IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

JIM AND SUSAN C.,
individually and as parents of J.C. PLAINTIFFS

V. 4:99CV921 GTE
4:96CV748 GTE

ATKINS SCHOOL DISTRICT,
ARCH FORD EDUCATIONAL SERVICE
COOPERATIVE, and ARKANSAS
STATE DEPARTMENT OF EDUCATION DEFENDANTS

AMENDED ORDER

Jim and Susan C., individually and on behalf of their autistic son J.C., initiated these cases pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and state law. Plaintiffs contend that Defendants have failed to provide J.C. with "a free and appropriate education"as required by federal and state law. The Plaintiffs and Defendant Atkins School District have filed cross motions for summary judgment on the merits of the final administrative decisions in these cases. After a careful review of the administrative records, the Court finds that the Defendant school district has provided J.C. with an education program that satisfies the district's legal obligations. In addition, the Court finds that the other Defendants should be dismissed from these cases.

I. STATUTORY BACKGROUND

Congress enacted the Individuals with Disabilities Education Act (the "IDEA") in 1975 after finding that the educational needs of disabled children were being overlooked and unsatisfied. *See* 20 U.S.C. §§ 1400 et seq. Specifically, Congress found that, at the time of enactment, more than one-half of the children with disabilities in the United States did not receive appropriate educational

services and that one million of these children were excluded entirely from the public school system. 20 U.S.C. § 1400(c)(2)(B) and (C). Although originally designated the Education of the Handicapped Act (the "EHA"), the Education of the Handicapped Act Amendments of 1990 officially renamed the statute as the Individuals with Disabilities Education Act.

Because many cases describe the structure of the IDEA in great detail, the Court will only briefly emphasize the pertinent statutory sections. *See, eg., Honig v. Doe*, 484 U.S. 305 (1988). The IDEA requires the states, as a condition to receiving certain federal funds, to provide a "free and appropriate education" to all disabled students within their jurisdiction. 20 U.S.C. § 1412(a)(1)(A).[1] As part of this requirement, the states, through their school districts, must develop an "individualized education program," or IEP, for every child with a disability.[2]

As an additional condition to receiving federal funds, states must implement the IDEA procedural framework, which emphasizes parental involvement in the education process. This framework allows the parents or guardian of a disabled child to participate in meetings with respect to the child's educational status and placement and to object to any matter relating to the child's

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[1] A "free and appropriate education" is defined as special education and related services that: (1) have been provided at public expense, under the public supervision and direction, without charge, (2) meet the standards of the educational agency, (3) include an appropriate preschool, elementary, or secondary school education in the State involved, and (4) are provided in conformity with the individualized education program developed in accordance with the statute. 20 U.S.C. §§ 1401(8).

[2] An "individualized education program" means "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the procedural requirements set forth in the statute]" and includes various information, such as "the child's present levels of educational performance" and "a statement of measurable annual goals. *See* 20 U.S.C. 1414(d)(1)(A)(i)-(viii). The IEP is prepared at a meeting among a qualified representative of the local educational agency, the child's teacher, the child's parents or guardians, and, where appropriate, the child. *See* 20 U.S.C. § 1414(d)(1)-(2).

status and placement, including a child's individualized education program. 20 U.S.C. § 1415(b)(1)-(8). Whenever a parent complains about a matter relating to a child's education, the IDEA ensures that "the parents or guardian shall have an opportunity for an impartial due process hearing." 20 U.S.C. §§ 1415(f)(1). The IDEA also spells out the minimum due process protections to be provided at this hearing.[3] Finally, under the IDEA, any party aggrieved by the findings and decision rendered by a state educational agency shall have the right to bring a civil action in a federal district court. 20 U.S.C. § 1415(i)(2)(A).

The Plaintiffs also bring a claim under section 504 of the Rehabilitation Act, which prohibits programs receiving federal financial assistance from discriminating against otherwise qualified persons with a disability. *See* 29 U.S.C. § 794. The regulations implemented under the Rehabilitation Act require elementary and secondary education programs receiving federal funds to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. 104.33(a). These regulations also provide that the implementation of an individualized education program in accordance with the IDEA will satisfy a school's obligation to provide an appropriate education under § 504 of the Rehabilitation Act. *See* 34 C.F.R. 104.33(b)(2).

II. FACTUAL BACKGROUND

In 1994, when J.C. was six-years-old, he was diagnosed as severely autistic by a team of health professionals at the Dennis Developmental Center in Little Rock.[4] Because of his condition, J.C. was found eligible for special education by Atkins School District in the fall of 1995. As

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[3] These protections include the right to be accompanied and advised by counsel, the right to present evidence and confront, cross examine, and compel the attendance of witnesses, the right to a written record of the hearing, and the right to written findings of fact and decisions. 20 U.S.C. § 1415(h).

[4] The hearing officer in the first due process hearing found that J.C.'s diagnosis was made somewhat beyond the age range at which a child is usually diagnosed as autistic.

required by the IDEA, the Plaintiffs and school personnel met in October 1995 to develop an IEP for J.C. Unfortunately, this process did not go smoothly for the parties. Indeed, the attempt to agree to an IEP sparked a dispute between the parents and the district that has lasted more than five years and resulted in almost constant litigation.

Basically, the disagreement between the Plaintiffs and the school district pertains to the methodology that the district has used to educate J.C. Since the Plaintiffs' initial meeting with school officials in the fall of 1995, the Plaintiffs have continuously requested that the district implement the Lovaas program, a program of intense behavorial intervention advocated by Dr. Ivar Lovaas for use with autistic children. Plaintiffs contend that this program should be the centerpiece of J.C.'s education and must be utilized 40 hours per week in order for J.C. to progress intellectually or socially. They further contend that the Lovaas program is the only method that has been "empirically proven" to help autistic children.

