

STATE OF NORTH CAROLINA  
COUNTY OF GRANVILLE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 EDC 6902

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Student by [Father],	)	
	)	
Petitioners,	)	
	)	
vs.	)	
	)	<b>FINAL DECISION</b>
	)	
Granville County Board of Education,	)	
Respondent.	)	
	)	
	)	

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This contested case was heard before Administrative Law Judge Joe L. Webster on August 10, 2011. The hearing was held at the Granville County Courthouse, Oxford, North Carolina.

**APPEARANCES**

**For Petitioners:** [Father]

**For Respondent:** James E. Cross, Jr.  
Dale W. Hensley  
Royster, Cross & Hensley, L.L.P.  
P.O. Drawer 1168  
135 College Street  
Oxford, North Carolina 27565  
Telephone: (919) 693-3131  
Facsimile: (919) 693-2919  
Attorneys for Respondent

**WITNESSES:**

**For Petitioner:** [Father] ([Father])  
D.V.W.

**For Respondent:** A.M.

**ADMITTED EXHIBITS:**

**Petitioner's Exhibits:** P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11

**Respondent's Exhibits:** R-1, R-2, R-3, R-4, R-5, R-6

**PETITIONER'S PENDING MOTION FOR UNDERSIGNED TO DISQUALIFY  
HIMSELF AND FOR ANOTHER ADMINISTRATIVE LAW JUDGE  
TO BE APPOINTED**

On August 31, 2011, Petitioner filed an Affidavit of Personal Bias or Disqualification pursuant to N.C.G.S. §150B-32(b) in the Office of Administrative Hearings alleging among other things that the undersigned's "decisions shows Judge Webster's inability and lack of knowledge of and ability to understand, IDEA and legal interpretations of IDEA by federal and State Courts." Petitioner also alleges that "the rulings Judge Webster made is contrary to statute and rules which directly and adversely affected Petitioner during and after the hearing." Petitioner further stated that "Judge Webster has corrupted the integrity of this hearing and literally gave the Respondent's an unlawful victory without due regard to the applicable legal standards." In his Prayer for Relief Petitioner stated: (1) "the Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over this contested case. (2) "In the alternative a new hearing shall be held or the case be dismissed without prejudice and the petition will be reinstated without prejudice."

There is absolutely no merit to the allegations made by Petitioner. Throughout the numerous contested cases Petitioner has filed regarding his minor child, Student, [Father] has seldom found an Administrative Law Judge that was acceptable to him with regard to knowledge, integrity and impartiality. The records in previous proceedings before the Office of Administrative Hearings shows that he has similarly filed a complaint against Office of Administrative Hearings Administrative Law Judges, Augustus B. Elkins (January 24, 2011), and Melissa Lassiter (February 21, 2011). Petitioner appears to equate rulings against him as evidence that the undersigned is doing something improper or violating his rights. The undersigned believes that he has conducted all proceedings in this contested case fairly, impartially and justly and has applied the law to the facts free of error. The undersigned takes notice that Petitioner's August 15, 2011 letter to Judge Julian Mann states that "due to substantial delays, he was not asking for the disqualification of Judge Webster. In his next filing with the Court on August 31, 2011, after receiving notification that the undersigned had decided to rule in Respondent's favor, Petitioner states, that "this ruling appears to be motivated by said letter [Petitioner's letter to Judge Mann] copied to him." Petitioner makes this allegation in spite of the fact the undersigned's assistant's email to the parties stated as follows:

*"Judge Webster asked that I forward the following to the parties:*

I have considered the hearing testimony and reviewed the file, all exhibits, proposed decision or findings of fact, written and oral arguments, and legal authority submitted by the parties. I wanted to let the parties know that I am ruling

in favor of the Respondent. A written order will be timely filed and mailed to the parties in this matter no later than September 30, 2011 as set forth in the Order of the Court dated July 19, 2011.

Because the new school year begins soon, I thought the parties should know how I plan to rule as soon as possible.

