

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 his parents or guardians.
Father and Mother*
Petitioners

v.

DURHAM PUBLIC SCHOOLS
Respondent

DECISION

08 EDC 3207

This is an appeal of the Decision of Chief Administrative Law Judge Julian Mann, III issued on August 17, 2009.

The records of the case received for review included:

1. Six (6) 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 Mann, motions, written arguments, procedural documents, orders, and correspondence concerning the case.
3. One (1) volume (loose-leaf notebook) of Petitioners' Exhibits.
4. Two (2) volumes (loose-leaf notebooks) of Respondent's Exhibits,
5. One (1) volume of Transcripts of IEP Meeting and Depositions, and
6. Additional written arguments submitted by both parties to the Review Officer.

The hearing of this case was held before Chief Administrative Law Judge Julian Mann, III on May 16 - 22 and June 2, 2009. The hearing was held at the Office of Administrative Hearings in Raleigh, North Carolina.

Appearances:

For Petitioner - Walter S. Webster; Hoof & Hughes, PLLC; Durham, North Carolina

For Respondent - Carolyn A. Waller and Christine Scheef; Tharrington Smith, L.L.P. Raleigh, North Carolina 27602-1151

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; Durham Public Schools; LEA

WITNESSES

For Petitioners: *Mother*
 Father
 Mary Ann Cassell
 Ragan Wright

For Respondent: *P.H.*
 L.S.
 C.M.
 V.S.

ISSUES

There was no agreement on the issues prior to the beginning of the hearing. Taking into consideration all of the evidence presented hearing, the Review Officer concurs with the issues determined by the ALJ:

1. Whether the IEP developed in March 2008 was designed to provide *Student* with an opportunity for a free appropriate public education;
2. Whether Respondent's refusal to engage in discussions at the March 2008 IEP meeting regarding a shadow aide for *Student* as a related service is a procedural violation of the IDEA, and if so, whether that violation:
 - a. impeded *Student's* right to a free appropriate public education;
 - b. significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*; or
 - c. caused a deprivation of an educational benefit; and
3. Whether the private program selected by petitioners from February 2008 through February 2009 was appropriate under the IDEA.

PRELIMINARY STATEMENT

Judge Mann's decision was appealed by Respondent on September 18, 2009, and the undersigned was appointed as Review Officer that day. The parties were provided a Request for Written Arguments on September 21 with Written Arguments due on October 7. The Decision was to be completed on October 17, (2009) 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).

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 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.

The Review Officer finds that the ALJ's findings are regularly made. 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 those of the ALJ, although often stated in a slightly different manner. 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. Those added do not significantly change the overall impression one gets when reading all the Facts.

The Review Officer Conclusions of Law are consistent with those of the ALJ. Many, however, may be stated differently but are supported by IDEA, Federal Regulations, and state law. In their entirety, the Conclusions are essentially the same.

STIPULATIONS

At the beginning of the hearing, the parties stipulated to the following:

1. All parties are properly before the court, and that the court has jurisdiction of the parties and the subject matter.
2. All parties have been correctly designated.
3. All documents within the case are authentic.

There were no stipulations regarding the facts of the case.

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 concurs with and uses many of the ALJ's Facts. To produce a Decision that is not too lengthy and more readable, some of the ALJ's Facts have been consolidated, reduced, or eliminated. Those eliminated are usually recitations of testimony, redundant, or those that have no bearing on the issues of the case. The Review Officer also does not always specify exactly where the source of the fact may be found, for some facts are gleaned from a combination of the testimony of multiple witnesses and/or documents.

FINDINGS OF FACT

1. Respondent is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, (IDEA) and was responsible for providing special education to *Student* pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes.

2. Petitioners *Mother* and *Father* are the parents of *Student*, who was enrolled in the preschool program of Respondent's schools from January 2007 through February 2008. At the time of the hearing, *Student* was five years old. He has a diagnosis of autism.

3. The parents became concerned about *Student's* development when he was about eighteen months old, because *Student* had developed no speech, would not answer to his name when called, and generally appeared to be in his own world, (T. Vol. 3, p. 507)

4. This concern led the parents to consult with their pediatrician at Regional Pediatrics in Durham, North Carolina. Upon the advice and counsel of their pediatrician, the parents elected to wait until *Student* was two years old before readdressing their concerns with the hope that *Student* would begin to develop speech and that his other symptoms would improve. (T. Vol. 3, p. 507). At *Student's* two-year birthday, his symptoms had not improved. At this point, the parents' pediatrician advised them to inquire into speech therapy for *Student* with the Duke Speech Pathology clinic in Durham, North Carolina.

5. *Student* received speech therapy from Duke Speech Pathology for approximately five weeks. His therapist recommended that the parents inquire into receiving services through the Child Developmental Services Agency (CDSA) of Durham County, North Carolina. (T. Vol. 3, p. 508).

6. The parents contacted CDSA in the spring of 2006. CDSA performed intake evaluations on *Student* and began rendering services to him. (T. Vol. 3, p. 508). The services which *Student* received from CDSA consisted primarily of speech therapy and play therapy, generally two to three times per week for about forty-five minutes per session for each. Those services began around March or April of 2006 and concluded in January of 2007. (T. Vol. 1, p. 48). *Student* stopped receiving services through CDSA in January of 2009 upon his third birthday. The reason for this discontinuation of services was that, upon *Student's* third birthday, he fell under the jurisdiction of the Respondent. (T. Vol. 1, p. 49).

7. The parents, however, paid for play therapy through CDSA in order to augment *Student's* educational program from January 2007 through January 2008. (Resp. Exh. #79, p. 19).

8. The parents contacted Dr. Worley of Duke in the hopes of receiving some diagnosis of *Student's* problems. In the fall of 2006, *Student* received a diagnosis from Dr. Worley of "Autism." (T. Vol. 3, p. 509).

9. In January 2007, the Respondent found *Student* eligible for special education services under the category of autism and on January 22 began providing exceptional children's services in a self-contained classroom for children with autism in ABC Elementary School. At the time these services began, *Student* was three years old. (T. Vol. 1, p. 4)

10. *Student* enjoyed his time at ABC, due in large measure to his teacher, P.H. (then P.N. and normally referred to as Ms. P) and her assistant, F.F.. (Resp. Exh. #51, pp.5-6).

11. Services were delivered pursuant to an Individualized Education Plan developed at a January 2007 IEP meeting in which the parents participated. (T. Vol. 1, p. 95). The January 2007 IEP was to be in place from January 22, 2007 until January 11, 2008, unless earlier changed by the IEP team. (Resp. Exh. 4).

12. The January 2007 IEP provided 20 hours of preschool special education services each week, as well as three weekly sessions of Speech Therapy of 20 minutes and one weekly session of Occupational Therapy of 30 minutes. (Resp. Exh. #4).

13. The classroom at ABC had a maximum of six students in the class at any one time. All of the children had a diagnosis of a disability on the spectrum of autism disorders. (T. Vol. 4, p. 662).

14. At the time of the adoption of the January 2007 IEP, *Student* had limited skills in numerous areas, including the ability to focus his attention, interact with peers, and using language. (T. Vol. 1, pp. 98-101).

15. The January 2007 IEP had goals to:
- a. Increase work behaviors by increasing attention to teacher directed activities, participating in classroom activities, and following directions and classroom routines.
 - b. Improve play skills to enhance his preschool experience by improving the ability to engage in role playing activities with peers and adults.
 - c. Improve pragmatic language skills for better interaction with peers.
 - d. Improve functional language skills for better communications with adults and peers. (Resp. Exh. #4)

16. Some of the benchmarks or short-term objectives for these goals were accomplished as early as May 2007. Others were accomplished by September 2007. (T. Vol. 4, pp. 676-682, 691-696) (Resp. Exh. #35).

17. By the time he left P.H.'s classroom in January 2008, *Student* was attending to teacher directed activities from start to finish, participating in classroom routines with very little

assistance and understanding a number of cues and prompts. He was transitioning with no difficulty and enjoyed circle time. He was staying in centers for greater than 7 minutes with adult supervision, attending to teacher directed activities for five consecutive minutes, and that he was following teacher directions with virtually no behavioral issues. (T. Vol. 4, pp. 678-682) (Resp. Exh. #35).

