

STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS

DEPARTMENT OF EDUCATION

SPECIAL EDUCATION DUE PROCESS HEARING

(Case # 11-04)

STUDENT: JOHN DOE

SCHOOL DISTRICT: JOHNSTON SCHOOL DISTRICT

**HEARING OFFICER: ARTHUR G. CAPALDI, ESQ.
1035 MAIN STREET
COVENTRY, R.I. 02816
Tel: 821-3537**

**SCHOOL DISTRICT REPRESENTATIVE: WILLIAM J. CONLEY, JR., ESQ.
670 WILLET AVENUE
EAST PROVIDENCE, R.I. 02915**

**PARENT'S REPRESENTATIVE: GREGORY A. MANCINI, ESQ.
100 MIDWAY PLACE, SUITE 1
CRANSTON, R.I. 02920-5707**

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LEXICON

For the purposes of the decision in the within hearing and to ensure confidentiality of the student, the following Lexicon shall be used in this decision:

STUDENT: JOHN DOE

MOTHER:

SCHOOL DISTRICT: JOHNSTON SCHOOL DEPARTMENT

**HEARING OFFICER: ARTHUR G. CAPALDI, ESQ.
1035 MAIN STREET
COVENTRY, R.I. 02816**

**DISTRICT'S ATTORNEY: WILLIAM J. CONLEY, JR., ESQ.
670 WILLET AVENUE
EAST PROVIDENCE, R.I. 02915**

**PARENT'S ATTORNEY: GREGORY A. MANCINI, ESQ.
100 MIDWAY PLACE, SUITE 1
CRANSTON, R.I. 02920-5707**

POSITION OF PARTIES

PARENT: The School District denied the Student a free appropriate public education (FAPE) by eliminating the physical therapy services at the Crossroads Physical Therapy and by reducing the Student's physical therapy by three hours one day a week, four weeks a month.

SCHOOL DISTRICT: The Services at the Crossroads Physical Therapy in part are medical services the cost of which is not the obligation of the School District and further, the School District has physical therapist that can perform the services of the Crossroads and therefore can be eliminated. Finally, the School District is obligated to only provide school based therapy necessary to access the Student's education and what is needed in the educational environment. The Crossroads is a physical therapy clinic that addresses other problems that do not have anything to do with the educational environment. The School District does not have to pay for that service.

ISSUES and SUMMARY of DECISION

ISSUE: The Johnston School District denied the Student a free appropriate public education by removing the Services of Crossroad Physical Therapy in the Proposed IEP of January 25, 2011.

DECISION: The School District did deny FAPE to the Student by eliminating the services of the Crossroads and by reducing the Student's physical therapy by three hours.

The Crossroads Physical Therapy shall remain in the IEP for three hours one day a week for four weeks a month. The additional physical therapy to facilitate head and neck mobility as found in the proposed IEP shall remain. ESY services at the Crossroad shall be added to the IEP.

TRAVEL OF THE CASE

Pursuant to Section IX, 7.1.1 of the Regulations of the Board of Regents Governing Children with Disabilities, on February 25, 2011, this Hearing Officer received Notice of Appointment to conduct an impartial due process hearing in the above matter.

On March 1, 2011, a notice of appointment was sent to all parties setting forth hearing dates and a date for a pre-hearing conference. The pre-hearing conference was held on March 24, 2011. The following hearing dates were scheduled:

March 31, 2011
April 6, 2011
April 7, 2011
April 13, 2011
April 14, 2011

Mr. Conley confirmed availability for hearing for April 7, 13 and 14, 2011. The Parents did not respond confirming their availability for hearing on the dates given. On March 24, 2011, a pre-hearing conference was held at which the Parents informed the Hearing Officer that they were seeking legal representation. On March 28, 2011, the Hearing Officer cancelled the hearings of the 6th and 7th of April and set April 13, 2011 for the next hearing date. On April 7, 2011, the Hearing Officer conducted a three-way telephone conference with the parties and the following dates for hearing were agreed upon:

May 9, 2011
May 11, 2011
May 18, 2011

On April 8, 2011, Attorney Mancini entered his appearance on behalf of the Parents and the parties stipulated to the above hearing dates. On May 5, 2011, the parties stipulated to continue the hearing of May 9, 2011 for forty-five days. The Parents had a problem scheduling one of their expert witnesses, Dr. Khwaja.

The hearings started on June 14, 2011. The next hearing date was June 27, 2011 to accommodate the availability of Dr. Khwaja and the hearing ended on June 28, 2011. The Parties received all the transcripts on or about July 15, 2011 and were to submit briefs by July 30, 2011.

FACTS

The Student was born June 20, 2004. He was born on the edge of viability at twenty-five weeks and he remained in the hospital for four months. (Trans. 6-14-11 P.14) While in Oxford, England, the Parents received a diagnosis of Cerebral Palsy. Before going to England and after returning from England the Student was enrolled in Meeting Street School. The Student missed every milestone. (Trans. 6-14.11 P.14) The Student is unable to feed himself, unable to walk and his speech is affected. (Trans. 6-14.11 P.13) The Student is unable to keep his head at midline. (Trans. 6-14-11 P.15) While in England, the student was assessed at Oxford Radcliffe Hospitals on April 3 to April 6, 2006. At two years old, the Student could barely roll over and could not sit without support. He could hold his head momentarily and lift it only to sit. He could reach out for objects but was not able to transfer. He was totally dependant for his self-care needs. He had significant primitive reflexes. The prognosis was that the Student had dystonic cerebral palsy. (Sch. Dist. Exh. 1) On August 31, 2006, Dr. Khwaja of the Neonatal Neurology Program at Children's Hospital, Boston, found the Student to have "global developmental delay; most marked in areas of gross and fine motor skills, with axial hypotonia, appendicular hypertonia and marked dyslunia." (Sch. Dist Exh. 2)

On September 29, 2006, Crossroads presented a report that was received by the School District on July 18, 2007. The physical therapist was James R. Bucklin. It stated:

