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[REDACTED]

[REDACTED]

[REDACTED]

RE: In the Matter of: [REDACTED] vs. Wilson County Schools

Docket No. [REDACTED]

Enclosed is an Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/abh
Enclosure

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

██████████

Petitioner

DOCKET NO: ██████████

v.

**WILSON COUNTY BOARD OF
EDUCATION,**

Respondent

FINAL ORDER

This matter came to be heard on ██████████ and ██████████ at the Wilson County Board of Education in ██████████ Tennessee, pursuant to Tenn. Code Ann. §49-10-606 and Tennessee State Board of Education Rule No. 0520-1-9-.08. The Petitioner, ██████████ was represented by ██████████ of the Nashville bar. The Respondent, Wilson County Board of Education, was represented by ██████████ of the Wilson County bar.

The subject of this hearing is Petitioner's claim that she was denied a Free and Appropriate Public Education (FAPE) from the Respondent from the time that she became ██████████ years of age to ██████████ the date when WCS began to provide services pursuant to a mediation agreement with Petitioner's parents. More specifically, Petitioner alleges that Respondent developed an Individualized Education Program (IEP) that proposed to place ██████████ in a pre-existing, predetermined program without first considering ██████████ unique needs or input from ██████████ mother and private therapists. The Petitioner seeks reimbursement for Applied Behavior Analysis (ABA) services she contracted to be provided in her home during the interim between Petitioner's ██████████ birthday and the date on which services pursuant to the mediation agreement began.

After consideration of the record in this case, it is determined that Respondent Wilson County Board of Education did offer FAPE to Petitioner during the period at issue. The

Petitioner's request for reimbursement for alternative educational services is not well founded and is hereby DENIED. As Petitioner was not the prevailing party, no attorney's fees or prejudgment interest is awarded. This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Petitioner () was born . She seemed normal at birth and displayed normal developmental patterns until about when her parents began to notice developmental delays. balance was off, and although she babbled, she did not communicate. Over time, her mother discussed her concerns about development with pediatrician, who made a referral to the on .

2. By sent evaluators to visit the Petitioner, and set an Independent Family Service Plan (IFSP) meeting for . The diagnosis making eligible for services was identified as . At that meeting, the decision was made to provide occupational therapy, physical therapy and speech-language therapy to Petitioner at the offices of , Tennessee. mother signed the documents agreeing to the IFSP.

3. A second IFSP meeting was held to conduct a six moth review. An evaluation of was performed on . An annual IFSP meeting was conducted on .

4. On , coordinator responded by e-mail to an message from in which announced her intention to take to referenced six hours per week of ABA services being received by her nephew in County, whom she described as having very little delay but being . She expressed the opinion that delay was severe enough that it ought to warrant ABA therapy or more therapy than was receiving. She stated she

¹ The nephew in question was receiving ABA services through from . Later, a contractor for behavioral therapy through in County, came to the County home of at the request of to discuss services for .

needed to know why [REDACTED] should have to be autistic to qualify for ABA therapy, and considered such a requirement discriminatory, saying "just because they are Autistic should not mean they get more help than [REDACTED]." Much of [REDACTED] response is blocked by what must be post-it notes covering some of the text when copies of the message were made for exhibit purposes. In what is unobstructed, [REDACTED] asks whether the nephew is receiving his services through [REDACTED], and advises that she has not heard that a particular diagnosis automatically qualifies one for predetermined services. She then describes the process in which the [REDACTED] team (including parents) receive evaluation information, and as a team, incorporate the recommendations into an IFSP that is individualized according to the needs of the child and family. She states: "when we determine the types and frequencies of services, *we look at how the service is supporting the goals that are written in the child's IFSP.*"

5. On [REDACTED] requested a new IFSP review from [REDACTED]. A transition meeting was held on [REDACTED] at [REDACTED] home. [REDACTED] would become [REDACTED] on [REDACTED] and plans for a transition from [REDACTED] to the Wilson County Schools (WCS) system needed to be made. [REDACTED] Local Educational Association (LEA) representative of WCS attended with [REDACTED] from [REDACTED] and [REDACTED] a [REDACTED] coordinator. The notes of the transitional meeting record that the group reviewed the current services being provided (occupational therapy, physical therapy and speech/language therapy), procedural safeguards, and a review of possible options for the future, which included the LEA [REDACTED] four days a week for three hours a day with transportation provided. [REDACTED] committed to forward current assessments and evaluations of AW to WCS. The procedural booklet was given to the family, the questions of [REDACTED] mother were addressed, and [REDACTED] was encouraged to visit the WCS comprehensive development classroom (CDC). [REDACTED] signed the [REDACTED] Form on [REDACTED]. On the same date, [REDACTED] an updated IFSP was completed in which an additional hour of speech and language therapy was added "due to lack of progress" with [REDACTED] speech goals. [REDACTED] could not recall whether she or the speech therapist initiated the increase in services. [REDACTED] testified that her only concerns at this point were about "language delay, lack of progress with her speech." However, shortly after this meeting, [REDACTED] asked [REDACTED] to come to her house to evaluate [REDACTED] for the purpose of receiving ABA therapy.

6. [REDACTED] received a Master of Education degree in the Early Childhood Special Education and Behavioral Analysis Certification Program from [REDACTED] at [REDACTED] in [REDACTED]. He sat for his BCBA certification examination on [REDACTED]. In order to sit for the certification examination, a candidate must have a certain number of hours of graduate credits in specific courses and 1500 hours of experience delivering ABA services. [REDACTED] certification was effective [REDACTED]. Prior to becoming certified as a BCBA, he visited and consulted with [REDACTED] concerning provision of ABA services to [REDACTED] in her home, as he had been providing to [REDACTED] cousin. [REDACTED] had been aware of [REDACTED] and the services he could provide as early as [REDACTED].

7. ABA therapy is based on the research and theories of B.F. Skinner and others. There are a variety of methods under the ABA umbrella, including the work of Ivor Lovaas, discrete trial learning, incidental teaching and embedded instruction. ABA therapy does not work from an IEP. Its principles of formulating observable identifiable quantifiable, verifiable goals and measures of achievement of those goals are applicable to other methods of instruction and other forms of ABA therapy as well. Nonetheless, IEP goals for a year are not written in the same way ABA goals for a discrete task in a skill set are written. No reason was given to determine that discrete trials cannot be embedded in a therapy delivered to individual students in a comprehensive developmental classroom. Except for [REDACTED] contention that a complete absence of distraction would be necessary for [REDACTED] to benefit from therapy, there appears to be no other reason why the ABA therapy [REDACTED] has been providing could not be done in a classroom setting. [REDACTED] and [REDACTED] both disputed whether ABA therapy as he practices it could be delivered in a program that also included occupational therapy, physical therapy and speech and language skills therapy. Yet this was the situation when [REDACTED] began providing services as part of the [REDACTED] program, and not only was progress observed, but there was spillover benefit on the other therapies.

