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Dispute Resolution &
Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

In re: Child

Findings of Fact

Due Process Hearing

and Decision

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This matter came to be heard upon the complaint for due process filed on April 11, 2011 by the Parents, ("Parents"), against City Public Schools, ("the LEA"), under the Individuals with Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400, *et seq.*, and the regulations at C.F.R., Part B, Section 300, *et seq.*, and under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794, and the Virginia Special Education regulations, ("Virginia Regulations"), at 8 VAC 20-80, *et seq.*

The due process hearing was held before the undersigned Hearing Officer ¹ over five days,

¹ Both counsel agreed to use a joint exhibit book which is marked by an alphabetical letter preceding the page number in this decision. The special education advocate made a recusal motion on the basis of hearing officer bias

on May 16, 17, 18 and 19, 2011, and on June 2, 2011 at the City Center, City, Virginia. The hearing was open to the public and transcribed by a court reporter. Counsel represented Parents and the Child at the hearing.² A Coordinator of Special Education Services and legal counsel represented the LEA.

This decision is timely and within the 45 day time limitation period under the IDEA.

The record includes written motions, hearing officer orders, closing remarks, the hearing officer's pre-hearing report, the parties' joint exhibit book and the Parents' exhibit books.³

Parents now seek retroactive reimbursement for private school placement on the ground that the LEA's Individualized Education Program, ("IEP"), does not provide the Child a free and appropriate public education, ("FAPE"), in the least restrictive environment, ("LRE"). Parents seek tuition reimbursement⁴ and related costs for the Parents' unilateral placement.

Parents provided the LEA written notice of their intent to remove the Child on March 19, 2009. E-108. Parents permanently removed the Child on March 27, 2009.⁵ The Child was then

and impartiality. The recusal motion was overruled by the Executive Secretary of the Supreme Court of Virginia. See A-87.

² Parents have also been represented, intermittently, by a clinical psychologist, who is the Child's therapist, and by a special education advocate.

³ Parents' individual exhibit books are marked by the letter "P" in the decision.

⁴ In 2008, the Child was placed on an LEA special needs school bus and left unattended for about three hours. When the LEA discovered the Child's "missing" status, the LEA notified the Parents but the Child was not located until later in the day. The school bus driver kept the Child in her home until his Parents retrieved him. Though the details of this incident have caused media attention, the incident dates prior to the two year limitation statute. Thus, this hearing officer did not permit much substantive discussion of this incident. Parents now seek retroactive private school tuition reimbursement in the amount of \$44, 800.00 and the Parents' financial reimbursement request is "... increasing monthly by \$3,000.00 after June 1, 2010." Parents also seek retroactive reimbursement for transportation costs of \$2,800.00, plus "...\$200.00 per month thereafter," and "\$250.00 for psychotherapy services related to the 'bus incident.'" Parents' reimbursement request also includes "\$250.00 for an educational expert to attend an IEP meeting, \$5,500.00 for the services of an educational advocate and [two] attorney's fees in the amount of \$3,500.00." The sum total of Parents' request for reimbursement from the LEA exceeds \$70,000.00. The Parents' reimbursement request differs in total amounts requested. The Private School Director guessed that the Parents owed \$35,000. 00 to the school but the Child's mother estimated the private school debt at about \$50,000.00. T543, T1556. Parents sought, concurrently with the due process request, a Family Assessment and Planning Team, ("FAPT"), referral to pay for the Private School. The Parents outlined their systematic strategy to obtain private school funding in emails to their prior counsel, the LEA, and the Private School Director. Parents indicated to the Private School Director that they were "moving closer to a settlement with [the LEA]." The LEA had not made a financial settlement offer. The Parents also stated to the Private School Director, "We plan to continue the pressure on the city's legal folks while we meet with the IEP team. Either way, with school starting in a week, something will break." E-17. The Clinical Psychologist joins in this effort. D-17, E-5, E-7, E-10, E-11, E-12, E-15, E-16, E-17, E-24, E-47, E-62, E-65, E-91, E-124, E-138.

enrolled at a private school, ("Private School"), on March 31, 2009.⁶ The Child reenrolled this past school year at the LEA on October 7, 2010. He attended a ⁷ placement, in an autism spectrum program, ("ASP"), classroom during the 2010 - 2011 school year.

On November 19, 2010, the Parents discovered that the Child was being taken twice daily to the LEA school nurse, ("School Nurse"), for a physical inspection of his extremities to track injuries occurring at school.⁸ After they learned of the School Nurse visits, Parents then gave the LEA a written letter, dated November 3, 2010, from the Child's pediatrician, ("Pediatrician"), requesting homebound placement. D-2.⁹

⁵ The Parents admit that educational services increased and that the LEA began formulating a functional behavior analysis just before the removal. But Parents dispute that proposed placement was available to them when they removed the Child in March 2009. The record reflects that the LEA offered the Parents an appropriate placement at ⁶ , in the ASP class, but the Parents elected to explore options. T1550-1551, T1770.

⁶ The Parents' theory, in part, was that the Child's "window of opportunity" was closing when they removed him in 2009. The "window" is grounded in Lovaas ABA terminology. It refers to the Child's learning potential and his ability to interact socially in the external world. The theory is that a Child with autism communicates with the environment only from the age of about eighteen months to seven years. The ABA theorem is that it is only during this limited timeframe when a child can learn language and adapt socially. Then, per Lovaas and ABA logic, the "window" closes. The Pediatrician provided a scientific explanation of the term. He testified that the "window" is a time when the brain is more "adaptable" in a young child. "The hope is that you can redirect neural impulse so you have more appropriate communication between brain cells. You have a better chance at that plasticity, the younger the child is." T1021.

⁷ " " is the acronym for ⁸ . The LEA shares this educational program with other local city school districts.

⁸ The Child's father admitted that he asked the LEA to inform him of the Child's bruises and abrasions occurring at school. T1805. The Child's father also stated that the Teacher Assistant told the Parents that she was taking the Child "for a walk." She did not say she was going to the School Nurse's office. T1804. The Child's mother attested to regularly seeing "two red linear marks," in an earlier timeframe, on the Child's back. She testified that she saw the Child, placed in a Rifton chair, at the LEA's early intervention program. T1538. At the due process hearing, the Child's mother attributed the two red marks to a Rifton chair at the ⁹ placement. The Child's mother claims that she regularly saw two red linear marks on the Child's spine in the earlier LEA placement. She also testified that she saw the Rifton chair again at the ⁹ placement. This device is utilized to restrain children. She then stated, "And then it all came together for me." It is apparent to the fact-finder that the Child's mother believes that the symmetrical red marks she saw, noted on one of the School Nurse reports, indicate restraint. The mother's assessment is not grounded in reality. None of the LEA witnesses, or the Parents' witnesses, attested to the Child's restraint in a Rifton chair at the ⁹ placement. But the indelible image of the Rifton chair generates the mother's fears. Also, the Parents requested LEA documentation of the Child's injuries on other occasions. In May 2011, the Child scratched the last homebound teacher. The Child's mother stated that "she saw blood on [the Child's] arm." She said that the Child "drew blood" from the teacher. T1507-1510. Also, she said that the Child was scratched in the neck that week. The Child's mother claimed that the teacher "grabbed the Child's hands" and tried to pull him." T1507-1510. The Child's mother complained that the LEA teacher did not share the details of the injuries with her. When the Child's mother cleaned his scratch with hand sanitizer, she decided to contact the Pediatrician. The Child's mother "wondered if [she] should be more concerned" about "blood borne pathogens." T1510. The Pediatrician told her that she could have the Child's "blood pathogen levels tested" if she liked "on Monday." But he responded "over the weekend" to her email and did not treat the Child's scratch as a medical emergency. C-296, T1510-1514, T1534-1535, PG-7.

The LEA admits that the homebound placement did not begin until February 2011 and that the 8.5 week delay constitutes a procedural error.

Parents had returned the Child to the LEA on August 24, 2010 after they learned that the Private School had ejected their son on August 23, 2010 for non-payment of the Private School tuition. The LEA's administrative staff arranged a "brainstorming"¹⁰ meeting on September 3, 2010 to gather updated information about the Child and to begin to craft a placement plan for the Child. E-15.

The LEA Special Education Director of the Office of Exceptional Programs, ("Program Director"), initiated the discussion with the Parents to begin to craft an updated IEP and placement for the Child. E-18, T 1792. The brainstorming meeting lasted for many hours. At the end of the September 3, 2010 meeting, the Child's father asked the LEA to pay for a portion of the Child's Private School tuition because the Parents knew that it would take more time for the LEA to draft the Child's IEP. The private school director, ("Private School Director"), attended the meeting, by telephone, and provided updated information about the Child. E-22, E-58, E-61, E-62.

The LEA's 2010-2011 school year began on September 7, 2010. The Parents had notified the LEA of their intention to return to the school district only eight days before the school year began. The Program Director emailed the Parents stating, "[The LEA] has maintained a space in the [Program, in the ASP class] at the [proposed original site] since May 2009 and continues to have the 'spot' available for [the Child] immediately." She concludes the email by saying, "I look forward to our meeting on September 10th." E-22.

The Parents and the LEA met again on September 10, 2010 for a three hour IEP meeting.¹¹ The Program Director stated that she understood that the Parents wanted to "replicate" the

⁹ The Pediatrician suggested a "structured classroom setting." D-2.

¹⁰ The "brainstorming" reference is to a planning meeting. It is not an IEP meeting.

¹¹ The LEA has recordings of some IEP meetings occurring on September 1, 2009, September 24, 2010, and December 3, 2010. The tapes are included in the evidentiary file in this case.

Private School environment.¹² The LEA identified the Child's proposed placement as the City's placement, in an ASP class. The LEA sent Parents a draft IEP and requested their consent to the placement. A copy of the draft IEP, dated September 10, 2010, is included in the evidentiary file. B-293.

