

DUE PROCESS HEARING

Case Number D08-011

LEA: [REDACTED] County Schools
Local Education Agency

COUNSEL: [REDACTED] Esquire

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Esquire

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Esquire

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

PARENTS: [REDACTED]
Parents of Student
Initiators

COUNSEL: [REDACTED] Esquire
[REDACTED] Esquire

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

STUDENT: [REDACTED]

DATE OF BIRTH: January 17, 2005

DATE OF REQUEST: February 8, 2008

DATE OF RECEIPT BY
LEA: February 11, 2008

DATE OF NOTIFICATION
TO HEARING OFFICER: February 12, 2008

DATE OF HEARING: March 25, 26 and 27, 2008

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

TRANSCRIPTION: Court Stenographer

STATUS OF HEARING: Open to Public

STUDENT PRESENT: No

POST HEARING
SUBMISSIONS: April 30, 2008 (Filed by counsel for parents of the student
and by counsel for LEA)

DECISION DATE: May 30, 2008

HEARING OFFICER: Raymond G. Frere, Esquire

WITNESSES FOR STUDENT/PARENTS:

[REDACTED]
Klingberg Center
Psychologist for parents of student

[REDACTED]
Lovaas Institute Consultant for Augusta Levy

[REDACTED]
Special Education Coordinator for LEA

[REDACTED]
Mother of the Student

[REDACTED]
Father of the Student

[REDACTED]
Autism Special Education Teacher for LEA

[REDACTED]
[REDACTED] Program Coordinator

[REDACTED]
Easter Seals Child Development Specialist

WITNESSES FOR THE LOCAL
EDUCATION AUTHORITY:

[REDACTED]
Parents' Behavioral Education Psychologist

[REDACTED]
Special Education Coordinator for LEA

[REDACTED]
LEA's School Psychology and
Special Education Expert

DUE PROCESS HEARING

PROCEDURAL BACKGROUND

A request for a hearing in this matter was made by the attorney for the parents of the student on February 8, 2008, and was received by the West Virginia Department of Education on the 11th day of February, 2008. By Memorandum from the Department of Education dated the 12th day of February, 2008, 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 25th day of April, 2008.

A Telephonic Pre-Hearing Conference Call was conducted on the 15th day of February, 2008, between this Hearing Officer, counsel for the LEA, and counsel for the student and his parents. The Due Process Hearing was scheduled for the 25th, 26th, 27th, and 28th days of March, 2008, commencing at 9:00 a.m. in the [REDACTED] and the deadline for the decision in this matter was extended at the request of all parties from the 25th day of April, 2008, to the 9th day of May, 2008. A Pre-Hearing Conference Order dated the 18th day of February, 2008, setting forth the matters discussed during the Telephonic Pre-Hearing Conference and scheduling matters, was prepared and forwarded to all parties.

The Due Process Hearing in this matter was held on the 25th, 26th and 27th days of March, 2008, in the [REDACTED]

Based upon a joint motion of counsel for the LEA and counsel for the student and his parents, this Impartial Hearing Officer entered a Post-Hearing Order in this matter on the 3rd day of April, 2008, extending the deadline for post-hearing submissions or Memoranda of law from

the 11th day of April, 2008, to the 30th day of April, 2008, and extending the deadline for the decision in this matter from the 9th day of May, 2008, to the 30th day of May, 2008.

Post-hearing briefs were timely received by this Hearing Officer from counsel for the LEA and counsel for the parents of 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.

ISSUES

1. Should the LEA be required to reimburse the parents of the student for the parents' unilateral placement of the student in a private Lovaas clinic due to the LEA's inability to provide a FAPE to the student in a timely manner?
2. Were there any procedural deficiencies by the LEA that would have deprived the student of a FAPE thereby entitling the parents of the student to reimbursement for their unilateral placement of the student in a private clinic?

FINDINGS OF FACT

1. The student is a male child, three years of age, and has been determined to be an eligible disabled student who meets the criteria for a pre-school special needs class under Policy 2419, Regulations for the Education of Students with Exceptionalities (126 CSR 16-1 et seq.) and who by reason thereof, is eligible to receive special education and related services. (Tr. p. 85)
2. 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 autism and autism treatment and has a national psychology license. (Tr. pp. 19 & 20)
3. The Klingberg Psychologist first saw the student in June of 2007. She authored a letter to the student's physician dated July 5, 2007, and a letter of service dated June 25, 2007 concerning the student. Her report of July 5, 2007 states that the student meets the criteria for a diagnosis of autism. (Tr. pp. 20 & 21) (Parents' Exhibits Nos. 2 & 3)
4. The Klingberg Psychologist said that ABA treatment, particularly discrete trial, is the only proven and replicated method of intervention that provides success for most children with an autism disorder. It means that the child is provided a curriculum based on their current skills and what is appropriate for a child of that age. It is a particular method of teaching that involves a command, response, and a reinforcement. (Tr. p. 22)
5. "Discrete" means that the child is given a very discrete and spare setting that will provide the most opportunity for learning. Often there is a very limited opportunity for noise, color, or any involvement that would distract the child. A young child with autism is very distractible. (Tr. p 21)

6. The Klingberg Psychologist said a diagnosis of autism often means that the child is not able to learn from the environment or manage in a regular classroom with typically developing children who can absorb noise and activity, and color and still learn. Very young children with autism need to be in an environment that is very restrictive in order to learn. She opined that it is counter-productive to have them in a typical LRE classroom. (Tr. pp. 23 & 24)
7. The Klingberg Psychologist said research into ABA analysis and discrete trial training intervention indicates that the earlier and more intensively and individualized the program is, the better the outcome for the child. There is a window of time between ages two and about five where the child has more opportunity to learn. (Tr. pp. 24 & 25)
8. The Klingberg Psychologist observed the LEA's discrete trial classroom on March 17, 2008, but not with the student present. When she arrived she noted a teacher working on one-on-one activities with a student in a typical classroom setting – sitting at a round table in the middle of the room. The teacher and child were doing some type of discrete trial training. (Tr. pp. 26 & 27)
9. The Klingberg Psychologist said the discrete setting for ABA therapy needs to be individualized for each child. It was her opinion that the classroom she observed would not have been an appropriate setting for this student because it was full of toys, books and activity centers. It would have been very distracting. (Tr. pp. 27 & 28)
10. The child that the Klingberg Psychologist observed at the LEA's discrete classroom had only been there for a few days and the staff were just getting to know this child. There was one-on-one support for each child. (Tr. pp. 28 & 29)

11. The Klingberg Psychologist did not review the IEP proposed for the student by the LEA. She said having the words "individualized instruction through discrete trial teaching" in the student's IEP would be the first step; more important would be if it were delivered appropriately. (Tr. pp. 34 & 35)
12. The Klingberg Psychologist testified no child with autism will have the same program, nor will they require the same setting nor a particular brand as much as they require excellent intervention based on ABA discrete trial principles, individualized, and provided intensively in the setting that's necessary for that specific child. (Tr. p. 37)
13. It is the Klingberg Psychologist's opinion that [REDACTED] provides the best treatment in the Tri-State area because they provide the most research-based intensive individualized one-on-one treatment for children with autism. (Tr. pp. 37 & 38)
14. The Klingberg Psychologist did not know until she received a letter from the LEA's Special Education Coordinator that they were providing a one-on-one ABA discrete trial classroom. (Tr. at p. 38)
15. The Clinical Supervisor and Consultant for the Lovaas Institute, an independent consultant firm, has a bachelors in communication disorders; and has 15 credits of graduate work pertaining to applied behavioral analysis and clinical psychology. She designs programs based on the Lovaas method for children with autism and supervises staff to implement the procedures. She provides consultative services for the A/L. (Tr. pp. 41 & 42)
16. The Lovaas Institute Consultant for [REDACTED] does observations of students at [REDACTED] every four to six weeks during sessions with an instructor and provides on-site training with the instructor and makes program modifications as needed. During workshops, she meets with

the entire team, including parents and children.. She monitors a child's progress in between workshops through data collection via email with [REDACTED]. (Tr. pp. 42 & 43)

17. The Lovaas Institute Consultant for [REDACTED] has been involved with the student's consultations since his involvement with [REDACTED] in August of 2007. (Tr. p. 43)
18. The Lovaas Institute Consultant for [REDACTED] was not in the LEA's IEP meetings for the student. The only involvement she had was to provide proposed specific goals for the family to take with them to the IEP meetings which were intended to be implemented in a one-to-one setting with discrete trial training and goals that were geared toward the student's success to become independent through communication, language, social play and self-help. (Tr. pp. 44 & 45)
19. The Lovaas Institute Consultant for [REDACTED] finds it effective to support a discrete trial program offered in a school through her visits to the site, observing children, and providing consultation and training to the providers of services. (Tr. at p. 45)
20. The Lovaas Institute Consultant for [REDACTED] said it takes a lot of training to understand the discrete trial method. The consultative services she provides are so the staff can learn and comprehend all of the procedures that she recommends and can carry them out and be able to use clinical judgment based on the training provided. (Tr. pp. 46 & 47)
21. The LEA's Special Education Coordinator (SEC) has a bachelor's degree in elementary education and a master's degree in special education; and 18 hours of credit towards an endorsement in autism and educational leadership through Marshall University and West Virginia University. (Tr. p. 49, 212)
22. The SEC has worked with the Autism Partnership consultants, a Lovaas methodology consulting firm, since they commenced their contract with the LEA. (Tr. p. 212)