8. On [REDACTED] [REDACTED] requested that [REDACTED] convene a "meeting to discuss a more intensive therapy." In particular, she wanted [REDACTED] to consider contracting with [REDACTED] personally to provide services directly to [REDACTED] at home. The request letter referred to lack of communication progress over a year and a half and a desire for a new approach. She expressed a desire to have as many sessions with [REDACTED] as possible and the willingness to give up other private therapies to get sessions with [REDACTED]. In her letter, she went on to say that [REDACTED]

"needs all we can give her" and "is not ready for the county system." The meeting was held on [REDACTED], the same date [REDACTED] contracted with [REDACTED] to provide ABA services to [REDACTED] in her home.

9. The result of the IFSP meeting was to approve adding six hours of in-home ABA therapy delivered by [REDACTED] to [REDACTED] therapy schedule. In the IFSP document that resulted from this meeting, there are a number of handwritten amendments: The page listing family resources, priorities and concerns substituted [REDACTED] neurologist, for [REDACTED] and listed safety for the first time as a family priority. The record had reflected that [REDACTED] was in a [REDACTED] Program. But it was amended to say "no [REDACTED] Program." (This represented a change. [REDACTED] explained that [REDACTED] therapists at [REDACTED] felt that being exposed to peer modeling might help [REDACTED] with her communication skills and speech.) Some of the goals and action steps on the [REDACTED] print-out were modified in handwriting, and new statements concerning the use of strategies for reinforcers and prompting were added, with a note that "strategies will be provided to the team." Under the heading of Services, additions included "family training (goals 1-4,6), [REDACTED] [REDACTED] 3 times weekly, 2 hrs, [REDACTED] Payor: [REDACTED]" and "Consultation, Prospect, [REDACTED] Payor : [REDACTED]" The notation of participants lists "[REDACTED] (sic) [REDACTED] by report". This is marked out with the notation "error". [REDACTED] did not begin actual service delivery to [REDACTED] until [REDACTED]. The new references to strategies to be provided to [REDACTED] team of therapy providers, and to reinforcers and prompting suggest that, whether or not raised by a report delivered to the [REDACTED] team from [REDACTED] utilization of some of the terms and concepts as used in ABA was discussed at the meeting. Contrary to the orientation of [REDACTED] parents to obtain more and more ABA therapy hours in search of greater progress, [REDACTED] did not think it appropriate to predict how many hours of service per week would be necessary for [REDACTED]

10. On [REDACTED], [REDACTED] completed a form requesting permission for WCS to conduct evaluations of [REDACTED] signed the form signifying her permission for WCS to conduct an individual assessment of [REDACTED]. The signed form was received back by WCS on [REDACTED]. [REDACTED] parents were requested to return the transition referral packet by [REDACTED].

11. [REDACTED] believes it was in [REDACTED] when she called WCS to make arrangements to visit the CDC classroom. She recalls that she was told she could observe for only 15 minutes, because of restrictions pursuant to HIPAA laws. Whenever her visit occurred,

[REDACTED]

12. In late [REDACTED] or early [REDACTED] [REDACTED] requested a new TEIS meeting, which was set for [REDACTED] to review the IFSP. The proposed participants were [REDACTED] early intervention teacher [REDACTED] the therapists from [REDACTED] and [REDACTED]. The notes from the meeting indicate that although [REDACTED] requested an increase in hours of therapy from [REDACTED] and [REDACTED] [REDACTED] denied this because the number of hours [REDACTED] was currently receiving had already resulted in "progress being made in a very short time." [REDACTED] personnel committed to asking the [REDACTED] for guidance with the request. The notes record that the transition process to WCS was discussed with [REDACTED] and that the family will "continue the process to see what they have to offer." [REDACTED] sent the current assessments, evaluations and plan to care to WCS for the purpose of facilitating transition services. [REDACTED] signed the Prior Written Notice document attesting that she received the notice and the copy of family rights, but the exhibit does not contain a page with her signature in agreement, although she testified that she was in agreement and that the comment by her name signifies that she was present and agreed. She had signed her agreement to prior IFSPs. Also on [REDACTED] signed an authorization for release of information about [REDACTED] to WCS and an authorization to access her private insurance coverage "for payment of charges resulting from the provision of services listed above." These services included "speech, ot, pt, feeding, vision, hearing and [REDACTED]." After [REDACTED] learned that her private insurance, [REDACTED] did not cover ABA services, [REDACTED] assumed the expense. [REDACTED] private insurance did cover a percentage of the cost of occupational and physical therapy visits up to 20 visits per year per service. About [REDACTED] [REDACTED] of [REDACTED]

█████ conducted a new developmental assessment of █████ comparing her performance on █████ with her performance on █████ across a number of goals and behaviors.

13. On █████ Dr. █████ of █████ wrote to Dr. █████ pediatrician, concerning her neurological evaluation of █████ In this letter, she stated that █████ continued to have significant delay in expressive and receptive language, showed a noticeable improvement in some skills after receiving ABA play therapy at home, puts everything in her mouth, climbs excessively, does not mind falling, feels no pain, and has poor social skills and eye contact, although this is improving. Dr. █████ notes █████ told her that a cousin has Asperger's syndrome and other relatives have ADHD. One relative is hypotonic. Dr. █████ concluded that █████ "has symptoms entirely compatible with █████ disorder. I am pleased to hear that she is making improvements with the new ABA therapy. Mother would like to receive therapy services through the school and supplement them as much as possible."

14. On █████, at the request of █████ physical therapist █████ and occupational therapist █████ executed a brief joint statement that said "since (█████) began ABA therapy, we have seen an increase in verbalization, eye contact and attention to task during one to one treatment sessions. Progress continues to be made on a week-to-week basis in those areas." Neither █████ nor █████ was trained in ABA therapy. They could not attest to whether the results they were seeing came solely from ABA therapy or an interaction of that with other training of █████ █████ did recommend that █████ continue with her other therapies. She was confident WCS could fashion appropriate an appropriate program for █████ The statement was on plain paper, not letterhead, addressed to "To Whom It May Concern:" However, attached to it and copied superimposed on it was the business card of █████ and █████, owners of █████, whose signatures were not on the statement. █████ believes that she produced this statement at the first IEP meeting, which occurred on █████ Prior to the IEP meeting, █████ WCS occupational therapist, and █████ WCS physical therapist, asked to see █████ to evaluate her.

