

Local Hearing X

State level appeal

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS



CASE CLOSURE SUMMARY REPORT

School Division Public Schools

Name of Parents

Name of Child

Date of Decision

Counsel Representing LEA

Counsel Representing Parent/Child

Party Initiating Hearing

Prevailing Party

Hearing Officer's Determination of Issue(s):

(1) The IEP is not appropriate and is a denial of FAPE; (2) reimbursement for Parents' school costs and expenses is Ordered; and (3) extended school year services is determined as required for school year

Hearing Officer's Orders and Outcome of Hearing:

1. Parents are the prevailing party.
2. Reimbursement of Private School and costs and expenses is Ordered.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision ~~from this hearing~~ is attached.

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS



POST-HEARING REPORT

School Division Public Schools

Name of Parents

Division Superintendent

Name of Child

Counsel Representing LEA

Counsel Representing Parent/Child

Hearing Officer

Party Initiating Hearing

ISSUE(S) AND PURPOSE OF HEARING:

Due process request by parents of child regarding [1] appropriateness of IEP [2] alleged denial of FAPE and [3] placement and payment therefore.

HEARING:

DATES	BEGINNING	DURATION OF PROCEEDINGS	CONCLUSION
August 15,	9:00 a.m.	7½ hours	4:30 p.m.
August 18,	9:00 a.m.	6½ hours	3:30 p.m.
August 19,	9:00 a.m.	7 hours	4:00 p.m.

HEARING OFFICER'S DECISION



I. NATURE OF THE CASE:

A young child was a student in the Public Schools received special education. had difficulty learning. At was basically home-schooled. was then in Ms. 's class and then later in Ms. 's class. Ms. 's class was a preschool special education class designed for children with autism. The student did not do very well in these classes. parents sent to a private school. At the private school learned more than had in the Public School classes. parents want to pay for fees at the private school. says that this child did as well as could in their classes and they contend that their plan for education can teach and, therefore, should not have to pay for private school.

My decision will be whether I agree with the parents or . In reaching that decision I have determined the facts from the witnesses' testimony and exhibits about observations and conclusions from testing or evaluations. I have had to determine whether the facts under the law prove that this STUDENT received appropriate educational benefit defined as progress or lack thereof while in Mrs. 's class and, more importantly, would have received the required education in pursuant to the November, IEP. In reaching this decision I have also had to decide the effectiveness and appropriateness of two different methods of teaching autistic children and the weight to be given to evidence of the amount of progress, if any, under each of these methods. The progress, amount or lack thereof, under 's method vs. the private school method is critical because of 's position that this child's ability to progress is and was limited by his disability.

II. SUMMARY OF FACTS:

The school board introduced evidence from the following witnesses: , , and . The parents presented evidence from , , and . This hearing

lasted three days and produced a transcript of approximately 750 pages. Also introduced into evidence were extensive exhibits from both sides.

SCHOOL BOARD'S WITNESSES

, a speech pathologist employed by the
, testified on behalf of the . She has been a speech language pathologist for 21 years and her responsibilities are to diagnose and treat children with communication problems. She worked with , the STUDENT in this case, for a period of three years. Ms. provided services to the STUDENT once a week for 30 minutes when was home based, . When was in 's class, , she saw individually for 30 minutes and with other students for some period of time. Ms. did not provide any services to the STUDENT when was in Ms. 's class during the school year of at School.

Ms. did an evaluation of the STUDENT in October of . She testified that during the time that she worked with received educational benefit. To support her conclusion she offered that had begun to follow directions and that was more comfortable with peers. She stated that did well and blended well. Ms. testified that while in 's class at did not initiate contact with other students but that improved. She stated that by September, 2002 when had finished the program that had no changes in expressive language. According to Ms. , at the end of the program at in could sit through a whole language group of approximately 30 minutes compared to the approximately 2-5 minutes of sitting time at the beginning of the program. She observed in regard to her evaluation that she didn't observe many of the skills that she had seen when was in the P.E.D.D. classroom of Ms. [Parents' Exhibit 11]. At her evaluation the STUDENT was not able to do what she had previously seen do. Ms. believes that the regression that she observed when evaluating was due, in her opinion, to transition to a new program. Ms. 's evaluation included three

different days of observation. When she completed her evaluation on October 24th [redacted] had been both in the [redacted] program and thereafter in the [redacted] preschool autism program in Ms. [redacted]'s classroom for a total of eight weeks. She acknowledged that the P.E.D.D. in Ms. [redacted]'s classroom was a group setting as was the program at [redacted]. Ms. [redacted] noted among other things particularly that [redacted] would not imitate actions, needed hand-over-hand to imitate playdough actions and was not able to do that activity independently. She observed [redacted] being unable to use the [redacted] methodology to move from one activity to another. [redacted] during her evaluation, engaged in a self-stimulatory behavior of putting toys in [redacted] mouth. She observed that [redacted] could not follow any commands and did not interact with other students or initiate contact with [redacted] teachers. When asked to compare her observations with testing done by the [redacted] Center, *Parents' Exhibit 4*, she was unable to make that comparison as she had not reviewed those test results. On specific questioning by me Ms. [redacted] was unable to offer any explanation of why the [redacted] may have used one methodology of teaching [redacted] as opposed to another.

Ms. [redacted] testified on behalf of the [redacted]. She was [redacted]'s teacher in [redacted] preschool autism program at [redacted] School during September, October and November of [redacted]. She testified that she was using a methodology of instruction that was modeled on the TEACCH program as she had learned in instruction at the University of North Carolina, Chapel Hill. In describing this methodology Ms. [redacted] uses the terms "visual, structured teaching". In testifying about her students generally she notes that the skills varied per student. In describing one-on-one instruction with [redacted] during her 3-hour class she stated that would include 15-30 minutes. As to specific observations of improvement she stated that when she first began to teach [redacted] could visually attend for one second and when [redacted] left her classroom that was up to three to five seconds. Ms. [redacted] had just started to work on individual skills with [redacted] before [redacted] left her classroom and [redacted] had been unable to do any independent work when [redacted] first came in her classroom in September of [redacted]. When [redacted] left her classroom [redacted] was not verbal and had no words at all.

was only able to form some letter sounds. Ms. testified that students in her class became more social by beginning to initiate social interaction with peers and adults. could walk independently with an occasional prompt and could throw some of trash away. was picking up items when asked and following a lot of basic one step commands and could identify animals and animal sounds as well as starting to identify colors and being able to imitate and identify some body parts. Initially this witness testified that the student had exposure to other children who were not impaired when they went to the cafeteria and to the library. In cross-examination, however, she admitted that the students did not have enough time to go to the cafeteria and lunch or snack would be in the classroom. Ms. 's students would go outside for recess if they could fit that in.

