

STATE OF NORTH CAROLINA

**BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO G.S. 115C - 109.9**

***Student, by parent or guardian, Mother
And Father***

Petitioners

v.

**ORANGE COUNTY BOARD OF
EDUCATION**

Respondent

DECISION

08 EDC 2969

This is an appeal of the Decision of Administrative Law Judge Melissa Owens Lassiter issued on June 18, 2009.

The records of the case received for review included:

1. Eight (8) days of transcripts of the hearing.
2. The Official Record of the case issued by the Office of Administrative Hearings; which included the Decision of Judge Lassiter, motions, written arguments, procedural documents, orders, and correspondence concerning the case.
3. One (1) volume (loose-leaf notebooks) of Petitioners' Exhibits.
4. One (1) volume (loose-leaf notebook) of Respondent's Exhibits, and
5. Additional written arguments submitted by both parties to the Review Officer.

The hearing of this case was held before Administrative Law Judge Melissa Owens Lassiter on January 21, 2009; March 23, 24, 26, 27, 2009; and April 2, 3, 6, 2009. The first 7 days of hearing were held in the boardroom of the Orange County Board of Education in Hillsborough, North Carolina. The final day of hearing was held, by agreement, at the Office of Administrative Hearings in Raleigh, North Carolina.

Appearances:

For Petitioner - Robert Ekstrand, Courtney S. Brown; Ekstrand & Ekstrand, L.L.P.
811 Ninth Street, Suite 260, Durham, NC 27705

For Respondent - Rachel B. Hitch, Brian C. Shaw; 19 West Hargett Street, Suite 1000
Post Office Box 2350, Raleigh, North Carolina 27602

To provide a document that does not have personally identifiable information regarding the Petitioner and/or for convenience, the following will be used to refer to the parties:

- For the Child/Petitioner - *Student*; the child
- For Parent/Petitioners - Petitioners; Parents; mother (*Mother*); father (*Father*)
- For Respondent - Respondent; Orange County Board of Education; LEA

WITNESSES

For Petitioner: *Father* (Father)
 Dr. Vivian Umbel (By telephone)
 Mother (Mother)
 Dr. Signe Naftel
 Ms. D.H.
 Ms. E.K.
 Ms. E.F.
 Ms. S.B.
 Ms. C.P.

For Respondent: *Director M.G.*
 Dr. Sally Flagler
 Ms. C.A.
 Ms. L.C.
 Ms. K.S.
 Ms. M.T.
 Ms. W.G.

ISSUES

1. Whether Respondent failed to provide *Student* with a free, appropriate public education through the development of an Individualized Education Plan (IEP)? Whether Respondent failed to provide *Student* with a free, appropriate public education through an IEP that was reasonably calculated to provide *Student* with educational benefit?
2. Whether Respondent failed to provide *Student* a free, appropriate public education in the least restrictive environment?
3. Whether Respondent procedurally and substantively failed to provide *Student* a free, appropriate public education by failing to provide *Student* with educational services before October 29, 2008, the date Respondent first provided services to *Student* at his private preschool placement?
4. Whether Petitioners' private educational placement was appropriate? If so, are Petitioners entitled to the requested relief, including but not limited to, reimbursement for all costs and expenses Petitioners incurred in providing *Student* with educational costs and placement in a regular education setting?

PRELIMINARY STATEMENT

Judge Lassiter's decision was appealed by Respondent on July 16, 2009 and the undersigned was appointed as Review Officer that day. The parties were provided a Request for Written Arguments on July 17 with Written Arguments due on August 6. The Decision was to be

completed on August 15, within the 30 day timeline established by 34 CFR 300.515(b) and the Policies Governing Services for Children with Disabilities, NC 1504-1.16(b). The Office of Administrative Hearings was unable to furnish the record of hearing until July 29, causing a delay in proceeding with the review. The Review Officer granted an Extension of the Time until August 19, 2009 to complete the review.

Standard of Review by the State Review Officer

The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that "due weight" be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court first noted, "by statute and regulation the reviewing officer is required to make an independent decision. . . ." *Doyle*, 953 F.2d at 104. The court held that in making an independent decision, the state's second-tier review officer must follow the "accepted norm of fact finding."

Recently in North Carolina, Judge Osteen further interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, Memorandum Opinion and Order 1:05CV818 (M.D.N.C. November 18, 2008). A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth."

Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes the following Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.532; N.C.G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.12.

With some exceptions, the Review Officer finds that the ALJ's findings are regularly made. Those exceptions are primarily due to the fact that the ALJ used the Petitioner's Proposed Decision as the source of many of the facts. Though subtle, the Petitioners' presentation of the facts was sometimes different from the facts clearly established in the record. As such, the ALJ's reliance on the Petitioners' misstatement of the facts illustrates that some are not "regularly made." The Review Officer has attempted to correct this in this decision. Also, the Review Officer will not comment on each of the ALJ's findings and conclusions. This will keep this decision from being too lengthy. With few exceptions, the Review Officer's Findings of Fact are consistent with most of those of the ALJ, although often stated in a slightly different manner. Rather than some of the Facts being a recitation of testimony, as in the ALJ's Decision, the Review Officer has consolidated the information from testimony and exhibits into a reduced number of Facts. **The Review Officer has added a few Findings of Fact supported by the record, but not among those in those of the ALJ. In this document, those Findings of Fact are in bold type.**

There are some Review Officer Conclusions of Law that are consistent with those of the ALJ. Many, however, differ but are supported by IDEA, Federal Regulations, and state law.

STIPULATIONS

The Order on Final Pretrial Conference included the following stipulations:

- (1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.
- (2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or non-joinder of parties.
- (3) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:
 - (a) *Student* is a “child with a disability” as that phrase is defined in 34 CFR §300.8 in that *Student* is a child evaluated as having autism, and, who by reason thereof, needs special education and related services.
 - (b) *Student* turned three years old on **, 2008; he is now four years old.
 - (c) Upon a referral from the ***, *Student* underwent a comprehensive psycho-developmental evaluation that was conducted by Dr. Vivian Umbel, PhD, at the South Miami Hospital Child Development Center (“Miami CDC”) on February 11, 12 and 15, 2008. (Petitioners’ Exhibit 2).
 - (d) Upon a referral from the ** *Department*, *Student* also underwent a speech-language pathology evaluation conducted by Stefanie Vasquez, a speech-language pathologist, at the Miami CDC on February 14, 2008. (Petitioners’ Exhibit 3).
 - (e) As a result of the Miami CDC’s evaluations, Dr. Umbel accurately diagnosed *Student* with Pervasive Developmental Disorder – Not Otherwise Specified (“PDD-NOS”).
 - (f) PDD-NOS, sometimes referred to as “atypical autism,” is a disorder on the autism spectrum.
 - (g) In April 2008, *Student* and his family moved from ** to Orange County after the *** assigned *Student*’s father to a post in North Carolina.
 - (h) *Student* is eligible for special education instruction and related services.
 - (i) *Student* requires speech and language instruction as a related service.
 - (j) [Respondent] The County provides one hour of occupational therapy a week to *Student*.
 - (k) *Student*’s IEP Team met to determine his eligibility on July 10, 2008, and thereafter, the IEP team held meetings on July 22, 2008, July 30, 2008, and October 13, 2008.
 - (l) On July 22, 2008, the IEP Team developed the Annual Goals and Short Term Objectives/Benchmarks listed on the IEP identified as Petitioners’

Exhibit 1.

- (m) On July 30, 2008, [Respondent] proposed to provide *Student* with the following: (1) two 90-minute sessions of special education a week; (2) two 30-minute sessions of occupational therapy a week; (3) all services would be provided at a “Playgroup” at XYZ Elementary School; (4) *Student* would only attend the school when he was to receive those four hours of special education and related services each week.
 - (n) On October 13, 2008, the IEP team added thirty minutes of speech and language therapy a week, with a focus on articulation, to *Student*’s IEP.
 - (o) *Student*’s parents, *Mother* and *Father*, placed him at *** preschool in September of 2008, where *Student* remains enrolled today.
 - (p) *Student* did not receive special education services from the Respondents before October 28, 2008.
 - (q) From July 22, 2008 through October 27, 2008, all of *Student*’s special education and related services were funded privately by Petitioners *Father* and *Mother*.
 - (r) *Mother* and *Father* have supplemented the services provided by the Orange County Schools by privately funding an additional four hours a week with an autism facilitator, an additional one hour per week of speech-language therapy focused on pragmatics, and an additional hour a week of occupational therapy.
 - (s) In August of 2008, *Father* requested the credentials of members of the IEP team, in particular *Ms. K.S.*, a current service provider.
- (4) It is stipulated and agreed that, prior to the hearing in this matter, opposing counsel was furnished a copy of each exhibit identified by Petitioners as expected to be introduced at trial.
 - (5) It is stipulated and agreed that each of the exhibits identified by Petitioners is genuine and, if relevant and material, may be received in evidence without further identification or proof, except that Respondents generally reserve the right to object at trial on grounds of relevance and materiality, and on the issue of the authenticity of a document if new information in that regard is received during the course of the hearing.
 - (6) It is stipulated and agreed that opposing counsel was furnished a copy of each exhibit identified by Respondent, except for the audio recordings that were already in the possession of the Petitioners, and provided to Respondent with Petitioner’s Requests for Admissions.
 - (7) It is stipulated and agreed that each of the exhibits identified by the Respondents is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except that Petitioners generally reserve the right to object at

the trial on grounds of relevancy and materiality.

- (8) A list of the names and addresses of all potential witnesses Petitioners may have offered at the trial was provided to opposing counsel in advance of the hearing.
- (9) A list of the names and addresses of all known witnesses Respondent may have offered at the trial was provided to opposing counsel in advance of the hearing.
- (10) No additional witnesses were discovered after the preparation of the order on final pre-trial conference.
- (11) Additional consideration was given to a separation of the triable issues, and counsel for all parties were of the opinion that a separation of issues in this particular case would not be feasible.
- (12) On May 19, 2009, the parties stipulated to the admission of the following exhibits for Respondent: R15, R31, R43, R67, R70, R71, R95 (2nd page, 1st page is already in evidence), R145, R147, R148, R149, R155, R158, R160, R161, R162, R163, R164, R165, R166, R167, R168, R170, R171, R172, R173, R175, R177, R178, R180, R181, R182, R183, R187, R188, R191, R200, R204, R206, R208, R209, R211, R225, R249, R251, R252, R254, R256, R257.

To the extent that the Findings of Facts may contain Conclusions of Law, or that the Conclusions of Law may include Findings of Fact, they should be so considered without regard to the given labels. The Review Officer has attempted to follow the broad outline used by the ALJ in the Findings of Fact, consolidating some, reducing some, and eliminating those that have no bearing on the issues of the case.

FINDINGS OF FACT

1. Petitioner *Student* is four-year-old preschool student residing with his parents, Petitioners *Mother* and *Father* in Orange County, North Carolina. *Student* has been diagnosed as mildly autistic with Pervasive Development Disorder Not Otherwise Specified (PPD-NOS).

2. In April 2008, Petitioners moved to Orange County from ***, where Petitioners had lived while Petitioner *Mother* was stationed as a ** with the US ***.

3. Before Petitioners moved to North Carolina, *Student* was enrolled for a year in a preschool called ** School (**S) in ****. Midway through *Student's* first year of preschool, when *Student* was two years old, *Student's* teachers advised *Student's* parents of serious concerns about *Student's* behaviors in the classroom setting. It was reported that while *Student* was often "sweet and affectionate," he regularly exhibited troubling behaviors. He did not play with other children

and spent most of his class time in single or parallel play. His play was very focused as he played with a lot of concentration and would stay in the same place for long periods while he plays.

4. The ***School* teachers explained that *Student* consistently would destroy his creation if someone got near him, or touched the materials he was using. Generally, on these occasions, *Student* threw and kicked toys, made quick sudden movements, shouted or hit his head or his body. *Student* exhibited a similar response when other children touched him appropriately, or approached him to offer to help him. *Father* and *Mother* called these outbursts “meltdowns.” *Student*’s meltdowns varied in severity and duration. Often, he reflexively threw his head and body backwards onto the ground, hitting his head and, without regard for his physical safety. *Student*’s teachers also reported that he often lined up stickers in symmetrical lines, and was prone to having a meltdown if his stickers were disturbed or moved by a peer or teacher. Meltdowns were also triggered by teachers imposing normal limits on children in classrooms, such as waiting one’s turn, and transitioning from one activity to another.