18. By the time he left *P.H.*'s classroom in January 2008, *Student* was having few tantrums. Although he was not always sharing trains, he had given single train cars to classmates without prompting. *Student* was playing well with friends in the block center. (Resp. Exh. #35). He was able to transition at least five times per day using pictures and without pictures. He also was able to follow classroom directions, although there were times that he chose not to do so. *Student* choosing not to follow directions was infrequent, and he was easily redirected. (T. Vol. 4, pp. 708-09). He was independent in completing work activities. His activities included puzzles, matching color activities, matching shapes, building blocks, and imitating block designs. Those were completed at a higher level than when *Student* started at *ABC*. (T. Vol. 4, p. 711).

19. By the time he left *P.H.*'s classroom in January 2008, *Student* was independently initiating interaction with his peers. According to *P.H.*'s testimony, *Student* would take a friend by the hand and say, "Come on." He would name his friend and lead him to an activity or demonstrate to him what they were supposed to do. (T. Vol. 4, pp. 691-96).

20. *P.H.* documented *Student*'s growth in his area of play and interaction with his peers in two short recordings of *Student* in the classroom. According to *P.H.*'s testimony, the videos were typical of *Student*'s engagement with other children in the classroom. In one video, *Student* makes eye contact with a peer and engages in a level of interaction not typical for children with autism. According to *P.H.*'s testimony, this video demonstrates how much progress he made from when he started in the classroom and made almost no eye contact with anyone. (T. Vol. 4, pp. 728-29) (Resp. Exh. #120).

21. The second video shows *Student* building blocks with a classmate and then singing Ring Around the Rosie. A third classmate interfered with this game when he kept knocking the blocks over, interfering with *Student*'s ability to continue playing. *Student* did not become upset with his classmate for interfering with the game, but adjusted and made a new game out of it. (T. Vol. 4, p. 727-729) (Resp. Exh. #120).

22. According to *P.H.*'s testimony, *Student* had mild behavioral difficulties in her classroom. By the fall and winter, she began taking note of when *Student* had temper tantrums because they were seldom. (T. Vol. 4, p. 697). *Student* had a tantrum in her classroom in mid-December. His previous tantrum took place on November 6. (T. Vol. 4, p. 754).

23. By the time *Student* left *P.H.*'s classroom in January 2008, he was able to accept limits and adult directives with no behavioral upsets and shared most materials with peers, although approximately once per week he did still struggle with sharing trains. (T., Vol. 4, pp. 709-10).

24. By the time *Student* left *P.H.*'s classroom in January 2008, *Student* had experienced growth in language that exceeded the expectations of the January 2007 IEP. According to *P.H.*'s testimony, by the time *Student* left her classroom, *Student* was regularly using words throughout the day and he was using full sentences in her classroom, including, "I want more candy, please," and

“I’m a princess,” during pretend play. He was using words so frequently that she only made note of when he used more elaborate words. (T. Vol. 4, pp. 692-93).

25. According to *P.H.*'s testimony, by August 2007 *Student* had already begun to recognize and understand some colors, shapes, letters and numbers. (T. Vol. 4, p. 707). *P.H.* also testified that *Student* had more knowledge than she was able to identify because he often would not wait to follow directions and would label an item before he understood what the teaching staff were asking of him. (T. Vol. 4, p. 708). *Student* was still working on waiting to hear full directions before engaging in a task and using discrimination skills to demonstrate prereadiness skill knowledge. (T. Vol. 4, pp. 710-11).

26. During the spring of 2007, the parents were pleased with *Student's* placement in the *ABC* Elementary School classroom. (Resp. Exh. #51). In a letter to a school system staff member, the parents wrote that *Student* was thriving in *P.H.*'s classroom. The letter states that the teachers had informed the parents that *Student* had progressed in his workstation activities and also said, “*Student's* immense happiness and success at *ABC* make it the ideal place for him to continue his time in Durham Public Schools.” Petitioners also stated that *Student's* teachers recognized his progress to that point and “the fact that he will most likely continue to make great strides.” (Resp. Exh. #51-5).

27. The January 12, 2008 IEP was reviewed on May 22, 2007. (Resp. Exh. #4, p. 7). At the May 22, 2007 meeting, *Student's* present level of performance and goals were amended. He was determined to be ineligible to receive extended services. (Resp. Exh. #4, p. 7).

28. *ABC* School follows a Year-Round rather than a Traditional school year. Over the course of the Summer 2007 intersession, the parents testified that they received notice that *Student's* time at *ABC* was going to be reduced from twenty hours per week to eleven hours per week. No exhibit, however, was entered to substantiate this. No IEP meeting was convened to address that change prior to that decision being implemented. (T. Vol. 1, pp. 116-117); (T. Vol.4, p. 775-76); (Resp. Exh. #78, pp. 40-42). On August 30, 2007 another IEP meeting was convened for the purpose of changing the service delivery portion of *Student's* IEP. (Resp. Exh. #3, p. 6).

29. An IEP meeting was held in August 2007 with new goals drafted for *Student*. At that time, *Student's* level of service was also changed from 20 hours per week to 12.75. *Student* also began receiving speech therapy four times a week, prior to the start of the regular school day. The IEP continued to include 30 minutes of Occupational Therapy each week. *Student's* The IEP also contained goals for social interaction, language development, and classroom participation. (Resp. Exh. #3).

30. During the fall of 2007, Respondent's autism consultant and expert witness, *L.S.*, began observing *Student* and providing training to *P.H.* regarding strategies that could prove effective for *Student*. When *L.S.* visited the classroom she provided guidance in the form of demonstration or notes. (T. Vol. 4, pp. 735, 802-03). During the fall of 2007, *L.S.* observed *Student* for approximately 24 hours. (T. Vol. 4, pp. 846-47).

31. The August 2007 IEP was scheduled to expire in January 2008. (T. Vol. 4, p. 716) (Resp. Exh. #3). For the January IEP meeting, *P.H.* was considering other classroom options for

Student because her classroom had limited opportunities for social interaction with peers. She wanted *Student* to move to a classroom that would allow him more opportunities for social engagement to move him toward the long-term goal of being in a regular kindergarten classroom. (T. Vol.4, p. 714-15).

32. In November 2007, *P.H.* spoke with *Father* about scheduling an IEP meeting in order to draft a new IEP for *Student*. During that conversation, *Father* requested *Student's* education records. (T. Vol. 4, p. 719). *P.H.* later provided *Mother* with a date for the meeting, as well as a copy of *Student's* school record. During the conversation *Mother* informed *P.H.* that she did not want to have an IEP meeting but wanted a “stay put.” (T. Vol. 4, pp. 719-20 and Resp. Exh. #47). *Mother* testified at the hearing that when she asked for a “stay put,” she meant that she wanted *Student's* services to remain the same until a new IEP was written. (T. Vol. 1, pp. 131-32). This was somewhat confusing to *P.H.*, for the purpose of the conversation was to schedule a meeting to develop a new IEP.

33. In November of 2007, *Mother* attended the National Autism Conference in Atlanta. (Res. Exh. #79, p. 9). While at the conference, *Mother* heard a presentation by Dr. Mitchell Perlman. Dr. Perlman could target therapies that would be most beneficial for children on the autism spectrum and could provide a prognosis for the children he tested and observed. As a result, the parents contacted Dr. Perlman for assistance. (Resp. Exh. #79, p. 31, 16 - p33, 14).

34. *Mother* informed *P.H.* that a specialist would be flying in to review *Student's* records and evaluate and observe *Student*. The parents would request a meeting after the evaluator made his recommendations. (T. Vol. 4, pp. 719-20). During the conversation, *Mother* discussed different types of methodologies that might be recommended by the evaluator, including Applied Behavior Analysis (ABA). (T. Vol. 4, p. 761).

35. On December 13 and 14 2007, Dr. Perlman observed and tested *Student* (Resp. Exh. #14). Dr. Perlman also observed *Student's* classroom time with *P.H.* at *ABC* on the morning of December 13, 2007. (Resp. Exh. #14, p. 5). Later, Dr. Perlman administered standardized tests to *Student* in the parents' home. (Resp. Exh. 14, pp 5-6). Dr. Perlman administered additional standardized tests on December 14, 2007. (Resp. Exh. #14, p. 6). Prior to his departure, Dr. Perlman indicated that he was leaning towards recommending ABA therapy for *Student* (T. Vol. 3, p. 522). After receiving this informal indication from Dr. Perlman, the parents began investigating the availability of ABA therapy for *Student* (T. Vol. 3, p. 522).

