[redacted] 24

[redacted] 2002 RECEIVED Complaints & Due Process

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the conclusion of the special education hearing and submitted to the Department of Education before mailing.)

[redacted] PUBLIC SCHOOLS
School Division

[redacted]
Name of Parents

[redacted]
Name of Child

[redacted] 2002
Date of Decision or Dismissal

[redacted] Esq.
Counsel Representing LEA

[redacted], Esq.
Counsel Representing Parent/Child

PARENTS
Party Initiating Hearing

[redacted] PUBLIC SCHOOLS
Prevailing Party

Hearing Officer's Determination of Issue(s):

1) Whether School is liable to Parents for the costs of the placement of child at [redacted] a private school?
2) Whether School is required to "mask" Student if he attends School?
3) Whether School's proposed [redacted] IEP is appropriate?
4) Whether defense by School of laches is applicable?

Hearing Officer's Orders and Outcome of Hearing:

1) Parents' claim for reimbursement of the costs of schooling Child at [redacted] is denied.
2) School is not required to "mask" Child if [redacted] attends School
3) School's proposed [redacted] IEP is confirmed with clarification.
4) School's defense of laches is denied as moot.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

[redacted]
Printed Name of Hearing Officer

[redacted]
Signature

VIRGINIA:

DEPARTMENT OF EDUCATION
DUE PROCESS AND COMPLAINTS

[redacted]
Parents

v.

[redacted] PUBLIC SCHOOLS
School

IN RE: [redacted]
(Student)

DECISION

I.

PROCEDURAL HISTORY

[redacted] (hereinafter "Student") is a [redacted] year old [redacted] with autism, speech impairment and a seizure disorder. [redacted] has been eligible for special education services for many years. Prior to the [redacted] school year [redacted] was primarily educated at home. Appropriate IEP's, to which Parents consented, were prepared for the school years [redacted] through [redacted]. The Parents disagreed with the IEP prepared for the [redacted] school year and unilaterally placed Student at [redacted] (hereinafter referred to as "[redacted]"), a private school. [redacted] remained at [redacted] for the [redacted] school year. The School was notified of the private placement by letter dated [redacted]

On [redacted] Parents requested a due process hearing upon their demand for reimbursement of the costs of privately schooling Student for the [redacted] and [redacted] school years, this because their tandem request that the School provide full-time individualized (one-on-one) tutelage as well as a full-time related service called "masking" had been denied. They further requested reimbursement of costs of the Student's future private education until the above requested accommodations were supplied.

The undersigned was appointed by letter dated [redacted] The case was originally scheduled by [redacted] for hearing on [redacted] with decision due [redacted] (See Initial Pretrial Report).

Counsel for the respective parties herein are:

For the Parents: [redacted] Esquire

For the School: [redacted] Esquire

An extensive Pretrial Conference was held on [redacted] resulting in a First Pretrial Order dated [redacted] which required, inter alia, a current IEP, the exchange of documents, list of witnesses and pretrial briefs five working days prior to hearing and set the hearing date for [redacted] (See First Pretrial Order). Due to a scheduling problem of Parents, the date for the hearing was extended to [redacted] (See

Second Pretrial Order). The current IEP for the Student was prepared on [redacted] Parents objected for the same reasons earlier set forth.

The School's Pretrial Motion to dismiss because of laches was denied without prejudice. (See Third Pretrial Order dated [redacted]. The case came on for hearing on [redacted] and continued through [redacted].

Due to the complex nature of this case, the extensive transcript and exhibits, the parties, by their counsel, requested that they be allowed to file contemporaneous briefs and reply briefs on [redacted] and [redacted], respectively, with oral arguments to be held on [redacted] and a decision due [redacted]. Based upon the finding that the Student, who is currently attending [redacted], would suffer no educational harm by allowing the above extended briefing schedule and in recognition of the fact that the best interests of all parties would be served by a thorough consideration of the complex issues arising herein, the requested continuances were approved. Pursuant to joint request by counsel for both parties, oral arguments was rescheduled for [redacted]. Due to illness in the family of counsel for the School, oral argument was reset and held [redacted], with decision due [redacted].

II.

NO PROCEDURAL ERRORS

No procedural errors have been alleged by either party, either in the prior IEP meetings or as a part of this proceeding. A review of the record reveals none.

III.

SUMMARY OF TESTIMONY

(a)

Introduction

Pursuant to Joint Stipulation between the parties, approved by the Hearing Examiner, Parent's legal authorities, A through I, the Curriculum Vitae of their experts and their Exhibits 1 – 31, as well as a tape recording (Exhibit 32), tables and updates were admitted into evidence. Likewise, School's Exhibits 1 – 56 were admitted into evidence. After brief opening statements by counsel for the parties, the following witnesses were called, sworn and testified, either in person or by a telephonic conference call.

(b)

[redacted] M.D.

Parents' first witness was [redacted] M.D., a physician certified in family medicine who has been practicing since [redacted] (Tr. 21-2). [redacted] has been the medical director of the [redacted] since [redacted] (Tr. 22).

The primary charge of the [redacted] which is located in [redacted] is to teach parents of brain-injured individuals (children) how to create and maximize the intellectual, physical, social and psychological potential of their brain-injured children, including but not limited to autistic children (Tr. 24, 28). [redacted] evaluates the children who come to the [redacted] and is responsible for designing and teaching medical, nutritional and physical programs for these children (Tr. 23). The [redacted] (and [redacted]) sees 500 - 600 children a year (Tr. 24).

The [redacted] is the primary sponsor of a quasi-medical procedure called masking (Tr. 74). In masking, a simple plastic mask is fitted over the mouth and nose of the child and sealed with an elastic band (Tr. 30). It has a small inlet to allow some ambient (normal) air to go into the mask (Tr. 30). As the child breathes into the mask, the oxygen content of the air in the mask drops from about 21% (normal content) to about 19% and the carbon dioxide content increase to about 4% (Tr. 30). The increase in carbon dioxide causes a speed-up in the circulatory rate, resulting in a increase of blood circulation in the brain, which according to the [redacted] improves the oxygen delivered to the brain (Tr. 30, 35, 32 - 33, 13).

According to [redacted], a study by a Canadian pediatric team and an observation by a neurologist in 1950, suggested that an increase in the carbon dioxide level in the blood (which, in turn, increases the circulation of oxygen to the brain), may in certain instances, abort or lessen the severity of seizures and assist other symptoms associated with brain damaged individuals (Tr. 36-7, 61, Parents' Ex. 6). The Institute developed masking as a method to obtain this result for their patients. It is the sole supplier of masks (Tr. 101).

While masking, when properly done, is according to [redacted] a safe procedure, having been performed many thousands of times without injury to the patient, it nonetheless can cause hypoxia (which can lead to serious brain injury or death) when improperly performed or administered to patients who are not appropriate for the treatment (Tr. 42). Accordingly, the [redacted] laid down a series of protocols and guidelines concerning its use.

Thus, masking is to be performed only by parents (Tr. 99, 44-46) who first must be trained by the [redacted] (Tr. 103). (In cases where a single mother who works is involved, a daycare provider, when properly trained and authorized by the parents, may be allowed to

perform masking) (Tr. 46). Masking cannot be performed during exercise, eating, bathing or sleeping; and, likewise, cannot be performed when the patient has a fever, is ill, has high blood pressure or any other type of infirmity which adversely impacts a higher circulatory rate (Tr. 80-86). The training for parents stresses the need to carefully supervise and time the periods of masking (Tr. 44-46). Thus, a Parent always must be in close proximity to the child when masking is being performed by him or her.

The amount of masking and its duration periods are individualistic, depending upon the patient (Tr. 87-88). After thoroughly testing and treating Student (namely from [redacted] through [redacted]) (Tr. 56), the [redacted] recommended a masking period of one minute followed by free breathing of five minutes (Tr. 85). The [redacted] has authorized only the Student's parents, who had been trained by it, to administer Student's masking (Tr. 99). Masking for Student was prescribed for the entire day subject to its earlier designated protocols (Tr. 88). Generally, however, masking should be between 60 and 80 times a day (Tr. 86), but not more than 120 times a day (Tr. 87).

In its reply to an inquiry by the School as to the advisability of performing masking in a school setting, [redacted], the school's secretary, responsible for responding to such inquiries as well as being [redacted] "right hand" assistant (Tr. 93, 48-50), stated that masking "would not be appropriate in a classroom situation" (School Ex. 9). When asked whether [redacted] agreed with this assessment, [redacted] indicated that [redacted] did not disagree with [redacted] conclusion - this because the [redacted] recommended masking only during home based care and home schooling (when the child is neurologically impaired), thus, when the child is able to go to school he or she no longer needs masking (Tr. 95-97).

[redacted] and the [redacted] stopped treating the Student in [redacted] (Tr. 56, 88-90). During cross-examination [redacted] conceded that masking was not a generally known or accepted medical procedure (Tr. 69, 72, 74); that its usefulness and efficacy had not been established by appropriate independent medical testing involving control groups (Tr. 78 - 79); and that it had not been the subject of peer review publications (Tr. 67, 76).

