

STATE OF RHODE ISLAND – DUE PROCESS HEARING CASE #LL 13-05

STUDENT DOE

v.

NORTH KINGSTOWN SCHOOL DISTRICT

**DECISION**

SUMMARY OF ISSUE AND DECISION:

....Is the District providing a FAPE to Student Doe specifically appropriate assistance with life skills training as related to hygiene needs (focus on toileting)?

Did the District provide a FAPE to Student Doe?

**Held for the Petitioner In Part** – The IEP – Related Services Portion must be revised

**Held for the District in Part** - The Petitioner did not meet its burden re: to provision of appropriate toileting services

CASE # LL 13-05

STUDENT DOE V. NORTH KINGSTOWN SCHOOL DISTRICT

IDENTIFYING DATA

Student.....

Parent.....

**LEXICON**

For purposes of the Decision in the within Hearing and to ensure confidentiality of the student, the following Lexicon will be used:

Student: the Student

Parent: the Parent

LEA: North Kingstown School District (the District)

Director of Pupil Personnel Services: Dr. Patricia Pezzullo (Dr. Pezzullo)

Hearing Officer: Gloria S. Feibish (H.O.)

Student’s Attorney: Vicki Bejma (Ms Bejma or Attorney Bejma)

LEA Attorney: Mary Ann Carroll (Ms Carroll or Attorney Carroll)

**WITNESSES**

For the Petitioner.....Direct Examination by Attorney Bejma:

Dr. Phil Auger.....Superintendent of Schools - North Kingstown

Dr. Patricia Pezzullo.....Director of Pupil Personnel Services – North Kingstown

..... Parent

Patricia Wright.....Family Services Coordinator – Ocean State Community Resources (OSCR) – for the Home-based Therapeutic Services program (HBTS) and Personal Assistance Service and Support program (PASS)

Rebecca Palumbo.....Family Services Coordinator – Ocean State Community Resources (OSCR) – for the HBTS and PASS programs; per diem Behavioral Therapist at Bradley Hospital

Christopher LeBlanc..... Home-based Service Provider for Student(HBTS) at OSCR; Special Educator at Sargent Rehabilitation Center

For the Respondent .....Direct Examination by Attorney Carroll:

Diane Linanne.....Certified Occupational Therapy Assistant – North Kingstown  
Kerry Langlois.....Teacher Assistant for Student at NK High School

**LIST OF EXHIBITS**

Petitioner's (marked "P"):

- |   |                 |
|---|-----------------|
| 1. Note from Dr. Lucarelli re: assistance (7/18/07)           | <b>NOT USED</b> |
| 2. IEP effective from 4/8/2010 to 4/7/2011                    |                 |
| 3. IEP effective from 4/29/2011 to 4/28/2012                  |                 |
| 4. IEP effective from 5/15/2012 to 5/14/2013                  |                 |
| 5. Authorization for Tech Access (11/26/2012)                 |                 |
| 6. Special Olympics Health Clearance (1/17/2013)              | <b>NOT USED</b> |
| 7. Team Meeting Notes (1/22/2013)                             |                 |
| 8. Authorization for Faith Paradis (1/22/2013)                |                 |
| 9. Letter from Pezzullo requesting evaluation (2/1/2013)      |                 |
| 10. Clinical Neuropsychological Evaluation (2/1/2013)         |                 |
| 11. Communication Notebook                                    |                 |
| 12. Team Meeting Notes (2/28/2013)                            |                 |
| 13. Letter to Pezzullo (3/4/2013)                             | <b>NOT USED</b> |
| 14. Letter from Carroll (3/5/2013)                            | <b>NOT USED</b> |
| 15. Due Process Hearing Request (3/13/2013)                   | <b>NOT USED</b> |
| 16. Response to Due Process Hearing Request (3/18/2013)       | <b>NOT USED</b> |
| 17. Records of Dr. Raymond Mis, Gastroenterologist (3/5/2013) |                 |
| 18. OSCR Hygiene Protocol and cover letter (3/6/2013)         |                 |
| 19. E-mail to Carroll re: Tech Access Evaluation (3/26/2013)  | <b>NOT USED</b> |
| 20. Decision of Commissioner (4/2/2013)                       |                 |
| 21. E-mail chain between Bejma and Carroll (4/2/2013)         |                 |
| 22. Morning e-mail chain between Bejma and Carroll (4/3/2013) | <b>NOT USED</b> |
| 23. Correspondence from Carroll (4/3/2013)                    | <b>NOT USED</b> |
| 24. E-mail chain between Bejma and Carroll (4/4/2013)         | <b>NOT USED</b> |

- 25. Petition to Enforce – to Superior Court –contains 7 Exhibits (4/4/2013) **NOT USED**
- 26. E-mail from Carroll (4/4/2013) **NOT USED**
- 27. Removal to Federal Court (4/4/2013) **NOT USED**
- 28. E-mail to Carroll (4/5/2013)
- 29. 8:00 AM E-mail to Carroll (4/8/2013)
- 30. 8:17 AM E-mail to Carroll (4/8/2013)
- 31. Letter from Carroll (4/8/2013)
- 32. Petition for Remand or in the Alternative to Enforce – to U.S.District Court  
(4/8/2013) **NOT USED**
- 33. Objection to Petition for Remand or in the Alternative to Enforce (4/11/2013)  
**NOT USED**
- 34. E-mail chain between Carroll and Bejma (4/11/2013 through 4/16/2013)
- 35. Transcript before U.S. District Court (4/18/2013)
- 36. E-mail to Carroll (4/22/2013)
- 37. Daily note home (4/22/2013)
- 38. Correspondence from Carroll (4/23/2013)
- 39. E-mail to Carroll (4/25/2013) **NOT USED**
- 40. E-mail to Carroll (4/29/2013) **NOT USED**
- 41. Documents subpoenaed from NK, Keeper of the Records  
Letter from Nancy Ferencko (4/10/2013)
- 42. E-mail between Parent and Diane Linnane (12/4/2012 through  
3/15/2013)

Respondent's (marked "R"):