36. The parents considered arranging for ABA services in their home in Durham, but had substantial concerns about the long-term viability of such a program. Their primary concerns were about the staffing requirement of the ABA program. (T. Vol. 3, p. 523:7-25). Dr Perlman had recommended the Center for Autism and Related Disorders (CARD) as a place they could get ABA services. (T. Vol. 3, p. 524:1-4). CARD is a for-profit corporation based in California but with offices in various parts of the country. There is no CARD office in North Carolina. CARD will only provide direct ABA therapy services to children with autism and related disorders in their homes so long as they live within a thirty-mile radius of a CARD office. (T. Vol. 2, p. 240:18-21). The program is supervised by Dr. Doreen Granpeesheh, who is a licensed psychologist in California. (T. Vol. 2, p. 195:10-15).

37. The parents made initial contact with CARD before Christmas. (T. Vol. 1, p 141). In a December 26, 2007 e-mail to Dr. Perlman, *Mother* stated that after doing the phone interview with CARD "we will then set up the intake evaluation ..." (T. Vol. 1, pp. 136-37).

38. During the latter part of December 2007 and early January 2008, *Father* began asking different staff members of the Respondent about their familiarity with ABA therapy. (T. Vol. 3, pp. 524:12-525:18). He also asked S.M. about whether Respondent could provide thirty hours per week of competently delivered ABA to *Student* (T. Vol. 3, pp. 524:23-525:18). The answer that S.M. gave was the IEP team would have to decide what *Student* needed. This response angered *Father* (T. Vol. 5, p. 965:4-7).

39. On December 27, 2007, parents participated in telephone interview with the staff at CARD. (Resp. Exh. #61, p. 17) The purpose was to give the parents the opportunity to describe what they were looking for, to have a question and answer session regarding CARD, and to discuss other topics necessary to see if CARD was appropriate. (T. Vol. 2, pp. 238:21-239:5).

40. The parents received a draft of Dr. Perlman's report on December 31, 2007. (T. Vol. 1., p. 141-42). The draft report recommended that *Student* receive 25 hours of one-to-one ABA therapy for approximately six months, after which he should attend school in a regular classroom with a one-on-one "shadow aide." (Resp. Exh. #14). Neither the draft report nor the recommendations contained in the report were shared with the members of the Respondent's IEP Team.

41. In planning for the upcoming IEP meeting, *P.H.* spoke with S.M., Respondent's Preschool Coordinator, and other school system staff about possible classroom placements for *Student*. *P.H.* as seeking a less restrictive environment for *Student* (T. Vol. 4, p. 731). Those discussions led to a suggested placement in the preschool developmental needs (DN) classroom at LMN Elementary School. The DN classroom is for children with delays, but the children do not all carry the label of autistic. Many were more vocal than *Student's* current classmates. The DN classroom was adjoined by a Title I classroom, which is a regular education preschool classroom where *Student* could also receive some instruction. Both classrooms had a full-time teacher and full-time teaching assistant. (T. Vol. 4, pp. 731-32) (T. Vol. 5, p. 955-56).

42. *P.H.* believed that LMN was a good option for *Student* because the DN classroom would provide him with a smaller structured setting while he also would have the opportunity to interact with typically developing students in the Title I classroom. (T. Vol. 4, p. 731). She believed that *Student* would benefit from initiating interaction with his peers because it was important to learn language in an appropriate setting. While *Student* knew many words, he needed to learn to use those words in appropriate situations, and that peers would provide the opportunity to play and use language in an appropriate way. (T. Vol. 4, p. 772).

43. On January 3, 2008 the parents, along with *P.H.* and *Ms. StudentS.*, visited the developmentally delayed and Title I classrooms at LMN Elementary School. (T. Vol. 3, p. 529:3-9). The parents were disappointed with the methods of instruction, particularly the lack of ABA techniques. They were also disappointed with the high ratio of students to teachers. (T. Vol. 3, pp. 529 - 530).

44. An IEP meeting was held on January 8, 2008 to revise *Student's* IEP goals and discuss changing his classroom. (T. Vol. 4, p. 734). During the meeting, the team reviewed goals that *P.H.* had drafted with *L.S.'s* input. (T. Vol. 4, p. 735). The goals in January 2008 were focused on continuing to develop *Student's* communication and social skills, classroom participation, and motor skills. (Resp. Exh. #2). *Student's* IEP team agreed that *Student* would remain in the classroom at *ABC* Elementary School until Dr. Perlman's report was received, but that they would begin to prepare to transition *Student* to *LMN*. (T. Vol. 4, p. 743 and Resp. Exh. #6).

45. At the end of the January 8, 2008 IEP meeting, the team decided to reconvene to consider placing *Student* in the developmentally delayed classroom at *LMN* Elementary with some time in the adjacent Title I classroom. (Resp. Exh. 5, p. 108:8-24).

46. On January 9, 2008, the parents moved into an apartment in *M***, Virginia, (T. Vol. 1, p. 154:5-10), for the purpose of having a place within the 30-mile radius a CARD office provides its local services. (Resp. Exh. # 79, p. 65:17-19). The parents retained their residence in Durham. The rent for the *M*** apartment was \$1,256.00 per month for the first twelve months, (Pets. Ex. 2), and was in excess of \$1,300.00 per month for the five-month period from January 2009 through June 2009, (T. Vol. 1, p. 62:16-63:2), all of which totals \$21,572.00.

47. The move to *M***, Virginia was the day following the January 8 IEP meeting. During that meeting the parents gave no indication that they were taking *Student* to Virginia for CARD's ABA program.

48. On January 10, 2008, *Father* took *Student* to the CARD headquarters in Springfield, Virginia, where an intake evaluation was conducted by Mary Ann Cassell and Ragan Wright. (Resp. Exh. #46, p. 1).

49. During the intake evaluation, Ms. Cassell and Ms. Wright were not only asking questions of *Father* about *Student*, but were also observing *Student* as he played during the interview portion. (Resp. Exh. #46). More specifically, Ms. Cassell's impression of *Student* at that time was:

At that time *Student* presented as a child with a very mixed bag of skills. I knew he had a previous diagnosis of autism. He came to us being able to say some words. He was able to label some things that he wanted. He was able to label some of his favorite activities.

However, during the intake process he did not attempt to interact, not only with myself and Ms. Wright, who to be honest he didn't know, but also his interactions with his father were primarily simply based on *Student* needing something. So for example, if he was playing with the train tracks and couldn't get the pieces to fit together, he would take the train track and hand it to his father in an attempt to get help. He was very difficult to engage in that aspect.

He exhibited quite a bit of echolalic speech. Echolalia is the repetition of speech that can either be immediate or delayed. In *Student's* case at that time, it was primarily immediate echolalia, to where for example he was even repeating some of the questions that I was asking his father. And then he would actually repeat the same question as he was playing.

He also was not potty trained at the time. He did have some independent play skills with trains, but that was really the only thing that he was interested in. He did not explore the toy room that we were in and became quite fixated on simply playing with the trains and running them around the track.

His receptive understanding was very inconsistent. There were times when we thought he was understanding what we were saying to him. Okay; receptive language is simply being able to follow commands, understand what's being said. But at other times he appeared to either be ignoring the commands, maybe because he didn't want to do them--it was hard to assess that at the time--or not to understand what was being asked of him.

(T. Vol. 2, pp. 200:20-202:3).

50. The CARD staff only received information about *Student* from the parents and Dr. Perlman's report. They did not request any information from the Respondent or *Student's* teachers, nor did the parents provide any information about *Student's* IEP or progress in Respondent's school.

51. The parents did complete an Initial Parent Questionnaire for CARD. In testimony during the hearing, *P.H.* was asked questions about the information the parents provided on this questionnaire. *P.H.* stated that the child the parents were describing was very different from the one that was in her classroom. *Student* had exhibited far different skills and behaviors while in *P.H.'s* classroom. (T. Vol. 4, pp. 753-758). CARD later began their therapy with a very distorted image of *Student*.

52. At the intake meeting, the parents were informed that CARD had availability and that they could serve *Student* (T. Vol. 3, p. 591).

53. *Mother* emailed Dr. Perlman on January 17, 2008, stating that she had moved to *M*** to be near the CARD offices so that *Student* could start therapy. *Student* would be starting 30 hours per week of therapy on February 4. (T. Vol. 3, p. 420 and Resp. Exh. #60-1).

54. Dr. Perlman's final version of his report was received by the parents and delivered to Respondent via email on January 21, 2008. Included was an article published by Jane S. Howard regarding the superiority of ABA therapy over other methods for children with Autism. January 21 was a holiday and the Respondent's staff did not get the email until the following Monday, January 24. (Resp. Ex. 50 p. #3).