Sincerely, Judge Joe L. Webster”

The hearing testimony revealed that Petitioner was free to reenroll his son at his former school. Therefore the undersigned chose to inform the parties as soon as possible of his decision so that the Petitioner would be able to elect the option of reenrolling his son at his former school should he choose to do so. In spite of the undersigned’s good intentions in this regard, Petitioner chose to make something sinister out of the undersigned’s email notifying the parties of how he would rule. The undersigned finds the Motion by Petitioner to not be filed in good faith.

Therefore, the undersigned declines to recuse himself from this case unless and until Chief Administrative Law Judge Julian Mann or some higher authority makes a contrary decision.

### **PRELIMINARY STATEMENT**

This case involves Petitioners’ challenge to the Individualized Education Program (IEP) prepared by Respondent Granville County Board of Education for Student. Student is a nine year old student diagnosed with multiple disabilities, including Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiant Disorder (“ODD”). Petitioners have previously challenged, on multiple occasions, the same IEP challenged in the Petition in the above-referenced action (developed on November 22, 2010), including alleging a failure to provide a free and appropriate public education and seeking private placement. In the instant case, Petitioners seek reimbursement of expenses for a private placement and private services. Respondent denies any violation of IDEA and maintains that its IEP provided a free and appropriate public education in the least restrictive environment. Additionally, Petitioner seeks a private placement of Student and petitions the Court to order Respondent to pay for the private placement.

### **FINDINGS OF FACT**

#### **I. JUDICIAL NOTICE**

1. Pursuant to N.C. Gen Stat. §150B-30 the court takes official notice that Petitioners have filed a number of due process petitions subsequent to November 22, 2010, the effective date of the IEP developed by Respondent. Such proceedings include 10 EDC 8869 (filed on or about December 10, 2010); 11 EDC 0703 (filed on or about January 20, 2011); 11 EDC 1459 (filed on or about February 10, 2011); and 11 EDC 2219 (filed on or about February 19, 2011), all of which were decided favorably to Respondent and adversely to Petitioners. The court takes judicial notice of the pleadings, filings and decisions in such actions.

2. The court also takes official notice that Petitioners have filed a number of due process petitions with respect to the previous IEP: 10 EDC 2914 (filed on or about May 21, 2010); 10 EDC 5398 (filed on or about August 30, 2010); and 10 EDC 7940 (filed on or about November 19, 2010), all of which were decided favorably to Respondent and adversely to Petitioners. The court takes judicial notice of the pleadings, filings and decisions in such actions.

## II. FINDINGS FROM DOCUMENTARY EVIDENCE

### A. Granville County Schools' Provision of FAPE to Student

3. On May 26, 2011, Respondent's Director of Exceptional Children's Programs, A.M., conversed with [Father], at length, regarding Student's education, progress and potential placement opportunities. Ms. A.M. followed this conversation with an electronic mail on May 27, 2011. (P-5; R-1.)

4. On May 31, 2011, at the resolution meeting in the above-captioned matter, Respondent provided [Father] with "ample documentation to show [him] the wonderful progress that [Student] had made this school year." (P- 5; R-1.)

5. In the 2010-11 school year, Student increased his scaled scores in math by seventeen (17) points, his reading scaled scores by thirteen (13) points, progressed from an initial 18 DRA to a 30 DRA, and went from a zero level to a 526 on his Read 180 assessment. (P-5; R-1; R-2, ¶6.)

6. [Father] was informed of this progress on May 31, 2011, at the resolution meeting in the above-captioned matter. (P- 5; R-1.)

7. On June 1, 2011, Respondent indicated to [Father] that the "contested due process hearings and appeals have more than adequately addressed [Student's] access to a Free Appropriate Public Education since May of 2010." (P-5; R-1.)

8. [Father] and Respondent discussed whether they could agree to a change in Student's placement at the resolution session in the above-captioned case. (P-5; P-10; P-11; R-1.)

9. A decision issued by the North Carolina Department of Public Instruction ("DPI") on June 17, 2011 in Complaint #10-56 (in which it was alleged that Respondent failed to convene an IEP meeting at [Father]'s request to review and revise the IEP) found in favor of Respondent. (R-2.)