15. █████ brought an advocate with her to the █████ IEP meeting. She and the advocate arrived 45 minutes late. Because the other IEP team members had another IEP meeting scheduled after this one, they were unable to extend the length of █████ IEP meeting to make up the lost time. █████ brought the statement she had requested from █████ and █████

She also brought a prescription pad form from Neurologist [REDACTED] which bore a handwritten statement that [REDACTED] and asked that that diagnosis of [REDACTED] replace developmental delay. Prior to this time, the operating diagnosis for [REDACTED] had been developmental delay.² That was the diagnosis on the evaluations from [REDACTED] presented to WCS. WCS school psychologist [REDACTED] discussed the necessity of documentation for the State Department of Special Education to recognize the proposed diagnosis of [REDACTED] for [REDACTED]. He offered to perform an evaluation for that purpose. [REDACTED] declined. She asked him for a recommendation for a private evaluation. He suggested the [REDACTED] stated her intention to obtain an evaluation there.

16. [REDACTED] observed that [REDACTED] advocate dominated the available meeting time with her presentation. The necessarily abbreviated meeting was taken up by the presentation of the advocate and the discussion regarding an evaluation to substantiate a diagnosis of [REDACTED]. There was not sufficient time at this meeting to engage in much discussion of the draft IEP that had been prepared for discussion and consideration at that time. [REDACTED] was disappointed that the prescription pad statement was not considered sufficient by the other members of the IEP team to change [REDACTED] diagnosis merely by its submission. She was disappointed that her report that [REDACTED] had made progress only with ABA therapy under [REDACTED] did not lead other members of the IEP team to agree that continuing 1:1 ABA therapy in the home was preferable to any services delivered in a classroom. [REDACTED] testified that she was concerned that [REDACTED] learns only with one-on-one training, and that other activity in the classroom would stop her from learning. She had confidence in the way that [REDACTED] practiced ABA because she had seen improvement with his help. She did not consider use of ABA techniques, as described by [REDACTED] when used in the school classroom "doing it in a way [REDACTED] would understand." She indicated in testimony that she would have considered therapy with a different BCBA or someone trained by [REDACTED].

² [REDACTED] testified that she had at least two conversations with [REDACTED] before the date of the meeting in which she mentioned the new diagnosis of [REDACTED] and the fact that [REDACTED] was now receiving ABA therapy. She stated that he did not tell her in their telephone conversations that anything more than a handwritten note from [REDACTED] would be needed to change [REDACTED] diagnosis, although she did not testify to what information she actually gave [REDACTED] about [REDACTED] documentation of this diagnosis. [REDACTED] recognized that an [REDACTED] diagnosis could be relevant to getting the school system to provide the ABA services she felt were important for [REDACTED].

17. The proposed IEP prepared for discussion at the [REDACTED] meeting was based upon the evaluations and information available to WCS at the time. Suggestions were that [REDACTED] attend the developmental classroom for individualized instruction for three hours a day, four days a week. In addition, she could receive 2.5 hours per week of occupational, physical and speech and language therapy from therapists at the school. Because there was insufficient time, and because [REDACTED] had brought up as a new issue a new proposed diagnosis for [REDACTED] the proposed IEP was not adequately discussed, no decisions were made about an IEP, and [REDACTED] did not consent for the school to provide services according to any agreed-upon plan. While they waited for the evaluation at the [REDACTED] to take place, [REDACTED] encouraged [REDACTED] to bring [REDACTED] to the CDC class on a part-time basis, one day a week, so that the teachers and other school staff could get to know her. [REDACTED] declined to bring [REDACTED] to class at WCS. [REDACTED] testified she was disappointed that her request for the school system to hire a BCBA (Board Certified Behavioral Analyst) to provide 40 hours a week of ABA therapy for [REDACTED] in her home instead of trying services in the WCS was not agreed upon at the meeting. She felt that because the school system did not acquiesce to her request, it failed to properly consider her request. She was also concerned that the school system did not appreciate the need for an adult to be dedicated to 1:1 monitoring of [REDACTED] at all times to prevent her from ingesting something that might be dangerous for her or from having some other type of accident in the classroom. [REDACTED] had pointed out to her on her visit to the classroom that the loft area was gated to prevent children from having access unaccompanied. [REDACTED] had attempted to assure her that the staff at WCS could keep [REDACTED] safe.

18. When the IEP meeting of [REDACTED] was concluded, the intent was to reconvene on [REDACTED] [REDACTED] years old on [REDACTED]. By law, services through [REDACTED] cease at the [REDACTED] birthday. It is expected that transition services through the local school system will begin at that time. However, the evaluation of [REDACTED] at the [REDACTED] [REDACTED] was not conducted in time for a meeting to consider the results of the evaluation by [REDACTED] [REDACTED] who performed the evaluation and prepared the report, dated his report [REDACTED]. However, it was not received by WCS until [REDACTED] [REDACTED].

19. When WCS did not agree at the [REDACTED] IEP meeting to provide ABA services through [REDACTED] to [REDACTED] in her home, [REDACTED] made the decision to provide

the services privately. They initially contracted for 12-15 hours per week of ABA services from several different therapists³, all of whom billed through [REDACTED] and all of whom were directed and supervised by [REDACTED] when he was not providing the direct therapy. [REDACTED] testified to his recollection that [REDACTED] received approximately 10 hours of ABA therapy per week from [REDACTED] until the end of [REDACTED] and then her hours were increased to 18-22 hours per week. The record is not definite on how many hours of therapy were received and when, but it is undisputed that the number of hours per week increased over time. [REDACTED] testified that he noticed a definite increase in [REDACTED] communication skills that paralleled the increase in weekly therapy. In contrast, [REDACTED] an ABA therapist who began work with [REDACTED] after mediation, noted that [REDACTED] performance was variable, rising and falling without a direct relationship to the number of hours per week of therapy received. By the time this matter was mediated in [REDACTED] four different ABA therapists worked under [REDACTED] supervision providing ABA services to [REDACTED]. Because of the expense of privately funding ABA services, particularly at the number of hours weekly [REDACTED] thought important to maximize their daughter's ability to make the most progress she could, [REDACTED] testified that she was unable to continue physical, occupational and speech-language therapy. Although she had made it clear she was unwilling to bring [REDACTED] to WCS for classroom services, and feared for [REDACTED] safety there, she was critical of WCS in retrospect for not urging her to bring [REDACTED] for walk-in therapies or for declining to offer the same therapies at [REDACTED] home. She did not indicate when there would have been an opening in [REDACTED] schedule for these services. She had not expressed the same safety concerns when [REDACTED] received therapy in the classroom at [REDACTED] although the [REDACTED] therapists said there were hazards in the classroom that required them to be vigilant.