(c)

[redacted]

[redacted] is a distinguished, published, Board certified Behavioral Analyst. [redacted] was asked by Parents to render an opinion as to whether Student required a one-on-one instructional aide during the school day (Tr. 515). In order to do so, [redacted] conducted an informed observation of Student at [redacted] over a two week period in [redacted]. [redacted] also conducted a 45 minute sampling interval of Student (Tr. 110-115). Acting with [redacted] partner [redacted] then analyzed the results of this study, preparing various charts and graphs (See e.g. Parents Ex. 14). [redacted] noted in part:

> ". . . it is necessary to provide [redacted] (Student) with consistent prompting and support, particularly in the form of physical presence" Parents Ex. 14, at pp 3-4).

[redacted] observed that Student, overall, averaged 91% on task when performed with teacher proximity, compared to 23% on task behavior without teacher proximity (Tr. 159-160, Parents Ex. 14, p. 11). According to [redacted] Student must be kept on task 75% of the time in order to learn (Tr. 160).

[redacted] concluded, inter alia, that ". . .pretty simply" the Student acquires new skills (sic only) when [redacted] receives one-on-one instruction (Tr. 164-165). And that [redacted] but marginally retains learned skills without close support (Tr. 165).

[redacted] conclusions were detailed not only in [redacted] testimony, but in numerous graphs, charts and exhibits submitted into evidence as a part of [redacted] report (Parents Ex. 14), as well as a video tape (Parents Ex. 32). Such will not be reiterated here.

[redacted] also noted that Student manifested certain aggressive social tendencies which needed prompt intervention (Tr. 141). Accordingly, [redacted] recommended one-on-one instruction and monitoring for Student throughout the school day (Parents' Ex. 14, Tr. 160-1).

Upon cross-examination, [redacted] conceded that Student's on task behavior was driven also by other factors, such as whether multiple tasking was involved and whether [redacted] was performing tasks that [redacted] liked (Tr. 294-6, 510-511). In short, one-on-one teaching did not, per se always guarantee acquisition of new knowledge and skills, nor did its absence always preclude acquisition of new knowledge (See, e.g., Tr. 510-511). What [redacted] studies clearly revealed was that in order to acquire new non-preferential knowledge and skills, one-on-one teaching was required (Tr. 511).

[redacted], who had earlier been at [redacted] before evaluating Student (Tr. 110), had substantial familiarity with [redacted] and its techniques. However, [redacted] did not visit the Communications Class at [redacted] (Tr. 483), nor had [redacted] participated in the School's IEP meetings regarding Student (Tr. 483). [redacted] was not asked to, nor did [redacted] comment upon the School's IEP for Student.

At the conclusion of [redacted] testimony, [redacted] was asked if [redacted] could express an opinion as to whether continuous one-on-one instruction was necessary to supply Student with "some" education benefit as distinguished from supplying [redacted] with the "best" educational benefit (Tr. 518-521). [redacted] replied that [redacted] could not - that [redacted] applied only a "best" educational standard (Tr. 520-1).

(d)

[redacted] licensed as a learning disabled teacher, is working on [redacted] full certification as a Special Education teacher (Tr. 211). [redacted] was not offered as an expert witness - but rather as a fact witness (Tr. 167).

[redacted] has been Student's teacher at [redacted] since [redacted] (Tr. 213-14). [redacted] along with [redacted] assistants, masks Student throughout the school day. (Tr. 227-8) (one minute of masking, five minutes off) (Tr. 225-6). [redacted] does not keep track of masking information all of the time - currently no statistics are being kept (Tr. 226).

[redacted] described in detail the labor intensive education provided to Student at [redacted]. Thus, [redacted] was masked throughout the school day (excepting lunch, pay activities and exercise (Tr. 227) and was provided with one-on-one education for about 4.5 hours of the 6 hour day (Tr. 197).

[redacted] described in detail the manner and progress of Student's education at [redacted]. Student is closely monitored, and, among other techniques, receives instruction and communication by way of the Picture Exchange Communication System ("PECS").

See e.g. Parents' Ex.23-26, Tr. 171-187). [redacted] also described other techniques, such pressure, utilized to control Student's behavior (Tr. 188-9).

[redacted] testified that [redacted] and [redacted] assistants often had to intervene with Student in order to prevent [redacted] from harming [redacted] or others (Tr. 192-97, 237, 243-4). Although [redacted] was not offered as an expert, [redacted] concluded, as a fact, that Student was making educational progress at [redacted].

[redacted] also participated in Student's IEP meeting in [redacted]. It was [redacted] belief, based upon her experience with Student, that [redacted] should be educated primarily upon a one-on-one basis.

(e)

[redacted] DVM

[redacted] provided a brief synopsis of Student's early education and personal history. Thus, when Student was 18 months old ([redacted] pediatrician noted [redacted] was not progressing normally (Tr. 250). [redacted] suggested that Parents enroll Student in a Parent-Infant program (PIE) of [redacted] Schools designed to enhance development of infants under 2 years of age. After [redacted] reached [redacted] years old, Student went on to a successor educational program offered by [redacted] Schools. Student made little progress over the next year and one-half to two years (Tr. 251).

In late [redacted] Parents enrolled Student, then nearly [redacted] years old, at the [redacted] (TR. 255). It prescribed an involved, intensive home based educational program (Tr. 258), including masking throughout the day (Tr. 258). Student, however, returned to the [redacted]

every 6 months for evaluations. In the late [redacted] of [redacted], the Parents dropped the [redacted] program; in the [redacted] of [redacted] they stopped masking Student (Tr. 258-60).

In [redacted] Student, who had been earlier diagnosed as developmentally delayed, was diagnosed as having autism (Tr. 259). In [redacted] Student began having seizures. [redacted] had another in [redacted] (Tr. 262). Student required intervention in order to come out of [redacted] seizures - pharmaceuticals having been used in [redacted] and [redacted] Another seizure occurred in late [redacted] The pharmaceutical used - [redacted] - caused a respiratory reaction which was alleviated with another pharmaceutical (Tr. 267-27, 275-8).

As a result of the seizures and their [redacted] reaction to [redacted] and certain other drugs, Parents decided in [redacted] to return to masking (See Tr. 425, 279 - 281; 286-296). Student, notwithstanding masking, continues to have seizures "once or less" a month (Tr. 427, 428). [redacted], however, based on [redacted] observations, believed that masking decreased the frequency and severity of [redacted] seizures, and was desirable because it was less intrusive than other procedures.

In the [redacted] of [redacted] reacting to their [redacted] request to go to school with [redacted] siblings, the [redacted] briefly returned Student to [redacted] Schools (Tr. 369). The pertinent IEP consented to by the [redacted] did not specifically call for one-on-one instruction. However, the [redacted] wished one-on-one instruction (Tr. 296-303) and thought Student was going to receive one-on-one instruction for a majority of the time (TR. 299-300). The [redacted], unhappy with [redacted] performance at school, and unable to secure from the School a commitment that Student would receive one-on-one teaching for most of the school day,

withdrew Student from the School (Tr. 310, 299-302, 304). Student then reverted to home schooling (Tr. 309-311, 369).

[redacted] next briefly recounted the history of Student with the [redacted] and the [redacted] (Their reports are in evidence and will not be repeated here).[1/]

[redacted] went on to testify that when the Student's IEP for the school year [redacted] was being prepared by the School [redacted] again pressed for continuous one-on-one instruction and masking. When the School refused to accede to these tandem requests, the [redacted] rejected this IEP and unilaterally withdrew Student and placed [redacted] at [redacted] (Tr. 385, 386-396). [redacted] rejected the School's promise to supply one-on-one teaching "as needed", which [redacted] considered to be too vague (Tr. 412).

Again, when the School prepared the [redacted] IEP for Student, the same scenario and same results occurred (Tr. 414). In addition to the School's Committee preparing this IEP, counsel for the parties, [redacted] and [redacted] (by telephone), as did the School's experts in autism, speech therapy and behavior.

1/ While these reports suggest a continued use of masking it is apparent from their language that such was based upon the Parent's request coupled with the [redacted] recommendations as distinguished from any independent studies conducted by them.

Again, [redacted] felt that the School's promise to supply such one-on-one teaching as might be needed was too vague to be relied upon (Tr. 412). Accordingly, the [redacted] rejected the [redacted] IEP and have continued Student on at [redacted] (Tr. 414).

Upon cross-examination, [redacted] conceded that except for a few months in the [redacted] of [redacted], Student had not attended [redacted] Schools (Tr. 421). From [redacted] to [redacted] Student had been home schooled (Tr. 422) primarily pursuant to the [redacted] program (Tr. 422). [redacted] also admitted that Student at [redacted] was not under treatment by it - but rather was part of a "control" group (Tr. 445); and that [redacted] knew nothing about the School's proposed IEP for Student or its facilities.[2/]

In concluding [redacted] testimony [redacted] stated that the only two issues presented in this case were (1) whether the School should provide continuous one-on-one teaching, and (2) whether the School should mask Student during the school day (Tr. 469).

(f)

[redacted]

As revealed by [redacted] C.V., [redacted], is a most distinguished neurologist, specializing in child neurology, with over 20 years of experience. [redacted] has published numerous articles in the field and has had extensive experience in treating neurological disorders - including autism and seizures (School's Ex. 51, Tr.). [redacted] is licensed in 5 states, including Virginia, and [redacted] and is Board Certified in Pediatrics, Psychiatry and Neurology

2/ For these reasons, the undersigned attaches little importance to the recommendation by [redacted] that Student receive "one-on-one instruction" and masking in the instant case Cf. Parents' Ex. 1).

with Special Qualification in Child Neurology. Among [redacted] articles and studies are 12 studies and/or investigations relating to the use of medications with regard to neurological disorders (See Ex. 51). [redacted] practice is 99% with babies and children having neurological disorders (Tr. 326-330).

