This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Student:	A.L.
Date of Birth:	<redacted>
Hearing Dates:	January 26, 2010, March 11, 2010, March 26, 2010, April 15, 2010, and May 6, 2010
ODR File No.:	# 00236/09-10AS
MAWA Holder:	Elwyn, Inc.

CLOSED HEARING

Parties:	Representatives:
<Parents>	Parent Attorney: Charles Weiner, Esq. 179 North Broad Street Doylestown, PA 18901
Elwyn, Inc.	MAWA Holder Attorney: Natalie M. Habert, Esq. Beatty Lincke 200 Old Forge Road, Suite 202 Kennett Square, PA 19348

Date Record Closed:	May 21, 2010
Decision Date:	June 5, 2010
Hearing Officer:	Gloria M. Satriale, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter referred to as "FAPE") for <student> (hereinafter referred to as "Student"), an eligible four year old student, who resides with his Parents within the <redacted> School District (hereinafter referred to as "District") and who has been diagnosed with Autism Spectrum Disorder (hereinafter referred to as "ASD").

This action challenges the actions of the agency charged with the provision of early interventions services for the District, Elwyn (hereinafter referred to as the "MAWA Holder") in failing to ensure meaningful educational progress through the development and implementation of an appropriate Individualized Educational Plan (hereinafter referred to as "IEP") and program in violation of the Individuals with Disabilities Education Act (hereinafter referred to as "IDEA"), 20 U.S.C. §§ 1400 *et seq.* The Parent seeks reimbursement for the complement of home based services asserting that the Student cannot make meaningful progress in other than an environment free from distraction and one sterilized to protect against the Students significant allergies.

The District takes the position that the only expert evidence presented by a professional who worked with the Student in both individual one to one therapy as well as within a center based group setting for a significant period of time, supported a center based placement. The District further relies upon the recommendation of a center-based placement as one in accordance with mandates of the Least Restrictive Environment (hereinafter referred to as "LRE") and, more importantly, that the complement of home

based services requested by the parent are not appropriate and cannot be implemented with fidelity.

Due process concerning the current matter was filed with the Office for Dispute Resolution on December 3, 2009. The resolution meeting was waived[1]. A due process hearing was conducted in this matter on January 26 2010, March 11, 2010, March 26, 2010, April 15, 2010, and May 6, 2010.

a. Exhibits were submitted and accepted on behalf of the Hearing Officer as follows:

   HO-1

b. Exhibits were submitted and accepted on behalf of the Parent as follows:

   P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-12, P-13, P-14, P-15, P-17, P-18, P-19, P-20, P-21, P-22, P-28, P-31, P-33, P-37, P-38, P-39, P-40, P-41, P-42, P-43,

c. Exhibits were submitted and accepted on behalf of the District as follows[2]:

   SD-9, SD-14, SD-15, SD-16, SD-18, SD-19, SD-20, SD-21, SD-23, SD-24, SD-26, SD-27, SD-28, SD-29, SD-30, SD-33, SD-35, SD-36, SD-37, SD-38, SD-39, SD-40, SD-41, SD-42, SD-43, SD-45, SD-46, SD-47, SD-48, SD-49, SD-50, SD-51, SD-52, SD-53, SD-54A, SD-54B, SD-54C, SD-54D, SD-55, SD-56, SD-58

d. Exhibits were submitted and accepted on behalf of the MAWA Holder as follows:

   MH-A, MH-B, MH-C, MH-D, MH-E

[1] The resolution meeting was waived by the parties since the parties participated in a mediation which resulted in agreement regarding some of the issues in this due process.

[2] Under early intervention, the responsibility for the delivery of services for a School District is through the MAWA Holder. It is noted that the volumes of testimony indicate representation is on behalf of the "School District" and notes exhibits submitted on behalf of the "School District", and witnesses testifying on behalf of the "School District". For the sake of consistency, exhibits are labeled as they appear in the notes of testimony as "School District", however the party will correctly be referred to as the MAWA holder.

For the reasons that follow, I find that the proposal of MAWA Holder was inappropriate and, thereby failed to provide a FAPE. Additionally, the program sought by the Parents likewise fails to be reasonably calculated to effect meaningful progress. Therefore, in accordance with the applicable legal standards and pursuant to the ORDER that follows, Parent's claim for reimbursement is **DENIED** and the IEP team is directed to reconvene to develop a program in accordance with that ORDER.

