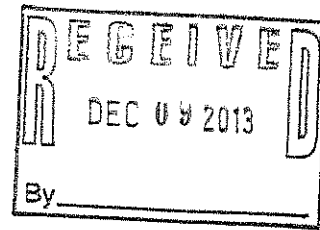


DUE PROCESS HEARING

Case Number D 13-018



LEA: [REDACTED]
Local Education Agency

COUNSEL: [REDACTED]
[REDACTED]
[REDACTED]

PARENTS: [REDACTED]
[REDACTED]
[REDACTED]

COUNSEL: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

STUDENT: [REDACTED]

DATE OF BIRTH: July 26, 2004

DATE OF REQUEST: May 9, 2013

DATE OF RECEIPT BY
LEA: May 14, 2013

DATE OF RECEIPT OF
MEMORANDUM OF
APPOINTMENT BY
HEARING OFFICER: May 15, 2013

DATES OF HEARING: October 7, 8 and 9, 2013

PLACE OF HEARING: [REDACTED] County Board of Education
[REDACTED]

TRANSCRIPTION: [REDACTED]
[REDACTED]
[REDACTED]

STATUS OF HEARING: Closed to Public

STUDENT PRESENT: Yes

POST HEARING
SUBMISSIONS: November 6, 2013

DECISION DATE: December 6, 2013

HEARING OFFICER: Raymond G. Frere, Esquire

WITNESSES FOR THE LOCAL
EDUCATION AUTHORITY:

[REDACTED]
LEA's Expert Psychologist

[REDACTED]
Principal, Student's assigned LEA School

[REDACTED]
Special Education Teacher for LEA

[REDACTED]
Speech/Language Pathologist for LEA

[REDACTED]
Occupational Therapist for the LEA

[REDACTED]
IEP Specialist for the LEA

[REDACTED]
Director of School Psychological Services for the LEA

[REDACTED]
Speech Pathologist Contracted by the LEA

[REDACTED]
Director of Special Education for the LEA

WITNESSES FOR STUDENT/PARENTS:

[REDACTED] (By telephone)
[REDACTED]

[REDACTED]
Mother of the Student

[REDACTED]
Father of the Student

[REDACTED]
[REDACTED] Psychologist for the Student's Parents

[REDACTED]
Director/Owner [REDACTED]

[REDACTED]
Clinical Director [REDACTED]

[REDACTED]
Speech/Language Pathologist, [REDACTED]

DUE PROCESS HEARING

PROCEDURAL BACKGROUND

On the 9th day of May, 2013, the parents of the student, through counsel, filed a Complaint in this matter requesting a Due Process Hearing, which was received by the West Virginia Department of Education, Office of Special Programs, on the 14th day of May, 2013. By Memorandum dated the 15th day of May, 2013, I was informed of my appointment as the Impartial Hearing Officer in this matter. In keeping with the 45-day rule allowing for the resolution period, the decision in this matter was due by the 28th day of July, 2013.

The Due Process Hearing in this matter was scheduled for the 9th and 10th days of July, 2013, beginning at 9:00 a.m. at the LEA County Board of Education Conference Room, [REDACTED] West Virginia [REDACTED] and the deadline for the decision in this matter was extended at the written request of both parties from the 28th day of July, 2013, to the 6th day of September, 2013. Pre-hearing submissions, including proposed evidence, exhibits, and witness lists, were to be submitted by each party, to the opposing party, and to me as Impartial Hearing Officer five (5) business days prior to the Hearing or on or before the 2nd day of July, 2013. Post-hearing submissions or Memoranda of Law, were to be submitted by each party, to the opposing party, and to me as Impartial Hearing Officer on or before the 9th day of August, 2013. A Pre-Hearing Conference Order dated the 23rd day of May, 2013, setting forth the matters above was prepared and forwarded to all parties.

Thereafter, counsel for the student and parents of the student and counsel for the LEA requested that the Due Process Hearing in this matter be continued in order to continue efforts to reach a settlement agreement. The parties also requested an extension of the due date for the Due Process Decision.

A Pre-Hearing Telephonic Conference Call was conducted on the 8th day of July, 2013, between this Impartial Hearing Officer, counsel for the student and parents of the student, and counsel for the LEA to determine a new date for the Due Process Hearing and new date for the Due Process Decision.

By Order of this Impartial Hearing Officer dated the 14th day of July, 2013, the Due Process Hearing was continued to the 7th, 8th and 9th days of October, 2013; pre-hearing submissions were to be submitted on or before the 30th day of September; post-hearing submissions or Memoranda of Law were to be submitted by the 1st day of November, 2013, and the deadline for the decision in this matter was extended to the 30th day of November, 2013.

The Due Process Hearing in this matter was held on the 7th, 8th, and 9th days of October, 2013, beginning at 9:00 a.m. at the LEA County Board of Education Conference Room, 69 Avenue B, Madison, West Virginia 25130-1196.

Counsel for the parents of the student and student sent this Impartial Hearing Officer an email dated the 31st day of October, 2013, notifying me that all parties had agreed to extend the deadline for submission of Post-Hearing Findings of Fact, Conclusions of Law, and Memoranda of Law to the 6th day of November, 2013, and to extend the deadline for the decision in this matter to the 6th day of December, 2013. Per my Extension Order dated the 21st day of November, 2013, this Impartial Hearing Officer, extended the deadline for submission of Post-Hearing Findings of Fact, Conclusions of Law, and Memoranda of Law to the 6th day of November, 2013, and extended the deadline for the decision in this matter to the 6th day of December, 2013.

By Interim Order of this Impartial Hearing Officer dated the 14th day of October, 2013, the LEA was Ordered to immediately contract with Bright Futures Learning Services, Inc. to

orient and train the student, the student's parents, the LEA's speech/language pathologist, and the other LEA personnel that provide direct instruction to the student on the use of the Accent 1000 SGD immediately so the student can effectively communicate and that the LEA, through its counsel, report progress on its contract with Bright Futures Learning Services, Inc. and initiation of the Accent 1000 SGD instruction for the student to this Hearing Officer by November 1, 2013, along with the submission of Memoranda of Law and Proposed Findings and Fact and Conclusions of Law by counsel for the LEA and counsel for the student.

Post-hearing briefs were timely received by this Hearing Officer from counsel for the LEA and counsel for the parents of the student on the 6th day of November, 2013 pursuant to this Hearing Officer's Extension Order of November 2, 2013.

This Hearing Officer conducted a Telephonic Conference Call with counsel for the student's parents and the student and counsel for the LEA on the 8th day of November, 2013, at which time both parties requested leave to file a Reply Memoranda to the other's brief, which this Hearing Officer granted.

The Hearing Officer received a letter from counsel for the LEA (with a copy to counsel for the student and the student's parents) dated the 6th day of November, 2013, regarding the LEA's delay in implementing the Interim Order of this Hearing Officer entered the 14th day of October, 2013.

On the 11th day of November, 2013, counsel for the student's parents and the student submitted a letter to this Hearing Officer with a copy to counsel for the LEA regarding the parents' concerns about the LEA's lack of action with regard to my Interim Order of October 14, 2013. Of even date, this Hearing Officer prepared a letter to counsel for the LEA with a copy to counsel for the student's parents and the student with concerns about the lack of timeliness on the

part of the LEA in seeing that the student received services needed for him to receive a FAPE and ordering that the LEA act now with respect to my Interim Order.

Counsel for the parents of the student and the student submitted a Reply to the LEA's Post-Hearing brief on the 12th day of November, 2013. Counsel for the LEA submitted the LEA's response to the Parents' Post-Hearing brief on the 12th day of November, 2013.

By e-mail from counsel for the LEA on the 13th day of November, 2013, this Hearing Officer and counsel for the student and the student's parents were notified that programming of the Accent 1000 Speech Generating Device (SGD) had begun and the device was available for use by the student.

PRELIMINARY STATEMENT

FOLLOWING THE DUE PROCESS HEARING IN THIS MATTER, COUNSEL FOR BOTH PARTIES WERE INVITED TO SUBMIT MEMORANDA INCLUDING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THEIR RESPECTIVE POSITIONS. ALL PROPOSED FINDINGS, CONCLUSIONS AND SUPPORTING ARGUMENTS SUBMITTED BY THE PARTIES HAVE BEEN CONSIDERED. TO THE EXTENT THAT THE PROPOSED FINDINGS, CONCLUSIONS, AND ARGUMENTS ADVANCED BY THE PARTIES ARE IN ACCORDANCE WITH THE FINDINGS, CONCLUSIONS AND VIEWS AS STATED HEREIN, THEY HAVE BEEN ACCEPTED, AND TO THE EXTENT THAT THEY ARE INCONSISTENT THEREWITH, THEY HAVE BEEN REJECTED. CERTAIN PROPOSED FINDINGS AND CONCLUSIONS HAVE BEEN OMITTED AS NOT RELEVANT OR NOT NECESSARY TO A PROPER DETERMINATION OF THE MATERIAL ISSUES AS PRESENTED. TO THE EXTENT THAT THE TESTIMONY OF VARIOUS WITNESSES IS NOT IN ACCORD WITH FINDINGS AS STATED HEREIN, IT IS NOT CREDITED.

CREDIBILITY OF THE WITNESSES, TESTIMONY AND EXHIBITS

The Hearing Officer is satisfied that the witnesses testified credibly. After considering the demeanor of the witnesses, any inconsistencies, conflict or any motive on their behalf, the hearing officer is satisfied that any inconsistencies were not a result of deliberate untruthfulness. Rather, any inconsistencies in the testimony were a result of a difference of opinion or a lack of knowledge or miscomprehension. The expert witnesses testified to the best of their abilities and the credentials of those witnesses was unquestioned. The hearing officer is satisfied that all records and documents entered as exhibits by the LEA at the time of hearing are authentic and valid and that they were entered with the proper evidentiary foundation; all records and documents entered by the parents of the student as exhibits at the time of hearing are authentic and valid and they were entered with the proper evidentiary foundation and over objection of counsel for the LEA. Any evidence submitted after the conclusion of the hearing was not considered herein.

All decisions rendered at the aforesaid hearing on motions or objections filed or presented in this action are hereby affirmed and all other motions or objections filed or presented in this action by either of the parties which were not previously ruled upon by the hearing examiner are hereby denied and rejected.

ISSUE

Was the student denied a FAPE by the LEA by not timely providing the student with the special education, related services and assistive technology that the student needed and was required under his IEP of December 10, 2012?

FINDINGS OF FACT

1. The student, born on July 26, 2004, is a nine-year old boy with disabilities as defined in the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 et seq.) ("IDEA" and Policy 2419 of the West Virginia Department of Education (126 C.S.R. 16).

TESTIMONY OF LEA'S EXPERT PSYCHOLOGIST:

2. The LEA's expert psychologist is a professor of school psychology at Marshall University Graduate College. He is qualified as an expert witness in the areas of child, forensic, school, and clinical psychology. He has been a school psychologist in West Virginia since 1989. He has a private psychology consulting firm and has taught a course in autism at the doctoral level. He does a lot of independent expert psychological evaluations for school systems. (Tr. Vol. I, pp.21-26)
3. He reviewed the student's records and observed him in his home school on July 23, 2013 during the extended school year (ESY) program. (Tr. Vol. I, pp. 26 & 27)
4. The LEA's expert psychologist observed the student in three different school settings: classroom, lunchroom, and the gym. He heard very limited speech from the student, but the student was able to follow directions and interacted with other children. (Tr. Vol. I, pp. 31-34, 37)
5. While at the student's home school, the LEA's expert psychologist reviewed the Boling Report which diagnosed the student as autistic in 2005. He disagrees with this diagnosis but believes the student is moderate mentally impaired with a severe expressive language disorder. (Tr. Vol. I, pp. 35-37, 48, 54, 62)
6. The LEA's expert psychologist reviewed the report from the Klingberg Center dated September 3, 2013 which indicates a parent rating scale was administered. The report

- states the student met criteria for the diagnosis of autism spectrum disorder and moderate mental impairment. There is no cognitive assessment listed. The LEA's expert psychologist opined the ADOS rating scale is now the gold standard and not the parent rating scale. (Tr. Vol. I at pp. 49-54) (LEA Exhibit 12)
7. The LEA's expert psychologist opined the student's prognosis is that the student will never live independently; he will never be able to read or do any functional math; and his language is going to be augmented in some way. (Tr. Vol I, pp. 54 & 55)
 8. ABA is applied behavioral analysis, an important clinical practice which is classic conditioning and discrete trial training based on reinforcers. It is important in working with autistic children and is effective. The LEA's expert psychologist believes the Augusta Levy Center provides probably the best implementation of ABA that he has seen. (Tr. Vol I at pp. 55 & 56, 61)
 9. The student has benefitted from being with other children. Children need to be in school and if ABA is not done in the school system, it takes longer for them to be re-integrated because of the environment change. Putting the student in a clinic or medical facility is a mistake. (Tr. Vol I at pp. 57-59, 61)
 10. IEP goals are by year and not documented every single week because of manpower. In discrete trial training, because behavior is constantly being modified, data is kept every two hours and there will be some progress. (Tr. Vol I, pp. 59 & 60, 82)
 11. Research shows that people do better in group learning. ABA is one-on-one. (Tr. Vol I, pp. 61 & 62)
 12. The student's two major diagnosis - moderately mentally impairment and a severe expressive language problem - make a big difference whether he is autistic or not because

- the long-term goal is different. IEPs are modified every year and a re-evaluation conducted to note progress. He believes the student would go backwards with ABA at nine years of age and the student needs to be socialized. (Tr. Vol I, pp. 63-65)
13. The LEA's expert psychologist reviewed the student's December 10, 2012 IEP and said the placement identified in it is appropriate. Also, the student should use an augmentative speech device which is usable and as portable as possible. (Tr. Vol I, pp. 65-67)
 14. The student had some characteristics of autism. It is difficult to diagnose autism because of his language pattern. The LEA's expert psychologist agreed if there is a teaching or instructional methodology for the student that is successful, the diagnostic label is not that relevant but he is not making any conclusions about the student's ability to benefit from ABA instructional methods or discrete trials. (Tr. Vol I, p. 77 & 78, 86)
 15. A goal retained from one IEP to the next would indicate a goal has not been achieved. (Tr. Vol I, p. 83)
 16. It is not unusual for a child with the student's level of disability to have a goal on one IEP that maybe would be there over a two or three year span. Some goals are lifetime skills. (Tr. Vol I, p. 87)

TESTIMONY OF PRINCIPAL AT STUDENT'S ELEMENTARY SCHOOL:

17. The principal at the student's elementary school met the student in August of 2011. She chairs IEP meetings and attended the IEP meetings pertaining to the student on January 23, 2012; and December 10, 2012. (Tr. Vol I, pp. 92-96)

