IOWA DEPARTMENT OF EDUCATION

In re: [B.T.], a child,	)	
	)	Dept. Ed. Docket No. SE-384
[B.T.]'s Parents,	)	(DIA No. 12DOESE015)
	)	
Complainants,	)	
	)	
v.	)	
	)	**DECISION**
Waukee Community School District and	)	(Redacted for Publication)
Heartland Area Education Agency,	)	
	)	
Respondents,	)	
	)	

Course of Proceedings

[Parents] filed a Due Process Complaint on November 28, 2012, on behalf of themselves and their daughter [B.T.] Jurisdiction is based upon section 1415 of the Individuals with Disabilities Education Act [IDEA], 20 U.S.C. § 1415, and Iowa Code section 256B. [B.T.] is eligible for services under the IDEA due to a discrepancy from peers in the area of reading fluency. The Complainants challenge the Respondents' denial of their request for vision therapy as a related service under the IDEA.

A prehearing conference call was held on December 14, 2012. All parties participated in the conference. The parties had conducted a resolution meeting on December 13, 2012, and were willing to participate in facilitated mediation. They also agreed upon dates in February of 2013 for the evidentiary hearing, if needed. The case was not resolved through mediation. The Respondents' made a continuance request, which was not resisted. Upon agreement of the parties the hearing was rescheduled for April 2013.

The hearing was conducted at the offices of the Heartland Area Education Agency in Johnston, Iowa on April 4th and 5th, 2013, before Administrative Law Judge Christie Scase. Complainants [ ] participated in the hearing and were represented by attorney Curt Sytsma. Roxanne Cummings, Executive Director of Student Services for the Waukee Community School District was present throughout the proceeding as a representative for the district. [The building principal] was also present for the district during much of the hearing. Cindy Yelick, Executive Director of Instructional Services, was present representing Heartland Area Education Agency. Attorney Miriam Van Heukelem appeared as counsel for the school district and AEA.

Testimony was received from [B.T.'s mother]; Beth Triebel, O.D.; Gwen Woodward, a regional director for Iowa Educational Services for the Blind and Visually Impaired;

Christine Short, a teacher of the visually impaired employed by the Iowa Braille School and Heartland AEA; Heartland AEA employees Cindy Yelick and Winifred Robinson; Waukee school district teachers [Ms. F.] and [Ms. I] and [the building principal].

The following school records and documents related to this proceeding were offered into evidence by the Respondents and admitted into the record without objection: (1) a bound volume containing pages 1 – 427; (2) a second bound volume containing updated records, numbered as pages 428 – 472; (3) a DIEBELS newsletter from August 2012, numbered as pages 473 – 474. The Complainants offered a bound volume of exhibits numbered as pages 1 – 94 and additional documents numbered as pages 95 – 111, which were also admitted into the record without objection. The Complainants also offered one demonstrative exhibit that is included in the hearing record for reference.

The evidentiary record was closed at the end of hearing on April 5, 2013. The parties submitted briefs in lieu of closing statements. The case was submitted upon filing of the Complainants' Reply Brief on May 24, 2013. The parties agreed to a continuance of the proceeding through June 28, 2013, to allow time for drafting of the decision.

Findings of Fact

General information: [B.T.] was born [in the spring of] 2002. She is now 11 years old. [B.T.] is the daughter of [ ]. She lives with her parents and older sister within the boundaries of the Waukee Community School District and Heartland Area Education Agency. [B.T.] has attended [the same] Elementary School in the Waukee district since she began school.

During the 2012-2013 school year, [B.T.] was in 5th grade. She is described by her classroom teacher as a hardworking student who is generally positive, engaged, and motivated, but sometimes shy – appearing more comfortable with small group activities. [ ] has been the principal [of the Elementary School] for seven years and has known [B.T.] since she was in kindergarten. He describes [B.T.] as a kind, caring student who is a bit reserved, but very social with many friends. She participates in band and soccer and is a very good problem solver in math, her strongest academic area. Her favorite classes are math and physical education. (Tr. 51, 403-04, 453-54; Resp. at 115)

Reading difficulty and Special Education: Educators working with [B.T.] first had concern about [B.T.]'s reading skills when she was in 1st grade. [B.T.] was referred for a fluency intervention in September of 2008 and began receiving general education assistance in the reading lab. At the end of the year, reading teacher [Ms. A.] reported: "Although she has made good growth she continues to mix fluent reading with spots that are choppy." (Comp. at 3)

A *Supplemental Instruction Problem Solving Plan* was developed for 2nd grade - the 2009-2010 school year – and [B.T.] continued to work with [Ms. A.] in the reading lab

to increase her oral reading fluency. (Resp. at 134-139; Tr. 30) At the beginning of [B.T.]'s 3rd grade year in the fall of 2010 the supplemental instruction plan was revised, with reading fluency instruction to be provided by [B.T.]'s regular classroom teacher, [Ms. S.], and parent volunteers for the remainder of the 2010-2011 school year, instead of by [Ms. A.]. (Resp. at 142)