- 1. Motion to Dismiss (4/30/2013) **NOT USED**
- 2. Letter to Attorney Bejma (4/23/2013) **NOT USED**
- 3. Commissioner of Education Interim Order and Decision (4/2/2013) **also P-20**
- 4. IEP (5/15/2012 ) **also P-4**
- 5. Request to Evaluate (1/22/2013)
- 6. Protocol (undated)
- 7. Toileting Log (12/30/2012 – 3/1/2013)
- 8. Toileting Log (4/8/2013 – 4/24/2013)

- |  |                  |
|--|------------------|
| 9. Food Chart (4/8/2013 -4/24/2013)  | <b>NOT USED</b>  |
| 10. Food Log (1/21/2013 – 3/1/2013)  | <b>NOT USED</b>  |
| 11. Teeth Brushing (4/8/2013) – 4/24/2013)                                     | <b>NOT USED</b>  |
| 12. Teeth Brushing (1/23/2013 – 2/27/2013)                                     | <b>NOT USED</b>  |
| 13. Walking Log (4/8/2013 – 4/24/2013)   | <b>NOT USED</b>  |
| 14. Copy of Agenda – Home/School Communication (Sept. 2012 through March 2013) | <b>also P-11</b> |
| 15. Memorandum to Kerry Langlois (4/10/2013)                                   |                  |
| 16. Assistive Technology Evaluation (5/2/2013)                                 | <b>NOT USED</b>  |

**N.B. Exhibit Items marked “NOT USED” were, by agreement of the parties, not used for Testimony, but may have been referenced during questioning, so in selected instances, may have been used by the H.O. in reaching a decision in this case. If used by reference, this will be acknowledged by the the H.O. and weighted accordingly.**

### **TRAVEL OF THE CASE**

A request for a Due Process Hearing in this matter was filed on March 12, 2013 by Attorney Stephen Robinson on behalf of the Parent and Student in accordance with 34 CFR and 307.507-515 of the RI Board of Regents for Elementary and Secondary Education Regulations Governing the Education of Children with Disabilities (July 1, 2010). The request was received at the RI Department of Education on March 13, 2013 and since there was no resolution during the Resolution period, this Hearing Officer was appointed on April 12, 2013, by J. David Sienko, Director of the Office of Student, Community and Academic Supports. Attorney Vicki J. Bejma of Mr. Robinson’s office, was the attorney of record for this case.

A pre-Hearing Conference was scheduled by the Hearing Officer, for Wednesday, April 24, 2013, where the issues of the case were delineated and confirmed to the

parties by mail, on April 25, 2013. Hearing meetings were also scheduled at the pre-Hearing Conference, for May 8, 2013, May 15, 2013, May 17, 2013, May 20, 2013, June 12, 2013 and June 14, 2013. The Due Date for a Decision was due by May 27, 2013.

On April 29, 2013, both attorneys stipulated to a request to extend the time for a due date for a decision due to: one of the attorneys being court excused for a medical procedure, and because a client was out of District. The motion was granted and the Due Date for a Decision was advanced to June 26, 2013.

On April 30, 2013, Attorney Carroll submitted a Motion to Dismiss, based on claims that the District had complied with all the issues in the complaint (originally, there were five separate issues). The motion was denied under RI Regulations 300.512 (a)(2), which specifies that to deny the complainant's "...right to present evidence, confront, cross-examine and compel attendance of witnesses..." would constitute a procedural violation and would not allow for Due Process to occur. The Parent objected to the District's Motion to Dismiss, but the Hearing Officer had already ruled to deny the motion, by the time the objection had been received.

On April 30, 2013, the Hearing Officer received a Motion to Authorize a Subpoena Ducas Tecum to the Supt. Dr. Phil Auger, and to the Director of Pupil Personnel Services, Dr. Patricia Pezzullo, to appear as witnesses and to bring with them specified materials from the student's record. Attorney Carroll objected to the issuance of the Subpoenae on the grounds that the requested documents were irrelevant to the matter, and that the materials on Issue #1 (Hygiene needs) would be included as part of the District's Document list in compliance with the 5-Day Notice. The Objection was denied because the Hearing Officer would determine relevance and that the Student's complete record may need to be supplemented. The Hearing Officer did not agree to issue the Subpoenae as submitted, but after revisions were made, the motion was granted, with the Subpoenae to be signed and served prior to the first scheduled Hearing meeting on May 8, 2013.

On May 4, 2013, the Hearing Officer received a motion from the Petitioner for a

Continuance of the May 8, 2013 Hearing meeting and an Order to Produce the Student's entire educational record . The request to produce the student's full record to include the identities of the Student's previous personal care assistants, was granted, however, the request for a continuance was denied in favor of utilizing the first scheduled Hearing date of May 8, 2013 for a second pre-Hearing conference . to further discuss preliminaries prior to calling witnesses.

A second pre-Hearing conference took place on May 8, 2013. The Subpoenae had not yet been signed, but the Hearing Officer intended to do that at this conference. With the agreement of the Respondent to have the Superintendent and the Director of Pupil Personnel Services appear as witnesses and to bring the requested materials with them, the Petitioner withdrew the request for the Subpoenae. to be issued.

On May 7, 2013, the Hearing Officer received a motion from the Petitioner, for a ruling in favor of the Student relative to the Toileting issue, as a matter of law. Additionally, the Petitioner was seeking a ruling for the Student relative to the Technology evaluation and any subsequent services needed as a result of said evaluation, claiming a timing violation with the provision of same, also as a matter of law. The motion was denied because: (1) the toileting issue was the subject of a Hearing before the Commissioner of Education (not a Due Process Hearing) in which the Student prevailed; (a) took place prior to the filing of the complaint for the instant Due Process Hearing; (b) the Commissioner does not have jurisdiction over the Hearing Officer in a Due Process Hearing; and (c) the instant Due Process Hearing had not yet begun, but included the toileting issue, for which the Hearing Officer would have to render a decision; and (2) the Technology Assessment was not an issue in this case, by agreement of the parties at the first pre-Hearing conference, but rather the timeliness of said assessment as related to compensatory services that might be necessary.