20. A second IEP meeting was scheduled for [REDACTED]. A new IEP document was proposed to be used as a springboard for discussion and decision, which reflected incorporation of information and recommendations in [REDACTED] long awaited evaluation, was distributed. [REDACTED] who had been providing ABA therapy in varying intensities to [REDACTED] for between five and six months, attended the meeting and shared a document of proposed goals for [REDACTED] IEP and copies of the data sheets compiled during the therapy he supervised or provided.

³ Originally, through [REDACTED] [REDACTED] received six hours of ABA therapy per week. On [REDACTED] [REDACTED] denied an increase in hours per week of ABA therapy because the existing number of hours of therapy were producing demonstrable results.

directly. Based upon [REDACTED] evaluation, the IEP team added the diagnosis of autism spectrum disorder to the IEP. The WCS members of the IEP team interpreted some of the goals listed by [REDACTED] as being substantially similar to goals already incorporated in the proposed IEP. They agreed to adopt the remainder of the goals and measures proposed by [REDACTED] [REDACTED] and [REDACTED] disputed the view of the other team members that the team had properly understood and adopted [REDACTED] list of proposed IEP goals, and questioned whether other goals, viewed by the rest of the team as already included, properly addressed those goals as [REDACTED] proposed them. The IEP team is charged with stating long term goals for the period of a year. [REDACTED] presented discrete, individual task goals. He explained how ABA goals needed to be written in a style that is very specific as to the particular behavioral response to be trained, what the standard for success would be and how response would be measured. The hierarchy of behaviors related to particular skills was not delineated in his sample goals. Most likely, the current daily goal for therapy sessions on particular skill set and the projected goals for a year would not be identical. The disjunction between the two perspectives was not successfully resolved. In addition, WCS proposed to incorporate philosophy and practices of ABA in their educational instruction for [REDACTED] in the CDC classroom. [REDACTED] the classroom teacher [REDACTED] and others who would be involved in [REDACTED] educational programming and instruction professed to have some training, experience and/or knowledge of discrete trial learning, incidental learning and embedded instruction, all procedures used in the context of ABA. They represented themselves as able to provide services that incorporated ABA procedures to benefit [REDACTED]

21. [REDACTED] has a Doctorate of Philosophy Degree from [REDACTED] at [REDACTED] and a Master of Arts from [REDACTED]. His Master's level training included the use of ABA therapy with [REDACTED] children. His Master's thesis was an ABA study. [REDACTED] supervises discrete trial learning and use of the Eden curriculum in the CDC classroom. He is able to review daily data as needed, and does so several times a week. He has confidence in the fidelity of procedure used by the teachers and aides in the classroom. The teachers monitor and maintain fidelity on the educational assistants.

22. A number of Wilson County educators who participated in the IEP meetings and/or would be working with [REDACTED] in therapy have had training and experience in implementing various principles of ABA therapy. [REDACTED] is a teacher in the WCS. During the [REDACTED]

school year she taught [REDACTED] children. She has training in teaching children [REDACTED] including the [REDACTED] conference at [REDACTED], training in the Eden curriculum that deals with [REDACTED] and training in a sensory Processing disorder Conference. Representatives of [REDACTED] came to her classroom to observe her implementing techniques of ABA therapy. [REDACTED], an educational assistant, attended the same training as [REDACTED]. Another educational assistant, [REDACTED] was trained by [REDACTED] on the Eden method and discrete trials. [REDACTED] is a speech-language pathologist employed by the Wilson County School system. She has had training in working with children with [REDACTED] including professional development courses, [REDACTED] training and other training evens that incorporate all of the treatment methodologies. [REDACTED] is an independent contractor with [REDACTED] who has been working with [REDACTED] since [REDACTED] of [REDACTED]. [REDACTED] has observed [REDACTED] and two therapists working under his supervision work with [REDACTED] in her home. [REDACTED] is a Board Certified Behavior Analyst. [REDACTED] has worked for the Wilson County school system for [REDACTED] years. She has received discrete trial training, training in ABA therapy an in the Eden program. She is implementing ABA in the classroom, supervised by [REDACTED] and in [REDACTED] by [REDACTED]. [REDACTED] provided extensive monitoring and feedback.

23. There was consensus among some members of the IEP team that Wilson County schools was prepared to provide services that would lead to educational benefit for [REDACTED]. [REDACTED] occupational therapist who provides services to students of WCS, did not think that [REDACTED] necessarily needed a 1:1 dedicated aide. She felt there were enough adults in the classroom to ensure that at all times there would be someone who could be available to watch after her safety. [REDACTED] has had some ABA training and uses the principles in her therapy sessions. She has worked with approximately 1000 students in the Smith County and Wilson County School Systems. In addition, she serves as [REDACTED] day camp for children with disabilities, 60 % of whom have diagnoses of [REDACTED]. She is also one of two contacts for the [REDACTED].

24. [REDACTED] attended all there IEP meetings. She does not recall [REDACTED] stating a concern that [REDACTED] have someone with her 100 % of the time, or that an educational assistant needed to be specifically assigned to [REDACTED]. [REDACTED] was confident that [REDACTED] could be kept safe. She has taught children with [REDACTED]. [REDACTED] recalls that the use of ABA therapy

and specific goals recommended by [REDACTED] were discussed. [REDACTED] did not consider suggesting that a BCBA be brought in because she felt capable of using ABA techniques herself to work with [REDACTED]. [REDACTED] prepared the original draft IEP for [REDACTED] based upon the speech, occupational and physical therapy evaluations and information from [REDACTED]. [REDACTED] also did not recall a dedicated aide for [REDACTED] as a major point of discussion. She also believed she was capable of implementing ABA principles in her therapy.

25. [REDACTED] did not consider this information as an adequate grasp of or substitute for the ABA services she requested through [REDACTED] in her home. She told the IEP team that ABA from [REDACTED] was "the one therapy" that was working for [REDACTED]. As explained by [REDACTED] in order to be effective, ABA therapy must be programmed and supervised by a BCBA, must be rigorously and exactly administered according to the service delivery protocol designed by the BCBA, and must be regularly monitored to prevent "drift" by overlapping sessions wherein the BCBA observes the ABA therapist and corrects any variation from protocol. Moreover, if someone not supervised by the BCBA mimics the protocol in a less than completely faithful manner, the resulting variation in reinforcement patterns or what cues are used or response is expected can damage the effectiveness of the ABA training by the ABA therapists by promoting negative learning examples which must be "unlearned.". [REDACTED] and [REDACTED] expressed concerns about drift and fidelity of delivery between the services [REDACTED] was providing and what WCS personnel might do in a broader context of seeking to deliver educational services through their understanding and use of ABA theory and techniques. ⁴ They considered the ABA-related Eden curriculum (which employs discrete trial learning), use of which was proposed by WCS, as inadequate or inappropriate for [REDACTED] needs. Discrete trial learning and the Eden curriculum were in use in the CDC classroom during the [REDACTED] academic year, when [REDACTED] would have been a student if she had begun services through WCS after her [REDACTED] birthday.