[redacted] testimony was brief but compelling. With regard to masking [redacted] noted that although it had been in existence for some years, it was not generally known to or accepted by the medical community; that it had never been proved by controlled studies; and that it had not been reported upon in the commonly read medical journal pertaining to the field neurology (which is the medical specialty pertinent to autism, brain disorders and seizures) (See e.g. Tr. 332-340).

With regard to the underlying premise supporting masking, namely that children with neurological impairment are chronically short of oxygen, [redacted] testified:

> ". . . I have no idea on what that is founded, at least, I have no data that I'm aware of that would agree with that; nothing scientific; and nowhere did I see anything within the things that I mentioned that in any way, shape or form lent any scientific credence to that premise" (Tr. 336).

[redacted] who keeps current with medical publications and studies relating to [redacted] field, was also unaware of any controlled studies which supported masking (Tr. 336-338).

[redacted] concluded with regard to masking, that it had the potential to be extremely dangerous (Tr. 338-340) that, there were no studies regarding its "true safety"; that there was little data as to its efficacy (Tr. 338); that it had to be carefully monitored (Tr. 356-7); and that it was not a procedure which [redacted] believed could be safely utilized in a classroom (Tr. 338-9, 358-359).

When asked whether [redacted] agreed with the statement that medications (i.e., pharmaceuticals) are rarely effective in controlling seizures, [redacted] testified:

> "I would strongly disagree . . . there is absolutely no data in the world to back that statement"

To the contrary, medications are highly effective, namely in 75% of the cases (Tr. 333-4). And, as [redacted] earlier noted, medications have been generally accepted by most of the medical profession as the means to control seizures for nearly a hundred years (Tr. 328, 329-33). Further, according to [redacted], since there is such a wide diet of medication available to control seizures, an experienced, qualified physician could work with the child (or through [redacted] observations and through the child's parents, siblings or others who are in close contact with the child if the child cannot speak) in order to come up with a regimen of medications to control the seizures with the least, and preferably no side effects (Tr. 332).

(g)

[redacted]

[redacted] is a certified Special Education teacher with extensive experience in teaching mentally retarded and autistic children (Tr. 923-929). [redacted] was received as an expert in this field (Tr. 529).

[redacted] is the teacher for the Communication Class beginning as of [redacted] school year. [redacted] visited [redacted] School while Student was being taught there (Tr. 530) and participated in the [redacted] IEP process for Student. In preparation for this hearing [redacted] viewed the video tape of Student prepared by [redacted] as well as Student's educational records (Tr. 530-1).

[redacted] testified that the School's staff had reached a consensus-namely that Student should be educated pursuant to its proposed [redacted] IEP in the Communication Class (Tr. 531). [redacted] stated that in [redacted] opinion:

"I think [redacted] would have real benefit and be successful in the program" (Tr. 531)

[redacted] went on to describe in great detail the facilities and program at the Communications Class at [redacted] School. The School has a student body of 450-500 (Tr. 532). The Communication Class, which is housed in a large room at [redacted], is partitioned into various functional areas, namely individual work stations for each student, a social area, a leisure area, a kitchen area and a library area (TR. 540-546). [redacted] added that these areas needed to be partitioned because autistic children needed to "keep routine and know where things are and where things are expected to occur." (Tr. 541) However, the partitioning was such that when [redacted] was not teaching Student, [redacted] would be nearby and able to monitor [redacted] (Tr. 548, 617-18). [redacted] then, by referencing pictures of the Communication Class went to detail how the children in that class are taught in the various areas (Tr. 540-555, 556-561).

There are currently seven children in the Communications Class ranging in age from 7 to 11 (Tr. 531). They all have communication deficits and social difficulty in interacting with people (Tr. 532), as does Student here (Tr. 532). Some are working at a lower level then Student, others at [redacted] or higher level (Tr. 532, 550). Five children are verbal, two not; and there are two autistic children (Tr. 534-5).

[redacted] has two full-time, experienced adult assistants on [redacted] staff (Tr. 533). In addition, a speech therapist attends the class on a daily basis (Tr. 534), and an occupational

therapist attends the class on Mondays and Tuesdays (Tr. 534). And, [redacted] also has the weekly assistance of the School System's expert in autism, ([redacted]). Some of the students attend "specials" (i.e., music, art, gym) with their grade level; another goes to a resource room for [redacted] academics (Tr. 536). Thus, there are numerous times when the ratio of student to teacher/teacher aides is far less than 7 to 3, sometimes 3 to 3 (Tr. 536-7).

[redacted] testimony revealed that the Communications Class utilized many of the same techniques in teaching autistic children as used at [redacted], such as the PECS program (Tr. 544) sensory integration (Tr. 559-60) and show and tell. However, the School's program at the Communications Class has more socialization, including visits and playtime interaction by members of the regular student body (Tr. 539-540), and more rest, music, art, small group and circle teaching time than at [redacted] (See e.g. Tr. 541-552). There is also a computer in the Class specially programmed for use by autistic and communication impaired students (Tr. 552). In short, there is a focus at the School on teaching self-help skills and daily living skills (Tr. 532), as well as knowledge acquisition.

Each child in the Communications Class has his or her own individualized schedule (Tr. 566) which is followed daily. This is a generally accepted technique for teaching mentally impaired or children with communication disorders (i.e., autism) (Tr. 566). All children in the class get individualized (one-on-one) instruction (Tr. 567); and [redacted] (or [redacted] aides) often give their students 50% one-on-one instruction per day (Tr. 575, 633). Communication is maintained with the parents allowing modifications to be quickly made.

[redacted] then opined that a program of continuous one-on-one instruction was not the best methodology for teaching autistic or communicationally impaired students such as

Student (Tr. 567-580). While one-on-one instruction is needed to acquire new non-preferential knowledge (Tr. 576), knowledge can also be acquired via circle or small group settings as well as by play (Tr. 569, 570), utilizing numerous techniques (Tr. 629). And, once knowledge is acquired, [redacted] felt it was important for Student to be able to generalize and apply it which is best done in settings other than one-on-one (Tr. 575-580).

[redacted] applies numerous accepted techniques to keep [redacted] students on task other than by one-on-one teaching. Thus, play activities (Tr. 580) sensory intervention (Tr. 572), visuals (Tr. 559), positive reinforcement (Tr. 574) are used in addition to close proximity teaching. Further, according to [redacted], because of their short frustration level, autistic and communication impaired students, such as Student here, are not able to absorb one-on-one knowledge acquisition for extended times during the school day (Tr. 571, 576-580).

[redacted], after observing Student at [redacted] and the video tape of Student prepared by [redacted], testified:

> "[Student] had many strengths . . . In viewing the tape, I saw that [redacted] had potential to learn how to work at a work station and work independently. [redacted] had potential to be more expressive with [redacted] needs and wants. (Tr. 579).
>
> * *
>
> . . . [redacted] had something to work from to learn independent work skills" (Tr. 580).

[redacted] anticipated no problems in addressing Student's aggressive and self-harm tendencies, with which [redacted] had extensive experience (Tr. 582-583).

[redacted] concluded by again noting that a preponderantly one-on-one educational methodology was not a recommended one (See e.g. Tr. 594). Thus, [redacted] testified:

"Because a child doesn't learn how to generalize and work. [redacted] learns to be dependent on that one specific person and doesn't generalize to other people. It's a tendency - I was also a one-on-one instructor for a short time, and its hard for that person to step back and not give the child so many prompts and staff, and the child doesn't learn to get as independent as [redacted] should.

One-on-one instruction is meant for a temporary situation when it does occur, and not for a permanent because you want to wean the child off one-on-one to make [redacted] more independent and not dependent on that person."

In sum, [redacted] had no doubt that [redacted] could successfully educate Student in the Communications Class pursuant to the [redacted] IEP (Tr. 586-587); and there was no doubt in [redacted] mind that [redacted] (or [redacted] aides) could provide [redacted] with one-on-one instruction for 50% or more of the school day (Tr. 633).

(h)

[redacted], a certified occupational therapist employed by the School, briefly observed Student and observed the tape of Student. [redacted] also participated in the School's IEP for Student and talked to the occupational therapist utilized at [redacted]. [redacted] supported fully the occupational therapy goals set forth in the School's [redacted] IEP for Student (Tr. 668). [redacted] agreed with [redacted] goal of making Student more independent (Tr. 708) which [redacted] felt was attainable (Tr. 668-671). [redacted] noted also that [redacted] and the [redacted] occupational

therapist were in agreement[3/] as to the amount of occupational therapy to be provided to Student (Tr. 674-676), as well as utilizing similar techniques (Tr. 681-2, 691).

As there is no dispute in this case as to the provision of occupational therapy and its amount, there is no need to elaborate on [redacted] testimony except to note that [redacted] is fully experienced and able to provide Student with the agreed upon therapy.