10. DPI's decision in Complaint #10-56 specifically noted, "During the 2010-11 school year, there were 16 hearing decisions issued (9 Office of Administrative Hearings; 5 state review officers; 2 federal; and 1 superior court) related to petitions and appeals filed by the father against the GCS. Decisions were issued and upheld stating that the IEP for the current school year is appropriate, the IEP and behavioral intervention plan were being implemented, and the

student was receiving a free appropriate public education. Decisions in three cases, which were filed on 1/21/11, 2/10/11, and 2/21/11, were pending until 6/13/2011 because each was appealed. The GCS delayed convening a meeting to change the IEP while the cases were pending.” (R-2, ¶5.)

11. As of the date of DPI’s decision in Complaint #10-56, the school had received no requests for an IEP meeting for Student since the 2/9/11 IEP meeting. (R-2, ¶7.)

12. DPI concluded the following (R-2, Conclusions):

- “The parent and his educational consultant participated in the development of the current IEP;”
- “The complaint indicates that the parent is concerned that the IEP does not adequately address his son’s needs. The 16 hearing decisions indicate that the IEP is reasonably calculated to provide educational benefit and the child is receiving a free appropriate public education;”
- “Furthermore, there were three pending hearing decisions, which trigger stay put on the current placement on the IEP;” and,
- “The GCS is found to be in compliance with the regulations for convening an IEP team meeting to review and revise the IEP at the parent’s request.”

13. At the resolution meeting in the above-captioned matter, Respondent offered to hold an IEP meeting to discuss [Father]’s concerns about Student’s placement. (P-5; R-1.)

14. On February 9, 2011 and again on April 4, 2011, Student’s special education teacher indicated that Student was making progress on his IEP goals. (R-3.)

15. Student’s IEP indicates that he was being educated in a separate setting because Student’s “behavioral and academic needs are such that he needs a small group, intensive, structured setting.” (R-3.)

16. [Father] and Jann Shepard, Petitioners’ educational specialist, participated in the development and writing of the IEP. (R-3.)

17. Petitioners provided no evidence that Student’s needs had changed necessitating a change in the IEP developed on November 22, 2010 IEP (which had repeatedly been deemed to provide an appropriate education to Student in the least restrictive environment).

18. Petitioner introduced an evaluation by Attention & Memory Center which was conducted on July 5, 2011 (after the filing of the above-captioned Petition). (P-1.)

19. This evaluation conducted on July 5, 2011 (P-1), was not available when the IEP team developed Student’s current IEP (November 22, 2010)(R-3), nor was it available when Petitioner withdrew his son from the Granville County Schools and unilaterally enrolled him in a private school (June 26, 2011)(R-5).

20. The evaluator at the Attention & Memory Center did not review Student's current IEP. (P-1, p. 2.)

21. The evaluation also indicates that "all scores are intended for the use of licensed professionals and are not to be interpreted outside of the context of this report." (P-1, p. 4.)

22. The evaluation does not indicate that the IEP provided by Respondent fails to provide Student with FAPE, nor does the evaluation recommend a private school placement. (P-1.)

23. Petitioner entered into evidence a June 21, 2011, letter to [Father] from Dr. Stephan Baum, M.D. (P-2.)

24. Dr. Baum's June 21, 2011, letter notes, "It is important that children continue academic pursuits throughout the summer or extended vacation times. Studies show that on average, children *lose* 2.6 months of grade level equivalency during summer months. Additional research notes that educators spend 4-6 weeks 're-teaching' material that students have forgotten over the summer." (P-2.)

25. Dr. Baum's June 21, 2011, letter does not indicate that Student regresses to an extent greater than any other student during the summer months, nor does the letter indicate that a failure to provide Student summer services is inappropriate. (P-2.)

26. Dr. Baum wrote a second letter on June 21, 2011. In Dr. Baum's second June 21, 2011, letter, Dr. Baum indicated that his role "is to provide treatment of and recommendations for psychiatric concerns. [His] role as outpatient provider limits [his] ability to provide specific academic recommendations and responses about school behaviors to the school." (R-7.)