26. On [REDACTED], Pediatrician [REDACTED] prepared a letter stating that [REDACTED] requires constant supervision because she is very active and can climb anything. The letter also stated that [REDACTED] might try to eat anything she touches, and concludes that [REDACTED] has a diagnosis of [REDACTED]. She is medically fragile due to her [REDACTED] and requires constant supervision to avoid injury."

27. At some point after receiving this diagnosis, [REDACTED] asked [REDACTED] to provide ABA therapy at home for [REDACTED] as a medically fragile, homebound student. [REDACTED] declined, referring to the Department of Education Rules that define eligibility for homebound placement. Homebound placements are meant to be temporary and shall not exceed 30 days duration. TN State Board of Education, Division of Special Education Rule 0520-01-09.07(3). Section 2(b) of the same Rule requires that the IEP team shall consider a medical homebound placement only upon certification by a licensed doctor of medicine or osteopathy that a child with a disability needs a homebound placement, is expected to be absent from school due to a physical or mental condition for at least (10) consecutive school days and that the child can receive instruction in a homebound placement without endangering the health of personnel providing it. Students placed in homebound placements are to be returned to a less restrictive environment as soon as possible. [REDACTED] request did not fit this category, despite the statement of [REDACTED] pediatrician that because of her [REDACTED] should be considered medically fragile. It should be recalled that under the IDEA, the school system has an obligation to place students in a setting for educational services that is the least restrictive environment in which services can be safely and appropriately delivered. That is, services should be delivered in the environment that is both feasible to provide an educational benefit and most similar to that in which developmentally typical peers are educated. In Wilson County, that environment for [REDACTED] is the CDC.

28. On [REDACTED] a third IEP meeting was convened at the request of [REDACTED] to discuss [REDACTED] recent pica diagnosis and the safety concerns associated with [REDACTED]. [REDACTED] recalls she had expressed reservations about [REDACTED] physical safety at WCS previously, and had not been reassured by statements that though a 1:1 aide dedicated only to [REDACTED] might not be provided, some adult in the classroom would be responsible for watching [REDACTED] at all times, even if it was not always the same adult. [REDACTED], [REDACTED] physical therapist, who provided services to [REDACTED] at the [REDACTED] classroom, noted that one did have to keep watch on [REDACTED] but she was able to manage [REDACTED] behavior and other safety concerns in the classroom there,

and thought it could be managed at WCS also. The members of the IEP team who attended the [REDACTED] IEP meeting considered the issue under discussion whether [REDACTED] should have ABA therapy in the home or whether WCS could provide adequate ABA therapy in the classroom. In their recollection the safety issue from the [REDACTED] did not loom as large as an issue. The important issue was whether WCS could provide acceptable ABA services. The individuals who would be providing services directly to [REDACTED] were confident that they were prepared to do so. Members of the IEP team who were there to represent non-special education functions, such as the assistant principal and regular [REDACTED] teacher, listened to the discussion, acknowledged the greater expertise of their special education colleagues on this question and agreed with their colleagues' assessments.

29. [REDACTED] did not concur with the special educators on the IEP team. She continued to think as she had thought since first hearing about [REDACTED] and his practice of ABA therapy, that his methods were the only procedures that had or could give [REDACTED] a chance at progress or prevent regression of what she had accomplished.⁵ She was unwilling to rely upon the personnel of WCS to provide the level of services she most wanted for her daughter. When the IEP team did not adopt her request to have private ABA therapy in her home, [REDACTED] declined to sign the IEP on [REDACTED]. She then filed a due process request on [REDACTED].

CONCLUSIONS OF LAW

1. The IDEA requires Respondent Wilson County Board of Education to provide FAPE in the "least restrictive environment" to all students with disabilities who are in need of special education and related services. 20 U.S.C. §1400 *et seq.*; TN State Board of Education, Division of Special Education Rule Chapter 0520-1-9. This shall be done by developing an IEP that is "reasonably calculated to confer educational benefit" to the students. *See Bd. of Educ. of the Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176 (1982). As the Supreme Court concluded in *Rowley*, "If these requirements are met, the State has complied with the obligations

⁵ In fact, even [REDACTED] noted regression frequently when [REDACTED] did not have ABA therapy over weekends, holidays or any other breaks in service, regardless of the number of hours of therapy per week she had been receiving. [REDACTED] noted that [REDACTED] progress and retention went up and down on a regular basis, unrelated to the intensity of therapy to maintain performance. There is reason to believe that even with [REDACTED] performing ABA therapy that there are limits to what additional hours of therapy can accomplish and that not as much training is being inculcated and generalized as might be thought.

imposed by Congress and the courts can require no more.” 458 U.S. at 207. The law does not require the Respondent to maximize the Petitioner’s educational benefits, or to guarantee that she reach a specific level of academic achievement. Rowley, at 197. The Sixth Circuit has held that this means “[t]he statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children.” Renner v. Board of Educ. v. Public Schools of City of Ann Arbor, 185 F.3d 635, 644 (6th Cir. 1999). *See also*, Doe v. Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993).

2. The IDEA, at 20 U.S.C. §1414(d)(1)(A) requires that an IEP include, among other things, (1) a statement of the child’s present levels of educational performance; (2) a statement of measurable annual goals; (3) a statement of the special education and related services and supplementary aids and services to be provided to the child that, to the extent practicable, are based on peer reviewed research; (4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the nonacademic and extracurricular activities; (5) a statement of how the child’s progress toward the annual goals will be measured; and (6) a statement of how the child’s parents will be regularly informed of their child’s progress. These “are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused.” Cleveland Heights-University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 398 (6th Cir. 1998). Petitioner’s proposed IEP contains all these elements.

3. In Rowley, the Supreme Court developed a two-prong test for determining the appropriateness of a proposed IEP. First, the IEP must be substantively appropriate by offering goals and objectives that are “reasonably calculated to provide educational benefit” to the child. Second, the procedural safeguards of the Act must be provided to the parents, including the right to participate in the development of the IEP and to receive notification and explanation of their rights. The Court has interpreted the IDEA’s “free appropriate public education” obligation to require local school systems to develop IEPs that are “reasonably calculated” to provide educational benefit to a child. Rowley, at 203-204. While the educational benefits accruing to the child must be “meaningful,” there is no requirement that the program provide the maximum benefit or the best available program. Rowley, at 200-201.

