores in reading, writing and science. A student’s performance on assessments in these subjects are a factor in determining his eligibility for graduation and have an impact on the accountability measures in place for his teachers, school and district. Counsel for the Petitioners submits that there is no evidence that Student Doe’s early release will

negatively impact his performance on state assessments. In fact, because of the intensive and specialized ABA therapy he receives, there has been an ongoing focus on functional academics and measurable academic progress. Even if this were not the case, it is simply not reasonable to argue that a student should be deprived of medically-necessary treatment because if the child remains in school longer, the school and its teachers will score better on their own assessments.

According to the testimony, the fact that Student Doe's therapy will be of indefinite duration was a factor in denying this request. Counsel for the Petitioners submits that requiring a specific end date is a policy that arbitrarily discriminates against children with long-term and chronic medical conditions, who many times cannot provide this information. Such discrimination violates both Section 504 and the Americans with Disabilities Act. Under the circumstances here, Student Doe is eligible for ABA therapy for as long as he needs it, and even if his treatment extends over the course of several years,⁵ he is entitled to early release during whatever period of time this may be. There is also the distinct possibility that in future years the intensity of Student Doe's therapy may decrease (as it has over the years) or his increasing maturity may permit him to receive treatment later in the evening. In either case, he would not then require early release from school.

School officials have made the argument that granting the Does' request may create a precedent that is used to support his request for release from school for other therapies – such as speech or occupational therapy. Student Doe's parents have never requested early release from school for these other services, so to anticipate that he will do so just because this request for early release is approved is speculative at this point. Instead of using unlikely possibilities as the basis for denying this request for early release, counsel argues that school officials should fairly consider this request on its own merits.

Similarly, the argument that a precedent will be set for other autistic students to be entitled to early release, even those whose current schedule for ABA therapy does not

⁵ The legislation requiring insurance coverage for medically-necessary and appropriate ABA therapy and other services for the treatment of Autism spectrum disorders mandates coverage until the child reaches age fifteen (15). R.I.G.L. 27-20.11-3.

require them to miss school time, is not valid. If Doe's request for early release is approved, it will not set a precedent that "every child for whom ABA is a medical necessity must be released from school early," but only that Student Doe's individual medical needs at this time require that he be released from school at 2:15 p.m. in order for him to benefit from his ABA therapy from 3:00 p.m. to 6:00 p.m. Student Doe's request for early release must be decided on the basis of his individual needs- not on the basis of a blanket policy denying early release for such therapy or by reliance on an irrebutable presumption that if other autistic students don't require early release, then Student Doe should be able to receive ABA services without missing a portion of the regular school day. Because he is a student with a disability, Section 504 requires that Doe's request be determined on the basis of his unique needs, not on generalizations or blanket rules based on a student's diagnosis.

To the extent that Cumberland seeks guidance from RIDE on each of the principles at issue in this appeal, the Petitioners agree that such guidance should be provided and further argue that each of these issues should be resolved consistent with the arguments they have presented.

The Respondent:

The school district does not dispute the medical necessity of Student Doe's ABA treatments; however, counsel argues that allowing the Petitioners' request will not only adversely impact his academic progress but also create a precedent that may open the floodgates to others requesting early release in situations in which the release is not necessary or advisable. Cumberland will be required to expend time and resources to deal with these requests. Implicitly the district argues that a general rule or presumption should prevail so that Cumberland (and other districts dealing with such requests) can require that ABA therapy and other treatments for which insurance coverage has been mandated by the R.I. General Assembly be provided so as not to interfere with the school day. Although they respect the Petitioners' perspective on the importance of ABA therapy to their son, district officials must strike an equitable balance between the

research-based schooling that they are statutorily obligated to provide and Student Doe's receipt of ABA therapy. If the Commissioner denies this appeal, Student Doe can still receive both the educational program mandated by state law and the therapy that has proven so beneficial to him.