55. Dr. Perlman's report included results from the standardized tests he administered to *Student* and his analysis thereof. (Resp. Ex. 14). In particular, Dr. Perlman recommended the following for *Student*:

Research has established the *level of intensity* and the *type* of intervention that is effective for remediating and educating children with Autism. Providing one without the other has not been effective in meaningfully altering the learning trajectories of children with Autism: dispelling the myth, for example, that providing virtually any intervention can produce meaningful benefits for children with Autism if it's provided intensively. The level of intensity necessary is a *minimum* of 25 hours per week of 1:1 (and at times 1:2) instruction. That intensity must be combined with a specific type of intervention: namely, *competently delivered* ABA.

Notably, in addition to the above, research has confirmed that eclectic approaches to educating children with Autism are ineffective: even when competently delivered by staff having considerable training and experience with children with Autism

In my experience, several factors may be associated with better intervention outcomes for children of Autism, and having intelligence that is above Mental Retardation is one of those factors. The fact that *Student* has at *least* Below Average intelligence, then, may indicate a good prognosis if the right levels, type, and duration of intervention is applied.

To this date, *Student* has never had the benefit of receiving the combination of intensity and type of intervention supported by the research, Not surprisingly, then, the combined interventions that he has received to date have not sufficiently altered his learning trajectory.

I recommend, then, that *Student* receive a minimum of 25 hours per week of 1:1 competently delivered ABA therapy. I am not convinced that *Student* should continue in his current SDC classroom. If there is a clear reason to use it as a support to his ABA intervention, it should be considered, but only as an adjunct and not as a substitute for the minimum hours of 1:1 ABA supported by research.

Still, since *Student* needs to move forward with self-regulation, with socialization, and with language/communication acquisition, his school placement should be with peers that can provide him with the opportunity to socialize and to communicate. Necessarily, that means the other peers cannot be behaviorally-challenged or communicatively handicapped themselves, and there must be a certain level of supervision and sophistication to ensure that opportunities for appropriate interaction and communication are created, that *Student* is able to avail himself of those created opportunities, and that his peers are able to be receptive to the interaction.

It is probable, that if provided with the right level and type of intervention, that *Student* can be readied for a regular education preschool (with ABA shadow-aide support) very quickly, and that by the time he reaches kindergarten ABA shadow-aide support to the regular classroom may not be necessary. I do recommend, in fact, that after six months of intensive ABA intervention, that consideration be given to placing *Student* in a regular education preschool (with ABA shadow-aide support) for a portion of his school week. (Resp. Exh. #14, p.16) (emphasis in original).

56. Dr. Perlman went on to explain the role of a shadow-aide in more particular detail:

By shadow-aide support, I am referring to a shadow aide specifically trained and skilled in ABA as it pertains to Autism. Notably, I am not equating *trained* to be synonymous with being *skilled*, and the correlations between the two are often very low. Especially with communication and social exchange, teaching and providing for corrective experiences often need to be *caught* in vivo on a continuous basis. Those having training in Autism but who are also lacking the skills (the skills which are developed through quality supervised experience) tend to miss discerning the many pertinent experiences that occur everyday and that provide the opportunity for learning and growth. Also, when those occasions are discerned, the interventions are at times awkward and/or inconsistent. Therefore, a trained aide lacking in skills would not be appropriate for *Student* (Resp. Exh. #14, p. 17) (emphasis in original).

57. *P.H.* was surprised when she read Dr. Perlman's report, for Dr. Perlman stated that *Student* would only complete one or two items on the assessment and then run off to watch television. *P.H.* testified that the report “didn't sound like the child that was in my classroom.”

Student was doing four to five tasks independently and was able to do at least that many in a structured setting. (T. Vol. 5, p. 759).

58. By email on January 21, 2008, the parents put Respondent on notice that the parents intended to place *Student* in the CARD program in Virginia after having read Dr. Perlman's report and having repeatedly asked whether Respondent could accommodate the types of services Dr. Perlman recommended without receiving the answers they wanted. (Resp. Exh. #50, p. 3).

59. *S.M.* called petitioners on January 24 and left a message stating that the IEP meeting originally scheduled for the following day would not be held. She left her cell phone number so that *Father* could contact her if necessary. (T. Vol.5, p. 963). *Father* called *S.M.* that evening. He did not want to cancel the meeting. *Father* also stated that the Respondent provided an eclectic model and that ABA was superior. *Father* asked whether *C.M.* would be able to decide whether *Student* would receive 25 hours of one-to-one ABA from the Respondent. *C.M.* told *Father* that an IEP team would have to make that decision. (T. Vol. 5, pp. 964-65).

60. *P.H.* also contacted the parents to cancel the IEP meeting scheduled for January 25, so that the Respondent's staff could take more time to review Dr. Perlman's evaluation and his recommendations. (T. Vol. 5, pp. 962-63).

61. *Student* began receiving ABA services through CARD in the parents' apartment in *M***, Virginia on 4 February 2008. (Resp. Ex. #60, p. 1).

62. During *Student's* time in Virginia, he received anywhere between 21-35 hours of one-on-one (1:1) ABA therapy from CARD's staff per week. The initial program that was set for *Student* was based upon CARD's assessment of his needs as reflected in the intake questionnaire that was completed by the parents and upon the intake observation that was performed by Ms. Cassell and Ms. Wright. CARD used no information from the Respondent.

63. During the course of *Student's* time with CARD, the areas in which instruction was provided covered the following areas: Actions, Attributes, Block Imitation, Body Parts, Categories, Colors, Drawing, Expressive Labels, Fine Motor Skills, Functions, Gross Motor Skills, Object Requests, Play Skills, Prepositions, Receptive Commands, Receptive Objects, Self Help. Sound Recall, Verbal Imitation, Choices, Drawing, Features, Fine Motor Skills, Functions, Gender, I have/I see, Joint Attention, Locations, Object Requests, Occupations, People, Social Questions, Yes/No, Puzzles, Asking Questions, Numbers, Pronouns, Requesting Cessation, Sight Reading, Waiting, Describe, Emotions, Negation, Prepositions, and "Wh" Rotation. (Pets. Exh. #6).

64. During each of the CARD therapy sessions for *Student*, every therapist performed a series of discrete trials (this form of therapy is known commonly as "discrete trial training" (DTT)). After each discrete trial, and while *Student* would take a break, the therapist made meticulous notes on the number of trials, the numbers for each type of answer (correct, incorrect, or correct with prompt), the percentage for the trial, anecdotal or other notes that would explain the results of the trial. Therapists noted compliance issues that *Student* had (i.e., elopement (leaving the room) or other maladaptive behaviors). (Pets. Exh. #6).

65. Every two weeks, each therapist would meet with Ms. Wright, and occasionally Ms. Cassell, together with *Student* and either *Mother*, *Father* or both for two hours at the CARD

headquarters in Springfield, Virginia. These meetings were called “clinics.” (T. Vol. 2, p. 255). Each clinic allowed Ms. Wright and/or Ms. Cassell the opportunity to review all of the notes and speak with all of the therapists on *Student's* team to determine progress, refine techniques, and for Ms. Wright and/or Ms. Cassell to personally observe the therapists performing each program. (T. Vol. 2, p. 255). These clinics were for the purpose of ensuring that the program being administered to *Student W.* was in accordance with CARD requirements.

66. According to Ms. Wright's testimony, *Student* received substantial benefit from the program that was specifically designed and maintained according to *Student's* needs. (T. Vol. 2, pp. 355:20-359:6). That same progress was also noted by *Mother's* testimony. (T. Vol. 3, pp. 482:13-487:25). Over the course of *Student's* instructional time with CARD in Virginia, it was reported that *Student* improved in all areas of instruction. (T. Vol. 2, pp. 331:20-359:6).

67. The CARD program was more restrictive than the program offered by Respondent, but the Petitioners believed the more restrictive program is what *Student* needed at the time. (T. Vol. 3, p. 539).

68. The Parents paid for CARD services for *Student* in the following amounts: Intake Evaluation (\$450.00); February 2008 (\$3,787.50); March 2008 (\$6,266.50); April 2008 (\$7,041.50); May 2008 (\$5,525.00); June 2008 (\$4,604.00); July 2008 (\$8,858.50); August 2008 (\$6,808.50); September 2008 (\$3,959.00); October 2008 (\$5,542.00); November 2008 (\$4,858.00); December 2008 (\$3,862.50); January 2009 (\$5,591.50); February 2009 (\$7,100.00). (Pets. Exh. 1). These charges total \$74,254.50 in tuition for *Student's* program at CARD.