18. The student's parents were at every IEP meeting in the two years that she was at the student's school. She said in the meetings she chaired, almost everyone was involved in the discussion of PT, OT and speech. (Tr. Vol I, pp. 97 & 98)
19. The principal has visited the student's classroom and never observed any disciplinary problems with him. (Tr. Vol I, p. 101)

TESTIMONY OF STUDENT'S SPECIAL EDUCATION TEACHER (SET):

20. The student's special education teacher (SET) has been his teacher for the 2012-2013 and 2013-2014 school years. (Tr. Vol I, pp. 105 & 106)
21. The SET has credentials in special education and is certified in mentally moderately impaired, autism, behavior disorder and the learning disabled. (Tr. Vol I, pp. 107 & 108)
22. The SET attended the student's October 12, 2012 and December 10, 2012 IEP meetings and had input in the development of his IEP. (Tr. Vol I, pp. 110 & 115) (LEA Exhibits 228 & 258)
23. The SET did not observe the PLEPs in the student's December 10, 2012, IEP and did not observe him being aggressive. A representative from Bright Futures Learning Services (BFLS) might have reported these negative behaviors when working with the student. He does need prompting at times to eat his food but he watches the other students and can go through the food line; he interacts with other students and requires less prompting when he can observe and mimic some of their behaviors. (Tr. Vol I, pp. 113-115)
24. The SET participated in the student's December 10, 2012 IEP meeting when the Director/Owner of BFLS revamped some goals which were adopted by the IEP team. With the equipment she was provided, trial and error, and pulling the student to the side

- to be able to work on specific goals, the SET did what she could toward those goals. (Tr. Vol I, pp. 115 & 116)
25. The goals the SET is currently working on with the student to be able to put numbers within sequence on a number line; to work on different kinds of nouns; to identify numbers; to be able to read and point to characters in a book; and a computer program where pictures are generated. It is a picture communication exchange called PECS, used to identify things in the student's environment. (Tr. Vol I, pp. 116 & 117)
 26. The methodology the SET uses with the student includes being able to work in a group. He can point to the month on the calendar, do coloring and gluing. She uses "contingent management". For example, "if you get your work done, or walk in a line" there may be a reward such as extra recess. There are twelve students in the student's classroom. (Tr. Vol I, pp. 118 & 119)
 27. The student uses the Proloque2Go, an augmentative communication device that he is currently using in the classroom. The SET gives the student modified assignments in everything. If she sees him getting frustrated with an assignment, she will move away from that and come back later. (Tr. Vol I, pp. 120-122)
 28. Everything the SET does with the student is paced at ability levels and if he is consistent, she moves on. If the student does not show consistency with the skills she has introduced, she does not move on. He loves to be read to and loves artwork and music; he likes hands-on work. (Tr. Vol I, pp. 122 & 123)
 29. The SET is working with the student on goals such as: involving him in an activity; frequent breaks for him between tasks; seats him so he experiences the least possible amount of visual and auditory stimuli; implements daily living skills; breaks down

- assignments into manageable components until the student becomes more proficient; provides frequent feedback on his performance in the classroom; incorporates differentiated instruction if the current instructional strategy is not effective; drills and repetition; finds an instructional level where the student can achieve success and controls the amount of information presented at one time. (Tr. Vol I, pp. 124-131)
30. The SET determines if the student is making progress on goals and works directly off the IEP and also sends a sheet home with the student. She has set up her grading criteria on a graph sheet which is on the computer. (Tr. Vol I, pp. 131 & 132)
31. The SET keeps a daily communication log for each child's parents noting whether a student has had a good day or not. The first one for the student is dated August 27, 2012. (Tr. Vol I, p. 135) (LEA Exhibits 101 - 227).
32. At the December 10, 2012 IEP meeting, the student's mother said she would like to see something more in-depth. The SET then revised daily communication for all of her students because she felt she would be more effective in her ability to communicate with the parents and to meet the needs of her students. (Tr. Vol I, pp. 136 & 137) (LEA Exhibit 158)
33. The student's parents have been supportive of the SET. The SET has provided his parents with in-depth progress reports on how he is doing. (Tr. Vol I, pp. 137 & 138)
34. Examples of the student's progress were presented by the SET. She could tell the student to get blocks out to do numbers and he sorted them without prompting; he could trace within lines; he recognizes his first and last name; and he is doing more things independently. (Tr. Vol I, pp. 140-143)

35. At the beginning of this school year, the iPad was sent home with the student after the SET showed his father how to use it. Through this iPad, the student can get to the Prologue2Go. He uses it at home and at school. (Tr. Vol I, pp. 145 & 146)
36. The speech/language teacher has the Accent 1000 and is working with it to get it in place for all to be trained. The SET has not received any training on it and no training has been scheduled. One of the student's goals was for him to effectively navigate the Speech-Generating Device (SGD) but the SET can't address that goal because she does not have the equipment. (Tr. Vol I, pp. 148-150)
37. The SET's classroom notes indicate the student was in time out for not following directions; pushing another child; trying to take the iPad away from another student; and throwing rocks but she does not consider that violent behavior from a child with the student's diagnosis. He has mental impairment but his positives outweigh the negatives. (Tr. Vol I, p. 150-154) (LEA Exhibits 162, 182, 203, 212, 222, 105, 119, 130, 131 & 135)
38. The SET knew when she stated that the student was not violent or aggressive she had sent home reports of behavior that involved throwing rocks or pushing another child. It is not aggressive behavior, but typical of any child. The behaviors would not interfere with her ability to provide instruction to the student and are not an impediment to the development of his social skills and learning. They are behaviors signifying the student might not understand a situation as opposed to intentional misconduct. (Tr. Vol I, pp. 156-158, 160)

TESTIMONY OF LEA'S SPEECH/LANGUAGE PATHOLOGIST (LEA'S SLP):

39. The LEA's Speech/Language Pathologist (LEA's SLP) has been in that position for twenty-seven years. She has undergraduate and graduate degrees from West Virginia

University. She works daily with a caseload of around 50 students. She does diagnostic testing and is a team member on IEPs. (Tr. Vol I, pp. 161 & 162)

40. The LEA's SLP met the student when he moved to the LEA County and started school in August or September of 2010. She worked with the student for the 2010-2011, 2011-2012, and 2012-2013 school years. She is not working directly with the student this 2013-2014 year. (Tr. Vol I, p. 163)
41. One of the student's major deficits is in communication. She has spoken to his current therapist and the student is utilizing the iPad, with the Proloque2Go program, purchased by the LEA in January of 2012. It is portable and acceptable because most people have an iPad or iPhone. (Tr. Vol I, pp. 163 & 164)
42. In December of 2012, the LEA's SLP began trying to find out how to get the Accent 1000 recommended by the WVU Speech and Hearing Center for a three month trial. At that time, it was not available because of manufacturing issues. She spoke with a woman who worked for West Virginia Augmentative based at WVU who told her they did not have an Accent 1000 but a Vantage Lite which was comparable. This individual said the devices were very expensive and that their equipment had been loaned to another county. The LEA's SLP attended a conference in February, 2013, and was going to bring the device back to the LEA to use with the student until the Accent 1000 was made available. However, the County it had been loaned to had not returned it. At that conference, she spoke with the manufacturer's representative of the Accent 1000 and gave the representative the phone number for the LEA's Director of Special Education (DSE). The LEA's DSE got the LEA's SLP an iTunes card so she could download the Proloque2Go to use in training the student in the classroom (Tr. Vol I, pp. 165 & 166)

43. The Proloque2Go is an augmentative communication program with over 15,000 different vocabulary choices. It is pretty easily programmable by a layperson. The student seemed to like it. She understands he is now using it in the classroom and taking it home. (Tr. Vol I, pp. 166 & 167)
44. The student would benefit from an augmentative communication device. (Tr. Vol I, p. 167)
45. The iPad with Proloque2Go is user-friendly. The LEA's SLP has not seen the Accent 1000 and does not know anything about it. According to the student's current therapist, it is a time-consuming piece of equipment that takes a lot of programming and a lot of man hours to prepare the dedicated device. (Tr. Vol I, pp. 169 & 170)
46. The LEA's SLP attended the student's IEP meetings of January 23, 2012, October 12, 2012, and December 10, 2012. She participated in the development of the speech and language present levels of performance in those meetings and believes the descriptions in the IEPs are accurate. (Tr. Vol I, p. 171-173) (LEA Exhibits 76, 228, 258)
47. The LEA's SLP said the speech and language goals (mostly SGD goals) for the student's December 10, 2012 IEP are appropriate and that direct instruction in speech and language is appropriate for the student. She said four hours a month was an appropriate amount of time for the student to benefit from his current classroom placement along with reinforcement from the classroom teacher and the teacher's aide. (Tr. Vol I, pp. 173 & 174)
48. The LEA's SLP worked with the student on sign language and used anything she could to help him communicate. (Tr. Vol I, p. 176)

49. It was the LEA's SLP's opinion that the student needed to focus on an augmentative communication device because he is nine years old and speech is not going to be a very successful mode of communication for him. He has the potential to speak. (Tr. Vol I, pp. 176 & 177)
50. The student's December 10, 2012 IEP has goals that are written around the use of a SGD and opined that is what the student needs for his education, whether with the Proloque2Go or the Accent 1000. (Tr. Vol I, p. 180)
51. The LEA's SLP does not think there has been any impact on the student in not having a dedicated SGD a year after it was recommended and placed in his IEP. (Tr. Vol I, p. 184)
52. The LEA's SLP said the student is functionally non-verbal now. (Tr. Vol I, p. 186)

TESTIMONY OF ACCENT 1000'S SALES REPRESENTATIVE:

53. The Accent 1000's sales representative has a master's degree in speech language pathology. He represents two augmentative communication device manufacturers. (Tr. Vol I, pp. 188 & 189)
54. In March of 2013, the sales representative was contacted by the LEA concerning an augmentative communication device. He was faxed a purchase order for the equipment on April 22, 2013 from the LEA's Special Education Director. The SGD was shipped to the LEA on June 7, 2013 by Federal Express. (Tr. Vol I, pp. 190 & 191)
55. The sales representative has not been asked to provide training on the Accent 1000 by the LEA and has not had any contact with the LEA since the SGD was shipped except for payment of the invoice. (Tr. Vol I, pp. 191-193)

56. The Accent 1000 can be used long-term for language development. The price of the Accent 1000 to the LEA was \$5,961.00. Training is provided on the Accent 1000 when requested. (Tr. Vol I, pp. 194-196)
57. A CD-ROM that comes with the Accent 1000 contains documentation for the system and an on-line knowledge-based flash manual is available through the website. They have been training individuals on this device all summer and are available to train at the LEA. (Tr. Vol I, pp. 196-199)

TESTIMONY OF THE LEA'S OCCUPATIONAL THERAPIST (OT):

58. The LEA's OT has provided OT services for the student from the time he arrived in the LEA school in 2010 to the present. She has attended the student's May 12, 2011, January 23, 2012, October 12, 2012, and December 10, 2012 IEP meetings. She participated in the development of the student's IEPs and is satisfied with the descriptions of his present levels. (Tr. Vol I, pp. 200-202) (LEA Exhibits 52, 76, 228 & 258)
59. The LEA's OT is currently using the OT goals set out in the student's December 10, 2012 IEP, including fine motor skills. She said direct instruction in OT is appropriate to meet the student's needs and she agrees with the duration of this instruction. She works on positioning the student's hands to hold a pencil and other skills, some of which are needed for daily living. (Tr. Vol I, pp. 203-208, 214 -216)
60. The LEA's OT has noticed progress in the student since August of 2010. (Tr. Vol I, pp. 210-213)

TESTIMONY OF THE LEA'S IEP SPECIALIST:

61. The LEA's IEP specialist has been a diagnostician and IEP specialist since 1988. She has written IEPs for 38 years and has worked for the LEA since 1975.(Tr. Vol I, pp. 223-225)

62. The LEA's IEP specialist first saw the student in August of 2010 in his IEP meetings. She has attended all of his IEP meetings and has participated in the discussion of present levels of performance for the student but she did not develop goals. (Tr. Vol I, pp. 224 & 225)
63. The LEA's IEP specialist said the student's parents have been at all of the IEP meetings she has attended and they were active in the development of his IEPs. (Tr. Vol I, p. 226)
64. The LEA's IEP specialist wrote a report as part of the student's triennial re-evaluation. She observed the student once in the classroom and once with the SLP to see if she should give the student a standardized achievement test. The student interacted well with peers and adults and his academics should continue to be addressed in the special education classroom through the use of technology as a primary learning tool. She also noted he should attain life, social, and functional skills to assist him to be more independent as he gets older and should be in his natural setting, the school, where he can model his peers. (Tr. Vol I, pp. 227-229) (Parents' Exhibit 27)
65. According to the LEA's IEP specialist, there are persistent life skills that moderately mentally impaired students have to continue to work on. She believes the student has done very well at nine years old from when he first came to the LEA. (Tr. Vol I, pp. 230 & 231)

TESTIMONY OF LEA'S DIRECTOR OF SCHOOL PSYCHOLOGICAL SERVICES (DSPS):

66. The LEA's Director of School Psychological Services (DSPS) has been in that position since January of 2013. She completed a psycho-educational report on the student by reviewing background information from the Tennessee School System, the Boling Center, and his current IEP. She administered the Wechsler Nonverbal Scale of Ability and the

Beery-Buktenica Developmental Test of Visual Motor Integration on the student. (Tr. Vol I, pp. 232-234) (Parents' Exhibit 23)

67. The results of the non-verbal test showed the student with an IQ of 37 which is extremely low. The other test was to measure the student's perceptual motor skills. He was only able to reproduce six items. There was no standard score given the student because of his age and the items he reproduced. (Tr. Vol I, pp. 234 & 235)
68. Based on her evaluation of the student, the LEA's DSPS said it benefits the student to be with non-disabled children in the school system. She is concerned about the psychological impact on the student in a clinical setting. (Tr. Vol I, pp. 237 & 238, & 240)

TESTIMONY OF THE LEA'S SPEECH PATHOLOGIST:

69. The LEA's speech pathologist is employed by a private practice and contracted through the LEA. She has been working for two months and has a provisional West Virginia license. The student was added to the LEA's speech pathologist's caseload one month ago. She is responsible for providing speech/language services and goals identified in the student's IEP. (Tr. Vol II, pp. 5-7, 12 & 13)
70. The LEA's speech pathologist sees the student twice a week for 30 minutes. She is working on increasing the student's understanding of vocabulary by receptive identification by name, function, feature and class, such as telling him to point to the ball; point to the vehicle. The student's IEP has goals for perceptive identification and the LEA's speech pathologist uses the iPad with the Proloque2Go program. If she pulls up two pictures of activities and tells him to touch the baseball, he uses his index finger to point. (Tr. Vol II, pp. 7-9)