“The development of his trunk control, head control, midline orientation and crossing, and motor control system as well as improvements in his distal mobility will all lead to improvements in his gross and fine motor skills.This type of physical therapy intervention (the Student) receives at Crossroads includes both structural and functional therapies” (Sch. Dist. Exh. 3)

Women & Infants Hospital in January 16, 2007 evaluated the Student in the Neonatal Follow up Clinic at a chronological age of four months, twenty-seven days. Dr. Betty R. Vohr reported:

“the neurologic examination revealed poor head control with hypertonicity of all four extremities consistent with spastic quadriplegia. His development is progressing slowly, although he remains significantly delayed. He has some nice social interaction emergency. He can roll from front to back and has a supported sit” (Sch. Dist Exh. 4)

The Student has always been home tutored. (Trans. 6-14-11 P.17) In 2006, the Student was part of the early intervention program of Meeting Street School and because of the Student was going into his third year he was no longer eligible for the programs. He was discharged on June 19th and 20, 2006. (Sch. Dist. Exh. 6 & 7)

The Student began physical therapy at the Crossroads in 2006. The physical therapy the Student received included both structural and functional therapies. (Sch. Exh. 3) On January 16,

2007, Woman and Infant Hospital through Dr. Betty R. Vohr, who had been evaluating the Student since November 17, 2004, reported findings and recommendations. One recommendation was “Increase Physical Therapy sessions at Crossroad to three hours per week considering the excellent progress made in that specialized program” (Sch. Dist. Exh. 4) The School District received that report on July 18, 2007 and on that same date received the Crossroads report, School District Exhibit 3. On September 12, 2007 and IEP was put into place by the School District. (Parents’ Exh. 15) It was to run to September, 2008. That IEP was accepted by the Parents. It provided for physical therapy three hours a week. (Out of district) (Parents’ Exh. 15 P.9) The IEP also provided Occupational Therapy (OT) and Physical Therapy (PT) by the District for forty-five minutes two days a week for OT and one day a week for PT. (Parents’ Exh. 15. P.12)

On September 4, 2007, the Crossroads presented another report which was received by the School District on September 14, 2007. The report set forth several short term and long term goals.

(Sch. Dist. Exh. 9)

On September 20, 2007, the Student was evaluated by Jennifer A. Price, M.S., CCC-SLP, Speech and Language Pathologist from Alphabet Soup. The evaluation was for Oral Motor, Feeding and Speech. (Sch. Dist. Exh. 10) At this time the Student was three years three months old. The evaluation made several recommendations to improve oral-sensory registration, tone, strength, grading and dissociation of tongue/lip/jaw movements to assist in achievement of standard feeding skills.

The Student was evaluated in May, 2008 by Faith M. Paradis M. Ed. OTR/L after a referral from his speech pathologist. The evaluation found that the Student had very limited

ability to interact with his environment in a typical manner due to his significant physical challenges. It was determined that the Student need both low tech and high-tech supports to gain language and communicate effectively. The evaluation concluded with eighteen recommendation. (Sch. Dist. Exh. #11)

Dr. Khwaja presented an opinion on October 1, 2008. He concluded his report by stating:

“While I am pleased with the Student’s progress overall, for it to continue it is very important that he continues his current therapies to prevent regression and enable him to progress. Recommended services include physical therapy, occupational therapy, speech and language therapies, hippotherapy and oral motor Therapy.”

He also opined that it was very important that his development services be maintained on an intensive full year basis with no gap in services over the summer. (Plaintiff Exh. 1)

On December 10, 2008, another IEP was developed to run through December, 2009. It provided for related services in Occupational Therapy for Sensory motor/ADL 1 positioning for one and half hours one day a week for three weeks each month, Physical Therapy for forty-five minutes one day a week for four weeks each month, Physical Therapy for functional and structural development three hours a week one day a week for four weeks each month and Physical Therapy for forty-five minutes one day a week for four weeks each month. (Plaintiff Exh. 4)

Although the IEP is silent on where the structural and functional Physical Therapy is to take place, it has the same amount of time as provided in the prior 2007 IEP for the Physical

Therapy related service. The 2007 IEP referenced that it would take place at an out of District Provider. I find that this is referencing the Crossroads.

Dr. Khwaja sent the Parents an evaluation as of May 27, 2009. He stated that the Student benefited significantly from intensive music therapy and he recommended that it continue.

(Plaintiff Exh. 4)

As of the spring of the Student demonstrated fluctuating tone and lingering primitive neck reflexes which requires maximal assistance to position head in neutral when supine. He was able while in sidelying to control head movements within twenty degrees away from neutral. He demonstrated about thirty seconds of neutral neck extension. In tailer, he could maintain neutral neck position for about five seconds. (Plaintiff Exh. 5)

Between spring of 2009 and January 21, 2011 (Plaintiff Exh. 12) there were six progress reports. (Plaintiff Exh. 6,7,8,9,10 & 11) all of the reports demonstrated progress in various areas. By January 21, 2011, the Student could maintain neutral head alignment when supported for up to five minutes. He needed maximal assistance to control sit to stand to sit, reaching and moving head; to control sit to stand transitions and for forward weight shift and control of flexion/extension. (Plaintiff Exh. 12)

On May 18, 2011, Dr. Khwaja, specifically gave an opinion concerning the therapy received by the Student at the Crossroads. He stated:

“(Student) Gondreau (date of birth 6/20/04) is a patient of mine with a history of severe neonatal hypoxic ischemic encephalopathy with basal ganglia injury and athetoid cerebral palsy who has made significant progress in his current rehabilitation program at Crossroads. He has had made marked improvement both in truncal stability and tone as well as purposeful movement and communication. It is our strong recommendation that he continue in this program given the high risk of regression should these therapies alter significantly or cease.” (Plaintiff Exh. 3)

On March 9, 2011, Dr. Khwaja gave basically the same opinion as that of May 18, 2010. (Plaintiff Exh. 19) Dr. Khwaja gave an opinion on January 11, 2011 concerning the Student and the need for homebound services which he recommended along with at least five hours of special education tutoring. (Sch. Dist. Exh. 13) On January 25, 2011 the School District proposed on IEP for the Student covering the period from January 25, 2011 to January 21, 2012). (Sch. Dist. Exh. 14)

It provides the following for Physical Therapy:

Occupational Therapy for sensory motor ADL/positioning program for 90 minutes one day a week for three weeks a month and Physical Therapy to facilitate head and neck control and develop mobility skills for forty-five minutes two days a week for three weeks a month and it provided for ESY, Occupational Therapy for sensory motor ADL/positioning forty-five minutes a day for two days a week for three weeks a month.