69. An IEP meeting, with prior notice, was held on March 14, 2008 at *LMN* Elementary School. (Resp. Exh. #1). In attendance on behalf of the Respondent were: P.H., *Student's* teacher at *ABC* Elementary; Carolyn Waller, attorney for Respondent; L.S., licensed psychological assistant and autism specialist for Respondent; Dr. J.B., director of special education programs for Respondent; M.J., autism specialist for Respondent; M.S., exceptional children's pre-kindergarten teacher at *LMN* Elementary School; C.K., Title I teacher for *LMN* Elementary School; E.M., occupational therapist for Respondent; C.M., director of the Respondent's exceptional children's pre-kindergarten programs; and T.R., speech therapist for Respondent. (Resp. Exh. #5, p. 2:12-4:1). In attendance on behalf of the Petitioners were the parents. (Resp. Exh. 5, p. 3).

70. Prior to the meeting, the parents had provided Respondent with IEP goals drafted by CARD and Respondent's staff had incorporated some of those goals into the goals that had been previously adopted at the January 8, 2008, IEP meeting. (T. Vol. 4, pp. 763-64).

71. The March 14, 2008 IEP meeting began with detailed discussions of *Student's* present level of performance of, including his strengths. (Resp. Exh. 5, p. 7:5-14:19). Neither *Mother* nor *Father* objected to *Student's* present levels of performance. *Mother* acknowledged during the hearing that she and *Father* had the opportunity to respond to, add to, or detract from the present level of performance. (T. Vol. 3, pp. 424-430, 436).

72. The discussion concerning *Student's* present level of performance was followed by very detailed and lengthy negotiations over the goals that were being set for *Student* in the IEP. In particular, *Father* was consistently requesting that more stringent requirements be placed upon

Student given the year long time period for which the March 14, 2008 IEP was supposed to last. (Resp. Exh. #5, p. 16:2-105:22).

73. *P.H.* testified that some of the goals drafted by CARD were not incorporated because *Student* had already mastered them or because they were not age appropriate. (T. Vol. 4, pp. 766-68). *P.H.* also stated that she did not recognize the child described by the skill levels in the CARD recommendation. *Student* had attained many of the skills that CARD recommended as the basis for goals to include in the new IEP. (T. Vol. 4, p. 769:10)

74. During the March 14 IEP meeting, agreement was reached on the goals for the new IEP. The Petitioners testified that they were satisfied with the goals established for *Student*. In fact they agreed that they had participated in the formulation of the goals and had significant input. (T. Vol. 3, pp. 598-99).

75. During the March 14 IEP meeting, there was lengthy and extensive discussion of the service delivery portion of the IEP. There was considerable and sometimes heated disagreement concerning the delivery of services. The Respondent's members of the IEP Team favored a placement in a DN classroom with opportunities for interaction with typically developing peers in a Title I classroom. This was a continuation and modification of the program first proposed and discussed during the previous January 8 IEP meeting. ABA would be the primary methodology used, especially in the DN classroom. The ABA would be used in no more than a 1:3 (one teacher/assistant with 3 pupils) setting using small groups. There would often be opportunities for ABA to be used in a 1:1 setting. The Respondent was contracting with *L.S.* to provide more ABA training and to help the staff set up the classrooms to be more accommodating for the use of ABA. (Resp. Exh. #5, pp. 109-183) (T. Vol. 5, p. 869-72).

76. The Respondents proposed March 2008 IEP could be implemented with *Student* in a group of one staff member to no more than three students. The staff member might be classroom staff or a related service provider. *Student* would receive some one-to-one instruction; however, he also needed some instruction with other children because he would be learning to converse and observe and imitate. He needed other people around him. A total one-on-one program would not meet *Student's* current needs, nor did the Respondent's team members believe it was necessary for *Student* to make progress. Some of the goals already agreed upon necessitated having other children present. (T. Vol. 5, pp. 893-95, 902, 950).

77. The Petitioners objected to the proposal of the Respondent's team members, for it was not what they preferred, nor was it exactly what Dr. Perlman and the CARD staff were recommending. The parents argued for ABA to be used totally in a 1:1 setting. If *Student* was to be placed in a classroom environment he needed a one-on-one ABA trained shadow with him at all times. There was a very lengthy discussion, with active participation of the parents, of the Respondent's proposal and the parents' objections and preferences. (Resp. Exh. #5, pp. 109-227)

78. Staffing of *Student's* program became the focus of the most vigorous discussion during the March 14 IEP meeting. Respondent's staff explained that the teachers in the DN classroom and the Title I classroom were both special education certified. Respondent's staff also explained during the meeting that *Student* would work on IEP goals in both classrooms. (T. Vol. 3, pp. 441-42). The DN classroom would be staffed with one teacher and one assistant for the

maximum of six (6) pupils assigned. Although the Title 1 classroom would have more pupils, it would also have an assistant. If there were a determination that there were not enough adults in the classroom, additional staffing would be recommended. (T. Vol. 5, pp. 907-07). There was extensive discussion of the possibility of additional staff being added to the classroom if necessary. (T. Vol. 3, pp. 462-63). The Respondent agreed that the teaching assistant from the DN classroom could accompany *Student* to the Title I classroom in order to assist him. (T. Vol. 3, pp. 477-78; Vol. 5, p. 957).

79. Staffing of classrooms is an administrative responsibility. IEP teams and teachers can make recommendations regarding staffing needs to implement programs, but they do not have the authority to make decisions related to staffing. The Respondent clearly maintains that decisions regarding the staffing of classrooms are an administrative responsibility. *C.M.* in her testimony stated that neither IEP teams nor parents are directly involved in making staffing decisions. Once the IEP team, including parents, agreed upon a program, Respondent's staff determines what level of staffing was needed to deliver that program. (T. Vol. 5, pp. 984-88) There was an extensive discussion of this issue during the March 14 IEP meeting. (Resp. Exh. #5, pp. 156-76).

80. *Father*, during the March 14 IEP meeting and later in testimony, stressed the necessity of a one-on-one ABA shadow for *Student*. During the meeting he insisted that it be included in the IEP. The Team refused to do so. There was some discussion, but the Respondent maintained that this is not an item for the IEP Team to decide and would not engage in detailed discussions on placing this in the IEP. The Petitioners maintained that there was a refusal to discuss the shadow aide, although *Father* did provide input to the Team on the need for the shadow aide. (Resp. Exh. #5, pp. 156-76).

81. According to Ms. Wright's testimony, a shadow-aide facilitates social interaction and helps the child with everything, whether it's prompting the child through academics, speaking for the child if he is nonverbal, or managing maladaptive behavior. According to Ms. Wright, a shadow aide gives the child an "extra nudge" to inform the child of what they are supposed to be doing or to provide extra help "if the teacher can't provide it because there's... 20 other kids in the classroom." (T. Vol. 2, pp. 359-60). Ms. Wright did not believe that *Student* would have required direct assistance throughout his day regardless of the type of activity or what was being focused on academically. Rather, Ms. Wright believed that *Student* may need direct support for social interactions and for transitions. Another adult in the classroom could be trained to give him the direct support at the times that he needs it. (T. Vol. 2, pp. 398-99). Ms. Wright acknowledged that an adult in the classroom who was already an employee of Respondent and who was familiar with *Student's* program and available to provide him direct support when he exhibited a need for it would be able to provide him with support. (T. Vol. 2, pp. 398-400).

82. The parents were willing to accept the Respondent's program included in the IEP, as long as a shadow aide was provided. (T. Vol. 3, pp. 551, 597).

83. The parents were not involved in the decision-making process in what parents asserted was a shadow aide as a related service. The parents' input regarding the need for a shadow aide was received and considered, but decisions regarding the staffing for the delivery of services would be made by Respondent. (T. Vol. 5, pp. 165:11-169:25).

84. *Father*, during the March 14 IEP meeting requested an ABA program of 30 hours for *Student* (Resp. Exh. #5, p. 152). This was the intensity level that the parents maintained was recommended by Dr. Perlman. It was also the intensity level included in a 2005 article by Jane Howard. (Pet. Exh. #5) The Petitioners appeared to use this article as the basis of their decisions regarding what would be the best program for *Student*.

85. During the March 14 IEP meeting the Respondent offered to provide eight hours of consultation per month by *L.S.*. The consultation was to be four (4) hours to *Student's* teachers and four (4) hours provided to the parents. (T. Vol. 3, pp. 442-43, 594). The eight (8) hours of consultation would be for intensive training for school staff working with *Student* and in the home to provide consistency and communication between the school and home. *L.S.* was to visit the classroom and recommend any additional training or support staff needed to provide *Student's* program. (T. Vol.5, pp. 903-06).