On May 9, 2013, the Hearing Officer received a Motion from the Respondent to Continue Hearing Dates, in order for an IEP Meeting to take place for the purpose of having the Parent review and discuss the Assistive Technology Evaluation with the IEP Team, as well as to consider offering compensatory services. The motion was denied



inasmuch as the Hearing Officer did not think the Hearing should stop in order to hold an IEP meeting on the subject of one of the issues in the case, and that the issues would be better addressed during the Hearing.

The Hearing meeting scheduled for May 15, 2013 was held as the first Hearing meeting, May 8, 2013 was originally scheduled to be the first Hearing meeting, but was utilized as a second pre-Hearing conference meeting, instead.

On May 18, 2013, the Hearing Officer received a Motion from the Petitioner, seeking a ruling that the District produce communications for which Attorney Carroll was asserting attorney-client privilege, and which the Parent stated were needed in order to determine whether the District was complying with the Commissioner's Order of April 2, 2013. Compliance with this order, which predated this Due Process Hearing, was the focus of the first issue in this case. The Hearing Officer indicated that she would review any communications *in camera* to see if attorney-client privilege should be attached to any of these communications. The District's communications were to be given to the Hearing Officer at the second Hearing meeting on May 17, 2013, however, the Hearing Officer was ill and the next scheduled Hearing date occurred on June 12, 2013. The Respondent submitted an objection to the Petitioner's Motion to Produce, which the Hearing Officer did not receive until June 14, 2013, the same date she received the District's documents to review. The Hearing Officer found seven documents to which attorney-client privilege attached, and ordered the District to turn the remaining eighteen documents over to Attorney Bejma, which Attorney Carroll did. The motion was granted in part, only.

Hearing Meetings took place on June 12, 2013, June 14, 2013 and June 28, 2013.

At the Hearing Meeting held on June 12, 2013, Attorney Bejma announced that the Petitioner was withdrawing the hygiene areas of toothbrushing and changing the Student's shirt, as well as walking pursuant to the Student's IEP, from the first issue in the Complaint.

The Petitioner rested her case at the June 14, 2013 Hearing meeting.

On June 17, 2013, the Hearing Officer received a Stipulation from both Attorneys, requesting that there be another continuance because of the need to postpone Hearing dates due to the illness of the Hearing Officer, and for the subsequent need for additional hearing dates to be scheduled. This request was granted and a Due Date for a Decision was moved to July 26, 2013.

At the Hearing meeting of June 28, 2013, Attorney Carroll for the Respondent announced that there had been an agreement reached between the Petitioner and the District relative to Issue #2 in the Complaint, and that that issue would be taken off the table. Attorney Bejma confirmed this on the record. It was also agreed that the fully executed Agreement would be sent to the Hearing Officer for the record, and was received by the Hearing Officer on July 11, 2013.

Attorney Carroll presented her case in full at the June 28, 2013 Hearing meeting. Having postponed her cross-examination of the Parent until after the Petitioner rested her case, Attorney Carroll completed her cross-examination at this meeting, as well. Having no further witnesses to call, Attorney Carroll rested her case.

This Due Process Hearing was officially closed on June 28, 2013.

July 16, 2013 was the date set by the Hearing Officer for briefs to be filed for closing arguments. That was moved back to July 15, 2013 inasmuch as the Transcripts were available sooner than expected.

The sole issue remaining for a Decision from the original complaint, Decision was Issue #1: Is the District providing a FAPE to the Student, specifically, appropriate assistance with life skills training as related to his hygiene needs (focus on toileting)?

## **POSITION OF THE PARTIES**

### **THE PETITIONER (THE PARENT):**

Having withdrawn the sub-issues of toothbrushing, shirt-changing and walking from the first issue of the original Complaint (Tr; Vol. II, pp. 3-4) as well as compensatory services as related to the timing of the Technological Assistance Evaluation, which was the subject of the second issue of the original Complaint (Tr., Vol. IV, pp. 3-5), the remaining issue of concern is that the District is not providing appropriate assistance to the Student in the area of life-skills/hygiene training, the focus being on toileting. The hygiene/toileting concern is the major focus of the first issue and of this Hearing. The Petitioner maintains that the District is not providing a FAPE for the Student unless what they consider to be appropriate assistance with toileting, as regards the Commissioner's Order in a Hearing at the State level, is provided to the Student. Further, they maintain that the District has persistently failed to provide the Student with a FAPE in that the Student's toileting needs are not being addressed because he is not being properly wiped after bowel movements, and as a result, frequently arrives home with soiled underwear (Petitioner's Post-Hearing Brief, p.18)., including since the Commissioner's Order (Tr. Vol. I, p. 84). The Parent claims that the Student's underwear is never soiled at home or in the community (Tr., Vol. II, pp., 54, 72, 83; Vol. III, pp. 10, 12-13). The Parent does not believe the reasons given by the District for the soiled underwear (Tr., Vol. IV, pp. 106-107), and denies that the Student has any gastro problems, pursuant to a report from his Gastroenterologist (Ex. P-17 A, B).

The Petitioner further believes that the use of a Bidet with the Student, as related to his hygiene needs, is for the convenience of the District's staff to avoid wiping him (Id., p. 33), that appropriate training is not being given the Student to enable him to become independent with wiping, and that he is subjected to unsanitary conditions, and that its continued use causes a serious health and safety issue for the Student in light of the persistent soiled underwear and an instance of a stained shirt. Citing that the Student suffered an anal fissure on April 24, 2013, the Petitioner believes that the conditions

imposed by the use of the Bidet, further causes a hazardous situation for the Student (Id., p.30).

The Petitioner claims that the District “stonewalled” the Parent with delaying tactics relative to informing her of the protocol that would be followed by them, in complying with the Commissioner’s Order (Id., p. 23), and that the toileting assistance they are providing since the Commissioner’s order, is incomplete and haphazard (Id., p.23, p.27). They further believe the protocol the District is following is flawed, especially in the way it is utilized (Id., p.28).

The Petitioner (Parent) objects to the fact that the Paraprofessional that works with the Student 1:1, has invited other paraprofessionals who are not assigned to the Student, to observe the toileting protocol, which they assert is a practice for which she had no permission, and which violates the Student’s privacy rights (Petitioner’s Post-Hearing Brief, p.29).