[B.T.] continued to struggle with reading fluency throughout 3rd grade. [B.T.'s mother] noticed that as her reading speed increased [B.T.] would miss little words or mix up letters in words. [B.T.] had been diagnosed as having a lazy eye in the summer before she entered 1st grade. This condition was relatively minor and resolved following three months of patching [B.T.]'s stronger eye for two hours a day. During 3rd grade, [B.T.]'s mother began to worry that her reading difficulty might be related to her eyesight. (Comp. at 1; Tr. 52-53)

In March of 2011, [B.T.'s mother] had [B.T.]'s vision examined by pediatric opthamologist Donny Suh, M.D., at the Wolfe Eye Clinic. He found that she had 20/20 visual acuity. The doctor noted "exophoria" on the billing slip, but did not discuss the term with [B.T.'s mother]. [She] was relieved by the outcome of the vision test and did not ask further questions at that time. (Comp at 1, 4, Tr. 31-32, 55)

While testing [B.T.] to gather benchmark data at the beginning of 4th grade, classroom teacher [Ms. D.], expressed concern about [B.T.]'s reading accuracy to [her] parents and they asked [Ms. D.] about getting extra help for [B.T.] through the AEA. The teacher initially told them that [B.T.] probably would not qualify for more assistance. Before further action was taken by the school, [B.T.'s parents] decided to look for a tutor. They hired [Ms. L.], a first grade teacher in [a neighboring] school system, to work with [B.T.] on fluency activities. In October of 2011, [the tutor] began working with [B.T.] once each week. The weekly tutoring sessions continued throughout 2012, including during the summer months, and were ongoing at the time of hearing. (C2; Tr. 36-37)

[B.T.'s parents], [her] classroom teacher, [the building principal], and a consultant from the AEA attended a Disability Suspected meeting on November 12, 2011. The meeting resulted in a referral for an educational evaluation, based on concerns about [B.T.]'s reading fluency and spelling skills. The evaluation referral form explains the reading fluency concern as follows:

> [B.T.] has an average score of 46 correct words per minute [cwpm] with less than 95% accuracy . . ., which places her at the 3rd percentile. Same age peers are scoring 83 to 131 cwpm with 95% or higher accuracy with 106 being at the 50th percentile. When given the NWEA/MAP test, [B.T.] scored at the 51st percentile [on reading] for fall of 2011. Her benchmarked reading level is Level K. Same age peers are reading grade level material fluently and accurately at Level P.

(Resp. at 26, 123-130) [B.T.]'s parents gave consent for a full educational evaluation,

which was conducted by AEA educational consultant Suzanne Howard.

The Educational Evaluation Report was reviewed at an IEP Team meeting on December 20, 2011. The evaluator found [B.T.]'s strengths in the reading area were her comprehension and accuracy, with the exception of decoding multi-syllabic words. The primary concern was reading fluency, particularly [B.T.]'s ability to read grade level material with automaticity. Although [B.T.]'s fluency rate increased from 46 correct words per minute at the beginning of the her 4th grade school year to a median of 62 cwpm on three DIBELS assessments performed in November and 64 cwpm on DIBELS NEXT, there was still significant gap between [B.T.]'s reading automaticity and that of her peers. Peers were reading as many as 110-130 cwpm, with a median of 97 cwpm on DIBELS NEXT. (Resp. at 102, 114-119)

[B.T.] was determined eligible to receive special education services and an initial IEP was developed during an IEP team meeting on December 20th, 2012. The IEP included only one goal, addressing reading fluency: "By 12/20/2012, given three fourth grade reading passages, [B.T.] will have a median score [of] 97 words per minute for three consecutive charting days." (Resp. at 102) [B.T.] was to receive 20 minutes per day of specially designed reading instruction taught in the special education setting. The IEP also provided for accommodations to allow extended time to complete assignments and assessments. (Resp. at 88)

[B.T.] made consistent progress toward her IEP goal during the remainder of 4th grade. During the last four weeks of the school year she achieved scores of 95, 107, 98, and 90 words per minute on writing probes, with accuracy of 96 to 98%. (Resp. at 108-109) The Waukee district uses the Fountas & Pinnell Benchmark Assessment System for district-wide benchmarking tool in oral reading fluency and comprehension. The district-wide goal is for students to enter 4th grade at level P. (Resp. at 176) At the beginning of 4th grade in the fall of 2011, [B.T.] was reading independently at a Fountas & Pinnell Level K, at rate of 77 correct words per minute with a fluency rating of 0. (Resp. at 191-194) On April 20, 2012, at the last test-point of the school year [B.T.] was reading independently at level P at the rate of 56 wpm with a fluency rating of 1. (Resp. at 209-212) (Resp. at 221-223)