5. *Student* exhibited these challenging behaviors in the classroom, in social settings, and at home. While exhibiting these behaviors, *Student* was not able to verbalize his thoughts, feelings, or experiences at all. *Student* did not have language at this time.

6. Because ***School* had no teachers with background or training to address *Student*’s patterns of behavior, ***School* “deem[ed] it necessary” for *Father* and *Mother* to consult with a developmental/behavioral pediatrician or mental health professional before *Student* would be allowed to enroll for the subsequent school year.

7. The ** Department arranged a psychodevelopmental evaluation for *Student* to be conducted in Miami, Florida by Dr. Vivian Umbel. The ** *Department* also arranged a speech-language evaluation to be conducted by Stefanie Vásquez, a speech language pathologist. Both Dr. Umbel and Ms. Vasquez specialize in evaluating children raised in bilingual environments.

8. The Miami evaluations were conducted over a four-day period on February 11, 12, 13 and, 14, 2008. Based on her comprehensive evaluation of *Student*, Dr. Umbel concluded that “[*Student*] falls within the spectrum of Autism,” and that *Student*’s delays and behaviors met the diagnostic criteria for Pervasive Developmental Disorder - Not Otherwise Specified (PPD-NOS). Dr. Umbel found that:

- a. *Student* was impaired in (1) his use of nonverbal behaviors to regulate social interactions, and in (2) his level of social and emotional reciprocity. Dr. Umbel concluded that *Student* was “delay[ed] in the development of spoken language,” and showed delays in pragmatic language skills.
- b. *Student* exhibited the following: (1) “decreased ability to sustain a conversation with others;” (2) “imitative/creative play [that was] not appropriate to his developmental level;” and (3) “inflexible adherence to specific, non-functional routines, and repetitive motor mannerisms.” *Id.* One of the cumulative effects of *Student*’s delays and impairments was *Student*’s “fail[ure] to develop peer relationships appropriate to his developmental level.
- c. *Student* exhibited “well-developed nonverbal intellectual abilities” and noted the gains that *Student* had recently made in the area of language development. *Id.* Based on *Student*’s demonstrated cognitive abilities, and *Student*’s recent gains in his language development, Dr. Umbel’s prognosis for *Student*’s continued improvement was “favorable,” so long as *Student* received appropriate invention services without delay.

9. Dr. Umbel made five recommendations relating to *Student's* educational needs, including:

- a. Special education school placement sensitive to [*Student's*] communication problems in order to advance his verbal and nonverbal learning experiences and foster peer socialization skills. Placement should be in a small (low teacher-pupil ratio) structured language-intensive classroom where behavior modification techniques are utilized.
- b. Speech-language therapy with a focus on the development of [*Student's*] verbal and nonverbal communication skills. Encouraged should be the use of eye contact, verbal and motor imitative behavior, decontextualize and symbolic use of objects, and reciprocal/sustained social interaction through the use of turn-taking activities.
- c. Occupational therapy evaluation with a focus on motor imitation and planning issues.
- d. Parent skills training in the use of behavior management techniques.
- e. Comprehensive psycho-developmental evaluation in one year.

10. Ms. Vasquez found *Student's* speech and language development to be within the normal range, although she recommended re-evaluation of his expressive and receptive language skills in six months. She also recommended further evaluation of *Student's* social pragmatic skills relating to functional communication with therapy provided as needed. She also suggested placement in a "language-based preschool setting (English speaking)."

11. Upon return to *** after the Miami evaluations, the Petitioners enrolled *Student* in a preschool whose director had some special education training. The school, Global Gardens, did not provide any special education but the Petitioners felt that some of *Student's* needs could be met there while they waited on *Father's* transfer to a location where *Student* could receive special education services. *Student's* performance at Global Gardens did improve in contrast with his previous performance at ** School, but the school could not provide the special education that was needed.

12. Based upon the psychodevelopmental evaluation and speech-language evaluation, and *Student's* diagnosis with PPD-NOS, the ** *Department* relocated Petitioner *Father's* position to North Carolina so *Student* could receive the necessary educational services.

13. **Before leaving ***, *Mother* made contact with Orange County officials, the Autism Society of North Carolina, and private providers. She was seeking information about the availability of services for *Student*.**

14. The Petitioners' first contact with the Respondent occurred while still in ***. *Mother* spoke with Respondent's coordinator of preschool special education services, N.K.. An initial meeting was scheduled with Ms. N.K. for May 23, 2009. Before meeting Ms. N.K., *Mother* provided Ms. N.K. with copies of the psychodevelopmental evaluation and speech-language evaluations received in Miami.

15. **The Petitioners also found a private autism consultant, *Ms. C.P.*, soon after their arrival in North Carolina. *Ms. C.P.*, whose qualifications do not include any license to teach in North Carolina, provides consultant services and autism services. Her services primarily involve the application of Applied Behavior Analysis (ABA) to children with autism. *Ms. C.P.***

conducted an assessment (not formal evaluation) of *Student* for the Petitioners. Later, this was never shared with the Respondent's IEP Team.

16. The Petitioners made contact with TEACCH center (Treatment and Education of Autistic and related Communication-Handicapped Children) at the University of North Carolina to obtain advice and further assessment of *Student*. On April 29, 2008, TEACCH conducted an intake interview with *Student*, and summarized that interview in a May 27, 2008 letter. During that intake interview, Dr Merkler observed *Student*'s behavior regarding independent play and ability to sustain social interaction. Dr. Merkler noted the following points, among others:

- a. *Student*'s language development was delayed, he did not respond to his name, but responded to other noises in his environment. *Mother* was "not concerned about his delays in language since he was growing up in a bilingual environment."
- b. Dr. Merkler noted, "Since *Student*'s language has increased, his tantrums have decreased. He noted there was no need formally to re-evaluate *Student*, because he already had a thorough evaluation with a diagnosis consistent with mild autism. He also noted that *Student* demonstrated many strengths and a "strong potential for learning," given a "well-structured, individualized educational program." He recommended a special education preschool placement for *Student*.

17. In April 2008, the Petitioners arranged for E.K. with Triangle Therapy to conduct an occupational therapy evaluation of *Student*. *Ms. E.K.* recommended weekly occupational therapy for *Student* to address (1) *Student*'s slight delays in self-care skills regarding dressing, (2) *Student*'s difficulties in fine motor skills such as writing simple activities, and (3) *Student*'s weakness in balance and coordination skills.

18. An initial meeting was held On May 23, 2008 with the Respondent's IEP Team. The Petitioners, before this meeting, thought that the meeting would result in immediate services for *Student*. They were not aware of the complicated process required by IDEA to identify and serve children with disabilities. The formal evaluations already available were discussed. This included the psychodevelopmental evaluation and speech-language evaluations received in Miami and the occupational therapy evaluation obtained by the parents. At this meeting a formal referral was made and decisions were made regarding further screening and observations. No additional formal evaluations were deemed necessary.

19. By email dated May 27, 2008, *Ms. N.K.* advised Petitioners that *Student* might not qualify as "a child with a disability" since *Student* was not delayed in any area of development. However, given Petitioners' concerns that *Student*'s behaviors might interfere with *Student*'s ability to successfully interact with peers and/or be successful in an educational setting, *Ms. N.K.* stated that the IEP Team was going to conduct two observations of *Student* in the *XYZ* Elementary playgroup prior to the next IEP meeting.

20. *Ms. N.K.*'s email caused the Petitioner's considerable distress, for they were certain that *Student* should qualify as a child with a disability because of his autism. This email appeared to condition the Petitioners behavior in future IEP meetings. *Ms. N.K.* left the school system soon after sending this email and was not available at the hearing.

21. On May 30, 2008, Respondent's *K.S.*, speech therapist, and *K.T.*, occupational therapist, observed *Student* as he participated in a playgroup of four or five children. *K.T.* and *K.S.* lead the activities of the playgroup. During their observation of *Student*, they conducted a

developmental assessment of *Student's* speech and language skills, completed a Pragmatic Language Checklist, and completed Teacher Rating Scales:

- a. The Pragmatic Language Checklist is based on the North Carolina Pragmatic Language Standard Course of Study for preschoolers, which includes: goals of using one to two word utterances to communicate sentence-like meanings to others in the school environment, responding to and using polite forms, producing a variety of assertive and responsive meaningful communicative interactions, and observing turn-taking rules in the classroom or in social situations. Due to *Student's* ability to perform a significant majority of the tasks on the checklist, *Ms. K.S.* determined that *Student* scored in the "average range" in the speech and language areas, and in the pragmatic and social communication areas. She noted that he was able to greet, express responsive needs, answer questions, and give significant information for her comprehension of what he was talking about.
- b. *Ms. K.S.* noted that *Student* presented some mild difficulties using appropriate eye contact, maintaining topic, and appropriate interruption. She determined, however, that *Student's* difficulties did not interfere with his ability to participate in the playgroup or his learning during the observation.
- c. *Ms. K.T.* noted there were three other children in the second playgroup session in which she observed *Student* in June 2008. *Ms. K.T.* observed that *Student* transitioned well, was not bothered by the noise during a musical activity, and had a good grasp when using a pretzel to pick up goldfish. Although *Student's* hands got sticky, he did not really seem to mind. He showed other kids that he had caught a fish stating, "Look, I caught a fish." *Student* drank from a cup independently, and was able to use the bathroom independently, except asking for assistance with a button. She observed that *Student's* fine motor skills are in the low average range. He does have a history of sensory issues. She gave the opinion that *Student's* sensory processing issues did not affect his ability to participate in a small group.
- d. *Ms. K.T.* noticed that *Student* exhibited some nice self-care tactics. He needed "a little assistance to put the scissors in his hand, but he did really well cutting the lines" when given a square. *Student* did pretty good for his age, given that a square is a harder shape, and he needed some help cutting it out. *Ms. K.T.* observed that *Student* did need some assistance in completing simple puzzles.

22. In June of 2008, Respondent's *Ms. M.T.*, school psychologist, observed *Student* in the XYZ Elementary playgroup on two occasions. She observed that *Student* was cooperative, willing to participate, and frequently responded to questions presented to the group. *Student* did not have difficulty transitioning from one activity to the next, and attempted to interact with other students. *Ms. T* noted that *Student* was getting intense feedback at all times while in the playgroup. He was repeating words, he was initiating conversations and he played outside with the other children. She also noted that she did not see any sensory issues during a music activity. She stated that *Student* appeared to adjust well to the small group setting with two adults coordinating the activity.

23. Later at the hearing *Ms. K.S.*, *Ms. K.T.*, and *Ms. T* stated that they shared their observations and opinions with the IEP Team. They, uniformly, did not believe *Student* required significant specialized instruction and related services, because *Student* was bright and exhibited very little difficulty during their observations.

24. *Ms. T* also developed a summary of the report from *Student's* preschool (** *School*) in *** where *Student* experienced problems and tantrums in a class of fifteen (15) students. She shared this with the IEP Team. *Ms. T* noted that, while attending ***School*, *Student's* language was not well developed and he normally used one word to communicate. The ***School* teachers reported that there were occasions when, frustrated, *Student* hit or pushed other children. *Ms. T*

noted that *Student*, while at *School*, appeared to have significant difficulties with communication, social interactions, and behavior management in the school environment. In the IEP meetings that followed, *Mother* stated that these issues were actually getting worse.

25. Following the initial meeting on May 23, 2008, the IEP Team met on four more occasions: July 10, July 22, July 30, and October 13, 2008. The Team generally consisted of Respondent's representatives: *Ms. L.C.*, certified special education teacher in birth-kindergarten and designated LEA representative; *Ms. M.T.*, school psychologist; and *Ms. K.S.*, speech language therapist. *Ms. C.P.*, Petitioners' private autism consultant, and Petitioners *Mother* and *Father* normally attended the IEP meetings on behalf of Petitioner *Student*. *Mother* missed part of one meeting and *Father* could not attend another. *Student's* grandmother and L.D., a family friend, each attended a meeting.

26. During the July IEP meetings, the IEP team relied upon Dr. Umbel's psychodevelopmental evaluation; *Ms. Vasquez's* speech language evaluation; the private occupational therapist's evaluation done by *Ms. E.K.*; the observations of *Student* done by *Ms. K.S.*, *Ms. K.T.*, and *Ms. T* at the *XYZ* playgroup; and an interview summary from TEACCH. It also relied upon information available about *Student's* autism spectrum disorder, and considered information available about *Student's* previous preschool history. Additional input was obtained from the Petitioners and their private autism consultant.