86. The program offered to *Student* was described during the meeting as a rigorous, controlled ABA program. (T. Vol. 3, p. 455). Petitioners were told that *Student's* ABA would go with him throughout his school day, though not always provided 1:1. (T. Vol. 3, pp. 445-46) (T. Vol. 5, p. 968). The data collection methodology was described to petitioners during the March 14 IEP meeting. (T. Vol.3, pp. 447-49, 595).

87. *L.S.*, with her training in verbal behavioral analysis, was to serve as the consultant for *Student's* program, to make sure staff were trained, that the classroom was set up the way it should have been, to ensure proper data collection, and to monitor the program. (T. Vol. 5, p. 967-68).

88. *Mother* testified that she believed that the March 2008 IEP reflected a recommendation by Respondent that *Student* be placed in an eclectic autism classroom. (T. Vol. 1, p. 164-65). Dr. Perlman did not recommend that *Student* be placed in an eclectic autism classroom because he had outgrown the classroom and because "they do not facilitate instances of communicative intent or situations where *Student* can interact with neurotypical children." (T. Vol. 1, p. 167 & Resp. Exh. #50).

89. The IEP agreed upon by the Team on March 14, 2008 (Resp. Exh. #1) provided for the following:

- a. Four and one-half (4 ½) hours of special education three (3) times a week in an exceptional child classroom. The classroom was to be the DN in *LMN* Elementary School
- b. Three (3) hours of special education two (2) times a week in a Title I classroom for interaction to typically developing peers.
- c. Thirty (30) minutes of Speech/Language two (2) times a week, and
- d. Thirty (30) minutes of Occupational Therapy once a week.

90. The parents refused to accept the program offered and refused to sign the IEP. It was stated in the IEP meeting that another meeting would be held to discuss the program and to determine *Student's* transition back to the Respondent's schools.

91. The Petitioners presented testimony of Ms. Cassell and Ms. Wright. Both stated that the program offered by the Respondent was not appropriate for *Student*. Neither had even seen the IEP. The only information they had about the Respondent's program was that they had listened to a portion of the recording of the March 14 IEP meeting. The pertinent information they had about Respondent's program was that it was not an intensive, 30 hour, 1:1 ABA program like theirs. They also relied solely on their information about *Student* from Dr. Perlman and their CARD program.

92. The Respondent presented testimony of *L.S.*, who asserted that the Respondent's program was appropriate for *Student*. She had information about *Student*, for she had observed and worked with him in an actual classroom situation. She also knew the details of the IEP and the manner in which the IEP services were to be delivered. She was also an ABA advocate and provided ABA training. She was the only expert who testified about the appropriateness of the Respondent's program who had the information, training, and expertise to make this determination.

93. The Petitioners introduced testimony through Ms. Cassell that ABA is the only method that has consistent research behind it as far as providing consistent results for children with autism. (T. Vol. 2, p. 208). This testimony was primarily based on a study conducted by Jane Howard and colleagues in 2005, comparing three groups of children. The three groups were a group receiving intensive behavior analytic intervention, a group receiving intensive intervention in an eclectic public school program, and a group in a low-intensity special education program. According to Ms. Cassell, the high intensity groups received 25 to 40 hours per week of services and the low-intensity group received 15 hours per week of instruction. (T. Vol. 2, pp. 208-09). According to Ms. Cassell, the study concluded that the children in the intensive behavioral therapy program "showed increases in skills above and beyond the children in the other groups across the board." The children who received ABA treatment outperformed the other children in all areas. (T. Vol. 2, p. 209).

94. The Respondent provided testimony Dr. Shea, an expert on the delivery of education to children with autism and a researcher in the field. She indicated that the Howard study, is one of many studies concerning methodologies used to educate children with autism. The Howard research has many flaws and is not widely accepted by the academic community. The sample of children used by Howard was not chosen in accordance with accepted standards. Using the category eclectic classroom posed other problems; for each eclectic classroom uses a unique combination of strategies and that there is no standard eclectic classroom. No two eclectic classrooms are alike. In Dr. Shea's opinion, when one reviews many of studies on this issue, one finds that students may benefit from less than 25 hours per week of one-on-one ABA therapy. There is "a fairly clear consensus in the professional research literature now that we're not able to identify any particular intensity of service that is optimal." "Intensity" referred to the number of hours. One study demonstrates that students made progress with an average of between 11 and 15 hours per week of services. Another study looked at students in two groups, one of which received 12 to 27 hours of service per week and the other 28 to 43 hours of service per week. The researchers found that "both groups made progress, but the amount of progress was not predicted by the number of hours." Another study compared students who were in home-based early intervention, students in intensive intervention and those who were in preschool. Those researchers did not find differences between the groups in terms of their cognitive or language or social skills. All children in that study received between 11 and 15 hours of intervention per week. (T. Vol. 6, pp 1029-31). The general consensus

in the field regarding the use of a variety of educational approaches for children with autism is that there are a number of educational methods or programs that are effective for young children. The National Research Council report identified as model, or effective programs, ten or twelve different programs across the country. (T. Vol. 6, pp. 1031-32).

95. The Petitioners filed the petition for a Due Process Hearing on December 3, 2008. Following an attempt at mediation and extensive discovery proceedings, the hearing of this case was held before Chief Administrative Law Judge Julian Mann, III on May 16 - 22 and June 2, 2009. The hearing was held at the Office of Administrative Hearings in Raleigh, North Carolina.

96. On June 18, 2009, Judge Mann issued a Final Decision, which stated:

1. Petitioners had the burden of proof on all issues pending before the Office of Administrative Hearings. Petitioners failed to show that Respondent committed a procedural violation that (1) impeded *Student's* right to a free appropriate public education, (2) significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*, or (3) caused a deprivation of an educational benefit.
2. Petitioners also failed to show that the March 2008 IEP developed by *Student's* IEP team was inappropriate and it has been found to be appropriate, to provide an educational benefit and to provide FAPE. Thus, the appropriateness of the CARD program is moot in light of the foregoing finding.
3. Petitioners have failed to carry their burden of proof. Petitioners are not entitled to relief in this special education due process contested case.

97. The Respondent filed Notice of Appeal of the ALJ's Decision on September 18, 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 September 18, 2009. A Request for Written Arguments was sent to the parties on September 21. Written Arguments were received from both parties on October 7, 2009.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes Conclusions of Law independently of those of the ALJ. For the most part they are consistent with those of the ALJ. The Review Officer has added several Conclusions of Law not included in the ALJ's Decision. These 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 within the boundaries of Durham Public Schools in 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 within its jurisdiction.

4. *Student* is a child with a disability for the purposes of IDEA, 20 U.S.C. § 1400 et seq. and a child with special needs within the meaning and definition of N.C.G.S. 115C-106.3(1) and (2). Being classified as autistic, *Student* is entitled to a free appropriate public education (FAPE) from the LEA in which he is domiciled. *Student* and his parents were domiciled within the Durham Public Schools district during the period relevant to this controversy.

5. N.C.G.S. §§115C, 109.6 - 109.9 and the *Policies* (NC 1504, 1.8 - 1.16) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer are required to be conducted in accordance with those provisions.

6. The Supreme Court determined who has the burden of proof in due process hearings in *Schaffer v. Weast* 546 U.S. 49 (2005). Under 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 by a preponderance of evidence that the Respondent did not offer *Student* a FAPE. For the reasons set forth in the following, the Petitioners have not met this burden.

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).

8. 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).

9. 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 procedural errors in the development of the IEP and the service delivery plan to implement the IEP, they could not show this by a preponderance of the evidence. The development of the IEP and the methods to be used in implementing the IEP were consistent with the law.

10. The parents have the right to be involved in the decision-making process with regard to their child. 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). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. 1415(f)(3)(e).

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 did not meet their burden of showing any of these.

13. The IEP team meeting on March 14, 2008 was extensive and lengthy. There was ample detailed discussion of the program that Respondent offered to *Student*, including the division of his time between the developmental needs classroom and the Title I classroom. The IEP team also discussed the incorporation of Petitioners' preferred methodology, the level of staffing that would be provided to *Student*, and the consultation services that would be provided by *L.S.*. With regard to staffing, given Petitioners' expressed concerns about the level of support *Student* would need in the Title I classroom, the IEP team agreed that a teaching assistant from the special needs classroom would go with *Student* to the Title I classroom.