When the Fountas & Pinnell benchmark assessment was administered in September of 2012, [B.T.] was found to be reading independently at level R at a rate of 92 wpm with a fluency rating of 1. Her IEP remained unchanged until October. On October 19, 2012, as IEP team meeting was held to discuss her progress. She was reading at a rate of 95 words per minute on fourth grade oral reading fluency probes, very near the existing IEP goal of 97 wpm. The team considered staffing [B.T.] out of special education in the area of reading, but rejected the idea because she continued to be discrepant from peers. The district benchmarks for 5th grade are 111 words per minute for fall, 120 wpm for winter, and 130 wpm for spring. The focus of [B.T.]'s IEP goal remained reading fluency. The goal was revised to: "By 12/20/12, given three fifth grade reading passages, [B.T.] will have a median score of 120 words per minute for three consecutive

charging days." The services and accommodations in the IEP remained essentially unchanged. (Resp. at 73, 75, 80-81)

Vision therapy request: Despite assessment data showing progress, [B.T.]'s parents remained concerned about her reading ability throughout her 4th grade year. In their view, [B.T.] was discouraged with her slow speed and did not like to read. In the spring of 2012 another parent mentioned vision therapy to [B.T.'s mother]. [She] remembered that Dr. Suh had noted exophoria when he examined [B.T.] in 2011. Through online research, she learned that exophoria refers to a condition in which one or both of a person's eyes turn outward, possibly making it more difficult to read due to missing little words. [B.T.'s mother] called the Wolfe Clinic and made an appointment with Dr. Suh to discuss vision therapy. When Dr. Suh examined [B.T.] on July 26, 2012. He noted exophoria, as well as anisocoria, and referred [B.T.] to Vision Park Family Eye Care for further testing. (Comp. at 1-2, 29; Tr. at 41-42, 48-49, 56)

Beth Triebel, O.D., is an optometrist in practice at Vision Park. She has held certification in vision therapy with the College of Optometrists in Vision Development since 1994. She is not an educator or a reading specialist. Dr. Triebel examined [B.T.] on August 8 and 17th, 2012. She found that although [B.T.]'s visual acuity was normal in both eyes, she had difficulty with tracking and focus. Dr. Triebel diagnosed [B.T.] with mild exophoria, suppression, and pronounced accommodative insufficiency. At hearing, she described these conditions as follows:

> Exophoria: "[W]hat that means is that her eyes have a slight tendency, instead of remaining straight, to float out, occasionally."
>
> Suppression: "[W]hich means that when she's looking at something with both eyes, occasionally her brain will not pay attention to everything equally with both eyes. It will start to shut one eye off and on . . ."
>
> Accommodative insufficiency: "[W]hich is a difficulty with sustaining and changing focus at the near point or when going from near to far."

(Comp. at 9; Tr. at 197, 201-04, 214)

Suppression was seen on a couple different tests where [B.T.] "would be looking with both eyes and then briefly her brain would ignore the other eye and then quickly turn it back on." The optometrist explained that suppression can be difficult to overcome, especially because a child does not know what is happening. She believes this condition directly affects reading.

> If you're reading along and one eye is looking at the beginning of the word, the other eye may float and look at the end of the word, and as the brain is switching, it can make it look confused, not sure of the order of the letters. It can cause sometimes adding in letters, missing letters, and then having

> to go back and reread and look at it a second time to make sense of it.

(Tr. at 202-03)

Dr. Triebel offers office-based optometric vision therapy, using different procedures, personalized for the individual patient, to specifically improve different vision skills. (Tr. at 204-05) The therapy is guided by two therapists; one is a certified vision therapist and the other in the process completing the three-years of practice with an optometrist that does vision therapy that is required for certification. (Tr. at 219-20) As described in a fact-sheet published by the American Academy of Optometry and American Optometric Association,

> Vision therapy is a sequence of activities individually prescribed and monitored by the doctor to develop efficient visual skills and processing. . . . The vision therapy program is based on the results of standardized tests, the needs of the patient, and the patient's signs and symptoms. The use of lenses, prisms, filters, occluders, specialized instruments, and computer programs is an integral part of vision therapy. Vision therapy is administered in the office under the guidance of the doctor. It requires a number of office visits and depending on the severity of the diagnosed conditions the length of the program typically ranges from several weeks to several months. Activities paralleling in-office techniques are typically taught to the patient to be practiced at home to reinforce the developing visual skills.