27. Petitioner also entered into evidence a May 5, 2010 letter (P-8) which requested an IEP meeting and an IEP meeting was held in May 2010. The issues to be addressed according to the letter and the IEP meeting decisions were the subject of a due process action in May 2010 (10-EDC-2914). At hearing it was believed that this letter may have actually been from 2011, so it was admitted into evidence. However, the letter is dated correctly and has no weight in the current action.

28. The IEP that Petitioners seek to challenge in this action comports with the procedures set forth in the IDEA.

29. The IEP that Petitioners seek to challenge in this action has been the subject of previous actions in which the IEP was determined to provide a free appropriate public education in the least restrictive environment. (R-6.)

30. The IEP that Petitioners seek to challenge is reasonably calculated to provide Student with educational benefit.

31. The IEP that Petitioners seek to challenge provides Student with a free appropriate public education in the least restrictive environment.

**B. Least Restrictive Environment**

32. The IEP team considered a separate setting to be the least restrictive appropriate environment in which Student's needs could be met.

33. This determination was reasonable and entitled to respect.

34. The offered placement was appropriate.

35. Placement in a separate setting in the regular public school is less restrictive (on the continuum of environments) than a separate private school. (P-9; R-3.)

**C. Appropriateness of Private Placement**

36. The Vance County Learning Center targets students in grades one through 12 who experience "repeat short-term school suspensions, failing grades, or a long-term school suspension or expulsion." (P-7.)

37. The Vance County Learning Center Day School offers an academic setting for "learners who are at-risk of failing or dropping out of school." (P-7.)

38. The Vance County Learning Center does not have a private school special education program certified by the North Carolina Department of Public Instruction. (R-4.)

39. The Petitioners' private school is not approved to provide special education to children placed in private schools or out-of-district placements by local education agencies. (R-4.)

40. Petitioners did not provide evidence that the Vance County Learning Center could appropriately address Student's needs.

41. Petitioners' private school placement is not appropriate.

**D. Reimbursement**

42. The notice provided by Petitioner to Respondent did not sufficiently identify the basis for Petitioners' dispute with Respondent's placement. (R-5.)

43. [Father]'s acts of removing his child from the Granville County Schools and then seeking reimbursement when FAPE had been conclusively determined to have been made available through Student's IEP, were unreasonable and sufficiently preclude a reimbursement claim. (R-5; R-6.)

### III. FINDINGS FROM TESTIMONY

#### A. FAPE Made Available In The Granville County Schools

44. A.M., Respondent's Director of Exceptional Children's Programs and only witness, has worked in the field of special education for twenty-two (22) years. (AM, Tr. p. 101)

45. Ms. A.M. has a "Bachelor's Degree in special education, and a Master's Degree in Supervision and Principalship." (AM, Tr. p. 101.)

46. Student's current IEP is appropriate to meet his needs. (AM, Tr. p. 103.)

47. Student was taught by a highly qualified special education teacher for all of his services. (AM, Tr. p. 112.)

48. While attending the Granville County Schools, under his current IEP, Student was served in a separate setting with access to typically developing peers during different sessions, lunch, and outside times and specials. (R-3; AM Tr. pp. 101-102.)

49. Nothing had changed in Student's performance or behavior since the last due process action that would justify a change in Student's IEP or BIP. (AM, Tr. p. 101.)

50. Granville County Schools was using the Read 180 program with Student, and that the Read 180 program was an approved research-based intervention program. (AM, Tr. 104.)

51. The Granville County School utilized the Read 180 program with fidelity. (AM, Tr. p. 105.)

52. Student made progress and did well under the current IEP. (AM, Tr. p. 104.)

53. Some of Student's improvement regarding his grades was due to good teaching and learning. (AM, Tr. pp. 103, 110.) Student's progress may also be attributed to the fact that he was being taught at his level. (AM, Tr. p. 112) Student was doing well in the Granville County Schools and had made marked growth. (AM, Tr. p. 112.)

54. End-of-Grade Test is a standardized test whereas an IEP is individualized and directly linked to a child's disability. (AM, Tr. p.112.)

55. The undersigned finds it would be unlawful for Respondent to change Student's IEP while a due process case was pending unless the parties agreed to the change. (AM, Tr. p. 107.)