Despite their contentions regarding the Lovaas program, the Plaintiffs agreed to an initial IEP in October 1995 that incorporated only 19 hours per week of Lovaas training.[5] Initially, this training was conducted at the school by "Lovaas trainers" whom the parents selected – mostly graduate students attending an area college. The district reimbursed the parents for the cost of hiring these trainers at a rate of $5.00 per hour.[6] The remainder of J.C.'s school week – about 16 hours – was spent in a special education program at the school; however, Plaintiffs used their own funds to

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[5] The agreement as to J.C.'s initial IEP was not easily achieved. The parties met on at least three occasions before reaching the agreement.

[6] Although most of the Lovaas trainers working with J.C. were graduate students, the district contends that Mrs. C also listed herself as a Lovaas trainer and that she was reimbursed for some of the time she worked with J.C. *See* Transcript I, p. 44.

supplement J.C.'s Lovaas instruction so that he was receiving about 40 hours of such instruction each week. While at school, most of J.C.'s time was spent with Ms. Angela Ayres, a teacher's aide hired by the district to work one-on-one with J.C. Ms. Ayres was supervised by Ms. Jackie Rooke, who was then the district's special education teacher for grades K through two.[7] By all accounts, the initial IEP was a compromise between the Plaintiffs, who requested a 40-hour-per-week Lovaas program, and district officials, who did not think that the Lovaas program was a necessary component of Jeremy's education.[8]

In December 1995, the Plaintiffs notified the district that they were dissatisfied with J.C.'s IEP. In January 1996, they sent a letter to the district requesting several changes in the IEP, including 40 hours per week of Lovaas instruction, an increase in the reimbursement rate for trainers from $5.00 to $10.00 per hour, and financing for ongoing consultations with Lovaas professionals. In addition, the Plaintiffs also requested that J.C. receive Lovaas training in the home because the district did not have a proper area at the school in which to conduct the training.[9] The district's IEP

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[7] Ms. Rooke also was responsible for ensuring that J.C. was progressing towards the goals and objectives in his IEP.

[8] *See* Opening Statement of Mr. Said Thomas, Transcript of Initial Due Process Hearing (hereinafter "1996 Transcript"), at 30-45. At the time of the initial due process hearing, Mr. Thomas was a special education supervisor employed by the Arch Ford Educational Service Cooperative, a intermediate agency providing services to school districts according to region. Mr. Thomas was assigned to work with the Atkins School District and also was the district's representative in the 1996 hearing. In his opening statement, Mr. Thomas claimed that district officials discussed the Lovaas method with state consultants at Arch Ford and decided that the method was not "the preferred way" to teach an autistic child. *See* 1996 Transcript, at 40. Mr. Thomas also stated that district officials always believed that "a full day at school" was "appropriate" for J.C. *Id.* at 43. The district agreed to fund about 19 hours per week of instruction in accordance with the Lovaas method in order to compromise with the parents. *Id.*

[9] At the initial due process hearing, Hearing Officer Ammel concluded that the district had "not chosen a suitable site for implementation" of the Lovaas program because the area in which J.C.

committee agreed to allow the Plaintiffs to transfer the Lovaas training site to their home. The committee also agreed to increase the reimbursement rate for Lovaas trainers; however, the district agreed to an hourly rate of $7.50, rather than the requested hourly rate of $10.00.[10] The district refused the remaining requests.

A. 1996 Due Process Hearing

In February 1996, the Plaintiffs requested an administrative due process hearing pursuant to IDEA and sought implementation of the rejected IEP provisions. In a two-day hearing before Mr. James Ammel, a hearing officer appointed by the Arkansas Department of Education, Mr. and Mrs. C argued that the district, by refusing to implement 40 weekly hours of Lovaas-based instruction, had denied J.C. a free and appropriate education in violation of the IDEA. They also argued that the school was obligated to implement the Lovaas technique and to pay for ongoing consultations with Lovaas professionals. In addition to presenting their own testimony, Mr. and Mrs. C. presented 12 exhibits that were admitted into evidence and also called the following witnesses:

> (1) Mr. Steve Shry, a licensed clinical psychologist and professor of psychology who helped put Mr. and Mrs. C in touch with graduate students interested in learning the Lovaas technique and working with J.C.;
> (2) Ms. Sarah McFarland, a graduate student and Lovaas trainer who worked with J.C.;
> (3) Ms. Rooke, the special education teacher for the district; and
> (4) Ms. Ayres, the district's aide who was hired to work with Jeremy at school.

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was instructed was often noisy. *See* Initial Administrative Decision, No. H-FY96-29, at 9 (hereinafter "1996 Decision"). The hearing officer noted that the district had "announced plans to move the instructional site to a larger room and to partition that new room for the individualized instruction." *Id.* at 10. The hearing officer further ordered the district "to ensure a relatively quite environment to minimize the problem of distractibility to which the Student is prone to suffer." *Id.*

[10] In his opening statement, Mr. Thomas informed the hearing officer that the district agreed to increase the reimbursement rate for Lovaas trainers only to $7.50 because that was the rate of compensation for the district's "one-on-one aides." *See* Initial Transcript, at 47.