(Comp. at 33-35)

In Dr. Triebel's experience, the combined conditions of suppression with accommodative insufficiency are often very amenable to treatment via vision therapy. Following her examination of [B.T.], Dr. Triebel recommended a two-month course of vision therapy. (Comp. at 9; Tr. at 203-04, 223-25)

[B.T.'s mother] shared Dr. Triebel's test results and recommendation with special education teacher [Ms. F.] on September 8, 2012, and asked if there were resources available through the school or AEA to help [B.T.]. (Comp. at 15) [Ms. F.] initially told [B.T.'s parents] that vision therapy could be offered to [B.T.]. She also forwarded their inquiry to [the building principal]. (Comp. at 16; Resp. at 385)

[The principal] contacted the AEA staff regarding the availability of vision therapy. AEA Consultant Suzanne Howard contacted Christine Short, a teacher of the visually impaired who works for the Heartland AEA and the Iowa Braille School. Short responded by offering to observe [B.T.] in the classroom. (Resp. 385, 393)

Several times each month Ms. Short is asked to consult with special education and regular classroom teachers to assist with development of accommodations for visually

impaired students. She went to the school and observed [B.T.] both on the playground at recess and in the classroom during large and small group activities. As an educational consultant for the visually impaired, Ms. Short was looking for indicators of loss of visual acuities or field loss, rather than from a vision therapy point of view. She did not observe any visual behaviors that would indicate a need for classroom accommodation of an acuity deficiency. (Resp. at 404, 406-07; Tr. at 98-112)

Educational services for the visually impaired in Iowa have traditionally centered on the identification and provision of interventions and accommodations to assist students who are blind or have a significant visual impairment manifesting in low visual acuity. The intent is to provide tools to help these students access the regular education curriculum to the greatest degree possible. (Tr. at 60-62, 92-93) Treatment to address and potentially improve or correct vision system dysfunction is not typically provided by public schools or AEAs to Iowa students. (Tr. at 74-75) Teachers for the visually impaired at Heartland AEA and the Iowa Braille School are not trained to provide vision therapy. (Resp. at 393)

AEA staff also contacted the AEA Executive Director of Instructional Services, Cindy Yelick, about the [parents'] request to ask if the AEA had provided vision therapy to students in the past. Ms. Yelick researched the issue and advised that she thought vision therapy was outside the scope of related services. (Tr. at p. 143) This advice is consistent with guidance offered by Iowa Educational Services for the Blind and Visually Impaired.

Historically in Iowa, teachers for the visually impaired were employed each AEA to provide services to school districts within the AEA. Approximately five years ago the state moved to a consolidated agency for providing educational services to visually impaired – Iowa Educational Services for the Blind and Visually Impaired. (IESBVI). (Tr. p. 64) At about the time of this transition, IESBVI, working with Dr. Mark Wilkinson - an optometrist serving the Braille School, developed and published a statement addressing vision therapy. (Tr. at 64-68; Resp. at 391-92)

For purposes of the *Vision Therapy Position Document,* IESBVI defines "optometric Vision Therapy, also referred to as visual training, or orthoptics, [as] a treatment regimen to correct or improve specific dysfunctions of the vision system identified by standardized diagnostic criteria."

> It is the position of the Iowa Educational Services for the Blind and Visually Impaired (IESBVI) that vision therapy is not an educationally acceptable or approved intervention for education of children and youth who are blind or visually impaired. The Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind, Elementary and Secondary Education Act require educators to consider evidence based educational practices.

> The rationale for this position, not supporting vision therapy as an educational intervention, is based on the lack of scientific evidence of the efficacy of eye exercises "vision therapy" as an educational intervention. Additionally, the time that would be required for vision therapy would take from research based educational interventions. Third, to the extent that vision therapy may be an appropriate medical intervention the research has found this intervention to be most effective with a comprehensive eye exam followed by a treatment plan administered in the medical office under the guidance of a doctor. Medical services such as this are excluded as a related service under the IDEA.
>
> For these reasons, unless and until the research base is established for vision therapy as an effective educational intervention, Iowa Educational Services for the Blind and Visually Impaired, a cooperative educational program of the Department of Education, Department for the Blind, and Iowa Board of Regents/Iowa Braille School and the organization of the Area Education Agencies does not endorse vision therapy as a proven educational intervention.

(Resp. at 392)

On November 8, 2012, the Respondents issued a *Prior Written Notice of a Proposed or Refused Action* form to the [B.T.'s parents], formally refusing the request for vision therapy. The notice explained the decision as follows:

> Vision Therapy is a service that must be provided by a licensed physician in a clinical setting. Since this service is a medical therapeutic service and is not used for diagnosis or evaluation, the service falls outside of the scope of IDEA's definition of what the school, the AEA and/or the Iowa Sight Saving and Braille School should provide. Thus, the LEA and AEA are refusing to provide Vision Therapy Service for [B.T.].

(Resp. at 65) [B.T.'s parents] filed the Due Process Complaint initiating this proceeding on November 28, 2012, requesting vision therapy as relief. A resolution meeting and a mediation session were held, without resolution of the complaint and the case proceeded to hearing.