56. Petition [Father] had been informed of Student's thirteen point increase in his Reading score, seventeen point increase in his Math scaled score, and that A.C.J's Read 180 score had gone from 0 to 526, and admits he considers these scores indicate substantial progress.

(TJ, Tr. pp. 62-63). In spite of this admission, [Father] contends that recent testing had shown that Student had made no progress under the current I.E.P.

57. [Father] made a reference to the Granville County Schools' failure to provide extended school year services for Student, although neither [Father], nor any other witness testified that Student needed extended school year service to receive FAPE, or that without extended school year services, Student would experience regression above that which all children experience in the summer months. (TJ, Tr. p. 113.)

58. Although [Father] contends that Respondent "flat out" refused to hold an IEP meeting for Student, the evidence and record before the undersigned does not establish this contention as a fact. (TJ, Tr. p. 54.) The evidence before the Court proves that numerous IEP meetings were held. [Father]'s own testimony was that there were IEP meetings for Student held on May 19, 2010, October 12, 2010, and February 9, 2011. (TJ, Tr. pp. 58,59.) Another IEP meeting was offered in response to [Father]'s most recent request. (R #1).

59. [Father]'s educational consultant was present at the October 12, 2010, IEP meeting. (TJ, Tr. p. 59.)

60. [Father] decided not to participate in the February 9, 2011, IEP meeting because he had requested to participate by phone and the school system phones could not accommodate the number of attendees that [Father] wished to have participated by phone. (TJ, Tr. p.60 .)

61. A resolution meeting in the above-captioned matter was held on June 1, 2011. (TJ, Tr. p. 62.)

62. While [Father] testified that a communication restriction kept him from being able to request or participate in IEP meetings, the undersigned finds that the evidence does not support [Father]'s contention. (TJ, Tr. p. 30.)

63. [Father] admitted that he frequently communicated with Ms. Twisdale (the school principal), Ms. A.M., and Ms. Cunningham. (TJ, Tr. p. 66.)

64. [Father] admitted that Dr. Farley, the Superintendent, was willing to meet and talk with him. (TJ, Tr. pp. 66, 76)

65. Ms. A.M. gave [Father] her cell phone number because he had indicated that he liked to communicate through text messaging. (AM, Tr. p. 106.)

#### B. Appropriateness of Private Placement

66. Vance County Learning Center does not have a private school special education program approved by the North Carolina Department of Public Instruction. (DV, Tr. p. 94.)

67. [Father] testified that Vance County Learning Center had "some" services and does IEPs. (TJ, Tr. p. 72.)

68. [Father] removed Student from the Granville County Schools to Vance County Learning Center because he did not feel welcome in the Granville County Schools and the Vance County Learning Center allowed more parent participation. (TJ, Tr. p. 57.)

69. D.V.W. is the administrator for the Vance County Learning Center. (DV, Tr. p. 79.)

70. D.V.W.' education consists of two (2) years of college. (DV, Tr. p. 93.)

71. D.V.W. is not a teacher or a retired teacher. (DV, Tr. p. 93.)

72. The Vance County Learning Center was founded to meet the needs of students who are habitually suspended. (DV, Tr. p. 79.)

73. D.V.W. did not know at the time of her testimony that Student had only been suspended from the Granville County Schools during the 2010-11 school year for three (3) days. (DV, Tr. p. 90.)

74. D.V.W. acknowledged that she would not consider three (3) days suspension "habitual" suspension. (DV, Tr. p. 90.)

75. D.V.W. did not know at the time of her testimony that Student had not been in-school suspended at all by the Granville County Schools during the 2010-11 school year. (DV, Tr. p. 92.)

76. The Vance County Learning Center addresses the needs of children who have made no progress in the public schools. (DV, Tr. p. 80.)

77. The Vance County Learning Center largely implements the IEP created by the public school from which a disabled student came. (DV, Tr. p. 98.)

78. When asked whether the Vance County Learning Center would follow the Granville County Schools IEP for Student, D.V.W. indicated that it would not "recreate the wheel" and that she would review the IEP to make sure she concurs with it. (DV, Tr. p. 98.)