On January 12, 2011, the School District sent a prior written notice to the Parent indicating that the School District was changing the prior IEP. It said “School Department proposes eliminating private PT and increasing PT time from District; change of SLP to District employee”

Testimony of Mother

Before going to Crossroads, they took the Student other places for five months. The mother testified “This (Crossroads) was the first place he displayed any progress at all” (Trans. June 14, 2011 P. 24) “The Student’s progress is extremely slow” (Trans. June 14, 2011 P. 26) In the 2007-2008 IEP the School District did not have a physical therapist to service the Student so it was suggested that the Town use the Crossroad.

“Following the negotiations between the Town and the Johnston School Department and the Crossroad an agreement was reached that was acceptable to both parties”. (Trans. June 14, 2011 P. 23).

In the 2008 – 2009 IEP the Town increased the physical therapy by adding the School District’s physical therapist for forty-five minutes a week. (Trans. June 14, 2011 P. 28) The Parents did not agree with the 2011-2012 IEP. (Trans. June 14, 2011 P. 38)

The Mother stated that over the 2009 – 2010 school year the Student increased his neck control and his mobility. He was able to put his feet on the ground and she attributed his progress to the Crossroads. (Trans. June 14, 2011 P. 39) The School District Occupational and Physical Therapist work together at the home.

“They work together so the Physical Therapist (PT) will position him and the Occupational Therapist (OT) will engage him in activities.” (Trans. June 14, 2011 P. 40)

The mother addressed her observations after this therapy at home and after therapy at the Crossroads.

“After his session in my home there isn’t any change really.” (Trans. June 14, 2011 P. 41 & 42) “At the Crossroads I can, depending, sometimes he is just having a much harder day. At Crossroads I can definitely sense a different pattern of movement sometimes once he has had his physical therapy sessions.” (Trans. June 14, 2011 P. 42)

The Student goes shopping and church with the Parents. He has a very full family life (Trans. June 14, 2011 P. 47) The Student does not receive Occupational Therapy at the Crossroads. (Trans. June 14, 2011 P. 62) The Mother explained the discussion with School Personnel about the elimination of the Crossroad services. She testified:

“ The explanation given to me for that

was that based on financial constraints these services were going to be terminated. I was told at the end of the school year of 2010 that was going to happen for the 2010 and 2011 school year.”
(Trans. June 14, 2011 P. 43 & 44)

“ At the IEP meeting, I was again told because of financial constraints these services were going to be terminated. I was told that they did not need to take into consideration medical needs of any sort. And they did say that children, that he was receiving a lot of services and that children like himbut children like him do not typically receive the kind of services that he is receiving.
(Trans. June 14, 2011 P. 44)

Testimony of Dr. Khjawa

Dr. Khjawa is a pediatric neurologist at Children’s Hospital in Boston and licensed in the United Kingdom and in the State of Massachusetts. He specialized in Neonatal Neurology. He completed his under graduate studies at Cambridge in England and his residency at the Royal Children’s Hospital in Melbourne. (Trans. June 14, 2011 P. 69 & 70) He is an assistant professor at Harvard Medical School. (Trans. June 14, 2011 P. 71) He has 2000 patients and 200 to 800 have a diagnosis of Cerebral Palsy and 70 to 80 percent have educational disabilities. (Trans. June 14, 2011 P. 72) Dr. Khjawa started treating the Student when he was twenty-one months old for over five years.

Concerning his recommendation in August, 2006 for three hours of physical therapy he testified:

“ That is based on the fact that during early life, from birth to about 10 years of

age, there is a significant spasticity of the brain, so the brain is able to compensate for many of the functions that have been damaged or injured. And so the way that spasticity works is by stimulation through environment enrichment and sensory input. And those types of positive therapies, such as physical and occupational therapy, are really key to stimulating the spasticity and re-wiring of the brain. That has to be done consistently, and it has to be done with sufficient repetition to actually stimulate that type of synaptic re-wiring. And that forms the basis for those types of recommendations for physical therapy.”

(Trans. June 14, 2011 P. 76 & 77)

In a response to how physical therapy affects the Student’s education, the Doctor responded:

“ Well, in order for him to participate effectively in the classroom environment and to interact and have academic attainment, he really needs to gain some basic functions such as positioning in seating, as well as reaching and manipulation with his hands, compression of excessive, abnormal movement, so physical therapy is key to do that. Otherwise it makes it very difficult for (Student) to engage in academic activities, particularly interpersonal communications, interactions in therapy, if he is unable to be positioned or seated effectively.”