Ms. testified that at circle time such activities were being taught as calendar activities and singing songs. She acknowledged that could not sing. Ms. acknowledged 's lack of imitation skills while stating that such skills are helpful but were not necessary in order to learn. She testified that during these group activities, and particularly circle time, that although did not actually participate was able to sit still in a group setting without being a behavior problem as far as being aggressive with other children. She testified that during circle time ! was starting to imitate movements to songs and, therefore, was attending during parts of that time.

She did not remember if engaged in self-stimulatory behavior such as looking away nor did she remember what 's mother had shared with her with regard to another methodology of teaching. She was unable to remember if Mrs. had talked about possibly needing to go to school all year. This teacher was unable to remember how the goals in the IEP were going to be achieved. This teacher testified that she sent a newsletter home with the students as well as a note at the beginning of the school year regarding October words and objects for identification. However, she didn't know if the parent received that note and did not know if it was in the student's packet or not.

In testifying about the evaluation done by the previous witness, Ms. , she testified that Ms. never came in to do an observation but that she did an evaluation and she took out of the classroom on two occasions into a separate room to evaluate . The report of Ms. 's with regard to her observations had not been seen by this witness. Ms. prepared a draft list of objectives and goals for this student's IEP without considering any of the recommendations or evaluations of one Dr. . Despite being familiar with the TEACCH methodology of teaching Ms. did not know if there was or was not a general recommendation of at least 20 hours of school instruction each week.

Ms. remembered the necessity of collaboration between home and school in regards to the TEACH methodology but could not remember any recommendations about the school day. She acknowledged an evaluation done by Dr. on August 29, recommending a different methodology of teaching called ABA Therapy. She did not know why ABA Therapy was disregarded in drafting the IEP that was offered for this STUDENT. Ms. knew that at the IEP meetings that the parents of this student wanted ABA Therapy. She testified that "we refused to provide private ABA programming for 's educational services" [School Board Exhibit 70] and she read into evidence further that feels that the student's educational needs and IEP can be met in a public school system which would include the autism program of hers at . Though unable to remember much before, in response to leading questions regarding the preparation of the IEP she concluded that all information was considered. She testified by conclusions with the use of words as "great eye contact", "good participation at the circle", "attempted to wave at Hello song", "very social with other students", "great job checking schedules", "nice job with schedule", "no assistance when given green ticket", "transitioned independently", "great eye contact today", "practiced galloping today", "lots of sound imitation". As one of Ms. 's objections to the ABA method of teaching autistic children, she opined that she did not believe it was a very good method for teaching social skills because ABA Therapy did not teach autistic children in what was

described as a natural setting not being around other students. She objected to the one-on-one setting of ABA Therapy. This witness had no other objection to the ABA Therapy.

When asked about her methods being the best for teaching this STUDENT she replied that she did not know if her methods were the best but that the student was making progress in her class. Finally, although stating that the goals for her students were for them to make progress that she meant that she wanted her students to exhibit as much progress as it is possible. Ms. testified that it would have been helpful to her as the STUDENT's teacher if she had been aware of what the parents were working on with at home. She stated that Mrs. , the mother of the STUDENT, was not very forthcoming with information. Ms. testified that she knew that 's mother was unhappy with the program. She knew that the mother wanted a different program which involved a different method of teaching and Ms. stated that she knew that from the notes that were sent in by Mrs. on September 4th about what she was wanting in the program. She did recall Mrs. requesting the parent-teacher meeting for about 15 minutes when Mrs. asked questions about the program and expressed her concerns but did not recall that Mrs. told her anything about what was working on at home.

Ms. testified and was this STUDENT's teacher for the school year in a Preschool Education for Developmentally Delayed (PEDD) at School. In her classroom because her students are at different levels and of different abilities an awful lot of individual work is done for the child. She described 's self-stimming activities in her classroom and how it affected ability to be attentive to tasks. She stated that it was difficult for to focus and that attention to tasks interfered with some of learning.

Ms. testified that 's progressed in her class with regard to self-stimulatory behaviors, participation in group activities and attention to tasks. She testified that when came into her class had difficulty following one step commands and needed some hand-over-hand assistance. As the year progressed the

amount of prompting decreased, made more eye contact and would go to the sink, stand up and to the bathroom and to the table with less verbal prompting. At the beginning of the school year needed hand-over-hand assistance when Ms. would tell to "go get your snack" to the end of the school year when needed less and less verbal prompting and would jump up and run over and get his snack and run to the table. She also testified as to toileting that in the beginning of the school year with less hand-over-hand assistance that with more verbal prompting was able to go to the restroom and push down pants, sit on the toilet and get up and pull pants up and run out compared to the beginning when the staff had to pull pants down and up. In the beginning of her class year was prompted by hand-over-hand assistance to stand up, circle and walk to the calendar and touch with Ms. 's hand on hand every number as counting went on. As the year progressed would touch the numbers as Ms. counted. at the beginning of Ms. 's school year with would have to be walked to the sink where would hold hands under the water, that staff would turn the water off and on and help dry 's hands. As the year progressed learned to turn the water on independently and to turn it halfway off with prompting and could dry hands independently. She testified that there was some difference with regard to being able to take coat off and that while continued to explore toys by putting them in mouth improved by playing with two toys in mouth and would remove the toy if was told "out of mouth".

Ms. testified that she herself evaluated this STUDENT on September 5 and 6, [School Board Exhibit 59] verifying that evaluation and offering that needs a lot of prompting and is prompt dependent. She explains that did not perform well on this evaluation because the evaluation was directed towards independence and without prompting was not able to perform as well with these assessments [School Board Exhibit 59]. Ms. testified that she had noted in her assessment/evaluation that 's imitation skills were in the 8 to 12 month range and that imitation was important to maintain attention to what a teacher/directed

activity is doing. She testified that she had reviewed records from the Center [Parents' Exhibit 4] and had no explanation at the lack of improvement in the Fall of when she did her evaluation compared to the evaluations done at the Center [Parents' Exhibit 4] before came in to her classroom.

Ms. pointed out that with two instructors and seven children she was able to devote 50% of the time individually with each child and would give more individual instruction as needed. Ms. did not know if she had told this student's parent that the STUDENT needed more hours of instruction than could get in the . As to whether or not needed more hours she opined that that was totally up to the next teacher. Ms.

continued the dual theme approach of its defense by pointing out the progress made by the STUDENT while being unable to comment on potential but being able to opine about any lack of or minimal progress as being limited by 's cognitive developmental delays. This witness identified "attending skills" as a student being able to focus on a spoken or demonstrated command and then to begin an activity and follow through to completion. She testified that did not master these defined attending skills in her class but that got better at them. Her opinion was that had I seen at the beginning of her class in and then at the end in there would have been a clear difference in what has been described as attending skills. Ms. recognized Dr. ' report as showing a lack of attending skills that she had described at the end of her school year and attributed those loss of skills not to regression but due to transition from one program to another. She believed that transition alternatively would take two or three weeks and sometimes a month. She stated that she wouldn't be concerned with the loss of skills for an adjustment period of up to 2½ months after the change of classes or programs.