The primary thrust of Mr. and Mrs. C.'s arguments at the 1996 hearing was that the Lovaas method was the only instructional method that would, with any probability, benefit J.C. Mrs. C. testified that she learned of the Lovaas method while reading about autism and that her research caused her to believe that "there are no empirically effective treatments for autism other than the behavioral approach advocated by or developed by Doctor Lovaas." *See* 1996 Transcript, at 207. Mr. and Mrs. C testified that they were so impressed with what they read about the Lovaas method that they paid for Mr. Ron Leaf, a Lovaas proponent who had worked with Dr. Lovaas, to come to Little Rock and conduct a two-day seminar and training session in the Lovaas method.[11]

Two witnesses called by the Plaintiffs also spoke highly of the Lovaas method. Dr. Shry testified that he thought "the Lovaas method empirically has by far the best track record" and that 40 hours per week of Lovaas "seems to be the minimal level of intensity" needed to produce improvement in autistic children. *See* Initial Transcript, at 83. Lastly, Ms. McFarland testified that she had seen significant improvements in J.C.'s social responsiveness and language skills after using the Lovaas method with J.C. for about six months. When asked about the effectiveness of the Lovaas method, Ms. McFarland also made the following statements:

> "In my experience I know how the Lovaas method has worked as a tool for me. I know how the different facets of it I find invaluable. I've never seen anyone else work with Jeremy that wasn't using Lovaas, so I don't know how they do it, but I don't think I could do it without that tool. I don't think I could get the response from him. So, I can't say, you know, where his improvement has come from. But in my experience I find [the Lovaas method] effective."

See 1996 Transcript, at 293.

Witnesses called by the school district disagreed with the parents' contention that Lovaas

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[11] The Plaintiffs emphasized that they invited J.C.'s teachers to come to the seminar but that they declined.

instruction was the only method that could successfully be used to teach an autistic child. These witnesses also testified that the instructional methods adopted by the Arkansas Department of Education (ADE) were in many ways similar to the Lovaas method. Ms. Maureen Bradshaw, an Arch Ford Coop consultant in charge of providing assistance to teachers working with autistic children, testified that the ADE had adopted a "combination of" approaches to teaching autistic students that was heavily influenced by the TEACCH method, a method of structured teaching advocated by researchers at the University of North Carolina at Chapel Hill.[12] *See* 1996 Transcript, at 399-401. Ms. Bradshaw testified that the approach to teaching autistic students adopted by the ADE is in some ways similar to the Lovaas method of applied behavior analysis; however, she also testified that she "saw Lovaas as being more limited" than the ADE's approach. *Id.* at 411. Likewise, Ms. Betty Stockton, an education consultant who works with autistic students, testified that there are similarities between the Lovaas method of applied behavior analysis and the teaching methods adopted by the ADE. However, she testified that the Lovaas method overemphasized behavior modification at the expense of understanding the motivations behind an autistic child's behavioral problems. *Id.* at 464-65. In addition, Ms. Stockton testified that she thought Lovaas proponents often created the impression that the method could "cure" autism and, thus, she had concerns about how the method was marketed to parents of autistic children. *Id.* at 463-64.

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[12] The formal name for the TEACCH method is the Teaching and Education for Children with Autism and Communication Handicap method. Ms. Bradshaw also mentioned the Behavior and Communications Associates, or BACA, method. Ms. Bradshaw testified that components of the TEACCH and BACA methods were used to instruct teachers of autistic students at state-sponsored workshops. *See* 1996 Transcript, at 399-403. Ms. Rooke testified that she attended two of these workshops before working with Jeremy, and Ms. Ayers testified that she attended one such workshop. *See* 1996 Transcript, at 143-44, 191.

B. 1996 Administrative Decision

In a decision dated August 21, 1996, Hearing Officer Ammel ruled in favor of the school district. He concluded that "[t]he IEP, in its original version and as revised, is reasonably calculated to confer a meaningful educational benefit to [J.C.]" and, thus, meets the IDEA's requirements.[13] *See* 1996 Decision, at 5. He further concluded that the dispute between the Plaintiffs and the district "boils down to nothing but a dispute about methodologies" and that, under *Board of Education v. Rowley*, 458 U.S. 176 (1985), great deference is due to educators' chosen methodologies. *Id.* at 8. In addition, Hearing Officer Ammel made the following comments regarding the Plaintiff's emphasis on empirical testing:

> First and foremost, it is noted that the Parents place an overriding, yet unwarranted emphasis on the fact that the Lovaas method for working with autistic students has been subjected to empirical studies ... while other equally-popular and acceptable methods have not similarly published such research. They argue that only such a method subjected to the rigors of similar research could possibly be considered to be prospectively calculated to confer a potential educational benefit. Neither any statutory or regulatory law nor interpretive cases have ever required that condition of empirical validation to enable a methodology to be acceptable as chosen by educators to achieve the goals and objectives in an IEP.

On September 20, 1996, Plaintiffs filed a complaint against Defendant Atkins School District

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[13] In so ruling, the officer made the following findings of fact:
(1) The Student does have a significant autism disability entitling him to special education services;
(2) The District has complied with procedural requirements for development of the Student's IEP;
(3) The adopted IEP has been appropriately implemented, although the element of supervision by the special education teacher of the Lovaas-portion of that plan was not totally satisfactory;
(4) The Student has admittedly demonstrated progress under the implemented IEP;
(5) The instructional site within the District was not satisfactory.

seeking a reversal of the hearing officer's decision. This case was randomly assigned to this Court and assigned the Case Number 4:96CV748GTE. The Plaintiffs subsequently filed an Amended Complaint and Application for Injunctive Relief in which they added Defendants Arch Ford Educational Service (Arch Ford) and the State Department of Education (ADE). In their Complaint, Plaintiffs assert that the Defendants "have violated J.C.'s substantive rights under IDEA," and they seek a reversal of the hearing officer's decision on both procedural and substantive grounds.[14]

This Court granted a continuance in the case and held all pending motions in abeyance while the ADE appealed this Court's rulings with respect to issues of Eleventh Amendment immunity.[15] The Eighth Circuit recently filed an *en banc* opinion in this case, making it ready for disposition.