71. The student is using the device appropriately. A few times a session, he will point multiple times on the device rather than once at the same level. She handles it by redirection which occasionally works. (Tr. Vol II, pp. 9 & 10)
72. The LEA's speech pathologist has had the Accent 1000 for about two weeks and has tried to get familiar with it on her own time. There is a manual she references. She has been told training will be available when she needs it, but she has not reached that point. (Tr. Vol II, pp. 10 & 11, 14)
73. The LEA's speech pathologist's work with the student on the iPad is a receptive function. She is working towards expressive. The student is functionally non-verbal. (Tr. Vol II, p. 13)
74. The Accent 1000 device is more complex with more icons to be recalled. She said the student is making progress with the iPad and it could be a bridge to the Accent 1000. (Tr. Vol II, p. 14)

TESTIMONY OF THE LEA'S DIRECTOR OF SPECIAL EDUCATION (DSE):

75. The LEA's Director of Special Education (DSE) has been in that capacity since 1987. She has an undergraduate degree in elementary education and learning disabilities. She taught learning disabilities in the LEA's County until 1979 and then took a job as an IEP specialist. In 1986 she became the LEA's assistant director of special education and is now the director. (Tr. Vol II, pp. 17 & 18)
76. The parents of the student asked about ABA several times. The original information the LEA had was from the Tennessee School System and from the Boling Center which had implemented ABA with very little success. The IEP committee didn't think it was something the student would need or would benefit from, but it was an issue at every IEP

- meeting. Most of the IEP meetings with the student's parents were long and they really felt it would help their son, so the team agreed to try it. (Tr. Vol II, pp. 18 & 19)
77. The student's trial with BFLS was February to June 2012. The student would go to his assigned school in the morning and be transferred at lunch to another elementary school (his home school) because his assigned school was constrained for space. BFLS provided a therapist who worked with the student one-on-one for about two and a half to three hours an afternoon. (Tr. Vol II, pp. 19 & 20)
78. The LEA's DSE attended the student's October 10, 2012 IEP meeting and raised a concern over the continuation of the ABA trial. The school year had ended and the student did not have an IEP in place. They extended the last IEP in place for the previous year with parent approval. In the meantime, she had received a proposal from the Director/Owner of BFLS to remove the student from the LEA and to send him to its facility. (Tr. Vol II, pp. 20 & 21, 23) (Parents' Exhibits 44, pp. 33 & 34) (LEA Exhibit 250)
79. The LEA's DSE gave the student's parents Prior Written Notice that the committee was not going to approve BFLS' proposal because the group was pleased with the student's classroom progress and didn't feel that the ABA therapy he was receiving was making significant changes. Also, the LEA's DSE had received reports from the elementary school where the student was receiving his therapy that he was unhappy and exhibited behavior problems. (Tr. Vol II, pp. 22 & 23) (LEA Exhibit 275)
80. None of the student's IEPs mention the Accent 1000 SGD; but do mention a speech generating device (SGD). (Tr. Vol II, p. 24)

81. At the student's December 10, 2012 IEP meeting there was a discussion about the Accent 1000, which was not yet in production and other devices. It was agreed that the student needed a speech and writing device. The LEA's DSE purchased the Proloque2Go app to be put on iPads in the student's classroom on January 9, 2013. The same month she sent a letter to the manufacturer's sales representative who told her the SGD was not yet available. In March the device became available and the LEA's DSE asked the manufacturer's sales representative for more information so she could order it. It was ordered by the LEA on April 12, 2013, and received by the LEA the day after school ended in June of 2013. The LEA's DSE kept the device in her office for the summer. When school started, she asked one of the autism itinerant teachers to become familiar with the device. (Tr. Vol II, pp. 25-27)
82. When the student was receiving ABA instruction, he was still part of the LEA school system and was not pulled from the school by his parents. If BFLS was providing ABA services at its office/clinic, the student would still be enrolled on paper at his LEA assigned school but in reality would be removed from the LEA. They were pleased with the student's progress at his assigned school. (Tr. Vol II, pp. 29-31) (LEA Exhibits 247 & 250) (Parents' Exhibit 48)
83. The LEA's DSE has not contacted BFLS about the training because of this litigation. (Tr. Vol III, pp. 42 & 43)

TESTIMONY OF THE STUDENT'S MOTHER:

84. When the student was around two years of age, his mother noticed the difference in his learning and he was not speaking. (Tr. Vol II, pp. 36-38)

85. An evaluation of the student at the University of Memphis determined that he had severe receptive and express language disorder and did not use speech to communicate. (Tr. Vol II, pp. 38 & 39) (Parents' Exhibit 107)
86. An evaluation of the student when he was four years old at Le Bonheur recommended that he be given ABA therapy three times a week for his functional skills. (Tr. Vol II, p. 39) (Parents' Exhibit 106)
87. The student was evaluated at the Boling Center which stated he exhibited impairments in social interaction, communication language, and restrictive behavior and that he was autistic. It recommended that the student receive ABA services through the school system or privately. (Tr. Vol II, pp. 40 & 41) (Parents' Exhibit 105)
88. After the evaluation of the student at the Boling Center, his mother worked on transitional trials with him daily at home for several months until they moved to West Virginia. She was amazed at his progress in three months. (Tr. Vol II, p. 42) (Parents' Exhibit 102)
89. The student's major disability is that he cannot speak or communicate. He cannot learn because he has no way to communicate and his major educational need in school is to be able to communicate. (Tr. Vol II, p. 44)
90. When the student's family moved to the LEA County, his mother talked to the LEA's DSE to see where the student would be placed. At the time, the LEA's DSE felt they were doing all they could for the student and were going by the information from Tennessee. (Tr. Vol II, p. 45)
91. The student's initial IEP meeting was on August 24, 2010. The student's mother told the group that the student did not speak and gave them all of the evaluations from Tennessee

- with the ABA recommendation. The first two goals mentioned in that IEP were that he was to have a voice output device and it was best for him to go to an assigned school, not his home school. (Tr. Vol II, p. 46) (Parents' Exhibit 98)
92. The student's mother does not remember the group wanting to do any evaluation of the student. They were duplicating what she gave them from Tennessee. The subject of availability of ABA services in the LEA did not come up. (Tr. Vol II, pp. 47 & 48)
93. The 2010-2011 school year was the student's first year in the LEA. There were three students in his classroom. The majority of the time he watched *Barney* videos and did a little work on the ZAC browser. His teacher was trying to get him to use the computer. There were a lot of nap times and the student's mother felt it was more of a babysitting service. (Tr. Vol II, pp. 48 & 49)
94. The student's mother was at his May 12, 2011 IEP meeting. She asked if there were any other therapies to help the student progress. She felt they thought they were doing all they could do and the student was doing just fine. They did not seem to care about the student's educational progress. There was a break in the meeting and the OT therapist handed the student's mother a piece of paper and pointed to the Director/Owner of BFLS' name and phone number and told her she needed to call her right away. (Tr. Vol II, pp. 49-52) (Parents' Exhibits 84 & 85)
95. Nothing was changed in the student's May 2011 IEP from his previous IEP in August. (Tr. Vol II, p. 52)
96. The student's mother discussed the meeting with her husband and immediately called the Director/Owner of BFLS and arrangements were made to meet. (Tr. Vol II, p. 53)

97. The student's mother sent a consent and release form to the Director/Owner of BFLS. The student's mother received a telephone call from the LEA's IEP specialist concerning BFLS while the Director was in her home. The student's mother asked the LEA's IEP specialist if BFLS could service the LEA, and she replied she didn't know. The student's mother knew this was incorrect because the IEP specialist knew there was a child at the school that BFLS was servicing at that time. (Tr. Vol II, pp. 53-55, 59-61) (Parents' Exhibit 83)

TESTIMONY OF THE STUDENT'S FATHER:

98. The student had no way to communicate and he needs to express himself. (Tr. Vol II, p. 64)
99. The student's mother came home from the student's May 2011 IEP meeting and discussed the student's lack of progress with his father. He told his wife to ask if there was anything else that could be done for the student. After the IEP meeting, the student's mother showed his father a note she received. The student's father decided to attend the student's IEP meetings. (Tr. Vol II, pp. 66 & 67)
100. The assessment date for the ABA evaluation was August 15, 2011. A signed consent form was received by the LEA on May 17, 2011. (Tr. Vol II, pp. 68-70) (Parents' Exhibit 80)
101. The student's father would call the LEA's DSE and get her voicemail or messages that her voicemail was full and could not receive any messages. He would send her emails to confirm the time of an upcoming IEP meeting but most of their notification letters were given to them at the meeting to sign instead of beforehand. (Tr. Vol II, pp. 69 & 70)

102. BFLS used a voice output device with the student in its assessment. BFLS found the student's vocal and sign language were extremely limited despite several years of therapy and that an augmentative communication evaluation was needed. It found that because the student was not acquiring language through traditional formats, he needed intensive teaching with an emphasis on manded training to develop his language base. (Tr. Vol II, pp. 70 & 71)
103. BFLS also found that because of the student's skill and language deficits, it was highly unlikely he could learn these skills through group teaching but needed to learn through ABA instruction in a structured learning environment. (Tr. Vol II, pp. 70 & 71)
104. BFLS' recommendation for an augmentative communication evaluation in August of 2011 was provided to the LEA. The student obtained the evaluation on August 3, 2012. (Tr. Vol. II, p. 71)
105. The student's father called the West Virginia Department of Education and voiced his concerns. He was given three names of individuals who could conduct the evaluation although the LEA's Special Education Director was still questioning who could do it. (Tr. Vol II, pp. 73 & 74)
106. At the student's ESY meeting on May 24, 2012, his parents again requested the evaluation and asked when it would take place. The iPad was mentioned at this meeting. (Tr. Vol II, pp. 75 & 76) (Parents' Exhibit 61)
107. An assessment by Professional Therapies for augmentative communication, dated August 3, 2012, found there was a definite need for an augmentative communication device more sophisticated or more suitable to the student than an iPad, which was the Vantage Lite series. (Tr. Vol II, pp. 76 & 77) (Parents' Exhibit 58)

108. The student's father took the student to an evaluation at the WVU Speech and Hearing Center on December 5, 2012. The staff at the Center did not see the student's evaluations and worked with the student for less than 20 minutes with the Vantage Lite, and the student caught onto this very quickly. There was an IEP meeting the next day for the student and the clinical supervisor drafted a letter for the father to take to the IEP. Her recommendation was for an Accent 1000. (Tr. Vol II, pp. 78 & 79) (Parents' Exhibit 45)
109. The augmentative communication device was discussed at the student's December 2012 IEP meeting. At that meeting, the LEA's DSE read the recommendation from Professional Services. It was the father's understanding when leaving that meeting that an Accent 1000 was going to be purchased and provided to the student. (Tr. Vol II, p. 79)
110. To this date, the student's father has not seen the Accent 1000. He and his wife were told at the IEP meeting they would receive four hours training per month on the device but have not been contacted concerning training. (Tr. Vol II, pp. 79-81) (Parents' Exhibit 43)
111. The student's father went to the student's school in the middle of September, 2013 and asked the principal if he could see the device. She said the student's special education teacher knew more about it. The special education teacher showed him the iPad. The father asked about the Accent 1000 and the special education teacher said she had not seen it but had heard it was in. The iPad was then sent home with the student every day. (Tr. Vol II, pp. 81 & 82)
112. At the student's January 23, 2012 IEP meeting, the LEA agreed to provide the student with ten hours of ABA therapy per week at his home school for the rest of the school year to evaluate whether it would be helpful to the student. Several members of the IEP team did not see the ABA as being beneficial. The parents explained that the student gets

social skills through his siblings and at church. (Tr. Vol II, pp. 86 & 87) (Parents' Exhibit 74)

113. The student began receiving ABA services in February of 2012 for 12 hours a week at his home school. The parents noticed within a few days of ABA that the student began making some sounds. (Tr. Vol II, p. 88)
114. BFLS' evaluation report dated March 19, 2012, and an update on ABA, IEP goals and ESY recommendations from BFLS dated May 24, 2012, showed the student making significant progress in all areas and going beyond set goals. (Tr. Vol II, pp. 89 & 90, 92) (Parents' Exhibits 69 & 59)
115. During the summer of 2012, the student went to the BFLS' Center for intensive ABA therapy for three hours a day for 13 different sessions. His mother or father drove him there but they did not seek reimbursement by the LEA for this. (Tr. Vol II, pp. 92 & 93, 116 & 117)
116. The student's parents went to his October, 2012 IEP meeting wanting to be placed with BFLS full time on a short term basis with intensive ABA but the IEP was not completed at that meeting because more information was needed by the LEA's DSE from the Director/Owner of BFLS. They also asked that school personnel get trained so when the student was reintroduced into the LEA everyone would have working knowledge of the machine. (Tr. Vol II, pp. 93-95) (Parents' Exhibit 51)
117. The student's parents wrote a letter to the LEA Board of Education requesting BFLS present a proposal to the IEP. (Tr. Vol II, p. 94) (Parents' Exhibit 48)
118. The student's parents' request at his December 2012 IEP meeting for more ABA, and to have the student placed in BFLS for a short period of time, was completely rejected. The

LEA's staff claimed the progress the student had made was under their care. The student's parents were asking for one semester for the student with BFLS. They never intended to withdraw the student from the LEA. They thought the LEA had a working relationship with BFLS. (Tr. Vol II, pp. 100-102)

119. The student's father recorded the student's May 24, 2012; October 12, 2012; and December 10, 2012 IEP meetings and notified the meeting attendees that he was doing so. (Tr. Vol II, pp. 103-105) (Parents' Exhibits 63, 52, & 44)
120. Any progress the student is making now stems back to what he gained through the ABA. (Tr. Vol II, p. 108)

TESTIMONY OF THE KLINGBERG PSYCHOLOGIST:

121. The Klingberg Psychologist is employed at WVU School of Medicine, Department of Pediatrics, Klingberg Center for Child Development. She has a doctorate in educational psychology with a focus on assessment of young children with neurodevelopmental disabilities. She is a board certified behavior analyst and licensed as a clinical psychologist. She is an expert witness in clinical psychology. (Tr. Vol II, pp. 120-123, 129)
122. The Klingberg Psychologist assesses and evaluates children at the Center with mental health and genetic concerns. (Tr. Vol II, pp. 123 & 124)
123. In the course of her evaluation of a child, the Klingberg Psychologist will determine recommended educational approaches. (Tr. Vol II, pp. 127-129)
124. The Klingberg Psychologist has reviewed the evaluations of the student from Tennessee; his LEA IEPs, progress reports, evaluations, and teacher data; independent evaluations;

therapy notes; information from BFLS; and some information concerning SGDs. (Tr. Vol II, pp. 128 & 129)