(Trans. June 14, 2011 P. 77)

On June 19, 2007, Dr. Khwaja recommended four hours of physical therapy and concerning that opinion he testified:

“Well, he has a very complex form of cerebral palsy, as I mentioned. So he has really two major forms related to the two types of brain injuries he has. And for him to adequately compensate for some his motor disability to participate in educational activities, he really needs very skilled, intensive therapy working on the two major domains of motor function. One is positioning and compensating

for spasticity, and the second thing is compensating for his excessive involuntary movement, or dystonia that he has. My assessment from his progress and his type of motor function was that that would be the ultimate combination of therapy for him.”
(Trans. June 14, 2011 P. 79 & 80)

The Doctor said that the most important part of the therapy at the Crossroads was continuity of the therapist. (Trans. June 27, 2011 P. 10 & 11)

Specifically addressing the Student’s motor dysfunction the Doctor said:

“(Motor dysfunction) I think it’s really important that he receives the intense degree of therapy, you know, the type of Therapy he’s had to date because he’s had measurable improvement in that and he’s had measurable improvement in his cognitive function as well.” (Trans. June 27, 2011 P.15)

Dr. Khwaja did make clinical assessment of his therapy and did not have direct contact with Crossroads. (Trans. June 27, 2011 P. 16) He did not have any excessive interest in one program versus another. On cross examination the Doctor said:

“What I am interested in is him continuing to make the type of progress that he started to make over the last two or three years.”
(Trans. June 27, 2011, P.16)

Dr. Khwaja received all the information about the therapies received from the Parents. As to that he said:

“His Parents are very good historians. They are able to tell me exactly what types of therapy, where he receives it.”
(Trans. June 27, 2011 P. 17)

The Doctor was further questioned on cross examination by the School District about the distinction between the School District's physical therapist services and that of the Crossroads and whether or not there is a real distinction except as the Parents have related to him.

Also, the Doctor's conclusion that the Crossroad's services should be continued as opposed to the increase in services by the School District was a result of what the Parents reported to him.

“No. It's based upon my clinical assessment of his response to whatever therapies he's been receiving. And I know that he's been in the Crossroads program for some time. I mean, I am a clinician and a pediatrician, my role is to, generally, to accept that parents want the best for their children, and therefore, that they don't tend to tell lies about the type of services and therapies that their children are receiving. So, when they tell me that some of the things that he's been receiving at Crossroads have been the things that have contributed to what I see as a clinician as his marked improvement in his head control, his positioning of his arms, and his ability to be seated appropriately, and his control over his mechanisms.”
(Trans. June 27, 2011 P. 21)

When asked how he could conclude that the progress he found was a result of the Crossroads and not a combination of the Crossroads, the School District Therapy and the Hasbro Children's Hospital he said:

“Because, first of all, he started to receive services from Crossroads before he transitioned to the school program, and I was able to see his

developmental strategy from up until when he started the Crossroads program through his progress through the Crossroads program. And there's been a change in that for the positive. So, I would assume that the only thing that has remained constant during that time, it wasn't the initiation of school-based services from the Johnston Public School Department, and it wasn't his early intervention services, it was the implementation of services he was receiving through Crossroads.”
(Trans. June 27, 2011 P. 22)

The Doctor concluded the cross examination by saying:

“I'm not sure that I would be willing to risk him regressing with the progress that he has made so far.”
(Trans. June 27, 2011 P. 27)

On further examination by the Parents, the Doctor gave an opinion on continuity of physical therapists.

“Yes. I think it's actually vital to his progression. I mean, he has taken a long time to get to the point where he is at. And he is a very, very highly motivated little boy. He is cognitively, in many ways, exceptional, when you consider his prematurely and the severity of illness that he had in the newborn period. And all of his skills and his ability to attain educationally are overwhelmed by this very, very complex motor syndrome that he has. And the therapy or combinations of therapies that he's receiving to date have had a really major impact in bringing him up to a point where he can start to participate meaningfully in classroom activity. And I think that to just pollute that would be appalling for him. I mean, to take the chance that he would not have the same skill set of people, with the same institutional memory about his progress over time, I think would just be just really doing him an enormous disservice.”
(Trans. June 27, 2011 P. 27 & 28)

Testimony of Brenda Lee Ford

She is a Personal Assistant in Social and Safety Skills and a registered CNA. She works for the Homestead Group. Ms. Ford works twenty hours a week in the Students home. She has had the opportunity to observe the Student's physical therapy at Crossroads and at the home. She observed that after the therapy session at home (School Therapist).

“He has very little reaction. There's very little reaction after a physical therapy session with Johnston.”
(Trans. June 27, 2011 P. 34)

“He, at Crossroads, is in constant movement, whether it's activities like reaching forward, or rolling over, or sit-ups and push-ups. They're always working with him, getting him to control his tone. Whereas, with the Johnston School Department, the therapists have to manipulate his body in order to get him to do what they want him to do. Whereas, at Crossroads, he can do it, he's capable of holding himself at midline and moving himself.”
(Trans. June 27, 2011 P. 36)

Ms. Ford works with the Student year round. The School Therapist would normally go to the home on Mondays when she is scheduled to be there because it was easier for them to have an extra set of hands. (Trans. June 27, 2011 P. 37)

She also works with the Student on communication, stretching him daily and she tries to help him function as best as he can independently. She was there for support. (Trans. June 27, 2011 P. 38) She observed the Crossroads five or six times and the School therapist one day a week. She has also observed him at home after his session at the Crossroads. (Trans. June 27, 2011 P. 40)

Testimony of Jerry Shimmel

Mr. Shimmel is a special education administrator for the Johnston School District. He is also an adjunct professor at Rhode Island College. There were no meetings between October, 2010 and January 25, 2011 with the IEP people. (Trans. June 27, 2011 P. 50) At that time there was no special education teacher assigned. (Trans. June 27, 2011 P. 51) As the October, 2010 meeting, Mr. Shimmel defined his role:

“My role in that service was to explore and get a clear understanding of what Crossroads was doing, a request for information, get some information, go out and investigate, bring our physical therapist with us so we would have a clear understanding of our resources, how they were being utilized.”
(Trans. June 27, 2011 P. 56)

When asked if the School District decreased the physical therapy in the proposed IEP, he said:

“.....We increased the school based physical therapy and we removed the outside physical therapy”
(Trans. June 27, 2011 P. 60)

When asked how he concluded that the Crossroads was outside the model for providing educational therapy he said:

“Because of the location where that service is provided is part of that. It’s an independent organization outside of the school department. The other reasons would be that there’s no evidence or communication, other than a log or a report that they would send in with their invoices, that it was contributing to his educational physical therapy.”
(Trans. June 27, 2011 P. 63)

The School District currently receives services from outside vendors that provide service for the School District including Occupational Therapist, Assistive Technology, and Physical

Therapy. They are under the direction and supervision of the Johnston School District. (Trans. June 27, 2011 P. 66 & 67.