27. At the July 10, 2008 IEP meeting, the IEP Team determined that *Student* was eligible for special education and related services, as a child with autism. He was found to be eligible for the related service of occupational therapy but was not eligible for speech language services.

28. During the July 10 meeting, *Mother* and *Ms. C.P.* were given opportunity to provide significant input into the Team's decision, especially concerns about language communication from a social perspective, as opposed to a speech/language perspective. Also included were their concerns for *Student's* need to be coached in social language, interaction and behavior. *Ms. C.P.* indicated that social interaction and appropriate language use were important in planning.

29. ***Mother* was surprised at how quickly the Team came to the conclusion that *Student* was a child with a disability. She, after being coached by *Ms. C.P.*, expected the meeting to be unfavorable and that *Student* would not be eligible for special education services. She was prepared to fight for *Student* and was surprised that it went so well. She was not prepared to begin a discussion of IEP goals. The IEP Team agreed to adjourn and convene again for IEP development. All would prepare possible goals for discussion at the next meeting.**

30. On July 22, 2008, the IEP Team reconvened. They congenially shared goals and objectives, with each side giving and taking suggestions. Agreement was reached on the goals and objectives, with all parties (even during the hearing) maintaining that the goals and objectives in *Student's* IEP were appropriate.

31. Following agreement on goals and objectives, *Mother* left the meeting for a previously arranged doctor's appointment. The discussion immediately moved from the goals and

objectives to implementation. The time required to implement the goals and objectives soon became one of the primary disagreements among the IEP Team members. Though the Petitioners maintain that there was inadequate discussion on this issue, the record does show that a discussion did take place. Instead of only discussing the time necessary to implement the goals, *Ms. C.P.* sought to discuss what would be necessary to enable *Student* to make progress on each of the goals and objectives, how long it would take to work on the goals, and the appropriate location. She wanted to emphasize the need for a "daily routine" and the necessity of involving "typically developing peers." She was also clearly speaking for the need to utilize the intensive methodology of ABA. There was nothing in the information provided to the IEP Team that indicated that *Student* needed ABA or any specific methodology.

32. Following a discussion of the time needed to implement the IEP goals, the Team soon offered *Student* three hours per week of special education services, in two 1.5-hour sessions, at the XYZ Elementary playgroup. The Respondent's team members explained that it would expand the playgroup by one day, so *Student* could attend two 1.5-hour sessions per week. The proposed playgroup would be similar to the playgroup at that time. The playgroup existing at that time was staffed by a speech pathologist and occupational therapist and consisted of two to four kids with speech/language problems but none with behavioral problems. Although it was not known exactly how many children and the exact staffing when the new school year began, it was known and explained during the meeting that the children would have mild speech/language problems and the playgroup would be staffed with a speech/language therapist and a special education teacher who had training in behavior modification.

33. Petitioner *Father* disagreed with the proposed placement. Both *Ms. C.P.* and *Father* did not feel that the playgroup was the right setting, and that 3 hours per week was not enough time for *Student* to work on all the IEP goals.

34. The team also discussed other local programs that might be available. After *Father* expressed concerns that Frank Porter Graham would not accept *Student* in a normal slot without a diagnosis, *Ms. L.C.* (the LEA representative) agreed to contact Ruth Miller at Frank Porter Graham, and Judy O'Connell at Center for Development and Learning at the University of North Carolina at Chapel Hill to verify whether these programs would enroll *Student* in a "typical" slot.

35. *Ms. L.C.*, as the designated LEA representative, noted that the full continuum of services is offered to preschoolers needing special education. The team decided it would further explore the placement decision, gather more information, and reconvene at a later date. The IEP team did not make a decision regarding placement that day.

36. On July 30, 2008, the IEP Team met again and initially discussed the following items: adding goals under sensory processing for calming techniques, *Mother's* concerns about *Student's* negative behavior and anxiety, and *Mother's* desire that *Student* interact with typical peers. *Ms. L.C.* noted that the issue for that day's meeting was to decide the location of services.

37. *Ms. L.C.* reiterated the placement option that Respondent's IEP team members had recommended on July 22. *Student* would be provided with three hours of special education instruction in two ninety-minute sessions. The special education instruction would be provided in a

playgroup, and provide *Student* an opportunity to interact with Head Start and Title I children. The two-day playgroup was not yet established, but would be in place when school opened. It would be similar to the one the previous year in which *Student* had been observed. *Ms. L.C.* also discussed the Title I preschool class, which is for four-year olds, as an option for “typical peers” with whom *Student* could interact. *Ms. L.C.* noted that the typical peer group would be pulled out of their rooms to join the playgroup, because the programs in which the typical children were participating had requirements for participation. The Title I program had a requirement that children must be five-years old on the following August 1, and entering kindergarten. *Student* did not meet those requirements.

38. The Team discussed blended full-day options at Frank Porter Graham and Children’s Learning Center. Those options, however, are for students needing full-time special education. The Respondent’s team members did not believe *Student* needed a full-time special education program to make progress on his IEP goals. The options at Frank Porter Graham and the Children’s Learning Center also had teacher/pupil ratios that were similar to the class in which *Student* had not been successful in ***.

39. **Although *Student* might benefit from attending preschool, Respondent’s team members thought a different environment like the playgroup was necessary to meet *Student*’s needs. The Team did consider regular preschool as one of the options on the continuum of services, but based on his goals and objectives, as well as the recommendations from his evaluations, the Team decided that *Student* did not need a full time regular preschool placement. The Team knew that *Student* had not done well in a prior preschool (***School*) with a ratio of approximately 15 students to two adults. Also, regular preschool is not a required service. The LEA is only required to provide the needed special education and related services. Regular preschool education is a responsibility of the parents. *Mother* and her advocates argued strongly for a full-day regular preschool as their preferred placement knowing that the Respondent had no obligation to provide it. They also argued for the full-day preschool, while knowing that *Student* did not do well in his former preschool in ***.**

40. The Respondent’s IEP Team members expressed that the XYZ playgroup offered the small, structured, language-intensive environment recommended by Dr. Umbel, Ms. Vasquez, and TEACCH. During the hearing there was testimony from several experts that current research has also shown short periods of time in such playgroups can be very effective for children such as *Student*. The Respondent’s IEP Team members expressed that the placement recommendation was based upon the goals in the IEP, the assessments, and the training of the teachers in the playgroup. *Student*’s age level, ability, and learning characteristics set out in the evaluations also factored into their recommendation. ***Mother* argued that the Team could not look at the assessments for the purpose of determining placement, but can only look at the goals and objectives.**

41. Based on the assessments and evaluations provided, Respondent’s IEP Team members argued that three hours per week of specialized instruction was sufficient for *Student* to make progress on his IEP goals. In Respondent’s opinion, the offered educational placement chosen was the least restrictive environment in which *Student*’s needs could properly be addressed. If it were discovered that *Student* needed additional behavior supports, the IEP Team would revisit the issue and add increased behavior services.

42. During the IEP meeting on July 30, *Mother* strenuously disagreed with the level of services and the level of inclusion in the regular education setting that Respondent's representatives were proposing. It was the Petitioners' opinion that *Student* would need more than 3 hours of special education per week in a typical preschool to address the goals on *Student's* IEP.

43. During the IEP meeting on July 30, *Mother* and her advocates requested that Respondent's team members provide an explanation or justification for the proposed number of hours of special education, and the proposed placement at XYZ playgroup. She asked how Respondent's team members arrived at three hours per week of special education services. She also wanted to know who was teaching the playgroup class and their experience. Later, at the hearing in this case, the Respondent was able to show that as of July 23, 2008, Petitioners understood the makeup of the proposed XYZ playgroup for the 2008-09 school year. The Petitioner's had sent an email on July 23, 2008 email to Dr. Merkle in which the Petitioner advised that the offered playgroup placement would include "5 boys with speech delays but not social delays...and 2 teachers."

44. During the July 30, 2008 IEP meeting, Respondent advised Petitioners that the 2008-09 XYZ playgroup would consist of 2-6 students. The proposed playgroup would be a continuation of the same playgroup *Student* had participated in during the May and June 2008 observations. The exact students and staff involved were not yet known, as school had not started. It was clear that K.S. would be one of the two teachers, but the other was yet to be assigned. The other teacher would be a licensed preschool teacher. In North Carolina a licensed preschool teacher is also a special education teacher and would know behavior modification techniques. *Ms. L.C.* stated that the playgroup would be changed to meet twice a week to accommodate *Student*. The record since shows that it was not changed because the Petitioners did not accept the proposed placement.

45. During the IEP meeting on July 30, *Mother* advised Respondent's team members of the primary reasons for disagreeing with the proposed provisions of special education services to *Student*. These reasons were:

- a. Respondent's IEP team members would not articulate, to *Father's* satisfaction, how they arrived at the decision to provide three hours of special education to *Student* and to place him in what she described as a highly restrictive setting. She also wanted to know how they had concluded that three hours per week of participation in any form of preschool would be sufficient to meet *Student's* needs, and
- b. Petitioners believed that *Student* could derive educational benefit in what they believed was a less restrictive environment than XYZ, and
- c. *Student* needed to be placed in a what she described as a less restrictive setting that produced natural opportunities to learn and apply those skills in order to develop appropriate, adaptive peer-interaction and socialization skills.

At the hearing, *Mother* added another reason for disagreeing with the proposed provisions of special education services to *Student*. She said that the Petitioners knew at that time, July 30, that they would be putting *Student* in a full day program.

46. **The Petitioners were inconsistent in their arguments during the IEP meeting on July 30. Both *Mother* and *Ms. C.P.* both stated that *Student* was not ready for a large-group inclusive setting, that his previous experience in *** showed this. *Mother* said that *Student***

looses it if he is not in a small group setting. Yet, at the same time, *Mother* and *Ms. C.P.* argued strongly for a regular preschool setting.

47. During one heated outburst during the discussion concerning placement at the July 30 IEP meeting, *Mother* clearly stated, "Giving *Student* exactly what he needs is not going to work! And it is not what I want." She was stressing her strong desire to have *Student* placed in a full-time regular preschool.

48. During the July 30 IEP meeting, *Mother* asked Respondent's team members how Respondent could deliver special education services to *Student* in a private preschool setting if the parents were able to find a regular education private preschool that would enroll *Student* for the coming year. *Mother* also asked why shouldn't *Student* be in a full-day program. *Ms. M.T.* responded that Respondent's representatives did not disagree with a preschool setting for *Student*, but were talking about the amount of specialized instruction time Respondent would provide *Student*. *Ms. T* and *Ms. L.C.* stressed that the specialized instruction is the financial responsibility of the school, while regular preschool is up to a child's parents.

49. During the July 30 IEP meeting, there was a disagreement that Respondent's team members did not provide Petitioners with sufficient justification explaining how it determined three hours per week of special education services per week would help *Student* meet his IEP goals. While Respondent's team members seemed to rely on their experience and expertise in special education, their answers to Petitioners' questions on this issue were viewed by Petitioners as vague and not individualized to *Student* and his IEP goals.

50. Although *Mother* argued extensively for a full-time regular preschool placement at Respondent's expense during the discussions at the July 30 IEP meeting, she never indicated that the Petitioners were going to enroll *Student* in a preschool anyway and seek reimbursement for the preschool costs.

51. During the July 30 IEP meeting, *Ms. C.P.* stressed *Student's* need for special instruction to meet his behavior and social goals. Based on an intentional misinterpretation of DPI's article on Best Practices for Autism, *Ms. C.P.* recommended the team provide 25 hours of special instruction per week to meet the goal of getting *Student* ready for kindergarten. During the hearing, she admitted that she said this, even though she knew it was a misinterpretation. She, in hearing, stated that ten (10) hours of special instruction would be enough, and that *Student* could actually make progress with even less.

52. North Carolina's DPI article Best Practices in Educating Children with Autism identifies research-based practices to "serve as a framework for the training of teachers" who teach students with Autism Spectrum Disorder. In that document, DPI stated:

Research suggests that providing 25 hours a week of intensive instruction on measurable objectives identified with the educational program is as effective as providing 40 hours of 1:1 instruction.

Contrary to how *Ms. C.P.* interpreted this document in advising the Petitioners and making statements during IEP meetings, DPI did not recommend 25 hours of intensive instruction a week for students in this document.