23. The LEA's SEC became a full-time employee of the LEA in 2000 as the autism specialist. She traveled from school to school, classroom to classroom to meet with general, special education, and resource teachers who teach students with autism. She provided interventions and modifications. In 2005, she became the Special Education Coordinator. (Tr. pp. 211 & 212)
24. The SEC offers support and is a resource to special education staff in [REDACTED] as well as to special education students and their families. (Tr. p. 212)
25. The SEC first met the parents of the student at the student's ninety day face-to-face transition meeting at the LEA's Board office. (Tr. p. 213)
26. The notice of the 90-day face-to-face transition meeting was provided by West Virginia Birth to Three. The SEC was contacted by the family service coordinator to set up the meeting for the 17th of October, 2007, which was ninety days before the student's third birthday. The purpose of this meeting is to ensure a smooth transition from West Virginia Birth to Three services to the public school system for the student. (Tr. pp. 213 & 214) (LEA Exhibit No. 5)
27. The SEC explained to the student's parents that a child with autism could go into an LEA Special Needs Preschool where there was a teacher, an aide with eight children; or a Universal Preschool – with eleven classrooms across the county with twenty children with a teacher, aide, and constructive consultative teacher for children with an IEP. There are three locations throughout the county providing the Special Needs Preschool. There are eight children in the a.m. class and eight in the p.m. class. Each classroom has a teacher and an aide. (Tr. pp. 51 & 52)

28. The SEC remembers that the student's mother asked if she could observe the LEA's preschool programs. The SEC felt it premature because they did not know where the student's placement would be. She said that observations are permitted and explained the practice. (Tr. p. 62)
29. There were two IEP meetings for the student and the SEC attended both of them. An IEP meeting was set for January 14, 2008. At that meeting a draft IEP was developed by the team. The IEP team reconvened on January 16, 2008. (Tr. pp. 62, 213)
30. An eligibility meeting was held on January 4, 2008, to review the evaluations that were completed for the student and to go over them with his family and then determine a primary area of exceptionality for the student. The SEC was invited to the eligibility meeting. At that meeting, it was determined that the student was eligible for a preschool special needs class. (Tr. pp. 213- 215) (LEA Exhibit No. 8)
31. The final IEP draft was prepared at the January 16, 2008 meeting. The parents of the student had representation by their legal counsel, and the director and program coordinator of the [REDACTED] Learning Center. (Tr. p. 215) (LEA Exhibit No. 10)
32. The SEC said the student's present levels were developed in a collaborative way at the IEP meeting on January 14 and then reviewed at the January 16, 2008 meeting. After being given the Batelle Developmental Inventory, a statement was written for every present level: The classroom teacher wrote a present level paragraph stating how the student did at the evaluation. There was written input from the student's parents, written input from the speech therapist, and written input from the occupational therapist. [REDACTED] entered their present levels of performance for the student indicating target behaviors, skills he had

acquired, and what current behaviors and current programs he was involved in at [REDACTED].

This material was reviewed on January 14 and 16. (Tr. pp. 215-217) (LEA Exhibit No. 10)

33. The SEC said the student's annual goals were very extensively developed by the team. It was definitely a collaborative effort. Every single person around the table had input in creating these goals. Every behavior goal of the student that was down on paper on January 16, 2008, and the 17 page document that was provided by the Lovaas Institute Consultant for [REDACTED] were agreed upon. The group went back and forth and compared those to ensure they were all included and every goal from the recommendations provided by A/L were incorporated. (Tr. pp. 217 & 218)
34. The services identified on the student's IEP were: Part B: Special Education Services – discrete trial teaching indicating it will be a direct service in a special education environment, 1,695 minutes per week. Part C: Related Services: Therapies that the student qualified for: Occupational therapy – direct service in a special education environment, 45 minutes per week; speech therapy – direct service in a special education environment, 30 minutes two times per week (60 minutes per week). This is a total of 1,800 minutes of discrete trial teaching or 30 hours per week. (Tr. pp. 66, 218 & 219)
35. The student also qualified for special transportation which is a special education bus – a direct service as part of his IEP. (Tr. p. 219)
36. The IEP indicates the student's placement was a "separate education classroom" because he is in the three to five age and he was in a special education environment 100% of the time. Large group was not included as part of the student's instruction mode. However, his IEP indicates on page 7 under the second goal: "individual/large group." It was an

oversight that this was not marked out because the team removed this exact wording everywhere else on the student's IEP. (Tr. pp. 220 & 221)

37. The SEC said that there was no objection or concern expressed by the student's parents or anyone else during the IEP meeting concerning his present levels; the wording of his annual goals; the language used to measure success in terms of annual goals; or the use of the phrase "discrete trial teaching". It was a collaborative effort. There was a lot of discussion but they did not move on until everyone was in agreement. The SEC said there was no request for discrete trial therapy instead of discrete trial teaching. It was a universal decision that the student needed one-on-one individual discrete trial ABA and that could be best provided in the LEA's R Classroom. (Tr. pp. 69 & 70, 223 & 224)
38. The parents of the student and their counsel were permitted input during the development of the IEP and did not object to any substantive part of the IEP. Neither the parents nor anyone on their behalf provided raw data generated by A/L as part of its program. (Tr. p. 225)
39. Following the IEP meeting, school personnel from the LEA observed the student at [REDACTED] to see where he was and observe the program, since the parents of the student requested fifteen days to observe the LEA's R Classroom. (Tr. pp. 225 & 226)
40. The parents of the student had not rejected his IEP at the time that the LEA staff visited [REDACTED]. The observation was not necessary for the development of the student's IEP, because the LEA had [REDACTED] representation at his IEP meeting. (Tr. p. 226)
41. The LEA has had an agreement with Autism Partnership's consulting firm since 2004 when the R Classroom was developed. Autism Partnership offers ongoing training to the LEA staff involved in using the Lovaas ABA discrete trial model. They come to the LEA

on a quarterly basis to work with staff; provide parent meetings with staff at R Classroom to go over current programs and to look at progress; and provide parent training. They are always available via e-mail, phone calls and phone conferences. (Tr. pp. 79, 80, 227, 228, 236 & 255)

42. The SEC believes that the IEP developed for the student would provide him with the educational program to move him toward kindergarten. She believes it was a true collaboration with his parents and with input from the student's private placement. She believes that with the LEA's collaboration with Autism Partnership and their expertise, the student would benefit from the LEA's services. (Tr. p. 228 & 229)
43. The WV Department of Education was contacted to find out if the student's age was a factor in the classroom. Their response was that if it is not in Policy 2419 and if the student is receiving one-on-one, having other children in the classroom who are older would not be a factor. (Tr. p. 232)
44. The LEA currently has a child the age of the student, in one-on-one ABA therapy with discrete trial training for 30 hours a week in R Classroom. (Tr. pp. 235 & 236)
45. There are two aides working with the student's teacher in the classroom. One has completed the coursework for her Autism mentorship and is awaiting the paperwork. They have all received extensive training with Autism Partnership. They hold credentials that entitle them to aide classification under West Virginia law and are highly qualified. (Tr. pp. 251 & 252, 255)
46. The SEC said research indicates that 20 to 40 hours of discrete trial teaching is recommended. Autism is a spectrum disorder; some are more severe and go all the way to

Asperger's higher functioning autism. Some students along the spectrum may do fine with 10 hours of discrete training and others may require more than 30 hours. (Tr. 256)

47. The SEC said R Classroom has one-on-one instruction involving ABA principles, which is discrete trial training in every component. The LEA refers to it by the term "individualized instruction." (Tr. p. 51 & 75)
48. Discrete trial teaching takes place in every component of the R Classroom. The goals in the proposed IEP involve discrete trial teaching through the occupational therapist; the organized play on the playground; every component of the student's day in the proposed IEP involves this teaching method. (Tr. p. 75)
49. The SEC said the team explained to the student's parents at the IEP meeting every section of the IEP and discussed it at length. They were told there would be up to four children in the R Classroom, a teacher, and two aides. (Tr. p. 75)
50. The program is individualized for each child. The students in the R Classroom all have an IEP. (Tr. at p. 76)
51. The LEA's prior written notice form to the parents denying responsibility for tuition and costs of the parents' unilateral placement was in response to the parent's ten-day letter asking for reimbursement of tuition at [REDACTED]. The SEC signed the document which indicates the LEA made a FAPE available to the student in a timely manner. (Tr. pp. 77-79) (Parents' Exhibits Nos. 12 & 14)
52. The SEC did not observe the student in his current placement at the [REDACTED] Center and has not reviewed his current programming notebook from there. (Tr. p. 81)
53. The SEC read the student's monthly progress reports from his [REDACTED] Lovaas consultant when they were given to the IEP team at the January 14 meeting but did not have access to the

reports prior to that date. The student's parents provided the team with Easter Seals information and verbal progress from the [REDACTED] program. (Tr. pp. 81 & 82)

54. The SEC has never met or observed the student. (Tr. p. 82)

55. The student's IEP meeting was on January 16, 2008 and his parents chose to take fifteen days to observe the R Classroom and look over the goals proposed. The SEC indicated on the initial consent form that in fifteen days the parents would bring the signed final IEP to the board office but it never happened. The student started at [REDACTED] in August 2007 and has been there approximately four months. (Tr. pp. 82 & 83)

56. The mother of the student said that the student started occupational and speech therapy and worked with a developmental specialist in the West Virginia Birth to Three Program and that they noticed he had some issues in April of 2007. (Tr. p. 85)

