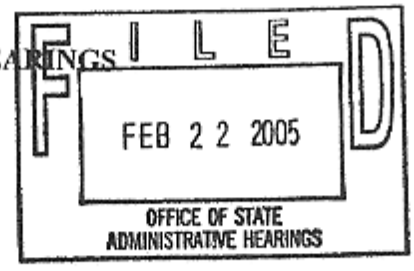
05-0510634

OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



[redacted] *

Petitioner *

vs * Docket No. OSAH-DOE-SE-0510634-76-CRAWFORD

*

HOUSTON COUNTY SCHOOL DISTRICT, *

Respondent

FINAL DECISION

I. INTRODUCTION

This matter comes before this administrative court ("the Court") pursuant to a November 15, 2004, due process hearing request. Petitioner [redacted], alleges that Respondent Houston County School District failed to provide Petitioner with an appropriate education, discriminated in several respects against [redacted] and committed a number of acts which Petitioner's attorney contended were in violation of federal and state law.[1] In August 2004 Petitioner withdrew from classes at [redacted] Elementary School without prior notice to Respondent. Petitioner seeks reimbursement from Respondent for private placement and in-home therapy.

The administrative hearing was held in Houston County on December 16 and 17, 2004. The parties completed the remaining testimony by depositions that concluded on January 5, 2005. The record closed on February 7, 2005, with the filing of Proposed Findings of Fact and

[1] Petitioner's attorney previously requested an administrative hearing in this same matter for [redacted]. That matter was set for an administrative hearing on September 29, 2004 but was withdrawn by Petitioner's attorney on September 28, 2004.

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Conclusions of Law.

The Court has reviewed carefully the transcript of all the testimony[2] and the exhibits admitted in evidence. For the reasons indicated below, it is the decision of the Court that [redacted]. has received a Free and Appropriate Public Education (FAPE) and is therefore not entitled to any remedy under the Individuals with Disabilities in Education Act (IDEA).

II. FINDINGS OF FACT

Brief Summary of [redacted].'s History Prior to the 2004-05 School Year

1. The parties stipulated that [redacted]. is a [redacted]-year -old student whose custodial parent, Ms. [redacted], presently is a resident of Houston County. [redacted]. has been identified as a student with autism and is entitled to special education services from the Houston County School District under the provisions of the Individuals with Disabilities Education Act (IDEA).

2. Petitioner and Respondent, through their respective counsel, negotiated a placement for [redacted]. for the 2004-2005 school year and reached an agreement that [redacted]. would be placed in the General Education Pre-Kindergarden Program (Pre-K) at [redacted] Elementary School, based on the request of [redacted].'s mother, with "a one:one trained paraprofessional to offer support as needed." (Exhibit R-28).

The August 12th IEP

3. [redacted] began attending [redacted] Elementary School on August 6, 2004, the first day of the 2004-05 school year for students. (Vol. II, 12/16/04, pp. 250) The IEP meeting for [redacted] took place on Thursday, August 12, 2004 and an IEP was developed at that time to be implemented beginning August 16, 2004, the following Monday. (Exhibit R-29).

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[2] The transcript consists of eight bound folios, including the testimony taken by deposition January 5, 2005. For convenience, the transcript of the testimony heard during the two days in December will be indicated as (Vol.__,date, pp.__). The testimony by deposition will be identified as (Depo., (witness), p. __).

4. The August 12th IEP reflects that Petitioner's mother was present, along with her counsel, as well as school district administrators, teachers and Respondent's counsel. The IEP minutes indicate that the parties **agreed** to the following:

- "continued services in the general education setting with the support of a one-to-one paraprofessional" as had been negotiated previously between counsel. (Exhibit R-29, p.11). The paraprofessional[3] "will receive training in behavior intervention and data collection from Lucy Hicks, Autism Program Specialist." *Id.*
- [redacted]. would receive occupational therapy ("OT") and speech/language therapy ("ST") services. (Exhibit R-29, p. 7-8).
- All of [redacted].'s special services, including Discrete Trial Teaching, would be provided during the time other children were napping[4]. (Vol. I, 12/16/04, pp.58-9; Vol. II, 12/16/04, p. 294).
- [redacted]. would continue to receive special transportation. (Exhibit R-29, p. 11)
- The academic goal for [redacted] would be the completion of the Georgia Pre-Kindergarten Standards by the end of the school year, which is the same curriculum used for all pre-K students. (Vol. I, 12/16/04, p.53). Specifically, [redacted] would meet seventy-five percent of those standards. (Exhibit R-29; Vol. I, 12/16/04, T-53-54).
- [redacted] has "behavior which impedes [his] learning or the learning of others" and that "a

[3] Ms. Wilson, the paraprofessional placed with [redacted] by Respondent, did not have prior training in the use of Applied Behavior Analysis or DiscreteTrial Training, which is a part of ABA therapy. (Vol III, 12/17/2004, p. 313) She did have a degree in Early Childhood Education, a masters degree in Christian Education and six years experience working as a paraprofessional in a high school self-contained special education classroom with students, some of whom were autistic.(Vol. II, 12/16/04, pp. 252-254)

[4] Because [redacted] has difficulty sleeping at night, [redacted].'s mother did not want [redacted] to have a daily nap with the other children in his class but requested that [redacted] receive speech/language therapy and occupational services during the class nap time. (Vol. II, 12/16/04, p. 58; Vol. III, 12/17/2004, p.334; Exhibit R-29, p. 13). Subsequent to the IEP meeting, [redacted] was removed from the classroom for ST and OT from 12:50 to 2:15 while the other children rested, even though most of that time [redacted] was tired and wanted to lay down on the tumbling mats and take a nap. (Vol. II,