C. 1999 Due Process Hearing

After the 1996 due process hearing, the district continued to reimburse the Plaintiffs for 19 weekly hours of Lovaas instruction which were carried out in the Plaintiffs' home. Likewise, the

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[14] The Plaintiffs also seek an Order directing ADE to amend J.C's IEP and an Order directing Defendants to comply with 20 U.S.C. § 1413(a)(3)(A) & (B) and 34 C.F.R. § 300.382 by disseminating certain information regarding the Lovaas method of instruction. They also request various forms of damages.

[15] On August 31, 1999, a panel of the Eighth Circuit Court of Appeals ruled that § 504 of the Rehabilitation Act was not a valid abrogation of the states' Eleventh Amendment immunity and that the states did not waive their Eleventh Amendment immunity by accepting federal funds. Thus, the Eighth Circuit concluded that the Eleventh Amendment barred Plaintiffs from asserting a claim under § 504 against the ADE. The court also held that Arkansas waived its Eleventh Amendment immunity with respect to claims arising under IDEA and, thus, Plaintiffs were free to pursue a claim under IDEA against the ADE. *See Jim C. v. Atkins School Dist.*, 1999 U.S. App. LEXIS 20831, No. 98-1830, (August 31, 1999).

On December 22, 2000, the Eighth Circuit, sitting en banc, reversed the panel and held that the Eleventh Amendment did *not* bar the Plaintiffs' § 504 claims against the ADE. *See Jim C. v. Atkins School Dist.*, No. 98-1830EA (December 22, 2000) (en banc). Thus, the Plaintiffs are now pursuing claims under § 504, IDEA and the Arkansas statutes implementing the IDEA's requirements against all the Defendants.

Plaintiffs continued supplementing, at their own expense, the amount of Lovaas instruction funded by the district so that J.C. was receiving about 40 hours of weekly Lovaas instruction. *See* 1999 Transcript, at 298-300. However, the Plaintiffs soon concluded that the additional training was too costly, and they discontinued the additional hours in August 1997. Thus, starting in August 1997, J.C. was receiving 19 hours of Lovaas instruction each week. *Id.* at 300-301. In August 1998, the Plaintiffs discontinued the Lovaas home-instruction altogether and began sending J.C. to school on a regular, full-day schedule.[16] Thus, starting in the 1998-99 school year, J.C. was not receiving any Lovaas instruction. *Id.* at 301-02.

Unfortunately, the change in J.C.'s schedule did not improve relations between the Plaintiffs and the district, and in February 1999, the Plaintiffs requested a second due process hearing. The Plaintiffs contended that J.C. was entitled to "a consistent, structured behavior modification program such as the Lovaas program" because he "has not progressed in his overall adaptive functioning in the past three years."[17] In a hearing in front of Ms. Pamela Walker, a hearing officer appointed by the Arkansas Department of Education, the parents argued that psychological testing showed that J.C. had failed to demonstrate any progress under the school district's instruction. The Plaintiffs also argued that this testing showed that J.C. had regressed after the discontinuation of the Lovaas instruction and, thus, proved that the district'program was inappropriate. In addition to seeking a determination that J.C. was entitled to 40 hours of weekly Lovaas instruction, the Plaintiffs also

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[16] Mrs. C. testified that she and her husband made the decision to discontinue the Lovaas instruction and send J.C. to school full-time because of demanding schedules made more burdensome by family illnesses. She also testified that they did not have the money to pay for a consultation with a Lovaas professional and that such a consultation was needed in order to successfully continue the instruction. *See* 1999 Transcript, at 301-02.

[17] *See* 1999 Administrative Decision, at 1.

sought reimbursement for the Lovaas instruction they had previously funded.

The Plaintiffs' main focus at the 1999 hearing was on several psychological tests conducted sporadically over the course of four years. The first such test was given by medical professionals at the Dennis Developmental Center at the time J.C. was originally diagnosed as autistic – November 1994. This test, which was done when J.C. was six-years-old, showed that he was functioning at about a two-year-old level. The Plaintiffs compared the results of this test to the following Peabody Picture Vocabulary Tests (PPVTs) given to J.C. by Dr. Steve Shry, the same psychologist who testified at the 1996 due process hearing:

> (1) a PPVT administered in February 1996, when J.C. was seven and one-half. Dr. Shry testified that this test showed that J.C. had improved to the level of 35 months. The parents emphasize that this test was given after J.C. had been receiving about 40-hours of weekly Lovaas instruction for about 5 months;
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> (2) a PPVT administered in June 1996, after J.C. had received 9 months of Lovaas instruction. Dr. Shry testified that this test demonstrated that J.C. had gained 4 to 7 additional months of functioning so that he was then functioning at an age level of 39 to 42 months.
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> (3) a PPVT administered in August 1996, shortly before J.C.'s eighth birthday and after 100 months in the Lovaas program. Dr. Shry testified that this test showed that J.C. had gained an additional 5 to 7 months of functioning so that he was functioning at the age level of 47 to 49 months;
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> (4) a PPVT administered in December 1998, when J.C. was 10 years old and had been deprived of Lovaas instruction for four months. Dr. Shry testified that this test demonstrated that J.C. had regressed to the age level of 33 months.