ISSUES

The issues presented at this hearing included the following:

1. Was the program and placement the MAWA Holder offered to the Student appropriate?[3]

2. If the program and placement offered to the Student was not appropriate, was the unilaterally

[3] Originally the Due Process action included claims for compensatory education for the lack of provision of the appropriate intensity of services. A Motion to Dismiss was filed, based on the fact that the parties, in connection with the settlement reached during mediation, waived all claims to compensatory education under a general release. The Motion to Dismiss sought to dismiss the action in its entirety to wit: (1) the claims arising prior to June 30, 2009 are barred by the release contained in the Mediation Agreement signed by Parents; (2) As a matter of law, Parents are not entitled to have their own unilaterally selected methodology funded at public expense; (3) The Hearing Officer lacks jurisdiction over claims for discrimination and retaliation asserted by Parents. Following a hearing on the motion to dismiss, the motion was granted with respect to the first ground and denied with respect to the remaining two. Additionally it is noted, that even if it were found that the general release did not serve to release claims for compensatory education, a claim for compensatory education cannot lie in this matter as it is inapposite to a claim for reimbursement of a private program. Compensatory education is not available remedy where, as in this case, a child has not been unilaterally placed in a private program. In such cases, the only potential remedy is reimbursement for private program. *P.P ex.rel. Michael P. v. West Chester Area School District.*, 585 F.3d 727 (3d Cir. 2009), citing 20 U.S.C § 1412(a)(10); 34 C.F.R §§300.137, 300.138, 300.148(c); *In re The Educational Assignment of J.D.*, Spec. Educ. No. 1120, at 14 (Pa. Spec. Educ. Appeals Panel 2001) ("[T]uition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under the IDEA thereby failing to give the child a FAPE. In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time." (citations omitted)).

secured complement of private home-based services chosen by the Parent appropriate?[4]

3. If the MAWA Holder did not offer the Student an appropriate program and unilaterally secured complement of private-home based services chosen by the Parent were appropriate, are there equitable considerations that would serve to remove or reduce the MAWA holder's responsibility to reimburse the Parent for the Student's tuition for that school year?

FINDINGS OF FACT

1. Student was born on <redacted>, and is an eligible young child under Part B of the IDEA.

2. The Student resides with his parents, <parents> (hereinafter referred to as "Parents") at <redacted>, Pennsylvania. (NT 154)

3. Both Parents are very involved in the care, treatment and development of the Student. (NT 172-174)

4. Under Part B of the IDEA, the State Educational Authority (hereinafter referred to as "SEA") is responsible for providing special education services to eligible young children between the ages of 3 and the age of beginners.

5. In Pennsylvania the SEA, through the Office of Child Development and Early Learning (hereinafter referred to as "OCDEL"), provides pre-school early

[4] At the second hearing session in this case, the issues for hearing were identified as whether the IEP of June 9, 2009 offered a FAPE, and whether parents were entitled to reimbursement for the cost of their private program from July 1, 2009 to June 1, 2010- the term of the IEP at issue, after consideration of the Mediation Agreement – including extended school year services (NT 150-153). During the course of the Parents' case in chief, Parents own witnesses opined that the <redacted> program which constituted the bulk of the unilaterally selected private program was not an accepted or research based methodology for educating children with ASD, and that it was not appropriate for the Student (NT 267-363, 437-522). During the 4th hearing session, Parents withdrew their claim for reimbursement of the <redacted> portion of their private program, which constituted the bulk of the time and cost of their private program. (NT 937-938)

intervention services under Part B of the IDEA through annual Mutually Agreed upon Written Arrangements (hereinafter referred to as "MAWAs") under Pennsylvania Act 212.

6. Elwyn was the MAWA-Holder for <District> for fiscal years 2008-2009 and 2009-2010.

7. Services for Infants and Toddlers under Part C of the IDEA are provided through ChildLink in <District>. (NT 987-1111; SD- 2).

8. On or about May 15, 2007 the Student was diagnosed ASD, in particular, Pervasive Developmental Disorder, Not Otherwise Specified (hereinafter referred to as "PDD-NOS") noting a loss of previously acquired skills, including language skills, at the age of 17 months. (NT 276-363; SD-3; SD-6; SD-7)

9. Dr. Schwartz, who saw the Student for initial diagnosis and in follow-up, was qualified as an expert in the areas of child psychology, the assessment and diagnosis of autism spectrum disorder, and the development of programming for children with autism spectrum disorder. (NT 283- 285)

10. Dr. Schwartz issued a report (P-1) which she noted a diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS); communication difficulties and problems with social environment. [NT 285-328]