57. The parents talked to their physician about their concerns with the student's behavior and lack of language. He referred the student for evaluation to the Klingberg Center at WVU where they met with the Psychologist. The Klingberg Psychologist prepared a report dated July 5, 2007. (Tr. pp. 85 & 86) (Parents Exhibit No. 2)

58. The student's teachers at the [REDACTED] completed a school questionnaire form in order to facilitate an evaluation of the student by the Klingberg Center. The form was provided to the parents to complete, but the student's mother passed it on to his teachers. (Tr. pp. 86 & 87) (Parents' Exhibit No. 4)

59. The student can be behaviorally difficult and be a challenge to redirect to appropriate behaviors and play, to get him to comply, to get him to attend to what he needs to be doing, and just being distracted in general. (Tr. pp. 87 & 88)

60. The LEA performed numerous evaluations at the request of the student's parents. (Tr. p. 90) (LEA Exhibits Nos. 5-11)
61. It was the mother's testimony that she initially requested an evaluation of the student on September 26, 2007. The first evaluations completed are dated December 21, 2007. (Tr. p. 91) (LEA Exhibits Nos. 21 & 22)
62. The Autism Special Education Teacher and the speech therapist involved in the IEP process observed the student at [REDACTED] after the IEP had been finalized on January 16, 2008. (Tr. pp. 92 & 93)
63. The LEA did not ask for any data or records from [REDACTED] to use in its evaluation prior to the January 16, 2008 IEP for the student. (Tr. pp. 93 & 94)
64. The mother of the student said that at the January 16, 2008 IEP meeting she kept saying that the IEP needed to say one-on-one ABA therapy with discrete trial, because it needs to be a one-on-one situation with the student. According to the student's mother, the LEA's attorney said they don't call it one-on-one because it is a staffing issue—that individualized means the same thing. (Tr. p. 96)
65. The parents of the student observed the R Classroom program after the IEP was proposed on January 16, 2008. The mother observed a situation that she didn't believe was appropriate for the student. The room would have been very distracting for him. They had tables and the student was just beginning to be introduced to the table so he wouldn't be able to work at a table at that point. The room was really big. (Tr. p. 98)
66. The mother of the student said she does not know what the teacher's capability would be to do ABA discrete trial with her son because he can be very difficult and challenging. (Tr. p. 100)

67. The mother of the student said he needs a one-on-one person to be attentive to him so he can learn and progress. It was the mother's opinion that the whole environment at the R Classroom would not provide the student with educational benefit and could actually be harmful to him. As a parent, she's concerned. (Tr. p. 101)
68. When the parents of the student met with the SEC in the 90 day face-to-face meeting on October 17, 2007, there was not a lot of discussion about the R Classroom, in particular. The different programs provided by the LEA were discussed. (Tr. p. 102)
69. At the January 14, 2008, IEP meeting the mother of the student provided a list of goals and specific objectives prepared by the Lovaas Institute Consultant for [REDACTED]. She does not believe they were incorporated. The mother said that at the January 16 meeting they had to continually say, it really needs to say this, because it is not included. They had to make a lot of changes. (Tr. p. 102)
70. The parents of the student did not accept the LEA's IEP program for their son because the mother said the school had known about the student transitioning into their program back in September and the things they said they could do were not in place. (Tr. pp. 107 & 108)
71. The mother of the student indicated that in September of 2007 she requested the LEA to perform evaluations of the student. The list of exhibits provided by the parents of the student contains a consent to evaluate signed by the mother of the student on December 21, 2007. There were no exhibits identified as "consent to evaluate" dated the 26th day of September, 2007, in the parents' exhibits; and said exhibits were not provided to the LEA five (5) business days prior to the Due Process Hearing. Said exhibits were only provided by counsel for the parents of the student at the Due Process Hearing and marked as LEA Exhibits Nos. 21 & 22. This was the first knowledge the LEA had of the mother of the

student providing any consent to evaluate dated the 26th day of September, 2007. (Tr. pp. 111-121) (LEA Exhibits Nos. 21 & 22)

72. The mother of the student is not certain that the behaviors listed on the student's IEP came directly from materials provided to her and developed by the Lovaas Institute Consultant for [REDACTED]. (Tr. pp. 111 & 112)
73. The mother of the student agreed that the IEP team went over every single reference in the IEP which mentioned large group therapy, removed it and substituted "individual instruction". She pointed to one instance where "large group" was not changed. She does not recall the IEP team making a decision about keeping this particular instance as "large group." She very reluctantly admitted it was possible the one instance it was not changed could have been an oversight. (Tr. pp. 113-115) (LEA Exhibit No. 10)
74. The parents of the student pay \$1,227.27 a month for the student's services at [REDACTED]. The per month cost has gradually increased. When the student started at [REDACTED], he was there on a part-time basis but they averaged out the costs for the August 2007 to August 2008 school year so they pay the same amount each month. The 2007-2008 year tuition totaled \$13,500. It is for the full year program. The student is currently there five days a week from 8:00 a.m. to 3:00 p.m. Normal yearly tuition at [REDACTED] is \$36,000 a year. (Tr. pp. 126 -128) (LEA Exhibit No. 20)
75. The Autism Special Education Teacher for the LEA earned a bachelors degree in early childhood education. She is licensed in special education and has her certification of multi-categorical and regular education for pre-K to 4. She has an endorsement in autism which she earned at Bethany College and also has an endorsement in reading. She is licensed to teach special education in West Virginia. (Tr. pp. 133 & 134)

76. The Autism Special Education Teacher has not met the student. She was teaching a class at R Classroom when the Klingberg Psychologist was observing, on March 17, 2008. (Tr. pp. 135 & 161)
77. The Klingberg Psychologist came to R Classroom on a day when the Autism Special Education Teacher was in the beginning stages of working with a new student. She is trained to first get to know the student and the programs are developed from there. She is still learning his reinforcements. (Tr. pp. 136 & 148)
78. At the time the January 16, 2008 IEP was proposed for the student, there were two students in R Classroom – one third grader and one second grader. The student would have been a preschooler. (Tr. pp. 136 & 145)
79. The instruction at R Classroom is driven by the content of each student's IEP. They must go strictly from the IEP and that's how they plan their teaching. Each semester and each student can be completely different. (Tr. pp. 138 & 139)
80. The Autism Special Education Teacher has looked at the IEP proposed for the student. She said if there was a need for the student to have his own schedule, it would be arranged around his needs. (Tr. p. 142)
81. The services the student would be receiving under Part B of the proposed IEP are discrete trial teaching for 1,695 minutes per week. (Tr. p. 144) (LEA Exhibit No. 10)
82. The Autism Special Education Teacher has two aides, and the student would receive one-on-one ABA intensive therapy all day if his IEP required it. (Tr. pp. 145 & 146)
83. One of the Autism Special Education Teacher's aides is working on her autism mentorship. The aides and the Autism Special Education Teacher are trained quarterly through Autism Partnership's consultants. (Tr. p. 146)

84. The Autism Special Education Teacher uses systematic prompting strategies and was using those when her class was being observed by the Klingberg Psychologist on Monday, March 17, 2008. She was using differential prompts. (Tr. pp. 148 & 149)
85. There was an observation by the [REDACTED] Program Coordinator with the parents of the student. The Autism Special Education Teacher believes she was using differential reinforcement at that time and systematic prompting strategies. (Tr. pp. 149 & 150)
86. The Autism Special Education Teacher was at the student's January 16, 2008 IEP meeting. (Tr. p. 152)
87. The Autism Special Education Teacher knows that the program offered to the student by the LEA was data-driven and researched by Lovaas. There is research to support what she does. (Tr. p. 155)
88. A consultant from Autism Partnership comes to the Autism Special Education Teacher's classroom every quarter. She consults with the teacher and checks the needs of the students. She makes sure the programs are being run the way they are supposed to. She continually trains the Autism Special Education Teacher and her aides and sees they are teaching the Lovaas method of ABA. The Consultant studied with Dr. Lovaas at UCLA. The Consultant observes what the Autism Special Education Teacher is doing and provides corrective feedback. She can be contacted by e-mail and phone. (Tr. pp. 156-158)
89. Parents of autistic children can receive training by the consultants on one-on-one ABA. (Tr. p. 158)

90. The Autism Special Education Teacher said that if the student were in her classroom and toys, tables and colors, and spaces were a distraction for him, the room would absolutely be modified. (Tr. p. 159)
91. The proposed IEP has never been implemented for the student, and to the Autism Special Education Teacher's knowledge, the student has never been a student in the LEA. (Tr. p. 160)
92. The Autism Special Education Teacher said she could provide the student with high quality applied behavioral analysis with discrete trial teaching if he were her student. Based on the student's IEP, she believes she could provide him with an appropriate education, and can ask for assistance from the Autism Partnership. (Tr. pp. 160 & 162)
93. The [REDACTED] Program Coordinator is a speech/language pathologist. She has a bachelors degree in interdisciplinary speech and language pathology and a masters degree in speech and language pathology. She is accredited by the American Speech-Language-Hearing Association and has a certificate of clinical competence to practice speech/language pathology. She has an Ohio and West Virginia speech license. She has been employed with [REDACTED] since August of 2006 . (Tr. pp. 162, 163 & 175)
94. The [REDACTED] Program Coordinator knows the student. She oversees the implementation of the programs dictated by the Lovaas consultant for the student and is involved in his particular programming. She also works one-on-one with students. She sits in on all initial consultations and oversees the therapists as they implement programs and she also implements some programming. (Tr. p. 164)