This witness recognized the evaluation done by 's speech therapist. She recognized the difficulty of her evaluation showing no imitation skills, the need for a lot of hand-over-hand assistance, no ability to respond to commands and no interactions with other students or teachers. She answers this

regressive evaluative report by referring to transition and incorrectly stating that Ms. did not pull the student out and take to a separate room.

, Director of Special Education for , testified on behalf of the . She testified regarding the TEACCH methodology as a fundamental basis for programs in for autistic children. She testified that at times other programs are needed, for example, when a student might have behaviors that are interfering with learning, the might develop specific behavior programs that would focus on the applied behavior analysis more than programs that might be based on the accepted methodology, TEACCH. Dr. testified that some autistic students receive ABA Therapy services but that it is not used as a methodology for all autism students in . The services offered by through the TEACCH methodology, according to Dr. , is offered by because the is charged with providing services in a least restrictive environment and ABA Therapy is one-on-one for a student for all of a day and, therefore, a very restrictive learning environment. She testified that the looks first at opportunities for children to progress on their IEP objectives in ways that are the least restrictive. She describes the difference in the two methodologies as being primarily the one-on-one all day therapy methodology of ABA as opposed to the TEACCH methodology involving larger groups in what she describes as a natural environment, meaning the mirror of what a typical school day may look like.

Dr. observed the STUDENT in class for approximately 40 minutes and testified almost completely in total contradiction of the observations of the teachers and their and other evaluations thereabout. Dr. testified that ABA Therapy services are offered in the for autistic children for such things as aggressive behavior, self-stimulating activities and attention process. Dr. recognized that 's earlier teacher in her evaluation identified the STUDENT's biggest concern as being a lack of attention and inability to complete tasks. Dr. , in recognizing that observation report,

stated that she wished Ms. [redacted] had the opportunity to qualify what that meant. Both Dr. [redacted] and Ms. [redacted] had that qualification opportunity and did not so qualify. Dr. [redacted]'s testimony on rebuttal was uninformative.

This STUDENT's teacher at [redacted], also testified by way of rebuttal indicating that she had talked to Mrs. [redacted], the student's mother, about the possibility of moving to [redacted] and also that she had indicated that she as a teacher could only do what the [redacted] allowed.

The last witness for the [redacted] was [redacted], Ph.D., a school psychologist for the [redacted] of [redacted]. Dr. [redacted] testified that she had reviewed the psychological evaluations done by Dr. [redacted] and by Dr. [redacted], witnesses for the STUDENT. She prepared a psychological report of her own completed in October, [redacted] [School Board Exhibit 61]. She completed this in conjunction with Dr. [redacted]'s testing. Dr. [redacted] testified that her results in the cognitive area were consistent with those found by Dr. [redacted] and by Dr. [redacted]. In her testing she noted that the STUDENT had fleeting and inconsistent eye contact. Dr. [redacted] testified about the need, she believed, for social reinforcement which was available through the program at [redacted] and which she believed, although she had never observed this STUDENT directly, was limited by the one-on-one therapy at the [redacted]. She reviewed and commented on the evaluation procedures used by Dr. [redacted] and opined that [redacted] administration of the Bayley Scales was of concern because [redacted] was too old for the test. Dr. [redacted] testified with regard to page 4 of Dr. [redacted]'s report [Parents' Exhibit 17] opining that there was virtually no developmental progress for [redacted] in the area of cognitive and language results between April, [redacted] and December, [redacted]. This witness believed that there was no basis for a psychologist to make a determination as to [redacted]'s cognitive function in April of [redacted]. She testified further that the HELP test does yield a cognitive score but that the same HELP result per School Board Exhibit 23 and 26 did not yield a cognitive score and, therefore, there was none despite the 4-27-2000 IFSP scores for expressive communication and receptive communication [School Board

Exhibit 29]. She stated that the expressive communication and receptive communication scores from the Rossetti that were listed cannot be used to determine cognitive function. She opined that the no development, no progress noted by Dr. [redacted] between April, [redacted] and 2002 was not consistent with her opinion because the teachers' descriptions of skills that they had seen this STUDENT gain and the testing indicate noted progress. She qualifies that statement with the following: "certainly not no progress, by any means."

Dr. [redacted] concludes that based on her evaluation of [redacted] and review of [redacted] school file she thought that the IEP of November, [redacted] was appropriate to meet [redacted] educational needs. Without any further explanation Dr. [redacted] comments regarding Parents' Exhibit 19 about the Peabody Test given by one [redacted] showing receptive vocabulary capability increasing from the one percentile to an age equivalent score of 3 years 9 months in a period of five months because she would have expected [redacted] rate of progress to be very slow and that much improvement is a huge jump in progress.

Dr. [redacted] recognized an observation of the student that if left to [redacted] own devices in a non-structured situation [redacted] engaged in self-stimulation. She observed the STUDENT licking some items or mouthing. While [redacted] would engage with her [redacted] wasn't initiating or integrating the social reaction with her. As to why her conclusions should be accepted as opposed to those of Dr. [redacted] she testified that she compared the skills that Dr. [redacted] had described or that were described in the 2000 report and then listened to Ms. [redacted] and Ms. [redacted] as to skills gained in their classrooms and the skills she saw in her testing and emerging skills that she saw in her own testing. When asked about what she meant when she said there was progress she summarized the progress as that in steps in toileting, in steps in transitioning between activities, in being independent walking down the hall and a lot of little things for a child with cognitive impairments that this child has. Dr. [redacted] agreed with a statement that essentially said that children with autism go through developmental spurts between the ages of 5 and 13 and some spontaneously begin to talk around age 5 or later. In addressing the differences in the TEACCH methodology as opposed to the applied

behavior analysis, ABA methodology, she defines ABA methodology as behavioral driven and TEACCH as a methodology that is more encompassing using a bit more of the environment. She believes that the TEACCH approach helps the individual to function in the environment. Continuing to assail opinions, testing evaluations or observations with which she did not agree Dr. questions

's evaluation that because she had seen the STUDENT at different places and different times it would make a difference in the test results.

PARENTS' WITNESSES

, Ph.D., was employed at the when came in for screening and for part of the time that was in that program. She now works with another program in the State of Maine. She testified that 's parents were seeking an alternative placement from being concerned that their was making very little progress in and they were considering an alternative teaching methodology for . She testified that at her screening in the Summer of had severe autistic symptoms and very little in the way of cognitive skills. engaged in a high frequency of self-stimulatory behavior, was non-verbal and was basically not able to engage in any purposeful activities. She pointed out that self-stimulatory behavior interferes with a child's ability to engage in a meaningful way with the environment and that unless such behavior is addressed the child's ability to learn is significantly limited. She testified that such behavior needs to be addressed in a very structured on-going manner. She testified that had a lack of engagement because of self-stimulatory behavior which limited in performing when was put in a situation that required to respond in some way to the environment. She reviewed 's November 4, IEP and found it striking that no goal therein addressed this behavior.