14. The parties are in agreement that, during the March 14 IEP meeting, the Respondent refused to discuss the shadow aide or to allow the Petitioners to participate in a decision related to the provision of a shadow aide as a related service for *Student*. The Petitioners were allowed to provide input at the meeting, even though the Respondent did not engage in an extensive discussion on the matter. Respondent's refusal to discuss the shadow-aide impeded, albeit not significantly, the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*. Even conceding that Respondent arguably may have committed a minor procedural violation, the Petitioners did not show that this impeded *Student's* right to FAPE, significantly impeded the parents opportunity to participate in the decision making process, or caused a deprivation of educational benefits.

15. A free appropriate public education includes not only special education, but also 'related services.' Related services include 'transportation ... and other supportive services ... as may be required to assist a child with a disability to benefit from special education.' (20 U.S.C. §1401 (a)(26). Parents failed to carry their burden of proof by a preponderance of the evidence that the provision of a shadow-aide was a related service according to 34 C.F.R. § 300.34. A related service must be a supportive service to the delivery of the main educational service that assists a child to benefit from special education. 34 C.F.R. § 300.34 enumerates examples of what would be considered a related service. As the shadow-aide proved to be a key component of the parents' preferred methodology of 1:1 ABA, it would not be an ancillary or supportive service. It would be part of the specially designed instruction that just happened to be required in the parent's preferred methodology. The choice of methodology must remain with the IEP team.

16. If the Respondent refused to discuss or consider the parents' request for a related service as opposed to a selected methodology, Respondent would be under a duty to meaningfully consider it. Respondent's refusal never amounted to a refusal to discuss a related service as the parents failed to establish the shadow-aid is a related service as opposed to a unique element of the methodology.

17. The parties are also in agreement that the Respondent refused to include staffing in the IEP. The Petitioners insisted that the Respondent should provide a shadow aide in the IEP document or the manner in which staffing requirements would be made to provide the 1:1 teacher/pupil ratio that the Petitioners insisted that *Student* needed. There is no requirement in federal or state law that the IEP contain such information. The required contents of the IEP are found in 20 U.S.C. 1414(d)(1)(A), 34 CFR 300.320 and in and the *Policies* (NC 1503-4.1). None of these laws/regulations states that the IEP contain any reference to staffing or gives an IEP Team the authority to make staffing decisions. The rule of construction portions of 20 U.S.C. 1414(d)(1)(A) and 34 CFR 300.320(d) make it clear that there are no requirements beyond what is explicitly required in these sections. While the applicable law has no prohibitions against inclusion of such things as methodology or staffing in the IEP, there is certainly no requirement to do so. The extent to which these details are included is up to the Respondent.

18. After a review of all the evidence and giving all evidence its due weight, the undersigned finds that *Mother* and *Father* were not significantly impeded in their ability to participate in the decision making process regarding the provision of a FAPE for *Student*. The record clearly shows that they participated in a significant and meaningful manner in the development of *Student's* IEP, commensurate to that which is encouraged by IDEA. The parents' opportunity to participate in the decision making process does not entitle them to have input in all of the decisions surrounding their child's education; just as methodological decisions are left to the judgment of professional educators, decisions about the day-to-day operations of the school, including staffing decisions, are also left to those responsible for operating those schools.

19. The Petitioner, during the March 14, 2008 IEP meeting and again at the hearing, made considerable arguments that a 25 - 30 hour intensive ABA program and a full-time shadow aide for *Student* while in the classroom would be appropriate for *Student*. They were not able to show this with a preponderance of the evidence. Their arguments are unconvincing. The IEP Team decided that *Student* did not need the intensive one-on-one ABA program to meet his IEP goals. Nor did he need the shadow aide. The evidence that he performed well and made progress using the

January 22, 2007, IEP was not challenged and was convincing. There was ample evidence in the record that the Petitioners themselves were satisfied with *Student's* progress while this IEP was in place. It was not until the parents learned about ABA that they began to try to change the perception of *Student's* progress. A good example of this was the answers provided by the parents on the questionnaire during the CARD intake process. *P.H.*, when asked to review the parents' responses to this questionnaire about *Student's* skills, stated that she did not recognize the child about whom they were responding. *Student* had already demonstrated skills and progressed beyond that indicated by the parents on this questionnaire. Most of the effort during the hearing to change the perception of *Student* was through an attempt to suppress clear and convincing evidence of *Student's* progress prior to the beginning of the CARD ABA program. The Petitioners repeatedly objected to the introduction of evidence that gave a clear image of *Student* prior to January 2008. The record is clear, *Student* made progress without the use of ABA or without having a full-time shadow aide while in the Respondent's program under the January 2007 IEP. It is proper and acceptable to consider prior progress under an IEP as a factor in the development of a subsequent IEP. *A.Student by D.Student v. Lawson*, 354 F. 3d 315 (4th Cir. 2004) The evidence does not support a finding that *Student* required intensive ABA or a one-on-one shadow aide in a self-contained classroom.

20. Petitioners failed to establish that the goals and objectives, which they acknowledged were appropriate for *Student*, required the assignment of a one-to-one aide, or that they could only be accomplished using intensive ABA.

21. The parents' argued for the use of a specific methodology, ABA, to be used in educating *Student*. The Respondent did choose to use ABA in *Student's* program, though not to the degree or extent that the Petitioners proposed. The Respondent's proposed ABA program also would not be as highly intensive as that wanted by the parents, for the parents wanted only a ratio of 1:1, while the Respondent would often use a ratio of 1:3. The choice of methodology is up to the schools. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Barnett by Barnett v. Fairfax Co. School Bd.* 927 F. 2d 146, 151 (4th Cir. 1991). *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).

22. An IEP Team's determination is entitled to substantial deference. 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 how to deliver the services to attain IEP goals in 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*.

23. The Petitioners were asking for more than was appropriate. They had learned of a different method (ABA) to educate children with autism from that which the Respondent was using. They were convinced that this method was superior to the methods used by the Respondent and better for their child. Many feel that ABA methodology is best for educating young children with autism. The Petitioners even introduced a single research study as their evidence to try to illustrate this. This single research study, out of the hundreds on the issue, was the basis of the Petitioners' claim that ABA was the best.

24. Regardless of which methodology is "best," 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. Loudon 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 (3d Cir. 1993). The Respondent offered an opportunity than that was more than trivial or *de minimis*.

25. 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); and an opportunity for a sound basic education, *Leandro v. State of North Carolina* 346 N.C. 336 (1997). 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).

26. The Respondent's IEP was calculated to provide the opportunity for *Student* to make progress toward a sound basic education. The requirement from *Rowley* that schools provide a basic floor of opportunity and the requirement from *Leandro* that schools provide an opportunity for a sound basic education together can be interpreted as the current North Carolina standard. The key element in both of these is that schools must provide an opportunity. The Respondent, through its IEP, provided that opportunity.

27. While the intensive ABA program with a one-on-one shadow may have been preferred by the parents and considered by them to be the best for *Student*, it would be more than the law requires.

28. The parents claimed that the Respondent had predetermined *Student* educational program prior to the IEP meeting. Predetermination can be a procedural violation of IDEA. *Deal v. Hamilton County Board Of Education*, 392 F.3d 840 (6th Cir. 2004). It can cause substantive harm, and therefore deprive a child of a FAPE, where parents are "effectively deprived" of "meaningful participation in the IEP process. Predetermination, however, is not synonymous with preparation. School members of the IEP Team may prepare reports and come with pre-formed opinions

regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions. *N.L. ex rel. Ms. C. v. Knox County Sch.*, 315 F.3d 688, 694 (6th Cir. 2003); *see also* 34 C.F.R. § 300, App. A, No. 32.

29. In this case, the Respondent's members of the IEP Team planned and prepared but did not predetermine *Student's* program. This is evidenced by changes made to the draft IEP document during the meeting and the considerable input, as well as objections, from the parents during the meeting.

30. The evidence presented at hearing supports the conclusion that the program offered by Respondent accounted for *Student's* development and progress through March 2008. The proposed IEP incorporated goals and objectives recommended by the parents and CARD, as well as some recommendations by Dr. Perlman. Given the nature of *Student's* disability and the progress he had made over the previous year, the March 14 IEP was calculated to provide an educational benefit. It was appropriate and would provide FAPE. It is immaterial that the CARD program may have provided a greater benefit.

31. 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).