Two IEP team meetings were held after the complaint was filed. At the annual review meeting, held on December 6, 2012, the team agreed that specialized instruction would remain in place for the upcoming year. Benchmark data was updated, but substantive changes were made to the IEP. [B.T.]'s reading goal remained achieving a median score of 120 words per minute for three consecutive charting days when given fifth grade reading passages. (Resp. at 53-64, 67)

Another IEP meeting was held on February 1, 2013, after the failed mediation session, to further address [B.T.]'s needs and Ms. Short's observation report. The team considered but ruled out additional classroom accommodations and no changes were made to the services offered through the IEP. The parents' ongoing request for vision therapy was again refused. (Tr. at 149-51; Resp. at 69-70) In addition to asserting that vision therapy is a medical service outside the scope of related services under the IDEA, the notice of this refused action also stated, "The team is rejecting the request for AEA provided vision therapy based on the current data provided by the LEA showing [B.T.] does not require vision therapy in order to access a Free Appropriate Public Education (FAPE)." (Resp. at 69)

Issues Presented

The parties agree that [B.T.] is a child with a disability and is entitled to receive special education and related services under the IDEA. The central question of this case is whether the school district and AEA violated the IDEA when they refused to provide vision therapy to [B.T.]. The parties agree that all of the following issues must be resolved in the Complainants' favor in order for them to prevail.

1. Whether vision therapy is a medical service, within the meaning of the medical services exception to the definition of related services under the IDEA.

2. Whether vision therapy has validated efficacy as an appropriate intervention to address [B.T.]'s needs.

3. Whether vision therapy provided by the school district or AEA is necessary in order for [B.T.] to receive a free appropriate public education.

Conclusions of Law

The overriding purpose of the Individuals with Disabilities Education Act (IDEA) is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.E.2d 690 (1982). In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction. 20 U.S.C. § 1412(a)(1).

Participating schools must evaluate and identify eligible students, develop an individualized educational program (IEP) for each qualifying child, comply with the Act's procedural safeguards, and provide services to each child in the least restrictive environment (LRE) appropriate for the child. 20 U.S.C. § 1412(a)(3)-(6). "Parents and

guardians of a disabled child may challenge the procedural and substantive reasonableness of an IEP by requesting an administrative due process hearing, …" *Fort Osage R-1 Sch. Dist. v. Sims,* 641 F.3d 268, 1002 (8th Cir. 2011).

"[T]he burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district." *School Bd. of Ind. School Dist. No. 11 v. Renollett,* 440 F.3d 1007, 1010 at fn. 3 (8th Cir. 2006), citing *Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). Here, this burden rests with the Complainants.

The Complainants advance no discrete procedural claims. They argue vision therapy is an appropriate related service necessary for [B.T.] to receive a FAPE. The substantive requirement to offer a free appropriate public education is generally satisfied when "a school district provide[s] individualized education and services sufficient to provide disabled children with some educational benefit." *Fort Osage R-1 Sch. Dist. v. Sims,* 641 F.3d 268, 1003 (8th Cir. 2011), quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The individualized education program – or IEP – is a "comprehensive statement of the educational needs of [the] handicapped child and the specially designed instruction and related services to be employed to meet those needs." *C.B. v. Special School Dist. No. 1,* 636 F.3d 981, 989 (8th Cir. 2011), quoting *School Committee of Burlington v. Dept. of Education,* 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.E.2d 385 (1985).

"The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed." *Park Hill School Dist. v. Dass,* 655 F.3d 762, 765-66 (8th Cir. 2011). "Although the IEP must provide 'some educational benefit,' it need not 'maximize a student's potential or provide the best possible education at public expense.'" *M.M. v. District 0001 Lancaster County School,* 702 F.3d 479, 485 (8th Cir. 2012), quoting *Park Hill School District v. Dass,* 655 F.3d at 766. "The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education." *Fort Zumwalt School Dist. v. Clynes,* 119 F.3d 607, 612 (8th Cir. 1997), citing *Rowley,* 458 U.S. at 185 & 203, 102 S.Ct. at 3045 & 3049.

Academic progress, standing alone, does not prove that a student received FAPE, but a student's academic progress can be an important factor in determining whether an IEP complies with the IDEA and academic progress can tip the determination in either direction. *M.M. v. District 0001 Lancaster County School,* 702 F.3d at 486. The fact that a student is falling behind or failing to make academic progress is an indicator that current programming is not sufficient to meet the student's needs. *See C.B. v. Special School Dist. No. 1,* 636 F.3d at 989-990 (holding that public school failed to provide a FAPE, where despite student's average intellectual ability, positive attitude, and willingness to work, the educational program offered by the school did not assist him in making progress in reading during the fourth and fifth grades). On the other hand, a

showing that a student is progressing academically at an average rate and that the discrepancy from peers is decreasing, is strong evidence that FAPE is being provided.

1. *Related services and medical services:* The IDEA requires states to provide eligible students with "special education" and "related services." The first issue to be resolved here is whether the requested vision therapy falls within the "medical services" exclusion from the definition of related services.