Testimony of Trisha Ann Shotsberger

Ms. Shotsberger is a speech and language pathologist who works in the Providence School District. She never worked directly for the Johnston School District but worked with it through CBS Therapy, a contract agency. (Trans. June 27, 2011 P. 71) She worked with the Student from October, 2007 to February, 2011.

When questioned about the October, 2010 meeting and if there were discussions about eliminating the services at the Crossroads she said:

“Not eliminating, there were just a lot of questions about what the program is, why they went there, and why they couldn’t use the Johnston Public School physical therapist versus why they went to Crossroads.”
(Trans. June 27, 2011 P. 74)

At that meeting she heard why they could not use Johnston and this information came from the parents. She said: “Because of the wide range of services that they offered in Connecticut, and the benefits that he was getting from those services, and how beneficial it was to him in multi ways.”

Testimony of Carolyn Roseman

Carolyn Roseman is a retired former Director of Special Education for the Johnston School District. As to physical therapist in the Johnston School District, she said: “We have none that are directly employed by Johnston. We contract for one.” (Trans. June 27, 2011 P. 81)

For the September 24, 2009 IEP, the School District relied on the progress notes, the service providers and Parents’ reports. (Trans. June 27, 2011 P. 91 She was at the IEP Meeting of January 25, 2011.

She testified that the physical therapist was not present. In the proposed IEP (Sch. Dist. Exh. 4) the IEP team eliminated structural and functional physical therapy. (Trans. June 27, 2011 P. 96) Ms. Roseman Explained the reason the School District eliminated that service. She said:

“Okay. We tried to communicate with Crossroads several times to find out what it was that they were doing, and after many, many tries, finally got a letter from them explaining exactly what their physical therapy involved. At that time I shared the letter with our physical therapist, and asked her if this was something that the district could also do for (the Student). And she said it was absolutely part of the routine that they, the physical therapists, do, and that we, as a district, could provide that therapy. And at this point there is a difference, or there was a difference between what (the Student) needs educationally. There’s a difference between educational physical therapy and medically-based physical therapy.
(Trans. June 27, 2011 P. 96 & 97)

As to decrease physical therapy time this witness said:

“First of all, it was a reduction in Crossroads, but an increase in the amount of time for the district. If you look at the IEP, it was twice, or two days a week, instead of one day a week. So, yes, I do believe, because the things that we focus on are (the Student) ability to access the curriculum, the education goals. I have no doubt that he may need physical therapy more than for his medically-based needs, but what we were talking about were his educationally-based needs; being able to have trunk stability, head stability, shoulder strength, being able to gaze steadily. Those are the kinds of things that are educational goals.”

When asked if there were financial considerations taken into the decision to eliminate

Crossroads) she said:

“The financial considerations were only second to the fact that we could provide the service. Districts are certainly always looking to save money, but we had to be able to provide an equal service within what we believe was the parameters.”

(Trans. June 27, 2011 P. 105)

After the questing by both parties, the Hearing Officer asked the witness to direct him to anything in the IDEA that makes the distinction between physical therapy for access to education and physical therapy for medical purposes. The witness said “Well no, not specifically.” (Trans. June 27, 2011 P. 114)

Testimony of Susan Anhrud

Ms. Anhrud had a degree in biology and a bachelor’s degree in Physical Therapy. She is licensed in Rhode Island. She worked as a physical therapist for nine years and she worked with the Student for three years. She was never present at any IEP developed for the Student. She did provide goal sheet strength and needs lists and service recommendations. (Trans. June 27, 2011 P. 121) When asked to give an opinion as to the difference between physical therapy in an educational environment and physical therapy in a clinical environment. She explained:

“I’ll try. The way I look at the clinic is it’s medically-based. It’s usually directed by a physician. A physician needs to provide a referral to the clinic to provide service, the treatment. And reports usually go back to the physician about the student’s progress. I can’t say how that particular practice works, but that’s generally how I see it works. It takes a more global view of the student, I guess I would Say, or the child, because in the clinic they wouldn’t be considered a student. They may work on, depending on the approach that they use, they make work on a developmental sequence, working on rolling/sitting/crawling/creeping/walking. Just a very global approach.

School-based is different. The educational team is what decides on the needs for the child, rather than the physician, or even necessarily the therapist. It's aimed at the educational needs of the student, to me, at the moment that they need them. For instance, in the clinic you might work on walking, but in school the student doesn't need to walk in order to be educated, so that, we're working on more immediate needs like head control: what does he need to be able to hold his head up to look at the educational materials being presented; does he need to sit up, or need some sort of support in order to sit so that he can access materials, maybe sideline is a better position. But it's all related to accessing educational materials in the educational program. It's much more, it's a slice out of the student's physical needs.

(Trans. June 27, 2011 P. 123 & 124)

Ms. Anhrud only reviewed the Crossroad report of November 19, 2010 and did not see the September 2, 2006 or the one of September 4, 2007. (Trans. June 27, 2011 P. 126) She told Mr. Shimmel and Ms. Roseman that she had training in all the techniques listed by the Crossroads report of November 10, 2010. (Trans. June 27, 2011 P. 127)

Testimony of James Bucklin

Mr. Bucklin is a licensed physical therapist employed by Crossroads Physical Therapy. He is also an adjunct professor at Quinnipiac University and teaches weekend seminars for continuing education courses for other therapists. (Trans. June 14, 2011 P. 81) He has worked at Crossroads since 1997. He has done around 50,000 treatments and had several hundred or more patients of which 25 to 30 percent are children with cerebral palsy. He has treated the Student for five years. He considers himself to be the Student's primary physical therapist. (Trans. June 14, 2011 P. 84) He works with the Student at least one of the three hours he is there.