After the Parents received the draft IEP,¹³ they refused to consent to it unless they were given more time to consider the IEP.¹⁴ They also wanted to visit the City's proposed IEP placement site and other sites. E-52, E-53, E-54.

Parents continued to send emails to the LEA documenting their assertion that placement was unavailable to them. The LEA again notified the Parents that a placement was available at , in an ASP classroom, but the Program Director advised that the LEA required a signed IEP to begin the Child's educational service delivery at the LEA's proposed placement site. Parents opted to observe alternate sites. Parents continued to document their assertion that a placement option was not available to them. Parents continued to request a FAPT referral from the LEA.¹⁵ E-50, E-54, E-55, E-58, E-59, E-60, E-61.

On September 14, 2010, the Parents emailed the Program Director and again requested a FAPT team referral to fund the Private School because the draft IEP would take "several more weeks" to finalize. E-58.

On the evening of September 22, 2010, the Parents emailed the Program Director. The Child's father indicated that Parents intended to bring the Child to the LEA placement site the next morning for "immediate enrollment" at the program, in the ASP classroom. E-72.

¹² The Program Director made this anecdotal comment. It appears on one of the tapes. T1555.

¹³ The parties disputed delivery of the proposed IEP on September 10, 2010. Parents stated they never received the IEP until Monday, September 13, 2010. But the LEA's record reflects that the IEP was emailed and sent to the Parents on September 10, 2010. Parents denied they had an email malfunction. The LEA acknowledged that the document was "returned." The LEA admitted that other items were returned that night. E-20.

¹⁴ Parents made handwritten notes on the face of this draft IEP and the September 3, 2010 preliminary document. Parents' notes cite their reasons why each document is unacceptable to them.

¹⁵ Parents stressed that a FAPT referral was necessary to support their reimbursement effort. The LEA did not agree that FAPT referral was an appropriate option. But the LEA contacted FAPT personnel to arrange a FAPT referral. An independent FAPT referral was never made. In order to make a FAPT referral, two separate City agencies have to agree on FAPT referral subject matter. E-44.

The Child's father states in his email ¹⁶ to the Program Director, "As stated, I will seek the [] principal's assistance in the morning to make sure I fill out the necessary documents to enroll him." E-72.

The Child's father observed the placement with the Child on September 23, 2010. Parents noted later that the program was "exciting and engaging." E-77. But Parents did not sign the City's proposed IEP on that date. Parents indicated the need for more site observation to find a site more closely resembling the Private School. Parents requested IEP revision. E-77, T1554.

The IEP was again modified, per the Parents' requests, and sent to the Parents the following day. E-76, E-78. Again the Parents did not sign the IEP. Instead, on October 1, 2010, Parents requested another IEP meeting. The LEA notified the Parents of compulsory school attendance law. E-80. On October 4, 2010, the Child's mother requested that legal counsel be present at the next IEP meeting. E-27. On October 6, 2010, the Parents again brought the Child to the placement to enroll him. The LEA administrative staff made a decision, contradictory to school policy, ¹⁷ to enroll the Child immediately at the LEA's program, in the ASP classroom, though Parents had not signed off on the draft IEP. E-28.

On October 7, 2010, the Child was formally enrolled in the LEA's program.

personnel individually purchased useful items for the Child. T806. The principal, ("Principal") purchased a noise barrier for the Child's classroom because the Child's father noted the Child's sensitivity to sound. The Child's special education classroom teacher, ("Primary Teacher"), formulated a log to pass between the ASP class and the Parents to inform the Parents of the Child's progress. C-239. A autism consultant, ('

¹⁶ The Parents created the email but the Child's father signed it. E-72.

¹⁷ LEA administrative personnel who testified stated that the decision to enroll the Child in the LEA placement, without a signed IEP, contradicts intra-city contractual policy with . The LEA's contract with dictates that Parents must sign an IEP before educational services can be provided to children with disabilities. T242-246.

Autism Consultant”), who is a BCBA, was contracted to oversee the Child’s evaluations and to provide behavioral and programming support in the ASP class. The Autism Consultant is fully knowledgeable about Lovaas ABA methodology. As a BCBA, the Autism Consultant is an expert in positive behavior modification techniques for students with autism. Also, a clinical psychologist, who has over twenty-five years of experience, oversees the program.

The Principal assigned a teacher specialist, (“Teacher Specialist”), to directly oversee the Child’s Primary Teacher. also employed a board certified speech pathologist, (“Speech Pathologist”), to develop the Child’s communication skills. The Teacher Specialist and the Speech Pathologist worked with the Child for one month to complete the Child’s educational evaluations, the VMAPP and ABELLS. B-137, C-29, C-38, C-13, C-14, C-36, C-70-74, C-127-132, C-140-144, C-180, C-202, C-204, C-215, G-152-156, G-240, G-260,

Prior to the homebound placement IEP, Parents only endorsed the Child’s pre-school IEP which the personnel accurately depicted as inadequate. The Child had been absent from the LEA for about eighteen months. Parents limited the LEA’s opportunity to observe the Private School program. Parents did not timely provide consent to evaluate the Child and they did not share any information about the Child’s updated skill levels until just before the Child reentered the LEA. Still, the Parents had not endorsed the IEP, permitting the Child’s enrollment at

, in the ASP classroom. The LEA conducted additional educational testing to gather more information about the Child’s academic abilities. Parents desired additional IEP modifications. T703, T725, T792, T793.

On November 19, 2010, another IEP meeting was scheduled to review the LEA’s extensive, updated testing and make revision, if necessary, to the Child’s draft IEP. On this date, the Child arrived to the school with both Parents. The Parents’ have an educational advocate, who is a state licensed clinical psychologist, (“Clinical Psychologist”), who was to

accompany the Parents to the IEP meeting. The Clinical Psychologist had observed the Child at the placement, in the ASP classroom on November 16, 2010. Parents were also scheduled to meet the Medicaid service facilitator, (“Medicaid Worker”), and the Medicaid Worker’s assistant, (“Medicaid Assistant”), to sign documentation. The Medicaid Worker and the Child’s mother later noted that the Child was crying when he entered the school building. H-109. After the parties entered the school building, the teaching assistant, (“Teacher Assistant”), met the Parents and the Child in the school lobby. The Teacher Assistant took the Child’s hand and led him down the hall. The Parents soon learned that the Child was led to the School Nurse’s office. The School Nurse examined the Child’s extremities for cuts and bruises.

After the Parents learned that the School Nurse examined the Child “without [their] knowledge or consent,” they complained bitterly to the LEA. T1515. The Clinical Psychologist, who had come for the scheduled IEP meeting, heard the Child’s crying in the school building. He wrote a scathing letter about the event to the LEA. E-91. In the Clinical Psychologist’s letter, he referred to the Child’s “strip searches.” E-91. The Medicaid Worker offered her written version of the incident. Parents have numerous witnesses who fully document their encounters with the LEA. Often, the Parents’ reporters do not offer neutral assessments. The fact-finder deems the sum total of the reporters’ comments to be “colorful,” yet emotionally charged.

Soon after this event, the Parents produced the Pediatrician’s letter requesting homebound placement and the “structured classroom environment” of the Private School for the Child’s educational service delivery. D-2. When he testified at the due process hearing, the Pediatrician admitted that he had no knowledge of the Child’s educational needs or individual program at the LEA. T1030. On December 22, 2010, the Parents signed a homebound IEP, which closely resembled the revised IEP proposed to the Parents on December 3, 2010. In the homebound IEP, the LEA agreed to provide the Child 7.5 weekly educational service hours at the Parents’ home. The IEP is forty-four pages in length. B-111, C-178.

The LEA admitted that procedural error occurred in that the homebound IEP did not immediately begin. But the LEA asserts that there were problems on both sides. LEA personnel stated that they encountered problems in staffing teachers to come into the Parents' home at appropriate times.¹⁸ But the LEA also asserts that the Child's mother presented a private therapeutic regimen daily for the Child – speech therapy, occupational therapy and therapeutic horseback riding – that was difficult to accommodate. Also, the Child's mother initially had a regular work schedule and had to pick up the Child's sister regularly from school. The Child developed seizures between January 19, 2011 to January 21, 2011. The LEA also asserted that there was confusion between the LEA and [redacted] about responsibility for educational service delivery to the Child who was no longer a [redacted] student.

The LEA and the Parents resolved the issue together. The LEA provided eighteen additional compensatory educational hours which the LEA has now completed. An IEP modification dated February 18, 2011 reflects the parties' compromised agreement. The Child's mother testified that she quit her job to comply with the homebound IEP. T1631. The LEA found more teachers to come into the home at preferable hours.¹⁹ But the homebound IEP was problematic for both the LEA and the Parents. In all, there are five LEA teachers who have provided educational services to the Child in the Parents' home. Parents continued to be dissatisfied with the LEA's teaching schedule for educational service delivery. Parents filed a due process hearing request on April 8, 2011. A-1.

On April 15, 2011, the parties continued to discuss the homebound placement issues at the

¹⁸ On February 28, 2011, Parents terminated the homebound teacher. On March 21, 2011, they refused to meet or discuss the homebound service delivery with the LEA. It appears that the LEA repeatedly contacted the Parents to amend the homebound schedule. The evidentiary record reflects that LEA homebound teachers worked diligently and were sufficiently qualified to deliver the Child's homebound IEP services to him. The LEA homebound teachers expended productive hours in the homebound placement. There is no academic deficiency in IEP service delivery. D-27, D-31, D-34, D-35, D-37, D-40-47, D-49, D-53-57.

¹⁹ The LEA employed a teacher with autism specialization to complete 44.5 hours of incomplete homebound compensatory educational service hours. Her job was also to provide autism support to the homebound teachers. T864, D-57.

pre-hearing conferences conducted with the hearing officer. The hearing officer extended the homebound placement, which was about to expire, to the termination of the due process case. The LEA then advised the hearing officer that another LEA teacher was scheduled to arrive at the Parents' home on April 26, 2011. The parties then agreed to attend resolution session at the LEA.