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behavior management plan has been developed and is attached." (Exhibit 29, p. 5). The Behavioral Intervention Plan itself is contained in [redacted]'s IEP at pages 5(a)-5(c), and targets two behaviors: "Tries to leave the work area, or begins to move in his chair" (p. 5(a)) and "Aggressive Behavior–kicking, biting, loud yelling." (5(c)). Under each of these targeted behaviors are Antecedent Modifications, Intervention Stages and Practice. *Id.*

5. [redacted]'s mother and her counsel were not in agreement as to the entire contents of the August IEP and specifically **disagreed** with the IEP because:

- The paraprofessional assigned to [redacted]. was not previously trained as an Applied Behavior Analysis ("ABA") therapist.
- [redacted]. was not receiving 40 hours a week of ABA therapy and one-half hour each day of OT and one-half hour each day ST. (Depo., Ms. L., pp.37-46, 102)

[redacted].'s Experience During the 2004-05 School Year

6. [redacted]. was assigned to a class of typical students taught by Ms. Molly Townsend, a Pre-K teacher at [redacted] Elementary School, a placement agreed to by Ms. L. (Depo., Ms. L., p. 35). Ms. Townsend had participated in developing the August IEP and it was her responsibility to administer that IEP to [redacted]. in the classroom. (Vol. I, 12/16/04, p.106) [redacted]. was a student in her classroom fifteen days[5] before his mother withdrew him from school. (Vol. I, 112/16/04, p.107).

7. Although unfamiliar with the routine in the cafeteria, [redacted]. adjusted and was able to sit with his class, interact with adults, and otherwise behave appropriately. (Vol. I.,12/16/04, pp.109-110,

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12/16/2004, pp. 275, 284

[5] [redacted]. attended school four days prior to the IEP meeting on August 12, and, including the day the IEP was developed, attended school eleven additional days before being withdrawn.

256).

8. At the beginning of the school year, [redacted]. played only by himself. About the fourth day, he began parallel play with other students and subsequently began to interact with other students. This was significant because children with autism have difficulty interacting with their peers and tend to play in isolation. (Vol. I, 12/16/04, pp.111-113). On the playground, [redacted] would ride bikes with other students, pull other students on a bike, spontaneously join play groups, imitate the activities of his peers, spontaneously initiate conversations with students, and otherwise engage them in such a manner that other children did not appear to know that [redacted] was a student with disabilities. (Vol. I, 12/16/04, pp.113-114; Depo.Reagan, 1/5/05, p 19-20).

9. At school, [redacted]. did work on shapes and colors, colored and glued and engaged in a number of Pre-K activities that are part of Georgia's Pre-K Standards. (Vol. I, 12/16/04, pp.117-120; Exhibit R-42). Also he worked with his group on puzzles, phonics, singing and learning every sound of the alphabet. (Vol. I, 12/16/04, pp.120-123)

10. During the time that [redacted] was in Ms. Townsend's class, it was her opinion that [redacted]. was on schedule toward mastering the goals contained in his IEP. Ms. Townsend and [redacted]'s autism teacher, Jenny Reagan, believe that [redacted] would have mastered the goals and objectives contained in his IEP by the end of the school year. (Vol. I, 12/16/04, pp.123-124; Depo, Reagan, p. 26)

11. At the time that he began school for the 2004-05 school year, [redacted]. was not toilet trained. (Vol. I, 12/16/04, pp.124-126; Vol. II, 12/16/04, p. 189). The method used to train [redacted], known as "trip training", involves taking a child to use the bathroom facilities at regular intervals until the student is able to indicate when he needs to use the restroom or to wait until restroom breaks

have been scheduled during the school day. [redacted]'s mother agreed that the paraprofessional should take [redacted] to the bathroom every thirty minutes. (Vol. II, 12/16/04, pp.189-190).[6]

12. While [redacted] would agree to use the restroom when all of the students in his class were scheduled to go, (Vol. I, 12/16/04, p.126) [redacted] frequently would resist and refuse to go to the bathroom thereafter because he wanted to continue to work on the projects or tasks that had been assigned for the class to do. (Vol. I, 12/16/04, p.127). When he was asked to leave those activities and projects to go to the bathroom, [redacted] frequently would "stomp his feet and scream 'no' really loudly." (Vol. I, 12/6/04, p. 127). Respondent attempted various methods to cause [redacted] to be willing to participate cooperatively in the trip training, including use of reinforcers and use of a small potty chair provided by Ms. L. and used in the bathroom stall. (Vol. I, 12/16/04, p.128-130)

13. Ms. Townsend received frequent support and training in her classroom from Respondent's autism specialists who provided recommendations to her and the paraprofessionals on ways to manage [redacted]'s behaviors through positive behavior supports. (Vol. I, 12/16/04, pp.151-152, p.156, Vol. II, 12/16/04, pp.184-186, p. 254)

14. Ms. Townsend did not observe [redacted] losing control and experiencing what Ms. [redacted] called a "melt down"[7] other than [redacted] stomping his feet. (Vol. I, 12/16/04, p.131). [redacted]'s behaviors were not so extreme as to interfere with the other children in the classroom[8] and there were times when he would go to the bathroom without difficulty. (Vol. I, 12/16/04, p.132). [redacted] was taken

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[6] [redacted] currently is enrolled in a half-day, private, pre-Kindergarten program, [redacted], where he is taken to the bathroom every 30 minutes. (Vol. III, 12/17/04,p. 310).