As currently defined within IDEA,

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and *medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A) (emphasis added). "Medical services" are included in the statute's parenthetical listing of related services that may be required to assist a child with a disability benefit from special education, but only to the degree that the medical services are provided for diagnostic and evaluation purposes. A medical service provided for another purpose, such as treatment of a medical condition, is not a related service under the IDEA. *See Irving Independent School District v. Tatro,* 468 U.S. 883, 891, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

Although the IDEA includes no definition of the term "medical services," the implementing regulations adopted by the United States Secretary of Education have long defined the medical services that fall within the definition of related services as: "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.34(c)(5); *see Tatro,* 468 U.S. 892 at fn 10 (quoting 34 C.F.R. § 300.13(b)(4) (1983). The United States Supreme Court has twice directly addressed the scope of the medical services exclusion from the definition of IDEA related services. In both cases, the Court upheld the Secretary's authority to limit the medical services exclusion to the services of a physician.

In *Irving Independent School District v. Tatro,* 468 U.S. 883, 891, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984) the Court held that the administration of clean intermittent

catheterization (CIC) services to a public school student who could not stay in school without the service, was a "related service" which the school was obliged to provide under the IDEA. The Court also concluded CIC services, which could be provided by a school nurse or trained layperson, were not "medical services." In doing so, the Court approved the Department of Education regulations which define "medical services" as "services provided by a licensed physician." *Id*. at 892.

The Court was again called upon to consider the scope of excluded medical services in *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66, 73, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999). In this case the Court reinforced *Tatro* and affirmed the Eighth Circuit's holding that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." *Id.,* 526 U.S. at 72, quoting *Cedar Rapids CSD v. Garrett F.,* 106 F.3d, 822, 825 (8th Cir. 1997).

> In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term "medical services" referred only to services that must be performed by a physician, and not to school health services. Accordingly, we held that a specific form of health care (clean intermittent catheterization) that is often, though not always, performed by a nurse is not an excluded medical service. We referenced the likely cost of services and the competence of school staff as justifications for drawing a line between physician and other services, but our endorsement of that line was unmistakable. . . .
> . . . Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute. Absent an elaboration of the statutory terms plainly more convincing than that which we reviewed in *Tatro*, there is no good reason to depart from settled law.

Garrett F., 526 U.S. at 73-74, 76 (citations omitted).

The licensing of medical practitioners is a matter of state law. Under Iowa law, "persons engaged in the using or employing of visual training or ocular exercises for the aid, relief, or correction of vision" are "engaged in the practice of optometry." Iowa Code § 154.1(2)(a) (2013). The vision therapy requested in this case could be provided only by an optometrist or by a vision therapist acting under the direct supervision of a licensed optometrist. There is little existing authority from other jurisdictions to lend guidance toward resolution of this issue, in part because the outcome turns on whether an optometrist is a "licensed physician" under the laws of this state.[1]

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[1] The Complainants point to two federal cases which have recognized vision therapy as an appropriate service under the IDEA. *DeKalb County School District v. M.T.V.,* 164Fed.Appx. 900, 2006 WL 197338 (11th Cir. 2006) (noting that the district court affirmed the decision of an ALJ for the State of Georgia, which required the school district to reimburse the parent for the

The licensing of practitioners in health-related professions in Iowa is overseen by twenty-four distinct professional licensing boards. Iowa Code § 147.13. The state board of medicine is vested with authority to license and oversee persons "engaged in the practice of medicine and surgery or osteopathic medicine and surgery." Iowa Code §§ 147.13(1), 148.1, and 148.3. The state board of optometry holds authority to license persons "engaged in the practice of optometry." Iowa Code §§ 147.13(9) and 154.1. However, with regard to patient care, an optometrist is held to the same standard of care as is common to medical doctors and osteopaths licensed under chapter 148. Iowa Code § 154.10.

Licensed optometrists who are exclusively engaged in the practice of their profession are not engaged in the practice of medicine, for purposes of licensure by the board of medicine. Iowa Code § 148.2(4). The Complainants argue that under the bright-line rule articulated in *Tatro* and *Garrett F.,* section 148.2(4) is dispositive of the first issue. I do not agree. As the Respondents observe, neither the IDEA regulations nor either of these cases provides us with a definition of "physician" or implies that the term must be defined so narrowly under the IDEA as to exclude all health-related professions except medical doctors or osteopaths.

The definitions within chapter 148 are controlling only for purposes of licensure by the board of medicine. The regulation of the practice of medicine in Iowa is not limited to this one code chapter. Code chapter 135 establishes the Iowa department of public health and the general definitions used for regulation of health-related activities. In this broader context,

> "Physician" means a person licensed to practice medicine and surgery,

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cost of vision therapy services – lower court decision at 413 F.Supp.2d 1322 (N.D. Ga. 2005)) and *C.T. ex rel. D.T. v. Vacaville Unified School District,* No. CIVS-06-187 FCD JFM, 2006 WL 2092613 (E.D. Cal. July 27, 2006) (noting that private vision therapy was included within the services offered by the school district). Neither of the cases addressed the issue of whether vision therapy is a medical service.