125. The Klingberg Psychologist and a staff member evaluated the student on September 3, 2013 for 2 ½ hours. The student was a very easy child to be with. He had some degree of social skills, but 60% of the time his eye contact was not directed appropriately. He had a great deal of interaction with the staff but he crossed social boundary lines in his interactions. (Tr. Vol II, pp. 130-132) (Parents' Exhibit 12)
126. The student used a lot of verbalizations with some repetitive sounds. He did not use words to communicate effectively. He would repeat a few things but only when he heard them being said. He could echo a few words but was essentially non-verbal. He got on his mother's lap and played with her hair. He was only able to point to his nose for body parts; he was not able to do shapes well; his hand control was not appropriate; and he was unable to tell them his name or his age. (Tr. Vol II, pp. 133 & 134, 150)
127. The Klingberg Psychologist did an Autism Rating Scale and based on her observation, the student fit the criteria of autism. His general level of ability in areas tested were all around three years, four months and one year, four months. He was definitely developmentally delayed. (Tr. Vol II, pp. 135 & 136)
128. It was the Klingberg Psychologist's opinion that children with the student's type of difficulties need intensive, one-on-one ABA interventions and recommended that his mother continue her efforts to get that for him and that it is critical that the student get a means of communication. (Tr. Vol II, pp. 136 & 137)
129. The student fits the criteria of moderately mentally impaired but it may not be accurate after he is tested and has a communication method. You cannot do an appropriate IQ test

at this age with a child who is non-verbal and has no means to communicate. The student has learning characteristics of a child with autism and also with mental impairment. (Tr. Vol II, pp. 143-145)

130. The Klingberg Psychologist read the triennial evaluations and functional behavior evaluation performed in 2013. The testing methods were appropriate but recommendations lacked detail and specificity for appropriate intervention for the student. She was disappointed in the functional behavior analysis because there were few descriptions of observing the child in the classroom. She does not disagree with any of the evaluations but in terms of offering the specificity the student needs to be a competent learner, she does not agree they are appropriate. (Tr. Vol II, pp. 150-158) (Parents' Exhibits 24, 27, 28 & 31)
131. The Klingberg Psychologist's evaluation said there was some progress in the student but not the amount she would expect him to make. He has made progress in receptive skills but not in labeling or expressive skills. He has missed a couple of years of good learning opportunity because he has not been taught in an appropriate way. BFLS provided very specific detailed daily reports of what the student is able to do which shows a pretty strong increase in his ability across the board. Based on that, she thinks the student can make a lot more appropriate developmental gains and would benefit from ABA methods. (Tr. Vol II, pp. 160-162)
132. The student needs intensive, reinforcement-based, 30 to 40 hours a week, one-to-one specific curriculum based instruction on what the student knows and does not know. (Tr. Vol II, p. 162)

133. It would be impossible for the student to have the level of support he needs in a classroom where he is one of 12 students with one professional and two aides. He has no functional means of communication in his current setting, is unable to focus, and is distracted. He needs to be in an individualized, distraction-free setting. (Tr. Vol II, pp. 163 & 167)
134. Research shows that between 30% to 50% of children who have appropriately well-developed ABA programs lead by behavior analysts are going to have indistinguishable characteristics from their peers. Two-thirds of the students at the Augusta Levy Center that have had treatment have gone into regular educational settings. (Tr. Vol II, pp. 168 & 169)
135. The student's IEPs indicate that instead of meeting progress levels at the end of the year, it is with prompts and increasing the level of prompting and decreasing the level of sophistication of the request and not based on mastery of skills. (Tr. Vol II, pp. 169-173) (LEA Exhibit 317)
136. The student made specific gains and broadened his skills without prompt when he was provided with intensive ABA instruction. These were more sophisticated goals than the student's IEP. He showed a lot of initiative with learning when in one-on-one therapy. (Tr. Vol II, pp. 173 & 174)
137. The student is well-cared for and will be redirected easily by his mother. He has some emerging skills but is very prompt-dependent. (Tr. Vol II, pp. 183 & 184)
138. The Klingberg Psychologist's research included Kennedy-Krieger and Eikeseth research and relate to the effectiveness of ABA for students with mental impairment. (Tr. Vol II, pp. 204 & 205) (Parents' Exhibits 127-135)

139. ABA treatment costs around \$55,000 to \$60,000 a year if done right which is the average for the country. The Klingberg Psychologist does not know what BFLS charges. (Tr. Vol II, p. 210)
140. Based on the data the Klingberg Psychologist reviewed, ABA is working for the student. The goal is always to move children back into the typical setting so it is not a lifelong program. They have done this in as short as a year and as long as two years. It depends on the child and cannot be predicted. (Tr. Vol II, pp. 210-212)

TESTIMONY OF THE DIRECTOR/OWNER OF BRIGHT FUTURES LEARNING SERVICES (BFLS):

141. Bright Futures Learning Services (BFLS) is located in Hurricane, West Virginia. The Director/Owner of BFLS (Director) studied special education at Marshall University. She was introduced to a world-renowned expert in ABA who trained her to implement ABA with a child with multiple disabilities. She worked with three consultants from the largest provider of ABA programs in Texas. She was hired to contract with the local school district in Texas to train teachers in classrooms. She moved back to West Virginia and flew back to Texas every two months to consult for that school district. She has been a consultant in four counties in West Virginia and has contracted with the WV Department of Education to train at the state autism academies. (Tr. Vol II, pp. 219-223)
142. The Director has evaluated children and implemented educational programs for 75 to 100 children. At least half of the children BFLS serves carry a dual diagnosis of mental impairment and autism. The Director has extensive experience reviewing and analyzing IEP documents. (Tr. Vol II, pp. 225 & 226)
143. When assessing a child, BFLS asks for all educational records and asks parents to send a video of a day in the life of the child. They work closely with speech therapists,

occupational therapists and physical therapists to coordinate goals and to reinforce them.(Tr. Vol II, pp. 227-230)

144. The learning technique most effective for children who have moderate to severe autism and moderate to severe mental impairment is through evidence-based behavioral perspective. (Tr. Vol II, pp. 229 & 230)
145. BFLS programs children with impaired abilities by teaching them how to imitate, how to follow instructions, and how to recognize same and difference starting with baby steps. (Tr. Vol II, pp. 230 & 231)
146. The Director was contacted at the end of May, 2011 by the student's mother. They had an end of the year IEP meeting for the student and after the meeting a LEA team member gave the mother a note with the Director's contact information and recommended that the student's mother call the Director. The Director told the student's mother that she would contact the LEA's DSE and get back to the student's mother because BFLS had a contract with the LEA for services for another student in the 2011-2012 and 2012-2013 school years. (Tr. Vol II, pp. 234-236)
147. The Director went to the student's home to meet with his mother. She was going to be in the LEA County and before she sees a child for a formal evaluation, she likes to meet them and the family. During the meeting, the student's mother received a telephone call from the LEA's IEP specialist which the Director could overhear. She was calling to say she received the BLFS' request for records release from the student's mother. The LEA's IEP specialist told the student's mother she did not know if BFLS served the LEA. (Tr. Vol II, pp. 236 & 237)

148. Because of scheduling conflicts and because the Director wanted to see the student in his ESY, it took from May of 2011 to August of 2011 for BFLS to perform the student's assessment. (Tr. Vol II, p. 237)
149. The Director first observed the student in his ESY at his home school. She reviewed the student's evaluation from the Tennessee school system and his current LEA IEP to perform her assessment. After his assessment, she reviewed additional documents from the LEA, including the student's 2010-2011 IEP for kindergarten and his 2011 IEP for first grade. (Tr. Vol II, pp. 238 & 239)
150. After seeing the student at his home school, in the BFLS clinic they first figure out what is going to motivate the student and performed the Verbal Behavior Milestones Assessment and Placement Protocol (VB-MAPP). (Tr. Vol II, pp. 239 & 240) (Parents' Exhibit 126B)
151. The VB-MAPP booklet has individual questions that are scored then graphed on a master form. BFLS also probed some augmentative communication options for the student. In the area of Mand (the student's ability to request things and tell what he wants) he scored a one, the lowest score; in expressive communication he scored a zero. He had no ability to tell the Director what something was through sign language or PECS (picture-based communication). The student babbled some and made some sounds that were non-functional with no meaning. (Tr. Vol II, pp. 240 & 241)
152. The student did relatively well in visual discriminations and in imitation abilities. He scored a zero in echoics (ex: listen to what I say and repeat it). Play and social skills were strengths. It is symbolic for a learner with autism to see splintered skills, some skills are really low and some really high, and holes in between. He scored 1 ½ points in vocal

- behavior, a zero in math and in linguistic structure. He cannot talk. This test is the most sensitive tool that exists to tell what a child can or cannot do. (Tr. Vol II, pp. 242-245)
153. BFLS also probed some augmentative communication on the iPad with the PECS app with the student and he quickly responded to it. Augmentative communication is one of the areas of expertise of BFLS and they were encouraged in seeing the student respond so quickly. (Tr. Vol II, pp. 245 & 246)
154. BFLS tried sign language with the student but his fine motor skills are impaired and it would be limiting for him to use sign language. The iPad app with the student was most promising. He critically needs a language-based way to communicate with others so he can learn. (Tr. Vol II, pp. 246-248)
155. BFLS recommended that the student have an augmentative communication evaluation and it be programmed based on Skinner's analysis of verbal behavior. The student should be taught based on that analysis and careful sequence; full-time intensive ABA; and a functional behavior assessment. (Tr. Vol II, pp. 248-250)
156. ABA is useful for the student because learners like him need things broken down into tiny steps, carefully sequenced, with specific reinforcement, making data-based decisions which is what ABA is. (Tr. Vol II, p. 250)
157. The Director attended a meeting between the LEA and the student's parents in September of 2012 chaired by the LEA's IEP specialist. The BFLS Director went over its evaluation and recommendations in which they could see the student full time at the student's home school with certified teachers and an LEA support staff member trained by the Director. It would not be necessary to hire additional BFLS staff. The LEA's IEP specialist said she

- could not commit funds and another meeting needed to be scheduled when the LEA's DSE could attend. (Tr. Vol II, pp. 250 & 251)
158. The Director and the student's parents tried to get a meeting scheduled but it was January 2012 when a meeting was held to act on the recommendations of BFLS. This was detrimental to the student because by January, BFLS' staff were committed to other children and not available to come and do the program and the LEA staff member wasn't available because she had been reassigned. The service BFLS could offer the student was 10 hours a week. (Tr. Vol II, 251 & 252)
159. At this IEP meeting, the Director of BFLS discussed its proposal to see the student at his home school but some of the LEA staff doubted it would work. The LEA's autism specialist in particular was concerned about moving the student out of his classroom at his assigned school because he liked being there. The ultimate decision was that the LEA would try ABA for ten hours a week and see what the results were and evaluate it after the trial to see if it benefitted the student. There were no other changes to this IEP. The student's ABA services started on February 6, 2012 at the student's home school. (Tr. Vol II, 252 & 253) (Parents' Exhibit 74)
160. BFLS focused on three goals with the student: tacting, manding, and receptive, which were all language goals most critical for the student. The student responded well to ABA services and the discrete-trial format. (Tr. Vol II, pp. 255 & 256)
161. The student's progress report from BFLS of March 2012, a little over a month after working with the student, showed he had a great interest in letters and letter sounds and tried to start vocalizing the sounds of those letters and at home as well. He initiated working with the BFLS staff. BFLS' staff went through the PECS' protocol and the iPad

- communication app and initiated up to 60 requests per session. (Tr. Vol II, pp. 261 & 262) (Parents' Exhibit 69)
162. BFLS had a collective list of more than 350 words the student could respond to, first as a listener (receptive) with more complex language. His rate of learning is impeded because he cannot speak. (Tr. Vol II, pp. 262-264) Parents' Exhibit 70)
163. The BFLS' end of the year before summer services update on ABA and his goals and ESY recommendations showed the student did phenomenally - in manding a request; in receptive language the student could identify more than 300 words and at least 22 letters; in expressive language he had increases by more than 30 words using the "Touch Chat" app on the iPad. (Tr. Vol II, pp. 264-267) (Parents' Exhibit 60)
164. At the student's May 24, 2012 IEP meeting, his extended school year services for ABA were discussed. The outcome was he received ABA directly six hours a week for six weeks; three hours a week for one week; and then direct program, indirect time, two hours a week for six weeks. The student's mother took him to the BFLS clinic in Hurricane where the services were provided. The student also attended the LEA school ESY services for speech, occupational and developmental therapy. (Tr. Vol II, pp. 267 & 268) (Parents' Exhibit 61)
165. At the student's ESY IEP meeting, BFLS requested an iPad for summer use at school and at home by the student because they were still waiting for an augmentative communication evaluation and they felt it was imperative that the student continue to have a voice. It was never received, so BFLS used theirs. (Tr. Vol II, p. 268)
166. The LEA's DSE told the Director that the plan for the student's home school program the next year was to use LEA staff. The Director told the student's mother BFLS was not

- going to be able to provide services in the LEA directly the way they had before and would need to discuss alternative service options. The last time BFLS saw the student and provided services to him was in August of 2012. (Tr. Vol II, p. 269)
167. At the end of the summer, the student's parents asked that the Director convey to the LEA that BFLS see the student initially at the clinic full-time for a semester so they could focus intensively on the implementation of the augmentative communication device with people with extensive knowledge of the device. (Tr. Vol II, pp. 269-270)
168. The Vantage Lite had been used for years by BFLS and the Accent 1000 was the new version. BFLS staff has extensive knowledge on how the language system is organized and how to program the device. The Accent 1000 would look different physically on the outside but the programming components were very similar. (Tr. Vol II, pp. 271)
169. Seeing the student at the BFLS' clinic for one semester was discussed at the student's October 12, 2012 meeting. The LEA members of the IEP committee were opposed to that. No agreement was reached and the LEA's DSE said they would not make a decision at this meeting and for BFLS to send a proposal and then the meeting would reconvene. (Tr. Vol II, p. 272)
170. After this meeting, the student's parents, instead of submitting the proposal of one semester and then transfer back to school requested a records review. After they reviewed the student's records, they asked BFLS to make a proposal for full-time placement which was emailed to the LEA. (Tr. Vol II, pp. 272-274) (Parents' Exhibit 250)
171. BFLS' proposal was presented at the student's December 10, 2012 IEP meeting, briefly discussed, and rejected. If the decision had been made in October or at the December

- 2012 IEP meeting to allow the student to have ABA services provided at the BFLS' clinic, there was availability and space for the student. (Tr. Vol II, p. 274)
172. There is no space at BFLS' clinic for the student now. There is a waiting list at BFLS. The Director and her team sit down and have an 11-point weighted matrix that helps determine who to enroll. The student has shown he has tremendous potential to benefit and would be at the top of the Director's list. The best case is they might be able to take the student in January on a full-time basis for 180 some days. (Vol II, pp. 275-277)
173. The student's progress on the goals implemented using ABA is excellent. (Tr. Vol II, p. 279)
174. The Director said the reports show that the student understands receptively. He still can't say anything and when taught in a method that doesn't break up the skills in small pieces, the student is not able to demonstrate what he does understand. (Tr. Vol II, p. 310)
175. It was the parents of the student who requested an increase for ABA services from six months to a year. (Tr. Vol II, pp. 311 & 312)
176. The Director did not recommend the Accent 1000, but made a recommendation for an augmentative communication evaluation. An independent evaluation and the LEA evaluation came to the same conclusion and recommended the Accent 1000. (Tr. Vol II, p. 312)
177. BFLS could work on the Accent 1000 because it was similar to the Vantage Lite they had used previously. There are currently three students at the BFLS' clinic who are using Accent 1000s which were provided by each students' LEA. (Tr. Vol II, pp. 312 & 313)
178. The Director is certified as a behavior analyst which is a national certification. (Tr. Vol II, pp. 315 & 316)