She testified that a consensus document published by the National Research Counsel at the National Academy of Sciences concluded children diagnosed with autism should engage in a minimum of 20 hours of education per week for 12 months during the year. She pointed out that many children need more. She testified that this time for

teaching preschool students with autism presents a tremendous opportunity while the student's cognitive window is wide open. She pointed out that in learning to attend, had to have that foundation laid for later academic learning and that the minimum hours of 20 per week allows such autistic children as to have enough opportunities to engage with the appropriate educational materials to gain the skill at a rate that's likely to produce progress.

Dr. is familiar with both the TEACCH methodology used by and the ABA methodology used by the private School. She testifies that absent from the TEACCH methodology is the number of direct instruction hours, i.e., one-on-one instruction, that we now know are critical to producing good skill gain in young children with autism. She commented about the critical importance of parent training as being a component and critically important in the ongoing success of teaching children with autism. Dr. offered evidence with regard to the least restrictive environment component of 's education pointing out that children with autism lack two very critical component skills that are necessary to allow them to learn in what is described as a natural environment, i.e., interaction with typically developing children. Autistic children have a deficit in the ability to imitate other people and they are, therefore, inhibited in their ability to learn in the natural environment. The other critical component is what Dr. calls joint attention and until the child with autism masters what Dr.

calls a technique of joint attention the ability of the child with autism to learn from the natural environment is tremendously inhibited. She testified further since showed no imitation skills and no joint attention skills it was difficult therefore to get to show any independent seeking of joint attention by attempting to communicate with others about objects in the environment.

She testified that at the under the ABA program began to learn and has developed the basic joint attention skills and has also developed imitation skills. Without these skills she opined that would have ability to learn in a group session very much affected. She testified that for this

STUDENT because of the nature of disability and the significance of self-stimulatory activity that the one-to-one intervention, i.e., that methodology employed by the , has given enough structure so that is able to work and perform in an educational setting without self-stimulatory behavior interfering with learning. She pointed out that because of this had made educational gains. Dr. testified that in July, when she first saw had no ability to focus on a task independently and that without the extended school day, parent training and one-on-one instruction could not master the skills listed in the IEP as Goals Objectives. Dr. testified that for a child with 's level of disability that daily data collection is very important. She emphasized that to continue to make progress such data collection was necessary.

Dr. testified generally about her observation of the setup and methodologies used in the School program of Ms. and said:

"Given my knowledge of children with autism, of educational programs for children with autism, my observation of Ms. 's classroom on several occasions, my knowledge of and the behavioral picture brings to the table and educational challenges, I do not believe would be able to achieve the goals that are on current IEP if were placed in the structure as it currently exists in ." [August 15, Transcript, p. 202]

Dr. testified that she had reviewed a report from Dr. and his evaluation dated December 9th and it influenced her opinion on this STUDENT's progress. It was a significant red flag. Basically she testified that for a period of almost two years based upon evaluations done over that time that this child had made no progress. She points out that if an autistic child is not making significant progress in the skill areas of verbal language that the chances of very severe long term disability are high and the chances that such autistic children as this student are going to develop verbal language in their lifetime drops precipitously. She added "And this is a child who was making no progress." August 15,

Transcript, p. 232.

With regard to questions about [redacted]'s mental retardation Dr. [redacted] testifies that accurate measuring of cognitive level in children with autism is very difficult and it would be better answered as [redacted] developed [redacted] language skills. She points out that [redacted] in the private school was able to very quickly begin to gain skills in the structured direct instructional model. She testified that [redacted] had made very significant progress in a relatively short period of time referring the [redacted] and the ABA method. She testified that the skills she had seen gain in the [redacted] included instruction of 6 hours at school, an after school program and in her opinion an extended school year which was critical for children with autism. Her reasons in determining the critical nature of the extended school year was testified to be that autistic students lost some of the opportunities to gain skill because of the difficulties with interacting with the environment.

Dr. [redacted] testified that the states of New York, Connecticut, California and Maine and Ontario, Canada all did reviews of the empirical literature dealing with educating young children with autism and all of these reports, empirical reviews of literature, reached the same conclusion that the intervention technique, i.e., teaching methodology, with the best evidence to support its effectiveness with children with autism is applied behavior analytic teaching techniques, i.e., ABA methodology. Dr. [redacted] points out that people in the field of education who say that the ABA methodology doesn't work generally rely upon personal opinion from what they had heard others say and not upon the standards of empirical evidence.

[redacted] participated in and implemented an ABA type of program in the STUDENT's home in August, [redacted] until about December, [redacted]. She described self-stimulatory behaviors in her efforts with [redacted] at [redacted] home. The program that she was implementing changed and was revamped by one [redacted] in October, [redacted]. The main concern then was attention skills for [redacted] and, connected therewith, getting rid of the self-stimming behaviors. The focus was on a lot of behavioral things and upon the implementation of an errorless

correction procedure. When she first began working with [redacted] was nonverbal and had no language to speak of. She testified that once [redacted] began at the [redacted] and with the home program that she was implementing [redacted] language blossomed. [redacted] was able to repeat almost everything that you said and was making spontaneous production of [redacted] own and with the help of the witness [redacted] they were able to get [redacted]'s attentive skills and focusing ability under control and removing stimming behaviors so that it was much easier for [redacted] to focus on attended task. She testified that [redacted] was able to repeat almost everything that the instructor/prompter/teacher would say. For example, if she said ball [redacted] would say ball; if she said book [redacted] would say book. If she showed a picture of a book [redacted] would say book. She testified that though she never kept count of how many words he could recognize and repeat, it was approximately 100. She testified that [redacted] had articulation problems so that it would not be as clear as other people's speech but [redacted] response was distinguishable. Ms. [redacted] testified that [redacted] was now a verbal child.