53. During the July 30 IEP meeting, *Ms. C.P.* stated that a small setting will not prepare *Student* for kindergarten, yet she had earlier advised the Petitioner that *Student* could be best served in a small structured setting.

54. During the July 30 IEP meeting, *Mother* requested an instructional or implementation plan from Respondent's team members, specifying how *Student's* IEP goals would be addressed during the XYZ playgroup. The evidence showed that neither the Respondent's team members nor *Mother* knew exactly what she was requesting. The Respondent's team members clearly stated that the staff could work on many of *Student's* goals at one time, that the teaching environment would allow several goals to be worked on at the same time. Ms. T indicated that once the classroom teacher has developed a plan for implementing *Student's* goals, such an instructional plan could be provided. At the close of the meeting, *Ms. L.C.* requested that *Mother* provide her with examples of such implementation plans.

55. At the end of the July 30 IEP meeting, *Mother* requested *Ms. L.C.* present them with a DEC 5 Notice. Specifically *Mother* wanted the DEC 5 to explain why the following requested services and/or information were being refused:

- a. A full-time preschool placement at Respondent's expense,
- b. Twenty-five (25) hours of special instruction for *Student*,
- c. Behavioral supports for *Student* provided by qualified personnel, and
- d. An implementation plan specifying how the IEP's goals and objectives would be addressed.

56. Regarding the request for a DEC 5, *Ms. L.C.* responded that, "Now we're in training four days next week, I am not sure how quickly this can get to you, but I'll be happy to - I will pass this on to my director." She confirmed, seconds later, that the director would prepare the DEC 5. *Ms. L.C.*, as the LEA representative for the team, either did not think she was authorized to answer *Mother's* questions and/or did not know how to write the DEC 5 given *Mother's* concerns. Subsequently, *Ms. L.C.* authorized someone outside of the room, later revealed as Director M.G., to prepare the DEC 5. *Director M.G.* was not a member of the team or involved in the decisions of the team.

57. The IEP team, following the July 30 meeting, did not present Petitioners a DEC 6 requesting either Petitioners' consent or Petitioners' written refusal to consent, to the provision of the services in *Student's* IEP. *Director M.G.*, the EC Director finally issued a DEC 6 to Petitioners at the next IEP Meeting on October 13, 2008.

58. On the same day following the July 30 IEP meeting, *Mother* sent an e-mail to *Ms. L.C.* with the following request:

I would like to go ahead and set up a meeting for 8/18 @ 10:30 *Father* at New Hope Elementary, which according to your email below is the next available time for the team to meet. I feel that regardless as to if we come to some type of agreement, it is important that we sign and implement [*Student's*] IEP so that he may begin to get services . . . still feel that [*Student*] shouldn't be penalized for the teams' inability to find a suitable and appropriate for him. I do not expect him to take part in the social skills group at pathways but do expect that the county will provide services to him in a private setting and I would like to know, prior to

the meeting on the 18th, what those services would look like if we were to start them while waiting for mediation.

59. **The email from *Mother* to *Ms. L.C.* on July 30 informed the Respondent that the Petitioners intended *Student* to be in a private preschool and that the Petitioners wanted the IEP services to be provided there. As the required DEC 5 and DEC 6 forms had not been provided to Petitioners, the final decisions of the IEP Team had not been made. *Mother* was continuing the dialogue.**

60. At three subsequent times (August 5, 12, and 14) within the next fifteen days, *Mother* wrote emails to *Ms. L.C.* to inquire if the July 30 email concerning private preschool services and setting a date for another IEP meeting had been received. On August 14, *Mother* was very specific:

I have now sent three emails, this one including, asking about what the 3 hours of services would look like if we were to put [*Student*] in a private preschool. Please respond to this request as soon as possible.

This email, as well as the previous two, does not indicate that the Petitioners were expecting the Respondent to make the placement in a private preschool. *Mother* clearly states, "if we were to put [*Student*] in a private preschool." There is no reference to the placement being a responsibility of the Respondent or that the Petitioners are placing *Student* with the expectation of reimbursement of the private preschool costs.

61. *Ms. L.C.* deliberately did not respond, in any way, to *Mother's* foregoing emails requesting guidance on how Respondent would deliver the offered IEP services to *Student* in a private regular preschool setting. Instead, *Ms. L.C.* acknowledged at the hearing that her superior, Director M.G., directed her not to respond to any of *Mother's* inquiries. *Director M.G.* also had directed *Ms. L.C.* not to advise *Mother* that she was not going to respond to *Mother's* email requests. At hearing, *Director M.G.* confirmed that she directed *Ms. L.C.* not to respond to *Mother's* emails.

62. The series of emails sent from *Mother* to *Ms. L.C.* in early August clearly established that the Petitioners were hoping to secure services for *Student* in a private preschool of their own choosing before school began. The start date for the Respondent's school was August 25, 2008. From a series of email correspondence between *Mother* and *Ms. S.D.* at *** Preschool, it is clear that *Mother* met with *Ms. S.B.* sometimes the week before the July 30, 2008 IEP meeting to attempt to enroll *Student*. *Student* was not immediately accepted. *Ms. S.B.* and her teachers initially were very reluctant to even consider enrolling *Student*, for they did not provide any special education and felt that *Student* would be a distraction in the regular preschool classroom. Following a meeting between *Mother* and *Ms. S.B.* in August, RM obtained an application and submitted it to *Ms. S.B.*. *Student* began preschool at *** Preschool immediately after Labor Day on September 2, 2008.

63. Although ongoing conversations about *Student's* enrollment in *** Preschool were taking place between *Mother* and *Ms. S.B.*, this was not shared with the IEP Team at the July 30, 2008 IEP meeting.

64. By letter dated September 10, 2008, the Petitioners clarified that *Ms. L.C.* had never responded to *Mother's* emails between July 30, 2008 and August 14, 2008 in which Petitioners asked *Ms. L.C.* to provide information about services provided in a private preschool setting. The Petitioners advised *Director M.G.* that *Mother* had already informed *Ms. L.C.* that Petitioners did not expect *Student* to participate in the *XYZ* playgroup. The Petitioners further stated, "we have never agreed with the decision by the IEP team to limit *Student's* services to those offered in the playgroup settings at *XYZ.*"

65. In the letter dated September 10, 2008, the Petitioners notified the Respondent that *Student* had been enrolled in a private preschool and will be seeking services at and/or reimbursement for the private placement.

66. The July 30 IEP Team meeting was the last meeting before Petitioners enrolled *Student* in the private placement for which Petitioners now seek reimbursement and, as such, was the appropriate IEP meeting to give verbal notice in accordance with 34 C.F.R. § 300.148(d)(1)(i). **The Petitioners had, on various occasions prior to this meeting as well as during this meeting, expressed their wish to have *Student* in a regular preschool. There is, however, no evidence that the Petitioners gave the required notice during this meeting. *Mother* did make statements regarding rejecting the Respondent's proposed placement and some references with regard to her placing *Student* in a private preschool. *Mother*, at no point, made a statement that that was even close to expressing "their intent to enroll their child in a private school at public expense." Quoting 34 CFR § 300.148(d)(1)(i)**

67. The Petitioners could also have met the notice requirements of 34 C.F.R. § 300.148(d)(1)(ii), which requires 10 days written notice before removal of the child from the public school. Technically, there was no removal, but a reasonable interpretation of 34 C.F.R. § 300.148(d)(1)(ii) would be that the written notice should have been given at least 10 days before enrolling *Student* in the private preschool. Another reasonable interpretation would be that the written notice should be given at least 10 days before the beginning of the public school session, August 25, for the offered placement would have been available at that time. The written notice provided by the parents was dated September 10, 2008. As *Student* was enrolled in *** Preschool on September 2, the written notice would not meet the requirements of at either of these interpretations. *Mother* did write a series of emails to *Ms. L.C.* between July 30 and August 14, 2008. None of them could reasonably be read to meet the notice requirement, for *Mother* was inquiring about the nature of services that the Respondent would provide in a private preschool. She never stated in these emails the "intent to enroll their child in a private school at public expense."

68. On August 27, 2008, Ms. K.S., a speech therapist for the Respondent, conducted a Speech and Language Evaluation with *Student*. She administered the Clinical Evaluation of Language Fundamentals Preschool (CELF-P) and the Goldman Fristoe Test of Articulation (GFTA-2). The results were that *Student* scored within the average range on all subtests and indexes of the CELF-P. Using the GFTA-2, he was found to have mild articulation problems, primarily because of a forward tongue position. The conclusion reached was that *Student* was within the average range for expressive and receptive language but had a mild articulation disorder.

69. An IEP meeting was held on October 13, 2008 to amend *Student's* IEP, finding *Student* eligible for speech services and including speech therapy for the articulation disorder. The IEP team decided to provide *Student* with thirty minutes per week of speech therapy to implement *Student's* speech goal.

70. During the October 13, 2008 IEP meeting this meeting, *Ms. L.C.* explained that Respondent was still offering special education services from the July 30 IEP with placement in the XYZ playgroup, two times a week at 90 minutes per session along with the occupational therapy and now speech therapy. Petitioners again disagreed with Respondent's offer of placement for the provision of special education services to *Student*.

71. During the October 13, 2008 IEP meeting *Ms. L.C.* stated that *Father* and *Mother's* decision not to sign, or otherwise endorse Respondent's IEP at the July 30, 2008 meeting, operated as their refusal to consent to implement the services Respondent had offered in the IEP. *Director M.G.*, who was present at this meeting, advised that *Ms. L.C.* was incorrect in her statement. The Petitioners had not refused services. They had refused the placement. The parents were not given the DEC 6 until October 13, 2008 meeting, even though the services were offered on July 30. The DEC 6 form is used in NC to obtain informed consent of parents prior to initiation of services. Informed consent must be obtained by the LEA prior to the initiation of services. When presented this form, parents can accept or refuse services.

72. During the October 13, 2008 IEP meeting, *Mother* explained that since September 2008, *Student* had been attending a private preschool at * Preschool in Carrboro, NC. This is the first time that the Respondent was informed of *Student* being in this school. *** Preschool, which had just opened, noted in its 2008-09 Policy Manual that the school is located just west of Carrboro and loosely follows the calendar of the Chapel Hill-Carrboro City schools. From this information, the assumption was made in the meeting that this school was outside the Respondent's district.**

73. Following a discussion of *Student's* private preschool, Respondent rejected Petitioners' request that Respondent provide special education services to *Student* at *** Preschool. Respondent's rejection was based on the assumption that *** was not located within the Orange County School district boundaries. The parents also did not know if *** Preschool was located within the Orange County School district boundaries. Following the meeting, both *Mother* and *Director M.G.* researched the location and both found that it was within the Orange County School district boundaries.

74. During the October 13, 2008 IEP meeting, *Director M.G.* provided Petitioners with the DEC 6 form. Petitioners' did not sign this consent for services form, because they first wanted to consult with their attorney. On October 16, 2008, Petitioners signed the DEC 6, and consented to Respondent providing special education services to *Student*. However, they noted on the DEC 6 that they "[d]isagree with the services currently being offered as we find them insufficient, inadequate, and not comprehensive enough to aid in his development." In an email on October 16, 2008, *Mother* informed *Ms. L.C.* that the Petitioners would like special education and related services to begin as soon as possible at *** Preschool.

75. By email on October 23, 2008, *Ms. L.C.* advised *Mother* that Respondent's Autism Facilitator, *Ms. W.G.*, would begin providing special education services for *Student* at ** Preschool. Respondent services to *Student*; special education, occupational therapy, and speech therapy, started on October 29, 2009.

76. The Petitioners had enrolled *Student* in *** Preschool on September 2, 2008. On October 29, 2008 the Respondent began to provide special education services to *Student* in *** Preschool. These consisted of those same services outlined in the July 20 IEP: 90 minutes of special education twice a week; 30 minutes of occupational therapy once a week; and the 30 minutes speech therapy once a week that was added at the October 13 IEP meeting.

77. The parents' placement, *** Preschool, was a regular education preschool setting consisting of 12-16 preschoolers, ages three to five years old. *Student* was the only student in his class who had been identified as a child with a disability under the IDEA. The preschool provides no special education services, is not structured, and is not language-intensive. The teacher has no training or experience working with autistic children and the class has a ratio of approximately sixteen students to two adults.

78. Prior to October 29, the educational plan at *** Preschool consisted of *Student* attending preschool five days a week from 8:45 until 12:30 pm. *Student* received six hours a week of special education therapy during preschool, with a focus on behavior modification from D.H. He also received one hour of speech and language therapy, and one hour of occupational therapy a week from other private providers.