179. The best way to get the student using the SGD is by physically delivering it to someone who knows how to program it and give them time to work with the student to teach him how to use it. She has worked with the manufacturer's sales representative for a number of years. He gives a basic training and will meet with teachers or family to provide training. There is also a hotline to call. BFLS' staff is competent to train the student. (Tr. Vol II, pp. 316-318)
180. To the Director's knowledge, the three goals assigned for ABA implementation, were not goals that the LEA was working on at the same time and were not reported as progress on the LEA's report. (Tr. Vol II, p. 318)

TESTIMONY OF THE CLINICAL DIRECTOR, AUGUSTA LEVY LEARNING CENTER:

181. The Clinical Director of the Augusta Levy Learning Center is an adjunct professor at Bethany College and a developmental specialist for WV Birth to 3 and is self-employed as a Board Certified Behavior Analyst. She has a B.S. in early childhood education from Ohio University. She has been a full time staff member at Augusta Levy Learning Center since November of 2007 and has developed programs at the Levy Learning Center. (Tr. Vol III, pp. 4-6)
182. The Clinical Director administered a VB-MAPP to the student on September 23, 2013 at the Levy Center. She had no prior information concerning the student. Those at the student's testing were the Clinical Director and the Levy Center's Speech Language Pathologist. An SGD was not used but she tried to implement a picture communication system and sign language for assessment purposes. (Tr. Vol III, pp. 7-9) (Parents' Exhibit 11)

183. The Clinical Director prepared the results of her assessment of the VB-MAPP she administered to the student. The results accurately measure the skills or abilities of the student tested that day. She tested him in all categories except group. He was able to imitate a communicated request but did not make verbal requests. The student was able to imitate signs when they used sign language but due to his fine motor skills deficits, they were not clear signs. (Tr. Vol III, pp. 9-11)

TESTIMONY OF LEVY CENTER'S SPEECH LANGUAGE PATHOLOGIST (SLP):

184. The Levy Center's Speech Language Pathologist (SLP) is self-employed and provides early intervention services for West Virginia Birth to Three. She has undergraduate and graduate degrees in speech and language pathology and extensive training in ABA and Discrete Trial training. She has worked at the Augusta Levy Learning Center where she was trained to provide ABA services. She is licensed in West Virginia in Speech Pathology. She has evaluated and provided speech and language services to hundreds of children and designed educational programs for children. (Tr. Vol III, pp. 12-15)
185. The Levy Center's SLP has used and is familiar with augmentative communication SGDs that supplement children's communication needs and has reviewed the evaluations to date for the student and observed the student on September 23, 2013, for two hours. (Tr. Vol III, pp. 15 & 16, 340)
186. The Levy Center's SLP did not feel the evaluations of the student gave a clear picture. The student has no functional communication and does not have a way to relate what he wants, needs or is unable to make any comments on his environment, verbally or otherwise. (Tr. Vol III, pp. 16 & 17)

187. In August of 2010, with the information provided at the time for the student, the Levy Center's SLP would have done an intensive speech and language evaluation including one for augmentative communication appropriate devices, an SGD, and how to get the student to communicate his wants and needs. In 2010, services and programming appropriate for the student in speech and language would have been intensive services of discrete trial instruction and ABA services focused on the development of speech and language. (Tr. Vol III, pp. 18 & 23)
188. In reviewing all of the student's IEPs nothing has changed in the student's speech and language present levels from his August 2010 to December 12, 2012 IEPs. The goals themselves have not changed and prompting strategies are still present. (Tr. Vol III, pp. 22 & 23)
189. The Levy Center's SLP noted from her review that the student made exponential progress using the ABA Discrete Trial techniques in three goals which were to receptively identify pictures; to be able to expressively communicate words; and also to develop some language understanding for feature function class of words. (Tr. Vol III, pp. 24 & 25)
190. The student has huge potential. He was motivated to learn and wanted to tell the Levy Center's SLP things and was frustrated he could not communicate. He was in a room with other children and gestured toward them, but couldn't communicate to them effectively to get them to play without adult assistance. (Tr. Vol III, p. 29)
191. The Levy Center's SLP acknowledged that she is familiar with the Accent 1000 received by the LEA in the summer of 2013, which is a new device just on the market. The iPad with the Proloquo2Go is not consistent with the software used on the Accent 1000. The

iPad has significant limitations because of the student's fine motor difficulties and visual impairment. It is not a replacement for the Accent 1000. (Tr. Vol III, pp. 31-33)

192. Parents are not required generally to request an evaluation for an educational need for a child. The Levy Center's SLP would have hoped the evaluation referral would have been made by the speech/language pathologist or some of the educational personnel which is typically done. (Tr. Vol III, pp. 35 & 36)

CONCLUSIONS OF LAW

1. The student is a disabled child within the meaning of 20 U.S.C., Section 1400 et seq. of the Individuals with Disabilities Education Act (IDEA) and W.V. Policy 2419 - Regulations for the Education of Students with Exceptionalities. 126 CSR 16-1 et seq.
2. The purpose of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C., Section 1400, et. seq., is to make available a Free Appropriate Public Education (FAPE) for every disabled child regardless of the severity of the child's disability. Timothy W. v. Rochester, New Hampshire School District, EHLR 441:393 (CA-1 1989); 20 U.S.C., Section 1400, et. seq., W.V. Policy 2419-126 CSR 16-1 et seq.
3. "Free Appropriate Public Education" (FAPE) means, among other things, special education and related services that are provided in accordance with the Individualized Education Program (IEP). 20 U.S.C., Section 1400 et seq., W.V. Policy 2419-126 CSR 16-1 et seq.
4. The provision of an IEP is a procedural requirement set forth in the IDEA. 20 U.S.C., Section 1400 et. seq., W.V. Policy 2419-126 CSR 16-1 et seq.
5. The importance of the IEP cannot be understated because it is the decision making document and primary vehicle for implementing the Congressional goals and the centerpiece of the statute's educational delivery system for exceptional students. Honig v. John Doe and Jack Smith, 108 S.Ct. 592 (1988).
6. In order for the student's IEP to be valid, it must contain, among other things, a "statement of the specific educational services to be provided to such child", and "appropriate objective criteria for determining, at least on an annual basis, whether

instructional objectives are being achieved". 20 U.S.C., Section 1400 et. seq., WV Policy 2419-126 CSR 16.

7. Failure to meet the Act's procedural requirements for an IEP are adequate grounds, by themselves, for holding that the school has failed to provide a FAPE. Board of Education of the Hendrick Hudson Central District, et al. v. Rowley, et al., 458 U.S. 176 (1982); Hall v. Vance, 774 F.2d 629 (4th Cir. 1985); Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986).
8. The IDEA requires that disabled children, to the maximum extent appropriate, shall be educated with children who are not disabled, i.e., they should be mainstreamed. Each public agency shall ensure that a continuum of alternative placement is available. 20 U.S.C., Section 1400, et. seq., W.V. Policy 2419-126 CSR 16-1 et seq.
9. The Federal mandate to mainstream students to the maximum extent possible is to be balanced with the primary objective of providing handicapped children with an appropriate education. Wilson v. Marana Unified School District of Pine County, 735 F.2d 1178 (9th Cir. 1984).
10. The School District has the burden of proving the appropriateness of a recommended placement by substantial evidence. Case No. 11966 (SEA N.Y. 1988) EHLR 509:271; Sylvio v. Commonwealth of Pennsylvania, (SEA PA 1982) EHLR 553:557. Board of Educ. of Co. of Kanawha v. Michael M., 95 F. Supp. 2d 600 (S.D. W.Va. 2000) (Goodwin, J.). It must demonstrate that it has adhered to required procedural steps to guarantee the appropriateness of its placement. In Re Jefferson Local School District, (SEA OH 1979) EHLR 501:394. W.V. Policy 2419-126 CSR 16.

11. A child is receiving an appropriate education if the IEP is reasonably calculated to enable the child to receive educational benefit. Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).
12. The educational benefit must be more than trivial. Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3rd Cir. 1988). Carter v. Florence County School District Four, 950 F.2d 156, 160 (4th Cir. 1991) aff'd 510 U.S. 7; 114 S. Ct. 361; 126 L.Ed.2d 284 (1993) citing Hall ex rel. Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985). But neither is it required to provide every service or accommodation which might bring a child with disabilities an educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 199; 102 S.Ct. 3034, 3047; 73 S.Ed.2d 690 (1982); Board of Education of the County of Kanawha v. Michael M., 95 F. Supp.2d 600, 607 (S.D.W.Va. 2000). See also Sumter County School District 17 v. Heffernan ex rel. TH, 642 F.3d 478 (4th Cir. 2011); Deal v. Hamilton County Board of Education, 392 F.3d 840, 861-62 (6th Cir. 2004).
13. The IDEA does not require that a school district provide a disabled child with the best possible education and once a FAPE is offered, the school district need not offer additional educational services. MM v. School Dist. of Greenville Co., 303 F.3d 523, 526 (4th Cir. 2002) (citing Board of Education v. Rowley, 458 U.S. 176, 192 (1982) (“Rowley”) and citing Matthews v. Davis, 742 F.2d 825, 830 (4th Cir. 1984).
14. The IDEA allows for private school placement at public expense if the school district does not provide an adequate IEP, and the private placement is appropriate. 20 U.S.C. §1412(a)(10) (c) Burlington v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 369, 105 S.Ct. 1996 (1985).

15. W.V. Policy 2419-126 CSR 16-1 et seq. defines Free Appropriate Public Education (FAPE) as:

Special education and related services that: 1) are provided without charge at public expense (free); 2) are provided in conformity with an appropriate individualized education program (IEP) developed in adequate compliance with the procedures outlined in this manual and reasonably calculated to enable the student to receive educational benefit (appropriate); 3) are provided under public supervision and direction; and 4) include an appropriate pre-school, elementary school or secondary education that meets the education standards, regulations, and administrative policies and procedures issued by the WVDE, including the requirements of IDEA 2004. See also 34 C.F.R..§300.17.

16. W.V. Policy 2419-126 CSR 16-1 et seq. defines Special Education as:

Specially designed instruction, at no cost to parents, to meet the unique educational needs of an eligible student with an exceptionality, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. The term includes speech-language pathology services, vocational education, and travel training, if it consists of specially-designed instruction, at no cost to the parents, to meet the unique needs of a student with an exceptionality See also 34 C.F.R..§300.39.

17. W.V. Policy 2419-126 CSR 16-1 et seq. defines Related Services as:

Transportation and such developmental, corrective and other supportive services as are required to assist an eligible exceptional student with an exceptionality to benefit from special education. The term includes, but is not limited to, assistive technology, audiology, interpreting services, speech and language pathology, psychological services, physical and occupational therapy, clean intermittent catheterization (CIC), recreation, including therapeutic recreation, counseling services, including rehabilitation counseling, orientation and mobility services, social work services in schools, school health services, and school nurse services, early identification and evaluation of disabling conditions in students, medical services for diagnostic or evaluative purposes only, and parent counseling and training. Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device or the replacement of that device. See also 34 C.F.R. §300.34.

18. WV Policy 2419-126 CSR 16-1 et seq. defines Supplementary Aids and Services as:

aids, service and other supports that are provided in general education classes, other education-related settings and in extracurricular and nonacademic settings, to enable students with exceptionalities to be educated with students without exceptionalities to the maximum extent appropriate. Supplementary aids may include any material/curricular resource or assistance, beyond what is normally afforded students without exceptionalities, provided to support a student with an exceptionality's placement, such as

large print books, assistive technology devices, auditory trainers, curriculum adaptations and classroom modifications or aids, services and other supports. Supplementary services include any human resource or assistance, beyond what is normally afforded students without exceptionalities, provided to support a student with an exceptionality's placement, such as direct instruction, peer tutoring or note taking. See also 34 C.F.R. §300.28.

19. WV Policy 2419-126 CSR16, Glossary defines Assistive Technology Services as:

Any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

1. The evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment.
2. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
3. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
4. Coordinating and using other therapies, interventions or services with assistive technology devices, such as those associated with exiting education and rehabilitation plans and programs;
5. Training or technical assistance for professionals, (including individuals providing education or rehabilitation services) employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of the student with a disability.

20. An IEP is not reasonably calculated to provide FAPE if it is a virtual copy of or is based on a previous IEP that failed to provide FAPE. Board of Education of the County of Kanawha v. Michael M., 95 F. Supp.2d 600, 609, n. 8 (S.D.W.Va. 2000); D.B. v. Bedford County School Board, 708 F. Supp.2d 564, 586 (W.D. Va. 2010). See also Bougades v. Pine Plains Central School District, 2009 WL 2603110 (S.D. N.Y. 2009); Evans v. Board of Education of Rhinebeck Central School District, 930 F. Supp. 83 (S.D. N.Y. 1996).

21. Progress toward IEP goals, or lack thereof, is relevant to determining whether an IEP is reasonably calculated to confer educational benefits. M.S. ex rel. Simchick v. Fairfax County School Board, 553 F.3d 315, 326-27 (4th Cir. 2009); D.B. v. Bedford County School Board, 708 F. Supp.2d 564, 568 (W.D. Va. 2010).
22. “[A]n important measure of an IEP’s success is whether the disabled child has made progress *on the basis of objective criteria*.” MM ex rel. DM v. School District of Greenville County, 303 F.3d 523, 532 (4th Cir. 2002).
23. In asserting that it provided FAPE, a school district cannot “simply provide conclusory statements that the IEP was adequate.” Board of Education of the County of Kanawha v. Michael M., 95 F. Supp.2d 600, 610 (S.D.W.Va. 2000). It must provide “direct reference to the IEPs or to particular examples of connections between the goals and objectives in the IEP and methodology contained therein.” Id. at 611.
24. The LEA was required to evaluate the student’s deficits in language and communication skills and to evaluate the student for an augmentative communication device in order to provide that required service to him. As provided in WV Policy 2419, pg. 13, 126 CSR16, Chapter 4, § 2, B:

- i. Within three years of the date of the last EC, or more frequently if the parent or teacher requests *or conditions warrant (e.g., if the district determines that the educational or related services needs, including improved academic achievement and functional performance, warrant a reevaluation)*, the district *shall* conduct, as appropriate, an individual multidisciplinary reevaluation to determine a student’s educational needs and continued eligibility for special education and related services and *whether any additions or modifications to the student’s special education and related services are needed to enable the student to meet their measurable annual IEP goals...* (emphasis added).