The Respondent does not share the optimistic view that continued early release from school will not disadvantage Student Doe from an educational standpoint. The Petitioners' premise is that Student Doe's early release, and his loss of the equivalent of thirty (30) days of instruction over the course of the school year, will not adversely affect his academic progress. This premise runs contrary to the proven relationship between length of instructional time and academic progress. Under his current schedule⁶ Student Doe misses roughly seventy-five (75%) per cent of reading intervention and the entire third-grade science curriculum on a daily basis. Cumulatively, this amounts to approximately one hundred and ninety-seven (197) hours, or thirty (30) days absent from school. Although the ABA therapy provided by his caregivers may be beneficial to Student Doe, it is not a substitute for educational instruction by certified educators. Stated another way, it is time during each school day when Student Doe is not in school and not exposed to teaching and learning.

The implications for Student Doe are that he will not be provided with the instruction designed to improve his reading and writing skills and will miss out entirely on essential components of the science curriculum. When his proficiency in these subjects is measured by standardized tests administered to all students in grade four, it is unlikely that he will be able to demonstrate proficiency. If the required curriculum is not delivered to him over the course of several years, it is unlikely that he will be able to demonstrate the level of proficiency needed to obtain a high school diploma. While it is true that Cumberland officials permitted an early release from kindergarten through second grade, a decision to continue his early release in grade three would not be prudent, given the increasing academic rigor of the elementary program and the fact that state assessments of his progress will be conducted in grade four.

⁶ During the pendency of this matter, the district agreed to release Student Doe at 2:15 p.m. every weekday so that he could attend his ABA sessions, which currently begin at 3:00 p.m. The school day ends at 3:20 p.m.

Continuing Student Doe's early release has negative implications for Student Doe's teachers, administrators and the Cumberland school district as well. The teacher evaluation rubric developed by RIDE places significantly more emphasis on student performance in assessing the performance of educators. Thus, evaluation of Student Doe's teachers will likely be significantly skewed by what will undoubtedly be his poor performance in science on the NECAP test. It is true that Student Doe's lowered performance on state assessments is theoretical at this point, but it is certainly predictable that he would not perform at grade level in subjects in which he has received little or no instruction. The district submits that it is simply unfair to test Student Doe, or any student, in a subject such as science when he has not attended science class. Furthermore, there is no indication, at least according to current RIDE Guidelines,⁷ that Student Doe would be entitled to an exemption from testing in Science in grade four. All indications are that even if his receipt of medical treatment causes him to miss instruction in this subject during his entire year in grade three, he would still be required to take the NECAP at the beginning of grade four. The predicament created both for this student and his teachers will be avoided if his ABA therapy schedule accommodates his attendance for the entire school day.

It is the schedule for Student Doe's ABA therapy that is at the crux of this dispute. The position of the district is that a full regimen of ABA treatment is accessible to Student Doe if it is scheduled to begin at 3:30 p.m. or 4:00 p.m. Since this is feasible, his attendance at school beyond 2:15 p.m. is obligatory. Minor adjustments to his established routine would enable him to complete his school day and then begin his ABA therapy at either 3:30 p.m. or even 4:00 p.m., instead of 3:00 p.m. as it currently begins. Since it is possible to alter the schedule for ABA therapy, the district argues that our compulsory attendance law requires Student Doe to be in attendance until the end of the school day. If the Commissioner adopts "impossible to do or carry out" as the definition of

⁷ The district placed into evidence S.C. Ex. A, "Rhode Island State Assessment Program; 2012-2013 State-Approved Special Considerations for Statewide Assessments: Guidelines and Forms; New England Common Assessment Program (NECAP) Testing and RI-Alternate Assessment (RIAA); Fall 2012 – Spring 2013". Evidently, the fact that a student's medical condition (or treatment for that condition) may have caused him or her to miss all, or a substantial portion of, the instruction in a tested subject is not currently the basis for an exemption from testing in that subject.

“impracticable” as that word appears in R.I.G.L. 16-19-1, then attendance at school must be “essentially impossible” (Cumberland’s Brief at page11) or it is obligatory. The district submits that the Petitioners have failed to prove that Student Doe’s attendance at school after 2:15p.m. is “essentially impossible”.