95. As a speech/language pathologist, the [REDACTED] Program Coordinator also consults with the development of the student's programming. She was in on the student's initial consultation and follow up consultations. (Tr. pp. 164 & 165)
96. There are nine therapists and the [REDACTED] Program Coordinator delivering therapy at [REDACTED]. The Center Director is also a trained therapist. (Tr. p. 165)
97. The [REDACTED] Program Coordinator observed the Autism Special Education Teacher's autism classroom three different times: in October of 2007, November of 2007 and January 16, 2008. (Tr. pp. 165 & 166)
98. On January 16, 2008, the [REDACTED] Program Coordinator observed the Autism Special Education Teacher, an aide, and a student implementing discrete trial programming which is a three-part component or sequence where there is instruction, a response, and a consequence. At times, she did not observe all three components in that progression. (Tr. pp. 166 & 167, 169)
99. The [REDACTED] Program Coordinator does not believe the Autism Special Education Teacher was using differential reinforcement when she observed her. She opined that the Autism Special Education Teacher used absolutely no prompting strategies that were sequential. (Tr. p. 168)
100. The [REDACTED] Program Coordinator said R Classroom was furnished with elementary school sized tables and chairs suitable for an older child. From what she knows of the student, she does not believe what she observed on January 16, 2008, was appropriate for the student. (Tr. p. 171)
101. The [REDACTED] Program Coordinator said the student definitely needs a one-on-one intensive treatment plan directed by someone experienced in the curriculum for children with

- autism, specifically, Lovaas, because it is the most research-based method available. The student has to have constant redirection. It is very labor intensive to track those behaviors and stay consistent with the implementation of the behavior plan. (Tr. pp. 172 & 173)
102. From her experience working with children with autism, the [REDACTED] Program Coordinator said they can regress if withdrawn from 30 to 40 hours of intensive therapy; which is why [REDACTED]'s program runs year round. (Tr. p. 174)
103. When the student began receiving therapy at [REDACTED], it was on a very abbreviated basis, one or two hours a day. A couple of weeks ago, he began receiving five day a week instruction. (Tr. p. 176)
104. Initially there was a transition period for the student because of his inability to tolerate the intensity of the therapy. By the end of two hours when he started out he was exhausted. After that initial two hours, he would go to childcare. (Tr. p. 177)
105. When the student stopped taking naps at Easter Seals, they knew he was able to tolerate a full day at [REDACTED]. The full day transition was started in January 2008. (Tr. p. 177)
106. The therapists at [REDACTED] have varying levels of college education. There is no technical certification for an ABA therapist. However, the [REDACTED] therapists receive ongoing training every five weeks from the Lovaas consultants. The therapists receive 70 hours of initial training under the supervision of someone working hands on with the children. (Tr. pp. 177 & 178)
107. Most of the students at A/L receive outside occupational therapy and parents absorb the cost. There is communication between outside therapists and consultants. The [REDACTED] Program Coordinator provides speech therapy. (Tr. pp. 178 & 179, 181)
108. None of the therapists at [REDACTED] have an autism endorsement. (Tr. p. 180)

109. The [REDACTED] Program Coordinator's observations in October and November of 2007 were for other students but on January 16, 2008, it was an observation for the student's proposed program. (Tr. p. 180)
110. The [REDACTED] Program Coordinator was also at the student's IEP meeting on January 16, 2008. (Tr. p. 180)
111. The Director of the Child Development Center (CDC) is a Specialist working for the Easter Seals Rehabilitation Center. She has a degree in elementary education from Marshall University and also has had special education classes. (Tr. pp. 182 & 183, 185)
112. The student attended the Child Development Center at Easter Seals in the Birth to Three Program. He started at five days a week and his services were tapered off when he started at [REDACTED] two half days which was slowly increased to two full days, three full days and then four full days. Eventually, he was only at Easter Seals on Fridays. As of March, 2008, his services ended at Easter Seals. (Tr. pp. 183 & 184, 187)
113. The CDC Director said she saw the student making progress when he was receiving a combination of all of the following services: Birth to Three; [REDACTED]; and Child Development. He is still getting occupational therapy services as an outpatient at Easter Seals. (Tr. p. 189)
114. The Parents' Behavioral Education Psychologist (Parents' BE Psychologist) has taught psychology at Bethany College for thirty-two years. He received a bachelors in psychology from Alma College in 1971; masters in psychology in 1973; and PhD in psychology in 1975 – both from Kent State University. (Tr. pp. 191 & 192)
115. The Parents' BE Psychologist teaches courses called "Modification of Behavior" and "Experimental Psych 2" which are heavily focused on learning. He also teaches two

courses in statistics which bears directly on his expertise in terms of reading, interpreting research and what it means. (Tr. pp. 192 & 193)

116. The Parents' BE Psychologist was qualified as an expert in behavioral educational psychology. (Tr. p. 193)
117. There are two acronyms used most often in literature to describe what's most appropriate, in his opinion, for children with autism based on research. One is called "discrete trials ABA." Another term that is used is IBT which is another term for discrete trials ABA and focuses more specifically on therapeutic aspects. "T" stands for therapy, "I" stands for intensive, and "B" for behavioral therapy. (Tr. p. 194)
118. The Parents' BE Psychologist said there are a couple of dozen different forms of therapy, many of them individually applied, dealing with children with autism that are not discrete trials ABA. (Tr. p. 195)
119. The Parents' BE Psychologist cannot imagine using ABA without reinforcement being differential. Some behaviors would be reinforced; some would not. It's fundamental to ABA. It would be difficult to not at least start with prompting but at some point may be able to quit prompting through fading. (Tr. p. 197)
120. According to the Parents' BE Psychologist, anyone looking at the literature involving treatment for children with autism will find that the only form of therapy – not teaching or training – because it is therapy - that has a track record in terms of replicated studies showing effectiveness is discrete trials ABA. (Tr. at pp. 197 & 198)
121. The Parents' BE Psychologist said one of the fundamental aspects of discrete trials ABA is to do intensive therapy typically two, three or four years and at that point, in 40 to 50

percent of the cases, depending on the study you look at, the child is able to return to a normal educational setting. (Tr. p. 199)

122. The Parents' BE Psychologist believes that the success rate of the study with Gina Green as co-author was 42 to 43 percent which is comparable to what Lovaas found in his 1987 original study. (Tr. pp. 199 & 200)
123. Literature supports that a key concept of the use of discrete trials ABA, is that the focus is not just on self-maintenance skills or education, but on social aspects and skills. It is a comprehensive approach to the problem of autism. (Tr. pp. 201 & 202)
124. Any studies that the Parents' BE Psychologist has seen recently recommend starting with a child before the age of four. (Tr. pp. 204 & 205)
125. It is essential that anyone providing this therapy have intensive pre-service preparation and professional development and the skills and knowledge necessary to deliver that type of therapy. The recommendations universally support intensive directed education in discrete trials ABA. (Tr. p. 205)
126. The Parents' BE Psychologist said the recommendation is 30 hours or more per week of time spent in discrete trials ABA one-on-one with one child and one therapist or teacher. (Tr. p. 206)
127. The Parents' BE Psychologist does not think if the classic style of ABA discrete trial training is being delivered, it is appropriate to mix children of chronological age in a separate classroom. He does not believe you can adequately deliver discrete trials ABA one-on-one if there are other people in the room, but he stated that is not directly his area of expertise. (Tr. pp. 206-208)

128. The Parents' BE Psychologist did not familiarize himself with the services provided to the LEA by Autism Partnership. (Tr. p. 209)
129. The LEA's School Psychologist and Special Education Expert (LEA's Expert Psychologist) is a Professor of School Psychology at Marshall University Graduate College. He has a private psychological consulting firm where he consults on a regular basis with school systems and attorneys in West Virginia and Southeast Ohio. He has been involved with students with autism his whole professional career. He has a PhD from Ohio State University. He is a licensed clinical psychologist; licensed and certified school psychologist; and licensed professional counselor. (Tr. p. 260-262)
130. The LEA's Expert Psychologist belongs to the West Virginia Psychological Association; has been a member of the American Psychological Association since 1976; member of the West Virginia School Psychology Association and former president; member of the National Association of School Psychologists and Association for Supervision of Curriculum Development; the 1993 National School Psychologist of the Year; and the only psychologist to ever receive the honor of Distinguished West Virginian. He has written five books, authored numerous articles, and made hundreds of presentations. He has testified in court or administrative proceedings as an expert witness in school psychology, special education law and practice, and all areas of clinical psychology. (Tr. pp. 262-265) (LEA Exhibit No. 1)
131. The LEA's Expert Psychologist reviewed the following documents with respect to the student: the Birth to Three records from Easter Seals with an occupational therapy report dated March 22, 2007, a speech and language evaluation dated April 2, 2007; and a child development specialist report dated March 27, 2007. These are the three reports that are

used to establish eligibility for those three services. The LEA's Expert Psychologist also read the LEA's psychological evaluation which was an OT report dated December 21, 2007, a PT report dated December 21, 2007, and an educational specialist report dated December 21, 2007. He read the proposed annual goals and objectives written by the Lovaas Institute Consultant for [REDACTED] dated January 8, 2008; two consultant reports written by their consultant – one dated August 6/7 of 2007 and one dated 2/28-29 of 2008 which was the first treatment plan written for the student and the most recent treatment plan; and the student's IEP written on January 16, 2008.