See Swope v. Central York School District, 796 F. Supp.2d 592, 604 (M.D. Pa. 2011)(holding that failure of school district to conduct an updated psychological evaluation when district’s educational program was failing denied FAPE).

25. School districts must modify an IEP that fails to provide meaningful educational benefits or no more than de minimus educational progress. 20 U.S.C. §1414(d)(4)(A); M.M ex rel. L.R. v. Special School District No. 1, 512 F.3d 455, 461 (8th Cir. 2008). See Board of Education of Frederick County v. I.S. ex rel. Summers, 325 F. Supp.2d 565 (D. Md. 2004); D.B. v. Bedford County School Board, 708 F. Supp.2d 564, 586 (W.D. Va. 2010).
26. To be meaningful, education benefits must be more than de minimis, and school districts must demonstrate more than trivial progress toward achievement of annual goals; if IEP goals are not achieved, through more than one IEP, progress is de minimis. See Board of Education of Frederick County v. I.S. ex rel. Summers, 325 F. Supp.2d 565 (D. Md. 2004); D.B. v. Bedford County School Board, 708 F. Supp.2d 564, 586 (W.D. Va. 2010); Bougades v. Pine Plains Central School District, 2009 WL 2603110 (S.D. N.Y. 2009).
27. Compensatory education is an appropriate remedy for the failure of a school district to provide FAPE or to implement an IEP. G ex rel. RG v. Fort Bragg Dependent Schools, 343 F.3d 295, 308-310 (4th Cir. 2003); Y.B. v. Board of Education of Prince George's County, 895 F. Supp.2d 689, 693 (D. Md. 2012) (“ When a FAPE is not provided to a disabled student, the student's parents may seek an award of “compensatory education.”). Ferren C. v. School District of Philadelphia, 612 F.3d 712 (3rd Cir. 2010).
28. WV Policy 2419-126CSR16 - Documentation of Adverse Effect on Educational Performance for Students with Speech/Language impairments says:
- IDEA requires that the EC in making the determination of a speech-language impairment consider how the disability affects the progress and involvement of the student in the general curriculum. The EC must consider each student individually to determine how the student's disability adversely affects educational performance.
- Documentation of adverse effects on educational performance can be gathered from a thorough assessment of communication skills. The assessment must include student, parent, and teacher input.

Information must be recorded by the speech-language pathologist (SLP) on the Eligibility Report form.

An assessment of a student's ability to communicate, rather than isolated skill assessment, will provide information on how the impairment affects the student. The following examples may be considered when determining how the student's ability to communicate may adversely impact educational performance:

1. Sound errors, voice quality, or fluency disorders inhibit the student from reading orally in class, speaking in front of the class, or being understood by teachers, peers, or family members.
 2. Sound errors, voice quality, or fluency disorders embarrass the student. Peer relationships suffer as a result, or peers may make fun of the student.
 3. Sound errors cause the student to make phonetic errors in spelling or have difficulty in phonics.
 4. Grammatical errors create problems with a student's orientation in time.
 5. Morphological errors inhibit the student from using or making complete sentences.
 6. Semantic problems slow the student's ability to follow directions, give directions, make wants and needs known, make oneself understood, relate information to others, or fully participate in daily living.
29. The student was not provided a Free Appropriate Public Education (FAPE) by the local educational agency (LEA) within the meaning of 20 U.S.C. Section 1400 et. seq.; 34 C.F.R. Section 300.1 et. seq.; and W. V. Policy 2419 - Regulations for the Education of Exceptional Students, 126 CSR-16-1 et seq.

DISCUSSION

REVIEW OF EXHIBITS

Prior to moving to West Virginia in the summer of 2010, the student and his family lived in Tennessee. On March 31, 2009, the student was evaluated by LeBonheur Children's Medical Center in Memphis, Tennessee and he was found to have mild developmental delays and it was recommended that he have an increase in his speech therapy and further recommended that he receive ABA therapy to assist with communication and vocalization. A Functional Behavior Assessment (FBA) was found to be clinically warranted. (Parents' Exhibit 106) The student was also seen by the Boling Center for Developmental Disabilities at the University of Tennessee on November 30, 2009, when a Psychological Evaluation was performed. (Parents' Exhibits 104 & 105) The student was found to have a full scale IQ of 40. Due to the levels of both cognitive and adaptive functioning the student met the criteria for an Axis I diagnosis of Autistic Disorder and an Axis II diagnosis of Moderate Intellectual Disability. Recommendations were for the student to receive ABA services. The student was also seen by the University of Tennessee Boling Center on December 4, 2009, where he was again diagnosed with Moderate Intellectual Disability and Autism. The Boling Center recommended a placement appropriate for a child with Autism and Moderate Intellectual Disability to include a language focus on functional communication and appropriate social interactions through a strong behavioral approach and ABA services through the school or private provider. The student was five years and four months old at that time.

Shelby County Schools in Tennessee performed a Psycho-Educational Report on March 29, 2010, and based on the evaluation, the student did not meet Tennessee state assessment

eligibility standards as a student with an Autism Spectrum Disorder, but instead met the eligibility standards of a Developmental Delay. (Parents' Exhibit 101)

Upon transfer to the LEA in the summer of 2010, the LEA had an Eligibility Committee Meeting finding the student's eligible exceptionality to be Mental Impairment (MD) (Moderate) on August 24, 2010, and prepared a transfer IEP from Tennessee to West Virginia. (Parents' Exhibits 98 & 99) No additional testing of the student was performed by the LEA in developing the student's IEP. The student was provided with Speech/Language Therapy direct in a Special Education Environment (SEE) for four hours a month and Indirect Speech Therapy in the SEE for two hours per month and Occupational Therapy (OT) direct in SEE for two hours a month, commencing on August 30, 2010, until June of 2011. The student was to receive 71% of his education in the SEE and 29% in the General Education Environment (GEE). The student (age 6) was placed in a kindergarten class by the LEA which was not at his home school.

The student's Kindergarten Progress Reports (Parents' Exhibits 88-97) show that the only skills that were mastered by the student were: follows school rules and respects authority. The only other skills that showed any semblance of mastery were done by matching prompts and hand-over-hand assistance.

An IEP meeting was held on May 12, 2011. (Parents' Exhibit 85) The S/L Pathologist was not present but submitted the student's present levels of Academic Achievement and Functional Performance wherein she stated that in regard to the student's communication skills, the student can receptively identify pictures in a field of two by pointing with 70% accuracy. With a choice of two, odds are that the student could get 50% accuracy, leaving little true accuracy and shows de minimus progress. The student was also said to produce 15-20 signs in imitation when presented with common objects or pictures. The May 12, 2011 IEP eliminated

the indirect Speech Therapy contained in the student's August 24, 2010 IEP (Parents' Exhibit 98) and reduced the student's GEE to 23.45%. The annual goals and present levels were virtually identical to the previous IEP. No evaluations or assessments of the student were discussed or recommended.

It was at the May 12, 2011, IEP meeting that the mother of the student asked "if there was anything more that could be done to help her son" and was told No. The OT Therapist gave the student's mother a note at the IEP meeting, with the Director/Owner of Circle of Friends (Bright Futures Learning Services) name and phone number. (Parents' Exhibit 84) The student was still non-verbal and had no means to communicate other than gestures and eye gazes.

On May 17, 2011, the student's mother signed a "Consent and Release" form authorizing the release of the student's educational records to Bright Futures Learning Services (BFLS) and also granting permission for BFLS to conduct observations and assessments as needed. (Parents' Exhibit 83) This was also the same time frame that the LEA's IEP Specialist, in a phone conversation with the student's mother, told the student's mother that BFLS did not do ABA for the County. The Director/Owner of BFLS was with the student's mother and overheard the conversation. It was untruthful because BFLS was, in fact, at that same period of time, providing ABA services to another LEA student. The LEA did not refute the "lie" to the student's mother.

BFLS conducted an assessment of the student on August 15, 2011 when the student was seven years old. (Parents' Exhibit 80) BFLS administered the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP). The student scored 35 out of a possible 151, indicating very significant delays. It was BFLS' recommendation that the student critically needs a language-based way to communicate with others and to allow him to learn and listed as the first recommendation that an augmentative communication evaluation was needed, and further

recommended 1:1 ABA instruction delivered in a structured learning environment and a behavior support plan that is consistently applied across settings. It was BFLS' conclusion that with an appropriate communication system and structured instructional programming, the student is poised to make significant progress.

An IEP meeting was held on January 23, 2012, which indicated that the student has communication needs, but did not indicate that the student needed assistive technology devices or services and did not order an augmentative communication evaluation. However, the IEP team did decide to provide the student with direct ABA services in the SEE ten hours per week and indirect ABA in the SEE two hours a week; along with the Speech/Language and OT services carried over from all of the student's previous LEA IEPs. The student was in the SEE 86.9% and in the GEE 13.1%. Services were to commence February 6, 2012 and continue until June of 2012. (Parents' Exhibit 74)

A Speech/Language Progress Report of February 10, 2012 showed that between October 28, 2011 and February 6, 2012, the student made little to no progress. (Parents' Exhibit 71)

The student was transported from his assigned school (Madison Elementary) at 12:35 p.m. to his home school (Brookview) at 1:00 p.m. and is transported from his home school to home at 3:40 p.m. (Parents' Exhibit 72) His ABA program was held at his home school for three hours, Monday through Thursday for twelve hours of ABA therapy per week. This was not the intensive program the Director/Owner of BFLS wanted to provide to the student, but by the time the LEA got around to contracting with BFLS, BFLS did not have the personnel needed for the student's intense program. Progress reports indicate that the student in one month increased his receptive vocabulary by 300 words and 22 letters and his expressive language by 30 words (Parents Exhibits 66, 69 & 70) using augmentative communication symbols and iPad apps.

The student's mother on April 16, 2012, submitted a request to the LEA, and accompanying permission to evaluate, for an augmentative communication evaluation for the student. The school district did not initiate the augmentative communication evaluation on its own initiative even though the BFLS' Assessment obtained by the parents (Parents' Exhibit 80) recommended an augmentative communication evaluation on August 15, 2011, eight months prior.

An IEP meeting was held on May 24, 2012 to discuss eligibility for Extended School Year (ESY) for the student the summer of 2012. (Parents' Exhibits 61-63) The student was to receive six hours a week direct SEE ABA for six weeks; three hours per week direct SEE ABA for one week; and two hours per week of indirect SEE ABA for six weeks. (Parents' Exhibit 61) The student used an iPad during his ABA training, no augmentative communication or Speech Generating Device (SGD) having been provided as recommended and requested.

BFLS' update on ABA IEP goals and ESY recommendations (Parents' Exhibit 60) showed the student was making progress with the ABA services which were actually delivered for twelve hours a week instead of ten. The student was making progress in manding/requesting and receptive and expressive language goals that were established at the student's January 23, 2012 IEP meeting. The BFLS' report stated that in less than four months, the student demonstrated very significant progress in language knowledge and use and a tremendous motivation to learn. BFLS recommended that the student receive the LEA's ESY services with the use of an iPad equipped with the necessary apps. (Parents' Exhibit 60)

An Augmentative Communication Assessment was finally performed for the student on August 3, 2012, one year after being recommended by BFLS. (Parents' Exhibit 58) The Speech/Language Pathologist who performed the evaluation stated that "the student presents

with a severe to profound expressive language disorder and is functionally non-speaking". The evaluation report also stated that the student makes efforts to communicate using a few single words, gestures, facial expressions and picture symbols but his success in communicating is dependent upon familiar listeners guessing, through content, his message, which results in extreme frustration for the student and his listeners. The student is dependent on family to interpret for him and others, and writing is not an option. The student's communication needs cannot be met using natural communication methods or low level technology. The evaluation found that the student needs a Speech Generating Device (SGD) to meet his functional communication goals. The student was tried on several SGDs, including the Vantage Lite and Prologue2Go on the iPad, but recommended, based on the student's needs, a complex, portable, synthesized speech generating device. It was reported that the student was highly motivated to use an SGD to improve and facilitate his communication, and has good entry-level skills to operate it.

The LEA took one year to evaluate the student for an SGD and in frustration of the foot-dragging by the LEA, the student's parents arranged an Augmentative Communication Assessment at West Virginia University for December 5, 2012.

The student's IEP of January 23, 2012 was no longer in force after ESY and the student did not have an IEP at the start of the August 2012 school year. The LEA extended the student's January 23, 2012 IEP until October 2012 or January 23, 2012 the date being indicated differently on the one page, "Amendment to IEP without convening an IEP team meeting" form. (Parents' Exhibit 57)

An IEP meeting was held on October 12, 2012, where the student's triennial evaluation due on May 10, 2013 was discussed. The LEA had not independently evaluated the student

since he entered the LEA on August 24, 2010, almost two years prior. The only evaluations the student received were at the request of the student's parents and consisted of the BFLS' August 15, 2011 Assessment (Parents' Exhibit 80) and the August 3, 2012 Augmentative Communication Evaluation (Parents' Exhibit 58) a year later.

This was a very contentious meeting and an IEP was not developed for the student. The draft IEP dated October 12, 2012 (Parents' Exhibits 51 & 52) indicated that the student has communication needs, as all previous LEA IEPs had indicated and for the first time, that the student needed assistive technology devices and services. Under Assessment Data, the Augmentative Communication Assessment and the ABA Evaluation both requested by the parents, and Informal Assessments and Observations of April 25, 2012, were indicated. The informal assessments and observations were described as "Making progress in all areas" which was during the time period the student was receiving ongoing ABA by BFLS. This draft IEP also contained ABA services as contained in the student's January 23, 2012 IEP and is virtually a mirror image of the previous IEP. The Director of Special Education (DSE) made it abundantly clear that she and other IEP members thought the student was doing much better and no longer needed ABA. The subject matter of the SGD was discussed, but as usual, nobody at the LEA had bothered to obtain any information about what SGDs were available and when. That and all other issues were shelved until the IEP meeting of December 10, 2012.

In the meantime, the student's parents sent a letter to the DSE on October 17, 2012, requesting to inspect and review all educational records for the student. (Parents' Exhibit 50) The student's Special Education Teacher continued to send Parent/Teacher Daily Communication forms home (Parents' Exhibit 49) which daily notations, such as: "Good Day", appear meaningless. On October 29, 2012, the parents sent a letter to the LEA Board of

Education informing the LEA that they were requesting that BFLS present a proposal concerning the student's education. (Parents' Exhibit 48) It was the parents' opinion that the staff at the LEA are not familiar with the student's language needs and that BFLS has detailed knowledge and has compiled data concerning the student. The LEA staff does not have experience with a SGD, but BFLS has multiple staff members who use and program these devices on an ongoing basis and presently have three students with the Accent 1000 SGD.