Counsel for the district points out that, other than Student Doe’s mother, every witness who testified at the hearing, including his treatment consultant, testified that it is possible or feasible for Student Doe to remain in school until his academic program ends. From a logistical perspective, his therapy could begin as late as 4:00 p.m. Cumberland questions the inflexibility of the routine that his mother described in her testimony. There is no objective evidence that a full half-hour at home is needed in order for Student Doe to have a snack and “unwind” before starting therapy. The district suggests that Student Doe could have a snack in the car and play portable video games during the drive home. He could then stay at school until his academic program is complete. If he started therapy a little later, he would not miss out on science instruction. Counsel notes that there is no law mandating that students receive ABA therapy, let alone that they receive it at a particular time of day. Conversely, Rhode Island law is quite clear that public education is compulsory, unless attendance is essentially impossible.

There is no basis for the Commissioner to rule that Student Doe’s ABA therapy should take precedence over the basic education program and Individualized Education Program that Cumberland stands ready to provide. With minor alterations to his routine, Student Doe could participate in fifteen (15) hours per week of ABA therapy and leave school at or near the regular dismissal time. Further, there is no evidence that the fatigue that Student Doe experiences later in the day is due to his schedule and there is no reason to conclude that his fatigue would worsen if his treatment started later in the day. In fact, his treatment consultant suggested that fatigue could be caused by the challenging nature of the ABA therapy itself and the demands made upon Student Doe throughout that three (3) hour block of time.

If fatigue were to become a factor in Student Doe’s receipt of ABA therapy later in the day, then the district suggests that the length of the therapy sessions could be reduced. Counsel for the district notes that there was no expert testimony presented to

support the Petitioners' premise that Student Doe would not benefit from ABA therapy provided to him for fewer than three hours per day, five days per week. Thus, reducing the three-hour block of time in which he receives therapy would be another strategy to enable Student Doe to participate in the compulsory school day. If it would not be detrimental to reduce his ABA therapy by fifteen (15) minutes per day (and there is no evidence that it would be), then the Commissioner should require Student Doe's attendance for all the hours that school is in session.

If the Commissioner were to permit Student Doe to leave school at 2:15 p.m. each day, there are negative implications in terms of how his lowered performance on state assessments would be viewed in the state's accountability system. Counsel argues that the Petitioners' request for early release is a tacit, but impermissible request for their child to be exempted from participating in Rhode Island's NECAP Assessment. The exemptions from state testing requirements that are currently in place clearly would not apply to Student Doe. His anticipated low performance on such assessments would reflect the decrease in instructional time provided to him by certified educators. In the case of science, his performance on the NECAP would reflect the absence of any instruction whatsoever. It is unfair to subject Student Doe to testing when he has not been adequately prepared. Allowing him to take the NECAP assessment with minimal reading preparation and no science preparation minimizes the importance of the BEP and borders on educational malpractice. In addition, his inability to succeed when his progress is measured by state assessments will negatively impact his teachers, the school and the Cumberland School District because low scores will negatively affect their evaluations and ranking, through no fault of their own.

Finally, Cumberland argues that granting the Petitioners' request for early release will set a precedent that will be relied upon by other Rhode Island families who will seek to have their children receive ABA therapy (and a host of other treatments for which insurance coverage is now mandated) at a more manageable time of day. The General Assembly's decision to require reimbursement of the cost of ABA therapy was not intended to permit parents to pull their children out of school. Sound public policy requires school districts to provide high quality education to all students. This cannot be

achieved by allowing early releases or alternative schedules. In each and every case, there must be a determination that the service in question can be delivered only during a time that conflicts with attending school.

For the foregoing reasons, the Cumberland School District requests that the Commissioner deny the Petitioners' request for early release of their son.