The Petitioner asserts that the use of a Bidet is not a practical tool in teaching the Student to be more independent with his toileting, in that Bidets are not likely to be found in the community or the workplace, and so conflicts with the activity of career and employment exploration, which is part of the Student’s Transition Plan in his IEP (Id., p.32). Also, the Petitioner believes the Student has no time to waste on learning to use a device such as the Bidet, which he would likely never use outside of his current school placement. The Petitioner wants the Hearing Officer to order the District to cease using the Bidet, and instead, focus on teaching the Student the skills he needs to wipe himself correctly (Id., p. 34).

The Petitioner asserts that it is a *per se* procedural violation under IDEA, that the District, by employing the use of the Bidet, and by making other decisions relative to the Student’s needs, specifically in the toileting area, violated the Student’s rights under IDEA. The Petitioner cites Deal v. Hamilton County Bd. of Educ., 392 F. 3d 840, 859 (6<sup>th</sup> Cir. 1988) in support of this claim (Id., p.34).

Lastly, the Petitioner asserts that the District should be ordered to: (1) provide compensatory services to the Student for the time lost from school since May 10, 2013,

because he was unable to attend due to his exposure to unsanitary conditions; (2) revise the Toileting Protocol (Ex., R-6); to eliminate the Bidet, requiring that the Student be provided a final wipe, rather than be visually checked; and (3) that goals be developed for the Student to improve his wiping skills (Petitioner's Post-Hearing Brief, p.35).

THE RESPONDENT (THE DISTRICT):

The District maintains that the Student is wiped and the protocol is followed (Ex. R-6). The District further claims that the Student's soiled underwear occurs before he gets off the bus, after he gets on the bus to go home, or because the Student is having accidents and/or passing gas (Respondent's Memorandum of Law, p. 10).

The District agrees that the Student is entitled to related services under the *IDEA* and *Regulations* in the area of daily living and self-care skills, including toileting skills. The District believes the dispute in this Hearing is that the Parent does not believe the Student is being wiped appropriately (Id., p.11).

The District maintains that the Student is sent home clean every day, and that the last thing that is done before the Student boards the bus to go home, is to check to confirm that he is clean (Id., p. 11).

The District claims that the Bidet was recommended by one of the Student's Home Care workers, and that the Team agreed to purchase one and teach the Student how to use it. . Further, the District believes that the Bidet ensures the Student's cleanliness, and that it is not used instead of wiping him (Id., p. 12).

The District maintains that the Student has been trained, and enjoys using the Bidet, and that using it, is not the cause of the Student's soiled underwear (Id., p. 12)/

Because the Parent has filed for a State Hearing and several court actions against the District, and because of the level of mistrust that exists between the Parent and the District, and because the Student requires touching when wiping him, the District agrees that it is best practice to have an additional adult in the bathroom with the Student, in order to supervise, so as to protect the District against further litigation for inappropriate touching (Tr., Vol. IV, p. 58; Respondent's Memorandum of Law, p. 12).

### **FINDING OF FACTS**

The Student is XX years old, born on XXXXX (having turned XX during the course of this Hearing), residing in North Kingstown, RI with his mother, father and an XX XX, who has cerebral palsy and Attention Deficit Hyperactivity Disorder (ADHD) (Tr., Vol. I, p.44).. The Student attends North Kingstown High School and is currently in the XX Grade, in a Self-contained class, integrated in a school district building, spending less than 40% of the school day inside a regular class. He receives special education services in the academic areas of Reading, Math, Communication (written and oral), and Writing, Functional areas of Social Skills, Independent Living, Self-Advocacy, and Adaptive Physical Education. He also receives related services in the areas of Speech and Language therapy, Occupational therapy and transportation. He has a personal care attendant on a 1:1 basis, case management, a modified curriculum in all content areas, extended time for transitions between classes, and the monitoring of hygiene in the bathroom throughout the day, He also receives supplementary aids through a Word prediction program and a Word processing program with auditory output. The extended time for transitions between classes and the monitoring of hygiene in the bathroom is considered a goal, but all of the services indicated in this section of the IEP, are designated *Supplementary Aids and Services/Program Modifications/Supports for School Personnel*. (Ex. P-4).

The Student was diagnosed with Autism, impressions of moderate Mental Retardation, a Mood disorder and Obesity. He requires one to one assistance and prompting for

most physical tasks due to his intellectual disability. He requires adult assistance during travel and community activities as a safety issue. He has a short attention span and exhibits frustration with transitions, which sometimes result in angry, verbal outbursts. He has sensory issues (Ex P-10). He has been receiving special education and related services from North Kingstown since he is three years old (Tr., Vol. I, p.46).

The Student receives home-based therapeutic services (HBTS) and personal assistance service and support (PASS) from a service agency for about 25 hours per week (Tr. Vol. II, p.42-43). He requires a lot of self-help care at home (Tr., Vol. I, p.45). One of the Service Agency's staff, Ms Wright, who is a Family Service Coordinator there, and has worked extensively with populations with similar disabilities to the Student's, attended the Team Meetings of January 22, 2013 and February 28, 2013, and recommended the use of a Bidet with the Student (Tr. Vol. II, p.58, 70).

Some of the Student's need areas include: deficits in expression and receptive language, attention and executive skills, initiating an activity, short term memory functioning, learning new information and retaining it, limited ability to decode unfamiliar words, comprehension of complex directions and multi-tasking, limited ability to read social gestures in others, learning to refrain from making distracting vocalizations, and limited ability to be aware of, and monitor engaging in safe activities (Ex. P-10).

Some of the Student's strengths include: being very social and communicating with others; enjoying physical activity, paying for things independently, reading and being read to (he reads at a beginning second grade level), and helping people (Id.).

The Student has difficulties in weight control (Id.).

The Student becomes distressed with changes in routines, when he is uncertain about the schedule of activities, and in response to increased demands (Id.).

The Student was rated by his teacher (in January, 2013) on a Behavioral Assessment System for Children (as part of a Clinical Neuropsychological Evaluation) to have extremely low ability in taking care of his personal hygiene (Id.). The Student is not totally independent in toileting with bowel movements and needs assistance with wiping to ensure he is clean (Tr., Vol. III, p. 7; Vol. I, p.51; Tr., Vol. II, p. 52).