[redacted], testifying for the parents, worked at the [redacted] for approximately seven months during the [redacted] school year and was [redacted]'s program coordinator. She helped with the design and implementation of [redacted]'s home program on or about September, October and November, [redacted]. She spoke with [redacted], [redacted]'s mother, about her concerns and watched a video of [redacted] during a therapy session. She observed significant lack of attending skills, all prerequisite skills to having an actual, functioning teaching session. She then personally met [redacted] and noticed self-stimulatory behaviors. She testified that if an autistic child did not have attending skills, which she defined as making eye contact, looking at [redacted] teacher, complying with the directives, sitting in [redacted] chair with [redacted] hands down and [redacted] feet on the floor, that the student could not gain anything from the teaching session and any such teaching session without those attending skills would be a waste of time. Ms. [redacted] felt that they needed to give [redacted] the fundamental skills, attending skills, to make teaching sessions productive. At the time she saw [redacted] and saw the video

had no attending skills and was unable to work independently. Ms. [redacted] was also [redacted]'s program coordinator at the [redacted] in charge of developing [redacted] program. She testified that in addition to being unable to pay attention or have attending skills that lacked in October of [redacted] imitation skills which prevented [redacted] from being able to function in a group program where imitation skills were necessary. When I asked about her observed progress in regard to attending skills during October and November, [redacted] and how she could attribute that progress to [redacted] home program as opposed to the program at [redacted] Elementary she testified that the home program which was one-on-one was significant compared to the 15 minutes of one-on-one in the [redacted] program and the types of skills that she understood [redacted] was working on in the program were not those kinds of skills that she was talking about where progress was observed. She testified that the TEACCH methodology was not, in her opinion, an appropriate way to teach autistic children because it was not scientifically validated. She stated that she believed in scientifically validated interventions, i.e., methods of teaching, of which TEACCH had not been demonstrated.

[redacted], the mother of the STUDENT, testified that her [redacted] began services for [redacted] disability in February, [redacted] through the [redacted] Center. After that [redacted] was involved with the Homebound Program and among other things received a one day half an hour visit per week from a speech therapist who previously testified, [redacted] also received extended school year services for a summer program which along with the homebound program was during the school year [redacted]. In the school year [redacted] entered the PEDD program at [redacted] Elementary and [redacted] teacher was Ms. [redacted]. Mrs. [redacted] testified that during the Spring of that school year she was invited by the teacher and came to view the classroom to see how [redacted] was doing. She had previously viewed [redacted] in the classroom at the beginning of that school year. At that observation Mrs. [redacted] was shocked at the lack of [redacted]'s progress compared to the other children who all seemed to be on the same level as [redacted] during her early visit that school year and in a group session could point and identify the calendar and numbers and often

verbally pronouncing the numbers while [redacted] could not even point to the days of the week.

Because of her concern about what she observed as lack of any progress and her dissatisfaction with the 4-week summer program she learned about the ABA program. At the height of her concern she talked again sometime in the Summer of [redacted] about ABA Therapy and became more concerned when Ms. [redacted] told her that she was not likely to get ABA Therapy in the [redacted]. Following that Mrs. [redacted] set up a home program based on ABA Therapy. She kept daily data collection, *Parents' Exhibit 47*, showing her [redacted] initial responses to four commands that were being worked on in her home session one-on-one therapy. Shortly after that at a scheduled IEP meeting she voiced her opinion that [redacted] had not made any progress in the PEDD program and she felt he needed to be moved to an autism program. She composed a letter, *Parents' Exhibit 32D*, which discussed her concern with the TEACCH program. She advised those at the meeting that she believed [redacted] needed a longer school year, a longer extended school year, one-on-one instruction and positive reinforcement and at home support from the school in regard to how to follow through with the school program at home. Following that Mrs. [redacted] requested and had a 15 minute conference with [redacted] new teacher, [redacted], and made notes which she took with her to that meeting, *Parents' Exhibit 32G*. Hoping that this would be a new program that was going to work for her [redacted] she wanted to find out what would be done differently than the previous program under Ms. [redacted].

After an explanation of the methodology to be used in this new program as TEACCH Mrs. [redacted] concern was that the program did not sound very different from the PEDD program that [redacted] had been involved in the prior years and which she did not feel [redacted] was making any progress with. She testified that the one-on-one therapy in this program was to be 10 to 15 minutes a week as told to her by the teacher, [redacted].

Mrs. [redacted] received the evaluations prior to what she calls the eligibility meeting for the IEP October, [redacted] and was concerned that they were ringing true to the child that she knew, i.e., there was no progress, extreme distractibility, stimming behaviors

observed, no language skills noted, very little receptive language. She voiced her concern about ABA Therapy and one-on-one instruction and essentially received no response except that what was being offered by [redacted] was something that was appropriate. She testified that when new goals for the IEP in November of [redacted] were drafted that 17 were the same as old goals from an old IEP even though she had requested new goals. She understood that goals needed to be changed and was concerned that if the goals were the same and, therefore, had not been achieved since [redacted] that they were now inappropriate. Mrs.

[redacted] felt that the goals needed to be broken down into smaller components consistent with the methodology and program at the [redacted] School. She felt after observing her [redacted] in the classroom at [redacted] that [redacted] wasn't attending, that [redacted] was stimming and needed redirection. [redacted] wasn't responding to directives.

Mrs. [redacted] observed her son in Ms. [redacted] class and she noticed the lack of [redacted] appropriate eye contact and that [redacted] was able to follow the commands, such as stand up, clap hands and sit down, which were those that she had been working on in the home program all summer. [redacted] was unable to as they call it transition as it is described as PECS. Mrs. [redacted] basically gave verbal confirmation to *Parents' Exhibit 16*. Mrs. [redacted] described in detail her observations of [redacted] that day in Ms. [redacted] class; this was identical to all of the evidence in this case, based on observation.

Mrs. [redacted] observed and described the program at the School as basically a flip-flop of what the program was at [redacted]. [redacted] went to school 6 hours a day, 5 days a week and of those 6 hours only 10-15 minutes were spent in group time which she describes as a total opposite of what's been done in the program. The program included extended year services and depended upon positive reinforcement upon correct completion of specific programming goals. Specific data was taken and the parents were immediately trained to follow through with the techniques at home that were being used at the school.

Mrs. [redacted] describes [redacted] communication skills following the program under [redacted] IEP as being non-existent.

Compared to that progress and language skills at the . was amazing. made huge gains. For example, was able to verbally identify different cards placed in front of and without assistance by January in the was pointing to over 100 different objects correctly when teachers would point to the word.

When I observed in the School I saw verbalize five different objects which were being pointed out by the teacher and watched point to over 20 different objects when the teacher would say the word describing that object.

Mrs. stated that when her began the ABA Therapy at had absolutely no imitation skills whatsoever. was unable to learn social skills by being in a group setting because didn't even look at or make eye contact with those in the group and, therefore, was unable to imitate. She observed the imitation skill is something that comes naturally to most children but has to be taught to .

Mrs. testified that had absolutely no transitioning problems from the PEDD program to the program at . She also testified that had none when moved to the . She opined that based on her observation in order to have a problem with transition attention skills were needed and did not have those.