The parents contend that these tests prove that J.C. was making significant educational progress that was attributable to Lovaas instruction and that he subsequently regressed due to the absence of Lovaas and the inadequacy of the district's educational program.

The 1999 due process hearing included extensive testimony from two of J.C.'s teachers – Ms.

Winifred Balch and Ms. Deborah Goode[18] – about both his progress and the difficulties he encountered in school. Interestingly, J.C's teachers testified that they thought J.C. was progressing academically until late 1998, when they thought he began to regress both intellectually and socially. However, they did not attribute J.C's regression to any inadequacies in the district's program; instead, both teachers testified about what they considered to be peculiar and unhealthy changes in J.C.'s diet and medical condition. Ms. Balch and Ms. Goode testified that, around late 1998, they noticed that J.C. suddenly became preoccupied, if not obsessed, with food.[19] They also testified that Mrs. C. informed them that she had placed J.C. on a restrictive diet.[20] The teachers testified that they became concerned about the health effects of J.C.'s diet after noticing that J.C. began to have a foul body odor, that his skin became a strange yellowish tone, and that he began drooling to such an extent that teachers working with him were required to wear gloves.[21] In addition, Ms. Balch and Ms. Goode testified that they were concerned about the amount of medications Mrs. C. was giving to J.C., as well as the inconsistency with which these medications were given.[22]

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[18] At the time of the 1999 hearing, Ms. Balch was a special education teacher at the district who had worked with J.C. for about two years, and Ms. Goode was a speech pathologist for the district who had worked with J.C. for about three years.

[19] Ms. Balch testified that J.C. frequently searched for food in other people's belongings and "will do anything for food." *See* 1999 Transcript, at 94-5. Ms. Goode testified that, sometime in the fall or winter of 1998, J.C. began "perseverating on foods" and would "attack" and try to eat anything he perceived as edible. *Id.* at 203-04.

[20] Ms. Goode testified that J.C.'s teachers received instructions from Mrs. C. limiting what J.C. could be given to eat and that a typical lunch for J.C. consisted of "a turnip and five boiled potatoes with a glass of water." *See* 1999 Transcript, at 204, 207-08, 209-10.

[21] *See* 1999 Transcript, at 100-01, 206

[22] Ms. Balch testified that Mrs. C. began giving J.C. an inconsistent course of medications, including Nystatin, starting in August 1998. She testified that J.C. would sometimes "throw a

Mrs. C testified at length about the various changes in J.C's diet and behavior referred to by Ms. Balch and Ms. Goode. The first major change that Mrs. C. described occurred in January 1997, when she decided to put J.C. on "a pollutant and casein free diet," thereby eliminating all wheat and milk products from his diet.[23] Mrs. C. testified that she thought this diet resulted in improvements in J.C.'s behavior and ability to learn. About the time she implemented the gluten- and casein-free diet, Mrs. C also "began treating [J.C.] for yeast" by putting him on a yeast-free diet and giving him the drug Nystatin.[24] Subsequently, in the spring of 1998, Mrs. C. placed J.C. on a diet she referred to as "Sara's Diet." Under this diet plan, Mrs. C. removed all, or at least most, "colored foods" from his diet.[25] She also began giving J.C. several vitamin and nutritional supplements, including "digestive enzymes."[26] In addition, Mrs. C. testified that she had occasionally used a nine-volt battery to shock J.C. after learning that "a low electrical shock does not harm people or animals, but will kill parasites in the body."[27]

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temper tantrum" when Mrs. C. came to school to give him medication. *See* 1999 Transcript, at 63-66, 98-99. Ms. Goode testified that Mrs. C. appeared to be giving J.C. medicines and vitamin supplements in inconsistent dosages. *See id.* at 204.

23 *See* 1999 Transcript, at 341-42.

24 *Id.* at 346.

25 *See* 1999 Transcript, at 347-50. Mrs. C. admitted that no doctor recommended placing J.C. on a "color free diet." *Id.* at 408.

26 *See* 1999 Transcript, at 351-52. Mrs. C testified that some of these supplements were recommended by a medical doctor specializing in alternative medicine. She also testified that a medical doctor in New Jersey advised her that J.C. needed certain supplements to "stabilize J.C.'s biochemistry" because "he was in acidosis almost consistently." *Id.* at 351-52. Mrs. C also admitted that she "kept [J.C.] out of school for three weeks or so" in January 1999 "in order to continue to work with these supplements" and observe their effect on J.C.'s behavior. *Id.* at 357.

27 *Id.* at 370-71.

After hearing Mrs. C's testimony relating to J.C.'s diet and medical regimen, Hearing Officer Walker ordered that J.C. undergo a complete medical evaluation at the Dennis Developmental Center. This examination took place on August 3, 1999,[28] and the hearing was reconvened on October 14, 1999. At this time, Dr. Tyra Reid, a pediatrician and the medical director at the Dennis Developmental Center, testified that she was part of a team of medical professionals that evaluated J.C. She testified that "[o]verall [J.C.] is basically at about a two-year level" and, thus, had progressed minimally, if at all, since 1994. *See* 1999 Transcript, at 546. However, Dr. Reid also testified that a lack of progress "might have been predictable, statistically speaking, based on how he presented [at the Dennis Developmental Center] in 1994." *Id.* at 549. In particular, Dr. Reid cited J.C.'s age at the time of diagnosis and his poor verbal skills as two of the reasons why his prognosis – both at the time he was diagnosed and at the time of the hearing – was "quite limited." *Id.*[29] She stated that she believed J.C. had a vitamin B-12 deficiency that could be interfering with his ability to learn and that the Sara's Diet that Mrs. C. had implemented for J.C. "would not be an adequate diet for sustained balance of nutrition." *Id.* at 566. She also opined that J.C.s "constant drive to get to food was so strong that it was getting in the way" of his ability to learn. *Id.* at 576.