(i)

[redacted] is a speech-language pathologist employed by the [redacted] School System (Tr. 731-2). [redacted] discipline is most pertinent in teaching autistic children. [redacted] is fully certified (Tr. 734) and has been working with the Communications Class for four years (Tr. 734). [redacted] participated in both the [redacted] and [redacted] IEP prepared for Student by the School (Tr. 734-5), and was received as an expert without objection (Tr. 737). [redacted] fully supported the Communication goals set forth in those IEP's (Tr. 738, 782), and fully supported placing Student in the Communications Class at [redacted]

After noting that the communication goals for Student at the School were consistent with the goals [redacted] was working on at [redacted] [redacted] testified:

> "Q: Now do you have an opinion about whether, as a part of an education program, the Communications Class at the [redacted] can provide appropriate speech and language for [Student].
> A: I absolutely feel they could provide appropriate services for [Student]. I think it could help [redacted] develop [redacted] communication skills." (Tr. 741)

3/ Insofar as the [redacted] medical model suggested a greater amount of therapy, [redacted] disagreed. However, [redacted] noted that the [redacted] statement was not related to educating Student (Tr. 709-10).

[redacted] also supported the holistic program found in the Communications Class noting:

> "I feel it could be a benefit to [Student] because I think it would allow [Student] an opportunity to generalize [redacted] skills, to allow [redacted] to communicate with a variety of individuals in a variety of settings which is an essential life skill" (Tr. 742).

[redacted] then described how [redacted] would first utilize one-on-one teaching to introduce [redacted] to new concepts and ideas, say by way of PECS, then advance to verbalization, and once [redacted] was comfortable with the concept, advance to its application in a group setting (Tr. 744-45). In short, [redacted] felt that it was important for Student to expand [redacted] skills into use in a variety of settings (Tr. 746). The goal is to enable Student to function in an open society (Tr. 772), which may entail a slow progression, starting with one-on-one instruction (Tr. 774-776).

[redacted] stated that [redacted] would provide [redacted] services in the Communications Class, working with both Student and [redacted] teacher (Tr. 749). These services would be provided in a number of settings such as the computer, or circle time or individually (Tr. 749-752).

[redacted] testified that [redacted] recorded the time [redacted] spent with each student (Tr. 759), which was provided either one-on-one or in a group setting (Tr. 759-761).

In short, [redacted] felt that Student had a potential that could be "tapped" (Tr. 786). And [redacted], like [redacted] did not believe that Student should be taught only on a one-on-one basis (Tr. 786-788).

(j)

[redacted] is employed by [redacted] Public Schools as an autism consulting teacher (Tr. 793). [redacted] as an expert in autism, provides consulting services to teachers, schools and parents, both in training and direct teaching (Tr. 793-795). [redacted] has had extensive experience as a classroom teacher (Tr. 795-796), and is certified as a Special Education Teacher in grades kindergarten through the [redacted] grade (Tr. 798). [redacted] is experienced in teaching children with learning disabilities, emotional disabilities and mental retardation - which includes autism (Tr. 797-799). [redacted] is also familiar with the various techniques for teaching children with autism, such as LOVAAS, TEACCH, PECS and ABA (Tr. 796-798).

[redacted] in light of [redacted] education, experience, certification and training was accepted, over the objection of Parents' counsel, as an expert in teaching autistic children (Tr. 806).

[redacted] visited and observed Student at [redacted] on two occasions and submitted [redacted] written report to School based thereon (See School Ex. 36, 37, Tr. 808). [redacted] felt Student had strengths in "note" learning, weaknesses in expressive language (Tr. 811-12). [redacted] was of the opinion that Student had the ability - but was not being given the opportunity - to take [redacted] one-on-one acquired knowledge to the next level - namely, independent generalization (Tr. 814-815). [redacted] likewise felt Student was receiving too much one-on-one tutelage leading to echolia (echoed) responses (Tr. 817 - 822), and could benefit from the broader approach found in the Communications Class (Tr. 823), which would help

[redacted] to transition to the next level - namely, more independent learning and greater generalization of learned skills (Tr. 823-825).

[redacted] fully supported the School's IEP for Student (Tr. 847-848); and believed that Students current learning environment at [redacted] was "too restrictive" (Tr. 842, 844). More specifically, [redacted] felt Student was getting too much one-on-one instruction (Tr. 844-845) and would benefit more from the broader program urged by the School (See e.g., Tr. 849-857).

(k)

[redacted]

[redacted] a qualified teacher of developmentally delayed children with 23 years of teaching experience is currently the early childhood and elementary special education coordinator for [redacted] Public Schools (Tr. 859-863). In addition, [redacted] has had special training in teaching autistic children (Tr. 863-4). [redacted] was accepted as an expert in the field of educating autistic children without objection (Tr. 864).

[redacted] was actively involved in preparing the School's proposed [redacted] IEP's for Student (Tr. 866-881) and talked with [redacted] testified that [redacted] desired one-on-one teaching throughout the school day combined with masking for [redacted] which the School declined to supply. Therefore [redacted] objected to the IEP, and had withdrawn and privately placed Student (Tr. 866-874).

[redacted] noted that it was very difficult for an IEP team to quantify in advance the exact amount of one-on-one instruction which might be needed - this because the amount of time needed for one-on-one instruction would be determined by success in meeting the

stated goals (Tr. 874-875). However, by constant communication with the Parent (which the School maintained with regard to the Communications Class) and observation of the Student's progress (daily individual records are kept), the Communications Class could easily increase one-on-one instruction as needed to meet the IEP goals (Tr. 874-879). [redacted] further testified that [redacted] had fully explained this to [redacted] (Tr. 878-879), who nonetheless objected to the IEP (Tr. 888).

[redacted] who was fully familiar with the Communications Class and had reviewed the documents and educational records here pertinent, was "very much in agreement with" and fully supportive of the [redacted] IEP (Tr. 882). [redacted] was of the opinion that Student would gain "great benefit" therefrom (Tr. 882-3), giving the same reasons as earlier set forth by [redacted] and [redacted] (See e.g. Tr. 883).

[redacted] then testified that [redacted] had sent a letter to [redacted] in [redacted] prior to the anniversary date of the [redacted] IEP in which [redacted] advised [redacted] that the School remained open to offer Student FAPE through an IEP appropriate IEP; that it would reconvene the IEP Committee if [redacted] was interested; and that the School wished to discuss the [redacted] concerns (Tr. 889). This offer was not taken up.

In [redacted] an IEP was prepared for Student pursuant to joint requests of the parties. [redacted] was again actively involved (Tr. 890), as was Student's teacher at [redacted] (Tr. 891). After thorough review, once again there was consensus by the School (Tr. 889-896), namely, that the School's IEP was appropriate (Tr. 896-898).

[redacted] explained why [redacted] fully supported the holistic educational approach outlined by [redacted] and rejecting the concept of continual one-on-one education with regard to Student (Tr. 905-908). Thus, [redacted] urged propriety of the [redacted] EP.

In this regard, [redacted] pointed out that under the School's policy and Virginia law, a special education class could not exceed 8 students. Thus the ratio of teachers to students in the Communications Class would never be more than 3 to 8 (Tr. 904, Tr. 928).

[redacted] concluded [redacted] testimony by noting that the [redacted] refused to accept the School's proferred [redacted] IEP for Student because School would not (1) supply masking; and (2) would not provide a continual one-on-one teacher (or aide) for Student throughout the school day (Tr. 942).

IV

ISSUES

1. Is masking a "related service" pursuant to 20 U.S.C. 1401 (17) and therefore required to be performed during the school day by the School upon Student in order to assist [redacted] to benefit from special education?
   a. Is masking a medical service required to be performed by a licensed physician?
   b. Assuming, arguendo, that masking is not a medical service required to be performed by a licensed physician, must the School nonetheless provide masking where it is not a generally accepted medical procedure and carries with it a potential risk of injury?
2. Is the education being provided to Student at the [redacted] Center "appropriate"?

3. Has the School proposed an "appropriate" educational program through its [redacted] IEP, namely is it "reasonably calculated to offer Student some educational benefit?"

   a. Are Student's disabilities here involved (namely, autism, speech impairment and seizure disorder) such that [redacted] cannot be reasonably expected to acquire some educational benefit from the educational services offered by the School unless [redacted] is also provided with individualized (one-on-one) instruction throughout the entire school day?

4. Is the Parents' claim for reimbursement barred by laches where the School has demonstrated no harm to it caused by the Parents' delay in filing the instant request for a due process hearing?

5. Are Parents entitled to reimbursement of the cost of privately schooling Student where the School refused to supply masking for Student throughout the school day and refused to supply "one-on-one" teaching for Student throughout the school day?

V.

DISCUSSION

(a)

Facts

Student, a [redacted] year old [redacted] with autism, speech handicap and a seizure disorder, has had little experience with the [redacted] School System. [redacted] briefly attended pre-school in the school system in [redacted] but was withdrawn by [redacted] Parents in the Spring of [redacted]

when [redacted] was diagnosed as autistic. Shortly thereafter [redacted] was designated as a student with disabilities entitled to the protections of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1401, et. seq.

From [redacted] until the late [redacted] of [redacted] Student was provided with home schooling by the Parents. The School was fully supportive. Appropriate Individualized Educational Programs (IEP's) were prepared, with Parents participation and consent, for the Student's school years for [redacted], [redacted] and [redacted]. (See School's Exhibits 16, 17). Again, the School, in the [redacted] of [redacted], convened an IEP team to prepare an IEP for Student (now just turning [redacted] for the [redacted] school year. While the Parents participated in this IEP, they did not consent to it. (See School's Ex. 18).

The circumstances surrounding the rejection by the Parents of the [redacted] IEP proposed for the Student are particularly germane to the decision herein: In the late [redacted] of [redacted] the Parents briefly enrolled the Student in the [redacted] School system – this because [redacted] had expressed a desire to go to school with [redacted] siblings. Shortly thereafter [redacted] was removed and resumed home schooling.