, Ph.D., a licensed clinical psychologist and Associate Professor of Psychiatry at , who is also the Director of Developmental Disorders Assessment Clinic for young children with autism, testified for the parents. At the Dr. had written an evaluation of this STUDENT involving testing and observation. reviewed the evaluations done by and concluded that had made no developmental gains over the period of Public School education . He describes at the time of the testing was able to do the basic skills of joint attention in a very structured setting. Dr. testified that at the in an extensive structured program had made a lot of gains in receptive language according to the objective data kept at the school. 's behavior challenges, specifically distractibility and self-stimulating behaviors, were still present

especially in the absence of structured instruction. testified that in the absence of that level of direct instruction, which defined as meaning continual interaction with the child on a one-on-one basis, that ability to occupy independently was very small and at such independent times would revert back to the interfering behaviors. At observation was having a lot of trouble making use of a group session. Even with the support of a one-on-one person standing right behind in the group, had a lot of difficulty maintaining attention tasks. In the absence of a high level of structure of one-on-one with the teacher directly being involved with along with one-on-one aide person behind was distracted and was not attending to what was going on in the group.

Dr. conclusion based on the behavior that he observed in the group setting was that wasn't able to benefit from the group instruction in terms of learning content. did not benefit at all from the group in terms of content, academic instruction, language skills or cognitive skills. In regard to level of functioning Dr. pointed out that such level is markedly impacted by distractibility and level of stereotypical behaviors that was engaging in. He believed that the progress that he saw in the School, being intensely structured and, thereby, managing the types of behavioral challenges, specifically distractibility and self-stimulatory and stereotypic behaviors. Dr. essentially debunks the premise that transition was responsible for the poor results in at Elementary emphasizing that transition problems should not exceed two weeks. He pointed out that in being so-called transitioned to the School was just as much a transition as any of the others relied upon by and despite that, from to demonstrated ability to learn very quickly with appropriate support in that kind of setting in a transition [Parents' Exhibit 17].

In answer to the of continued questions attempting to justify the lack of progress in their program due to the underlying disability of autism coupled with possible mental retardation, Dr. points out that the child's ability to learn

should not and could not be measured by a conclusion of mental retardation because of the level of interfering behaviors. Dr. repeats again that on the basis of evaluation and observation of at the School that because of inability to attend to group instruction or participate in a small group that could not benefit from small group instruction.

testified and is the Program Coordinator for this student at the School. She testified about the importance of simultaneous collection of data with regard to instruction with autistic children as being important in determining progress objectively. Otherwise, she states that the teacher would rely on memory and often that would result in inaccurate data. To alleviate that the program at the School collects the data the moment the student performs a teaching/learning task. Anecdotal data is a concern because it involves data taken after the facts relying upon the data collector/teacher's memory and limits itself to subjectivity in which there is always a bias. Ms. points out that because all teachers want their children to progress that unless learning data is collected immediately it becomes less than objective because biases lead to interpret things that really aren't there.

In describing program as other witnesses have also indicated she points out the necessity of mastering or at least paying attention to attending skills. It is difficult if not impossible to learn quite simply if one cannot pay attention to the materials. Attending skills and skills like matching and imitation are those that are automatic in other kids but not for kids with autism and particularly not with . Ms. testified that based on 's history he had demonstrated that was unable to learn in a group setting. That needed an intensive program involving providing multiple opportunities to practice the program skills and to keep focused. If is focused responses are forthcoming. If the teacher walks away and gives a break reverts back to self-stimulating conduct. lack of attending skills, i.e., being able to pay attention, were of such short substance when first came into the program that distractions in rooms had to be covered with a sheet so there

would be nothing to distract and would be better able to attend to the program rather than paying attention to all of the stuff around . At the point of her testimony the program was able to gain the attention of to the extent that they now have been able to restore the environment back to its original and remove the white sheet.

In reviewing a report by speech therapist this witness observed that the problems noted in that report were consistent with the conduct of when first came to . On the basis of observation and review of an evaluation by one

this witness noted a great deal of progress in receptive language skills. Ms. observation indicates that has very little if any transition problems either with regard to different teachers or different settings. matching skill improvement has been phenomenal. had none prior to coming to the

School. has shown much improvement with expressive language in that will approximate anything that you attempt. has progressed and is doing spontaneous labeling/vocalizing. did little of this when came to the School and wasn't able to imitate sounds on demand then.

This witness reviewed the November, IEP and the goals stated therein for this STUDENT. She points out that her concern is and was that in order to master the goals ability to attend was a skill necessary as a foundation and without those prerequisite skills would struggle with the IEP goals. Generally this witness pointed out as have almost all witnesses that until can eliminate behaviors and pay attention, i.e., master to some extent attending skills, will not be able to make progress toward the IEP goals.

, who at the time of her testimony was the interim administrative director at the School, is TEACCH certified and had observed classroom at Elementary School. She identified the methodology of teaching in that classroom as the TEACCH model involving primarily group instruction. She witnessed and talked with Ms. about the use of the Picture Exchange Communication System, PECS. This witness responded that Ms. spent about 15 minutes a day one-on-one with each child doing

direct instruction. She observed without the direct one-on-one instruction activities in the classroom that showed students engaged in a high level of self-stimulatory behavior. Ms. describes the TEACCH methodology and what she sees as its limitations. In general, she testified that this method, which was used in and involved in preparing the objected to IEP, simply doesn't break down the components of learning which the ABA Therapy does.

After the hearing at scheduled times I personally have visited and observed the preschool autistic classroom at Elementary School. The set-up, layout and structure was very similar to what all of the evidence indicated. The so-called TEACCH method of instruction was obvious as was what they called the PECS methodology of moving from one instructional activity to another. The program from group instruction observed was consistent with the evidence. By observation alone, however, I was unable to confirm the testified to TEACCH methodology system being involved with integrating the student in the environment as opposed to the ABA Therapy which necessarily limits that by the consistent and constant one-on-one direction teacher to student. The classroom setup and methodology used were similar to and consistent with the classroom setup and methodology with which I was extremely familiar with through other cases since the 1970's with regard to teaching preschool children and early elementary school children with cognitive delays.

I also visited the School and observed in several of different ABA therapies and I observed all of the different activities that he could have been involved in through the six hour school day. I observed a great deal of the progress indicated by the evidence and specifically saw repeat without any prompting 7 or 8 words, select picture objects in response to words, initiate word requests in response to simple directions or questions by the teacher. I observed matching skills, simple puzzle placement skills and the like which were not demonstrated by the evidence in the program. I observed attending to the program with little prompting by the teacher. Any prompting done with regard to any of the activities was not hand over hand but was generally one or

two word directions or commands. Self-stimulatory activity that I observed was minimal and involved the STUDENT on several occasions looking back at me fleetingly and then directing eye contact to something other than what was being instructed. I watched , as they call it, transition from room to room and activity to activity and observed nothing unusual. activities were all one-on-one but consistently there were other children coming and going and other teachers and children coming into, leaving and speaking to the teacher directly involved in the one-on-one therapy. was not distracted by any of this and appeared to appropriately divert attention and immediately go back to this one-on-one task. The methodology that I observed at the School was a methodology that I had no prior familiarity with nor any prior knowledge of.