The West Virginia University Speech and Hearing Center evaluated the student at the parents' request and at their expense on December 5, 2012. (Parents' Exhibit 45) The Auditory Comprehension portion of the Preschool Language Scales -5, was administered to the student to evaluate his receptive language, which was in the first percentile with an age equivalent of three years two months which is well below average for his age (eight years, four months). The student was not formally tested for expressive language, due to his lack of communication, being non-verbal. There is a significant gap between the student's receptive and expressive language abilities. The student was given the opportunity to use several SGDs including the Accent 1200. The student demonstrated the ability to intentionally and functionally use the devices.

The Accent 1000 is a slightly smaller and lighter version of the Accent 1200 and was recommended by the examiners. A phone number for a company representative to arrange a trial of the Accent 1000 and eventual purchase by the LEA for the student was provided in the Augmentative Communication Evaluation Report. (Parents' Exhibit 45) The West Virginia University clinic also prepared a Results and Recommendations Summary for the student's parents to take with them to the December 10, 2012 IEP meeting five days hence.

The December 10, 2012 IEP was a re-evaluation review and to put in place an IEP for the student because his last IEP of January 23, 2012 expired two months prior. (Parents' Exhibit 57)

All in all, fifteen persons attended the IEP meeting, including the student's parents and an impartial facilitator. Of the remaining twelve team members, all were teachers and experts representing the school district and advisors from BFLS.

It was determined that the student would not receive any ABA services from BFLS at the LEA's expense and there was a brief discussion of the ability of the LEA to train teachers and staff to use ABA. There was also discussion on the acquisition of the Accent 1000 SGD, but NOBODY had seen the device or ever inquired about its availability or if a trial SGD could be obtained immediately, even though it was recommended on August 15, 2011, and an augmentative communication evaluation was performed on August 13, 2012, *one year later*, and now *four months later* they commence to discuss it, but come to the student's IEP meeting without the slightest idea of how and when to put it into use.

The IEP of December 10, 2012 provided for the student to receive direct SEE training on the SGD three hours per week and parent training on the SGD direct four hours per month, in addition to the Speech/Language Therapy and Occupational Therapy that have appeared in all of the student's IEPs at the LEA. 11.72% of the student's education was to take place in GEE and 88.28% in SEE. Prior Written Notice (PWN) was given to the parents of the student that the LEA was going to implement the same old IEP "with the addition of an SGD for both school and home". The PWN listed as the basis for their proposal, the Augmentative Communication Evaluation, the out-of-state testing and reports (from Tennessee in 2010) and teacher and therapists' logs/notes/reports. It also rejected the proposal made by BFLS and added the reason the options were rejected is that the student had shown progress in the four months since ABA was not used (being the end of ESY on July 26, 2012 until the IEP meeting on December 10, 2012). (Parents' Exhibits 43 & 44) The other factors relevant to the district's proposal was that

the IEP committee feels strongly that the student needs to remain at school in his special education classroom where he is given opportunities to interact with his non-handicapped peers. The student is only in the GEE 11.72% of his time in school.

It is obvious after reviewing the immense number and complexity of exhibits presented at the hearing that the LEA has decided, for whatever reason, probably financial, that they are not going to provide ABA services to the student through BFLS, even though all of the progress reports and testimony of those experts who were providing ABA services documented the student's ongoing progress. It is not like the people at BFLS do not know the student, they have been included in his education since May of 2011 when the student's mother made contact with the Director/Owner of BFLS. To stall from having an IEP because the DSE and some of the LEA's teaching staff don't want to provide ABA to the student even though they have observed his progress is truly disingenuous. The decision to not provide ABA was made long before the October or December 2012 IEP meetings and the LEA set its teachers and others to make reports showing how well the student was doing without ABA. The reason he was doing so well was because of the progress the student made while he was receiving ABA from BFLS. This decision was not a team decision but an LEA decision based on manufacturing reports and graphs with practically no value. The DSE's final response to the student's parents and their advocates and BFLS staff was the LEA is not providing ABA and if you don't like it, file a due process complaint. (Parents' Exhibit 44, Pages 33-47)

The LEA made first contact with the SGD sales representative in March of 2013, and the SGD that was agreed upon was finally ordered by the LEA on April 12, 2013, four months after the December 10, 2012 IEP requiring its use by the student. It was received by the LEA in June 2013, the day after the last day of school (six months into the IEP).

To make matters worse, the brand new Accent 1000 SGD sat in the DSE's office the entire summer even though the student's IEP required its use as a Special Education Service and Related Service. The Due Process Complaint was filed on May 9, 2013, but the placement of the student does not come to a halt because of a Due Process Complaint and "stay put" would require the use of the SGD by the student. During the student's 2013 ESY, he was not even provided with an iPad with apps by the LEA.

My Interim Order directing the LEA to contract with BFLS to initiate training and implementation of the SGD rested on the fact that the LEA had no one knowledgeable on programming or implementing the use of the SGD. BFLS does have the knowledge and they were available. The time from putting the SGD in the student's IEP to the time he first saw the device is eleven months and they had no one who knew how to use the device and no training scheduled even though there was extensive discussion at the December 10, 2012 IEP meeting of who was going to be the person or persons to dedicate themselves to working with the SGD, the student, and others, none of which happened.

The line was drawn in the sand in August of 2012 when a SGD was recommended by the Augmentative Communication Assessment of August 3, 2012, and the student had finished ESY and he was without a current IEP. Instead of acting quickly and establishing an IEP requiring the use of a SGD, the LEA just extended his prior January 23, 2012 IEP until October of 2012. The IEP team failed to complete an IEP on October 12, 2012 and the student was without an IEP and wasn't being provided ABA services under the extended January 23, 2012 IEP. What could have been so difficult to have an IEP Meeting and move forward on obtaining a SGD for the student, whether borrowed, leased, or purchased? When the LEA finally had an

IEP meeting on December 10, 2012, the student was denied ABA services but the SGD was added to his IEP.

The triennial evaluations were done in the spring of 2013 and were the first evaluations done by the LEA since the student was enrolled in the LEA in 2010.

REVIEW OF TESTIMONY AND FINDINGS OF FACT

The LEA and the parents of the student both had their experts observe the student in a "snapshot" of approximately three hours. The LEA's expert psychologist in the areas of child, forensic, school and clinical psychology, observed the student during ESY, and reviewed all of the reports and filings that are enumerated in the discussion. It was his opinion that the student will never live independently; he will never be able to read or do any functional math; and his language is going to be augmented in some way. (FOF 7) It was his opinion that people do better in group learning (FOF 11), and he believes the student needs to be socialized (FOF 12). It is the LEA's expert psychologist's opinion that the student is moderately mentally impaired with a severe expressive language disorder. (FOF 5)

The student's Special Education Teacher (SET) has worked with the student for the 2012-2013 and 2013-2014 school years (FOF 20). She is extremely well-credentialed and is certified in mentally moderately impaired, autism behavior disorder and the learning disabled. (FOF 21) The SET uses a picture communication exchange called PECS with the student to identify things in the student's environment. (FOF 25) According to the SET, there are twelve students in the student's classroom. (FOF 26) The student used the Proloque2Go augmentative communication app with an iPad in the classroom and the SET gives the student modified assignments in everything. (FOF 27 & 35) The SET keeps a daily communication log for the parents of the student noting whether the student has had a "good day". (FOF 31) (LEA Exhibits 101-227)

The student's parents were supportive of the SET. (FOF 33) The SET has not been provided any training on the Accent 1000 SGD and none has been scheduled, and she cannot address SGD goals without the equipment. (FOF 36)

The LEA's Speech/Language Pathologist (SLP) has been in that position for twenty-seven years and has a daily caseload of approximately 50 students. (FOF 39) She has worked with the student since he moved to the LEA County in August 2010, but hasn't worked with the student for the 2013-2014 school year. (FOF 40) The SLP, in December 2012, commenced looking for an Accent 1000 SGD as recommended by the WVU Speech and Hearing Center. Due to unavailability, the student was provided with an iPad with Proloque2Go which the student uses at school and at home. (FOF 42 & 43) It was the SLP's opinion that the student would benefit from an augmentative communication device. (FOF 44) The SLP has not seen and knows nothing about the Accent 1000 SGD. (FOF 45) The SLP opined that the student's December 10, 2012 IEP is appropriate and that four hours per month of speech/language therapy was an appropriate amount of therapy for the student to benefit from his current classroom placement. (FOF 47) It was the SLP's opinion that the student needs a SGD for his education but does not think there has been any impact on the student in not having a dedicated SGD a year after it was recommended and placed in the student's IEP. (FOF 50 & 51) According to the SLP, the student is functionally non-verbal. (FOF 52)

The student's Occupational Therapist (OT) has worked with the student since he arrived at the LEA in 2010 and has attended his IEP meetings and is currently using the goals set out in the December 10, 2012 IEP. (FOF 58 & 59) The OT has noticed progress in the student since August of 2010 but does not believe that the student has the skills to use a SGD now. (FOF 60)

The LEA's IEP Specialist has worked in that position since 1988 and has written IEPs for the thirty-eight years she has worked for the LEA (since 1975). She met the student in August 2010 and has attended his IEPs as have his parents. (FOF 61-63)

The LEA's Director of School Psychological Services (DSPS) administered the Wechsler Nonverbal Scale of Ability and the Beery-Buktenica Development Test of Visual Motor Integration to the student. His non-verbal test showed the student with an IQ of 37 which is extremely low. (FOF 66 & 67) It was her opinion, based on her evaluation, that the student benefits from being with non-disabled children in the school system. (FOF 68)

The student's new Speech Pathologist is employed privately but contracts with the LEA. She has a provisional West Virginia license and has been working as a speech pathologist for two months and was assigned to the student one month prior to this hearing. (FOF 69) The Speech Pathologist has had the Accent 1000 in her possession for two weeks and is trying to get familiar with it on her own time. (FOF 72) It was the Speech Pathologist's opinion that the student is functionally non-verbal. (FOF 73)

The LEA's Director of Special Education (DSE) has been teaching with the LEA since 1979 and has been the Director since 1986. She acknowledged that the student's parents had requested that the student be provided with ABA services on numerous occasions. It was an issue at most of the IEP meetings for the student so in 2012, it was decided to give it a try (FOF 76) from February to June 2012 at the student's home school for approximately three hours in the afternoon. (FOF 77) At the October 12, 2012 IEP meeting, the DSE raised a concern over the continuation of the ABA trial, and refused to include it in the student's IEP and in fact, did not complete the student's IEP which expired in August of 2012.

BFLS gave the LEA a proposal to place the student in their facility to which the DSE gave the parents a Prior Written Notice (PWN) that the IEP committee was not going to approve the BFLS proposal (LEA Exhibit 250) because they were pleased with the student's classroom progress and didn't feel ABA therapy was making significant changes and they claimed the student was unhappy and exhibited behavior problems. (FOF 79)

The Accent 1000 became available in March of 2013, was ordered on April 12, 2013, and received by the LEA in June of 2013 and was kept in the DSE's office all summer. (FOF 81) The student was not provided with the Accent 1000 SGD until November of 2013, pursuant to this Hearing Officer's Interim Order of October 14, 2013. A year had passed since the student received the Augmentative Communication Evaluation and the student still did not have his required SGD.

The student's mother stated that the student's major disability is that he cannot speak or communicate and that his major educational need in school is to be able to communicate. (FOF 89) Upon enrollment of the student, the LEA did no evaluations of the student and ABA was not discussed. (FOF 92) The student's mother was of the opinion that the LEA was a babysitting service for her son. (FOF 93) At the May 12, 2011 IEP meeting, the student's mother asked if there were any other therapies to help the student progress. The IEP team did not seem to care about the student's educational progress. A member of the team gave a note to the student's mother with the name and phone number of the BFLS Director/Owner. (FOF 94) Consent and release forms were sent to BFLS by the student's mother. The IEP specialist told the student's mother that she did not know if BFLS could service the LEA, which was untrue. (FOF 97)

The student's father expressed the same concerns as the student's mother in that the student needs to express himself. (FOF 98) An assessment date for an ABA evaluation by

BFLS was set for August 15, 2011, and the parents of the student gave the LEA a signed consent form on May 17, 2011, three months prior. (FOF 100) BFLS used a voice output device with the student during the evaluation. The student's vocal and sign language were extremely limited despite years of therapy and an Augmentative Communication Evaluation was recommended. (FOF 102) It was BFLS' opinion that the student needed to learn through ABA instruction in a structured learning environment, not by group teaching. (FOF 103) The assessment for the Augmentative Communication Evaluation found a definite need for a SGD more sophisticated than an iPad. (FOF 107) The student had another Augmentative Communication Evaluation on December 5, 2012, at West Virginia University and was able to work with a Vantage Lite SGD. The student caught on quickly. (FOF 108)

To the date of the hearing, the student's father has not seen the Accent 1000 that was discussed and agreed upon at the December 10, 2012 IEP meeting, eleven months prior. (FOF 109 & 110) Not only have they not seen the device, they have not been trained on it per the student's IEP.

At the student's January 23, 2012, IEP meeting, the LEA agreed to provide ABA services to the student to evaluate whether it would be helpful to the student. (FOF 112) ABA services began in February of 2012 for twelve hours a week at his home school and the parents noticed within a few days that the student began making sounds. (FOF 113)

The BFLS' evaluation report dated March 19, 2012 and an update on ABA, IEP goals, and ESY recommendations dated May 24, 2012, showed the student making significant progress in all areas and going beyond set goals. (FOF 114) At the IEP meeting on October 10, 2012, the student's parents and the Director of BFLS wanted the student to be placed with BFLS full-time for a short term basis with intensive ABA. The IEP was not completed and the Director of BFLS

was asked to submit a proposal to the LEA. (FOF 116 & 117) At the December 10, 2012 IEP meeting, the subject of ABA was completely rejected. The LEA claimed that any progress by the student was under their care. (FOF 118) It is the parents' opinion that any progress the student is making is from his gains through ABA. (FOF 120)

The expert clinical psychologist for the Klingberg Center for Child Development at the West Virginia University School of Medicine is also a board-certified behavior analyst. (FOF 121) The Klingberg Psychologist reviewed all of the student's evaluations and records from Tennessee, progress reports, IEPs, teacher data, therapy notes; and information on BFLS and SGDs. (FOF 124) The student did not use words to communicate effectively and he was unable to tell the psychologist his name or age. (FOF 126) The Klingberg Psychologist did an Autism Rating Scale and based on it and her observations, she believes the student meets the criteria of Autism, and that his general level of ability in the areas tested were all around three years, four months, and one year, four months although his age was nine years. (Parents' Exhibit 112) The student was found to be definitely developmentally delayed. (FOF 127) It was the Klingberg Psychologist's opinion that the student needed intensive one-on-one ABA intervention and that it is vital that the student get a means to communicate. (FOF 128) Testing is difficult to do with a non-verbal child. After reviewing all of the evaluations by the LEA for the student's triennial review in the spring of 2013, the Klingberg Psychologist does not disagree with any of the evaluations, but offered that the specificity that the student needed to be a competent learner were lacking and she does not agree they are appropriate. (FOF 130)

The student has made progress in receptive skills but not in labeling or expressive skills. The Klingberg Psychologist thought the student has missed a couple of years of good learning opportunity because he was not taught in the appropriate way and recommended (FOF 131)

thirty to forty hours per week one-on-one ABA. She did not think a classroom with eleven other students, as in the student's current classroom setting at the LEA, where the student is prompt-dependent was appropriate. It was her opinion that, based on the data reviewed, ABA is working for the student. It is not a life-long program and usually takes one to two years for best results.