It was recommended by the Clinical Neuropsychologist who examined the Student in January and February 2013, that instruction with the Student be concise, include modeling with hand-over-hand teaching, include frequent positive reinforcement, and be repetitious (Id.).

At a February 28, 2013 Team Meeting, the Parent requested the staff to do the final wipe after the Student has a bowel movement, since he cannot do it himself, and was told by Dr. Pezzullo, that it isn't appropriate to do this in a High School setting, and that alternative devices would be used (a portable Bidet had been recommended at the January 22, 2013 Team Meeting-Ex. P-7). She further stated that no student would leave the restroom unclean (Ex. P-12). At this same meeting, the Parent requested either a male paraprofessional or a CNA to do the wiping (Id.).

The Parent took the Student to Dr. Mis, a Gastroenterologist, who conducted a medical follow-up examination in March, 2013. The Doctor found no organic pathology and said that the Student likely needed extra help with cleaning and hygiene because of his special needs. An Ultrasound of the Student's liver had been done in February, 2013, which was limited because of the Student's size and bowel gas, which prevented visualization of the pancreas. Dr. Mis first examined the Student in January, 2013, and noted that he weighed XX lbs., had soft stool in the rectal vault, but otherwise, no organic pathology. He prescribed additional fiber in the Student's diet. In March, during the follow-up, Dr. Mis noted the Student showed evidence of a fatty liver, had 2-3 stools per day, with occasional red blood per rectum (per Parent) with difficult stool. The doctor also noted that the Student's weight at the March exam, was XX lbs., per his Parent, He prescribed a continuation of the fiber supplementation. He also noted that the Parent requested some assistance in planning the Student's diet (he already goes to a Gym for exercise four times per week), and was referred to a Nutritionist to discuss diet planning



and weight loss (Ex. P-17 A and B). N.B. Dr. Mis was not called as a Witness, but his findings were referred to, during testimony.

After the February 28, 2013 IEP Team meeting, the Parent removed the Student from school and filed for an Interim order with the Commissioner of Education (Tr., Vol. I, p.76). An Administrative Hearing took place at the Commissioner's Office, following a request for an Interim Order to provide the Student with appropriate toileting assistance, including wiping. The Commissioner's Interim Order and Decision was made on April 2, 2013, under RI General Laws 16-39-3.2 and applicable Federal law. The Order was for the School Department staff to provide the Student with the assistance needed to clean his body following a bowel movement at school, to include wiping if the Student is not clean. It was ordered that an inspection of the Student's buttocks by staff must be made after he attempts to clean himself, to determine if wiping is needed, and if so, it must be done. This service was deemed to be a related service that his IEP requires (Ex. P-20).

Attorney Carroll, at a Hearing in Federal District Court on April 18, 2013, on a Motion by Attorney Bejma to enforce the Commissioner's Order, testified that she met with various involved school staff to direct them as to their responsibility to comply with the Commissioner's Order, and that the Teacher Assistant assigned to the Student was directed to wipe him (Ex. P-35). The Motion was denied without prejudice, inasmuch as the School District had just received the Commissioner's Order, and needed time to put all the pieces in place, so there was no evidence that the School was in non-compliance. The Judge indicated that the School was taking the Order very seriously (Id.).

Dr. Pezzullo issued a directive in writing, to the Paraprofessional assigned to the Student, with specific instructions to be in compliance with the Commissioner's Order. The directive indicated that the Bidet would be used, in addition to wiping (Ex. R-15).

The Parent was denied being able to view the Bidet, when she returned the Student to school on April 8, 2013. Additionally, Attorney Bejma asked to see the Protocol that

would be followed which included use of the Bidet (Ex. P-30), which did not occur. Attorney Carroll thought it best to discuss the Protocol at an IEP meeting.

Supt. Auger confirmed at the Hearing meeting of May 15, 2013 that the Paraprofessional Union had raised a question as to whether the job description for a paraprofessional included wiping a Student, and that he discussed compliance with the Commissioner's Order, with them. He also indicated there were no union actions taken, nor any grievances, regarding this issue (Tr. Vol. I, p. 27).

### **DECISION**

There is one remaining issue in this case, which deals with whether the District is providing the Student with FAPE, i.e., appropriate assistance with life skills training in the hygiene area, specifically focusing on toileting. In order to respond to this concern, one must first define what is meant by "appropriate" The IDEA defines FAPE to be educational instruction "specifically designed" to meet the unique needs of a child with a disability, coupled with any additional related services that are required to assist a child with a disability to benefit from that instruction, pursuant to an IEP (34 CFR, 300.39(a)(1)). Related services means transportation and such developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. Under 34 CFR, 300.39(a)(1), a special education includes speech-language therapy, audiology, interpreting, psychological, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling, including rehabilitation counseling, orientation and mobility and medical services for diagnostic or evaluation purposes. Related services also include school health services, school nurse services, social work services in schools, and parent counseling and training. A student identified as a student with a disability in need of special education and related services, must have an IEP, in which said services and supplementary aids needed, are described (34 CFR, 300.320(a)(4)). The IDEA requires that the statement of related services must be based on peer-reviewed research to the extent practicable, and a statement of the

modifications or supports for school personnel that will be provided to enable the child: to advance toward attainment of annual goals; to be involved in, and make progress in the general education curriculum, to participate in extracurricular and other non-academic activities; and to be educated and participate with other children with disabilities and non-disabled children in said activities. Further, each student's need for related services, like his special education, must be determined on an individual basis and on an assessment of the student's individual needs (112 LRP 51286-OSEP 9/6/12)