Of the six state agency decisions I have located addressing requests for vision therapy, four do not directly discuss whether vision therapy is a medical service. *See Maine School Administrative District #72,* 53 IDELR 207, 109 LRP 63855 (Maine SEA 2009)*; Department of Education, State of Hawaii,* 52 IDELR 58, 108 LRP 69487 (Hawaii SEA 2008); *Springville-Griffith Institute Central School District,* 37 IDELR 175 (NY SEA 2002); and *Wilson Area School District*, 110 LRP 17537 (Penn. SEA 2010). In the remaining two cases vision therapy services had been denied by schools on the grounds that the therapy was a medical service. On review, the denial was reversed in one case and affirmed in the other. *In Re: Student with a Disability,* 24 IDELR 612, 24 LRP 3894 (Vermont SEA 1996) (finding classification of the requested vision therapy as a medical service "was clearly in error, since it was not a service provided by a licensed physician"); *Palatine Community Consolidated School District No. 15,* 108 LRP 38094 (Ill. SEA 2005) (finding the "weight of the testimony and evidence is that the vision therapy was medical treatment" and was not required to provide the student with FAPE).

> osteopathic medicine and surgery, chiropractic, podiatry, or optometry under the laws of this state; but a person licensed as a physician and surgeon shall be designated as a "physician" or "surgeon", a person licensed as an osteopathic physician and surgeon shall be designated as an "osteopathic physician" or "osteopathic surgeon", a person licensed as a chiropractor shall be designated as a "chiropractor", a person licensed as a podiatrist shall be designated as a "podiatric physician", and a person licensed as an optometrist shall be designated as an "optometrist".

Iowa Code § 135.1(4). Even though an optometrist is not a medical doctor, I must conclude that under Iowa law a licensed optometrist is a licensed physician.

Although the resolution of the first issue mandates judgment for the Respondents, a brief discussion of the remaining issues is appropriate.

2. *Vision therapy as a scientifically-demonstrated or research-based intervention to address [B.T.]'s needs*: The IDEA, as amended in 2004, requires each IEP to include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent possible, to be provided to the child . . .." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Neither the statute nor the IDEA regulations provide clear guidance on how the requirement for research-based methodologies is to be interpreted and applied. *See* 34 C.F.R. § 300.320(a)(4) (mirroring the statutory language).

In response to comments made while the regulations were being drafted, the U.S. Department of Education made clear its intent for SEA's and LEA's to "select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available." *Ridley School District v. M.R.,* 680 F.3d 260276 (3rd Cir. 2012), quoting, *Analysis of Comments and Changes to the 2006 IDEA Regulations,* 71 Fed. Reg. 46,540, 46,665 (2006). The Department of Education went on to explain that the IDEA amendment

> does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services . . . that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.

Id.

Here, the parties disagree as to whether there is a sufficient scientific research base to support vision therapy as an appropriate related service to meet [B.T.]'s needs. Dr. Beth Triebel, an Iowa-licensed optometrist and certified vision therapist examined

[B.T.] and diagnosed her with exophoria, suppression, and accommodation insufficiency. These conditions affect the coordination and focus of the eyes and the way in which the brain receives information from the eyes. Based upon her knowledge and experience from more than 20 years of providing vision therapy to patients, Dr. Triebel is convinced that these conditions affect reading – particularly reading speed. She is also confident that in-office vision therapy programs like she offers are highly effective in correcting, or at least improving, these conditions.

The Complainants and Dr. Triebel cite to several vision therapy studies, including the *Convergence Insufficiency Treatment Trial Study Group, Randomized Clinical Trial of Treatments for Symptomatic Convergence Insufficiency in Children,* Arch Opthalmol 2008; 126:1336-49.[2] *See* Comp. at 50-89. There is significant research-based support for the view that vision therapy has demonstrated effectiveness as a treatment for accommodation disorders and eye teaming conditions, such as exophoria.

Cindy Yelick, the Executive Director of Instructional Services for Heartland AEA, holds a doctorate degree in educational leadership and has a great deal of experience as an administrator and consultant in the area of special education. Dr. Yelick researched vision therapy and reviewed several of the journal articles, including some of those cited by the Complainants, in an attempt to determine whether vision therapy positively impacts reading comprehension. She agreed that there are studies supporting use of vision therapy to positively affect convergence insufficiency. She agreed that it is intuitive that vision problems can be the cause of reading difficulties and there is some support for this view in the scientific literature. Dr. Yelick did not find what she considered to be conclusive research squarely addressing whether correction of vision problems through vision therapy has a measurable positive effect on reading comprehension or fluency. (Tr. at pp. 238-244)

I agree that the research into the efficacy of vision therapy as an educational intervention to address reading difficulties is not conclusive, but the Complainants make equally valid points. [B.T.] is diagnosed with specific vision problems. The vision difficulties that [B.T.] experiences while reading are consistent with the symptoms of these conditions. There is scientific research showing that the specific vision problems [B.T.] has can be effectively addressed with vision therapy and, in Dr. Triebel's experience, accommodative insufficiency and suppression can be treated with a very high success rate.