When the LEA and the Parents met for resolution, the Child's mother, the Parents' special education advocate, ("Advocate"), and various LEA special education personnel came together for a lengthy meeting. A recordation of this resolution meeting was prepared for the fact-finder's review. Midway through the resolution meeting, it was apparent that the Child's mother suddenly became tearful and upset. The Parent and the Advocate recessed briefly. Then the Child's mother did not return to the resolution meeting. The Parents' Advocate reappeared and notified LEA personnel that she and the Child's mother no longer chose to participate. The LEA continued the discussion after the Parents' Advocate was informed that resolution would move forward. Parent and her Advocate left the building. Again, the LEA reached the conclusion that the correct placement for the Child was the program, in the ASP classroom.

In early May 2011, the fifth teacher arrived to teach the Child. Within the first week of the last homebound teacher's arrival to the Parents' home, a child protective service complaint, soon followed by a criminal complaint, were filed against the homebound teacher.²⁰

On May 13, 2011, LEA counsel requested a pre-hearing conference to discuss the homebound placement. Parents' counsel participated in the conference call. This hearing officer ruled that the LEA was no longer required to deliver the Child's educational services to him in the Parents' home because the Parents' home was deemed to be unsuitable for educational service delivery. Parents were permitted to observe and select another location for the

²⁰ The CPS complaint was reportedly "unfounded" by the City Department of Social Services per LEA counsel. Also, LEA counsel reported that no criminal charges are currently pending against the homebound teacher in the City Commonwealth Attorney's Office. Parents asserted they did not make a CPS complaint. They have indicated that the complaint was filed by an unnamed individual who was employed to work in their home. T1523-1529.

homebound setting.²¹ Parents requested a visit the suggested homebound placement site.

The Parents agreed to visit one of the proposed sites.

The LEA offered two observation dates. The hearing officer set rules for the Parents and one professional to join them and observe the site. On the first and second dates set for the Parents' site observation, the Parents did not arrive. They elected to substitute the Clinical Psychologist. Parents never observed either alternate site proposed by the LEA for the Child's homebound IEP service delivery.²² T1778-1779.

The Child has severe medical issues. The Child's disability is Autism. The Child has also been more recently diagnosed with mitochondria, strabismus and other medical difficulties.²³ The Child has demonstrated severe behavioral issues in the past. The Child's behavioral problems emanate from his autism diagnosis. The Child is on a gluten free diet and he requires a health care plan²⁴ to attend school. LEA personnel indicate that the Parents have not returned health questionnaires necessary to create a complete health care plan for the Child. T239.

²¹ The LEA provided two possible sites.

²² The hearing officer set parameters for the observation beforehand. The Parents were given four alternate site observation dates by the LEA. Parents' explanations for their non-appearance on all dates were reasonable yet the hearing officer never authorized the Clinical Psychologist to be substituted for the Parents at the site. *See also* Hearing Officer Ruling dated June 1, 2011.

²³ Mitochondria disorder primarily manifests in the Child as "muscle fatigue and muscle weakness" per the Child's mother. The Child was diagnosed with mitochondria on June 3, 2008. Though the Child's mother also testified that the mitochondria results in the Child's "significant cognitive issues," the Child's Pediatrician did not attest to the Child's overall cognitive decline. The Pediatrician stated that the Child has the potential to develop cognitive skills. The Child has gastro-esophageal reflux disorder, ("GERD"), which is treated with medication per the mother's report. The Child has strabismus, a "wandering eye," which can be the source of a visual processing disorder. The Child's mother testified that the strabismus is a condition which has been treated through a surgical procedure. The Child's mother also reported that the Child has a "visual processing disorder" which she appeared to describe as an "astigmatism or nearsightedness." The LEA has not confirmed through the Pediatrician that the Child has a visual processing disorder. The Child's mother also stated that the Child has an "innocent heart murmur" which is followed every three years. The Child has food allergies. The Child's mother collectively described the Child's other ailments as "hypoglycemia, lethargy, vomiting, fever, dehydration" and "basically, if he stops eating or drinking, his body shuts down, and he goes to the emergency room." T1486-1487. It is accurate to say that mitochondria is a global medical condition, but the Child's mother only described his symptoms as "muscle fatigue and weakness." Also, the Child's Pediatrician did not share the mother's sense of imminent medical urgency in his testimony. The Child's Pediatrician described the Child's medical conditions as "autism spectrum disorder, mitochondrial disorder, and developmental delay." In the recent Present Levels of Academic and Functional Performance, the ("PLOP"), LEA assessments depict the Child's emerging expressive language, communication, social and independent living skills. B-7, H-8, H-10, T1002-1008, T1028, T1036, T1486-1488, T1491-1492.

²⁴ The Principal prepared the health care plan. Parents disputed its contents. The health care plan is incomplete. The Pediatrician and the School Nurse need to complete it. T239, T342, C48-50.

Parents dispute the LEA's many "draft" IEP's because the Parents do not think that the Child's placement is appropriate or his related services adequate. Parents do not believe that they may endorse an IEP without first observing the program proposed for the Child. But Parents disagree mainly with the LEA's teaching methodology. The Private School solely utilizes the Applied Behavior Analysis, ("ABA"), teaching method. Parents prefer this ideology because the Child's behavior improved dramatically and his language skills developed after he left the LEA in 2009. Parents believe that the LEA's teaching methodology is not adequate to meet the Child's educational needs. Parents point to the Child's pre-school academic deficiencies and they depict the Child's academic performance as regression²⁵ during the Child's prior 2008-2009 LEA placement in a "Developmentally Delayed" pre-school program.²⁶

But the LEA asserts that the Child was not diagnosed with "full-blown" autism until July 2008. T1577. The LEA also asserts that its placement decision in a placement, in an ASP classroom, is appropriate. T1558. The LEA's position is that the Child's private therapies and specialist appointments during school hours result in excessive absences from school. T268. The LEA opines that the Child's missed school time results in academic and behavioral issues. T346. Ultimately, the LEA proffers, the Child is not in school. Thus, the LEA opines that FAPE is offered to the Child but he is unable to fully benefit from the LEA's educational

²⁵ The LEA refutes the Parents' assertion that the Child experienced regression supporting private placement prior to the Child's March 2009 removal. The LEA asserts that the LEA had just begun to learn about the Child's extensive educational needs when the Child was removed. Also, the Child was not diagnosed with autism until July 6, 2008. Parents assert that no program was available for their observation. But the record reflects that the educational services were upgraded and that the teachers had provided services appropriately prior to the Child's removal. The LEA closely monitored and evaluated the Child for a change to a more suitable placement in the 2008-2009 school year after his classroom teachers noted the Child's classroom difficulties. At February 2009 IEP meetings, the Clinical Psychologist asserted that the Child's cognitive testing and psychological data showed regression because of lowered I.Q. scores. Thus he concluded that the signed pre-school IEP and proposed IEPs did not provide FAPE. The Private School Director did not seem to agree with the Clinical Psychologist's theory. She testified that the Child is not "testable" and is "not a good candidate for standardized I.Q. testing." T571. In a child with autism, low cognitive testing does not demonstrate his "regression" or that the Child's "window of opportunity" has closed. B-50, B-456, H-26, T566, T571, T1550, T1551, T1552.

²⁶ After the Child was removed, he was cognitively evaluated by a private psychological provider. Research based literature reflects that cognitive testing of a child with autism is not the best practice for intelligence prediction. See Koegel, L.K., Koegel, R.L., et al. *Variables Related To Differences In Standardized Test Outcomes For Children With Autism*. Journal of Autism and Developmental Disorders, Vol. 27, Number 3/June, 1997, pages 233-243.

program which is designed to meet the his needs.

Parents mistrust the LEA. This factor shapes the Parents' vision of the Child's educational plan. Parents accuse the LEA of "deception." T1717. Parents seek a safe, "germ-free" environment. T1779. Parents want to know "all the details of the Child's day." T1533. Parents need to know "exactly" what the Child is doing. T1534. Parents admit that a guilty conscience for past events, unrelated to this case, motivates their present thought processes in dealing with LEA personnel.²⁷

In response, the LEA asserts that the program offered to the Child provides him a FAPE and that Parents have unreasonably withheld consent from the extensive IEPs. The LEA informs the fact-finder that the program offered to the Child is far superior to the Parents' private therapeutic program or to the Private School program. Parents seek an "ideal" program, the LEA urges. E-30. Parents believe that the Child's "ideal" program exists only at the costly Private School. E-30.

In sum, Parents admit that they know that the Child has "regressed academically, cognitively and socially" since the homebound placement began. T1776. Parents know that a homebound placement is formed only as a temporary academic solution. H-8.

The Child has not been taught in a classroom since November 23, 2010. The Child's "constellation of issues"²⁸ has not likely disappeared from view.

BURDEN OF PROOF

In this case, Parents challenge the sufficiency of their son's IEP and the LEA's proposed placement for him in a program, in an ASP classroom. Parents allege that the proposed

²⁷ The Child's mother stated during her testimony, "I have a lot of guilt for what happened with the [Child being left on the] bus, for putting him on that bus with a substitute driver who – I actually should have known not to do it. And I cannot keep subjecting him to unsafe environments. And it is [Parents'] job to protect him and that's what we felt we had to do." The Child's mother has requested a "constant video" of the Child in school. T286, T1521.