The IEP Team should consider the student's need for modified or alternative instructional materials when deciding the student's supplementary aids and services (51 IDELR 194-OSEP 2008). To the extent practicable, the special education and related aids and services must be based on "peer reviewed research", which is research that is reviewed by qualified, independent reviewers to ensure that the information meets the standards of the field, before the research is published (71 Fed. Reg. 46,664 2006). Parents are an essential component of the IEP Team and are to be involved in the IEP development process, which includes decisions regarding the provision of related services. However, parents have no veto power over any of the IEP's components, including related services (Buser v. Corpus Christi Indep. Sch., 22 IDELR 626 (5<sup>th</sup> Cir. 1995), cert. denied, 516 U.S. 916, 110 LRP 66347 (1995); also Hatfield Public Schs., 34 IDELR 168 (SEA MA 2001)). Further, the IEP Team may include other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate, whose inclusion are at the discretion of the parent or agency (34 CFR 300.21 (a)(6)). Additionally, a statement of frequency, location, and duration of the related services that will be provided must be included in the IEP (34 CFR 300.320 (a)(7)). With the aforementioned being stated, Congress has not defined what is meant by an "appropriate" education more specifically, nor have IDEA Regulations issued to date. So because of the silence of Congress and the Department of Education on this issue, reliance is placed on judicial interpretations of "appropriate" education in order to understand the meaning of the law. The Courts have struggled with this, also, and presently, the 1<sup>st</sup> Circuit , which includes RI, adhere to the *Rowley* test, which mandates that only *some* benefit is necessary. This being said, thiis Hearing Officer will weigh the evidence provided, to determine if the Student is receiving

all the related services to which he is entitled and is being educated in a manner in which he can learn.

The Parent of the Student in this case, requested a Hearing before the Commissioner of the RI Department of Education in March 2013, complaining that her child was not receiving the services he needed in his life skills training, specifically with toileting assistance, including wiping, so that his health and safety could be properly provided for in school (Ex. P-20). At that time, the District had stated that it was not appropriate for personnel to wipe the Student in a public school setting (Ex. P-12). However, it was established that the Student, who is not 100% toilet-trained for bowel movements, and who has several disabilities, needed assistance in order to be clean, when he had to do this in school (Ex. P-17A, Tr. Vol. II, pp. 51-52; pp. 102-103; Vol. III, pp. 809). The Parent's complaint also addressed a concern about the Student frequently coming home from school with soiled underwear, which she believed was occurring because the Student was not receiving a final wipe after a bowel movement. It was pointed out that the 1:1 Aide that accompanies the Student to the bathroom at school, does not look at the Student's buttocks to determine if he is clean; she looks at the wipes he is given. The Parent was keeping the Student out of school, dating from the Team meeting cited above. Further the record indicated in the past three IEP's, that there was no mention of wiping the Student, only of monitoring the Student in the bathroom, which was in compliance with his IEP. Also, there was no evidence that wiping was done in the past.

After hearing the position of the parties, examining the evidence presented and listening to the testimony of the Home Service Coordinator and the Parent, the Commissioner determined that, under RI General Laws, Regulations for School Health Programs, the Student was being adversely affected, resulting in his inability to "deal effectively" with himself or others in the school setting, and was entitled to the assistance being requested, with appropriate school personnel to keep his buttocks free of feces, if ordered by a physician.

The State Department Hearing Officer determined that when the Student's IEP indicated monitoring his hygiene in the bathroom, along with Occupational therapy services focusing in part, on functional living skills, it meant (to him) that appropriate staff was observing the Student to make sure that he is dealing effectively with his bowel movements. He further determined that the proof of "dealing effectively" was not to see if the wipes were clean, but to see if his buttocks were clean, and if not, to clean him. If wiping was required, then they must wipe him. He further stated that this was the related health service the Student required to have in his IEP.

The Interim Order and final Decision that was made, was that the appropriate school staff provide the Student the assistance he needs, when necessary, after a bowel movement as described therein. The Decision also ordered the District to provide compensatory services for the instruction he missed since March 1, 2013. This decision was dated April 2, 2013.

Parenthetically, this Hearing Officer believes that the Commissioner's Order is using "buttocks" as a euphemism for the inner buttocks and anal area. The Hearing Officer is of the opinion that it would be more helpful in this case, if the area to be cleaned is referred to more specifically, so as to ensure there are no misinterpretation of what has to be done with this Student. In other words, specificity in favor of delicacy is preferable, in the opinion of the Hearing Officer. If the term. "Buttocks" is continued to be used. its meaning needs to be clearly understood by the personal attendant and others working with this Student.

### Related Services

As indicated by the Commissioner's Order detailed above, the services to be provided to the Student, are considered Related Services, and as such, must be included in his IEP. The type of related services ordered in the instant case, are related to the services required of the student in the cases: Cedar Rapids Community School District v. Garrett

F., 526 U.S. 66 (1999) and Irving Independent School Dist, v. Tatro, 468 U.S. 883 (1984). The physical needs of the students in the cited cases were far more involved than the Student in the instant case (they required clean intermittent catheterization several times during the school day), Similarly, however, without the services needed, they were adversely affected in accessing their special education.

The Student's current IEP (of record during the time of this Hearing) includes a goal: *Extended time for transitions between classes and Monitor hygiene in the bathroom,* which are in the section of the IEP entitled: *Supplementary Aids and Services/Program Modifications/Supports for School Personnel.* The services identified as Related Services in the Commissioner's Order, encompassing *what* was ordered belong in the Related Services Section of the IEP. The IEP Team must convene a meeting to review the current IEP and make the necessary revisions. In addition to "Monitoring Hygiene in the Bathroom. The revisions should specifically include inspection of the buttocks, wiping when necessary, utilizing the agreed-upon protocol, instructional activities, for increasing independence with personal hygiene, the service provider(s)...in other words, all parts that are completed for the other goals/objectives in the IEP (e.g., as with academic areas), must be completed for this related service. The parent, as an integral member of the Team, will be included in developing the revision. If a device, such as a Bidet, or other equipment is to be utilized, that is also to be included for this service.

### The Bidet and the Protocol

There is a great deal of dissension about the use of the Bidet with the Student, with the parties lining up on opposite sides of the issue. The District has been accused of using the Bidet for their own convenience, ostensibly to avoid wiping the Student, and that its continued use is impractical, sets the stage for health and safety issues and continued reliance on its use, and is resulting in the Student not being properly instructed in becoming more independent with his toileting needs (Petitioner's Post-Hearing Brief). The District, on the other hand, believes the use of the Bidet provides one more step in assuring the Student's cleanliness, that they are not substituting it for wiping the

Student, because they *are* wiping him, and are following the protocol developed. Furthermore, the District points out that one of the Student's home care workers (provided by the Parent), had recommended using a Bidet (Respondent's Memorandum of Law, pp. 11-12). Perhaps, if the District had permitted the Parent to see the Bidet when it was about to be used with the Student, and if the Parent had been invited to participate in the development of the Protocol for compliance with the Commissioner's Order, there would not be so much controversy and disagreement.