132. The LEA's Expert Psychologist observed the student in his current setting at [REDACTED] for about three hours on March 18, 2008; he spent the afternoon in the LEA's R Classroom. (Tr. p. 267)
133. The LEA's Expert Psychologist did not evaluate the student but from what he observed, he believes his diagnosis of autism is appropriate. (Tr. p. 267)
134. The LEA's Expert Psychologist said that the model used at [REDACTED] is the Lovaas ABA model of therapy of discrete trial training. Each child has a treatment room and basically get three two-hour intensive treatments per day. The student stays in the room; the therapists go into the room to work with him. [REDACTED] varies the therapists working with him, sometimes there is one with the student; sometimes two. The children come out of the therapy session and snack for about twenty minutes. Each person has an individual with them and there is at least a one-to-one ratio there at all times. The LEA's Expert Psychologist said the [REDACTED] program is excellent and is as classic as he's ever seen ABA therapy implemented which was developed by Lovaas. The [REDACTED] program is as intensively offered as he's ever seen. (Tr. pp. 267 & 268)

135. The LEA's Expert Psychologist said a consultant from the Lovaas Eastern Division comes in from New Jersey for a day or two every month to help the therapists and provide supervision. They conduct a two-day workshop and develop the goals and objectives for each child until the next visit. The LEA's Expert Psychologist based his testimony from his observation, from talking with the Executive Director of [REDACTED]. He was accompanied by the A/L Program Coordinator the entire time of his visit. (Tr. p. 269)
136. The LEA's Expert Psychologist said the consulting services are the backbone of the program because that person writes the treatment plan. The initial plan for the student was written by the Lovaas Institute Consultant for [REDACTED] on January 8, 2008. (Tr. p. 270)
137. The LEA's Expert Psychologist interviewed the consultant from the LEA's consulting firm, Autism Partnership, by telephone for almost an hour. It is his understanding that the scope of services provided by Autism Partnership to the LEA is very similar to what [REDACTED] has by their consultants. (Tr. p. 271)
138. One of the people who did one of the landmark studies in the Lovaas research is the author of the book that Autism Partnership uses as its model treatment plan called: "A Work in Progress". It's an ABA approach that John McEachin, a student of Lovaas with a PhD from UCLA, adopted. The primary difference between pure Lovaas ABA training at A/L and the Autism Partnership program at the LEA appears to be the Autism Partnership's willingness to work with schools and to allow it to be done in the schools. The Lovaas program is adopted and all of the same principles are applied, but integrated into a school model. (Tr. p. 273)
139. Autism Partnership's consultant told the LEA's Expert Psychologist that she comes to the LEA's school four times a year for four or five days which is equal over the time of a year

as [REDACTED] consultants spend with [REDACTED], so it comes out to the same number of days. Because the teacher at the R Classroom was new, the Autism Partnership consultant came two weeks the first visit to help the special education teacher get started. The model is discrete trial training. The difference is the R Classroom model is more a school model than [REDACTED]'s therapy model. [REDACTED] is a therapy model and has treatment plans and therapists. The R Classroom model has teachers and functional behavioral assessments. (Tr. pp. 273-275)

140. The LEA's Expert Psychologist said there is some controversy in the autism community and literature about how to integrate with schools. The [REDACTED] staff contends that their average time to transition a child back to school is two to three years because the model is so restrictive that the children (autistic children handle change poorly) have to make major changes in the way they operate. The big issue is generalizing children to other places. The Autism Partnership's belief is that to not make the transition so severe, you should provide services in the school so that it is seamless as the child grows older. There is no data to say which way is better. (Tr. pp. 275 & 276)
141. The LEA's Expert Psychologist reviewed the student's IEP dated January 16, 2008, and based on it, his observation of the student, the information he gathered from the LEA, information from representatives of [REDACTED], the Autism Partnership consultant, and the Lovaas Institute consultant, he thinks the IEP is reasonably calculated to confer educational benefit to the student. He thinks it is hard to do an IEP when you haven't had the child and believes that an IEP is a work in progress. He thinks it is a good IEP but will be better once the staff at the school get the chance to interact with the child. It was his

opinion that both programs are based on the same discrete trial training model, same goals and objectives, and same target behaviors. (Tr. p. 277)

142. The LEA's Expert Psychologist said the LEA's program would not have the same intensity as the [REDACTED] program because the [REDACTED] program is a therapy model. The Expert opined that the ABA discrete trial training method works for autistic children, and there are five really good studies to show that it works. What is not known is when you go to less than 30 hours, how much difference it makes. If you go to the model [REDACTED] has, the transition out into a public school will be more difficult for the student. (Tr. pp. 279-281)
143. The LEA's Expert Psychologist clearly differentiated between what is the best therapy and what is the best education. He said you would be a fool not to be impressed by the therapy being done at [REDACTED] but it is not a school; it is a very well done clinical treatment program. It is medical; not educational. The question in this case is whether or not schools should pay for therapy. (Tr. p. 282 & 283)
144. The LEA's Expert Psychologist saw that the qualifications of the two therapists from [REDACTED] were that one has a bachelors degree in special education from Bethany College and the other has a teaching certificate. There are 14 professionals for eight children. One is a speech therapist; the center director; and nine therapists and less than half of them are teaching certified. (Tr. pp. 292 & 293)
145. The LEA's Expert Psychologist said although discrete trial training is important for a child with autism, so is being involved in a preschool classroom. He thinks the program offered by the LEA in early intervention is appropriate and includes discrete trial training, but with a broader scope. The child gets to go to the auditorium; to walk through the halls; to see other kids. The student would be involved in a school; not a clinic where the

student would be in a room by himself where people come to him. The LEA's program is much more appropriate because it is a school experience. (Tr. pp. 296 & 297)

146. The LEA's Expert Psychologist opined that there is no problem with the student getting therapy, but there's a socialization process in school that is essential. A criticism of the Lovaas approach is that kids are successful but have trouble generalizing. The IEP developed for the student by the LEA reflects a total school experience. (Tr. p. 297)
147. The LEA's Expert Psychologist testified that there is a difference in placing a student in a classroom where several students of different chronological age receive instruction from the same teacher than a setting where several students are in the classroom but each are receiving separate instruction on an adult, one-on-one, individual instruction basis. Since most of the instruction is one-on-one, the age factor is not as significant. The LEA's Expert Psychologist's observation at the R Classroom of the students was that each one worked one-on-one at a separate table. (Tr. p. 298)
148. The LEA's Expert Psychologist believes the LEA's program is on par with the services offered at [REDACTED], but different. In the long run, he thinks the student's IEP is a better educational plan, beyond the minimum, and a much more comprehensive way of dealing with the student's educational needs. (Tr. pp. 299 & 300)
149. In his thirty years experience, the LEA's Expert Psychologist has never seen anyone with autism cured, but Lovaas in his original 1987 study, claimed that 40 percent of his children were cured. It is the Expert's opinion that the [REDACTED] program is good therapy, but it is not education. (Tr. pp. 301 & 302)
150. It was the LEA's Expert Psychologist's opinion that the student could get educational benefit from the program at [REDACTED]. They have snack time and circle time. The Lovaas

group is aware of the criticism from the general community and they have attempted to incorporate those items into their program to make it more like a school. It was the LEA's Expert Psychologist's opinion that at [REDACTED] they have tried to put in enough things in their program to make it look like a school so they can get reimbursement from school districts. (Tr. p. 303)

151. The LEA's Expert Psychologist said he was shocked when he went to the LEA to see the kind of money they are spending to have the Autism Partnership come in. He has been in 50 of the 55 counties in West Virginia and has never seen another county that spends the kind of money to put these services in place. He was very impressed by the willingness of the LEA to provide these services. (Tr. pp. 306 & 307)

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 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.
6. 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).

7. 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).
8. 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).
9. 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).
10. W.V. Policy 2419-126 CSR 16-1 et seq. defines Free Appropriate Public Education (FAPE) as:

Special education and related services which: a) are provided at public expense, under public supervision and direction, and without charge to the parent; b) meet the standards of the state education agency, including the requirements of these regulations; c) include pre-school, elementary school or secondary school education in the State; and d) are provided in conformity with an Individualized Education Program. See also 34 C.F.R. §300.17.
11. 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 teacher 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.

12. 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 to benefit from special education. The term includes, but is not limited to, assistive technology, audiology, 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. See also 34 C.F.R. §300.34. (See Page 457 – Glossary)

13. If the parent of a student with a disability, who previously received special education and related services from the district, enrolls the student in a private elementary or secondary school without the consent of the district, a court or hearing officer may order the district to reimburse the parent for the costs of unilaterally placing the student in a private school if the court or a hearing officer determines that:

- a. The district had not made FAPE available to the eligible student in a timely manner prior to the time the parent enrolled the student in the private school; and
- b. The private school placement is appropriate. W.V. Policy 2419 - Regulations for the Education of Students with Exceptionalities. Chapter 8, Section 4, Item A(2).

14. The student's IEP provides the student with a Free Appropriate Public Education (FAPE) by the local educational agency 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 Students with Exceptionalities. 126 CSR 16-1 et seq.

DISCUSSION

The student was born January 17, 2005. He was enrolled in the West Virginia Birth to Three Program and started occupational and speech therapy. In April of 2007, it was observed that the student had issues with behavior and language. The parents took the student to their physician who referred the student for evaluation at the Klingberg Neurodevelopment Center, Department of Pediatrics, at West Virginia University. The Klingberg Psychologist evaluated the student on June 25, 2007 and sent a report to the student's physician on July 5, 2007, which stated that the student met the criteria for the diagnosis of autism. It was the Klingberg Psychologist's opinion that children with autism learn best using intensive 20-40 hours a week of 1:1 individualized therapy that employs the principles of Applied Behavior Analysis (ABA), specifically, discrete trial training (DTT) and strongly recommended the student attend the [REDACTED] Center where he would receive the "best" combination of treatment possible in this area. The student would also benefit from continued speech and occupational therapies. (Parents' Exhibits Nos. 2 & 3) (FOF 2 & 3) It was the Klingberg Psychologist's opinion that the only proven and replicated method of intervention that provides success for most children with an autism disorder is ABA discrete trial. The setting should be discrete with very limited distraction. It was her opinion that the earlier and more intensive the ABA DTT intervention, the better for the child, and that the window of opportunity is between ages two and five.