[7] A melt down is a tantrum that can vary in time and intensity. It may include kicking, screaming, biting, flailing, crying, or hitting. It may last a few minutes or an hour. (Vol I, 12/16/04, p. 131; Vol. III, 12/17/04, p. 237-238; Depo., Ms. L., pp. 127)

[8] There was at least one typical child in the classroom who was very oppositional and displayed behaviors when required to follow directions and pay attention. (Vol. I, 12/16/04, p. 277)

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to the bathroom by his paraprofessional, Sharon Wilson, who had difficulty in convincing [redacted]. to use the bathroom on schedule. (Vol. II, 12/16/04, p.257) Most of [redacted].'s behaviors of refusal, spitting and attempting to bite were with Ms. Wilson when she attempted to take [redacted]. to the bathroom. (Vol. II, 12/16/04, p.263) The one time [redacted]. bit Ms. Wilson was in the bathroom. *Id.* Ms. Wilson was working with the other teachers on strategies to help [redacted]. be more successful in potty training but the strategies were not implemented prior to [redacted].'s withdrawal from school. (Vol. II, 12/16/04, p.264)

15. Ms. Wilson kept a log or a daily report at the request of Ms. [redacted] in accordance with the IEP requirement that Ms. [redacted] should "know about every aggressive act/bite/attempt to bite." (Exhibit R-29, p. 13; Vol. II, 12/16/04, pp. 254-255). These reports are entitled "My Day at School" and indicate Ms. Wilson's observations of any inappropriate behavior by [redacted] during the school days reflected on those reports. (Exhibit R-32). These reports reflect Ms. Wilson's opinion that on most occasions [redacted]. had a "great day" or "good day" in spite of incidents in which he resisted being taken to the restroom. (Exhibit R-32; Vol. II, 12/16/04, pp. 288-289).

16. [redacted].'s ability to attend to his work, participate with other students and complete tasks had improved considerably from the first day of school until Ms. [redacted] withdrew him 15 days later. (Vol. I, 12/16/04, pp 131-132). The behaviors associated with the effort by the school system to toilet train [redacted]. were a relatively small portion of the school day and did not disrupt or interfere with other children in class. Respondent kept minute by minute data of [redacted].'s behaviors and tracked 2,940 minutes of behavior. Of those minutes, only 47 minutes consisted of inappropriate behaviors. (Depo, Reagan, 1/5/05, p. 26-27) Most of these inappropriate behaviors were "maybe 20 seconds in length." (Reagan, p. 28).

17. It was the opinion of the professional educators who testified on behalf of Respondent that

the IEP developed for [redacted] on August 12, 2004 for the 2004-2005 school year was reasonably calculated to enable [redacted] to make educational progress. (Vol. I, 12/16/04, pp.59-60; Vol. I, 12/16/04, pp.123-124; Vol. II, 12/16/04, pp.196-197; Depo., Reagan, 1/5/05, p.26).

Methodology

18. Petitioner contends that the only effective methodology for teaching students with autism is Applied Behavior Analysis (ABA) or ABA therapy. Various expert witnesses opined on the use of ABA at school, as well as other appropriate methodologies for children with autism. The school district relied on Dr. Robert W. Montgomery, a Board Certified Behavioral Analyst, who has had considerable experience in the use of ABA and in teaching educators how to use ABA appropriately in the public schools. ABA as a methodology may be used in a public school classroom by incorporating it in the physical layout, the daily schedule, the signals used to all the children, and by avoiding excessive transitions .(Vol. I, 12/17/04, pp 13-17). Dr. Montgomery opined that a child being moved from a self-contained class of only six students the previous school year to a class of twenty students, nineteen of whom are typical, would be an abrupt transition and may not work immediately. (Vol. I, 12/17/04, pp. 18-19).

19. Dr. Montgomery also opined that students with autism have greater difficulty transitioning into independent use of the bathroom, especially when using bathrooms in schools where noise is reflected that can affect the sensory functioning for children with autism, and difficult behaviors can be anticipated in that process, including tantrums. (Vol. I, 12/17/04, pp.21-27)

20. The National Academy of Sciences published a report which concluded that educational programs, in order to be effective, must include specialists who have training and skills in autism and who use a collaborative approach which addresses communication, social needs, use of peers as models, inclusion of students, ongoing monitoring of the program, and collection of data in

order to guide the process. (Vol. I, 12/17/04, pp. 29-30). From Dr. Montgomery's review of the school district's August 12th IEP, and his knowledge of the National Academy of Science's report, it was his opinion that Respondent's program had all the elements needed for an effective program. From his review of the qualifications of [redacted].'s service providers at school, it was his opinion that the staff that was to administer the IEP program had been appropriately trained. (Vol. I, 12/17/04, pp. 31-32).

21. Dr. Montgomery also opined that [redacted]. attending school only 15 days before being withdrawn by his mother was not a sufficent amount of time for Respondent to effectuate or demonstrate a substantial change in [redacted].'s behaviors. (Vol. I, 12/17/04, p. 34).

22. Petitioner relied on Kelly Ritchison, a paraprofessional who has served as an ABA Therapist for five different children in Houston County with a home ABA program. (Vol. II, 12/17/04, pp.107-108). Ms. Ritchison observed [redacted]. in Ms. Wainwright's class May 11, 2004 at Ms. [redacted]'s request and thereafter was employed by [redacted].'s family to provide some services[9] in their home during the summer months of 2004. (Vol. II, 12/17/04, pp.151-163). At least fifteen days during the summer was spent in building confidence and trust through "pairing"[10] with [redacted]. (Vol. II, 12/17/04, pp.163-164). She did not work on toilet training and did not devote any time to taking him to the bathroom. (Vol. II, 12/17/04, pp.165-166) Ms. Ritchison found that [redacted]. made progress on behaviors while she worked with him[11] and opined that "(t)o really judge the progress in these kinds of programs, it takes time." (Vol. II, 12/17/04, pp.131) She would not

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[9] The ABA therapist worked six to ten hours a week with [redacted]., and his mother worked every day with him, for a total of about 25 hours a week of one-to-one therapy. (Vol. III, 12/17/04, p. 357; Depo. Ms. L., p. 21; Vol. II, 12/17/04, p. 172). [redacted]. also received private occupational and speech therapy during the summer. (Depo., Ms. [redacted]., pp. 22-23).