When asked to explain his physical therapy routine he stated:

“I employ what we consider to be a combination of structural and functional therapies. (the Student) presents with several needs from a physical standpoint, educational standpoint, and in working with him, our desire is to increase the level of function for him. And because this is being paid for by the School District, we hone in on his educational needs as far as our specifics when we work with him.

His educational needs require things from a physical standpoint, like the ability to hold his head up and sit and have trunk strength and extremity movements and things of that nature.

The structure of the body, and when I talk about the structure I refer to it as thing like the bones, ligaments, tendons, muscles, nerves, those are all aspects of the structural component of the body. The function is the body’s ability to walk, talk, eat, sleep, learn, sit up, reach, all of those things are functional-type activities.

The structure of the body governs the function. Because (the Student) has had injury to his central nervous system because of his birth injury, different parts of his brain have been affected. And that has resulted in a decreased ability or struggle to accomplish various functional tasks that would allow him to excel in an educational-type setting.” (Trans. June 14, 2011 P. 85 & 86)

Each day when he treats the Student he performs a mini reevaluation. (Trans. June 14, 2011 P. 86 & 87)

When reviewing the goals Mr. Bucklin testified:

“ One of the goals with treatment is to get the nervous system to learn and intergrate these new connections via the nervous system so it becomes second nature and it is not some thing we have to try to stimulate or get out of him” (Trans. June 14, 2011 P. 91)

He stated that with less hours of Physical Therapy the Student would regress. (Trans. June 14, 2011 P. 93)

Mr. Bucklin was asked why he would not let school therapist visit his session with the Student. He replied:

“I had had previous discussions with both Paul and Chris and they alluded to the fact that the school may be looking at cutting his services. If felt that it would not be in (the Student’s) best interest to have them come into the school.”
(Trans. June 14, 2011 P. 96)

On cross examination, Mr. Bucklin said:

“ At this point, I have no problem with the school therapist coming in if we know that he is going to continue to receive treatment from Crossroads and the school system. I am more than happy to oblige them coming in, and I will share any and everything I can with them.”
(Trans. June 14, 2011 P. 98)

Based on how the Parents described the School Therapies, he said that it differs from his therapy at the Crossroads (Trans. June 14, 2011 P. 100) and the therapy described by the Parents actually emphasizes the dysfunction as opposed to working on plasticity. He further gave examples of what they did in their therapy that was negative reinforcement strategy. (Trans. June 14, 2011 P. 101)

When asked what the distinction between the physical therapy Johnston is paying for and that which they are not paying for, he said:

“It is all educationally based. It is based on his educational needs.”
(Trans. June 14, 2011 P. 112)

As to how he knew what the IEP goals were, he testified that the Students’ father sent him updated goals from the school’s IEP. Mr. Bucklin addressed the distinction between medical or clinical based therapy and therapy that is educational or school based.

“In (the Student’s) case that answer is that the two are intertwined.”

(Trans. June 14, 2011 P. 127)

“Functional needs are functional needs, so if a child is struggling to be able to hold up their head, that is something that they need to do in order to be able to function well in school. But it is also something they need to be able to do to function well outside of school.”

(Trans. June 14, 2011 P. 129)

The Parents kept Mr. Bucklin informed weekly about the Students progress and about his educational needs.

Testimony of Sarah Louise Boynton

Ms. Boynton is an occupational therapist licensed in the State of Rhode Island. She has been in practice for twenty years. She has a master’s degree from Tufts University. She is employed by the Northern Rhode Island Collaborative. She exclusively does work for Johnston. She has been giving therapy to the Student since he was three years old. (Trans. June 28, 2011 P. 9)

Her session is for 45 minutes once a week. She described the therapy she and the other occupational therapist provide for the Student.

“Well, I’ve been co-treating with the physical therapist. And what she is doing is, through handling techniques, she’s working on positioning him in ways that he can impact his environment in a positive way. (The Student) is tone bound with unintegrated reflexes which are very easily brought on inadvertently, so that it’s very hard for him to voluntarily do anything without a lot of facilitating on the part of the therapist. So, he requires, at least I think, two team people to handle him effectively. And we have the two people to do that. So, she’s been working on core muscles, and I’ve been doing the finer things, eyes and hands. (Trans. June 28, 2011 P. 11)

She described the Student:

“He has made, I think, some gains in my primary goal, which was to enable him to access his education. We’ve discovered that there’s a very smart little boy in there. He’s learning to read, he’s learning to approximate some words, he’s learning to use his hands. We’ve got some bilaterals, two-handed, hand use on a piano. He’s learning to touch, without a hundred percent success, a switch. So, the progress is slow, but it’s there. I think the key thing with (the Student) is that the progress is slow, we have to be patient. And the little motor gains that we’ve made are vastly surpassed by his intellectual capacity. He’s a little boy who is eager to learn, and eager to demonstrate what he has learned. He’s a fun little kid.

(Trans. June 28, 2011 P. 13)

When asked what is the difference between occupational therapy that is medical and that which is educational, she said:

“In clinic-based therapy they would probably be looking at a single injury or a single system of injuries to work on that without a practical application for education. So, for instance, an outside therapist may be working on feeding, or working on range of motion or building splints, they might be working on posture or equipment. And a school-based therapist would go from the curriculum and the child’s needs to set objectives.”

(Trans. June 28, 2011 P. 21)

“In the clinic, physical therapy often happens alone, with just the child and the therapist, as opposed to in the classroom, the physical therapist would be working on and with a variety of equipment that would happen in a clinic that doesn’t occur in the school. Things like large platforms, big therapy balls, maybe swimming, maybe horseback riding. These are clinics that would happen, clinic-based, that are typically not found in the school. In the school, the PT’s sole purpose is to help the child access the

curriculum. I'm sorry I keep hammering on that, but that is the purpose.