III. Finding of Facts:

A. Undisputed Findings:

All requirements of notice to the parents of the child with regard to due process rights were satisfied. There were and are no procedural issues. This child is without dispute a student with a disability under the law who needs special education and related services. The educational services received by this child in the private school are appropriate and provide significant educational benefit to the STUDENT as measured by progress as defined by the law.

B. Further Finding of Fact:

The process following this due process complaint is that as mandated by law under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq and the appropriate regulations. Recent cases in the United States District Court for the Fourth Circuit have overturned hearing officer decisions because of the hearing officers' failure either to give enough weight to the professional judgment of witnesses for the school board or pay appropriate attention to experts. [County School Board of Henrico County, Virginia v. Zachary Michael Palkovics by and through his parents and next friends, Robert William Palkovics and Nancy Michaele Palkovics, U.S. District Court, Eastern District, Richmond Division, CN 3:03CV396, September 26, 2003, and J.H., by and through his parents and next friends, JD and SS; JD; SS v. Henrico County

School Board, U.S. Court of Appeals Fourth Circuit, April 21, 2003, No. 02-1418] Those cases, along with the law defining the process, virtually eliminates any ability to decide the issues at the conclusion of the case. By definition therefore the decision could not be rendered until the transcript was prepared. Likewise, a *fortiori*, the transcript then must be read and reviewed and then the opinion drafted in written form. I was prepared in this case to make the decision at the close of the evidence. The testimony and exhibits were fresh at that time. I was unable to do so because of both the law and the process. While the transcript was being prepared the Palcovics decision above was announced. Therefore, even more careful scrutiny had to be made of the evidence hampered by the time deadlines imposed by the regulations of IDEA. The decision then that I would have made had the process allowed at the close of the evidence was required to be put aside and ignored in a new and fresh attempt to decide the case on the basis of multi-reviews of the evidence and exhibits and the hearing notes. The decision reached with small exceptions mirrors the decision that I would have announced at the close of the evidence on August 19, 2003 had the process so allowed.

This comment is necessary to explain to the parties and those otherwise interested to explain the enormous amount of time involved and my ORDERED delays in the time of the decision.

C. Finding of Facts:

1. This STUDENT made little, if any, measurable progress and received little, if any, educational benefit in the special education programs that attended in .

2. The IEP of November, 2002 was not designed so as to implement educational benefit.

3. The primary skill that this STUDENT lacked was that of attention labeled herein as attending skill.

4. The methodology involving basically group instruction does not address the attending skill problem and, therefore, does not deliver to the STUDENT educational benefit as measured by progress.

5. The intensive one-on-one methodology used by the

School demonstrates this STUDENT's ability to receive educational benefit as measured by progress not demonstrated in the program.

Consistent with the requirement of law the evidence was given the most significant of consideration. Careful consideration and great weight was given to each of the witnesses. All of the evidence was offered to show the receipt of educational benefit by this STUDENT as determined by the witnesses' evaluations, observations and opinions. That evidence was simply not persuasive.

Although , the STUDENT's teacher at Elementary, testified that she believed would receive educational benefit from the November IEP and had received educational benefit in her class it is her basis, therefore, that is in question. For that basis she points only to extremely minimal differences in this STUDENT's activities. Many pertinent questions were revealed by the record that she could not answer and just could not remember. The basis of her conclusion of progress rested upon things such as was able to visually attend for three to five seconds compared to an earlier one second. She justified her conclusions by the observations of great eye contact, good participation, attempted to, very social, great job, nice job and transitioned independently. Considering these subjective conclusions along with her manner and appearance while testifying and her opportunity for knowing the truth and observing the same I give little credibility to her testimony and find the witnesses for the parents more believable.

Similarly teacher in the prior year in a PEDD classroom at testifying in support of the position was unpersuasive and not as believable in regard to her conclusions as other witnesses. Her testimony in its attempt to provide a basis for her opinion of educational benefit was, at best, minimal. That testimony was actually in conflict with her own evaluation of performed on 09/05/ [School Board Exhibit 59] showing poor performance and the lack of improvement when compared to the baseline like evaluation demonstrated from Parents' Exhibit 4 evaluation from the Center. Her explanation of

loss of skills at the time of her evaluation as regression simply
believes common sense. Like the teacher this witness by
her appearance and manner on the witness stand appeared to be without
credibility and reluctantly defending the selected teaching
methodology.

Dr. testimony as Director of the Exceptional
Educational and Support Services of the Public Schools was
not as credible as other witnesses since her opportunity to know the
truth was dependent upon a 40 minute observation of at the
School. Her observation was for the most part in direct
conflict with my own observations made under similar circumstances
for a like period of time.

Similarly Dr. was less than persuasive as to the
ultimate issue. For the most part she simply disagreed with Dr.
opinion of no progress for this STUDENT while in
Henrico. Her opinion rested upon her position that Dr. use
of testing for a cognitive score beginning in April, was
inappropriate. Without deciding that issue I find it irrelevant as
discussed later in this decision where I have held that the cognitive
issue defense presented by the fails not because of the
cognitive scores but because of the progress in the School.

Her further basis for her opinion of receipt of educational
benefit relied upon what she said was the description of skills that
teachers had seen gain. However, even this unpersuasive
basis was followed by this witness's very revealing statement
"Certainly not no progress....". Dr. further testimony as
to the skills she said she understood that this STUDENT had gained in
the classrooms and that she saw in her own testing to be steps in
toileting, transitioning, independent walking and a lot of little
things is not as credible as other witnesses and like some of the
other witnesses her appearance and manner of testifying had
effect upon the credibility assigned to her evidence.

The one witness for the who had the greatest opportunity
to know the truth about progress or lack thereof was
speech therapist Ms. . She performed her own evaluation
of in October of and found to be unable to do what she

had previously seen do. She stated that the skills she had previously seen in Ms. classroom were not observed at the evaluation. Though she stated that she believed had received educational benefit her testimony and evaluation is to the contrary. Essentially had no changes in expressive language and this evidence is consistent with Elementary classroom teacher, , who expressed that was nonverbal. Her opinion that the lack of skills shown in her evaluation was due to regression at the time is simply without foundation and unconvincing.

All of the remaining witnesses provided evidence that was more believable considering the credibility of each witness than those of the . These witnesses variously concluded either by testing, evaluation, observation or review of relevant documents, reports and evaluations came to the same conclusion of an almost total lack of educational benefit received in in September, October and November of and a significant educational benefit received as measured by the observation of progress while in the six hour per day twelve month a year program at the .

Broken down into its most simple component what the evidence showed as a whole was that throughout educational experience lacked and never attained **attending skills**.

could not pay attention. Until was able to pay attention did not while in the Public School System and could not receive the appropriate educational benefit contemplated under IDEA. Without exception experience at the School demonstrates through their methodology of longer hours, behavior oriented programs, one-on-one intensive instruction and twelve months of instruction as opposed to the basic group instruction for three hours without extended school year services demonstrated that was able to and did, in fact, achieve the **attending skills**. As measured by progress at the School was, therefore, able there to receive educational benefit as IDEA and the law contemplate as being appropriate.