The Klingberg Psychologist did not review the student's proposed IEP at the LEA but did observe the LEA classroom on March 17, 2008, one week prior to the hearing in this matter. She had various criticisms of the classroom setting but observed DTT and one-on-one support being provided for each child present. It was the Klingberg Psychologist's opinion that the [REDACTED] provides the "best" treatment in the area, but was unaware of the LEA's program when her initial

opinion was rendered. (FOF 4-14) The Klingberg Psychologist was not permitted to testify as to what she observed in the LEA classroom and her opinion of her observation and whether what she saw would be appropriate for the student. She had observed another student, who was not identified and had an IEP that was unknown and could not be compared to what the student in this hearing's IEP specified. Such testimony would be speculative as it would apply to the student and his IEP. (Tr. pp. 29-32)

The parents also presented an expert witness in behavioral educational psychology (Parents' BE Psychologist) who has had 32 years of experience of college teaching. (FOF 114-116) It was his opinion that looking at literature involving children with autism that the only form of therapy – not teaching or training – that has a track record of replicated studies showing effectiveness is Discrete Trials ABA. It was his opinion that intensive therapy of thirty hours or more per week should typically be provided for two to four years at which time 40% to 50% of the children can be placed in a normal educational setting. The Parents' BE Psychologist did not review the student's prepared IEP, observe the educational setting at the LEA, or at [REDACTED], or consult the [REDACTED] or LEA's autism teachers, therapists or consultants. His opinion was solely based on literature he has read. (FOF 117-128)

The Parents' BE Psychologist was read a paragraph by the parents' attorney to which the expert responded that it was a mishmash of terms and practices that had no meaning to him. The parents' attorney, in his post-hearing brief, attributed that statement to language in the IEP but it should be noted that the IEP was never referenced and the attorney never identified what he was reading to the expert witness.

The LEA's School Psychology and Special Education Expert (LEA's Expert Psychologist) is a PhD professor at Marshall University Graduate College with a private

psychological consulting firm which consults with school systems and attorneys in West Virginia and [REDACTED]. He has been involved with students with autism his entire 36-year professional career. He has authored five books and dozens of articles and given hundreds of presentations. He is a licensed clinical psychologist, licensed and certified school psychologist, and a licensed professional counselor. He has testified in state and federal courts numerous times as an expert in the areas of school psychology, special education law and practice, and all areas of clinical psychology. (FOF 129 & 130) (LEA Exhibit No. 1)

The LEA's Expert Psychologist reviewed essentially every evaluation (speech, OT, and development) and report performed by the LEA or other educational settings the student had been in, all proposed annual goals and objectives, all consultants' reports, and the student's IEP. He observed the student in his setting at [REDACTED] and observed the LEA's proposed R Classroom. The LEA's Expert Psychologist did not evaluate the student, but is of the opinion that the student's diagnosis is autism. (FOF 129-133) (LEA Exhibits Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18 & 19) He further reviewed all evaluations, records and reports written by [REDACTED] Lovaas Institute's Consultant, which were not introduced as exhibits by either party.

It was the LEA's Expert Psychologist's testimony that the model used by [REDACTED] is the Lovaas ABA method of therapy with DTT. It was his opinion that the [REDACTED] program is excellent and is as classic and intensive ABA therapy program as developed by Lovaas as he has ever seen. (FOF 134) The LEA's Expert Psychologist opined that the LEA's R Classroom which he observed is ABA DTT but the difference between the R Classroom model and the A/L model is the [REDACTED] model is a therapy model and has treatment plans and therapists and the LEA's R Classroom model has teachers and functional behavior assessments. (FOF 139)

According to the LEA's Expert Psychologist, there is controversy in the autism community and literature about how to integrate autistic children with schools. [REDACTED] graduates take about two to three years to transition to the school setting because their therapy model is so restrictive that the children have major changes to overcome, since autistic children have major transitioning problems to begin with. The Psychologist believes that the method used by the LEA, in consultation with their consultants, Autism Partnership, provides a school setting for the provision of ABA DTT services and makes for a seamless transition as the student grows older. (FOF 140)

It was the LEA's Expert Psychologist's opinion, based on the student's IEP, all his observations of the student, the evaluations and information gathered from the consultants and staff at [REDACTED] and the LEA, that the student's January 16, 2008 IEP is a good IEP and that the IEP is reasonably calculated to confer educational benefit to the student. He went on to opine that an IEP is a work in progress and that it will be better when the LEA has the opportunity to have the student and can interact with him. (FOF 141) It was his opinion that the LEA and the [REDACTED] programs are based on the same DTT model, same goals and objectives, and same target behaviors. (FOF 141) It was the opinion of the LEA's Expert Psychologist that the two programs will not have the same intensity because the [REDACTED] program is therapy or a clinical treatment program, in a clinic, and the LEA program is a school and educational, not medical. (FOF 142, 143 & 145) In the LEA's program, the student will be in a school, see other kids, walk through the halls, and in general, have a school experience as opposed to a clinic where the student is in a room by himself and the therapists come to him. He has no problem with the student receiving therapy; however, socialization in a school is essential. He thinks the student's IEP is a better educational plan, a total school experience, and a much more comprehensive way

to deal with the student's educational needs. (FOF 146-148) The LEA's Expert Psychologist was very complimentary of the [REDACTED]'s program, having had a similar clinic in his own clinical psychology practice and was of the opinion the program is good therapy, but not education. (FOF 149 & 150)

In summarizing the three psychology experts' testimony, we first have the Klingberg Psychologist, whose primary input was to diagnose the student with autism, and no one throughout the hearing disagreed with her assessment. She made a recommendation for treatment, not education, at the [REDACTED] Center with 20 – 40 hours a week of 1:1 therapy employing ABA DTT techniques. (Parents' Exhibits Nos. 2 & 3)

The Klingberg Psychologist was totally unaware of the LEA's R Classroom program until very late in this process, and observed that classroom one week prior to this hearing in anticipation of litigation. (FOF 14) The Klingberg Psychologist did not review the student's IEP. (FOF 11)

The Parents' BE Psychologist has been a college professor for 32 years and has read extensively on autism and Discrete Trial ABA and testified about the appropriateness of the student's IEP which based on his testimony as a whole, he never reviewed. The Parents' BE Psychologist, based on the record, never met the student or observed him in his educational setting, never interviewed the parents or anyone at [REDACTED] or the LEA concerning the student, and never reviewed any evaluation or information from [REDACTED] or the LEA, and played no role in developing an educational program for the student. Any opinion, other than his knowledge of the literature on the subject, would be mere conjecture on his part since there was no foundation that the Parents' BE Psychologist had ever treated children with autism, worked with schools, or maintained any clinical position involving students with autism. Therefore, his testimony as an

expert witness in this case is of little value other than to testify on the literature in the area of autism, to which no one disagrees in this case.

The only psychology expert witness to testify that had observed the student, reviewed all information covering the student including the IEP, observed the R Classroom and the [REDACTED] Center, and consulted with the therapists at [REDACTED] and the teachers at the LEA and their respective consultants on Lovaas ABA DTT was the LEA's Expert Psychologist who was duly qualified as an expert and extremely credibly. He based his professional opinion on clinical expertise and experience, educational expertise and experience, and his knowledge about the student's educational programs both at [REDACTED] and the LEA and the educational benefit the student could receive based on his IEP. His opinion was that the student could receive educational benefit at the LEA pursuant to his IEP dated January 16, 2008. (FOF 141)

[REDACTED] has a consultant from the Lovaas Institute, an independent consulting firm, that they contract with to provide consultative services in designing programs based on the Lovaas method for children with autism, and supervises and trains [REDACTED] staff to implement the program and procedures. The consultant physically comes to [REDACTED] every four to six weeks to monitor children's progress by observation and program modification as needed. The consultant is always available for consultation via email or by telephone. (FOF 15-20)

The LEA's Special Education Coordinator (SEC) has a BA in elementary education, an MA in Special Education, and 18 hours credit toward an endorsement in autism. She is a highly qualified teacher and administrator. (FOF 23) (LEA Exhibit No. 3) (34 C.F.R. §300.18 and W.V. Policy 2419) The SEC testified that the LEA also contracts with a consulting firm, Autism Partnership, which performs exactly the same type of services for the LEA and their students as

does the Lovaas Institute for [REDACTED]. (FOF 22, 41) Both consultative programs appear to do an equally outstanding job at their respective locations and programs.

There was extensive testimony concerning the IEP and its development. The SEC testified that she first met the student's parents at the 90 day face-to-face transition meeting noticed and set up by the West Virginia Birth to Three family service coordinator for October 17, 2007, which was ninety days prior to the student's third birthday which conforms with the legal timelines for conducting the transition planning meeting. (FOF 25 & 26) (LEA Exhibits Nos. 5 & 6) At the meeting, all of the options available to the student through the LEA, including the Special Needs Preschool and a Universal Preschool with a ratio of one teacher to eight students and one teacher and an aide with 20 students respectively, were explained to the student's parents. (FOF 27) There was much confusion on the record because of the misunderstanding as to what was explained to the parents at that meeting, and the parents' attorney's confusion with the Special Needs Preschool and the Universal Preschool and the services provided in each program.