[10] Gaining a rapport with [redacted]. and gaining his trust. (Vol. II, 12/17/2004, p. 121; pp. 190-191)

[11] In June, [redacted]. was exhibiting behaviors at home such as physical aggression (including biting), screaming, running, throwing, property destruction and refusal. These behaviors at home decreased in July and increased again in August. (Vol. II, 12/16/04, pp.192-193)

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expect to see "huge academic progress" in the few months she spent with [redacted]. *Id.*

23. Petitioner also relied on Ann Sullivan, a Board Certified Behavior Analyst, who opined that [redacted]. must have somebody working with him who is trained upon Applied Behavior Analysis principles. (Vol. II, 12/17/04, p.181). Ms. Sullivan was employed by Ms. [redacted] to supervise Ms. Ritchison's treatment of [redacted].. (Vol. II, 12/17/04, p.172-176). Ms. Sullivan was not familiar with any methodology other than ABA and ABA is the only methodology that she was trained to provide to students with autism. (Vol. II, 12/17/04, pp.211-212). Ms. Sullivan believed that only a Board Certified Behavior Analyst could oversee and provide training for a paraprofessional because that is what the Autism Special Interest Group of the Association of Behavior Analysts have adopted as their guidelines. (Vol. II, 12/17/04, pp.212-213)

[redacted].'s Bus Transportation

24. [redacted].'s IEP provided that he "will continue to receive special transportation." (Exhibit R-29). A bus monitor, Ms. Joyce McDaniel, assigned to the special bus which [redacted]. rode to and from school; her husband was the bus driver for this bus. (Vol.II, 12/16/04, p. 297). During the first days of school, road construction and new students assigned to the bus who had never been transported before caused [redacted] to have to wait for up to an hour for his bus to arrive at his school to take him home. (Vol. II, 12/16/04, p.298-299) The problem was resolved when the director of transportation arranged for a different driver to pick up children, including [redacted]., at [redacted], and to meet the McDaniel bus at a location where the children would then board the McDaniel bus and be transported home. This arrangement was made approximately one and one-half weeks after school began. [12] (Vol. II, 2/16/04, pp.299-300)

[12] At the IEP meeting August 12th, Ms. [redacted] was asked about bus transportation and she stated to the Team : "Great. Thirty-minute ride." (Depo., Ms. L., pp. 83-84). Following the IEP meeting, the mother and [redacted]'s counsel stood in the parking lot talking and watched [redacted]. standing in front of the school, waiting for his bus. (*Id.* pp.105-106) The

25. During his ride to and from school, [redacted]. behaved appropriately. [redacted]. was always smiling and cheerful except on two occasions when [redacted]. did not have his Cheerios at home before he boarded the bus; on the other occasion, [redacted] was distressed because his family was moving to another house. (Vol. II, 12/17/04, pp.301-302). Even on these occasions, [redacted]. was just "fretful" but settled down quickly; he never had a tantrum or screamed, cried, or kicked. (Vol. II, 12/604, pp.301-302). Ms. [redacted]. was unable to timely administer [redacted]'s medication to him when the bus was late. (Vol. III, 12/17/2004, p. 365)

Homebound Services

26. [redacted]'s parent observed that, after school began, Petitioner's aggressive behaviors increased substantially at home, with Petitioner becoming aggressive to his family[13] and himself, with head banging, gouging of his eyes, kicking, throwing himself to the ground, hardwood and tile floors, flailing back and forth, screaming, crying, hitting, and biting. (Vol. III, 12/17/04, pp. 235-238; Depo. Ms. L., p. 122). He would bite four to six times a day after school. (Vol. III, 12/17/04, p. 366). Sleep problems arose and [redacted] began coming into his parent's room, saying he was scared. (Vol. III, 12/17/04, pp. 338-339). [redacted]'s mother was afraid he was going to hurt someone or himself and considered hospitalizing him. (Vol. III, 12/17/04, p. 364).

27. On August 27, 2004 [redacted] went to school in the morning and was withdrawn from school prior to the end of school day although he was not sick or unable to attend school that day. (Depo., Ms. L., p. 61). Ms. [redacted] presented to the school district on that day a school district form entitled "Referral for Hospital/Homebound Instructional Services" (the Homebound form). This

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fact that Ms. [redacted] did not mention a problem with the bus delivering [redacted]. late in the afternoons and did not take him home with her after watching him wait from the bus on August 12th, weighs against the credibility of [redacted].'s contention that the bus schedule was harmful to A.A. prior to August 12th.

[13] [redacted]'s family at home consists of his mother, step-father, two older step-brothers and a seven-month-old brother. (Depo., Ms. L., p5).

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form was signed by Dr. [redacted] and reflected a diagnosis of "Autism/Sensory Integration Dysfunction/ CNS function deterioration/deteriorating medical condition." (Exhibit R-33). Petitioner's attorney requested an immediate IEP meeting to determine services for [redacted] at his home, but counsel for Respondent responded by requesting "more complete and detailed information contained in [redacted]'s medical records as they may relate in any manner to the diagnosis stated on the form."

28. Counsel for Respondent sought the parent's permission to speak to [redacted].'s physician concerning [redacted]. (Exhibit R-34). Permission was refused and a request for a due process hearing was filed by [redacted].'s counsel. (Exhibit R-35). On September 20, 2004, Dr. [redacted] executed an affidavit repudiating his prior diagnosis, stating in essence that he signed the previous forms as an accommodation to Mr. and Ms. [redacted] (Exhibit R-53).