79. From the time *Student* began at *** Preschool until October 29, the only special education services for *Student* in the private preschool were those obtained by Petitioners from outside providers. The Petitioners also continued the home services of the autism consultant, *Ms. C.P.*, which had begun in May 2008.

80. After the Respondent began providing services on October 29 at *** Preschool, the parents decreased the private special education/behavioral modification services to four hours a week. These services, combined with special education services by the Respondent, meant that *Student* received seven hours total of special education per week, all in the preschool. The parents continued to pay for private related services, and supplemented the related services provided by Respondent with another hour of occupational therapy, and 30 minutes of speech and language solely focused on articulation. The Petitioners and their providers had a totally separate set of goals and objectives developed by *Ms. C.P.* that was the focus of most of their efforts. These goals were based on the ABLSS, an assessment that is not normed to age-appropriate development of skills. This set of goals and objectives was not shared with the Respondent.

81. The research introduced by Petitioners at the hearing noted that many programs for working with autistic students have very low teacher/student ratios and involve transition from a small, highly structured group to an integrated classroom. The research further noted that a successful strategy for engaging the child is to provide a highly structured classroom environment, thereby preventing behavior problems by increasing the children's understanding of classroom

routine and specific activities and by promoting the children's independence and success. Early intervention and teaching skills in a small structured environment are critical factors in outcomes for children on the spectrum. This was not the environment in ** Preschool.

82. Playgroups are a commonly accepted method of teaching skills to students with autism. Recent research supports autistic students making progress from using playgroups for three hours per week.

83. **During the hearing, Dr. Sally Flagler was Respondent's only expert witness who was not employed by the Respondent. She was also the most believable of all those who testified. She gave the opinion that Respondent's proposed IEP placement and services were appropriate. When challenged on cross-examination, using her own writings, she did confirm that a bright autistic child like *Student* is difficult to assess, and that the difficulties experienced by a highly intelligent child with Autism are not likely to be observed, much less assessed, in a structured environment. Quick observations were inadequate tools for assessing the needs of a high-functioning autistic child like *Student*. Yet, she stated that if the IEP Team used many inputs to determine child's needs, not just the observations, they still could properly evaluate a child such as *Student*. When asked, based on all data available to the IEP Team on July 30, 2009 and her expertise, was the IEP and placement appropriate and in the least restrictive environment, she responded "yes." She went on to say, that a similar child would probably be offered two hours a week of itinerant services in Wake County, where she is the autism specialist.**

84. By letter dated August 14, 2008, Respondent provided Petitioners with a Written Prior Notice indicating that the IEP team had determined the offered placement as appropriate, and explained the basis for that decision. The IEP team denied Petitioners' request for an implementation or instructional plan as such request exceeded Respondent's obligations to *Student* and impedes the classroom teacher's ability to seize optimal opportunities to work on *Student's* goals.

85. On August 22, 2008, *Director M.G.* informed Petitioners that *Ms. L.C.* had shared two emails from *Mother* requesting information on service delivery and staff qualifications. *Director M.G.* explained that the school system was "ready, willing, and able" to serve *Student* pursuant to the IEP. *Director M.G.* also stated: "At this time, there is no indication that a private preschool placement is warranted via the decision reached by the IEP team on July 30, 2008."

86. Initially, *Student* was on a reduced schedule at *** Preschool. The number of days and hours were increased in phases, until he was attending five days a week from 8:45 to 12:30. When *Mother* became employed in late October, *Student* began to stay for the remainder of the day. His hours then were from 8:45 to 3:30. The afternoon session was not part of the educational day but was a childcare arrangement.

87. During the summer of 2008, neither of *Student's* parents worked. Using the information they had learned from researching autism and following the guidance of *Ms. C.P.*, they were able to work with *Student*. This contributed to *Student's* remarkable progress over the summer and fall. *Ms. C.P.* was a member of the IEP Team and had data about *Student's* excellent progress

during the summer. She, however, did not share it with the IEP Team prior to the development of the IEP. Her data showed that he was making remarkable progress. The Respondent's teacher and therapists, after they began providing services, also reported on a regular basis that *Student* was making excellent progress on his IEP goals. By December he had almost completed the IEP goals. All parties agreed that his progress, while in *** Preschool with the provided special education services, was indeed remarkable.

88. The private provider, D.H., noted on September 4, 2008 that *Student* clearly participates at least more than 99% of the other children, has more language, and attends to the teachers better, and follows directions most of the time. She was reporting to the Petitioners concerning *Student's* first days in *** Preschool.

89. B.R., *Student's* teacher in the social skills playgroup at TEACCH, observed *Student* in *** Preschool in September 2008 without Ms. D.H. being present. Only the regular teachers were there. B.R. noted that she was very impressed with *Student's* coping skills most of the day.

90. During the hearing, witnesses for the Petitioner made these remarks:

- a. *Mother* stated that *Student* made very good progress with six hours per week of special education. Earlier she had told the IEP Team that he needed much more, though she never specified exactly how much. She had repeatedly told the IEP Team that three hours was not enough, but said that she did not know if *Student* could make progress with the three hours. She said that she thought all children with autism need more than three hours.
- b. D.H., the ABA therapist used in the classroom, despite noting that *Student* had made "remarkable" progress in four months while receiving six hours per week of special education, recommended a minimum of ten hours per week of special education. Ms. D.H. later admitted that *Student* would benefit from seven hours of special education. She also said that *Student* is a quick one-trial learner who has shown that he can make progress.
- c. Ms. C.P. acknowledged that she told Petitioners that 10 hours of special education was appropriate, although Ms. C.P. never suggested to the IEP Team that 10 hours of instruction was appropriate. She clearly told the IEP Team that *Student* needed 25 hours of special instruction.

91. **During the hearing, the Petitioners focused at length on the examples of *Student's* progress while in *** Preschool. The ALJ also included many examples in her decision. There is no reason to repeat them in this Decision, as all parties were in agreement. The Respondent did not question *Student's* progress in the private preschool setting.**

92. **In her phone testimony, as in her recommendations in her evaluation, Dr. Umbel stressed the need for a small, structured, language-intensive placement. She did not make any recommendations with regard to hours, only that *Student* should be in a special education preschool placement. She never recommended that *Student* needed a behavior therapist. Instead she recommended a classroom where behavior modification techniques are used. In her testimony, she stated that *Student's* behaviors needed to be addressed before he would be able to access a regular program with typical peers. Neither she nor any of *Student's* assessments indicated that he required the one-on-one facilitation that was used by Ms. D.H. in *** Preschool.**

93. **At the hearing the Respondent argued that given Petitioners' own research, and expert evidence, *** Preschool was not the appropriate placement or the least restrictive environment for *Student* to receive special education services. It was also not appropriate when applying the recommendations of Dr. Umbel and TEACCH. The classroom in the morning was unstructured, chaotic with lots of kids and lots of activities all over the place. It also was not a language-intensive environment.**

94. *Mother* felt that *Student's* private preschool class at *** might lack some structure. B.R. from TEACCH who observed *Student* in the *** Preschool agreed with *Mother's* characterization of *Student's* class as "loosey goosey." At the October 13, 2008 IEP meeting, *Ms. C.P.* stated that the preschool in which *Student* was enrolled was not the best choice for *Student* because there was not a lot of structure. Further D.H. stated that there were not a lot of models for *Student* in his private preschool class.

95. **There was never any agreement between the parties concerning the Least Restrictive Environment (LRE). The Respondent maintained that their playgroup was the LRE in light of the data available on July 30, 2008, and a special education preschool setting where appropriate personnel could work on the goals and objectives. The Petitioners maintained that the playgroup was more restrictive than a regular preschool setting. They wanted to ignore the information available to the IEP Team on July 30.**

96. At the preschool level, the least restrictive environment is that environment in which goals can be achieved and removes the child from their regular environment as little as possible. The regular environment is that place where the child would otherwise be or where the parents are maintaining the child. On July 30, 2008, the date of the placement decision, that regular environment was the home. The parents indicated they wanted to enroll *Student* in a regular preschool, but as of July 30 they had not done so. Had they done so, this would have been *Student's* regular environment.

97. **There are no publicly funded regular education preschools available to all children in Orange County, nor is there any requirement to provide them. Where regular preschools are not provided, as in North Carolina, the obligation to provide services in the least restrictive environment at the preschool level is met by providing special education services to the child in the least amount of time and with minimal disruption to the child's natural day.**

98. Respondent had demanded, by way of a counterclaim, that Petitioners allow comprehensive psycho-educational testing of *Student*. On the first day of hearing, Petitioners consented to the evaluation. The evaluation was conducted in February 2009 by Dr. Naftel of CDL. In her report, Dr. Naftel found:

Student continues to be diagnosed with high-functioning autism.

A regular education classroom is likely the most appropriate least restrictive environment for him at this time. (Emphasis added)

Student struggles with play skills, peer interactions, flexibility, and self-help skills. Thus, within the regular education classroom, [*Student*] will likely benefit from and require special education services to function appropriately in this setting.”

Specifically, a special educator may be helpful in modifying tasks so that they are geared to his learning style (such as presenting tasks in a visual rather than auditory format), provide him with individualized instruction, provide strategies/accommodations to assist with behavioral issues that may impede learning, and help facilitate peer interactions and play skills.

Based on information from his family, public educators, and private educators, ‘[*Student*] currently seems to be making appropriate progress towards his IEP goals. Thus, the present level of services seems adequate in regard to meeting [*Student*’s] educational needs at this time.’

Student benefitted from the use of a schedule during the evaluation to let him know what to expect. Thus, a schedule with pictures and simple words is recommended for use with [*Student*] at home and at school.

It is recommended that [*Student*] work in several shorter work sessions interspersed with brief breaks, rather than one long work session to increase his ability to stay on task.

When teaching, it will be important to incorporate challenging items with easier items to prevent [*Student*] from shutting down. A social story that emphasizes that it is okay to make mistakes and take guesses may also be helpful to [*Student*].

99. Based on the testing she conducted, Dr. Naftel concluded that *Student* had made significant progress at *** Preschool. She stated that *Student* currently seems to be making appropriate progress towards his IEP goals. Thus, the present level of services seems adequate in regard to meeting *Student*’s educational needs at this time.

100. **Dr, Naftel based her conclusions and recommendations without observing *Student* in a classroom or interacting with typical peers. She did not know if the placement in *** Playschool would have been appropriate in July 2008.**

101. **Dr. Naftel, however, was basing her evaluation and recommendations on *Student* in February 2009. At this time, *Student* was performing significantly higher. She did not base her opinion on the information available to the IEP Team in July 2008.**

102. **The evaluations available to the IEP Team were done in February 2008, whereas Dr. Naftel performed her evaluation in February 2009. It is almost like the evaluations were of two different children. It is likely that the IEP Team would also have reached a different conclusion in February 2009 than they had in July 2008.**

103. **None of the Petitioners' experts performed an observation of *Student* with peers in any classroom setting prior to the development of his IEP. The Respondent, however, had made three observations of *Student* in the XYZ playgroup. The only information made available by the Petitioners was the preschool report from **School in *** and Mother's comments. *Student* obviously had problems in this regular preschool setting.**

104. According to testimony of *Mother* at the hearing, *Student* performed well at Global Gardens School in ***. This was a school supervised by a special educator with a lower student-teacher ratio than **School in which the parents placed *Student* for a brief period after learning of

his diagnosis of autism. The Petitioners did not share the information about *Student's* performance at the Global Gardens preschool with the IEP Team.