An eligibility meeting was noticed on December 21, 2007, and held on January 4, 2008, to review evaluations of the student to determine a primary area of exceptionality for the student. (LEA Exhibit No. 7) Numerous evaluations were considered as shown on the Eligibility Committee Report. (LEA Exhibit No. 8) The student was found eligible for a preschool special needs class. (FOF 30)

An IEP meeting was held on January 14, 2008 and a draft IEP was developed by the IEP team for the student. (FOF 29) (LEA Exhibit No. 9) A follow-up IEP team meeting was held on January 16, 2008 with all interested parties present, including the director of A/L and its Program Coordinator, the attorney for the parents, the parents of the student, and all of the LEA

evaluators, representatives, the SEC, and the LEA Autism Special Education Teacher. (FOF 31)
(LEA Exhibit No. 10)

According to the SEC, the IEP draft of January 14, 2008 and the IEP developed on January 16, 2008, were done in total collaboration with the student's parents and personnel from A/L and the evaluators and staff from the LEA. (FOF 33) As a matter of fact, the present levels of performance for the student, including target behaviors, current behaviors and current programs at A/L were made a part of the IEP. (FOF 32) The student's annual goals were likewise extensively developed by the IEP team in a very collaborative effort. Every single person present had input into the student's IEP and there were no final objections or concerns voiced by anyone at the IEP meeting. (FOF 33-38) Objections and concerns, however, were voiced at the hearing in this matter by the student's mother. (FOF 62-73)

The student's parents requested fifteen days to observe the LEA's R Classroom where the student would be placed under his IEP developed on January 16, 2008. (FOF 39) (LEA Exhibit No. 12)

There was extensive adversarial questioning of the SEC by the parents at the hearing concerning the program to be provided to the student by the LEA, which I do not intend to explore in depth. The parents raised issues of the qualifications of the teachers and aides at the LEA, the hours to be provided to the student in 1:1 ABA therapy with DTT, the wording used in the IEP, i.e., individualized vs. 1:1, the composition of the LEA Classroom and procedural violations by the LEA, all in an effort to discredit the educational program and placement proposed for the student at the LEA in their R Classroom pursuant to his IEP. (FOF 64-73)

It should be noted that the Autism Special Education Teacher at the LEA is without a doubt the most highly qualified teacher to testify at this hearing. She is licensed in special

education and has an endorsement in autism and has been trained by the consultant from Autism Partnership. The aides at the LEA school are certified aides and one has her autism mentorship course work completed and both were also trained by the consulting firm, Autism Partnership, in ABA DTT.

At the [REDACTED], the Program Coordinator is a speech/language pathologist with a masters' degree. There are 14 professionals at [REDACTED] including nine therapists with varying levels of education, but all trained as therapists by the Lovaas Institute as elicited from the Coordinator in cross-examination by the Attorney for the LEA. (FOF 93 & 44) There was also extensive testimony from the [REDACTED] Coordinator concerning the [REDACTED] program, her observations of the R Classroom at the LEA, and the student's program at [REDACTED]. (FOF 94-110)

It should be noted that all of the special education teachers and administrators from the LEA who testified are highly qualified and meet the definition of highly qualified special education teachers pursuant to 34 C.F.R. §300.18 and WV Policy 2419. None of the witnesses for the LEA criticized or degraded any person from the [REDACTED] and to the contrary, seemed quite respectful of their clinical abilities and program although from the minimal testimony elicited on their qualifications, they do not meet the statutory definition of highly qualified special education teachers.

All in all, the majority of testimony elicited from the witnesses called by the parents were to bolster their program at the [REDACTED] and to discredit virtually everything presented by the LEA, whether it be procedural deficits, qualification of personnel, or the programming content of the [REDACTED] program versus the LEA's proposed program which was developed cooperatively by the IEP team, including the student's parents and attorney.

It is a fundamental flaw in the parents' presentation of their request for the LEA to reimburse them for their unilateral placement of the student in the [REDACTED] for several reasons:

1. It is not the correct legal standard to find that the LEA cannot replicate the program provided by [REDACTED]. Just because [REDACTED] operates a Lovaas-based ABA DTT program does not mean the LEA has to duplicate it in order to provide a FAPE to the student or that it is the "best" approach. The parents were given full opportunity to have meaningful input into the development of the student's IEP. The student's present levels of performance from [REDACTED] were made a part of the student's IEP and in fact, the [REDACTED] had extensive input into the development of the student's IEP.

The law is very clear that in order to satisfy the proper appropriateness standard a student's IEP must be calculated to confer educational benefit. Board of Education of the Hendrick Hudson Central District, et al. v. Rowley, et al, 458 U.S. 102 S.Ct. 3034 (1982); (COL 7) The educational benefit must be more than trivial. Carter v. Florence County School District Four, 1950 F.2d 156, 160 (4th Cir. 1991) *aff'd*. 510 U.S. 7, 114 S.Ct. 361 citing Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985). IDEA does not require an LEA to provide a student with every service or accommodation which might bring a child with disabilities an educational benefit. (COL 8) The IDEA does not require the LEA to provide the student with the best possible education. MM v. School District of Greenville County, 303 F.3rd 523, 526 (4th Cir. 2002).

As the party challenging the adequacy of the educational plan proposed by the District, the parents bear the burden of proof. In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005), the U.S. Supreme Court held that parents who initiate a due process hearing challenging an IEP

team's proposed IEP and the lack of FAPE pursuant to that IEP, bear the burden of proof on their claims. Except for the initial evaluation performed by the LEA, the IEP that was developed for the student was based primarily upon information provided by the parents. This was primarily due to the fact that the LEA has never been afforded with an opportunity to provide special education and related services to the student. The statement of present levels of performance as well as the annual goals were developed directly from information provided by representatives of [REDACTED] and a consultant retained by [REDACTED]. The student's mother testified that the development of the IEP was conducted with a significant amount of discussion and that such discussions resulted in numerous changes being made to the initial draft IEP. The record supports a conclusion that the development of the IEP was the product of true collaboration by the IEP team.

The parents offered very little expert witness testimony, none of which rendered a proper opinion on the appropriateness of the student's IEP. Their criticisms mainly surrounded the physical make-up of the LEA's R Classroom. The LEA's Expert Psychologist, the SEC, and the LEA's Autism Special Education Teacher, on the other hand, presented with proper expert qualifications and access to virtually all information concerning the student were able to offer expert opinions concerning the student's IEP. Each of these witnesses opined that the student's IEP was reasonably calculated to confer the student educational benefit. (FOF 42, 92, 141)

Expert testimony provided by the LEA's Psychologist, the LEA's SEC, and the LEA's Special Education Teacher clearly show that in fact, the program at the [REDACTED] and that at the LEA's R Classroom are virtually alike except the [REDACTED] is set in a therapeutic clinic instead of a school with therapists instead of teachers. The evidence was overwhelming that the IEP developed by the IEP team, including the student's parents and staff and therapists from the private school, was a good IEP and would provide the student with educational benefit with the

added benefit that it would provide some socialization or mainstreaming with non-disabled students at the LEA school, which the private clinic [REDACTED] did not provide for at all.

The public school placement, pursuant to the student's IEP, would be less restrictive than the program being provided by [REDACTED]. The LEA's Expert Psychologist noted that the student would be exposed to public school routines and be able to participate in school-based activities in the program offered at the LEA's School. In contrast, the [REDACTED] program is highly restrictive and was described by the LEA's Expert Psychologist as a clinic as opposed to a school. Such a restrictive program offers the prospect of difficulty in later transitioning from [REDACTED] to a public school. (FOF 142, 145, 146)

From the outset, the parents of the student did not apply the correct legal standard of whether the LEA could replicate the services that the student was receiving at the [REDACTED]. The United States Court of Appeals for the Fourth Circuit has in G. ex rel. R.G. v. Fort Bragg Dependent Schools, (343 F.3d 295 NC 2002), held that a school district's ability to replicate a Lovaas-based therapy program for an autistic child is not the proper standard for determining whether a proposed IEP provides a FAPE. The proper standard is whether the IEP is reasonably calculated to provide the disabled student with meaningful educational benefit, which is the same standard as set forth in Rowley. (COL 7)

The requirements for the reimbursement of a student's unilateral placement in a private school by the student's parents is contingent on a two-prong test. One, did the LEA timely provide a FAPE to the student through the IEP; and secondly, is the private placement appropriate for the student? 34 C.F.R. §300.148 and W.V. Policy 2419. School Commr. of Town of Burlington, Mass. v. Department of Education of Mass., 471 U.S. 359, 369 (1985).

It should also be noted that the parents provided absolutely no evidence to prove that the cost of the private unilateral placement at the [REDACTED] was reasonable as required by law.

The testimony presented at the hearing substantiated that the IEP developed for the student at the LEA was appropriate and reasonably calculated to provide educational benefit to the student. The second prong does not need to be considered if the LEA has met its burden of providing a timely FAPE to the student.

The LEA, in developing the proposed IEP for the student, met the legal requirement that the IEP be reasonably calculated to provide the student with educational benefit. The LEA continues to engage Autism Partnership to provide the very kinds of consultative services that the parents of the student's own expert recommended. In short, a Free Appropriate Public Education has been timely offered to the student via the January 16, 2008 proposed IEP, and for that reason, tuition reimbursement is not available to the parents of the student.