²⁸ The Child's mother and the Clinical Psychologist use this term repeatedly throughout their correspondence to LEA administrative personnel. The term is used to describe all of the Child's special education needs – medical, psychological, social and educational. E-21, E-61, E-72, E-91, E-138, T202.

placement is insufficient to meet the Child's needs. Parents do not believe that they can endorse any educational program without first observing it. Parents believe that the Child's educational requirements present a unique situation for the LEA. Parents assert that the Private School only can provide the Child a FAPE. Private School personnel utilize ABA methodology only to teach students. In contrast, the LEA blends a combination of methods - TEACCH and ABA. Parents emphasize that the Child's "opportunity window"²⁹ is closing. Parents assert that the Child can no longer learn language and social skills, without immediate ABA intervention, after he attains a certain age. Parents do not believe that the Child's LEA teachers have professional credentials and on-the-job experience sufficient to qualify them to instruct the Child. Parents assert that the Child's behaviors and medical needs are overwhelming.

In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.*, at 537.

Parents filed this due process hearing request. Accordingly, I find that the Parents have the burden of proof at this due process hearing.

FINDINGS OF FACT

1. The Child's special education category is Autism. He is 7 years of age. The Child was placed in an pre-school classroom for children who are delayed, ("Developmentally Delayed Class"), in an early intervention program, at this LEA when he was two years of age. Also, the Child's Pediatrician had told the mother that the Child was on the "autism spectrum." T1491. The Child was diagnosed with "full-blown" autism on July 6, 2008. T1577, H-10. The Child's pre-school teachers noted regression to the Parents in the 2007-2008 school year. The LEA suggested a change of placement to an autism classroom. The LEA began to conduct more

²⁹ See footnote numbered "6" of the decision and T1021.

educational observation and testing on the Child in February 2008 and added educational services. But the Child did not finish the 2007-2008 school year with his classmates. After a frightening incident at the LEA, he was placed on a homebound IEP. At the beginning of the 2008-2009 school year, the LEA continued the Child's educational testing. The LEA gave the Parents various educational options which the Parents ultimately rejected. But Parents did not file for a due process claim to challenge the placement issue though the record shows that Parents knew their procedural rights. In March 2009, the Parents unilaterally removed the Child from the LEA and placed the Child at the Private School. Just prior to the Child's removal, the LEA began to gather data for the Child's Functional Behavior Assessment, ("FBA"), to be created. T1540-1545, T1550-1551, B-349, B-353, D-4, D-7, D-8, PD-1, PD-14, PD-15, PD-17.

2. Parents did experience a frightening incident at the LEA when the Child was left, unattended for a number of hours, on an LEA school bus by a substitute driver.³⁰ Parents have stated often that they do not trust the LEA with the Child because of the bus incident. But Parents remained at the LEA for ten months after the event. Parents never filed a civil claim for damages against the LEA for the bus incident. Parents now assert that the bus incident represents the origin of their LEA mistrust. After the Parents removed the Child and placed him at the Private School, the Child did very well until the Parents could no longer pay the Private School tuition and other costs. The Child rode a bus 45 minutes every day to and from the Private School. T1553, T1493, H-6.

3. The LEA fully admits fault in the bus incident and the bus driver was terminated. But Parents have lingering questions about the event because of the Child's limited communication skills. A two-year statute of limitations bars the fact-finder from consideration of the bus incident in the Parents' due process claim. But the fact-finder acknowledges the Parents' assertion that the seminal point of their LEA mistrust began with this incident. T1521, T1779-

³⁰ See footnote numbered "4." in this decision. The bus incident is described at length. During resolution, the LEA acknowledged the Parents' residual sensitivity to this incident. Resolution session CD dated April 26, 2011.

1782.

4. The Child has mitochondrial disorder in addition to Autism. Mitochondria is a debilitating disease. But the Child's Pediatrician testified that the Child can attend school in spite of the mitochondria and other medical conditions. The LEA acknowledges that a health care plan is necessary for the Child to attend the LEA, but hearing testimony revealed that the Parents did not return the medical questionnaires necessary to complete a viable health care plan. T1002-1005, T1020, T1021, T1028, T1030, PF-35, H-8, H-10.

5. The Child's Pediatrician testified that the Child should attend a classroom with a small number of students.³¹ At the Parents' request, the Pediatrician wrote a letter to the LEA in which he recommended the Child's placement at the Private School.³² But the Pediatrician now admits that he is unfamiliar with the specifics of the LEA proposed program. T1030, PF-35, D-2, H-8, H-10.

6. The Child's Clinical Psychologist testified that the Child's mitochondrial disorder is a very serious problem preventing the Child's enrollment at the LEA. The Clinical Psychologist testified that the Child's environment must be "germ-free" because he has an "extremely compromised immune system." T133, T153-154. The Clinical Psychologist is not a medical doctor. He is not state-licensed to make a medical prognosis based upon the Child's mitochondria. A medical doctor did not make this claim at the hearing. T133, T153-154, T1028, T1036.

7. The Clinical Psychologist observed the Child at the placement, in the ASP class. The Clinical Psychologist asserted that LEA personnel used "ungloved" hands on the Child. T32. He also testified that a teacher wiped oozing mucus from her drippy nose

³¹ The Pediatrician also admitted that academically related services are "very important" to the Child. T1004.

³² The Pediatrician testified contrary to his assertions in his prior letter to the LEA. At the hearing, the Pediatrician stated that he is not aware of specific medical precautions the LEA needs to make. He stated that the Child is not "at risk for life threatening infections." The Child is susceptible to "more acute illness" which he defined as an "ear infection" or "sinus ailments." T1028, T1036.

and touched the Child. He stated that the Child's classmates spread unknown germs to the Child. Yet the fact-finder noted that no particular health issues have arisen at the Child's Private School. In fact, the Child missed only a few days there though the class had over twenty children in it. The Child rode the bus twice daily. The Child ate lunch with other children. Though the Child's mother stated that the Private School personnel "kept everything sterile and clean," the Child's only known health change was his adherence to a gluten free diet. F-16-33, P-F38, T130-T133, T158, T1496.

8. The Principal, the Autism Consultant, the Primary Teacher, the Teacher Specialist and the Speech Pathologist, testified at the hearing. All individuals who taught or oversaw the Child at the placement were knowledgeable and convincing. The Autism Consultant is properly credentialed in BCBA and ABA methodology.³³ The Principal is state-licensed and has attained a masters level degree in special education. She has one course to complete for her BCBA certification.³⁴ She has extensive experience in educational programming for children with autism.

³³ The Autism Consultant provided the Child's discrete trial documentation, along with his statistically based ABA functional analysis of the Child's behavior, and a bibliography of his research reference materials. This data is included in the evidentiary record. The Autism Consultant has extensive autism programming and behavior modification expertise he provides regularly to local programs. The Autism Consultant tracked the Child's behavior through discrete trial methodology in which he documented the Child's aggressive and disruptive acts. The Autism Consultant attributes most of the Child behavioral incidents to escape behaviors and social avoidance. The Autism Consultant confirmed that he used the "ABC" behavior model to track and address the Child's behavioral incidents toward preparation of a Behavior Intervention Plan, ("BIP"). T619-636, C-1-C47.

³⁴ The Principal denied that she created discrete trial literature for the hearing. She also denied that she did not know the meaning of ABA terminology. She confirmed that the program utilized the pre-school IEP for background and historical information. But she used the proposed IEP and evolving educational data for current IEP goals and objectives. She affirmed that the Parents stipulated to this arrangement because Parents had not signed an IEP. The Principal testified also that she purchased a fabric wall to address the Child's sensory issues. She testified that the other teaching staff worked daily with the Child for about thirty days prior to the November 16, 2010 observation by the Clinical Psychologist. The Principal testified that she was concerned about the Child's large number of absences and tardy arrivals. She confirmed that the Child made academic progress in her program and that it is standard operating procedure for school visitors to make an appointment before observing school programs. She stated that school nurse checks, documenting school injuries, are routine and do not require Parents' approval. She also confirmed that uses MANDT restraint techniques only to prevent self-injury. She also confirmed that these instructors are present in a ASP classroom – a teacher specialist, a teacher, a speech therapist, an educational specialist and an occupational therapist. T236, T246, T244-247, T268, T278, T282, T1771-1772, C1-13, C-45-47, C-48-49, C-148-160, C-273, C-288-290, C-291-293.

9. All personnel are state-licensed and have attained various levels of BCBA training. Though the Child's Primary Teacher currently has provisional state licensure and has taught for nearly two years, her testimony reflected her ability to competently teach the Child. The Primary Teacher was candid regarding her work experience. All of the Child's teaching staff were passionately immersed in providing the Child a FAPE.³⁵ The Teacher Specialist, who oversees the Primary Teacher at , cried softly during her testimony after she was asked to tell a personal anecdote about the Child. She conveyed a story about how the Child, whom she described as a "beautiful boy,"³⁶ was focused upon the kitchen's microwave. T1080. Once, he asked it if it was "feeling okay."³⁷ T779. It seemed that the Teacher Specialist had personally bonded with the Child.³⁸ C-70-71, C-74, C-126, C127-132, G-151-156, T1081, T1086-1098.

10. The Speech Pathologist testified boisterously and demonstrated her spirited teaching methodology to hearing room participants. The Speech Pathologist punctuated her testimony by recreating some of the animal sounds she makes to reach the Child's private orbit. The hearing room "came alive" when she spontaneously made the sounds of the "elephant's roar" and the "chicken's cluck." T1168. The Speech Pathologist then exuberantly replicated the animal sound litany she routinely conjures to maintain students' interest. T1168. The Speech Pathologist

³⁵ The Primary Teacher offered personal recollections about the Child. He "giggled" when he threw a baby doll in the trash can after he decided it was no longer interesting. T780. The Primary Teacher also related that she had saved her photograph of the Child from a class field trip. The Child was pictured in the photo with his bare feet dangling from his father's car window. The photo represented a victory the Child had in a dispute with his father about wearing shoes. The Child's father had insisted that the Child wear shoes. The Child had reluctantly put them on. T777-778.