105. **There are several different methodologies commonly used with autistic children, and no one methodology is required. Most schools use an eclectic approach. They choose the methods that work best with each particular child. It was clear that the Petitioners' private consultants and providers were strong advocates for the use of ABA. Ms. D.H., in fact, stated in the hearing that it was educational malpractice not to use ABA.**

106. Prior to the hearing, the Petitioners provided no information to substantiate any reimbursement. During the hearing the Petitioners submitted incomplete data to substantiate reimbursement for their private education costs. (Pet Ex 81) This incomplete data included:

a. The cost of the 5-day morning program at *** preschool is \$590 per month, plus \$25.00 application fee, and \$ 250.00 enrollment and supply fee. The cost for the month of June is ¼ the cost of other months. The full-day program, including the afternoon childcare is \$1,000 per month. The total on the invoice is \$7,045.00 for September 2008 to March 2009. The *** Preschool invoice does not reflect less than a five (5) day attendance by *Student*. The invoice also includes child-care beginning in November. Child-care is not an educational cost.

b. The Petitioners submitted invoices/information for New Hope ASD Consulting for consultation, educational therapy or tutoring, meetings, and planning for the following:

May 2008	Consultation	\$280.00
June 2008	Consultation	\$360.00
July 2008	Consultation	\$320.00
	Meeting	\$560.00
	Planning	\$320.00
	Therapy	\$605.00
August 2008	Consultation	\$560.00
	Therapy	\$550.00
September 2008	Consultation	\$120.00
	Therapy	\$1210.00
October 2008	Consultation	\$140.00
	Therapy	\$1292.50
November 2008	Tutoring	\$715.00
December 2008	Tutoring	\$550.00
January 2009	Observation	\$80.00
	Consultation	\$240.00
	Tutoring	\$660.00
February 2009	Consultation	\$80.00
	Tutoring	\$660.00
March 2009	Tutoring	\$495.00

c. In the New Hope ASD Consulting sales receipts, there were several inconsistencies between the dates for which services were charged and the provider's notes. In November, several charges were on Saturdays.

d. Petitioners submitted an invoice for services rendered by Triangle Therapy, the private occupational therapists, from April 2008 through March 2009 for \$2434.00. The invoice from Triangle Therapy indicated that Blue Cross Blue Shield (BCBS), not the Petitioners, was billed for the all of the \$2434.00 except for the initial evaluation. This was billed for \$166.00. In a deposition before the hearing, *Mother* stated that BCBS paid for all except \$15 per session for the occupational therapy.

- e. Petitioners submitted an invoice from **, the private speech therapists for *Student*, for services rendered from June 24, 2008 through March 19, 2009 for \$3,655. In the invoice from **, \$1,020 is for services rendered before the beginning of the Orange County Schools school year on August 25, 2008. In a deposition before the hearing, *Mother* stated that she gets insurance payments to help with the cost of speech therapy.
- f. Petitioners only submitted invoices for occupational therapy and speech therapy. There is no indication that the Petitioners actually paid for these services.

107. On June 18, 2009, Judge Lassiter issued a Decision, which stated:

- 1. Petitioner proved that by a preponderance of the evidence that Respondent:
 - a. failed to provide *Student* with a free, appropriate public education through the development of an Individualized Education Plan (IEP), and
 - b. failed to provide *Student* with a free, appropriate public education through an IEP that was reasonably calculated to provide *Student* with educational benefit.
- 2. Petitioner proved by a preponderance of the evidence that Respondent failed to provide *Student* a free, appropriate public education in the least restrictive environment as required by 20 USCA § 1412(a)(5)(A).
- 3. Petitioner proved by a preponderance of the evidence that Respondent procedurally and substantively failed to provide *Student* a free, appropriate public education by failing to provide *Student* with educational services before October 28, 2008, the date Respondent first provided services to *Student* at his private preschool placement.
- 4. Petitioner proved by a preponderance of the evidence that Petitioners' private educational placement was appropriate, and they are entitled to reimbursement for costs and expenses as provided in the above Conclusions of Law.
- 5. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners are entitled to the equitable remedy of reimbursement of the following costs Petitioners incurred in educating *Student* including:
 - a. compensation for the private tuition costs at *** from September 2008 through December 2008 from 8:45 pm until 12:30 pm Monday through Friday,
 - b. compensation for all costs for private special education services provided by New Hope ASD Consulting from July 31, 2008 until October 28, 2008,
 - c. compensation for private special education services by New Hope ASD Consulting for four hours per week from October 28, 2008 until the end of Respondent's 2008-2009 school year,
 - d. costs for speech and language instruction, and occupational therapy incurred for the entire 2008-2009 school year beginning on August 25, 2008.
- 6. The Court finds that Petitioners' expenses were reasonable and necessary to provide *Student* with an appropriate private educational placement. The actual costs to be reimbursed were established through documentary (Pet Ex. 81) and testimonial evidence. (Tr. Vol. 4, 675-689- Testimony of *Father*) Reimbursement shall not include consultants' costs in preparation of IEP meetings or for consultants to attend IEP meetings. Petitioners were not seeking reimbursement for verbal behavioral therapy during the summer of 2008. (See Findings) The Court also awards Petitioners any additional, equitable remedies tailored to address the specific deprivations that were established by the evidence in this case.

108. The Respondent filed Notice of Appeal of the ALJ's Decision on July 16, 2009. The appeal was filed in accordance with G.S. 115C-109.9 with the Exceptional Children Division of the

North Carolina Department of Public Instruction. The undersigned was appointed as Review Officer on July 16, 2009. A Request for Written Arguments was sent to the parties on July 17.

109. The Office of Administrative Hearings encountered a delay in providing the records of the case. The complete records of the case were not received by the Review Officer until July 31, causing difficulty in completing the review within the 30-day time period allowed. The Director of Exceptional Children Division of the North Carolina Department of Public Instruction authorized an extension of time to complete the review. The Review Officer granted a brief Extension of Time, with the Review Officer's decision to be completed by August 19. Written Arguments were received from both parties on August 11, 2009.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes Conclusions of Law that in some instances depart significantly from those of the ALJ. These were made independently and are consistent with IDEA, state law, federal regulations, state policies, and court interpretations. The Review Officer makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes; NC 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. IDEA was enacted to “ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. §1400(d)(1)(A). IDEA; the implementing federal regulations, 34 C.F.R. Part 300; N.C.G.S. 115C - Article 9; and NC 1500 *Policies Governing Services for Children with Disabilities* all have specific procedures that an LEA must follow in making FAPE available.

3. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services in Orange County, North Carolina. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and the North Carolina *Policies*, NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education residing within its jurisdiction.

4. *Student* and his parents were residents of Orange County during the period relevant to this controversy. *Student* is a child with a disability for the purposes of 20 U.S.C. § 1400 et. seq. and N.C.G.S. 115C, Article 9.

5. N.C.G.S. 115C-109.9 and the *Policies* (NC 1504-1.15) provide the guidelines to be used in the administrative review process. The hearing by the ALJ and subsequent review by this Review Officer are required to be conducted in accordance with those provisions.

6. Determining who has the burden of proof in due process hearings was decided by the Supreme Court in *Schaffer v. Weast* 546 U.S. 49 (2005). Under the IDEA, parents who challenge educational decisions made by schools have the burden of proof in the administrative process. Thus, the Petitioners have the burden to show that the Respondent did not offer *Student* a FAPE. The Petitioners have met this burden on several issues before the Review Officer.

7. A free appropriate public education (FAPE) that must be made available to all eligible children is defined by IDEA, 20 U.S.C. §1401(9):

FREE APPROPRIATE PUBLIC EDUCATION. —The term ‘free appropriate public education’ means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;

and

(D) are provided in conformity with the individualized education program required under section 614(d).

A free appropriate public education has also been defined as that which provides a child with a disability with personalized instruction and sufficient support services to enable the student to benefit from the instruction provided. The individualized educational program (IEP) must be reasonably calculated to enable the child to receive benefits. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990).

8. A FAPE was offered in accordance with an IEP that was developed in accordance with procedures set forth in 20 U.S.C. §1414; 34 CFR 300.320 - 328; and NC 1503 et. seq. Although at hearing, the Petitioners made a big effort to try to show the IEP development process was flawed, they could not show this by a preponderance of the evidence. The IEP development process was consistent with the law.

9. Although the IEP development process was consistent with the law, the requirements of Prior Notice, parental participation, obtaining consent, and the implementation of the IEP were flawed. The Petitioners met their burden of showing:

a. The IEP Team did not give the required Prior Notice as required by 34 CFR 300.503 and NC 1514 - 1.4. The Team ended the meeting on July 30, 2008 with a completed IEP and an identified placement, but did not give the required notice. The notice, delivered some days later, was developed by someone not involved in the IEP decision-making and not present during the IEP meeting.

b. The Prior Notice that was given denied the parents the right to fully participate in the decision-making process with regard to the special education for *Student*. To deny participation in this manner is a clear violation of 34 CFR 300.121(b), 34 CFR 300.500 et. seq., and NC 1504-1.2.

c. Following the completion of the IEP and making a placement decision, the IEP Team failed to obtain informed consent to provide services in accordance with the requirements of 34 CFR 300.300 and NC 1503-1. Although *Mother* clearly opposed the recommended placement at the end of the IEP meeting on July 30, 2008, she made it clear that she still wanted services. Later at the October 13 meeting, the LEA Representative of the IEP team erroneously announced that the Petitioners had refused services

because they had refused placement and had to be corrected. Simply because the parents orally disagreed with the recommended placement is not a refusal of services. North Carolina provides a form, DEC 6, which is designated as the method of obtaining consent for or refusal of services. The Team, likewise, did not document its attempts to obtain consent.

- d. The Respondent did not implement the services within the IEP until October 29, 2008. The failure to provide the FAPE proposed in the IEP is an obvious violation of 20 U.S.C. 1412(a)(1)(A); N.C.G.S. 115C-106.2(a); 34 CFR 300.323(a) and (c)(2); and NC 1503-4.4(a) and (c)(2). While the ALJ devoted several pages in her Conclusions of Law on this issue, it needs no elaboration. Failure to attempt implementation of a plan specifically designed to provide FAPE is a failure to provide FAPE.

10. The parents have the right to be involved in the decision-making process with regard to their child. The procedural violations in (9) above significantly impeded *Student's* right to FAPE and his parents' opportunity to participate in the decision-making process regarding *Student's* education. As stated by the Supreme Court in the *Board of Education v. Rowley*:

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process... as it did upon the measurement of the resulting IEP against a substantive standard. 458 U.S. 176 (1982).

11. If there is a procedural violation of the IDEA, it must be determined whether the procedural violation either (1) resulted in the loss of an educational opportunity for the child, or (2) deprived the child's parents of the right to meaningfully participate in the development of the child's IEP. M.M. ex rel. D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002)

12. N.C.G.S. 115C-109.8 provides that in matters alleging a procedural violation, the hearing officer may find that a child did not receive FAPE only if the procedural inadequacies either impeded the child's right to FAPE, significantly impeded the parents opportunity to participate in the decision making process, or caused a deprivation of educational benefits. The Petitioners met their burden of showing all three of these.

13. IDEA requires that a child with a disability be educated in the least restrictive environment (LRE). This means that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. 1412(a)(5)

14. For preschool children the LRE is far more difficult to determine than for K-12 children. For K-12 children, the regular school environment is the normal, regular, and obviously the least restrictive environment available for placement purposes. For preschool children, since there is no compulsory school enrollment, it is more difficult to determine when a child is removed from a less restrictive to a more restrictive environment. The same provisions, however, of law apply to both K-12 and preschool children but the continuum of placements is not the same. The ALJ erred in applying the LRE concept of K-12 education in this case. Indeed, most of the Petitioners' arguments were based on a K-12 analysis.

15. The continuum of available placements in NC 1501-3.2(c) for preschool children in North Carolina includes:

- 1) Regular early childhood program;
- 2) Special education program provided in a separate class, separate school, residential facility;
- 3) Service provider location; or
- 4) Home instruction

The Respondent's placement would be best categorized as the second on the continuum, a separate class. As the IEP Team decided that *Student* did not need a full-time regular education, the part-time special education class could reasonably be determined to be the LRE.

16. During the hearing the Respondent was consistent in arguing that the "natural environment" controls the determination of LRE for preschool children. The Respondent argued that *Student* should be removed from his natural environment for as little time as possible in order to work on the goals of the IEP. The natural environment for preschool children was borrowed from the LRE requirement of Part C of IDEA concerning the education of infants and toddlers with disabilities. The natural environment for *Student*, on July 30, was the home and thus the LRE. That is where he spent most of his time. The IEP goals, however, required another setting, so *Student* would have to be removed from the home for just enough time to implement the goals. Removing him from the home would be moving him to a more restrictive setting, so the removal should be for the least amount of time necessary. The natural environment is a flexible LRE concept, in contrast to the rigid LRE concept of K-12 education. OSEP has taken the position that the natural environment can be the LRE for preschool children, but only if the IEP Team determines this setting meets the requirements of IDEA. The IEP Team had done so in this case. The Respondent's arguments were persuasive but not totally convincing for too much is still not clear about LRE requirements in preschool. Neither Congress nor North Carolina has done an effective job of clarifying the LRE concept for preschool special education. Likewise, there appears to be no guidance in this Circuit on this issue. The Petitioners still did not show by a preponderance of the evidence that the Respondent's placement decision did not meet LRE requirements.