4. The Petitioner has the burden of proving by a preponderance of the evidence that her IEP was inadequate and that she has not been offered FAPE from the Respondent. The U.S.

Supreme Court held in Schaffer v. Weast, 546 U.S. 49 (2005), that the burden of proof is on the party "seeking relief." In the instant case, the Petitioner has challenged the proposed IEP developed over [REDACTED] and [REDACTED] and intended to be implemented in Wilson County's CDC classroom at [REDACTED] as inadequate to provide FAPE. In the alternative, the Petitioner requests a determination that the [REDACTED] IEP would have placed Petitioner in a pre-existing, predetermined program without first considering Petitioner's unique needs and input from Petitioner's mother and private therapists and that Petitioner should therefore receive reimbursement for cost of the private in-home 1:1 ABA therapy program selected instead by Petitioner's mother for services to Petitioner from [REDACTED] until [REDACTED] (when WCS began serving [REDACTED] through an agreement reached in mediation), at a cost reported to be \$ [REDACTED].⁶

5. Rowley, which requires that the IEP be reasonably calculated to provide an educational benefit to the child, also held that a school district has discretion to use whatever methodology will allow a child to receive an educational benefit. The gist of Petitioner's case is that when Wilson County Schools did not accede to [REDACTED] request that the IEP approve exclusive private in-home ABA therapy from [REDACTED] for Petitioner at WCS expense because [REDACTED] had shown some progress under [REDACTED] services once this therapy was added, WCS denied Petitioner FAPE, denied her parents meaningful participation in the IEP process and predetermined the appropriateness of an existing placement without considering Petitioner's unique needs. Petitioner's arguments are not persuasive. The preponderance of the evidence supports a determination that WCS did offer Petitioner an IEP that constituted FAPE, that her parents were accorded the opportunity for meaningful participation in the IEP process, and that Petitioner's unique needs were given consideration and addressed in the IEP.

6. The IEP of [REDACTED] provided FAPE. The IEP prepared for discussion on [REDACTED] formed the departure point for discussion on [REDACTED]. That IEP reflected the discussions of the [REDACTED] IEP meeting attended by ABA therapist [REDACTED]. The IEP team adopted goals brought by and proposed by [REDACTED]. It incorporated and considered implications of the [REDACTED] diagnosis and evaluation conducted by [REDACTED]. It provided for the use of ABA principles and techniques, among other methodologies, by

⁶ Although Petitioner presented post-hearing documents attesting to the total cost of ABA services by all providers during this period, the amount was not proven at hearing. As the Petitioner is not being awarded reimbursement in this Order, the matter of the precise amount actually expended is moot.

classroom teachers and aides. The IEP team agreed that someone needed to monitor [REDACTED] for [REDACTED] incidents at all times, but differed from the parent in proposing that the same person might not discharge this responsibility during the entire day. The IEP's goals, including those on the proposal brought by [REDACTED] addressed Petitioner's level of development and unique needs for instructional content and methodology. It offered APA methodologies, but not in as rigid and restricted form as implemented by [REDACTED]. It contemplated an ABA collaboration with ACBA [REDACTED], but an actual ABA program for [REDACTED] was never shared by [REDACTED] with the IEP team. The IEP provided appropriate educational instruction in a less restrictive environment than private in-home therapy would do. It provided related services of physical therapy, occupational therapy and speech/language therapy not available to the Petitioner in the home. It provided peer modeling opportunities in the classroom. It made provision for Petitioner's safety in the classroom.

7. Petitioner does not agree that the IEP provided FAPE because much of the education is delivered in the Wilson County CDC classroom, methodologies other than the specific form of ABA Petitioner has been receiving were proposed for use, and the services were not to be delivered in Petitioner's home, which Petitioner's mother considered a much safer environment for Petitioner because of her [REDACTED] and her lack of appreciation of danger when climbing and one in which distractions could be severely limited. The IEP also failed the approval of Petitioner's mother because it was not a continuation of the in-home ABA services by [REDACTED] that Petitioner had received at her mother's request from [REDACTED]. The record is clear that even before ABA therapy was presented as a request at an IFSP meeting, JBA therapy from [REDACTED] was specifically what [REDACTED] wanted.

8. The IEP meetings afforded Petitioner's mother the opportunity for meaningful participation in the IEP process. The preponderance of the evidence is that IEP team did not predetermine what educational instruction was available in WCS and then assign that to Petitioner without consideration of her unique needs. [REDACTED] concerns for therapy were heard at all three IEP meetings. Failure to adopt her proposal uncritically does not constitute a lack of meaningful participation. [REDACTED] participation could as easily be described in the manner she describes WCS, that she had predetermined what therapy would be acceptable and would only consider in-home ABA therapy with [REDACTED]. The IEP team considered her concerns about safety and her conviction that ABA therapy as practiced by [REDACTED] was the only therapy that

was effective with her daughter. The IEP sought to provide effective therapy through use of accepted methodologies of ABA principles and practice, while also providing a less restrictive environment, a selection of needed related services, safety precautions, peer interactions as modeling, and a less restrictive environment for her instruction.

9. Petitioner's unique needs were considered and addressed in the IEP. The short and long term goals in the IEP reflect consideration of the evaluations, therapy reports and the input in IEP meetings. Being served in a classroom setting where there are other children does not indicate a lack of consideration of the student's unique needs if the student has an education program designed for his or her specific level of development, method of learning and educational goals.

10. When an IEP targets the child's unique needs, is administered by qualified personnel, and is implemented based on accepted principles in the field of [REDACTED] the school system does not violate the IDEA when it denies a parent's request for an ABA-based [REDACTED] Joshua A. v. Rocklin Unified School District, 52 IDELR 64 (9th Cir. 2009). It has been established that the IEP targeted [REDACTED] unique needs. The record also establishes that the personnel of WCS who were to implement the IEP were qualified personnel, and the program they proposed to implement was based upon accepted principles [REDACTED] including principles and methodology of ABA as promulgated by the [REDACTED] program.

11. Parents of students with disabilities, including students with [REDACTED] disorder, cannot dictate the instructional methodology that is used by a school district to implement an appropriate IEP. See Lachman et al v. Illinois State Board of Education, 441 IDELR 156, 853 F.2d 290 (7th Cir. 1988) In Lachman the Court found that "Rowley leaves no doubt that parents, no matter how well motivated, do not have a right under the act to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a disabled child".