In [redacted] of [redacted], Student began having seizures every other month or two. The Student had a reaction to certain of the drugs initially prescribed to relieve these seizures. Earlier in [redacted] the Parents (the [redacted] is a [redacted]) became aware of and started Student with a technique called masking, which they discontinued in early [redacted] but resumed in [redacted] in order to help control [redacted] seizures.

As before noted, masking involves placing a transparent, easily removable, mask over the mouth and nose of the patient, thereby altering the normal breathing function by forcing

the patient to rebreathe already exhaled air. As a result the oxygen content of the rebreathed air is slightly reduced and its carbon dioxide content is increased which raises the patient's blood pressure and increases the circulatory rate, This results "in an increase in the supply of oxygen available for use by the brain". The [redacted] believes this reduces or lessens the severity of seizures and has other beneficial effects. However, there is no clinical proof supporting these conclusions.

Masking if continued unabated, could lead to acute hypoxia, brain damage and ultimately death. For this reason, and in view of the fact that masking is usually performed as often as 30 to 90 times throughout the day (but not at lunch or when the patient is bathing, sleeping, exercising or otherwise ill), the amount of and duration of masking must be rigidly controlled. The norm, and the cycle used for Student here, is one minute of masking followed by 5 minutes of normal breathing with mask removed. Thus, during the day when the masking procedure is being utilized, someone approved by the [redacted] always must be in close physical proximity to the patient, carefully timing the masking.

While the [redacted] maintains that masking, if properly administered, is totally safe and has been performed successfully on thousands of patients of all ages who have had chronic non-progressive brain disorders, it concedes that masking is not appropriate for individuals who also may have certain other health problems, temporary or chronic. Accordingly, the [redacted] requires that it carefully evaluate in advance each potential candidate for masking.

After a patient is approved for masking (as was Student here), and its duration set, the [redacted] requires that the person(s) supervising the masking be approved by and thoroughly

trained by it. In this regard, by letter dated [redacted], and addressed to "Whom It May Concern", [redacted], Medical Director of the [redacted] stated:

> "[redacted] have been trained at this [redacted] to administer a therapy called masking to their [redacted] has a seizure disorder that is well controlled with masking. [redacted] parents would like to continue their program as they accompany [redacted] to a school setting. I do not authorize any other individuals to administer this program to [redacted] other than [redacted] parents" (Underscoring supplied).

During [redacted] telephonic testimony herein, [redacted] reiterated the above directive, but slightly modified it by stating that in a situation where a single parent worked a daycare provider could administer masking if he or she was properly trained by the [redacted] and authorized by the Parents. In this regard, Student is currently being "masked" by a teacher or teachers employed by [redacted] while [redacted] attends school at [redacted]. These teachers have neither been trained by nor approved by the [redacted] (which stopped treating Student in [redacted]).

[redacted], a prominent and published child neurologist (the medical specialty dealing with autism and seizures), certified not only by the American Board of Pediatrics, but also by the American Board of Psychiatry and Neurology, with Special Qualification in Child Neurology, testified that masking was not a generally accepted medical procedure; that its alleged benefits had not been clinically proven and that it carried with it a potential for serious injury, permanent brain damage or even death if it were not carefully administered or if other circumstances intervened. Accordingly, [redacted] was opposed to its use by or in the School. (In this regard, [redacted] conceded that masking was not a generally accepted medical procedure, that "masks" were not generally available to the

public, that it was the sole supplier of masks, and that masking if improperly done could result in serious injury to the patient).

In response to the Parents' request in [redacted] that the School provide masking for the Student, the School's Health Administrator, [redacted], contacted the School's Physician Health Advisors, [redacted] M.D. and [redacted] M.D.. Based upon their advice [redacted] informed [redacted] by letter dated [redacted] in part as follows:

> ". . . that masking would be an inappropriate procedure to be used in our school system. Both of our physician advisors stated that masking is an unproven non-medical procedure, and should not be made available to any student who attends our school system." (School Ex. 13).

[redacted] noted in that same letter that [redacted], Secretary of the [redacted] likewise felt that masking "obviously would not be appropriate in a classroom setting." (School Ex. 13). In the same vein, the [redacted] medical director testified that [redacted] viewed masking primarily as an in home treatment.

While the Student's pediatrician, [redacted], authorized masking to be provided by "any trained person" as a related service by the School for the school years here involved, such appears to be based upon the [redacted] recommendation, as distinguished from [redacted] own.[4/]

Likewise, the [redacted], which had conducted a study involving language delays in which Student was a part of the control group, likewise had no direct experience

4/ [redacted] mistakenly believed that the Student was still under the supervision of the [redacted] (See Parents' Ex. 7, 8; Cf Tr. 56, 88-90).

with masking. While noting that masking seemed to have some benefit, it stated merely that it did not "see any contradiction for its continued use. . . which seems to be well monitored by the family." (Parents' Ex. 1, p. 23) Its neurology clinic, however, prescribed pharmaceuticals to control seizures (School Exs.38, 40).

The procedure generally accepted by the medical community for controlling seizures is medications pursuant to a physician's directive. And there are a variety of pharmaceutical and regimes which are available, some of which have been prescribed by Student's physicians, as well as by [redacted] (Parents' Ex., 38, 39, 40). Accordingly, it cannot be said that masking is required to allow Student to attend school.

Turning next to the facts relating to the second of Parents' tandem demands, namely, that [redacted] receive constant one-on-one tutelage while in school, it is conceded by both parties here that the Student is autistic, has a speech disorder and, recently, has suffered from intermittent seizures. [redacted] entitlement to special education and related services also has been long conceded. However, the extent of the special educational services to be supplied, their location, and the manner of their delivery is fiercely disputed by the parties.

Student is currently attending [redacted] a recently established private school located in four rooms housed in an office building in [redacted] Virginia. It has an enrollment of six students, all learning impaired. It is staffed by a full-time teacher, [redacted] (provisionally certified as a Special Education Teacher), and three assistants. It has no playground, although one room is set aside for recreation. Consulting experts in speech communication and occupational therapy visit the school weekly. [redacted]

currently teaches Student on a "one-on-one" basis. [redacted] also provides masking for Student throughout the school day. Student has been making educational progress at [redacted].

The School proposes to educate Student at the "Communications Class" located in a large room at the [redacted] Public School located in [redacted] Virginia. The room is partitioned into individual study areas, an area for circle, small group and interactive teaching; areas for computers, a library area, a recreation area and a kitchen area.

The special education students in the Communication Class attend special events (under supervision) with the general student body at [redacted] and have access to the gym and outdoor playground. There are regular visits by members of the general student body to the Communications Class.

Currently there are seven special education students in the Communication Class, taught by an experienced, certified special education teacher ([redacted]) and two full-time assistants. In addition, three fully certified teachers in speech therapy, occupational therapy and autism, respectively, regularly attend the Communication Class. The School proposes a combination of one-on-one and small group interactive teaching for Student in this Class. It has had success in the past utilizing this methodology to teach autistic students, such as Student here. The School is confident it can provide substantial educational benefit to Student via this methodology.

Parents' request for continual one-on-one instruction of [redacted] throughout the school day was supported by [redacted], MA, a Board Certified Behavior Analyst. [redacted] performed extensive studies with regard to Student, the results of which were set forth not only in [redacted] testimony but also in [redacted] Report with its graphs and charts (See e.g.,

Parents' Ex. 14). [redacted] conclusion was that the Student requires "consistent prompting and support, particularly in the form of close physical presence" (Parents' Ex. 14, p. 3). Further, according to [redacted] in order for the Student to learn new information [redacted] must be kept "on task", which, in turn, requires a one-on-one physical proximity" for an average of 61% of the time. However, with regard to activities and subjects [redacted] has learned or [redacted] prefers, [redacted] conceded on cross-examination that [redacted] was able to work on a more independent basis without one to one prompting (Parents' Ex. 14, p. 3)

When asked whether Student could acquire "some educational benefit, as distinguished from the best possible educational benefit" from a combination of both individualized and group [redacted] stated [redacted] could not answer that question – this because [redacted] study was based upon how to provide the best education to Student. Further, [redacted] never visited the Communications Class.

The [redacted] Center, which had been providing the Student with some auditory training and sensory integration treatment since [redacted] recommended, inter alia that :

> ". . . a one on one ratio for [redacted] therapy and academic settings [be continued] in order for [redacted] to maintain and continue progress" (Parents' Ex. 2, p. 2).

However, the [redacted] Center is not an expert in Special Education, and appears to have been parroting the Parents' views rather than expressing its own view. [redacted] who espoused a "one-on-one" teaching methodology for Student testified that Student was making educational progress in this setting. [redacted] along with [redacted] assistants, also masks the Students throughout [redacted] school day while [redacted] is teaching [redacted]

The School's experts agreed that the Student required substantial one-on-one teaching. However, the School denied that this methodology of teaching should be the exclusive manner of educating autistic children with learning disorders, such as Student here. Thus, [redacted], who has had extensive experience in teaching autistic children, advocated a broader educational approach. [redacted] recommended that the Student receive not only extensive one-on-one teaching (namely 50%, more, if needed), particularly with regard to acquiring new knowledge as well as to reinforce earlier taught non-preferential knowledge, but [redacted] also recommended that Student participate in small group or circle settings where [redacted] could be taught to apply earlier processed information while interacting with other students. [redacted] pointed out that in such small group settings [redacted] would be nearby and that Student would be closely and constantly monitored and "taught" by [redacted]

Virginia law limits the size of a special education class to 8. Here, if Student attends the Communications Class at [redacted], the ratio would be at least three teacher/teacher aides to a class of 8. Some of the other seven students require less direct supervision than the others - Thus, the ratio of teachers to students is sometime greater.