If you're talking occupational therapy, the purpose of trunk stability in a school-based occupational therapist is enable the child to sustain him or herself against gravity to be able to use the outer extremities, typically hands and arms.

Ms. Boynton confirmed that whether it is clinical therapy or educational therapy one is still working on the same set of muscles or trunk stability. (Trans. June 28, 2011 P. 23)

Testimony of Faith Maurene Paradis

Ms. Paradis is an occupational therapist specializing in assistive technology. She has a BS degree in OT and a masters in Education and a certificate of Advance Studies. She did graduate study in Autism. She explained her specialization. (Trans. June 28, 2011 P. 33) She started treating the Student in 2008. She explained the Student's disability:

“He has Cerebral Palsy. He has a mix between, like, some high tone and low tone, and he has a lot of primitive reflexes of his body which makes it very hard for him to interact with communications systems, or with the computer, just makes it very hard for him to interact.”
(Trans. June 28, 2011 P. 35)

As to the student's progress she testified that the Student progressed cognitively and in the Student's ability to make more choices. She described the progress as great. (Trans. June 28, 2011 P. 38)

DECISION:

Did the Johnston School Department deny the Student a free appropriate public education by removing the services of Crossroads Physical Therapy in the proposed IEP of January 25, 2011 effective from February 4, 2011 to February 4, 2012?

A free appropriate education was addressed by the Supreme Courts in Board of Education of the Hendrick Hudson Central School District, Westchester County, et al v. Rowley by referencing the Education of Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. 1400 et seq. It provided:

“The term ‘free appropriate public education’ means *special education and related services* which (A) have been provided at public expense, under public supervision and direction, and with out charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a)(5) of this title” §1401(18)

The Court continued an further referenced the definition of “related services” in the Act: “speech pathology and audiology, psychological services, physical and occupational therapy, recreation and medical services except that such medical services shall be for diagnostic and evaluation purposes only.” U.S.C. Sec. 1401 (17)

The School District argument in this matter is two pronged: firstly, the Crossroads Physical Therapy was hired temporarily until the District could have their own physical therapist in place and secondly, the services provided by the Crossroads or at least in part the services are “medical” or “clinical” and are not solely for helping the Student in the educational environment and therefore the School District does not have to pay for those services because they fall under the medical exclusion of the law and are not only for the educational environment.

The first argument falls short of the facts presented by testimony and evidence. In the IEP of September 12, 2007, goal four provides for PT out of District. Since the Student was attending the Crossroad at that time, the “out of district” reference I find was to the Crossroad. There is no mention or reservation that they were continuing with the Crossroad until they had their own Physical Therapist. Even when the School District had a physical therapist they continued with the Crossroad with absolutely no reservation (See IEP of December 10, 2008) I find that the reference to PT for functional and structural physical therapy in that IEP refers to the Crossroads. The IEP of September 24, 2009 was the same as prior years. The only IEP that eliminated the Crossroad services was the proposed IEP of January 25, 2011. In the team meeting minutes of March 7, 2007, May 7, 2007, July 17, 2007, September 6, 2007, March 19, 2007, August 13, 2008 and September 26, 2008 (Hearing Officer’s Requested Documents) I find no reference that the Crossroads was a temporary service to be replaced by other physical therapist to be contracted with by the School District.

A corollary to that first argument is that the School District has the right to assign personnel to perform the services required for related service. The law is clear on that view of the School District’s right. Of course, the School District has that right but under the facts of this case it is not a right without limits. I do not find that the Physical Therapist hired by the School District to be school personnel but a contract provider just like the Crossroads.

Trisha Ann Shotsberger, speech and language pathologist works for the Providence School Department but provides contract services for Johnston under CBS Therapy. Carolyn Roseman, a former Director of Special Education for Johnston testified that Johnston does not have any physical therapist employed by the School District. They are contracted for just as the Crossroads. The School District certainly has a right to contract with whom they want but in this

case there is a long history with the Crossroads. To eliminate a contract with a service provider like the Crossroad which has been the Physical Therapy Provider since 1997 could have a drastic affect on the Student.

I find that the elimination of this service at the Crossroad was driven primarily by financial consideration and not by thorough and thoughtful analysis of the educational benefit that service was providing the Student.

Two witnesses were very impressive to this Hearing Officer in understanding the Student's disability and how physical therapy benefits the Student, Dr. Khwaja fully and professionally explained how physical therapy provides the Student with the physical means of accessing his education. He said that the most important part of the therapy at the Crossroad was continuity of the Therapist.

He attributed the progress made by this Student to the Crossroads because the Crossroads was the only constant factor since he started therapy. The Doctor feared regression if the those services were stopped. I find that the risk of regression should not be taken because I find that the School's physical therapist can not do what the Crossroads does. Susan Anhrud said she could duplicate what the Crossroad does. If the Crossroads was not educationally beneficial why would the School District want to duplicate what it does?

That is an admission that they are not doing what the Crossroads does. Further, she said that she had training in what the Crossroads does. That statement is not encouraging because it leaves her without experience in that area. This Student is so fragile and his gains are pitifully slow there is a real possibility of regression if someone does not have the experience doing what was eliminated by terminating the Crossroads.

I find little to no evidence that the School District considered Dr. Khwaja's opinions prior to making the decision to terminate the Crossroads.

Mr. Bucklin has treated the Student the longest. Based on his testimony I find that the Therapy at the Crossroad was totally educational. What he does including functional and structural therapy I find is needed to access his special education as well as what is needed for him to function outside of school.

Much time was spent on the communication or lack thereof by the Crossroads. I find that it was a misplaced concern. The responsibility for coordinating the Student's many service providers is that of the School District and not the provider. The School District did receive reports from the Crossroads. As far as the Crossroad not allowing physical therapist from the School District to view a session, Dr. Khwaja testified that there are physical therapy techniques that can be considered proprietary. However, the School District is paying for that service and it has the right to request regular reports and evaluations directly from the Crossroad to the School District and for the physical therapy sessions that are not proprietary, the other therapist are to be allowed to attend. I find that coordination has been very lax and in part that is the fault of the Parents. Some of the therapist did not know about Hasbro. However, I find the Parents to be very well educated and knowledgeable people. There were questions about how Mr. Bucklin knew about what the other physical therapist were doing in their sessions. The information came from the Mother and Father. I find them to be very reliable information gathers for their Son. No one involved in this case knows the Student better than them and anyone can rely on their opinion concerning the gains or lack thereof of the Student. I would also rely on them as to the effect on the Student after the therapies given at home and that at the Crossroad.