29. At the hearing, Dr. [redacted] stated that at the time he was presented the Homebound form on August 27, 2004, the form was prepared for him to sign and he signed it based on information that was provided to him by [redacted].'s mother. At that time, Dr. [redacted] thought he was acting in [redacted].'s best interest. (Vol. III, 12/17/04, p.250). Subsequently, the step-father of [redacted] requested a letter to be signed to obtain the benefits from some type of insurance that would cover [redacted].'s schooling. Dr. [redacted] signed the letter prepared for him because, based on information furnished by the family, he believed it was in [redacted].'s best interest. (Vol. III, 12/17/04, pp.255-256)

30. [redacted].'s counsel requested Dr. [redacted] to sign an affidavit which he realized was not what he truly believed to be the case. Instead, Dr. [redacted] executed an affidavit that counsel for Respondent presented to him that was based on his belief and was consistent with his diagnosis. (Vol. III, 12/17/04, pp.257-258). At the hearing, Dr. [redacted] affirmed that the affidavit was his

sworn testimony at the time he executed the same and that it remains the truth. (Vol. III, 12/17/04, p.261). The substance of Dr. [redacted]' testimony as stated in his affidavit is that at the time Ms. [redacted] withdrew [redacted]. from school on August 27, 2004, Dr. [redacted] found no medical reason why [redacted]. could not attend school. (Vol. III, 12/17/04, pp.261-62; Exhibit R-53).

A.A.'s Current Placement

31. Without prior notice to Respondent, Ms. [redacted] placed [redacted]. at [redacted]s, a private preschool daycare center, on October 18, 2004, for a half day program for socialization only. (Depo, Ms. L., p. 74-75). [redacted]. does not receive academic services, ABA therapy, speech therapy, occupational therapy exercises from [redacted]s. These services are provided by private therapists. (*Id.*). Ms. [redacted]. does not know if any of the [redacted]s staff has training in ABA. (Depo, Ms. L., pp. 78-79).

32. [redacted] receives ABA therapy while he is at [redacted]s from a paraprofessional employed by Ms. [redacted] and supervised by Carla Nunziato, an ABA Consultant Therapist. (Vol. III, 12/17/04, p.276; Depo. Ms. L., pp.79-80). Ms. Nunziato observed [redacted]. in October 2004 at [redacted] and noticed, " he had some fairly aggressive behaviors such as hitting, yelling, pushing grabbing....he was not biting." (*Id.* p 277) Ms. Nunziato opined that [redacted] has done well in that program. (Vol. III, 12/17/04, pp.279-280). Ms. Nunziato goes to [redacted] weekly to work with [redacted] (Vol. III, 12/17/04, p.300) and provides training for a paraprofessional who is with [redacted] during the time that he is at Little Reasons. (Vol. III, 12/17/04, p.312). Ms. Nunziato provided a total of twelve hours of training for the paraprofessional in the two weeks before [redacted]. started [redacted] (Vol. III, 12/17/04, p.313). [redacted] began [redacted]s wearing a diaper but stopped wearing a diaper approximately mid or late November. (Vol. III, 12/17/04, pp.309-

310). [redacted] is on a trip training schedule every thirty minutes (Vol. III, 12/17/04, pp.310-311) and will not be fully toilet trained until he can inform others when he needs to use the bathroom. (Vol. III, 12/17/04, p.311). Petitioner is seeking reimbursement from the school district for the expense she is incurring in placing [redacted]. at [redacted] and in providing ABA therapy at her own expense.

III. CONCLUSIONS OF LAW

After consultation with the parties, the Court stated the issues for determination in the Court's order dated December 7, 2004 to be as follows:

A. Did Respondent design a program for Petitioner that offers a free, appropriate public education in the least restrictive environment?

B. Is the IEP drafted for Petitioner on August 12, 2004 and the services provided therein reasonably calculated to enable Petitioner to receive educational benefits?

C. If Respondent did not provide Petitioner a free, appropriate public education, did Petitioner's family provide Petitioner with appropriate educational services in the least restrictive environment for which they are entitled to be reimbursed?

D. Did Respondent discriminate against Petitioner in violation of Section 504 of the Rehabilitation Act in the manner in which Respondent transported Petitioner to and from school?

E. Is Respondent legally responsible to provide Petitioner compensatory services?

BURDEN OF PROOF

The Georgia State Board of Education defines the burden of proof in administrative proceedings tried under the IDEA, in part, as follows: The school district has the burden of coming forward with the evidence and the burden of proof to establish that the proposed IEP is

appropriate and provides a student with a free, appropriate public education. When the parent is proposing a placement that is a more restrictive placement, the parents shall bear the burden of establishing that the more restrictive environment is appropriate. Rule 160-4-7-.18(1)((g)(8). Therefore, as to issues in paragraphs A. and B. above, the school district has the burden of proof. As to the issues of reimbursement and compensatory services stated in paragraphs C. and E., the Petitioner has the burden. See, M.S. v. Bd. of Education, 231 F.3d 96 (2nd Cir. 2000) (When seeking reimbursement for private placement or services, parent has the burden of proof. Petitioner also bears the burden of proof as to the assertion in paragraph D. that the school district discriminated against Petitioner in violation of Section 504 of the Rehabilitation Act.) See generally, Doe v. Alabama State Department of Education, 915 F.2d.651, 666 (11th Cir. .1990); Weiss v. School Board of Hillsborough County, 141 F.3d 990, 998 (11th Cir. 1998).

The Order additionally provided: "This administrative court will hear evidence on whether Petitioner was or was not eligible for homebound instruction at the time these services were requested. All of these issues are limited to evidence regarding the 2004-2005 school year."

I. Special Education and Related Services Provided in the August 12, 2004 IEP.

The first issue this administrative court must decide is whether the IEP developed by the IEP team on August 12, 2004 offered [redacted] a free, appropriate public education in the least restrictive environment.