12. There are numerous cases that find a school system's IEP appropriate without the inclusion of an intensive ABA program for the child at home. In Brown v. Bartholomew Consolidated School Corporation, 43 IDELR 60 2005 WL552194 (D. Ind. 2005), the District's IEP was found appropriate [REDACTED] even though it did not provide him with his parents' preferred methodology-at home, one-to-one ABA instruction by trained ABA instructors. The Court found that the District was not required to adopt the parents'

preferred program because there was no evidence that their chosen methodology was the only one that would provide him an educational benefit. While the Court found the student progressed through his at-home ABA instruction, that fact alone does not establish that ABA was the only way for him to be educated nor did it establish that it was unreasonable at the time the District created his IEP "to suppose that he could receive meaningful educational benefits from this program that did not include ABA". Or, as applied to the instant case, that he could receive meaningful educational benefits from a program that combined some elements of ABA training with additional methodologies.

13. In Michael J. v. Derry Township School District, 45 IDELR 36 (M.D. Pa. 2006), a case where the child was receiving an intensive ABA program at home, the Court found that the goals and objectives of the school district's IEP were appropriately designed to provide the student with a meaningful educational benefit and that the goals and the objectives were developed based on evaluations, assessments, parental input, and observations of the student (in the instant case by his various therapists). In addition, the techniques, which included some ABA techniques, used to implement the IEP were reasonably calculated to provide the student with an education that would help him meet his goals and objectives. Similar to the instant case, the IEP also placed the student in the least restrictive environment to meet his needs, giving him the opportunity to interact with non-disabled peers, as opposed to a more isolating home based program.

14. In J.P. v. West Clark Community Schools, 38 IDELR 5, 230 F. Supp. 2d 910 (S.D. Ind. 2002), the Court was not convinced that the ABA/discrete trial training approach was the only appropriate methodology for teaching the student. There, as in the case of [REDACTED] the school district demonstrated a willingness to incorporate ABA and discrete trial methods into its teaching plans and demonstrated flexibility by adding more hours and communication goals to the child's program.

15. In Renner v. Board of Education of the Public Schools of Ann Arbor, 30 IDELR 885, 185 F. 3d 635 (6th Cir. 1999), the Court found that the IEP team appropriately incorporated discrete trial instruction into a comprehensive curriculum and determined that the parents could not prescribe their desired methodology. In Renner, the Court found that the expert used by the parents prescribed to only one methodology. This is similar to the testimony that has been heard in support of [REDACTED] position, specifically the testimony of [REDACTED] and [REDACTED]

16. While there was a great deal of testimony about the different teaching methods available, and whether they had been peer-reviewed, at least one Court has found that a school district has the right to choose among methodologies, whether peer-reviewed or not, for [REDACTED] Encinitas Union School District, 5 ECLPR 117 (SEA Cal. 2008)

[REDACTED]

18. There was abundant proof presented in this hearing that the professionals in the Wilson County School system who would be working directly with [REDACTED] had attended numerous workshops, including the extensive [REDACTED] training, were familiar with different methodologies employed with children [REDACTED] and had direct experience working with children [REDACTED]

19. When a parent requests a particular methodology, it has been held that a school system does not need to compare the qualifications of its staff with that of the parents' chosen private providers; rather, the school district must show that its staff is trained and qualified to implement the child's educational program. G v. Fort Bragg Dep. Schs., 40 IDELR 4, 343 F. 3d 295 (4th Cir. 2003)

20. The IEP teams are not required to name a particular brand of instructional methodology in an IEP even though the parents may desire a specific methodology and may have independent evaluators who recommend it for the student. The test is still this: "whether the student's program is designed to confer an educational benefit". See Shakopee Indep. Sch. Dist., 52 IDELR 210 (SEA MN 2009)

21. Courts have repeatedly rejected the notion that ABA-based programs are the only acceptable method of educating children [REDACTED] Freemont Unified School District, 49 IDELR 114 (SEA CA 2007)

22. While [REDACTED] and [REDACTED] had clearly received extensive training in principles of ABA therapy, [REDACTED], when first employed after the Fall Break in [REDACTED], had not had such training. [REDACTED] and [REDACTED] provided on-the-job training for her and worked with her in a classroom setting. Special Education personnel do not need to have training with regard to each disability identified in the IDEA in order to satisfy the IDEA's personnel requirements. The fact that a Special Education teacher had implemented a [REDACTED] old's IEP for three months without receiving training [REDACTED] did not make a Wisconsin District liable for denial of FAPE. See Boyceville Community School District, 48 IDELR 297 (SEA WI 2007) In that case, the Administrative Law Judge found that the parent did not provide any evidence showing that the teacher was unable to teach the child effectively.

23. There is no established methodology for educating children [REDACTED] A district is free to apply any methodology that will allow a child to receive an educational benefit. See Long Beach Unified School District, 49 IDELR 210 (SEA CA 2008)

24. [REDACTED] also attempted to show that school system professionals predetermined an IEP for [REDACTED] by bringing a draft IEP to the IEP team meeting and communicating by e-mail among themselves what might be appropriate to include in an IEP. case law does not support such a determination. School systems are permitted to discuss a child's Special Education needs, as well as potential services and placements, in advance of an IEP meeting. However, their employees must arrive at the meeting with an open mind and consider the parents input. See T.P. and S.P. ex rel S.P. v. Mamaroneck Union Free School District, 109 LRP 5967 (2d Cir. 2009) See also Ms. C. ex rel N.L. v. Knox County Schools, 315 F.3d 688 (Circ. 2004). Petitioner's contention rests on an interpretation that when some IEP members testified that after hearing the discussion, they agreed with their colleagues who had more experience, they were failing to give appropriate consideration to the information [REDACTED] brought to the meeting. Their testimony does not communicate that they merely abdicated their responsibility as members of the committee to consider all input, just that in considering it, they gave more weight other professional expertise of their colleagues that to [REDACTED] preference for ABA as practiced by [REDACTED] only in her home with [REDACTED] or a similarly credentialed BCBA.

25. [REDACTED]
[REDACTED]



26. Where the IEP team thoroughly discussed the child's placement in services at the IEP meeting with the parent, the district's Director of Pupil Services expression of an opinion about a child's placement prior to an IEP meeting did not mean that the district predetermined placement. Solana Beach School District, 49 IDELR 237 (SEA Cal. 2008)

27. To establish predetermination, the parents must show that the district was unwilling to consider other placements. H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (9th Cir. 2007, unpublished) In the instant case, not only did the district argue that it could provide ABA related therapy through its' classroom personnel, the district pointed out that in-home placement was not the least restrictive environment and did not afford the Petitioner with peer modeling or opportunities to interact in a small group context.