17. Regular education for preschool children is not provided for all children in North Carolina, nor is there any requirement that it be provided. The only requirement imposed by federal and state law is that FAPE be provided to preschool children identified to be in need of special education and related services. 20 U.S.C. 1412(a)(1)(A) and N.C.G.S. 115C-106.2(a)

18. The Petitioner, during the July 30 IEP meeting and again at the hearing, made considerable arguments that a full-time regular preschool setting would be appropriate for *Student*. They were not able to show this with a preponderance of the evidence. Their arguments are unconvincing for several reasons:

- a. The goals on the IEP were very limited. As *Student* was known to be very capable, more extensive goals were not deemed necessary by any of the parties. There is no evidence that the IEP goals could not be implemented in the part-time playgroup placement recommended by the IEP Team and that *Student* could not make reasonable progress in the playgroup. The playgroup would be staffed with qualified personnel and provisions made for interaction with typical age-level peers. A regular inclusive preschool placement was not warranted by the facts. (*Emphasis added*)
- b. Public agencies that do not operate programs for preschool children without disabilities are not required to initiate them solely to satisfy the LRE requirements of IDEA. If placement in a private preschool is the only way to provide the special education and related services to a child, then the

LEA must do so. Other alternatives, however, may be used and still satisfy the LRE requirements of IDEA. "We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements." *Note regarding 34 CFR 300.115 in Federal Register Vol. 71, Page 46589, dated August 14, 2006*

- c. An IEP Team's determination is entitled to substantial deference. The Team decided that *Student* did not need an inclusive full-time preschool program to meet his IEP goals. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 206 (1982), the Court said that one must defer to these decisions as long as a procedurally proper IEP has been formulated and the child is provided the basic floor of opportunity. This was reinforced by the Fourth Circuit in *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4th Cir. 1990). One should be reluctant to second-guess the judgment of educational professionals simply because one disagrees with them. Deciding where to place a child based on a properly developed IEP is one of those decisions made by local school authorities. We are not to substitute our own notions of sound educational policy. *Hartmann v. Loudoun County Board of Education*, 119 F.3d 996 (4th Cir. 1997). The ALJ and Review Officer, therefore, should defer to the IEP Team if the Team used proper procedures in making its decision or unless the decision is clearly flawed and not made in accordance with the law. The Review officer cannot and will not, under the standard set by *Rowley* and *Hartmann*, substitute his judgment for that of the educational professionals engaged in providing services to *Student*.
- d. The Petitioners were asking for more than was appropriate. They had always intended and wanted *Student* to be in a regular preschool. Regular preschool, for many parents, offers the best educational opportunity for a young child. The Respondent is not required to provide the "best." Instead the Respondent must provide that which is "appropriate." While a school district cannot discharge its duty under IDEA by providing a program that provides only *de minimus* or trivial academic advancement. *Carter v. Florence County School Dist. Four*, 950 F.2d 156 (4th Cir. 1991), IDEA does not require the furnishing of every service necessary to maximize each handicapped child's potential. *Board of Education v. Rowley*, 458 U.S. at 199 (1982). Instead, school districts are required to provide a "basic floor of opportunity" to every child with a disability. *Rowley*, 458 U.S. at 201. The basic floor of opportunity cannot be achieved if it affords the opportunity for only trivial or *de minimis* educational advancement. *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997); *Hall ex rel. Hall v. Vance County Bd. of Education*, 774 F.2d 629 (4th Cir. 1985); *Oberti v. Board of Education of Borough of Clementon School District*, 995 F.2d 1204 (3^d Cir. 1993). The Respondent offered an opportunity than that was more than trivial or *de minimis*. In North Carolina, the IEP must also ensure that the child has an opportunity to reach his or her full potential commensurate with the opportunity given other children, *Burke County Board of Education v. Denton*, 895 F.2d 973, (4th Cir. 1990). This does not mean that public schools must provide students with disabilities a utopian educational program any more than public schools are required to provide utopian programs to students without disabilities, *Harrell v. Wilson County Schools*, 58 N.C. App. 260 (1982) A full-time regular preschool for *Student* would certainly be desirable and the best for him, but would be more than the law requires.

19. The parents' advocates argued for the use of a specific methodology, ABA, to be used in educating *Student*. The choice of methodology is up to the schools. *Board of Education v. Rowley*, 458 U.S. 176 (1982). *Rowley* and its progeny leave no doubt that parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education for their handicapped child. *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988)

20. Much of the hearing was devoted to the Petitioners' attempt to show the Petitioners' placement in the private preschool was the LRE and that *Student* made significant progress while enrolled in ** Preschool. The LRE requirements do not apply to parental decisions to the same extent as they do to the public schools. While ** Preschool could be chosen by the parents for their placement option for *Student*, this placement option was foreclosed and not available to the IEP

Team. Our ** Playhouse Preschool did not have any of characteristics of a placement recommended by all those who evaluated/assessed *Student* prior to the July 30 IEP meeting. The recommendations uniformly stated that that *Student* need a preschool special education placement, with a small student/teacher ratio, and a language-intensive environment. Still, this would not prohibit the parents from choosing the school, for parents are not restricted in their choice of education. Had the parents made known their choice, the Respondent could have negotiated with ** Preschool for the delivery of special education and related services in the IEP.

21. The IEP Team also did not even know of this private preschool at the July 30 IEP meeting. The school was just being formed. The parents knew of this new school but withheld information at the meeting. The parents also withheld the fact that they were already negotiating with the preschool to enroll *Student*. It was necessary for them to negotiate enrollment because ** Preschool did not offer any special education programs.

22. If a child with a disability is placed in a private school through the IEP process of a public school, then that child has the opportunity for and must be provided FAPE in that private setting. 20 U.S.C. §1412(a)(10)(B), 34 CFR 300.146 This was the purpose of the parents' argument that *Student* needed a full-time regular preschool placement, to obtain public funding for their private school choice. A full-time regular preschool placement, however, was not necessary for the implementation of the IEP goals.

23. The Petitioners' sought reimbursement for all the private education and related services on the basis that the Respondent did not meet its requirements under IDEA to serve a child with a disability and parents must seek an appropriate education for child. If this happens, the LEA may be required to reimburse the parents for the cost of private education. This concept from *School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) was codified as 20 U.S.C §1412(a)(10)(C)(ii):

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

The private education obtained by the parents does not have to meet all the requirements of that which should have been provided by the LEA. *Carter, supra*

24. A two-pronged test is now used to determine if reimbursement for unilateral private placement may be allowed: 1) did the LEA make FAPE available? and 2) was the parents' placement appropriate? The Respondent did not make FAPE available, but not because of an inadequate IEP or proposed placement. Both the IEP and the proposed placement were appropriate. The failure to make FAPE available was because of procedural errors that significantly impeded the parents' opportunity to participate in the decision making process and caused a deprivation of educational benefits to *Student*. (Emphasis added)

25. Because of *Student's* remarkable progress on his IEP goals, there is no question about the appropriateness of the parents' placement at ** Preschool. All relevant information

demonstrated that *Student* made significant progress towards his goals. Virtually every witness, including those of the Respondent, confirmed this progress. Also, the absence of any significant alteration or modification of the Respondent's delivery of services prior to initiating them on October 29 is compelling evidence that the special education services could be satisfactorily delivered in the parents' chosen preschool setting. There is no need to elaborate on this conclusion, for the facts are clear and unchallenged. The Petitioner, therefore, met their obligation with regard to answering both prongs of the test regarding reimbursement. Reimbursement may be allowed.

26. The reimbursement may be reduced or denied if:

- (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa); 20 U.S.C §1412(a)(10)(C)(iii)(I)

27. Technically, the parents were not removing *Student* from the Respondent's schools, but that does not change the requirement for the required notice. In *Forest Grove School District v. T.A.* ___ U.S. ___ (June 22, 2009), the U.S. Supreme Court said that prior enrollment in the public schools of an LEA is not a requirement for reimbursement, but the parents must still provide notice. The notice to which they were referring is that in 20 U.S.C. 1412(a)(10)(C).

28. The Petitioners failed to show that they gave the required notice in 20 U.S.C. 1412(a)(10)(C)(iii)(I)(aa), which requires giving notice in the last IEP meeting, July 30. *Mother* did make statements regarding rejecting the Respondent's proposed placement and some references with regard to her placing *Student* in a private preschool. *Mother*, at no point, made a statement that that was even close to expressing "their intent to enroll their child in a private school at public expense." The Petitioners had, on various occasions prior to this meeting as well as during this meeting, expressed their wish to have *Student* in a regular preschool and had asked for the Respondent to pay for it. Just making these statements or making a request does not rise to the level of the notice requirement, for specific notice that meets the requirements of law cannot consist of requests or ambiguous and/or vague statements.

29. The Petitioners also failed to show that they gave the required notice in 20 U.S.C. 1412(a)(10)(C)(iii)(I)(bb), which requires 10 days written notice before removal of the child from the public school. Since there was technically no removal, a reasonable interpretation would be that the written notice should have been given at least 10 days before enrolling *Student* in the private preschool. Another reasonable interpretation would be that the written notice should be given at least 10 days before the beginning of the public school session, August 25, for the offered placement would have been available at that time. The written notice provided by the parents was dated September 10, 2008. As *Student* was enrolled in *** Preschool on September 2, the written notice would not meet the requirements of at either of these interpretations. Likewise, the series of emails from *Mother* to *Ms. L.C.* between July 30 and August 14 could not be read to meet the notice requirement, for *Mother* was inquiring about the nature of services that the Respondent would

provide in a private preschool. She never stated in these emails the "intent to enroll their child in a private school at public expense."

30. Although the parents did not give the required notice, it is not required that reimbursement be denied. 20 U.S.C §1412(a)(10)(C)(iii)(I) The reimbursement may, instead, be reduced. Because of the significant procedural errors c*Student*tted by the Respondent, especially in denying FAPE from the beginning of the school year on August 25 until October 29, the Review makes an award that consists of a reduced reimbursement.

31. The Petitioners are entitled to a reimbursement of all their educational costs from August 25, 2008 to October 29, 2008. This includes reimbursement for the tuition at ** Preschool for that time period as well as any special education and related services provided in that preschool environment. There is no entitlement for reimbursement for education and related services provided in the home. The parents are also not entitled to reimbursement for consultant services or for the cost of consultants to attend IEP meetings.

32. The Petitioners are also entitled to reimbursement of a portion of the tuition for the remainder of school year 2008-2009. That portion can be determined by calculating the percentage of ** Preschool's normal preschool day, from 8:45 until 12:30, utilized by the Respondent for the delivery of the IEP services. During that time the Respondent effectively utilized ** Preschool's facilities and resources to implement the IEP services. The extended day at the preschool in which *Student* participated is not to be considered in this calculation.

33. A reasonable calculation of the reimbursement from # 31 & # 32 is as follows:

a.	Tuition for September and October 2 months @ \$590	\$1180.00
b.	Partial tuition November through June calculated as 4.5 hours of the 18.75 hour week (24 %) June (per policy manual is ¼ tuition rate)	\$ 1026.60
c.	Occupational therapy (Sep & Oct) 7 hours @ \$15 (actual parent cost, remainder insurance)	\$ 105.00
d.	Speech Therapy (Sep & Oct) 5 treatments from invoice	\$ 645.00
	Total	\$ 2956.60

DISCUSSION

The intent of this section is to provide some insight into the Review Officer's reasoning. It incorporates some elements of both the Facts and Conclusions and is not intended to be a substitute for either.

The three-year-old child in this case, *Student*, was diagnosed with mild autism in February 2008. At the time, the family was living in ***, where the father was working for the U. S. **

Department. Because special education services could not be obtained in ***, the father requested a transfer, resulting in the family moving to Orange County. The parents immediately began to provide private special education services. The parents' plan was to do everything they could to get *Student* ready for regular kindergarten. Through the summer of 2008 both parents, with the help of a private consultant, worked intensively with *Student*. He made remarkable progress. The parents also presented *Student* for enrollment in the Orange County schools.