A "free appropriate public education" is defined in § 1401(8) of the IDEA as special education and related services that 1) have been provided at public expense, under public supervision and direction, and without charge, 2) meet the standards of the State educational agency, 3) include an appropriate education in the state involved, and 4) are provided in

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conformity with the IEP prepared as prescribed in §1414(c) of the Act. Of these criteria, the only ones at issue here require this Court to determine whether the special education and related services described in the IEP developed for [redacted] on August 12, 2004 were "appropriate" to address the educational deficits associated with A.A.'s disabilities.

In order to determine whether special education and related services are "appropriate," the United States Supreme Court, in the seminal case of Board of Education of the Henrik Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), established a two-part test. First, has the school district complied with the procedures set forth in the Act? Second, is the IEP "reasonably calculated to enable the child to receive educational benefits?" Id. at 206-207. If these requirements are met, the school district has complied with the obligations prescribed by the IDEA and, as Rowley holds, is required to do no more. Both parts of this test, and the subsequent case law that has interpreted it, are discussed below.

A. Compliance with Procedural Requirements of IDEA.

The Court concludes that in developing the August 12, 2004 IEP, the school district complied with all the procedural requirements of the IDEA. Specifically, the parent was provided with sufficient prior notice of the meeting and its purpose and she participated fully, together with her attorney, in the development of the IEP. 20 U.S.C. § 1415(b). Petitioner identified no procedural violations associated with the August 12, 2004 IEP, the only IEP at issue in this matter.

Instead, Petitioner focused on errors dating back to December, 2002 when [redacted]. first was served by Respondent.[14] Even assuming the errors Petitioner identified were relevant, none

[14] For example, when the family returned from Florida in the middle of the 2003-04 school year, at the mother's request, the pre-school coordinator took the form for consent to recommence [redacted].'s special education services based on his Florida IEP to the family's home for the mother to sign. She signed the form at her home, as did the

would establish that the school district had failed to provide FAPE. The Eleventh Circuit Court of Appeals has rejected the notion that procedural errors are a per se violation of the IDEA. Rather, in at least three cases, the Court has held that procedural violations of the Act must cause **actual educational harm.** School Bd. Of Collier County v. K.C., 285 F.3d 977 (11th Cir. 2002); Weiss v. School Board of Hillsborough County, 141 F.3d 990 (11th Cir. 1998); Doe v. Alabama Department of Education, 915 F.2d 651 (11th Cir.1990).

In Doe, the Court reasoned that the Supreme Court's emphasis in Rowley on a school district's compliance with the procedural mandates of IDEA was to assure the "full participation of concerned parties throughout the development of the IEP." Doe, 915 F. 2d at 662, quoting Rowley, at 205-06, 102 S. Ct. at 3050. The Court then held that the procedural deficiencies in Doe "had no impact on the Does' full and effective participation in the IEP process and because the purpose of the procedural requirement was fully realized" there was no violation that warranted relief. Id. The Court later made the requirement of harm explicit in Weiss when it concluded that in order to prove that the student was denied FAPE, the family "must show harm to [the student] as a result of the alleged procedural violations." Weiss, 141 F.3d at 996 (explaining that where the family had "full and effective participation in the IEP process" then "the purpose of the procedural requirements was not thwarted. . . ."). Finally, in Collier County, the court concluded that even a "procedurally flawed" IEP "does not automatically entitle a party to relief," unless it also failed to provide the student with any "educational benefit." Collier County, 285 F.3d at 982. In this case, as previously noted, [redacted].'s mother and attorney fully and effectively participated in the development of the August 12, 2004 IEP. Procedural

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pre-school coordinator, and two teachers signed it later. [redacted] received services under this slightly modified Florida IEP from January, 2004 to March 10, 2004 when an IEP meeting was held to discuss services for the remainder of the 2003-04 school year.

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errors, if any, in developing previous IEP's did not deprive [redacted] of FAPE during the 2004-05 school year or cause him harm.

B. Provision of Educational Benefits.

The second prong of the Rowley analysis requires the court to determine whether [redacted]. has been provided with an IEP "reasonably calculated to enable him to receive educational benefits" in the least restrictive environment. The "least restrictive environment" requirement dictates that a student be educated with his non-disabled peers to the maximum extent appropriate. In this regard, there is no dispute that the IEP provided a placement for [redacted], at his parent's request and with the concurrence of the other IEP team members, in the least restrictive environment: the regular Pre-Kindergarten classroom with typical or non-disabled four and five year old students for the entire school day.

Since Rowley, which held that school districts were not required to "maximize" a disabled child's educational potential, the Eleventh Circuit has had several opportunities to refine further the meaning of "educational benefits." In JSK v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991), the court rejected the argument that the IDEA required the school district to provide "meaningful" educational benefit. The court explained:

> We disagree to the extent that "meaningful" means anything more than "some" or "adequate" educational benefit. In Drew P. [Drew P. v. Clarke County School District, 877 F. 2d 927 (11th Cir. 1989)], we held that "The state must provide a child only with a 'basic floor of opportunity.' .... Our decision in Drew P. was not based on whether Drew P. was receiving "meaningful" educational benefits, but was based on whether he was receiving *any* educational benefits.

J.S.K., 941 F.2d at 1572 (italics in original). The court further explained that the benchmark for

measuring educational benefit was the "basic floor of opportunity" discussed in the Supreme Court's decision in Rowley. Finally, the court held:

> If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied. While a trifle might not represent "adequate" benefits, *see, e.g.,* Doe v. Alabama State Department of Education, 915 F. 2d at 665, maximum improvement is never required. Adequacy must be determined on a case by case basis in the light of a child's individual needs.