28. Researching placement options prior to an IEP meeting does not mean that predetermination has occurred. The district is required to determine if there was an appropriate public school placement before agreeing to private placement. Schoenbach v. District of Columbia, 46 IDELR 67 (D. D.C. 2006)

29. School officials are permitted to form opinions and compile reports prior to IEP meetings, as long as an meaningful IEP meeting is subsequently conducted where various options are discussed and considered. E.W. v. Rocklin Unified School District, 46 IDELR 192 (E.D. Cal. 2006)

30. The IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions. The fact that a parent's

suggestions are not accepted and incorporated into the IEP does not necessarily constitute a violation of the IDEA. L. M. v. Hawaii Department of Education, 46 IDELR 100 (D. HAW. 2006)

31. The right of parental participation is not violated where teachers and staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made. N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003). School officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind. Doyle v. Arlington County School Board, 806 F. Supp. 1253, 19 IDELR 259 (E.D. Va. 1992).

32. At all times relevant herein, the parents of [REDACTED] have declined to cooperate with the school system by allowing them to implement an IEP. They have refused to sign a proposed IEP, even after the goals suggested by their expert, [REDACTED] were incorporated. And, while not technically before this Hearing Officer for consideration, at the time of the hearing of this matter, they had not signed the IEP which specifically included modifications they had suggested.

33. In Colbert County Board of Education v. BRT, by and through her mother and next friend, Theresa T. Cagle, 51 IDELR 16, U.S. District Court (N.D. Alabama 2008), the Court held that an Alabama school district could not be found liable for failing to provide IDEA services because the parents' refusal to consent relieved the district of liability for any FAPE violation. While the Court acknowledged the parents' belief that the proposed IEP was inappropriate, the Court found that a district cannot implement a proposed IEP without the parents' consent. If a parent refuses to consent to the provision of services or does not respond

to the district's request for consent, the district does not commit a FAPE violation by failing to provide those services.

34. Likewise, the parents' request to recover the costs of their son's home-school program was denied in Astourian v. Blue Springs R-IV School District, 50 IDELR 282, U.S. District Court, (WD Missouri, 2008). In support of its decision, the Court pointed out that the parents participated in all of the child's IEP meetings, the IEP included observations by the parents' consultant and the district allowed the consultant to observe the student in class. The school district offered the child FAPE and the parents were not entitled to reimbursement. In Astourian, the Court further found that the IDEA does not require that progress be attained in a certain time frame as every child progresses at a different rate. In the instant case there is evidence that even with intensive ABA therapy, Petitioner's progress has waxed and waned.

35. The case of Sytsema v. Academy School District No. 20, 50 IDELR 213, 538 F.3d 1306 (10th Cir. 2008) is almost exactly on point. The 10th Circuit concluded that the parents' withdrawal from the IEP process made any procedural violation by the district harmless. The Court found that a procedural violation of the IDEA is actionable only if it results in substantive harm. The 10th Circuit found that the parents withdrew from the IEP process when they learned that the district intended to deliver services in an [REDACTED] environment. U.S. Circuit Judge David M. Ebel wrote "the parents made this decision in spite of the fact that the district had not yet finalized its offer for educational services". The parents' decision to continue the child's home-based program effectively terminated the IEP process. The parents of [REDACTED] have acted almost identically to the facts contained in Sytsema. However, there is no procedural violation before this Hearing Officer.

36. The district was not required to reimburse the parents of a [REDACTED] child with [REDACTED] for additional hours of ABA therapy in the home in J.A. and E.A. ex rel M.A. v. East Ramapo Cent. Sch. Dist., 52 IDELR 196 (S.D. N.Y. 2009). The Court found that the district does not have to show that it offered the amount or type of services that would maximize a child's potential. It is sufficient that the district offered a program which was reasonably designed to enable the child to reap an educational benefit.

37. In Tarlowe v. New York City of Education, 50 IDELR 186 (S.D.N.Y. 2008), the Court denied the parents of a [REDACTED] request to recover the costs of their son's private placement concluding that the district offered the child FAPE. There, the Court found that the IEP contained fourteen annual goals, each of which had 2 to 4 short term objectives. While the goals themselves are generally stated, they contain sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration and percentage of accuracy required for progress.

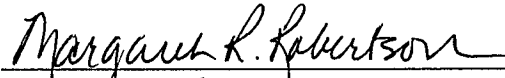
38. The Petitioner is not entitled to any attorney fees, costs and/or pre-judgment interest. As noted previously, the burden of proof is, and remains at all times, on the Petitioner. The Petitioner has carried their burden on no issue in this matter. The Petitioner has proven no procedural violation by the school system and, even if they had, their withdrawal from the IEP process negates any procedural violation that may have occurred.

39. It is apparent in the record that [REDACTED] parents have devoted their energies to obtaining for her as much of the specific therapy that appears to have had the most visibly beneficial impact on her performance as they could obtain in the effort to help [REDACTED] progress as far and as quickly as possible. Certainly when first begun, ABA therapy directed by [REDACTED] increased [REDACTED] attention span, eye contact and responsiveness to cues and reinforcement so that, utilizing these skills, she could achieve and demonstrate improvement on other tasks and in other therapies as well. The other therapists not only remarked on the amount of direct progress that

resulted from the ABA therapy sessions, but how they were able to utilize these newly acquired skills to make more progress on their own therapeutic goals. This finding, taken together with the observation of variability in performance not being well correlated with number of hours of therapy per week, confirms the importance of an IEP broader than strictly ABA therapy.

40. The Wilson County School System did offer a free appropriate public education to Petitioner. While it is understood that Petitioner's parents were acting in what they considered to be Petitioner's very best interests, Petitioner's decision to decline the services of Wilson County Schools and to undertake exclusive intensive private ABA therapy was a choice made by Petitioner's parents and does not compel Wilson County Schools to reimburse Petitioner for the cost of that therapy. It was Petitioner's parents, from their first request for ABA services from [REDACTED] who were predisposed to consider only the therapy that had been recommended to them by a relative, and when that therapy succeeded in providing a new measure of progress, only that therapy they considered the most effective therapy available. The record reveals there were limitations to progress with the chosen therapy, and a lack of proof that the IEP team's recommendations would not have afforded Petitioner with a free appropriate public education that is reasonably calculated to provide an educational benefit. The Petitioner has failed to establish by a preponderance of the evidence that she was denied FAPE by the Respondent or that the Respondent denied Petitioner's parents meaningful participation in the development of Petitioner's education. As the Petitioner has not prevailed, Petitioner is not entitled to retroactive reimbursement, attorney's fees or prejudgment interest.

This Initial Order entered and effective this 15th day of March 2010.



Margaret R. Robertson
Administrative Judge

15th Filed in the Administrative Procedures Division, Office of the Secretary of State, this
day of March 2010.



Thomas G. Stovall, Director
Administrative Procedures Division

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.