D. 1999 Administrative Decision

In a decision dated November 22, 1999, Hearing Officer Walker ruled that the school district

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[28] Testimony at the hearing established that the medical evaluation was delayed twice – once at the request of Mr. and Mrs. C. and once due to a scheduling conflict with the doctor in charge of performing the evaluation.

[29] Dr. Reid testified that two of the most important measures of an autistic child's potential are the "IQ at diagnosis and the presence or absence of verbal speech used communicatively." *See* 1999 Transcript, at 548. She also testified that based on those two factors as applied to J.C., his prognosis would be "very guarded." *Id.* at 549.

had met its burden of proving that J.C.'s IEP was reasonably calculated to offer him educational benefits. *See* 1999 decision, Case No. H-99-32, at 2. The hearing officer relied on the testimony of Ms. Balch and Ms. Goode and also relied extensively on the testimony and findings of Dr. Reid. In addition, Hearing Officer Walker noted her own observations of J.C. during the hearing. In particular, she noted that upon seeing his parents enter the room, "the child immediately rose, came over to the parents, and began drooling and asking for food."[30] The hearing officer also made the following observations about the possible impact of the parents' decisions regarding J.C.'s health and education:

> The parents are seeking a cure for their son's autism. To that end they have tried diet restrictions, Nystatin to control 'yeast' that might be in the child's system, buzzes with a 9 volt battery to kill "parasites" that might be in his system. They have given him enemas to cleanse his system and then started him on a series of supplements. Yet they have not allowed their child to receive all the programs that the school provides. For some reason, the parents have declined a full year program, they have declined physical and occupational therapy. There is no way of knowing how well this child would have done this past year had the parents given the child an adequate diet, and had they allowed him to take part in physical and occupational therapy and the extended school year program offered by the school district.

See 1999 decision, at 10-11.

The Plaintiffs filed their second complaint, Case No. 4:99CV921GTE, against the school district and the ADE on December 17, 1999. They seek reversal of the hearing officer's decision.

III. ANALYSIS

A. Standard of Review

Because courts are not trained educators, judicial review under the IDEA is limited. *E.S. v.*

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[30] The hearing officer also noted that when she was introduced to J.C., he "looked in her hands and in her pockets for 'some' and 'good'" and that his lunch that day consisted of "small potatoes, raw turnips, and water." *See* 1999 decision, at 10.

Independent Sch. Dist., No. 196, 135 F.3d 566, 569 (8th Cir. 1998). The Supreme Court has emphasized that a reviewing court's inquiry under the IDEA is limited to the following two issues:

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

Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982).[31] The State and local school district have the burden of establishing substantive and procedural compliance with the IDEA. *Stein v. Independ. Sch. Dist. No. 196*, 135 F.3d 566 (8th Cir. 1996). However, once a court has established that a child's IEP is reasonably calculated to ensure educational benefits and that the State and district have followed IDEA procedures, it can require no more. *Rowley*, 458 U.S. at 207.

A reviewing court should make an independent determination of the aforementioned issues based on the preponderance of the evidence. *See* 20 U.S.C. §§ 1415(e)(2).[32] Both the Supreme Court and the Eighth Circuit, however, have emphasized that courts, when reviewing administrative proceedings under the IDEA, should give "due weight" to the results of those proceedings. *See Rowley*, 458 U.S. at 206; *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996). In addition, the Supreme Court has emphasized that the IDEA "is by no means an invitation to the

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[31] In *Rowley*, the Court held that a student was not entitled to a qualified sign-language interpreter in all of her academic classes because the services already provided by the school – including a special hearing aid and additional tutoring – were sufficiently providing the student with a "free and appropriate education." *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982). In so ruling, the Court held that the IDEA does not require States to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.* at 200. Instead, the Court emphasized that "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education." *Id.*

[32] Section 1415(e)(2) of the IDEA states that a reviewing court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. §§ 1415(e)(2).

courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. Instead, once a court determines that the requirements of [the IDEA] have been met, questions of methodology are for resolution by the States." *Id.* at 208. This Court finds the following language of the Supreme Court particularly relevant to these cases:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials.' (citation omitted). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §§ 1415(e)(2).

Rowley, 458 U.S. at 207-08.

The Court also notes that a panel of the Eighth Circuit recently decided a case remarkably similar to these cases. In *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000), parents challenged the local school district's decision not to implement 40 hours of weekly Lovaas instruction for their autistic child. The district court found that the school was providing an adequate educational program despite the absence of Lovaas instruction and, thus, was in compliance with the IDEA and Rehabilitation Act. In affirming the lower court's decision, the Eighth Circuit made the following statements:

> Children with autism have difficulty in developing cognitive, linguistic, and social skills. Although early diagnosis and therapy improve the outlook for such children, autism experts have a variety of opinions about which type of program is best. Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible. ... Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of the child's IEP team, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child's benefit, but it does not empower parents to make

unilateral decisions about programs the public funds.

Gill, 217 F.3d 1027, 1038.