79. D.V.W. characterized the progress Student achieved under the challenged IEP as "miraculous." (DV, Tr. p. 91.)

80. The Vance County Learning Center teaches children on their current academic level. (DV, Tr. p. 88.)

81. The Vance County Learning Center is not certified to provide mental health services, but partners with mental health service providers. (DV, Tr. p. 85.)

82. The Vance County Learning Center has not yet determined who Student's teacher will be at the school. (DV, Tr. p. 93.)

83. The Vance County Learning Center uses some retired teachers and business leaders from the community to provide instruction. (DV, Tr. pp. 80, 93.)

84. The Vance County Learning Center was not certified as a private special education placement because it had no certified special education teachers on staff. (DV, Tr. p. 94.)

85. At the time of her testimony, D.V.W. had not reviewed Student's IEP from the Granville County Schools. (DV, Tr. p. 91.)

86. The Vance County Learning Center can offer Student a small class setting with a focus on his behavior issues. (DV, Tr. p. 95.)

87. The Granville County Schools has a certified behavior specialist, Gina Cunningham, who discussed with Petitioner ACJ the possibility of placing [Father] at the Achievement Center. (DV, Tr. p. 63.)

#### C. Reimbursement

88. [Father] testified Student would begin attending the Vance County Learning Center at the end of August 2011. (TJ, Tr. p. 24)

89. [Father] testified that the costs for Student's private school attendance were \$500.00 per month for tuition and \$125 per month for transportation. (TJ, Tr. 52.)

90. D.V.W. testified that parents have to pay \$200 for their children to attend the Vance County Learning Center. (DV, Tr. p. 96.)

#### **IV. OTHER FINDINGS OF FACT**

91. The witness presented by the Granville County Schools was knowledgeable, experienced and credible.

92. The IEP developed by the Granville County Schools was appropriate with regard to the level of services and placement offered to Student

93. The placement offered by the Granville County Schools was the least restrictive environment appropriate for Student

94. Student's IEP was reasonably calculated to provide him with meaningful educational benefit.

95. There were no procedural errors in the development of Student's IEP that amounted to a denial of a free appropriate public education.

96. Respondent did not deny Petitioner's request for an IEP meeting.

97. Respondent and Petitioner have substantially complied with discovery; that all documents between the parties relating to this matter were properly exchanged and received. The undersigned does not find that sanctions against either party are necessary or appropriate.

## **CONCLUSIONS OF LAW**

### **A. General**

98. Student is a student with disabilities entitled to special education under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §1400 et seq., the federal statute governing the education of students with disabilities. Federal regulations promulgated under the IDEA are codified at 34 C.F.R. Part 300. The controlling state law for the education of students with disabilities is G.S. §115C-106.1 et seq., and the corresponding state guidance is the Policies Governing Services for Children with Disabilities.

99. The Office of Administrative Hearings (OAH) has jurisdiction of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes, and the Individuals with Disabilities Education Act.

100. The Petitioners have the burden of proof by the preponderance of the evidence. Schaffer v. Weast, 546 U.S. 49 (2005); G.S. §150B-29(a).

101. The Fourth Circuit has made it abundantly clear that in IDEA cases the considered educational judgments of local school officials are entitled to deference. MM v. School District of Greenville County, 303 F.3d 523, 532-33 (4<sup>th</sup> Cir. 2002) ("We have always been, and we should continue to be, reluctant to second-guess professional educators. ... The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators"); A.B. v. Lawson, 354 F.3d 315, 328 (4<sup>th</sup> Cir. 2004) ("IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent"); Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997) ("Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment"); Tice v. Botetourt County School Board, 908 F.2d 1200, 1208 (4<sup>th</sup> Cir. 1990) ("once education authorities have made a professional judgment about the substantive content of a child's IEP, that judgment must be respected").

## B. Res Judicata/Claim Preclusion

102. “Res judicata (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating matters and promoting judicial economy by preventing needless litigation.” Williams v. City of Jacksonville Police Department, 165 N.C. App. 587, 591, 599 S.E.2d. 422, 427 (2004)(quoting Bockweg v. Anderson, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)).