DECISION

There is no dispute in this matter that Student Doe's ABA therapy is medically necessary. The letter that the parties agree establishes this fact also indicates:

Given (Student Doe's) positive response to his current protocol and intensity of ABA (3 hours a day, 5 days per week) and the progress he is making including its impact on activities of daily living, I strongly consider this therapy medically necessary. As I have done in the past, I support his parents' request for a continuation of the intensity of said services.

Additionally, this is also a request for (Student Doe) to continue being provided the services at a time of the day when he is accessible to the therapist and therapy. Please consider accommodating his academic curriculum to allow him the time for these services. His parents are likely a good resource for discussing the appropriate time of day when the ABA services may be most beneficial through (Student Doe's) responsiveness to therapy. (Petitioners' Ex.1, letter of Dr. Viren D'Sa dated July12, 2013)

This medical opinion, together with the testimony of Student Doe's treatment consultant, establishes the basis for our finding that it is medically necessary for Student Doe to receive fifteen (15) hours of ABA therapy delivered in blocks of three (3) hours.

According to his doctor, the effectiveness of this treatment depends on him being provided services “at a time of day when he is accessible to the therapist and therapy”. As the letter also suggests, his parents will be a good resource for establishing the appropriate time of the day when the ABA services will be most beneficial.

In this case, the parent did prove to be a reliable resource on the most beneficial time for her son’s receipt of ABA therapy. Her credible and uncontradicted testimony was that her son is not receptive to therapy provided at a time of day when he is too tired or hungry to do such challenging work. Her testimony establishes that her son is accessible to the therapist and therapy when it begins no later than 3:00 p.m. She also testified that he needs to “unwind” for a half hour at home and have a snack in order to be ready to participate in the three-hour therapy session. We thus find that ABA therapy is most beneficial for Student Doe when he starts it no later than 3:00 p.m.

The district takes the position that reducing the length of therapy sessions, eliminating “down time” at home before each session begins, or starting therapy later in the day would eliminate the need for his early release. Some or all of these measures would make his attendance for the entire school day possible. The district focuses on the word “impracticable” as it appears in the compulsory education statute.

While it is true that attendance in school is required unless it would be “impracticable,” attendance is also not required if it would be “inexpedient”. The district argues that inexpedient should be defined as “inadvisable,” but yet its position that Student Doe is not entitled to early release this year ignores substantial evidence in this record that it would be inadvisable for this student to do what Cumberland suggests. According to the evidence in this case, a reduction in the intensity of ABA services, scheduling it later in the day or eliminating the one-half (1/2) hour of time for this nine (9) year old child to “unwind” at home would reduce the effectiveness of this medically-necessary treatment. We find it inadvisable to compromise the effectiveness of medically-necessary treatment. Student Doe’s parents have proven that it is inexpedient for him to be in attendance at school after 2:15 p.m. during the 2013-2014 school year. The factors on which this finding is based are likely to change each year as Student Doe

matures. The parties should review his entitlement to early dismissal no less than annually.

The district's concern as to a precedent and the potential proliferation of early release requests from parents is well taken. However, each request for early release must be reviewed and determined on its own merits. Individualized determinations must be made as to whether a child's physical or mental condition is such as to render his or her attendance at school inexpedient or impracticable. Under the statute, the parents have the burden of presenting school officials with sufficient documentation and other information to establish that their child is not required to be at school "during all the days and hours that the public schools are in session..." R.I.G.L. 16-19-1 (a).

Concerns with respect to the instruction that Student Doe will miss due to his early release this year may be addressed by the IEP team. Members of the team, including Student Doe's parents, should develop an alternate means of providing missed instruction as a reasonable accommodation to his disability. The parties have a long history of cooperation and, if they continue to work together, will determine an appropriate way of addressing this issue. In this way, Student Doe will not miss any components of the Basic Education Program. He will also continue to be provided with the free appropriate public education to which he is entitled. We anticipate that the district's concerns with respect to state assessments and their implications for educator evaluation and school ranking will also be addressed in this way.

For the foregoing reasons, the appeal of the Petitioners is sustained.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

Date: December 4, 2013

Deborah A. Gist, Commissioner