³⁶ The Teacher Specialist stated, "[The Child is] a beautiful little boy. Blond haired. Blue eyed. He's an absolutely gorgeous little boy. And a lot of fun. A lot of fun. He has a great personality. And he has a lot of skills that you discover the more that you're with him. He doesn't show those skills to everybody. And it's not going to happen right away...He loved to sing into the microphone." T1080-1082.

³⁷ Another little boy had a temper tantrum near the Child. Instead of patting the little boy, to calm him down, the Child patted the microwave. T779.

³⁸ She recalled the November 16, 2010 observation. She remembered that the Child was tardy to class. She recalled that the Child aggressed toward her because she presented a demand he did not want to complete. But she blocked him from hitting her nose. He was rewarded with food because he completed a task. Occasionally, she saw the Child aggress toward other children by grabbing for their arms. The Child has bitten himself. T1086-1098.

also provided helpful insight regarding the Child's mindset.

11. The Speech Pathologist provided an anecdotal incident about the Child that enlightened her. She conveyed her recollection at the hearing. When she first met the Child, she made a spontaneous "tap, tap, tap" sound to pique the Child's interest. T1161. Much later, the next time the Child encountered the Speech Pathologist inside the building, he spontaneously made the same "tap, tap, tap" sound back to her - from across the room. The Speech Pathologist's testimony was captivating – this witness energized the room with her enthusiasm for teaching the Child. The fact-finder is convinced that these skilled teaching professionals, working as a team, are able to reach into the Child's impenetrable "world" in a uniquely compelling way. T1161 - T1185, C-198, C-192, C-197, C-198.³⁹

12. The Private School is an appropriate educational placement. But the LEA's program appears to be far superior. The ABA's "discrete trial" method is solely utilized at the Private School. But the TEACCH method and the ABA are blended at the LEA. It appears to the fact-finder that speech-language development skills and behavior modification are not the sole goals of the IDEA. This fact-finder reserves judgment on the long-term benefit of either teaching philosophy. Private School personnel admit that mainstreaming opportunities are vastly limited. The Private School teachers testified credibly and convincingly. They were knowledgeable and attentive to the Child while he was there. T215, T22-224, T227, T619, T1559, C-347, C-350, C-352, C354-355.

13. Parents admit that they want "the ideal" placement for the Child. E-30. The LEA is not required to provide "the ideal" placement. No evidence was shown at the hearing reflecting that the LEA is unable to provide an appropriate placement, even if Parents do not deem the LEA

³⁹ The Speech Pathologist confirmed that she came to the classroom regularly and that the fabric curtain was based upon the TEACCH model for structured teaching. She confirmed that the fabric curtain was not placed to isolate the Child but to reduce his distractions. She also confirmed that the Child made progress per the proposed IEP which she deemed appropriate for him. She did not observe him kicking, grabbing or scratching. T1185-1198, T1201-1215.

placement to be “ideal.” Parent stated that the public and private school options are “parallel” in his mind. T1818. But the evidence reflects differently. Parents will accept only the Private School option. E-30.

14. The Advocate testified that she was in the Child’s home with him from March 11, 2011 through May 16, 2011. She experienced only two incidents with the Child requiring his disciplinary correction. Once the Child scratched her when he wanted a cup. In the second incident, the Child grabbed her hair when he wanted his mother’s attention. The Advocate was twice able to require the Child’s compliance because she spoke to the Child at his “eye level” to get him to obey her commands. T38-45. The Advocate and the Child’s mother are both able to place the Child in “time-out” for 3-5 minutes if the Child misbehaves. T38. The Advocate showed a video of the Child who was accompanied by the Parents’ autism expert, (“Parents’ Autism Expert”), as the Child placed puzzle pieces together.⁴⁰ This fact-finder noted that the Child sat quietly and focused intently on the puzzle pieces. Then the Child correctly placed about ten large puzzle pieces together into a circular base. The Child required little assistance from the Parents’ Autism Expert. Thus, it appears to this fact-finder that the Child’s behavior issues have significantly improved from prior reports. The “puzzle” video attests to this Child’s present ability to access the LEA educational environment. T38, T40-45.

15. The Clinical Psychologist has met with the Child since early 2009. Per the Clinical Psychologist’s testimony, Parents began the Child’s treatment because of the Child’s behavior toward his sister, not for school problems.⁴¹ Parents’ Clinical Psychologist

⁴⁰ The Parents’ Autism Expert has extensive experience and has state special education licensure. During her observation of the Child in May 2011, she noted that she was able to control the Child’s behavior by ignoring aberrant instances, redirecting the Child’s focus and reinforcing him. She noted that the Child often tried to pull down his pants and she suggested other clothing. She noted that the Child’s errant behaviors are normally grounded in a desire to escape a directive. The Parents’ Autism Expert and the Autism Consultant agreed that aggressive episodes are prompted by the Child’s escape motives. The Autism Consultant proposed the FBA and BIP to address this behavioral need. T345, T927-948.

⁴¹ The Child pulled his sister’s hair out so much that her father described “bald spots” on her head. But the father also admitted that his daughter likes to tease her brother. She plays “tricks” on him. T1810.

alluded to the Child's post-traumatic stress disorder, ("PTSD"), and the Child's "severe reactivity" to his "prior trauma" which the Clinical psychologist defined as a "hot Mayday" for the "bus incident." T90-92. The Clinical Psychologist made an analogy between "flatworms and leeches ... [that] suck blood and stay in one's system" and the manner in which the PTSD patient revives the initial traumatic incident. A PTSD patient "generalizes" his environment, he stated. T94-96. The Clinical Psychologist asserted that a school bus prompts a dramatic response in the Child. The Clinical Psychologist's theory does not conform to the evidence. After the initial bus incident, the Child often rode school buses since he attended the Private School.⁴² Thus, PTSD is not a fact-finder consideration. T-94-96, T100.

16. At the due process hearing, the Clinical Psychologist testified that the School Nurse "strip searched" the Child. T103. The Clinical Psychologist stated that the Child's "shirt [was] pulled up" and his pants were "dropped." T100. The Clinical Psychologist reported to the fact-finder that on November 19, 2010, he met the Parents at the school building for an IEP meeting. When he entered the school building, he heard the Child's "screaming and howling in tremendous desperation." T107. Parents demanded to know why the Child was "so distressed." T109. A teacher assistant, ("Teacher Assistant"), then informed the Parents that the Child underwent physical inspections twice daily – upon arrival and departure from school - in the School Nurse's office. The Teacher Assistant informed the Parents and the Clinical Psychologist that the "body checks" began a day after the Child's father asked the substitute teacher for a daily injury report after he discovered unreported bite marks. T103, T105, T100, C291-C298, PF-38.

17. When questioned at the hearing, the Clinical Psychologist admitted that he never saw the School Nurse "strip search" the Child. The School Nurse testified that the "body checks" were only examinations of the Child's lower arms and legs for fresh abrasions. T101-103, T105,

⁴² The Clinical Psychologist did state, however, that Child's mother initially rode the bus with the Child. The Child then rode alone twice daily to and from the Private School. T92.

E-91.

18. Parents testified that they never consented to physical examinations conducted on the Child. The School Nurse admitted she never obtained Parents' permission for the body checks. The body checks began in the School Nurse's office only after the Child's father requested that the LEA "drop a note and let us know what happened" if an injury occurred at school. T1805. The Child's father testified that the twice daily body checks were "spawned from an innocent request he made" to the LEA, then the "whole thing mushroomed." T1814, T1805. The Child's father requested documentation of injuries after the Child's "[mother] had said that [the Child] had been coming home with bruises and bite marks." T1805, T1515.

19. The fact-finder noted that one of the Parents' experts who testified at the hearing, the Medicaid Worker, who has a special education college degree but is not state licensed,⁴³ contradicted the Clinical Psychologist's recollection. She reported that the Child began to cry in the school driveway, not when he entered the school or was led to the School Nurse's office as the Clinical Psychologist implied in his testimony. She wrote this report on November 19, 2010:

"[The Child] continues to attend [the autism class at the LEA] While I was there, I observed [the Child] come into the school. His mother told me that he started crying as soon as they came into the school driveway. He was crying when he came to the foyer of the school. A teacher met [the Parents] in the main entrance and took [the Child] into the [School Nurse's] office. [The Child's mother], [the Medicaid Assistant] and [Parents' Medicaid Worker] were discussing [the required] paperwork and [the Child's mother] left the conversation. When she returned, she said the [School Nurse] was checking [the Child] for bite marks and bruises. [The Child's mother] had said that he had been coming home with bruises and bite marks. [The Child's mother] was visibly upset. [The Medicaid Worker] discussed with [the Child's mother] and [the Assistant] why they [personnel] were checking him before class for this when no incidents had occurred yet. From the [School Nurse's office], the [Teacher Assistant] walked past me toward the classroom and [the Child] was growling and crying. He then flopped himself down on the floor in the main entrance hall and didn't get up to walk. While sitting, he was calm and relaxed and [he] observed [the environment] around him. Then when the [Teacher Assistant] tried to move him he kicked and cried again. The [Medicaid Assistant] got up from our bench and went over to [the Child], talking quietly and trying to get him up from our bench. After two attempts between the [Teacher Assistant] and the [Medicaid Assistant], the [Child's mother] came to [the Child] and he wrapped his arms around [his mother's] neck. She took him down to the classroom." H-109. T1516.

⁴³ The Medicaid Worker is not directly employed by the Parents. Medicaid pays her salary. Parents' witness operates a behavioral control business, "BITE," an acronym for the entity, "Behavioral Interventions, Trainings and Evaluations, Inc." Parents' witness, the Medicaid Worker, provides in-home respite care services to the Parents for up to 25 hours weekly. At the end of the above account, the Medicaid Worker notes to her employer, Medicaid, that "[The Child's mother] is happy with [the Medicaid Worker's] service from BITE, Inc." T378, H-109.