103. Under the doctrine of res judicata or claim preclusion, a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privities. Williams, *supra*, 165 N.C. App. At 591, 599 S.E.2d at 427 (quoting Whitacre P’ship v. Biosignia Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)(internal citations and quotations omitted)).

104. “[I]n general, a cause of action determined by an order for summary judgment is a final judgment on the merits.” Hill v. West, 189 N.C.App. 194, 198, 657 S.E.2d 698, 700 (2008) (quoting Green v. Dixon, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55, *aff’d per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000)).

## C. Collateral Estoppel (Issue Preclusion)

105. “Under the companion doctrine [to res judicata] of collateral estoppel, also known as ‘estoppel by judgment’ or ‘issue preclusion,’ the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” Williams, *supra*, 165 N.C.App. at 591, 599 S.E.2d at 427 (quoting Whitacre P’ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal citations and quotations omitted)).

106. “Collateral estoppel applies when the following requirements are met: ‘(1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.’” McCallum v. North Carolina Coop. Extension Service, 142 N.C.App. 48, 54, 542 S.E.2d 227, 233 (2001) (quoting King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)).

## D. The Law Of The Case

107. “Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case....” “At the trial level ‘[t]he well established rule in North Carolina is that no appeal lies from one Superior Court judge to another or, ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.’”

N.C.N.B. v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (citing Tennessee–Carolina Transportation, Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974); Horton v. Redevelopment Commission of High Point, 266 N.C. 725, 726, 147 S.E.2d 241, 243 (1966); Bass v. Mooresville Mills, 15 N.C.App. 206, 207–208, 189 S.E.2d 581, 582, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972); and quoting Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

#### E. Free Appropriate Public Education (FAPE)

108. The standard for assessing the substantive adequacy of a free and appropriate public education (FAPE) under the IDEA is whether the individualized educational program (IEP) is “reasonably calculated to enable the child to receive educational benefits.” Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982). See, also, A.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004) (“the FAPE must only be ‘calculated to confer some educational benefit on a disabled child.’”) (Emphasis in original).

109. Congress did not require that school districts maximize each disabled child’s potential commensurate with the opportunity provided other children. Rowley, 458 U.S. at 198. See also, Cone v. Randolph County Schools, 302 F.Supp.2d 500, 509 (M.D.N.C. 2004) (the Rowley standard is “relatively modest,” and does “not require a school district to maximize a handicapped child’s potential, but merely mandates that the IEP provide some educational benefits”). See also, A.B. v. Lawson, 354 F.3d 315, 330 (4th Cir. 2004) (although a child was thriving in private school, “IDEA’s FAPE standards are far more modest than to require that a child excel or thrive”).

110. Procedural violations of IDEA that do not actually interfere with the provision of a free appropriate public education will not support a finding that the school system failed to provide FAPE or justify relief. DiBuo v. Board of Education, 309 F.3d 184, 190 (4th Cir. 2002). See also, G.S. §115C-109.6(F), which provides that “the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.”

111. The IEP provided by Respondent was reasonably calculated to enable Student to receive educational benefits, and therefore provided a free appropriate public education (FAPE) under the Rowley standard.

#### F. Least Restrictive Environment (LRE)

112. School systems are to provide FAPE in the least restrictive environment (LRE). 42 U.S.C. §1412(a)(5).

113. A disabled child is to be mainstreamed to the maximum extent appropriate. 42 U.S.C. §1412(a)(5)(A).

114. The IDEA requires that disabled children be placed as close to his or her home as possible and that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 20 U.S.C. §1412(a)(5); 34 C.F.R. 300.116.

115. The IEP's placement of Student in a separate setting in the regular public school with opportunities to interact with nondisabled peers throughout the day satisfied Respondent's obligation to offer FAPE in the least restrictive environment.

116. A separate setting in a public school is a less restrictive environment than a separate school with a day treatment program.

#### G. Private School Reimbursement

117. For students with disabilities who are enrolled in private school by their parents when FAPE is not at issue, there is no right to reimbursement and no individual right to a due process action. 34 C.F.R. 300.137(a).

118. IDEA does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility. 20 U.S.C. §1412(a)(10)(C)(i); 34 C.F.R. 300.148.