The second argument is that the therapy at Crossroads Physical Therapy is in part “medical” and therefore the School District does not have the obligation to pay for medical services.

The Supreme Court has addressed the “medical” services that are not covered under the IDEA. The School District’s attempt to make a distinction between physical therapy for medical purposes and physical therapy for educational purpose falls short. The School District could not present any probative evidence or law that makes such a distinction. Ms. Roseman, former Special Education Director said in response to the Hearing Office question as to whether such a distinction can be found in the IDEA “not as such, no.” Mr. Schimmel said the location where the service is given makes that service medical and that the Crossroads is an independent organization outside of the District also makes it medical. Ms. Roseman defined the difference by contrasting physical therapy needed to access education and that needed for his life’s goals. This is the same position put forth in the School District’s brief. However, this may be a distinction found in the State of Illinois but no such distinction is found under Rhode Island law. Ms. Anhrud said the distinction is that the IEP decides on the needs in educational therapy rather than a doctor. There was no evidence presented that a doctor is involved with the Student at the Crossroads. It provides physical therapy and it does follow the goals and the IEP developed by the School District. I do not find any of those explanations to be convincing in light of *Cedar Rapids Community School District v. Garret F.*, 119 S.Ct. 992, 143L. Ed. 2d 154, 67USLW4L65.

The issue in that case was whether or not the School District had to pay for a continuous one-on-one nurse for a student who was paralyzed from the neck down. The School District held that such case was medical and therefore the District did not have the obligation to pay for such

service under the law. The Court upheld the findings of the Court of appeals which followed Irving Independent School district, 468 U.S. 883 which provided a two step analysis of Sec. 1401 (a)(17)'s "related services" definition. First. Are the requested services "related services" and second, are the services excluded as a medical service under the "bright light" rule as found in *Tatro v. State of Texas*, 703F2d823 (5th Circuit 198) which holds that services of a physician are excluded except those services for evaluation and diagnosis purposes.

The Court stated: "The scope of the "medical services" exclusion is not a matter of first impression in this Court. In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term "medical services" referred only to services that must be performed by a physician, and not to school health services. 468 U.S., at 892-894. Accordingly, we held that a specific form of health care (clean intermittent catheterization) that is often, through not always, performed by a nurse is not an excluded medical service. We referenced the likely cost of the services and the competence of school staff as justifications for drawing a line between physician and other services, *ibid.*, but our endorsement of that line was unmistakable. It is thus settled that the phrase "medical services" in § 1401(a)(17) does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as a claim for an income tax deduction. See 26 U.S.C. § 213(d)(1) (1994 ed. And Supp. 11) (defining "medical care").

Cedar Rapids Community School District v. Garret 119s.Ct.992,1999,pages 73&74.

There have been a line of cases wherein the School District attempted to define "medical services" by the kinds of services rendered as Johnston did in this case. The purpose was to avoid the cost of those services. If the service, no matter what, can be performed by a non-physician then it is covered and has to be paid for.

Mr. Bucklin is not a physician.

The various distinctions given by school witnesses concerning physical therapy for “medical” purposes and “physical therapy” for educational purposes is no way supported by law. The only question is whether those services at the Crossroads are related services, a supportive service and there is no question that it is.

Based on the testimony and exhibits referenced in this decision and especially that of Dr. Khwaya and Mr. Bucklin that to eliminate the services of the Crossroads and to change the IEP by reducing physical therapy by three hours and eliminating the services of the Crossroads is a denial of FAPE. I find that what the Crossroad provides is extremely necessary and the results are different than those of other physical therapist. I do not find them to be better but different and they are necessary as an addition to the Crossroads. I come to this conclusion from the testimony of the Mother and Brenda Lee Ford who added to the testimony of those already mentioned.

I find that the physical therapy he has had since 2007 (the combination of therapists) is absolutely necessary for him to be able to access his special education services and based on all of the above it should be increased. I find that the services of the Crossroads shall continue for three hours and one day a week four weeks a month and the physical therapy to facilitate head and neck control and develop mobility skills for 45 minutes two days a week for three weeks a month shall remain in the proposed IEP.

Finally, I find that continuity and repetition is crucial for this Student to be able to access his special education and prevent regression. He is to have ESY service from the Crossroad for three hours a day each week, four times a month.

DATE: _____

Arthur G. Capaldi, Esq.
Hearing Officer
1035 Main Street
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DICTUM

If Mr. Bucklin considers himself to be the Student's "primary" physical therapist it is imperative and necessary that Crossroads provides the School District with regular evaluations and reports on progress not through the Parents but directly to the School District, the entity that pays for the service. It has to be as close a relationship to the School District as the other contract physical therapist are. When available and when possible it should have its personnel attend and assist at IEP meetings with this important and crucial area of related services. This should be required as part of the terms of hiring the Crossroads. I found the Crossroads reports to be valuable, professional and informative, a necessary element for review by the IEP Team. I find that the Parents are in a position to make sure this cooperation exists. I can not order the Crossroads to comply with my observation in this regard but an intentional failure to cooperate by it could result in an unfortunate action by the School District.

In his testimony Mr. Bucklin gave assurances of total cooperation by the Crossroads with the School District which should be the center in which all reports and evaluations are transferred from the providers of services. This should include Hasbro. Again it is the School District's responsibility to coordinate these service providers along with the Parents and it is the Crossroad's responsibility to give the School District reports and evaluations so necessary to develop an effective IEP.