This Hearing Officer believes that personal hygiene is easier when one uses a Bidet, as hands will encounter contaminants when using paper or wet wipes as the Student does. However, in the instant case, it *is* necessary to use hands at the end, to ensure the anal area is clean and dry. There is actually more work entailed in using a Bidet, because it must be properly maintained in order to keep it clean. It is definitely not more convenient, in the Hearing Officer's opinion. The Bidet has another benefit, in that it is easier for an obese person to handle their personal hygiene while using the bathroom. Bidets are often used in the community with the elderly, in nursing homes and in rehab centers, and with Autistic people, but it is true they are rarely, if ever, seen in the workplace or in public facilities.

A Bidet must be selected carefully, to make sure it will fit the person using it, that the right set-up is available for its installation, and that it be installed correctly. There is also some instruction from a person knowledgeable about Bidets and the person who will be using it, needed. This involves some investigation and analysis relative to the person for whom it is intended. During the Hearing, the Occupational Therapist Assistant, Ms Linnane, indicated that she did an assessment as to suitability of the use of a Bidet with the Student. She also indicated that she trained him in its use, and that he liked using it (Tr. Vol. 1V, pp.24-28). The continued use of a Bidet will be determined by the IEP Team at the time the IEP Revision occurs.

Miss Linnane was questioned by Attorney Bejma as to why her title, listed on IEP cover sheets was sometimes not indicated with an "A" next to OT. The Hearing Officer

Inferred that the questions were accusatory that Ms Linnane was holding herself out to being a Registered OT, rather than an Assistant. The Hearing Officer found Ms. Linnane to be credible in *not* representing herself as something other than what she is (Tr. Vol. IV, p. 18).

Ms Linnane, as a licensed Occupational Therapy Assistant, may not initiate a program until the patient has been evaluated by the licensed Occupational Therapist, and may not perform an evaluation, but may assist in the data-gathering process (Rules and Regulations for Licensing Occupational Therapists and Occupational Therapy Assistants, p.6). Ms Linnane did testify that she works under the supervision of a licensed Occupational Therapist, but was not asked if that Supervisor had any involvement with the instant case, so there was no evidence presented to support non-compliance in this activity.

The Protocol used in the bathroom with the Student, was developed following the Commissioner's Order. Various exhibits and testimony by the Parent, bear out the fact that the Parent did not have a copy of it, nor was she involved in its development (Tr. Vol. I, p. 79). This Hearing Officer has indicated that the IEP is to be reviewed and revised consistent with Regulations, which will remedy this situation, as the Parent is to be involved in its revision.

The Bathroom Log, as related to the Protocol (Ex. R-8) is not signed by Ms Langlois, the 1:1 Personal Assistant to the Student. Instead, there are initials of several different unidentified others for each day (Id.). Additionally, Ms Langlois admitted there were probably some instances when the Protocol was not followed as written, and/or some steps were not recorded correctly (Tr., Vol. IV, pp. 90-91). However, Ms Langlois testified under oath that she wipes the Student after a bowel movement if needed, , consistent with the Commissioner's Order. It was also stated in testimony that Ms Langlois was/is uncomfortable with her assignment with the Student, and expressed this during the Team meetings in January and February, prior to the Commissioner's Order and this Hearing. This Hearing Officer did not see any evidence that bears this out, nor did she give the impression of discomfort during testimony.



### Bathroom Monitors

In addition to the Paraprofessional (Ms. Langlois) who assists the Student on a 1:1 basis throughout the day, including in the bathroom, there are several additional paraprofessionals who monitor the Protocol being followed with the Student while in the bathroom (R-8 – Bathroom Log for period 4/8-4/24/13). The Parent objects to this practice on many levels: privacy rights of Student, undignified, to name a couple. The Parent also complains that the “monitors, who are also paraprofessionals, not otherwise assigned to the Student, includes among them, the Paraprofessional’s Union President (Petitioner’s Post-Hearing Brief, p. 29, citing various witness testimony). When Ms Langlois was asked why she did not sign any of the Toilet Logs, her response was that she thought those were her personal notes, and she didn’t have to sign them. The Hearing Officer does not find that response to be credible, especially in view of the fact that others initialed them. The Logs and any other document that is identifiable and maintained is part of the Student’s record (FERPA-34 CFR, 99.3).

When asked why there are monitors in the bathroom when she is providing services to the Student, Ms Langlois replied that she did not get a formal authorization to have additional aides in the bathroom with her, but was taught that in her certification class and previous jobs, that when pants come down, it was good practice not to be alone in the bathroom with a Student (Tr., Vol. IV, p. 58). Attorney Carroll, in her post-Hearing Memorandum of Law, p. 12, indicates that it is best practice to have an additional adult in the bathroom, so there are no issues of impropriety or inappropriate touching of this child, Further, Attorney Carroll indicates that, because of the mistrust of the Parent toward the District, and the numerous legal actions that have already been taken by the Parent against the District, it is necessary to take every step to protect against further litigation.

No District policy was put into evidence to corroborate what Attorney Carroll states in her post-Hearing Memorandum of Law. Also, there is no course instruction given in programs for the licensure of paraprofessionals that indicate it is best practice to have a second adult in a bathroom with the paraprofessional, that this Hearing Officer is aware of, or has seen presented in evidence for this Hearing. It is also unlikely, in the opinion

of this Hearing Officer, that the Parent would bring suit for touching the Student inappropriately, especially in light of the fact that that is precisely what the Parent is demanding the District do, in order to ensure cleanliness after a bowel movement. For these reasons, this Hearing Officer rejects the arguments given for additional monitors in the bathroom with the Student, and orders that this practice immediately cease.