20. The School Nurse testified that the Child's Primary Teacher routinely brought the Child, first to her office, then he went to class. The School Nurse conducted the body checks only on the days when the Child was in school.⁴⁴ The School Nurse testified that the Child was "active and curious" but he never cried.⁴⁵ T421. After the Child calmed himself down,⁴⁶ the Child went to class and worked on the computer. C-48, C-291-298.

21. The Principal testified that she has trained in ABA⁴⁷ teaching methodology for children with autism. She has completed five out of six courses in BCBA.⁴⁸ She testified that both the ABA and TEACCH⁴⁹ methodologies are used in the program. The Principal described a verbal behavior map she created for the Child from which he is provided strategies. Though the LEA combines the TEACCH method with ABA, the Child is taught to model behavior per the ABA teaching method. The Principal asserted that her personnel use only positive reinforcement to increase or extinguish targeted behaviors. C-347, C-350, C-352, C354-355, T22-224, T213-215, T225-227.

⁴⁴ Testimony indicated that the Child had missed 25 school days from October 7, 2010 to November 19, 2010. His mother said he was ill with a sinus infection on some of the days. There were also many "tardies" to school. T268, T274, C-168, C288-290.

⁴⁵ She testified that the Child liked to visit the microwave in her office. T424.

⁴⁶ After the incident, the Child ran into the bathroom. At first, he pulled his mother into the bathroom with him. He then began to pull paper towels out of the dispenser. When his mother said, "It's okay to say [I'm] mad," the Child responded, "I'm sad." Then he pushed his mother back out of the bathroom. He came out after a few minutes and went to the computer where he worked quietly. T1519, T389.

⁴⁷ ABA, also known as the Lovaas Method or the Lovaas Model of Applied Behavior Analysis, is a science that involves using behavioral learning theory to modify overt behaviors. Behavior analysts reject the use of hypothetical constructs and focus on observed behavior and its relationship to the environment. ABA practitioners assess targeted behavior, and its connection to the surrounding environment, to change undesired behavior. ABA teaching methodology is a system utilizing "discrete trials" in a research based classroom. The discrete trial method is a three part teaching unit comprised of the antecedent, the behavior (or response), and the behavior consequence, meaning reinforcement is provided or withheld.

⁴⁸ A BCBA. ("Board Certified Behavior Analyst") is an independent practitioner who conducts and interprets descriptive, systematic behavioral assessments. A BCBA designs behavioral interventions for clients. Board certification requires completion of six graduate level courses, a passing grade on an examination and supervised work in the field.

⁴⁹ The TEACCH program, also known as "structured teaching," is a specific teaching methodology for children with autism. TEACCH is administered through the University of North Carolina at Chapel Hill. TEACCH, is a widely known, nationally accepted teaching approach for children with autism. This teaching method was founded in the 1970's by Eric Schopler, Ph.D., and incorporates the scientific study of patterned behaviors and thought processes of those who have the autism diagnosis. TEACCH practitioners concentrate on skill development to enable the individual to function independently in the world outside the classroom.

22. The Clinical Psychologist observed the _____ program for the Child on November 16, 2010. The _____ Principal contradicted the Clinical Psychologist's account of the program observation.⁵⁰ The Clinical Psychologist dismissed the _____ classroom as a "dog and pony show."⁵¹ T127. He stated that children with autism are taught per an "industrial" model at the LEA. T136. He testified that children at _____ appear to be corporally required by teaching assistants to stay in a circle. He implied that children are struck, "Whack-A-Ball" style, if one of them attempts to escape the circle.⁵² The Principal testified that there are four teachers to every four children. The _____ Principal assured the fact-finder that children are not physically forced, by "very large" teaching assistants, to stay in the ASP classroom. T137. The Clinical Psychologist's statements were scathing and uncorroborated by the evidence. T136, E-91.⁵³

⁵⁰ There were two observations that day. The first observation included the Teacher Specialist, seated with the Child. The other observation referred to the Primary Teacher who instructed the other children. Thus, one observation included the Child and the other one did not include him. In the latter observation, the Child's Primary Teacher read to four children who were seated around a semi-circular table. The Clinical Psychologist stated that the Primary Teacher could not keep the other children's interest when she read to them. The Child was seated about twenty feet away from this group with the Teacher Specialist. T194-195.

⁵¹ The "dog and pony show" comment was specifically addressed to the Clinical Psychologist's opinion that staff had "staged" his observation of the Child. He alluded to the surplus of teaching professionals present in the class that day. He chastised the _____ Teacher Specialist for his assertion that she reinforced the Child with "yummy food" after he "grabbed" her hair and "bopped" her in the nose. He stated at the hearing, "...It appears that [the _____ Teacher Specialist] decided she wanted to have a more effective presentation for me." T131-133.

⁵² During the observation, the Clinical Psychologist had stated that the Primary Teacher sat in front of four other children at a semi-circular table. He stated that there were two "very large" teaching assistants behind the children. If any of the children tried to escape the area, he asserted, the teacher's assistants physically forced the students back to the circle by "bopping" them. He compared this procedure to the game of "Whack-A-Ball." T130-131, T194-195. Curiously, the Clinical Psychologist appears to approve the use of punishment if inflicted per the ABA method. He stated, "[The LEA] chooses not to use any form of punishment – which is to lower the frequency of behavior. [The LEA] only uses reinforcement." T190. The Clinical Psychologist does not believe that the LEA's methodology works because the LEA utilizes behavioral assessment and evaluation, in advance of the behavior, to control it. The Clinical Psychologist asserted that the sole methodology to use on a child with autism is the ABA method because it applies "swift and sure consequences" on the Child's negative behavior. The LEA addresses the Child's behavior modification "on the fly," he testified. T86-90. The Clinical Psychologist emphasized the Lovaas concept of "contiguity" which means that behavior modification has to be done immediately, contiguously with the behavioral event. The Clinical Psychologist deems that behavioral assessment and plans are time-consuming and do not quickly address behavioral incidents. He asserted that behavior plans are ineffective for that reason. T86-90

⁵³ In his letter, dated November 23, 2010, addressed "To Whom It May Concern," the Clinical Psychologist accuses the LEA of "stonewalling" in providing the Child a FAPE. E-91. In that vein, the Clinical Psychologist admitted that he assisted the Parents with a T.V. article. He told the Child's 'unbelievable story' on air. The Clinical Psychologist often describes himself as the Parent's advocate. After the Parents learned of the physical exams, the Clinical Psychologist indicated to the Parents that the LEA was likely developing a child protective service complaint against

23. The Clinical Psychologist asserted to fact-finder that on November 16, 2010, the Child sat alone, in the classroom behind a “partition.” T194. The Clinical Psychologist implied that the Child must be separated from the other children because of his behavior. Multiple witnesses drew diagrams of the classroom. The LEA explained that the structure surrounding the Child is the “noise barrier.” ⁵⁴ T236. The noise-barrier is a large, ribbed curtain. The LEA brought the structure into the hearing room for hearing participants to view. During his testimony, the Clinical Psychologist depicted a gloomy, secluded visual picture of the Child at . The Clinical Psychologist also implied that teachers kept the Child from eating lunch with his peers. E-91.

24. The Principal testified that the noise barrier is used by teaching staff, not to “isolate” the Child, but to reduce distractions for him. T236. The Child’s father testified that he asked the LEA staff to keep the Child in the classroom for lunch – his mother prepares gluten free meals for him. T259. The Child has food allergies. T783. There is a semi-circular table in the classroom where all of the children have group activities. This Child’s seat was situated, not with the other children at the group table, but a few feet away from it. teachers asserted that the Child was seated partially behind the group. LEA personnel asserted at the hearing that they had to assure that the Child could not bite or interfere with his classmates. They testified that the Child was to gradually move toward the circle. This explanation seems logical to the fact-finder. The Child was not consistently in school and the Child has shown physical behaviors. The Principal testified that the Parents never returned her draft behavior checklist. T751, T763, T1109, T1115 – T1119, T1185-1196.

25. The Clinical Psychologist testified that the Child was rewarded with food, as a

them. Another scathing letter is addressed to the LEA, citing the T.V. story above. It is dated December 3, 2010. In it, the Clinical Psychologist continues his theme, “A War To Educate The Child.” E-91, E-138.

⁵⁴ The noise barrier is a fabric curtain, about seven to eight feet high and ten feet in width. Though it is soft and pliable, the structure can be manipulated into different configurations. It is free-standing and relatively soundproof. T-194.

positive reinforcement, after he showed “aggression” to the teacher.⁵⁵ The Principal asserted otherwise – that the Child was only given food after the Child completed a task. The Clinical Psychologist stated that personnel did not keep discrete trial documentation on hand in class. T792-793. The Principal testified that the discrete trial documentation had been accessible. She made a simple error. The discrete trial sheets had been hidden beneath a paper pad. T792-793. When the error was later discovered, personnel provided the Clinical Psychologist with the Child’s missing discrete trial paperwork. C-13, C-14, C-15, C-23, C-42, C-43, C-44, C-45, C-47, C-48, C-184-187, C-188.

26. The Private School Director testified at the hearing. She is a BCBA and has Virginia state special education licensure. The Private School Director is respected in her field. She owns an autism consulting business in addition to her job as the Private School Director. She provides private ABA therapy to children. Her fee is \$40.00 to \$60.00 hourly. T1563-1565. ABA communication skills are developed through forty hour weekly sessions. The Parents first met the Private School Director when she provided ABA therapy to the Child. When the Child first began at the Private School, the Private School Director stated that the Child could not use words at all and he exhibited challenging behavior – he screamed, scratched, pulled hair and bit others to communicate his needs. The Private School Director gathered the Child’s unsigned IEP’s and used these LEA prepared documents to teach the Child.⁵⁶ The Private School Director and the Child’s mother attested to the Child’s progress shown in manding⁵⁷ skills after attending the Private School. When the Parents could no longer pay the Private School tuition, the Private

⁵⁵ The Clinical Psychologist asserted that the Child was very aggressive at the class observation and testified that the Child “was violently throwing punches and... probably ‘bopped’” the teacher in the nose. She denied this account. The Clinical psychologist admitted that he did not actually see the blow. T130-131.