Following referral, initial assessments and observations, a series of three IEP meetings were held in July 2008. The IEP Team developed an IEP providing *Student* with 3 hours of special education and 1 hour of occupational therapy each week. His evaluation results indicated that he did not need speech therapy. The Team, which included the parents, reached quick agreement on goals and objectives, but not placement. On July 30 the Team offered a placement in a structured speech-language playgroup at XYZ Elementary School, providing opportunity for interaction with nondisabled peers in a Head Start program. The parents disagreed with the proposed IEP, and in early September placed *Student* in the *** Preschool, a private preschool in Orange County. *Student's* parents also paid for private speech therapy, occupational therapy, and ABA behavioral therapy for *Student*.

Applying a little common sense, both parties could have avoided the impasse that occurred in this case. The parents were determined to get the very best for their child. Although they used the term "appropriate" to describe the education they wanted for *Student*, in reality they meant "the best," or a utopian educational program free of cost to them. The Orange County IEP Team, following its usual practice and the intent of IDEA, offered only what they described as "appropriate." The parents, being new to the public schools and the mandates of IDEA, may not have been cognizant of the fact that IDEA does not mandate "the best education," but instead mandates an "appropriate" education. There can be a vast difference between the two, especially in a situation where regular preschool is not provided to all children.

Student had previously been enrolled in a regular preschool in ***, where he had significant problems. Although they knew North Carolina does not provide regular preschool education, the parents were determined that Orange County provide a regular preschool for *Student* with special education being provided in that preschool setting. All the data and recommendations available to the IEP Team on July 30 indicated that *Student* needed a highly structured, language-intensive, special education setting. There were no indications that *Student* needed a full-time regular preschool setting.

The parents did not make some information available to the IEP Team. Following his diagnosis of autism, *Student* had been placed in a second preschool in *** which was supervised by a teacher with training in special education and had a much lower ratio of students to teachers. As the LEA discovered much later, as the hearing process began, *Student* had been successful in this second preschool. Why the parents had not provided this information to the IEP Team is unknown.

The LEA, likewise, did not always use common sense. During the IEP meeting on July, 30, when confronted by the mother's refusal to accept the offered placement, the LEA Representative on the team did not provide the parents a Prior Notice (DEC 5 form) as required by law or have the Consent for Services (DEC 6 form) completed by the parents. Instead, she had someone not

involved in the IEP decision-making (the local Director of Special Education) complete the Prior Notice some days later. The intent of Prior Notice is clear, the team making the decision must inform the parents of what was offered and refused (and why) within the notice. To have someone outside the team not involved in the decision develop the notice indicates that the decision was not being made by the IEP Team as mandated by IDEA, and is a serious procedural error. It is a clear and direct violation of the parents' rights, for it interferes with the parents' right to be involved in the decision-making regarding the child's education.

The LEA Representative on the team did not attempt to obtain consent for the services in the IEP until several months later. It was never fully explained why she did not attempt to get the informed consent on the DEC 6 form as required. She maintained, and told the parents later, that the mother had verbally refused services during the IEP meeting. The DEC 6 form should have been provided for the parents to accept or refuse services. It was clear that the mother had not refused services for she had refused only the placement. She was making attempts to have the services provided in another placement immediately following the IEP meeting on July 30. As no Prior Notice had been given, the decisions of the IEP Team had not been finalized.

The LEA Representative on the team also deliberately refused to respond to a series of emails from the parents, the first of which was immediately after the IEP meeting on July 30 and continued up to August 14. The LEA Representative said that she received the emails but was directed by her Director not to respond or even acknowledge receiving them. One email asked for another IEP meeting. The law required a response. The primary purpose, however, of the series of emails were attempts to obtain information concerning the providing of services in a private school placement.

All the members of the IEP Team knew that the parents wanted *Student* to be in a full-time regular preschool setting, and that the only choice would be a private preschool. During the IEP meeting on July 30, 2008, the mother and her advocate insisted, at length, that the goals on the IEP required *Student* to be in school every day, and that daily attention to the goals was necessary for him to make progress. It was interesting to listen to the recording of the meeting. Repeatedly, *Mother* and *Ms. C.P.* stressed the necessity of daily attention to the goals. It was also interesting to hear *Mother* say "Giving *Student* exactly what he needs is not going to work! And it is not what I want." Her desire for *Student* to be in a full-time preschool seemed to outweigh *Student's* needs, and is certainly contrary to the dictates of IDEA. Also, *Mother* had already initiated the enrollment process to get *Student* enrolled in ** Preschool, but withheld this information from the IEP Team. These actions could cause one to question motives. All members of the Team knew that the only way to get the LEA to place *Student* in a full-time regular preschool was for the IEP Team to conclude that this was the only placement in which the special education services could be effectively provided. In that event, the cost of the private preschool would be the LEA's responsibility. Otherwise, the expense of the regular private preschool would have to be borne by the parents.

The remainder of the IEP Team was not convinced that *Student* needed a full-time preschool placement, for they were certain that *Student* could achieve his goals in a part-time special education setting. At the hearing, several of the IEP Team members noted that they had previous experiences with mildly autistic children such as *Student*. Those children had made excellent

progress in a part-time special education setting. While the mother and her advocate were adamant that *Student* could achieve the goals only in a full-time preschool setting, the other members were equally adamant that *Student* could be appropriately served in the part-time special education playgroup.

The Petitioners, by letter on September 10, 2008, formally notified the LEA that they had enrolled *Student* in a private preschool. This was the first time that the parents had provided such notice. Previous discussions had concerned only possible enrollment. In this notice, the parents clearly stated that they would be seeking services at and/or reimbursement for the private placement. The letter goes on to say that they are confirming the earlier notice made on July 30. It is not clear what earlier notice was made on July 30. The parents could have been referring to statements *Mother* made during the IEP meeting. She did make references to placing *Student* in a private preschool but made no reference to doing so and seeking reimbursement. Also, in the email to *Ms. L.C.* on July 30, *Mother* made reference to a private preschool, but the reference pertained to what the special education services would look like if offered in a private preschool. She made no mention of actual enrollment or intent to seek reimbursement.

During the hearing, the Petitioners made a great effort to try show that the combination of the remarks made in the IEP meeting about private preschool and the following email established that the LEA was provided the notice necessary to get reimbursement for a private placement made by parents. Their arguments were not convincing.

If parents show that the LEA has failed to make a free appropriate public education available to a child, the parent can be denied reimbursement for private school placement if:

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and **their intent to enroll their child in a private school at public expense**; or *[emphasis added]*

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa)

20 U.S.C. 1412(a)(10)(C)(iii)(I)

Technically, the parents were not removing *Student* from the Respondent's schools, but that does not change the requirement for the required notice. In *Forest Grove School District v. T.A.* (June 22, 2009) the U.S. Supreme Court said that prior enrollment in the public schools of an LEA is not a requirement for reimbursement, but the parents must still provide notice. The notice to which they were referring is that in 20 U.S.C. 1412(a)(10)(C).

There is no evidence that the Petitioners gave the required notice during the IEP meeting. *Mother* did make statements regarding rejecting the Respondent's proposed placement and some references with regard to her placing *Student* in a private preschool. *Mother*, at no point, made a statement that that was even close to expressing "their intent to enroll their child in a private school at public expense." The Petitioners had, on various occasions prior to this meeting as well as during this meeting, expressed their wish to have *Student* in a regular preschool. Just making these statements does not rise to the level of the notice requirement in 20 U.S.C. 1412(a)(10)(C)(iii)(I)(aa).

The Petitioners could also have met the notice requirements of 20 U.S.C. 1412(a)(10)(C)(iii)(I)(bb), which requires 10 days written notice before removal of the child from the public school. Since there was technically no removal, a reasonable interpretation would be that the written notice should have been given at least 10 days before enrolling *Student* in the private preschool. Another reasonable interpretation would be that the written notice should be given at least 10 days before the beginning of the public school session, August 25, for the offered placement would have been available at that time. The written notice provided by the parents was dated September 10, 2008. As *Student* was enrolled in *** Preschool on September 2, the written notice would not meet the requirements of at either of these interpretations. Likewise, the series of emails from *Mother* to *Ms. L.C.* between July 30 and August 14 could not be read to meet the notice requirement, for *Mother* was inquiring about the nature of services that the Respondent would provide in a private preschool. She never stated in these emails the "intent to enroll their child in a private school at public expense."

The Petitioners met none of the foregoing requirements regarding notification in order to receive reimbursement for the cost of their private preschool. Reimbursement, therefore, can be denied or reduced. This is true even if the chosen private preschool might be appropriate.

Using the information available to them on July 30, 2008, the IEP Team made a reasonable effort to design and offer a free appropriate public education (FAPE). The IEP and placement were clearly based on *Student's* needs rather than what the parents wanted. IDEA requires that the child's needs, not parental wants, dictate what is necessary to provide FAPE. The services described in the IEP were also calculated to enable *Student* to make progress. The IEP team offered FAPE.

The LEA, however, committed several serious procedural errors. The failure to give the required notice on July 30, and to have someone outside the IEP Team make decisions that must be made by the IEP Team are grievous procedural errors. These errors caused *Student* to lose opportunities for a FAPE and denied the parents their right to participate in the decisions affecting their child. Either of these is sufficient to provide relief to the Petitioners. The failure to obtain informed consent, while not as serious, was also a clear violation of IDEA.

From the beginning of the school year on August 25 until October 29 the LEA did not provide any special education services for *Student*, in direct violation of the mandate in IDEA. Representatives of the LEA certainly knew, at least as of September 10, that *Student* was in a private preschool. On that date, the parents provided notice. The Representatives of the LEA may not have known the name of the school until October 13, but there is certainly no evidence that the LEA even inquired.

At the preschool level, the least restrictive environment (LRE) is a flexible concept, especially in a state that does not offer preschool education to all children. The LRE is that environment in which goals can be achieved and removes the child from their regular environment as little as possible. The regular environment is that place where the child would otherwise be or where the parents are maintaining the child. On July 30, 2008, the date of the placement decision, that regular environment was the home. The parents indicated they wanted to enroll *Student* in a regular preschool, but as of July 30 they had not done so. The special education services in the July

30 IEP could not reasonably be provided in the home. It was a reasonable decision made by the IEP Team to remove *Student* from the home for only the time necessary to give him a chance to be successful in attaining the goals on the IEP. The choice of the playschool group by the IEP Team was based on *Student's* needs and was the LRE at that time. The Review Officer must, by law, defer to the IEP Team's decision with regard to this issue.

The Petitioners had the right to enroll *Student* in the ** Preschool. Parents are not unduly restricted in making choices of schools. Private schools do not have to meet the same requirements as do the public schools and parents can choose schools that could not be chosen as placements by the LEA. ** Preschool would not have been an appropriate placement to be made by the LEA for *Student* on July 30, 2008. The preschool provided no special education services nor was it a structured, language-intensive environment with a small student-teacher ratio. Based on the IEP and the information available to the IEP Team on July 30, all of these were necessary for *Student* to be successful.

There is nothing, however, that dictates that the LEA cannot deliver its special education services in the private preschool chosen by the parents. Under the LRE guidelines, a preschool is the least restrictive environment. The parents' chosen school is also the natural environment and removal from that setting should be done to the minimum extent necessary. If arrangements can be made to effectively deliver the special education services in that setting, then that is where the LEA must provide the services.

The Respondent knew, as of September 10, 2008, that *Student* was in a private preschool and did not provide special education services until October 29, 2008. The failure to provide the special education services designed in his IEP is a failure to provide FAPE. As the parents did not give the required notice, reimbursement can be denied or reduced. It is reasonable to give relief in the form of reduced reimbursement.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

DECISION

The ALJ's decision is partially upheld, but modified. The Review Officer holds:

1. Because of significant procedural errors in providing notice that impeded the parents' opportunity to participate in the decision making process and caused a deprivation of educational benefits, the Respondent denied *Student* a free appropriate public education (FAPE). Had the Respondent not committed these procedural errors, the IEP that was developed and the placement proposed would have provided FAPE.

2. The Petitioners' placement, for which they seek reimbursement of costs, was an appropriate placement for the parents to make. This placement, however, would not have been an appropriate placement for the IEP Team to make on July 30, 2008.

3. *Student's* needs did not indicate that a full-time preschool was necessary for FAPE. The Respondent had no obligation to provide a full-time private preschool education.

4. The Petitioners' did not give the required notice to inform Respondent that they intended to enroll *Student* in a private school and would seek reimbursement of costs. Because of the failure to give the required notice, a full reimbursement is not awarded. For details, see Conclusion # 33 of this decision.

5. The Petitioners are entitled to a partial reimbursement of \$2956.60.

This the 19th day of August 2009.

Joe D. Walters
Review Officer

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. 115C - 109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.