I conclude that there is sufficient peer-reviewed research to support the use of vision therapy as appropriate intervention to address [B.T.]'s unique needs. I believe vision therapy could be an appropriate related service for [B.T.], if it were not a medical service. However, the failure of the school and AEA to provide all potentially appropriate related services does not automatically result in a denial of FAPE.

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[2] Available in abstract and full text formats at http://www.ncbi.nlm.nih.gov/pubmed/18852411

3. *Vision therapy as a requirement for FAPE*. The basic principles governing this third issue are set forth above. The FAPE requirement of the IDEA does not require schools to maximize a student's potential or to provide the best possible educational opportunity. Nor does the IDEA require public schools to correct disabilities.

> Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting a child's disability. Certainly, given the wide range of disabilities covered by IDEA, remediation may often be part of an IEP. Behavioral modifications, for instance, immediately come to mind as an example of an IEP strategy that may remediate a disability while also being necessary to confer educational benefits. But the whole educational experience, and its adaptation to confer "benefits" on the child, is the ultimate statutory goal.

Klein Independent School Dis. v. Hovem, 690 F.3d 390, 397 (5th Cir. 2012), *cert. denied* 81 USLW 3421, 2013 WL 182782 (2013). Rather, "[t]he standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed." *Park Hill School Dist. v. Dass,* 655 F.3d at 765-66.

In this case, [B.T.] is making average or slightly above average progress through the general education curriculum based on a variety of measures – including passing grades awarded by her classroom teachers and tri-annual progress monitoring assessments. No significant discrepancy between [B.T.]'s performance and that of her non-disabled peers was shown, except in the area of reading automaticity and fluency. This discrepancy is the sole basis for her IDEA eligibility and improvement in reading fluency, as tested by oral reading fluency probes, is and has been her sole IEP goal. The operative question in this case is whether [B.T.]'s IEP is offering her instruction and services reasonably calculated to allow her to progress toward meeting this goal.

When the initial IEP was developed in December of 2011, [B.T.]'s oral fluency was 62 to 64 correct words per minute. Her initial goal was to achieve a median score of 97 words per minute on a fourth grade writing probe for three consecutive charting days within the first year of services. She nearly reached this goal by the end of her fourth grade year in the spring of 2012.

In October of 2012, the IEP team met and advanced the reading level of oral fluency probes to fifth grade and increased the words per minute of the goal to 120. DIBELS NEXT progress monitoring data presented at hearing shows continued progress toward meeting the fluency goal during the 2012-2013 school year. (Resp. at 87, 438) The Complainants argue that the methodology of this testing was so flawed that this data cannot be relied upon. Three probes have been given each week during the school year. There are only 20 fifth grade level probes, which are used in rotation. At the time of hearing, [B.T.] was starting her fourth progression through the probes. The Complainants contend that any alleged progress is little or nothing more than the

"practice effect." AEA reading specialist Wendy Robinson doubted that a significant practice effect would be seen where several weeks passed before the same passage was repeated and the student read new parts of the passage each time it was presented. (Tr. at 272-274)

While I find some validity in the Complainants' concern regarding the DIBELS testing methodology, I do not believe this concern supports a conclusion that [B.T.] has made no progress toward her reading fluency goal. In addition to the DIBELS probes that are used as an IEP progress monitoring tool, [B.T.] also participates in district-wide reading benchmark assessments that are taken three times each school year using Fountas & Pinnell assessment tools. This assessment measures comprehension, in addition to reading speed and accuracy. Since [B.T.]'s IEP was implemented, she has advanced through the overall reading levels at a faster than anticipated rate and her fluency rate, as measured by words per minute, has gradually increased. (Resp. at 217-236, 464-471, Tr. at 468)

[B.T.] has had an IEP in place for approximately a year and a half. Her oral reading fluency rate remains discrepant from her peers, but the record supports a finding that she is making progress and closing the gap between her reading rate and that of her peers. She is also progressing through the general education curriculum and attaining passing grades. Although I understand that her parents would like to see faster or more concrete progress, given these findings I must conclude that [B.T.] is receiving FAPE under her current IEP.

Decision

The Respondents were justified in denying the request for vision therapy because it is an excluded medical service, rather than a related service under the IDEA. The Respondents are providing [B.T.] with a FAPE and are the prevailing parties in this proceeding.

Issued on June 28th, 2013.

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