Further, if Student was educated at [redacted], Student would receive additional weekly or twice weekly learning services supplied by an experienced, licensed occupational therapists [redacted]), who has specialized in neurological therapy; by an experienced and licensed speech pathologist [redacted]; and by an autism educational expert [redacted]. Student, under supervision, also would be allowed to attend special school functions with the general student body – and would have daily exercise periods with [redacted] class – again under supervision.

[redacted] (who had visited [redacted] and observed Student there) opined that this type of a holistic educational approach would be far more beneficial to Student than one provided primarily by a one-on-one approach as utilized at [redacted] [redacted] stressed that the goal of educating an autistic child such as Student here was not only to provide [redacted] with as much of a core subject education as possible, but also to teach [redacted] to be able to apply those skills as well as to teach [redacted] to be able to function to some degree in the general society. [redacted] also believed, based upon [redacted] past experience with autistic students, that Student could acquire knowledge in a small group setting, particularly with regard to subjects that [redacted] liked. The evidence likewise reveals that Student can work semi-independently on subjects [redacted] likes.

As earlier set forth in their respective Summary of Testimony, [redacted] and [redacted] and [redacted] fully supported [redacted] opinions and conclusions. While the School has not yet had any real opportunity to educate Student, as before noted, the Communications Class, utilizing its educational methodology, has successfully educated numerous other autistic children in the past. Further, the array of experts, all fully certified and highly experienced, available to Student in the Communications Class compares favorably to what [redacted] offers.

It should be noted in concluding this section that the education proposed by the School and by [redacted] share various areas of similarity, such as the use of PECS, show and tell, sensory integration and positive enforcement.

In any event based upon the past success of the School in educating autistic students and given the expertise and experience of the teachers who will be educating Student here

pursuant to the proposed [redacted] IEP, it is likely that [redacted] will receive more than "some educational benefit" from the School's proposed IEP. Conversely it cannot be said at this time that Student will not receive "some educational benefit" from the School's proposed IEP, this because [redacted] was withdrawn from the School before it had a fair chance to implement its proposed IEP and teaching programs. Accordingly, it is clear from a preponderance of the evidence that the IEP proposed for Student here is reasonably calculated to provide Student with an educational benefit.

(b)

Application of the Pertinent Law

(i)

Can the School be Required to Provide Masking

Although this case could be decided without addressing the issue of the propriety of requiring the School to "mask" Student while in School (or being required to reimburse the Parents for the cost of privately schooling the Student if it does not provide masking), such avoidance would be unfair to both parties who have expended very substantial efforts and monies in setting forth their respective positions on this issue. Indeed, the entire case has been typified by an extremely thorough, cogent preparation by highly skilled counsel.

For the reasons hereinafter more fully set forth, the undersigned is of the opinion, and hereby rules, that the School is not required pursuant to Section 504 of IDEA to include masking for Student as a "related service" as a part of [redacted] IEP at the School. More specifically, the School cannot be required to provide or perform a quasi-medical procedure that is not generally accepted by the medical community, particularly where such procedure,

if not properly administered could lead to serious harm or injury to the Student/patient involved. Indeed, the principal advocate of masking authorized only Parents to provide it to Student. Accordingly, the School cannot be held liable for the costs of private schooling Student because of its refusal to supply a clinically unproven procedure not generally accepted by the medical community.

Parents' legal case with regard to masking is predicated upon their position that the School, as a recipient of federal funding under the Education of the Handicapped Act (IDEA, 20 U.S.C. 1401 et. seq.) must provide a Free Appropriate Public Education ("FAPE") to a handicapped student qualified to receive educational services under that Act. And, under that Act, FAPE is defined to include "related services" (See IDEA, Section 1401 (18)), Related Services, in turn, are defined to include such "supportive services" as may be required to assist a handicapped child to benefit from special education (See IDEA Section 1401 (17)).

Parents rely principally upon the United States Supreme Court's holdings in Irving Independent School District v. Tatro, 468 U.S. 883 (1984), and Cedar Rapids School District v. Garret E., 119 S. Ct. 992 (1999).

Tatro concerns an 8 year old female (Amber) special education student born with a defect known as spinabifida. As a result she suffers from orthopedic and speech deficits, and a neurogenic bladder which prevents her from emptying her bladder voluntarily. Consequently, she must be catherized every three to four hours to avoid injury to her bladder. To accomplish this, a medical procedure known as clean intermittent catherization

("CIC") was prescribed. CIC is a simple procedure that can be performed by a lay person with an hour of training.

The school in Tatro refused to supply CIC, claiming it was not covered as a "related service" under IDEA. The District Court agreed. The Court of Appeals for the Fifth Circuit reversed, holding that CIC was a "related service" required to be provided under IDEA. Upon appeal the United States Supreme Court agreed with the Fifth Circuit. The Supreme Court stressed that unless the school there supplied Amber with CIC services she could not even attend school. Then, relying upon regulations promulgated by the Secretary of Education, it next defined the excludable medical services as those required to be performed by a licensed physician. The Supreme Court then held that since it could be performed by the school's nurse, or indeed, by a trained lay person, that it was not the type of medical service which was excluded from the mandate of Section 1401(18). In other words, it was a "supporting service" required to be provided pursuant to Section 1401(18) of IDEA together with special educational services.

In Garrett, the parents of a young boy, Garrett, whose spinal chord had been severed in a motorcycle accident, requested the school to provide ventilator service at school, without this service Garrett could not survive much less attend school. Despite his paralysis from the neck down, Garrett was mentally sharp, and was able to operate his wheelchair and a computer with appropriate aids.

The School in Garrett refused, denying that the requested service of a ventilator was a "related service' required to be provided by it pursuant to Section 1401(18) of IDEA. The parents there then sought a due process hearing. The ALJ agreed with the parents, ruling

that the school must supply ventilator services. The lower Courts agreed. The school then appealed to the Supreme Court, arguing for a four pronged test of whether: (1) the care required was consistent or intermittent; (2) whether the school's personnel could provide the service; (3) the cost of the service was excessive; and (4) the potential consequences if the service was not properly performed.

The Supreme Court rejected the school's four pronged test, pointing out that it had no support in the language of Section 1401 of the Act. It affirmed relying upon the reasoning in Tatro. In so ruling the Supreme Court noted that while the school "may have legitimate financial concerns", such that it (i.e., the Supreme Court) could not substitute a test based on financial concerns for the will of Congress which had included no such financial test in the governing statute.

It might first seem that Tatro and Garrett are supportive of Parents' case – this because the medical procedure advocated by the Parents and ordered by Student's pediatrician [redacted]) can be performed without the presence of a licensed physician. However, upon closer analysis, particularly in view of the specific facts found in the instant proceeding, such is not the case.

The School here, does not object to masking because it would be intrusive to the school day, or expensive, or because it must be supplied continuously (30 – 90 times) during the school day. Nor does it say the presence of a physician is required, rather, the School refuses to provide masking solely because such is an unorthodox medical procedure which is not generally accepted by the medical community; and one which if not properly supervised, could be dangerous.

A careful reading of Tatro, supports the School's position. When faced with the school's argument in Tatro that it was being compelled to do far more than provide services related to education of the student there, the Supreme Court in Tatro responded:

> "To keep in perspective the obligation [by the School] to supply services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner [school] fears. First to be entitled . . . a child must be handicapped so as to require special education. Second, only those services necessary to aid a handicapped child to benefit from a special education must be provided regardless of how easily a school nurse or a lay person could furnish them. (Underscoring Supplied) (at p. 894)

Thus, under Tatro the test here is whether masking is "necessary" to aid the Student here to benefit from special education." Clearly, it is not.

Masking is conceded by both the Parents' expert ([redacted]) and the School's expert ([redacted]) to be a medical procedure which is not generally accepted by the medical community. Its benefits are not yet clinically proven. It has serious potential dangers if improperly performed. Indeed, the School's consulting physicians refuse to allow its use in the School. And [redacted] stated that masking of the Student should be performed only by the Parents. Most importantly, masking is not a required life supporting procedure needed to allow the Student to survive much less to attend school, as was the case in both Tatro and Garrett. Masking relates only to lessening the frequency and severity of the occasional seizures which Student here has had every month or two over the last two years. Even if untreated by masking, Student's occasional seizures would have limited impact upon [redacted] overall schooling.

The procedure used by the medical community over the past hundred years to prevent, control and relieve seizures is by use of medication. In point of fact, the testimony and exhibits introduced by Parents reveal that pharmaceuticals were prescribed and have been used to bring the Student out of a seizure in the past. The School is willing to administer medication as ordered by a physician. In other words, the School is willing to provide appropriate and medically accepted support services. It simply is unwilling to provide a little known, clinically unproven alternate procedure which is not generally accepted by the medical community. Nothing in IDEA, Tatro or Garrett requires it to do so. Were Masking to be the preferred, or indeed, even a generally accepted medical technique required to control seizures, perhaps under Tatro and Garrett its use might be required here. But those are not the facts found in this case.