⁵⁶ But the Private School created its own educational plan for the Child. T537.

⁵⁷ Manding is the use of verbal language to request items from the Child’s environment. In the Lovaas discrete trials method, behavior charts document the information. According to the theory, if the Child’s mands increase, the Child’s negative behaviors decrease. The Private School staff tracked the Child’s manding and behavior by using a manual “clicker.” The Private School then converted the Child’s daily performance onto graphs showing upward and downward trends. T497-499, PE-14, F1-F14, T440-443.

School disenrolled the Child in June 2010. Parents owe the Private School for unpaid tuition. The Private School Director has indicated to the Parents that she can temporarily curtail creditor collection activity for the outstanding Private School debt. T557-558.

27. When the Child attended the Private School, the Private School Director stated that the Child rode the school “activity” bus “every day unless he had therapy.” T541. She stated that he attended school regularly. T486. She said that he did not sit in a class room with a barrier and developed his skills while sitting at a small table. She stated that the Child ate lunch in an open area with staff and classmates. The Private School does not provide occupational therapy, (“OT”), speech therapy or other academically related services. T541. There is no mainstreaming at any point during the day at the Private School. The Private School Director testified that the Child now has a working vocabulary of words which he uses expressively and receptively. T513.

28. When the LEA Program Director conducted a brainstorming meeting with the Parents in September 2010, she testified that she honestly believed that the Parents were ready to enroll the Child at the LEA and sign off on one of many IEP’s the LEA prepared. T985-988. After their return to the LEA, Parents never signed off on a single IEP other than the homebound IEP endorsed on December 22, 2010 and its subsequent modification on February 17, 2011.

DECISION

Parents claim they are entitled to reimbursement for their Child’s unilateral placement at the Private School in City, Virginia. Parents claim the Child is denied a FAPE by the LEA.

For the following reasons, I find that there has been no denial of FAPE to the Child in the LEA’s IEP or in the LEA’s placement decision.

1. *The LEA Provided A FAPE To The Child At The Placement, In The ASP*

*Classroom. The ASP Classroom Provides The Least Restrictive Environment For The Child.*⁵⁸

Parents unilaterally enrolled the Child at the Private School about ten months after the bus incident of May 2008. Parents only elected to return to the LEA after the Child was denied access to the Private School. Parents were sincere at the due process hearing – they admit that they want “the best” for the Child. Parents assert that the ABA teaching methodology, solely used at the Private School, is the “best” teaching protocol. The LEA’s program utilizes two teaching methodologies – ABA and TEACCH. Parents infer then that the LEA’s program is defective. But the evidence shown at this hearing reflected that this is not the case.

The Child’s program, in an ASP class, was an appropriate placement for the Child. When Parents returned to the LEA, the evidence showed that LEA personnel attempted to meet the Child’s needs. The LEA Program Director immediately made arrangements to “brainstorm” with the Parents in September 2010 and the City gathered expertise on the Child’s skills. The LEA Program Director assured Parents that board certified behavioral support would be provided at the Child’s placement. But at the conclusion of the meeting, the Program Director became alarmed when the Parent asked for the LEA to partially pay for the Private School until the Child’s IEP was created. It is evident that the Program Director then doubted the Parents’ intent to permanently place the Child at the LEA.

At the brainstorming meeting and in successive IEP meetings, the Parents “came to the table” with irrevocable notions about the Child’s educational needs and his placement in a

autism classroom. Often, Parents’ preconceptions against the program are not

⁵⁸ The Virginia Department of Education regulation at 8 VAC 20-81-130 states as follows: “Each local educational agency shall ensure: a. That to the maximum extent appropriate, children with disabilities, aged two to 21, inclusive, including those in public institutions or other care facilities, are educated with children without disabilities; and b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (2010).

grounded in fact. But the Child's Parents are both articulate. Both of them have attained graduate level degrees.⁵⁹ The Child's Parents are ideal. The Child is a "beautiful boy" with autism and other medical issues. When he grows up, the Parents hope that the Child will become independent and contribute to society. The Child's mother is a state licensed, board certified speech pathologist who has expertise in autism. The Parents have availed themselves of many community resource agencies to assist their effort to educate the Child at the optimal level. But Parents detrimentally rely on misinformation given to them by some of the professionals who surround them.

For example, the Clinical Psychologist's comment in which he referred to the program as a "dog and pony show" was apparently generated by the Clinical Psychologist's perception that the TEACCH method is not effective. He stated that "the LEA utilizes an industrial model" in its teaching methodology. T127, T136. The fact-finder is persuaded that the Clinical Psychologist's observational findings are not entitled to great weight. The Clinical Psychologist's testimony was driven by his prior thoughts about the LEA's program rather than by his factual conclusions at the Child's observation. The Clinical Psychologist provided incendiary information to the fact-finder, often not factually correct, about the LEA's

program. In turn, it is evident to the fact-finder that the Parents are swayed by the Clinical Psychologist's stance against the LEA's program.

Parents already mistrust the LEA. The Parents allude to the bus incident and the Child's physical examinations to underscore their misgivings about any LEA placement offered to them. The Clinical Psychologist exacerbates the Parents' fear of the program.

⁵⁹ The Child's mother has a B.S. in English and an M.S. in speech pathology. In addition to other employment, she worked in a high school program for three months. The father has a B.A. and an M.S. from a respected state university. T1484.

He ignites them. Parents become more inflamed against the LEA. The situation erodes.

The Child's placement in a classroom, appropriately designed to meet his needs, does not occur. The fact-finder reached this conclusion by examining the Clinical Psychologist's testimony for connection to other factual accounts.

The Clinical Psychologist stated that the LEA has large teaching assistants. He implied that their function is to exert physical force on the children in the ASP classroom to prevent their escape from it. This information is not reliable. There is no evidence that the teacher assistants apply corporal punishment to the children if they attempt to escape. No other factual witnesses supported this conclusion. The Clinical Psychologist did not see this happen.

Also, the Clinical Psychologist alluded to the LEA's "strip searches" of the Child at the placement. T103. Upon questioning at the hearing, the Clinical Psychologist also admitted that he never actually saw the Child, "strip searched." T100-103. The School Nurse confirmed that the body checks were more aligned with physical inspections. She reported that she physically examined the Child's lower arms and legs. The School Nurse never made the Child "drop his pants to the floor" as the term "strip search" implies. T100. But Parents validate their mistrust of the LEA because the Parents' expert conveys inflammatory reports to them.

Did the LEA wrongfully conduct the body checks without notifying the Parents?

Parents had requested feedback on the Child's injuries. Parents did suspect the LEA of wrongful conduct. By her own testimony, the Child's mother stated that she wanted to know details about the Child's "entire" day.⁶⁰ It appears that the Child's body checks amounted to nothing more than quick trips to the School Nurse's office to check for bruises and abrasions. It seems that the LEA acted upon the Parents' request and began to conduct the daily body checks

⁶⁰ The Child's mother testified, "I need to know what's going on during his day, what's upsetting him, how [personnel] are managing it, what's their intervention plan. You know, why, why is he having these behaviors. It's important for me to know this." T1503, T290.

to quell the Parents' insatiable need for information. But there was no legal requirement for the School Nurse to inform Parents of routine office visits.

Also, the Clinical Psychologist testified that the Child suffers from PTSD. There was no other evidence attributing the Child's mental state to PTSD. The Child's Pediatrician has not noted this factor in his correspondence to the LEA about the homebound placement. The fact-finder noted that the Child was placed daily on a bus, for over a year, to attend the Private School. Thus, the fact-finder concludes that the Clinical Psychologist's conclusion that the Child has PTSD is not a scientific conclusion. The Clinical Psychologist's testimony is based upon hyperbole. But the Parents remain polarized against the LEA on the basis of their expert's assessments.

The Child's Pediatrician provided correspondence to the LEA in which he concluded that the only program suitable for the Child was the Private School. But at the hearing, the Child's Pediatrician stated that he never observed the LEA's program. He admitted that he has no knowledge of the LEA's ASP class. He admitted that he does know that the LEA program offered does not fulfill the "structured classroom setting" he recommends. PF-35, D-2. In fact, the Child's Pediatrician remarked that he has great respect for his own child's public school autism class. The Pediatrician did not state that the Child's mitochondria, or other medical conditions, prevent the Child from attending school.

The LEA presented convincing expert and factual witnesses. Their testimony was credible. The LEA witnesses who testified regarding the Child have substantial training and experience in working with children with disabilities who require special education. The LEA witnesses had direct knowledge of the Child's educational program and his behavioral needs.

This hearing officer gives deference to the expert opinions of the LEA staff. The IDEA

does not deprive educators of the primary role in developing an IEP. *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also, Springer By Springer v. Fairfax County School Board*, 134 F.3d 659, 663 (4th Cir. 1998) (“The task of education belongs to the educators who have been charged by society with that critical task...”); *MM by DM and EM v. School District of Greenville County*, 303 F.3d 523, 531 (4th Cir. 2002) (“The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities.”).

The LEA’s IEP and placement proposed provide FAPE, in the least restrictive environment for the Child. At best, the Private School offers an acceptable alternative to the LEA’s ASP classroom. Even if the Private School program were a better program, reimbursement is not required. *See Hessler v. State Board of Education*, 700 F.2d 134, 139 (4th Cir. 1983).