With the foregoing principles in mind, this Court cannot conclude that either of the hearing officers in these cases erred in finding that the school district has complied with the IDEA.[33]

B. 1996 Decision

The Court agrees with Hearing Officer Ammel's finding that the dispute leading to the Plaintiffs' initial request for a due process hearing was basically a dispute about methodologies. In fact, the following exchange between Mr. and Mrs. C. during Mrs. C's 1996 testimony indicates that the Plaintiffs' disagreement with school district officials rested solely on their decision not to implement the Lovaas program: (245)

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[33] On June 5, 2000, the Plaintiffs filed a motion to expand the administrative records in these cases. Docket No. 81. The Defendants have not responded to this motion. Thus, the Court has decided to grant the Plaintiffs' Motion to Expand the Record and, accordingly, has considered Plaintiffs' Exhibits A through K as listed in that motion. The Court notes that one of the exhibits referred to in this motion is the Clinical Practice Guideline, a publication sponsored by the New York State Department of Health Early Intervention Program. *See Clinical Practice Guideline: Report of the Recommendations*, Autism/Developmental Disorders, Assessment and Intervention for Young Children, 1999. This publication states that "[a]nti-yeast therapies, including the use of oral anti-fungal medications and special diets, are not recommended for the treatment of autism in children." *Id.* at 179. The publication also makes the following statements regarding diet therapies:

> The use of special diets that eliminate milk-products, gluten products, or other specific foods from the diet is not recommended for the treatment of autism in children. ... If food allergies are documented in a child using standard allergy testing methods, then appropriate dietary changes or other treatment may be needed, but this would be unrelated to the child's autism.

Id. at 182. The publication also states that "administering high doses of any type of vitamin or trace mineral is not recommended as a treatment for autism in young children. *Id.* at 180.

The proper focus of cases filed under the IDEA should be on the adequacy of a child's educational program. However, the Court is compelled to conclude that changes occurring in a child's home-life, including changes in the child's diet or medical regimen, are often intertwined with that child's educational program. Indeed, the quoted language from the *Clinical Practice Guideline* suggests the possibility that some of the changes in J.C.'s medical and diet regimens may not have been conducive to improving his academic performance.

Q (Mr. C): Incidentally, goals were never much in dispute between –
A (Mrs. C): No.
Q: – us and the other members of the IEP Committee, were they?
A: Right.
Q: It was the method?
A: Right.

See 1996 Transcript, at 245.

As Hearing Officer Ammel emphasized, the Parents repeatedly referred to the Lovaas method of instruction as the only method subject to empirical research and published studies. In addition, the Plaintiffs made several references to the district's failure to specifically identify a particular instructional method that it was using with J.C. and to provide empirical research as to the method's efficacy. The Court agrees that the failure of the school district to provide such information does not constitute a violation of the IDEA. As *Rowley* instructs, once a school has established that it complied with IDEA and implemented an IEP that "is reasonably calculated to enable the child to receive educational benefits," a reviewing court's inquiry is at an end. In other words, a reviewing court can not delve into the issue of whether alternative educational programs or methods would be more likely to maximize a child's potential.[34] Put simply, as long as school officials have acted reasonably and complied with the procedures of the IDEA, the choice of methodologies and techniques is left to the discretion of the educators.

After a thorough review of the administrative record, the Court concludes that the district adopted an educational program reasonably calculated to provide J.C. with educational benefits. The

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[34] Even if this Court had the authority to consider what methodology would maximize J.C.'s potential, the Court would be unwilling to declare the Plaintiffs' choice of methods as the one most likely to do so. Rather, based on its review of the entire record, the Court can find no basis to disagree with the hearing officer's statement that the State's approach to teaching autistic children – a blend of methodological principles – is probably better designed to deal with the individual needs of a student. *See* 1996 Decision, at 7.

IEP included goals and objectives in the areas of social/self-help skills, reading, math, language skills, and gross and fine motor skills, and, as mentioned, the Plaintiffs did not object to those goals and objectives. While at school, J.C. received one hour of weekly speech therapy and one-on-one instruction from a teacher's aide hired solely to work with him. Moreover, it is undisputed that both Ms. Rooke and Ms. Ayers attended workshops on teaching autistic children that were sponsored by the ADE. At the time of the 1996 hearing, the parties also agreed that J.C. had made noticeable progress since attending school. These facts, considered in light of the deference due to the hearing officer's findings, convince this Court that J.C.'s IEP was in compliance with the IDEA.

In addition, the Court agrees that the school district complied with IDEA procedures. This is not a case involving a school district that has overlooked a parent's willingness to be involved with a child's education. In fact, it is clear that Mr. and Mrs. C have had extensive involvement with school officials and teachers since they first began to consider enrolling J.C. in the Atkins School District. The Plaintiffs claim that the failure to include an "expert in autism" on J.C's IEP team constitutes a procedural violation of the IEP. However, the IDEA does not require that an "expert" in the field of the child's particular disability be included on the IEP team. *See* 20 U.S.C. § 1414(d)(1)(B). In addition, the Plaintiffs contend that the district violated IDEA procedures when – prior to the meetings of J.C.'s IEP team – district officials contacted consultants from the ADE to discuss autism and the challenges associated with teaching autistic students. However, testimony established, and the hearing officer specifically found, that any communications between district and state officials prior to IEP meetings with the Plaintiffs were for the purpose of obtaining "generic information" regarding autism. Such communications do not amount to a procedural violation of the IDEA. Indeed, this Court agrees with the hearing officer's conclusion that the district fully complied with the IDEA's procedural requirements when enacting and implementing J.C's IEP for the 1995-96 school year.