Neither counsel for the parties, nor the undersigned has been able to find any case in point. The closest case - an insurance case - supports the conclusion reached here by the undersigned. Thus, in Hendricks v. Central Reserve Life Ins. Co., 39 F.3d 507, 512 (4th Cir. 1994), the Fourth Circuit held that a healthcare insurance provider was not required to provide a type of medical treatment which has limited human application but has not received "general acceptance."

(ii)

Can the School Be Required

To Provide "One on One" Teaching to

the Student Continuously Throughout the

School Day.

Applicable case law controlling this case places upon the Parents the burden to not only prove that their proposed educational program for [redacted] is appropriate, but also to prove that the School's proposed Individualized Educational Program (IEP) for [redacted] is inappropriate. Bales v. Clark, 523 F. Supp 1366 (E.D. Va 1981), Alexander K. v. Virginia Board of Education, 30 IDELR 967 (E.D. Va 1999), In re Fairfax County Public Schools, 20 IDELR (Va 1991) (applying these burdens of proof in Due Process cases). See also Tatro v. Texas, 703 Frd 823, at 830 (5th Cir. 1983) 468 U.S. 883 which holds that a school system's IEP is presumptively appropriate. And, neither the School nor a reviewing Court is required to assess whether the competing private school's program is better than the School's. Hessler v. State Bd of Educ., 700 F.2d 134, at 139 (4th Cir. 1983), Lewis v. Loudoun County School Board, 808 F. Supp 523, 526 (E. D. Va 1992).

The standard to be followed in determining whether a school system's proposed Individualized Educational Program is "appropriate" (as required by Section 1412 (1) of IDEA, 20 U.S.C. 1412 (1)) is likewise clear. It was set forth in the landmark case of Board of Education v. Rowley, 458 U.S. 176 (1982). The Supreme Court in Rowley after exhaustively examining the language in and legislative history of IDEA, specifically rejected a definition of "appropriate" as equating with either the "best possible" education or

one "equal to" the education offered to non-handicapped students. The Supreme Court instead adopted a far lower standard – namely requiring only that "some educational benefit" be conferred upon the handicapped child.

Thus, a school system meets the Rowley test if it proposes an IEP which is reasonably calculated to enable the child to receive some educational benefits. In short, a public school must provide only a basic floor of opportunity which may not be the best education possible or even equal to a private school education. JSK v. Hendrey County School Board, 941 F2d 1563, 1572 (11th Cir. 1991), Accord: Hartmann v. Loudoun County School Board, supra; Bales v. Clark, supra.

While Parents' evidence establishes, and the School concedes, that the best method of teaching Student new non-preferential information is via one-on-one instruction, the acquisition of new information is not the sole goal of an education. Autistic students must also be taught how to apply (i.e., generalize) the newly acquired information in the context of a normal environment, which encompasses other people and other settings than found in one-on-one teaching. What good is the acquisition of knowledge or information if it cannot be utilized?

In this regard, it should be recalled that the School's proposed IEP for Student (which originally provided for such one-on-one instruction as might be needed) was further refined at the hearing to include one-on-one instruction for 50% of the school learning day, more if needed. Moreover, even when Student is not receiving one-on-one teaching, [redacted] certified Special Education teacher or one of [redacted] aides will be within a few feet, ready to intervene if necessary.

Further, in the opinion of the School's experts all of whom have had extensive experience in educating autistic children, considerable educational benefit is also provided to autistic children such as Student here via a small group (or circle) instruction. In view of the above facts, the School's proposed educational program passes muster under Rowley.

The School's educational program also addresses another basic requirement of IDEA – namely, that special education be provided to handicapped children in the "least restrictive environment" See: Section 1412 (5) IDEA, 20 U.S.C. 1412 (5), Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 359, 369 (1985), Devries v. Fairfax County School Board, 882 F2d 876 (4th Cir. 1989). Here, the School's proposed placement of the Student at [redacted] is far less restrictive than that at [redacted] In the Communications Class at [redacted] Student will have an increased opportunity to interact not only with [redacted] fellow special education students, but also to interact with the general student body as a whole. Thus, under Burlington, the preferred placement of Student is at [redacted]

As before noted, the clash here over the respective IEP's for the Student is primarily a dispute over methodologies, namely how much one-on-one teaching is desirable. In this regard, when evaluating or reviewing individualized educational programs and placements for handicapped children, courts and hearing officers are admonished not to unduly interfere with decisions of educational methodology made by the public school. In Barnett v. Fairfax County School Board, 927 F. 2d 146, at 151 (4th Cir. 1991), which is controlling here, the Fourth Circuit stated:

". . . while a school system must offer a program which provides educational benefits, the choice of the particular education methodology employed is left to the school system."

And, it must be borne in mind that there are numerous techniques used in educating an autistic child – all of which have a time and place for use. To exclude all but "one-on-one" teaching short changes the child by denying [redacted] the use of other strategies that will help [redacted] to learn - and most importantly to apply [redacted] knowledge in a generalized setting. Accordingly, based upon a preponderance of the evidence presented here, it is apparent, and I so rule, that the proposed IEP and placement by [redacted] School System (i.e., [redacted] School) for Student is reasonably calculated to provide [redacted] in the least restrictive environment, with "some educational benefit", possibly even superior to that supplied at [redacted]

As a corollary to the above, Parents have not been able to sustain their burden to prove by a preponderance of the evidence that the School's proposed IEP and placement of Student at [redacted] under its proposed IEP will not provide [redacted] with an educational benefit. Given the overall, resources, expertise in autism and experience of a school such as [redacted] that is a formidable burden for a parent to meet. And, where as here, the parents withdraw a handicapped child and place [redacted] in a private school before an experienced public school is given a fair chance to apply its proven teaching methodology by way of its special education class, that burden becomes almost insurmountable. In any event, the Parents did not carry their burden of proof here.

Parents' attempt to deflect the impact of the cases controlling the disposition made here by urging the undersigned to adopt the legal position that the School - as distinguished

from the Parents - has the burden to prove that its proposed IEP is reasonably calculated to provide some educational benefit to Student. Parents first correctly note that there has been no precise holding on this point by the Fourth Circuit. They then cite and rely upon a West Virginia federal case, namely Bd. Of Ed. of the County of Kanawha v. Michael M., 92 F. Supp. 2d 600, at 602 (D.C. W.Va 2000) which so holds. From this predicate they argue that the School did not sustain its burden here to substantiate its IEP and therefore, that the School must bear the costs of privately educating Student, past and future.

The primary fallacy in this line of reasoning is that Kanawah does not represent the federal decisional law in effect in Virginia. In Bales v. Clarke, 523 F Supp 1366, at 1370, the U.S. District Court, Richmond Division squarely held in a private school reimbursement case, that the parents have the burden to establish that the School's proposed education is not appropriate. Accord: Alexander K. v. Virginia Board of Education, 30 IDELR 967 (D.C. Va. July 27, 1999). Bales has been routinely followed by hearing officers in Virginia. See e.g., In re: Fairfax County Public Schools, 20 IDELR 585 (Va. 1991), at p. 2. See also: Tatro v. Texas, 703 F2d 823 at 830 (5th Cir. 1983) (holding that the party challenging the IEP bears the burden of proof). Until the Fourth Circuit rules otherwise, Bales controls here.

Furthermore, even if Kanawah were to represent the view of the Fourth Circuit, as before set forth, the facts in the instant case reveal that the School has established by a preponderance of the evidence that its proposed placement and IEP are reasonably calculated to provide some educational benefit to Student. Cf. Board of Education v. Rowley, supra.

Parents argument that one-on-one teaching is also required as a "related service" fails for the same reasons set forth above. Moreover, Parents have offered no authority at all for their contention that teaching services are included in the term "related services." There is nothing in the case law or IDEA to support this novel - and indeed - superfluous contention.

(e)

Are the Parents Entitled to

Reimbursement of the Cost of

Privately Educating the Student Here

In order to recover the costs and expenses of private schooling, Parents who withdraw their child from a public school and place [redacted] in a private school must establish that: (1) the public school's proposed IEP and placement cannot or is not reasonably calculated to provide the handicapped student with an educational benefit; and (2) that the private placement does or will provide [redacted] with an educational benefit. See: Bales v. Clark, supra, Tatro v. Texas, supra.

While the Parents here have established that the Student's education at [redacted] is providing [redacted] with an educational benefit, they have not been able to prove by a preponderance of the evidence that the IEP and placement proposed by the School cannot nor reasonably will not provide [redacted] with some educational benefit. Conversely, the School has proved by a preponderance of the evidence, that its proposed IEP (i.e., [redacted] and placement of Student in the Communications Class is reasonably calculated to provide [redacted] with some - indeed, substantial educational benefit. Accordingly, Parents' claim for reimbursement of the costs of the private placement of the Student for prior years and

[redacted] is denied. Likewise, the request that the School pay for the future costs of privately educating the Student is denied. This result moots consideration of the Parents' claim for reimbursement of travel costs to and from [redacted]

(f)

Should Laches be Applied Here

Prior to the hearing, the School raised the defense of laches to the Parents' claim for reimbursement of the costs of educating the Student at [redacted] for the school year prior to the [redacted] year, relying upon Vipperman v. Hanover County School Board, 22 IDELR 796, 799-801 (E.D. Va 1997) and Ian H. v. Fairfax County School Board, Docket No. 97-168-A, Sup Op. 1-2. This defense was denied without prejudice with leave to reassert it at the hearing, particularly if some sort of prejudice resulting from the delay appeared. No harm was shown.