Id. Applying this definition of educational benefit in a later case involving a student with autism, a district court in Georgia determined that the student had failed to show that **no measurable and adequate gains** were made in the classroom. Rebecca S. v. Clarke County School District, 22 IDELR 884 (M.D. Ga. 1995)(unpublished opinion)

In a more recent case addressing the educational benefit afforded by an IEP to an autistic student, the Eleventh Circuit reiterated that educational benefits do not include programming that permits "generalization across settings," such as in the student's home environment. Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001). In that case, the student's teachers testified that he had acquired behavioral skills, established a relationship with his peers and a bond with one of his teachers. His parents argued, however, that he had serious behavior problems at home. Citing JSK, the Court stated, "[t]his circuit has specifically held that generalization across settings is not required to show educational benefit. 'If "meaningful gains" across settings means more than making measurable and adequate gains in the classroom, they are not required by IDEA or Rowley.'" Id. at 1293. Similarly, the district court in Rebecca S. also observed that while the situation was "increasingly intolerable" at home with the autistic child, the IEP provided adequate instruction and services in the classroom.

Applying these principals to this case, it is evident that the August 12, 2004 IEP was reasonably calculated to enable [redacted] to receive educational benefit. First, the IEP itself contained appropriate academic goals and objectives, namely that [redacted] would meet 75 % of Georgia's Pre-Kindergarten Standards by the end of the school year. The appropriateness of this goal was not in dispute. The IEP also contained significant related services to address [redacted]'s speech/language and occupational therapy needs and the goals drafted to address them. The services included three weekly thirty minute sessions of speech/language services, and two weekly thirty minute sessions of occupational therapy, an increase in both services at the mother's request. In addition to these therapies, [redacted] was provided a one-to-one paraprofessional. Both [redacted]'s teacher and paraprofessional were to work on the OT and speech goals throughout the day.

The IEP also addressed the behaviors associated with autism with a Behavior Intervention Plan. Discrete Trial Training (DTT) was to be implemented, when appropriate, by the paraprofessional and the teacher, after they had been trained by the school district's Autism Program Specialist and the Itinerant Autism teacher, and had had an opportunity to "pair" with [redacted]. With consent of the mother, the teachers were to toilet train [redacted] using "trip training." This IEP and the related services it required the school district to provide were reasonably calculated to achieve educational benefits for [redacted].

The parties introduced competing expert testimony as to the appropriate use and techniques of Applied Behavioral Analysis, including Discrete Trial Teaching, a methodology for teaching students with autism. [redacted]'s mother seeks to have [redacted] taught exclusively by ABA while Respondent planned to incorporate ABA along with other methodologies in teaching [redacted] Dr. Montgomery, a board certified behavior analyst, has considerable experience teaching public

school educators how ABA and other specialized methodologies can and should be incorporated in the classroom environment to enable students to learn to generalize appropriate behaviors in a variety of settings.

Although Ms. Ann Sullivan and Ms. Carla Nunziato are board certified behavior analysts, neither was familiar with other methodologies and the research supporting their efficacy. Their knowledge was limited to the use of ABA and DDT, primarily as delivered in the child's home.

In any case, the use of a particular methodology to address a disabled student's educational needs is within the discretion of the educators who develop the IEP. This is so, as the Supreme Court explained in Rowley, because courts "lack the specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." Rowley, 458 U.S. at 208, 102 S. Ct. at 3052. The Court cautioned that "courts must be careful to avoid imposing their view of preferable educational methods on the states." Id. at 207, 102 S.Ct. at 3051. Reinforcing this point, the Eleventh Circuit has held that "it seems highly unlikely that Congress intended courts to overturn a state's choice of appropriate educational theories in a proceeding conducted pursuant to Section 1415(e)(2)." Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)(citing Rowley, 102 S. Ct. at 3051) Rowley cautioned that great deference must be paid to the educators who developed the IEP. As the Court noted, "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the states." 458 U.S. at 208.

In a related argument, Petitioner also contended that [redacted]'s paraprofessional, Ms. Wilson, had not been trained by a board certified behavior analyst in the use of ABA and DTT when [redacted] began school. Although Ms. Wilson did not have prior training in the use of ABA or DTT, she was trained in that she had a degree in Early Childhood Education, a masters degree in

Christian Education and six years experience working as a paraprofessional in a high school self-contained special education classroom with students, some of whom were autistic. Respondent's Program Specialist in Autism and the Itinerant Autism Teacher were in the process of providing specialized training in ABA and DTT specifically for use with [redacted] in his classroom when his mother withdrew him from school. Even according to Petitioner's witness, twelve hours of training would be sufficient as that is what she provided the paraprofessional at the day care center. Petitioner's witnesses also admitted that "pairing" is required before therapy can be effectively administered. Withdrawal of [redacted]. from school only eleven days after the IEP was drafted short-circuited this process. The claim that Respondent failed to deliver on its promise of a trained paraprofessional is without merit.[15]

On its face, the IEP met the substantive requirements for providing a "free appropriate public education." The school district also demonstrated that even for the limited time [redacted] attended [redacted] Elementary School–15 days of the 2004-05 school year before being withdrawn by his mother–he made some measurable and adequate gains in the classroom, according to the educators responsible for implementing his IEP. For example, in that short period of time, [redacted]. made more than adequate progress in learning the routine of the classroom, interacting appropriately with his peers and with his teachers and service providers, going to and from the school cafeteria, appropriately playing on the playground, and participating in academic classroom activities. Academically, like his typical peers, [redacted]. was able to work on shapes and colors, coloring and gluing, as well as with his group on puzzles, phonics, singing and learning the sounds of the alphabet. [redacted] adapted in less than three weeks to the routine of an entirely

[15] See Ryan M. V. Gwinnett County School District, OSAH-DOE-SE-02-10492-67-JBG, for a more detailed discussion of the application of these principles to the challenge to the methodology chosen by Respondent and the personnel selected by Respondent to implement a student with multiple disabilities.

new classroom, with many more students and more activity than his previous self-contained class with other autistic students.