32. The restrictive nature of the CARD program is a factor to be considered in the determination whether the CARD program was appropriate for *Student*. The Fourth Circuit recently held that the restrictiveness of a private placement can be considered in barring reimbursement, as long as it is used as a factor and not a dispositive requirement. *M.S. ex rel. Simchick v. Fairfax Co. Bd. Of Educ.* 533 F. 3d 315, 327 (4th Cir. 2009). The March 18 IEP included both occupational therapy and social goals. Some of the goals also required peer interaction. The CARD program, which provided extensive services in a one-on-one therapeutic setting, did not provide opportunities for socialization or interaction with same-age peers, either disabled or non-disabled, nor did it provide occupational therapy. Occupational therapy means services *provided by a qualified occupational therapist*. 34 CFR 300.34(e)(6)(emphasis added). CARD does not employ occupational therapists.

33. Petitioners failed to introduce evidence sufficient to establish that *Student's* private program addressed *Student's* social and occupational therapy needs. The CARD ABA proposed methodology is more restrictive than the setting proposed by the Respondent. Respondent's educational placement for *Student* was in a far less restrictive environment, it provided occupational therapy, and had opportunities for interaction with typically developing peers.

34. The placement decision of the Respondent on March 14, 2008 would have educated *Student* in the least restrictive environment.

35. 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.

36. This concept was recently upheld again by the Supreme Court. In *Forest Grove v. T.A.*, --- U.S. --- (June 22, 2009), the Court held that reimbursement may be provided when a court or hearing officer concludes that a school district failed to provide FAPE and the private placement is suitable. Notice must still be provided by the parents, but that was satisfied in this case.

37. Following *Burlington, Carter*, and *Forest Grove*, a two-pronged test can now used to determine if reimbursement for unilateral private placement may be allowed: 1) did the LEA make FAPE available? and, if not; 2) was the parents' placement appropriate (or suitable, *see Forest Grove, supra*)? In this case, the Respondent made FAPE available, thus there is no reason to decide the appropriateness or suitability of the Petitioners' private program. Reimbursement can be denied.

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.

This case is about parents who, after learning of a different method to educate their child, chose to unilaterally remove the child from the Respondent's school and purchased services from a private provider. The child, *Student*, has a diagnosis of autism and was served in a special classroom by Respondent from January 2007 to January 2008. During the time in the Respondent's school, *Student* made progress on the goals of the IEP, achieving most of them sooner than planned. The parents, on several occasions during this period, expressed satisfaction with the program and the child's progress.

After hearing about a specific methodology, ABA, to educate autistic children, the parents contacted and arranged for a psychologist to come from California to evaluate *Student* and make recommendations. The psychologist did recommend ABA and the parents choose to pursue this methodology to educate their son. The psychologist recommended that the parents contact the Center for Autism and Related Disorders (CARD), in Tarzana, California for intensive ABA services. CARD has offices around the country but none in North Carolina. In December 2007, the parents began discussions with the CARD office in Springfield, Virginia. On January 9, 2008 the parents moved into an apartment in *M***, Virginia so that *Student* could be within the required 30-mile radius of the CARD office to get direct services from CARD. CARD began serving *Student* at the *M*** apartment on February 4, 2008.

Meanwhile, in December 2007, the Respondent was trying to schedule an IEP meeting to develop a new IEP for *Student*. Following an IEP meeting on January 8, 2008, an interim IEP was developed. The parties were waiting on the results from the new psychological evaluation to insure that they could incorporate information from that evaluation. The parents already had the draft of the evaluation at this time, but chose not to provide it to the IEP Team. Only the father attended this meeting, for the mother and *Student* were already in Virginia. The January 2008 IEP was never implemented. On January 21, the parents forwarded the psychologist's evaluation report to the Respondent. Also, the parents notified the Respondent that they were beginning the CARD program and would forward the expenses to the Respondent for payment.

The recommendations from the psychologist was an intensive 1:1 ABA program for a minimum of 25 hours a week with an ABA trained shadow whenever *Student* may be in a classroom. Upon receipt of the evaluation report, the Respondent attempted to schedule another IEP meeting and were finally able to schedule one on March 14, 2008.

The IEP developed on March 14, 2008 included goals for *Student* that were agreed upon by both parties. Parents had significant and meaningful input in the formulation of the goals. The IEP Team decided to place *Student* in a developmentally delayed classroom for special education services and an adjacent Title I classroom for interaction with typically developing peers. Speech and occupational therapy services were also included. The special education services were to be primarily through the use of ABA, but not necessarily the intensive 1:1 at all times. Usually the ABA methodology would be used in a 1:3 setting. At times that *Student* would be in the Title I classroom he would be accompanied by a teacher assistant from the special classroom. The assistant would receive ABA training.

The March 14 IEP was well designed and was based on *Student's* needs. It incorporated many, though not all of the psychologist's recommendations. The IEP was calculated to enable *Student* to make progress and would provide FAPE.

Two things, however, that the parents considered most important were not incorporated in the March 14 IEP; the 25 hours of 1:1 intensive ABA and the shadow aide. At the hearing, the parents said that they would have accepted the Respondent's program, even though it was not as intensive or include the 25 hours they preferred. The parents, however, were not willing to accept not having the specially trained ABA shadow aide.

The parents actually were making several allegations at the hearing. First, they maintained that the Respondent was not using the best methodology for educating *Student*. They introduced information about the superiority of the intensive ABA program compared the type program being used by the Respondent. They attempted to show this through the use of one research study, personal testimony, and testimony of CARD employees. They also asserted that the IEP Team did not consider intensive ABA as a methodology to use. The parents were not convincing in their arguments. The research actually shows that there are many types of programs that are successful in educating children with autism - ABA is only one of them. The Team did engage in a discussion about ABA and allowed the parents to provide input. The IEP Team did consider and utilize the

parental input. The Team did actually design a program using ABA, though not as intensive as the parents wanted. The parents participated in a meaningful way in the decisions affecting their child.

The law does not allow parents to dictate methodology. The choice of methodology to implement a properly developed IEP is the prerogative of the Respondent. Parents, no matter how well intentioned, only have input in this decision. The courts have expressed caution that we are not to interfere with the decisions of schools in determining the methodology to use in educating children. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Barnett by Barnett v. Fairfax Co. School Bd.* 927 F. 2d 146, 151 (4th Cir. 1991); *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988).

The other allegation made by the parents was that the Respondent's IEP Team refused to engage in a discussion concerning the ABA shadow aide and thus committed a procedural error. The record does show that the Team did allow the parents to introduce the idea, but did not engage in a detailed discussion. The parents' participation was still meaningful. This was not a procedural error envisioned by 20 U.S.C. 1415(f)(3)(e), N.C.G.S. N.C.G.S. 115C-109.8, *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, or *Rowley*, that impeded *Student's* right to FAPE, significantly impeded the parents opportunity to participate in the decision making process, or caused a deprivation of educational benefits. The shadow aide is an integral part of the intensive ABA methodology. As discussed previously, the Respondent can make decisions about methodology. The parents only have the right to provide input, which occurred in this case. Also, making staffing decisions in a public school classroom is solely within the authority of the Respondent. There is nothing in the law that requires the Respondent to even allow parents to provide input in staffing decisions.

Thus, for the reasons explained above, the Petitioners failed to show that the Respondent did not offer a free appropriate public education to *Student*.

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

DECISION

The ALJ's decision is upheld. The Review Officer holds:

1. The IEP developed by Respondent on March 14, 2008 was calculated to provide a free appropriate public education for *Student* and was developed in accordance with the law. Thus, the appropriateness of the CARD program is moot in light of this holding.

2. The Petitioners failed to show that the Respondent committed a procedural violation that (1) impeded *Student's* right to a free appropriate public education, (2) significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*, or (3) caused a deprivation of an educational benefit.

3. The Petitioners are not entitled to any relief.

This the 16th day of October 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.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the Petitioner, Respondent, and their counsels by U.S. Mail, addressed as follows:

Walter S. Webster
Hoof & Hughes, PLLC
3604 Shannon Road, Suite 200
P.O. Box 51909
Durham, NC 27717-1909
Attorney for Petitioners

Carolyn A. Waller
Christine T. Scheef
Tharrington Smith, LLP
209 Fayetteville Street
P.O. Box 1151
Raleigh, NC 27602-1151
Attorneys for School Board

Office of Administrative Hearings
State of North Carolina
6714 Mail Service Center
Raleigh, NC 27699-6714

Dr. Carl E. Harris, Superintendent
Durham Public Schools
P.O. Box 3002
Durham, NC 27702-3002
Respondent

Mary N. Watson, Director
Exceptional Children Division
N.C. Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699-6356

This the 16th day of October 2009.

Joe. D. Walters
Review Officer