The Director/Owner of BFLS is an expert and has evaluated and implemented educational programs for seventy-five to one hundred children. The Director was contacted by the student's mother in May 2011 after an IEP meeting and told the student's mother that she contracted with the LEA for services for another student in the LEA. The Director was present when the LEA's IEP specialist told the student's mother that she did not know if BFLS served the LEA. (FOF 147) The Director observed the student in his ESY at his home school in the summer of 2011 and administered the Verbal Behavior Milestones Assessment and Placement Protocol (VB-MAPP). The student, in the area of manding (requesting things) scored a one, the lowest score; in expressive communication he scored a zero. The student had no ability to tell the Director what something was through sign language or PECS (pictured-based communication). The student babbled some and made some sounds that were non-functional with no meaning. (FOF 151) Play and social skills were the student's strengths. (FOF 152) The student, at the evaluation by BFLS, was introduced to an iPad with the PECS app and he quickly responded to it. Augmentative communication is one of the areas of expertise of BFLS. (FOF 153) BFLS recommended an Augmentative Communication Evaluation, full-time, intensive ABA, and a Functional Behavior Assessment. (FOF 155)

An IEP meeting was held in September of 2011 that the Director of BFLS attended to go over her recommendations and proposal for providing the student ABA at his home school. The

meeting was re-scheduled for January 23, 2012 (four months later) because the DSE was not present and the chairperson (the IEP specialist) could not commit funds.

Due to the long wait, BFLS did not have the staff needed to provide the student with the proposed proposal. However, the LEA decided to provide the student with ABA to see what the results were and if it benefitted the student. The ABA services started February 6, 2012, at the student's home school. The goals established for BFLS were tacting, manding, and receptive, which were all language goals most critical for the student. The student's learning is impeded because he cannot speak. The end of school year update on ABA showed the student did phenomenally. (Parents' Exhibit 60)

The student attended ESY and was to be provided an iPad for summer use at school and at home. It was not provided so BFLS used theirs.

At the end of ESY, the DSE told BFLS and the student's parents that BFLS was not going to be able to provide services in the LEA. The last time BFLS saw the student and provided services to him was August of 2012. (FOF 166)

At the October 12, 2012 IEP meeting, the DSE asked BFLS to send a proposal and then would reconvene the IEP meeting. At the student's parents' request, BFLS submitted a proposal to the DSE asking for compensatory education services for the student because of all of the LEA's foot dragging. (LEA Exhibit 250) BFLS' proposal was addressed at the December 10, 2012 IEP meeting, where it was briefly discussed and rejected. BFLS has experience with the Accent 1000 and its predecessor, the Vantage Lite, and there are currently three students at BFLS' clinic who are using the Accent 1000 which was provided by each student's LEA. (FOF 177)

The Clinical Director of Augusta Levy Learning Center administered a VB-MAPP to the student on September 23, 2013, at the Levy Center. (Parents' Exhibit 11)

The Levy Speech/Language Pathologist (SLP) is licensed in West Virginia in Speech Pathology and is familiar with Augmentative Communication SGDs. She reviewed the evaluations of the student to date and observed the student on September 23, 2013 for two hours. She did not feel the evaluations of the student gave a clear picture. The student has no functional communication and does not have a way to relate what he wants, needs, or make comments on his environment verbally or otherwise. (FOF 186) When the student was six years old in 2010 when he moved to West Virginia, the Levy SLP would have done an intensive speech and language evaluation including an Augmentative Communication Evaluation. An SGD along with intensive services of discrete trial instruction and ABA services focused on the development of speech and language is what the student needs to make educational progress. (FOF 187) It was her opinion that requests for evaluations for an educational need for a child is usually made by a S/L Pathologist or some educational personnel, not the parents. (FOF 192)

At the hearing, LEA witnesses commented on the fact that the student is social and plays with other students, but he can't talk to them. As pointed out by several of the parents' experts, the student is highly distractible and cannot stay focused on his education if something is going on in the room. All testimony of the parents' experts indicate the student needs a distraction-free environment in order to learn, which he does not receive in a class of twelve special education needs students. The student has clearly not been provided with a FAPE by the LEA. They know he needed an Augmentative Communication Evaluation in August of 2011, received the Evaluation a year later in August of 2012, and we are now in November 2013 and the student still doesn't have the SGD despite the fact that the LEA has had the SGD for five months. I

believe the LEA teachers have the desire to implement the student's IEP but cannot get "moving forward" with providing the student with his IEP-required services. I could order the IEP team to write the student an appropriate IEP but fear that may take months to create and even longer to implement. The student is in dire need of a means to communicate. He is non-verbal, cannot sign, and has no means of communicating with teachers or others.

In fact, the student if asked, cannot tell you his name, his address, his telephone number, or who his parents are. When he arrived at the LEA, he was non-verbal and three years later, he is still non-verbal. If the LEA had been timely, the Augmentative Communication Evaluation would have been accomplished in a few months, not a year, and a SGD could have been acquired before the passage of two years.

The proposal made by BFLS, at the parents' request, for a FAPE and Compensatory Education services from the LEA dated October 29, 2012 (LEA Exhibit 250) is quite thorough and well-reasoned.

In the case of Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/05), the Court developed a qualitative standard for awards of compensatory education in order to place disabled students in the same position they would have occupied but for the school district's violation of IDEA. The Court adopted a flexible approach based upon the needs of the child who has been denied FAPE.

In the case of Draper v. Atlanta Indep Sch System, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 3/6/8), the Court specifically approved a private school placement as a form of compensatory education when the school district continued to use an ineffective reading program for three years despite the student's failure to make progress.

The only entity that can provide the student with the service he so desperately needs in a short frame of time is BFLS and the proposal presented by BFLS to the LEA on behalf of the student and his parents is for the LEA to contract with Bright Futures Learning Services (BFLS) to provide the program to the student as outlined in the October 29, 2012, Proposal for FAPE and Compensatory Education Services that was proposed by BFLS. (LEA Exhibit 250) The student needs a voice, whether by SGD or speaking. If the student does not become verbal, he will probably never live independently.

At the end of the recommended one hundred eighty (180) instructional days in the BFLS' clinic, an evaluation should be performed to insure he is progressing and needs further ABA services or is ready to return to the LEA school system with a proper IEP.

In the student's parents' Complaint, counsel for the student and his parents, is asking for the LEA to be responsible for services at the LEA's expense for as long as the student is eligible for special education, and related services, and extension of the student's eligibility to age 24, and monetary damages. This Hearing Officer did not find that the LEA acted with malice in its attempt to provide the student with a FAPE that would warrant such remedies. The student's immediate need is to have a functional expressive way to communicate. The student did progress somewhat while at the LEA school, but his progress was trivial or de minimus and he was denied a FAPE by the LEA from August 2011 to the present, except for the four month trial of ABA services at Bright Futures Learning Services.

The LEA has the burden of proving that the IEP is reasonable, calculated to provide some educational benefit. Board of Education of the Co. of Kanawha v. Michael M., 95 F.Supp. 2d 600 (S.D., W.V. 2000). As in the Michael M. case, the student has a developmental disorder characterized by significant deficiencies in communication skills, social interaction and motor

control, and like the student in this case, would not talk. After receiving ABA discrete trial training, the student had a successful school year with meaningful speech.

The LEA in the case at bar, did not meet its burden of seeing the student's IEPs were adequate and the parents and the student meet their burden that the program at BFLS is appropriate under the IDEA. The fact that the school district's program is unsuccessful is strong evidence that the IEP should be modified during the development the student's next IEP. A new IEP will not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed.

The United States District Court of New Jersey, in B.G. v. Crawford Board of Education, 702 F.2d Supp. 1158 (1988 DNJ) concluded that "The cooperative efforts of parents and school authorities are inextricably intertwined with a handicapped child's inalienable right to a free appropriate education. Whoever disrupts that cooperative venture, and thus interferes with the child's right - whether it be parents or school authorities - does so at his or her financial peril."

DECISION

1. The LEA failed to provide the student with a FAPE as required by IDEA and WV Policy 2419.

2. That the Interim Order entered by this Hearing Officer on the 14th day of October, 2013, shall be incorporated and made a part of this Order. (Copy attached)

3. That the LEA, within five days of the date of this Order as compensatory education, shall contract with Bright Futures Learning Services of Hurricane, West Virginia, to develop and implement an ABA program for the student, in the Bright Futures Learning Services' clinic or in the student's home school, as deemed appropriate by the Director/Owner of Bright Futures Learning Services, consisting of one hundred eighty (180) instructional days of service to the student, as set forth in the October 29, 2012 Proposal to the LEA. (LEA Exhibit 250) The one hundred eighty (180) days of ABA services shall commence after the introduction and training set forth in this Hearing Officer's Interim Order.

4. That the Director/Owner of Bright Futures Learning Services be given full authority to implement the student's ABA plan and be provided by the LEA with any and all support and personnel deemed beneficial or necessary to transition the student to the classroom as expeditiously as possible at the end of his compensatory education.

5. That any and all necessary training for the student's parents, teachers and aides shall be provided by BFLS or the LEA based upon the recommendations of the Director/Owner of Bright Futures Learning Services. If Bright Futures Learning Services is of the opinion that the student needs any evaluations or special services, the LEA shall provide such evaluations or special services or pay for the acquisition of the same from entities other than the LEA.

6. That the parents of the student shall be reimbursed by the LEA for any mileage costs incurred for the transportation of the student.




RAYMOND G. FRÈRE
IMPARTIAL DUE PROCESS
HEARING OFFICER

DATE: December 6, 2013

APPEAL RIGHTS

A decision made in a hearing is final unless a party to the hearing appeals the decision through civil action. Any party aggrieved by the findings and decision made in a hearing has the right to bring a civil action in any state court of competent jurisdiction within 90 days of the date of the issuance of the hearing officer's written decision or in a district court of the United States.

By: 
Raymond G. Frere, Impartial
Due Process Hearing Officer

Date: December 6, 2013

**WEST VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL PROGRAMS**

IN THE MATTER OF KAMRIN D. MULLINS

Due Process Hearing No. D13-018

INTERIM ORDER

The Due Process Hearing in this matter was held on the 7th, 8th and 9th days of October, 2013, at the LEA Board of Education Conference Room.

At said hearing, it was ascertained that Boling Center for Development Disabilities at the University of Tennessee conducted a psychological evaluation of the student on the 30th day of November, 2009, and diagnosed the student with Moderate Intellectual Disability and Autism and recommended that the student might benefit from Applied Behavior Analysis (ABA) which supports the learning of new information through teaching and repetition. (LEA Exhibit No. 1)

A March 29, 2010 Psycho-Educational Report of the student which was conducted by Shelby County Schools, Department of Exceptional Children, Bartlett, Tennessee, found that the student's delays were the result of developmental delays. (LEA Exhibit No. 25)

Bright Futures Learning Services, LLC of Hurricane, West Virginia, conducted an assessment of the student on August 15, 2011 and found that the student *critically* needs a language based way to communicate with others and to allow him to learn. The student's program should focus heavily on remediating his language deficits and recommended 1:1 Applied Behavior Analysis (ABA) instruction for the student along with access to a computer and specialized software for learning and generalizing language. (LEA Exhibit No. 70)

Professional Therapy Services, Inc. of West Virginia conducted an Augmentative Communication Assessment of the student on August 3, 2012 and concluded that based upon the student's communication needs, the student being essentially non-verbal, that he required a

speech generating device (SGD) to meet his functional communication goals. It recommended that the student's SGD provide for direct access using a touch screen with picture symbols. (LEA 95)

The student was seen for an Augmentative Communication Evaluation at West Virginia University Speech Center on December 5, 2012. The conclusions of this evaluation were that there was a significant gap between the student's receptive and expressive language abilities. The student was presented with two SGDs and demonstrated the ability to intentionally and functionally use both devices. The recommendation of the Speech Center was that the student needed a voice output device and that after a trial period, the LEA should purchase an Accent 1000 Speech Generating Device for the student. (LEA 257)

The student's IEP of December 10, 2012, noted that the student has communication needs and needs assistive technology devices and services, and in particular, a speech-generating device for school and home use.

The LEA first made contact with an equipment salesman for Prentke Romich, the manufacturer of the Accent 1000 speech generating device in March of 2013 and the Accent 1000 SGD was ordered by the LEA on April 12, 2013. (LEA 258) The Accent 1000 SGD was shipped on June 7, 2013, and received by the LEA in June of 2013.

The student's current speech/language pathologist has been a speech pathologist for two months and has worked with the student for one month and was trying to learn the Accent SGD on her own time.

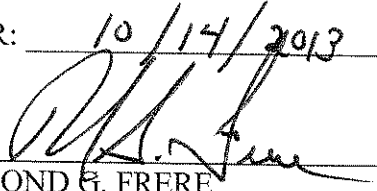
Based on the testimony adduced and exhibits entered into evidence at said Due Process Hearing, it is evident that the student is nine plus years old, is expressively non-verbal while having some receptive language skills, and is in dire need of being able to communicate **NOW!**

The LEA, having no other plan to put the Accent 1000 into use by the student, should immediately contract with Bright Futures Learning Services, Inc. to orient and train the student, the student's parents, the LEA's speech/language pathologist, and other LEA personnel that provide direct instruction to the student on the use of the Accent 1000 SGD.

IT IS, THEREFORE, ORDERED that the LEA shall immediately contract with Bright Futures Learning Services, Inc. to orient and train the student, the student's parents, the LEA's speech/language pathologist, and the other LEA personnel that provide direct instruction to the student on the use of the Accent 1000 SGD immediately so the student can effectively communicate.

IT IS FURTHER ORDERED that the LEA, through its counsel, report progress on its contract with Bright Futures Learning Services, Inc. and initiation of the Accent 1000 SGD instruction for the student to this Hearing Officer by November 1, 2013, along with the submission of Memoranda of Law and Proposed Findings and Fact and Conclusions of Law by counsel for the LEA and counsel for the student.

IT IS FURTHER ORDERED that this Interim Order shall not be amended except by consent of all parties, unless the Court shall modify the same to prevent manifest injustice, and such modification may be made on application of counsel.

ENTER: 10/14/2013

RAYMOND G. FRERE
Impartial Hearing Officer