C. 1999 Decision

The Court also fully agrees with the conclusions of Hearing Officer Walker. The record of the 1999 proceedings certainly raises serious concerns about J.C.'s overall progress – or lack thereof – since the first administrative hearing in 1996. However, the Court cannot conclude that the district failed to meet its obligations under the IDEA. Specifically, the Court finds that J.C.'s IEP was reasonably calculated to enable the child to obtain educational benefits. The Hearing Officer found, and this Court agrees, that J.C.'s IEP included goals and objectives very much like those recommended by Dr. Doreen Granpeesheh of the Center for Autism and Related Disorders – recommendations that were introduced as Parents' Exhibit 5. *See* 1999 Decision, at 3. Moreover, the Plaintiffs do not dispute that the school district was providing everything that was recommended by the Dennis Developmental Center. The Plaintiffs do not agree that these recommendations are sufficient to provide their child with an appropriate education. However, the Court concludes that the district's compliance with the recommendations of medical experts such as those at the Dennis Developmental Center is strong evidence that J.C's IEP was reasonably calculated to ensure educational benefits.

Perhaps most interesting about the Hearing Officer's decision is her conclusion that the tests relied upon by the Parents were inaccurately scored and, thus, do not establish that J.C. made dramatic gains under the Lovaas method only to regress once he was enrolled in school full-time. Hearing Officer Walker specifically found that the PPVT tests admitted into evidence established that J.C.'s "verbal understanding ha[d] steadily increased" from 1996 to 1999. The Plaintiffs do not address these findings but, instead, continue to insist that "[t]he only method which has produced developmental progress in this child" is the Lovaas method. *See* Plaintiff's Motion for Partial Summary Judgment, Docket No. 82, at ¶ 14. However, even when overlooking the Hearing Officer's factual findings with regard to the PPVT tests, the Plaintiffs still cannot establish that the school district has denied J.C. an appropriate education.

The extensive testimony regarding J.C.'s diet and medical condition convinces this Court that any regression in J.C.'s progress cannot be separated from the many changes in J.C.'s home life from January 1997 to the time of the hearing. As mentioned, Mrs. C. placed J.C. on a diet consisting largely of turnips, potatoes, cauliflower and breasts of chicken. J.C.'s teachers testified that, during the course of these diet changes, they noticed dramatic changes in J.C.'s behavior and health, as well as his ability to cooperate in class. After considering this testimony, as well as the testimony of Mrs. C., this Court finds that a lack of educational progress – assuming there is one – can reasonably be attributed to the many changes in J.C's home-life rather than to any inadequacy in his IEP.

Lastly, the Court does not find that the district failed to comply with IDEA procedures in the events leading up to and including the 1999 due process hearing. The Plaintiffs contend that they were denied due process because the1999 due process hearing was conducted by a hearing officer appointed by and paid for by the ADE. They contend that an alternative party should have selected a hearing officer because, at the time they requested the second due process hearing, they were involved in ongoing litigation with the ADE. This Court concludes that this contention is without merit. The IDEA provides that parents "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1). The only limitation on who may conduct such a hearing is found in § 1415(f)(3), which provides that the hearing "may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child." Moreover, Plaintiffs have cited no evidence of bias on the part of Hearing Officer Walker and, after a thorough review of the record, this Court has found no such evidence.

Plaintiffs also contend that various actions of Hearing Officer Walker resulted in the denial of due process. This Court, however, again concludes that their arguments are without merit. The weight of the Plaintiffs' objections relates to the introduction of evidence concerning J.C.'s diet and

the Hearing Officer's decision to order a physical evaluation at the Dennis Developmental Center. As an initial matter, the Plaintiffs' contend that the school should not have been allowed to submit any testimony or other evidence relating to J.C's diet and health because they failed to raise such a "defense" in their pleadings. However, the IDEA contains no formal pleading requirements and, moreover, the Court finds that the admission of such evidence did not result in unfairness to the Plaintiffs. In addition, the Court concludes that Hearing Officer Walker's decision to order a medical evaluation of J.C. did not violate the Plaintiffs' due process rights. Indeed, given the circumstances of this case, Hearing Officer Walker could not reasonably have been expected to make a decision without first obtaining information about the child's health from an unbiased and qualified source.

IV. CONCLUSION

The Court is sympathetic to the Plaintiffs' attempt to obtain what they view as the best possible education for their child, and the Court also is understanding of their attempts to alleviate J.C.'s condition. However, after an extensive review of the administrative records in these cases and in light of the Eighth Circuit's recent decision in *Gill*, the Court concludes that the Defendant school district has implemented an educational program for J.C. that complies with the IDEA and § 504 of the Rehabilitation Act. In addition, the Court concludes that the Defendants have complied with the procedural requirements of the IDEA. Thus, the Court will grant the district's motion for summary judgment. In light of the Court's findings, the remaining Defendants should be dismissed from these cases.[35]

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[35] In both of their Complaints, the Plaintiffs have contended that Defendant ADE violated the IDEA by failing to implement effective procedures for the education of autistic children and by frustrating the dissemination of information regarding the Lovaas method. After reviewing both administrative records, the Court concludes that officials with the ADE carefully considered various instructional methods and adopted in a reasonable manner a teaching method to be used with autistic students. The IDEA requires nothing more. Thus, the Court concludes that the ADE did not fail to meet its statutory obligations under the IDEA.

IT IS THEREFORE ORDERED that Defendant Atkins School District's Motion for Summary Judgment[36] be, and it is hereby, GRANTED. Accordingly, Plaintiffs' motions for summary judgment[37] are DENIED and all other pending motions are DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Plaintiffs' complaints be DISMISSED WITH PREJUDICE as to all Defendants.

Dated this 27th day of April 2001.

Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 4-30-01 BY

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[36] Docket No. 89.

[37] Docket Nos. 82, 41 and 15.

F I L E C O P Y

bm

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

April 30, 2001

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:96-cv-00748.

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