The only apparent problem [redacted]. experienced in the classroom was oppositional behaviors primarily related to the effort the paraprofessional was making to toilet train him. At times when [redacted]. was interrupted from activities to go the bathroom, he would have a tantrum, stomp his foot, and sometimes try to hit his paraprofessional. Dr. Montgomery opined that some difficulties should be expected and the school district should be provided more than two weeks to implement the training scheme that the parties had agreed to in the IEP.[16] Even if this difficulty were construed as evidence of "regression," it does not diminish the other progress [redacted]. had made in adjusting his behavior to the new environment. In this regard, the Eleventh Circuit's recent decision in Collier County is instructive as it refused to allow one significant instance of maladaptive behavior, attacking other students and staff with a nail, to overshadow the other success the student had exhibited.[17] Collier County, 285 F.3d at 983. This was especially true because, as here, the parent withdrew the student not long after school began.

Petitioner contends that even if [redacted] made measurable and adequate gains in the classroom, his behavior at home so deteriorated that he was no longer able to attend school. This is an objection based on the failure of the IEP to offer "generalization across environments" but, as shown above, generalization is not required to demonstrate adequate educational progress.

This administrative court, therefore, concludes that the IEP was reasonably calculated to achieve adequate educational benefit and that in the limited time A.A. attended school, he did, in

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[16] [redacted]'s summer ABA trained therapist made no effort to address toilet training, and [redacted]'s current ABA trained therapist at the day care center was using the same "trip training" technique.

[17] The district court opinion in that case contains a complete description of the facts and provides an excellent application of the practical meaning of "adequate educational benefits." School Bd. of Collier County v. K.C., 34 IDELR 89 (U.S. Dist. Ct. M. D. Fla. 2000).

fact, make sufficient progress that demonstrated the efficacy of the IEP and related services offered.

II. Reimbursement for Services Provided at Home and at the Day-Care Center.

In order to be reimbursed for services provided to [redacted] by his parents after they withdrew him from school, this Court would have to conclude that the school district was not providing [redacted]. with a free appropriate public education. Burlington School Committee v. Department of Education, 471 U.S. 359, 105 S. Ct. 1996 (1985). Because the Court has already concluded that the school district had, in fact, offered [redacted] with FAPE, it is unnecessary to reach the issue of reimbursement or compensatory services. But even if it were, Burlington places the obligation on the parents to demonstrate that the unilateral removal of the child from school and placement of him at home or in any other setting was appropriate. Only if they succeed in proving that the services they chose provided an "appropriate" education in the least restrictive environment are they entitled to reimbursement for any expenses incurred in providing services.

Although there was testimony that [redacted]'s behavior improved somewhat while receiving some ABA therapy at home and later at the day care center, Petitioner submitted no evidence that the center made any effort to provide a systematic academic program of any sort. Indeed, [redacted]'s mother admitted that he was enrolled at the center purely for socialization purposes. The Court concludes, therefore, that Petitioner failed to meet this threshold requirement of proving that [redacted]. was provided an "appropriate" placement.

III. [redacted] Was Not Discriminated Against in Violation of § 504 of the Rehabilitation Act.

Petitioner contends that [redacted] was discriminated against in violation of § 504 of the Rehabilitation Act of 1973 in the manner in which the school district transported [redacted] to and from school. In order to succeed in proving a violation of § 504, Petitioner must prove that he

has been intentionally discriminated against–excluded from a benefit solely on the basis of his disability. In the education context, "bad faith or gross misjudgment" must be shown, not simply a failure to provide FAPE. Sellers v. Sch. Bd. of Manassas, 141 F.3d 524 (4th Cir. 1998). As indicated in the findings of fact, [redacted]. was transported to school each day for the fifteen days he was enrolled in the elementary school he attended. There is no dispute that the bus picked up [redacted] each day at his home and delivered him to school, usually on time. However, for approximately one and one-half weeks after school began, the bus was late picking [redacted]. up after school by as much as an hour. After adjusting the schedule and reassigning [redacted]. to another bus, the problem was resolved. Petitioner produced no evidence that the short delay was motivated by an intent to discriminate against [redacted].. For example, there was no evidence that non-disabled students have not been delayed arriving home or that adjustments at the beginning of school in scheduling are not needed for non-disabled students.

IV. Homebound Services

Petitioner contends that [redacted]'s behavior had so worsened that removal from school was necessary medically. It is undisputed that a physician must verify that a child needs homebound services because the child is medically unable to attend school. Although Dr. [redacted] authorized homebound services based upon the parents' report of [redacted].'s behavior at home, he subsequently disavowed the accuracy of the Homebound form he signed. Therefore, there is no evidence in the record that services in the home were required at the time [redacted] was withdrawn from school because [redacted] was medically unable to attend school.

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This Court concludes that Respondent has established that it developed an IEP for [redacted] in accordance with the requirements of the IDEA and that such was reasonably calculated to enable [redacted] to make educational progress. Respondent also established that the IEP was implemented in [redacted]'s classroom according to its terms and that [redacted], in fact, made at least adequate educational progress toward his IEP goal. Petitioner has failed to establish that the transportation provided for [redacted] discriminated against him due to his disability in violation of Section 504 of the Rehabilitation Act of 1973. Petitioner is not entitled to compensatory services or to be reimbursed for any expenses provided by [redacted]'s parent. Petitioner failed to establish that [redacted] was eligible for homebound instruction at the time the services were requested in August 2004.

V. DECISION

IT IS HEREBY ORDERED that A.A. received a free, appropriate public education from the Houston County School District, that any relief or remedy sought by Petitioner is unwarranted and is denied.

SO ORDERED, this 22nd day of February, 2004.

C Crawford

CATHERINE T. CRAWFORD
Administrative Law Judge

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