I have carefully considered the evidence of progress at the School only in terms of the determination of expected receipt of educational benefit from the November IEP as measured

by the STUDENT's progress. This consideration is directly relevant to the attempt to explain this STUDENT's lack of progress by reference to cognitive impairment in addition to autism as being an explanation of a very limited ability to progress. This attempt fails being completely refuted by the evidence taken on the whole and by the consistent credible and believable evidence presented showing significant progress within the program at the School.

I have given the most credibility to the Parents' witnesses in reaching my decision. In particular I have found the mother, , and Dr. after considering all of the evidence as the testimony that I have most accepted. Similar to the other witnesses testifying on behalf of the STUDENT I find these two witnesses based on their intelligence, their opportunity to know the things about which they testified and their background and experience in dealing with the unique individual requirements of to be the most believable. Mrs. was concerned about her clear observation of lack of progress of her when compared to the witnessed progress of other like students in class. She discovered ABA Therapy through her own initiative and research. She initiated that at home on her own. She saw the results. She saw those same results as claimed progress in Ms. class in September, October and November of . There was no other so-called progress and that which was claimed was actually the result of the home ABA Therapy primarily administered by Mrs. . Her request for the use of ABA Therapy in the program was met with a stone wall refusal without any reasonable or adequate explanation. Her observations of the change in her conduct, activities and abilities outside of the school setting after experience in the School were overwhelmingly convincing of ability to progress once the intensive ABA behavioral therapy was able to address previous lack of attending skills. She was concerned that attending skills were never identified as a goal in the system nor under the November, IEP and concerned that a majority of the goals in that IEP were the same as they had been before using the very same teaching methodology. Mrs.

was a very convincing witness.

Likewise Dr. _____, Ph.D., was most believable. She clearly addressed _____ primary skill that needed to be mastered before _____ could receive educational benefit as _____ attending skills. In clear language she expressed the differences between the TEACCH methodology used in _____ and the ABA methodology used at the _____ School. She explained in clear terms how until _____ had developed joint attention skills that _____ would have little, if any, ability to learn or receive educational benefit in a group session. Dr. _____ addressed the issue of least restrictive environment by demonstrating again that without attending skills and the then thereafter developed imitation skills that an autistic child such as _____ could receive no educational benefit in what has been called throughout this case the natural environment, i.e., least restricted environment mixing with other nondisabled students. Most convincingly Dr. _____ demonstrated that the ABA Therapy used at the _____ School was supported by the conclusions of empirical review of literature and that the criticism of such methodology is not based upon the standards of empirical evidence but from personal opinion.

IV. Decision and Analysis:

The November, _____ IEP does not provide this student a free and appropriate education as it was not reasonably calculated to provide him educational benefit. Under *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the IEP that is developed by the school must be reasonably calculated to enable the child to receive educational benefit. The instruction and service required must be individually designed to provide that educational benefit. Minimal educational benefit is not acceptable. *Florence County School District Four v. Shannon Carter*, 950 F. 2d 156, 160, 18 IDELR 350 (4th Cir. 1991) and *Hall v. Vance County Board of Education*, 774 F. 2d 629 (4th Cir. 1985) However, IDEA does not require the school system to provide the optimal education program. *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002)

Having made the finding of fact herein that _____ "attending

skills" must first be addressed before is able to receive educational benefit and having made the finding of fact that the November, IEP and the program developed thereunder does not provide this required benefit based upon the clear progress when the same was addressed at the School, reimbursement to the parents for all costs and expenses associated with the School is ORDERED. Reimbursement is also ordered because of the failure of the November, IEP to offer extended school year services found as a finding of fact to be necessary for to receive educational benefit and to progress. The full year of program service provided to at the School taken along with the six hours of class time per day and its intensive one-on-one behavioral therapy all confirm that has the ability to receive educational benefit not recognized or planned by the November, IEP and not provided for by the very well intended but failed classroom programs of the .

Under the law as stated in *Town of Burlington v. Department of Education for the Commonwealth of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996 (1985) and *Florence County School District Four v. Carter*, 950 F.2d 156, 18 IDELR 350 (4th Cir. 1991) the required prerequisites to reimbursement have been shown. I have found the IEP of November, to have failed to provide a free and appropriate education to this STUDENT and the evidence and stipulation by the establishes educational benefit received at the School.

As to the least restrictive environment requirement under IDEA the placement at the School is absolutely necessary for educational reasons and, therefore, outweighs any benefit that may be gained by a less restrictive environment placement. The Elementary School placement contemplated by the November, IEP was by the evidence and my own observation only slightly less restrictive than the School program. The teaching methods of the School that provided educational benefit and progress as compared to the lack of any progress found through the program by definition of the methodology used requires a very restrictive environment; having found that requirement, the least restrictive environment requirement, is overridden by the educational

need.

Having decided the issue of educational benefit and progress as I have it is not necessary, therefore, I do not issue any decision with regard to the differences or appropriateness of educational methodology, i.e., the TEACCH method vs. the ABA method nor do I or have I decided the claim by the parents for the development of a home program beyond the school program itself.

Similarly, to the extent that there still remains any so-called Section 504 claim or claim under the No Child Left Behind Act neither of those claims or statutes are considered and there has been no evidence thereabout and no legal or factual basis for any such claims even made.

It is ORDERED that the parents, _____ and _____, are entitled to reimbursement of tuition costs and related expenses at the _____ and the _____ are the prevailing parties.

V. Notice of Appeal Rights:

This ruling shall be final and binding upon the parties unless the decision is appealed by either party to a state circuit court or a United States District Court within one year of the date of this ruling. See, §22.1-214; 34 CFR §§300.510, 300.512; 300.514

Hearing Officer _____, Jr.

Date _____

cc:

_____, Esquire
_____, Esquire
_____, Ph.D., Director _____ Public Schools
Dr. Judith A. Douglas, Department of Education

ATTORNEY AND COUNSELOR AT LAW

BUILDING
SUITE

VIRGINIA

TELEPHONE

TELEFAX



Esquire

, Virginia

, Esquire

Office of the Attorney

Re: Due Process Hearing

/

Public Schools

Dear Ms. and Mr. ::

The Commonwealth of Virginia's Department of Education Office of Dispute Resolution and Administrative Services has reviewed my decision and determined that I had used incorrect appeal rights language. Abiding by the Department's recommendation, the language of my decision with regard to *Notice of Appeal Rights* is amended to read as follows:

This decision is final and binding unless appealed by a party in a state circuit court within one year of this decision's issuance date, or in a federal court.

Thank you for your attention, and I remain

Yours truly,

cc: Dr. Judith A. Douglas
Patrick Andriano, Coordinator of Due Process Services