Given the decision on the merits herein, any further consideration herein of this defense is moot.

VI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a)

Findings of Fact

1. Student is a [redacted] year old [redacted] with autism, speech impairment and a seizure disorder
2. Student was diagnosed with autism in [redacted]
3. Appropriate IEP's were prepared for Student by the School for the school years [redacted] through [redacted], as to which Parents attended and consented.

a. Student was primarily home schooled during this period.

4. Sometime before [redacted] the Parents learned of a procedure called masking advocated by the [redacted] located in [redacted]

a. Masking involves placing a transparent plastic mask over the nose and mouth of the patient, thereby causing the patient to rebreathe exhaled air, which slightly reduces the oxygen content and increases the carbon dioxide content of the rebreathed air. This, in turn, accelerates the circulatory rate increasing the blood supply (and oxygen) to the brain.

b. Masking is usually performed with one minute with mask on, five minutes with mask off, from 30 to 90 times a day.

c. Although masking has not been clinically proven, the [redacted] based upon its safe results with thousands of patients, believes masking to be beneficial to certain brain damaged patients as well as helping allieve certain seizures.

d. Masking, while a quasi-medical procedure does not require a physician to perform it.

5. Masking is not well known and is not a generally accepted medical procedure.

a. Masking if performed upon patients who have not been determined as an appropriate candidate, or who are otherwise temporarily unfit, can be dangerous.

b. Masking, if not properly performed and supervised by a trained person can cause hypoxia leading to permanent brain injury and even death.

c. The person masking must carefully time the masking and remain close to the patient during the masking.

6. Student was evaluated by the [redacted] as appropriate for masking in [redacted] which treated [redacted] until [redacted]

a. The [redacted] trained Parents in masking, and have authorized only the Parents to mask their child, namely Student, up to 60 - 90 times a day, with mask on for one minute and off for five minutes.

b. Parents stopped masking Student in early [redacted]

7. Beginning in [redacted] Student began having seizures every other month or so.

a. Parents, recognizing that Student was allergic to certain anti-seizure drugs decided to resume masking as their preferred anti-seizure treatment for [redacted] in [redacted]

8. When the [redacted] IEP was being prepared, Parents requested the School to provide Student with a "one-on-one" instruction throughout the school day.

a. Parents further requested that Student be masked by the School throughout the school day - presumably by the teacher or teaching aide who was providing the one-on-one instruction to Student.

9. The School, acting upon advice of its physician advisors refused to supply masking to Student, this because it was a potentially dangerous clinically unproven technique not generally accepted by the medical community.

10. The entity primarily advocating masking, namely, the [redacted] does not regard masking as a technique appropriate for use in a school setting.

11. The School agreed to supply such one-on-one instruction as might be needed to educate Student, but not necessarily one-on-one instruction throughout the entire school day.

12. Objecting to the School's refusal to supply masking and continuous one-on-one instruction, the Parents refused to consent to the School's proposed IEP for Student for the 2000/2001 school year.

a. Parents unilaterally withdrew Student from the School in the [redacted] of [redacted] because of the aforesaid refusal.

b. Parents unilaterally placed Student at [redacted] for the [redacted] school year for the same reason.

c. Student currently attends [redacted] which is masking Student and is supplying continuous one-on-one instruction.

13. By agreement of the parties, an IEP was prepared for Student in [redacted]

a. The School again objected to supplying masking and the requested one-on-one instruction throughout the school day.

b. Parents again objected and filed the instant Due Process.

14. The generally accepted medical technique for controlling seizures is by use of pharmaceuticals.

a. The School is willing to administer such pharmaceuticals and medications as may be directed by an appropriate physician.

15. [redacted], an experienced and leading expert in child neurology, was of the opinion that a suitable medication program could be derived for Student in order to control [redacted] seizures.

a. Students current physicians, while prescribing masking have also prescribed medications for treatment of Student's seizures.

b. Pharmaceutical have been used to relieve Student's serious seizures in the past.

16. Student's occasional seizures do not prohibit [redacted] from attending school and deriving some educational benefit therefrom.

17. The School has successfully provided educational benefits in the past to numerous autistic students via its Communications Class at [redacted] School.

18. At the Communications Class Student would be taught primarily by [redacted], a certified Special Education teacher with extensive experience in teaching autistic children.

    a. [redacted] is assisted by two experienced teaching assistants, and also has the assistance, on a weekly basis, or more if needed, of certified experts in autism, speech therapy (daily) and occupational therapy.

19. The ratio of teachers to students at the Communications Class is a minimum of three teacher/teacher aides to a maximum of eight students.

    a. The School is willing to provide Student with one-on-one instruction for 50% of the school day - more, if needed.

20. Student does not require continuous one-on-one instruction during the entire school day in order to acquire reasonable educational benefit therefrom.

    a. One-on-one instruction is needed primarily to allow Student to acquire new and non-preferred knowledge.

    b. One-on-one instruction is not needed in order for Student to perform already learned preferred tasks; nearby supervision is sufficient.

    c. A substantial component of educating an autistic student is teaching him or her to be able to apply his or her knowledge in a generalized environment such as School can provide here via its Communications Class.

    d. Because of the layout of the classroom Student's Special Education Teacher at School [redacted] will be nearby to Student during the school day and thus able to promptly intervene if required to alleviate disruptive behavior.

21. Continuous one-on-one teaching is not the preferred teaching methodology advocated by the School for teaching autistic students.

a. Based upon its past successful experience in teaching autistic children the School believes that one-on-one teaching should be supplemented by circle and/or group teaching.

b. School believes that the provision of opportunity to its autistic students to apply learned knowledge in a generalized setting, such as found in the Communications Class, is essential to providing a reasonable education.

c. A primary goal of educating an autistic student is to teach him or her to be self reliant - which is best served by combining one-on-one teaching with other teaching techniques.

22. The School is a less restrictive environment than [redacted].

23. The [redacted] IEP proposed by the School is reasonably calculated to provide some - indeed - a meaningful educational benefit to Student.

a. Given the School's past successful experience in teaching autistic children, as well as [redacted] expertise and past successful teaching of autistic children such as Student, it is likely that the School's proposed IEP and placement will provide some - indeed - substantial educational benefit to Student.

VI.

CONCLUSIONS OF LAW

1. Student is entitled to the protections of IDEA.

2. No procedural violations of IDEA have been alleged or are present in this case.

3. Masking, as a clinically unproven, alternate medical procedure not generally accepted by the medical community, is not a "related service" which must be provided to Student by School pursuant to Section 504 of IDEA.

4. The Courts and this Hearing Officer are required to give deference to proven educational methodologies adopted by a school. Barnett v. Fairfax County School Board, supra.

   a. The School is not required pursuant to IDEA to provide Student with a continuous one-on-one teaching methodology throughout the school day; it also may supply alternative teaching methodologies. Barnett v. Fairfax County School Board, supra.

5. The [redacted] IEP proposed by the School for Student is reasonably calculated to provide some educational benefit for Student and therefore supplies Student with the appropriate education (FAPE) required by Section 1412 of IDEA. Board of Education v. Rowley, supra.

6. In order to recover the costs of privately schooling Student, Parents have the burden to prove, by a preponderance of the evidence, that: (1) the School's proposed IEP and placement are not reasonably calculated to provide Student with some educational benefit (i.e., an "appropriate educational program"), and (2) that the Parents' placement of Student in a private school will provide [redacted] with an appropriate educational program. Bales v. Clark, supra.

   a. Parents have failed to sustain their above required burden of proof with regard to the School's proposed IEP.

7. Parents, accordingly, are not entitled to reimbursement of their past or future costs of privately schooling Student. Bales v. Clark, supra.

8. Consideration of the School's defense of laches is mooted by the decision herein on the merits.

VI.

DECISION

For the reasons hereinbefore set forth:

1. Parents' claim for the reimbursement of the expenses and costs of educating Student at the [redacted] Center for the school years [redacted] and [redacted] is denied.

a. No claim was made for any reimbursement for any school years prior to [redacted]

2. Parents' request for an order entitling them to reimbursement by the School for the costs of providing in the future a private education of Student at [redacted] School is denied.

3. The School's [redacted] Individualized Education Plan for and placement of the Student at the Communications Center at [redacted] as clarified below is confirmed.

In conformity with the testimony of the School herein, the [redacted] IEP is hereby clarified to expressly include that Student shall receive at least fifty percent (50%) of [redacted] weekly educational tutelage via one-on-one (individualized) instruction, such to be supplied at such times and in such manner as, in the discretion of the School, will best benefit the Student.

b. In conformity with its past practices the School shall maintain close contact with Student's parents while [redacted] is at School.

Dated this [redacted] day of [redacted] 2002.

[redacted]

Hearing Officer

RIGHT OF APPEAL

This decision may be appealed within one (1) year of its date of issuance by the filing of an appeal in either a Commonwealth of Virginia Circuit Court or in a United States District Court in Virginia regardless of the amount in controversy, if any.

CERTIFICATE OF MAILING

I hereby certify that a copy of the aforegoing Decision was either mailed, postage prepaid, or personally delivered to:

1. [redacted] Esquire
   [redacted]
   Counsel for [redacted] Public Schools.
2. [redacted] Esquire
   [redacted]
   Counsel for the Parents
3. [redacted]
4. [redacted] Public Schools
5. Virginia Department of Education
   Due Process and Complaints
   P.O. Box 2120
   Richmond, Virginia 23218-2120

[redacted]