119. A court evaluates the appropriateness of the district's proposed placement without comparison to the private school placement and consistent with the Rowley standard. A student's placement is appropriate when the student is making reasonable and educationally adequate gains. L.G. v. School Board, 255 Fed.Appx. (11th Cir. 2007). See also Lewis v. School Bd. of Loudoun County, 808 F.Supp.2d 523 (E.D.Va. 1992).

120. The provision of a FAPE for purposes of a tuition reimbursement claims does not require public schools to duplicate the unique experience in a private program, no matter how comfortable the student becomes in that setting. Redding Elem. Sch. Dist. v. Goynes, 2001 WL 34098658 (E.D. Cal. 2001).

121. If a Petitioner first proves that the LEA has not made FAPE available, to be eligible for reimbursement the Petitioner must then prove that the private placement chosen by the parent is appropriate. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361 (1993).

122. Tuition reimbursement may be denied for a parent's failure to provide a proper notice of intent to withdraw and seek reimbursement. 34 C.F.R. 300.148.

123. Tuition reimbursement may be denied for a parent's unreasonable actions. 34 C.F.R. 300.148.

#### H. Stay Put

124. Except in disciplinary situation, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. 20 U.S.C. §1415(j); 34 C.F.R. 300.518.

#### I. Extended School Year

125. Extended School Year services must be provided only if the IEP Team determines such services are necessary for the provision of FAPE. 20 U.S.C. §1412(a)(1); 34 C.F.R. 300.106.

126. Extended School Year services are only necessary to FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during summer months. M.M. ex rel. D.M. v. School District of Greenville County, 303 F.3d 523, 537-538, (4th Cir. 2002).

127. "The mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY services are required under the IDEA only when such regression will substantially thwart the goal of meaningful progress." M.M. ex rel. D.M. v. School District of Greenville County, 303 F.3d 523, 538 (4th Cir. 2002) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3rd Cir. 1988)).

#### J. Procedural Violations

128. The administrative law judge has carefully reviewed all other alleged violations of the IDEA and concludes that they allege procedural violations and that in any event Respondent provided a free and appropriate public education in the least restrictive environment. In light of these conclusions, it is unnecessary to determine whether procedural violations of the IDEA did occur, as violations (if any) would not entitle Petitioners to relief.

#### K. Appropriateness of Petitioner's Unilateral Placement in Private School

129. In light of the conclusions that Respondent's IEP provided a free appropriate public education in the least restrictive environment, it is unnecessary to determine whether Petitioners' unilateral placement of Student in the private school with supplementary aids and services was appropriate. Even if the undersigned were to find that Petitioner's choice for private placement was appropriate, the undersigned finds as a matter of law that Respondent is not

responsible for payment of that placement because Responded has provided to Petitioner Student a free appropriate public education in the least restrictive environment.

Based upon the foregoing Findings of Fact and Conclusions of Law:

**IT IS HEREBY ORDERED**

Petitioners have failed to establish any violation of the Individuals with Disabilities Education Act that would entitle Petitioners to relief; and Petitioners' claim for relief is denied and the Petition is dismissed.

**NOTICE**

In order to appeal this final decision, the party seeking review must file a written notice of appeal with the Director of the Exceptional Children's Division, North Carolina Department of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the parties' receipt of notice of the decision. *North Carolina Policies Governing Services for Children with Disabilities* §1504-1.15.

This the \_\_\_\_\_ day of September, 2011.

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Joe L. Webster  
Administrative Law Judge

A copy of the foregoing was mailed to:

[Father]  
PO Box 232  
Ridgeway, NC 27570

Dale W. Hensley  
Royster, Cross & Hensley, LLP  
P.O. Drawer 1168  
Oxford, NC 27565

James E. Cross, Jr.  
Royster, Cross & Hensley, LLP  
P.O. Drawer 1168  
Oxford, NC 27565

And faxed to:

Lynn Smith  
Consultant for Due Process and Parents' Rights  
N.C. Dept. of Public Instruction  
Facsimile Number: (919) 807-3243

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Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, North Carolina 27699-6714  
(919) 733-3961  
(919) 733-3407 Fax