2. The student was never enrolled in the LEA. There was ad nauseam testimony as to procedural violations, delays in evaluations and so on, but there was no testimony that the parents ever enrolled the student in the LEA. The Act at 20 U.S.C. § 1412(a)(10)(C) and W.V. Policy 2419 clearly state that if "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment...." (COL 13) The United States Court of Appeals for the First Circuit, in Greenland Sch. Comm. v. Amy N., 358 F.3d 150 (1st Cir. 2004) considered this statute, and the 1997 Amendments to the IDEA generally which limit the circumstances in which parents who have unilaterally placed their child in a private school are entitled to reimbursement for that

placement. The Court ruled that the language of 20 U.S.C. §1412(a)(10)(C)(ii) sets an eligibility requirement for tuition reimbursement “for children who have previously received ‘special education and related services’ while in the public school system (or perhaps those who at least timely requested such services while the child is in public school).” Amy N., 358 F.3d at 159-160 also stated that in order to be eligible for tuition reimbursement, parents must give notice to the LEA that special education is at issue prior to placing a child in a private school. Other courts had already concluded that parents needed to give school districts a reasonable opportunity to provide special education and related services to their child before seeking tuition reimbursement for unilateral placements and in the Amy N. case, the Court of Appeals found that the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) no longer left any room for doubt on this point.

In Amy N., the child had previously been enrolled as a student with the LEA; however, never requested or received any special education or related services from the LEA. After being eventually identified as needing special education services, the student’s parents at first worked with the school district to develop an IEP only to surprise the district by filing for due process seeking tuition reimbursement in a private school. The Court of Appeals denied the request for tuition reimbursement.

In Baltimore City Bd. of Sch. Comm’r, et al. v. Taylorch, (395 F.Supp.2d 246 D. Md 2005), the United States District Court for the District of Maryland held that “the plain language of section §1412(a)(10)(C)(ii) makes it clear that, as a threshold matter, reimbursement is available only in cases where the disabled student was at one time receiving ‘special education and related services’ from a public agency.” 395 F. Supp. 2d 246, 249 (2005). The District Court cited Greenland and other federal decisions in support of this conclusion. The District

Court found that Congress, by its unambiguous statute, had clearly spoken on the issue of tuition reimbursement “to prevent the FAPE process from being converted to a program for funding private tuition for parents who have demonstrated no commitment to the public school system....” Taylorch, 395 F.Supp. 2d at 250. (See also Carmel Central School District v. U.P. by Mr. and Mrs. G.P., 43 IDELR 218 (S.D.N.Y. 2005) and (M.M. and B.M. ex. rel. C.M. v. School Board of Miami-Dade County, Fla., 45 IDELR 1 (11th Cir. 2006).

The student in the case at bar was never enrolled in the LEA and had never been provided special education and related services by a public agency.

3. The most compelling reason that the parents are not entitled to reimbursement for their unilateral placement of the student is the fact that without any previous contact with the LEA, on July 24, 2007, they entered into a one year non-cancellable contract with the [REDACTED] Center to provide services for the student, which was almost three months prior to ever meeting with the LEA’s representatives at the 90 day face-to-face meeting. It is quite apparent that after having already contracted with the [REDACTED], they then set out on a path to force the LEA to reimburse their unilateral placement. The mother of the student testified (FOF 56-73) very negatively concerning the LEA and their proposed program at the R Classroom in an effort to show that it was inadequate and that the student needed the “best” at [REDACTED]. The tenor of the entire hearing and the demeanor of the witnesses for the parents were negative and very misleading. The parents had absolutely no intention of enrolling the student in the LEA and it is my opinion that they set out with their first contact with the LEA at the 90 day face-to-face meeting on October 17, 2007, to discredit the LEA in order to receive financial reimbursement for their predetermined, unilateral placement of the student. The [REDACTED] contract was calculated for payment over an eleven month period as testified to by the student’s father, since the student started there

on a part-time basis in August 2007 and became full-time at [REDACTED] in January 2008 as the student's IEP was being developed and considered. The parents' 10 day notice letter dated January 25, 2008, from the parents' attorney stated that they were keeping the student enrolled in the [REDACTED] Center and requested the LEA to be financially responsible for their unilateral placement due to the failure of the LEA to provide a FAPE to the student. (Parents' Exhibit No. 12) The LEA responded with Prior Written Notice on February 1, 2008, stating that they made a FAPE available to the student in a timely manner and would not be responsible for tuition and costs of the parents' unilateral placement. (Parents' Exhibit No. 14) On February 8, 2008, the parents, through their attorney, requested a due process hearing.

The evidence is abundantly clear that the parents had no intention of enrolling the student in the LEA and proceeded to engage the LEA in a planned sequence of notices and meetings to establish an IEP for the student that they were never intending to utilize, in an effort to receive reimbursement from the LEA for the student's placement at the [REDACTED] Center. They did not even try the placement proposed by the LEA. The IEP was thorough and prepared with overwhelming input by the parents and the [REDACTED] and without a doubt is reasonably calculated to provide the student substantial educational benefit and a FAPE.

The parents and their attorney alleged procedural violations. The Courts have addressed procedural violations and the cooperative process that the IDEA establishes between parents and schools.

In J.K. by Kraft v. Metropolitan School District Southwest Allen County, 44 IDELR 122 (N.D. Ind. 2005) the court held that a three year old, who was provided initial special education services for a communication disorder and then evaluated for autism, was offered FAPE by an Indiana district. The procedural errors committed by the district in not providing written notice

of meetings nor memorializing agreements or notes in writing did not adversely affect the parents' ability to participate in their son's education. The court also found that the district's failure to complete its evaluation of the child before his third birthday did not create a significant gap in services. Finally, the district's refusal to offer ABA or extended hour services was not, in and of itself, a violation of the IDEA. The district showed that it provided services that were reasonably calculated to provide educational benefit.

In Pachl by Pachl v. Seagren, 43 IDELR 217 (D. Minn. 2005) the parents of a student with developmental disabilities did not show that the student was denied FAPE because of procedural errors in developing her IEPs. The procedural errors were harmless because the student did not lose educational benefit and the parents were well informed and actively involved in all steps of their daughter's education. (See also M.M. ex rel. D.M. v. School Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002)).

It was further held in Hymes v. District of Columbia, 42 IDELR 266 (D.D.C. 2005) that though the district committed a procedural violation of the IDEA when it failed to provide notice of its proposed placement to the parents of the student with autism, it was not obligated to reimburse the student's parents for their unilateral placement. The court held that the procedural violation did not deprive the student of a substantive IDEA right. The court determined that the parents had actual knowledge of the proposed placement because one of the parents signed the IEP and agreed to visit the location of the proposed placement. The court ruled that a violation of the notice of proposed placement requirements was harmless because the parent was fully engaged in the process that developed the IEP.

The procedural violations or defects of this case in no way resulted in any loss of educational benefit or opportunity for the student. (See M.M. ex rel. D.M. v. Greenville County,

303 F.3d 523 (4th Cir. 2002)). The student was enrolled in the unilateral placement at the [REDACTED] [REDACTED] from August 2007 and the parents would be hard pressed to claim the student lost educational benefit and opportunity in that unilateral placement.

The evidence is overwhelming that in this case, the parents of the student and the staff from the student's private placement at [REDACTED] were well-informed, engaged, and involved in the development of the student's IEP.

It should be noted that one of the main procedural errors set forth in the parents' request for due process was that the LEA failed to timely evaluate the student. The evidence was clear that the student's mother gave permission to evaluate the student on December 21, 2007. (Parents' Exhibit No. 6) However, at the hearing in this matter, without prior disclosure by the parents, and by way of cross-examination by the attorney for the LEA, the attorney for the parents produced a document dated September 26, 2007 requesting an evaluation of the student which was marked as LEA Exhibit No. 21. By way of exclamation of the attorney for the LEA, it was the first time the LEA had seen the September 26, 2007 request. Interestingly, the attorney for the parents is using this undisclosed document as a major basis for lack of a FAPE due to procedural violations. If this permission to evaluate had been received by the LEA on the date signed, it would have been eighty-six days until the evaluation of the student. W. V. Policy 2419 requires an initial evaluation to be conducted in eighty days. It should also be noted that the parents never disclosed the contract with the [REDACTED] and it was likewise marked as an LEA exhibit (No. 20) during cross-examination of the student's father by the attorney for the LEA. It seems odd that in a case for reimbursement of tuition for a unilateral placement, that the parents would not disclose the contract that they are seeking reimbursement for, unless they did

not want it known that it was executed on July 24, 2007 – almost six months prior to the IEP developed for the student on January 16, 2008.

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.”

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 without the proper evidentiary foundation and over objection of counsel for the LEA. Any evidence submitted after the conclusion of the hearing was not properly submitted and is not considered herein.

DECISION

1. The LEA through the IEP team properly and timely developed an appropriate IEP for the student that was reasonably calculated to confer the student substantial educational benefit; therefore, the parents' request for reimbursement for their unilateral placement, attorney's fees, and costs is DENIED.

2. There were absolutely no procedural violations of the IDEA by the LEA that were material and resulted in any loss of educational benefit or opportunity for the student which would render the student's IEP inappropriate or have prevented the student from receiving a timely FAPE from the LEA.




RAYMOND G. FRERE
IMPARTIAL DUE PROCESS
HEARING OFFICER

DATE: May 30, 2008

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 120 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: May 30, 2008