2. The IEP Is Calculated To Sufficiently Provide This Child A Free Appropriate Public Education.

Does the LEA’s IEP provide a FAPE to the Child? This is a two part inquiry. First, does the LEA’s IEP comply with Virginia Regulations and the IDEA? Second, if the IEP complies with procedural requirements, is the IEP reasonably calculated to enable the Child to receive educational benefits?

The record in this case reflects that the Child’s procedural rights were violated. There is validity to Parents’ claim that the Child’s homebound placement did not begin until February 2011. But the Parents and the LEA agreed to the eighteen hour compromise to make up for the Child’s “lost” time for delay in service delivery. The procedural error has been corrected. The Parents’ claim that the Child’s IEP was not properly developed is without merit. The Child was

removed from this school district for about eighteen months before the proposed IEP was developed. There was little information available about the Child before the parents decided to re-enter the school system. Prior to August 2010, the Parents had expressed no interest in returning to the LEA school district.⁶¹ There is also evidence that the Child was absent frequently. Also, Parents regularly removed the Child from the ASP class for private psychological, occupational and speech therapy and for weekly horseback riding lessons. There is ample evidence that the Child's behavior in school, though challenging, was manageable because of the BCBA supports in the _____ program. Also, the Advocate's video of the Child, calmly at work on a puzzle, provided proof of the Child's improved behavior. In addition, the Child has been at home now for months. The Child has no behavioral base from which a BIP may be made. The Pediatrician testified that this Child's mitochondria and other medical ailments and conditions do not prevent the Child from going to school. The Parents need to have the Child's Pediatrician and the School Nurse work out health care plan details with the LEA so the Child can attend school.

The Child needs to attend school because there is evidence that the Child's behavior and communication skills are regressing at home. Parents need commit to a structured educational program either at the Private School or at the _____ program, in an ASP class.

Even if the LEA has committed procedural violations, these do not mean that the Child was denied an educational opportunity unless the procedural flaws result in a denial of FAPE to the Child. There has been no FAPE denial. *See MM v School District of Greenville County*, 303

⁶¹ Parents' first counsel initiated a series of letters designed to elicit a settlement response from the LEA to reimburse Parents for the Private School cost. Parents' first settlement request occurred in June 2010. Parents' counsel made additional requests to the LEA superintendent's office and to other LEA administrative personnel. Finally, the LEA refused to provide reimbursement funds to the Parents in early August 2011. Parents sought community based funding through a state Family Assessment and Planning Team ("FAPT") referral. The LEA offered to make contact with the FAPT team but the LEA has never offered to provide funding or arrange for funding for the Parents. The City's position is that FAPE is provided to the Child in the _____ placement. T200-202.

F.3d 523 (4th Cir. 2002) (A procedural violation in IEP delivery which does not cause a denial of FAPE does not contravene the IDEA); *See also Gadsby v Grasmick*, 109 F.3d 940 (4th Cir. 1997).

In *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982), the U.S. Supreme Court defined a “free appropriate public education,” (“FAPE”), as one that provides “personalized educational instruction.” FAPE is provided in the IEP if it is “specially designed to meet the unique needs of the handicapped child, [and] supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.”

“Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, at 203-204.

There is no obligation to provide the best education or an ideal education in order to provide a FAPE. *Id.* at 200.

In *Hartmann v. Loudoun County*, 118 F.3d 996, 1004 (4th Cir. 1997), cert. denied, 552 U.S. 1046 (1998), the 4th Circuit, quoting the *Rowley* decision, stated that federal courts cannot run local schools and must be given “latitude” in creating an IEP.

The legal framework dictates a decision in favor of the LEA because the Parents have failed to establish the inappropriateness of the proposed IEP.

Thus, “The IDEA does not deprive educators of the right to apply their professional judgment. Rather it establishes a ‘basic floor of opportunity’ for every handicapped

child.” *Rowley*, at 201. States must provide specialized instruction and related services ‘sufficient to confer some educational benefit’ on the handicapped child, *Id.* at 200. The IDEA does not require ‘the furnishing of every special service necessary to maximize each handicapped child’s potential.’ *Id.* at 199.

A student receives a free appropriate public education through the IEP process. *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002). This hearing officer has reviewed the IEP for its appropriateness on the basis of whether or not it is reasonably calculated to confer some educational benefit. *Rowley*, 458 U.S. at 206-207. The LEA is not required to provide the best education or an ideal education in order to provide a FAPE to the Child. *Id.* at 200.

Parents have not shown that this IEP is inappropriate or that it is not reasonably calculated to provide this Child a FAPE through the LEA’s proposed IEP.

3. Parents Are Not Entitled To Reimbursement For Private School Placement.

The placement, in the proposed ASP class, with speech services, occupational therapy, and other academically related services, all in accordance with the LEA’s proposed IEP, ought to be implemented for the Child. Per the LEA’s proposed IEP, the Child is also entitled to Extended School Year services and to 45.0 hours of compensatory educational services because of the Child’s “missed” hours on the homebound IEP. The balance of the Child’s homebound IEP compensatory educational hours are to be implemented at an LEA designated site.

If Parents choose to send the Child to the Private School, that is certainly their unilateral choice to make. But it does not mean that the LEA is financially liable for the Private School. The LEA’s proposed IEP provides a FAPE to the Child.

This hearing officer gives deference to the LEA's educators for the decisions made on behalf of this Child. *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997); *See also, Springer v. Loudoun County School Board*, 134 F.3d 659 (4th Cir. 1998). The court may not substitute its own notions of sound educational policy for those of local school authorities. *MM by DM and EM v. School District of Greenville County, Id.* at 531 (4th Cir. 2002).

In order to be successful in a claim for reimbursement by a parent for private tuition placement, the fact-finder must first determine that the public school failed to provide the Child with a free appropriate public education and then that private placement is appropriate under the IDEA. *See County School Board of Henrico Co. v. R.T.*, 433 F. Supp.2d 692, 697 (E.D. Va. 2006); *See also School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 371-372 (1985); *Tice v. Botetourt Co. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990).

I find that FAPE has been provided to the Child in the LEA's IEP development and placement decision. The IEP provides the least restrictive environment for the Child.

In response to the second inquiry, regarding the appropriateness of the Parents' private placement, the Private School placement is limited in socialization opportunities. Per the IDEA, the Child is to be mainstreamed, with his same age peers, to the maximum extent possible. The Private School fails to provide mainstreaming opportunities for the Child. This attribute contradicts the IDEA.

The Private School is also limited in its provision of academic resources to address the Child's "constellation of issues." Private School teachers appeared to be qualified in their field. The Private School Director testified credibly. But Private School personnel clearly regard the

ABA's "discrete trial" method as the sole teaching methodology.

It appears that the Child received some academic benefit from the Private School. But the same academic improvement could have been achieved at the LEA if the Parents had not removed the Child in March 2009. The LEA appropriately conducted educational evaluations of the Child and assigned behavioral experts to him. Parents left the LEA when an FBA was being prepared – at the Parents' request. Parents' claim that the Child's "window of opportunity was closing" is not logical. Evidence at the hearing showed that the Child, who is years of age, has acquired language skills and he continues to do so. From personnel reports, it appears that the Child's window is "open."

Also, at the Private School, the Child did not have access to any academically related services there. His parents were required to independently obtain educational services that the Child needs to achieve a FAPE. For these reasons, the Private School is not deemed an adequate alternative to suit the Child's educational needs.

Parents seek reimbursement for the Private School which is a highly intensive program. The IDEA does not require the LEA to duplicate the Private School for the Child. The LEA is not required to provide a maximum or optimal education to the Child. The concept of maximization was rejected long ago in *Rowley, supra*. The *Rowley* court held that "to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than congress intended to go." *Rowley, supra* at 199; see also *School Board v. Beasley, supra* at 49 ("By specifying an 'appropriate' education, Congress did not mean 'a potential maximizing education.'"); *Bales v. Clark*, 523 F. Supp. 1366, 1370-71 (E.D. Va. 1981) ("Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they nor any other parents have the

right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense. The law requires an appropriate free education. Efforts to build this requirement to something more will threaten the substantial gains already made to the education of the handicapped.”) The appropriate instructional model is available to the Child at the LEA.

Tuition reimbursement is not appropriate unless the parents prove the LEA’s program is not appropriate. Reimbursement in this case is not appropriate because the LEA provided an appropriate IEP for the Child and the Parents’ private unilateral placement is not required. *See Burlington Sch. Comm. v. Dept. of Education*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Parents who make a unilateral placement run the significant risk that a court will find against them and they will be left bearing the cost of the placement. *See Linkous v. Davis*, 633 F.Supp. 1109 (W.D.Va. 1986).

Parents did not prove that the LEA had failed to provide student with a FAPE in the IEP. Parents’ request for tuition reimbursement of private placement under the IDEA is DENIED. There were no claims made under Section 504 of the Rehabilitation Act of 1973.

The LEA is the prevailing party in this due process hearing.

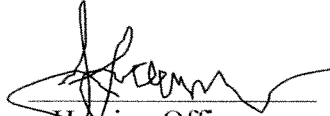
ORDER

The LEA is directed to implement the proposed IEP and provide educational and academically related services to the Child. The LEA’s placement decision in a program, in an ASP class, provides the Child a FAPE. Extended School year services are to be implemented in conformity with the IEP. The Child is entitled to 45.0 compensatory educational hours for the “missed” hours on the Child’s homebound IEP which will be delivered to him at an

LEA designated site.

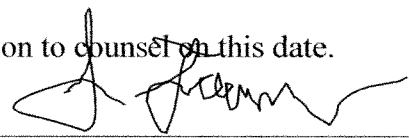
Right of Appeal Notice

This decision shall be final and binding unless either party appeals in federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.


Hearing Officer

Decision Date: June 24, 2011

I have mailed the above Decision to counsel on this date.



Sarah S. Freeman, Hearing Officer

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