### The Soiled Underwear

This concern and source of aggravation to the Parent is the focus of the sole issue in this Hearing. The Parent believes the soiled underwear emanates from the refusal of the District to wipe the Student following a bowel movement (Tr., Vol. IV, p.104). Also, the Parent does not believe that the soilage of the underwear is due to the Student having gas or diarrhea, as claimed by the District (Id, p.104; p. 106). The Parent's belief is based on the size and shape of the soilage of the underwear, insisting that he does not have diarrhea, and that gas would make a different shape (Id., p. 106). She insists this only happens in school, and never at home or in the community. The Home Care worker that works with the Student testified that he never saw any soilage of the Student's underwear when he was in his charge.(Tr., Vol.III, pp. 11-12). The Parent also claimed that the Student was examined by a Gastroenterologist, and that everything was fine (Tr., Vol. IV, p. 107). She also asserts the Student does not have diarrhea or gas at home.

The District, on the other hand, claims that whenever they sent soiled underwear home with the Student, it was because he had diarrhea or gas, and that they were absolutely wiping him so that he was clean. Miss Langlois testified under oath, that when the Student was sent home, he was clean. She also testified that on occasion, he arrived at school with soiled underwear, and she had to change him. The Parent does not accept this explanation, and insists that she sends the Student to school, clean (Tr., Vol. IV, pp. 60-61). Ms Langlois has stated that the Student often has gas, which she believes causes the soilage at times (Id, p. 61).

The Student was examined by Dr. Raymond Mis, a Board certified Gastroenterologist, on January 29, 2013 and March 5, 2013. In addition to the examinations performed, the Student's Primary Care Physician, Dr. Lucarelli, ordered a Liver Function Test, which was completed on February 25, 2013, and an Ultrasound of the Abdomen, which was performed on February 19, 2013. The Ultrasound results were limited, due to the Student's Habitus (large size) and limited visualization of the pancreas due to bowel gas. There was evidence of fatty liver. The Student has 2-3 large stools per day, with an occasional small amount of red blood from the rectum, if he has a difficult stool. On examination in January, the Doctor noted soft stools in the rectal vault. On examination in March, the Doctor indicated bowel sounds were present (Ex. P-17 A and B). The Student weighed XX lbs. in March, per his Parent, which was a 20 lb. gain since the January examination. The Parent requested assistance in planning his diet in an effort to work on weight loss. The Doctor referred the Parent to a Nutritionist, with whom she testified she is following up (Tr. Vol. IV, p.108). The Doctor also prescribed fiber supplementation to the Student's diet. The Student is also exercising at a Gym four times a week. Dr. Mis did not otherwise find any organic pathology (Ex. P 17 B). It is noted that Dr. Mis' report was the Petitioner's exhibit, but he was not called as a witness by either party, although opportunities were given to allow for cross-examination, which the District chose not to do, This Hearing Officer admitted the Exhibit, inasmuch as it was referred to, during the Hearing, and the Hearing Officer is giving it due weight.

According to Dr. Mis' findings the Student does exhibit soft stool and gas and he is extremely obese, which is noted on his IEP. If the Parent is, or will have a Diet Plan for the Student, and especially if it needs to be monitored in school, it would be extremely beneficial to the Student, if the school staff worked with the Parent to monitor that. This is something that should be discussed at the IEP Revision. Based on the findings in the examinations noted above, this Hearing Officer believes that the Student's diet, which certainly relates to his size, and that he has soft stools, abdominal noises and gas, can possibly cause some of the soilage of his underwear. it is also possible that the wiping after a bowel movement is not always done thoroughly. There is no reported direct supervision of the 1:1 when she is in the bathroom with the Student. Dr. Pezzullo did testify that she plays a supervisory role with the paraprofessionals in that she becomes involved with them if they're in a special ed. classroom (Tr.,Vol. I, p.39). Without a

supervisory report or any direct observation by a neutral party of the implementation of the Protocol, or of the Student's underwear right after a visit to the bathroom, there is no way to determine how the underwear is becoming soiled. There was no evidence presented by the Petitioner that proves the Student's underwear was soiled because the District is not wiping him. Parenthetically, Attorney Bejma attempted to present the soiled underwear that the Parent had collected over time, at the last hearing meeting, as evidence, however it was not permitted, because the District objected, and it was also well beyond the five-day time frame permitted for disclosures. The reason for the soiled underwear is based solely on conjecture, in the opinion of this Hearing Officer, and is therefore, not definitive proof of how or where it became soiled.

The burden of proof/persuasion as regards the provision of a FAPE for the Student, with a specific focus on the toileting portion of the Issue in this case is on the Petitioner (Schaffer v. Weast, 126 S. Ct 528, 537 (2005)), and it is the opinion of this Hearing Officer that the Petitioner has not met its burden. **Held for the District**

The Hearing Officer finds that the District has committed a procedural violation, in that the life skills/hygiene/toileting services needed to be included in the Student's IEP in the Related Services section, consistent with RI Regulations and the Commissioner's Order, belongs in the Related Services section, meaning that the IEP must be revised forthwith. **Held for the Petitioner**

**Additional Order**

To ensure that an appropriate protocol for the Student is developed for inclusion in his revised IEP, the District should consult with an agency or person(s) experienced in working with autistic persons with toileting issues, to be in attendance at the IEP meeting for this purpose.

**ADDENDUM**

In her post-Hearing Brief, Attorney Bejma for the Petitioner, chose to critique this Hearing Officer for not allowing certain offers of proof, and/or for not permitting any entry of evidence beyond the start of this Hearing, citing Rules of Evidence and a RI Supreme Court murder case. Attorney Bejma engaged in repeated attempts to accomplish this.

Attorney Bejma should have known that Rules of Evidence used in courts are not applicable in Due Process Hearings. Further, there is no express right to Discovery in RI, in a Special Education Due Process Hearing, except the 5-day disclosures and the right to examine educational records (unless otherwise provided under state law). Non-paper exhibits must be copied and exchanged under the five-day rule, as well (See 34CFR 300.512 (b))

I, the undersigned Hearing Officer, hereby certify that on July 26, 2013, I mailed and/or delivered a true and accurate copy of the Decision in the case of M v. North Kingstown School District, Case #LL 13-05:

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Gloria S. Feibish  
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