11. A Multidisciplinary Evaluation ("MDE") and Individualized Family Service Plan (hereinafter referred to as "IFSP") were developed by Childlink on May 31, 2007 which identified significant delays in speech/language; low tone and weakness; sensory and behavioral difficulties and provided for the Student to receive 26 hours of Special Instruction (hereinafter referred to as "SI"), Physical Therapy (hereinafter referred to as "PT"), Occupational Therapy (hereinafter referred to as "OT") and Speech Therapy (hereinafter referred to as "ST") every 6 months, and 52 hours

every 6 months of at home behavioral services from the Lovaas Institute, as well as 15 hours a month of service coordination services, all to be provided in the family home. This translates into approximately 1.12 hours a week of SI, PT, OT and ST, and 8.66 hours a week of behavioral intervention for a total of about 13.14 hours a week of direct intervention. (SD-2)

12. The Student transitioned from eligibility for Infant Toddler Services under Part C of the IDEA to eligibility for Preschool Early Intervention Services under Part B of the IDEA (hereinafter referred to as "EI") on <redacted> third birthday. (SD-1; SD-2)

13. In preparation for this transition, MAWA-Holder completed its initial Evaluation Report ("ER") on May 7, 2008 with considerable input from Parents. (SD-1; SD-2; SD-3; SD-4; SD-5; SD-7) The ER found the Student eligible for services. (SD-7)

14. An Individualized Education Plan ("IEP") was prepared on June 12, 2008 at a meeting attended by, among others, both Parents and the supervisor of Student's Home Program. Parents had significant input into development of the IEP and were full members of the IEP Team, which included new updated information since the ER was developed in the IEP at Parents request. (NT 987-1111; SD-1; SD-8; SD-9)

15. The IEP provided for a period of transition between Student's Infant Toddler program and EI which involved continuation of home program services from 7/17/09 to 9/3/09, an hour a week of Speech/language therapy, as well as OT and PT for 1 hour a week. (SD-9)

16. During this period a clinical consultant from MAWA-Holder's applied behavioral analysis (hereinafter referred to as "ABA") program shadowed the Student's Lovaas supervisor's provision of direct services to Child on 3 occasions, reviewed the Lovaas records which included clinical data, and met with the Lovaas supervisor. (NT 1111-1215; SD-9)

17. Pursuant to the IEP the Student fully transitioned to MAWA-Holder provided programming on September 3, 2008 at which point <redacted> was scheduled to receive 17.5 hours a week of in-home ABA services, 10 hours a month of behavior analyst services, 4 hours a week in the Preschool Language Group at the Bryn Mawr Child Study Institute, and 1 hour a week of OT and PT. (SD-9) The Preschool Language Group was included in the IEP at Parents' request. (NT 154-273, 363-415, 987-1111)

18. Parents approved the educational program set out in the IEP through a Notice of Recommended Educational Program ("NOREP") on June 17, 2008. (SD-10)

19. Child suffered a second regression of acquired skills in Spring 2008. (NT 1093; *Compare* P-3 with SD-7; P-3, p. 6 (reduction in cognitive score on DACY from 92 to 62), 8 (reduction in squat time from 30 seconds to 10 seconds), 10-11 ("language use has decreased recently" and functional expressive vocabulary reduced from 25 words to 0, down from Parent report that as of April 17, 2008 there had been "a significant increase in [Student]'s ability to use words over the last year").

20. Parents have explored a variety of methodologies to try to ameliorate Student's ASD including obtaining private services (P-3; NT 154-273, 363-415); following various diets including in Spring 2008 (P-3), a gluten and casein free diet (SD-9), a carbohydrate free diet which began in Spring 2009 (SD-36; SD-33; SD-34; SD-35), and additional unspecified dietary restrictions in Summer 2009 (NT 154-273, 363-415).

21. Following the introduction of dietary restrictions, a number of providers noted the Student appeared lethargic during therapy sessions. 317, 339-340, 364-365]

22. During the time which MAWA-Holder provided EI services to Student, Parents did not provide records or reports from private providers or physicians regarding these methodologies. (NT 154-273, 363-415, 987-1111)

23. Parents report that Student has many allergies to food and other things. (NT 93-107, 154-273, 363-415; SD-3; SD-7; SD-9; SD-36)

24. In the home numerous accommodations have been made for the Student's food and environmental allergies. The accommodations include totally organic diet, no carbohydrates of gluten products. The house has Heppa filter throughout and is cleaned regularly to reduce dust. No chemical products are used to clean the house and Parents make sure all cleaning products at home. (NT 169;171)

25. Notwithstanding environmental modifications made in the home in order to accommodate the Student's allergies, the Student participated in activities in environments where environmental accommodations were not made without evidence of adverse reaction.

26. In other environments, such as clinical environments where the Student received certain therapies, the Student wither had no adverse reaction or environmental modifications in order to protect against potential adverse allergic reactions were easily made.

27. Documented Medical evidence of the Student's allergies, asthma or debilitating conditions resulting from allergies or asthma was not provided (NT 93-107, 154-273, 363-415, 987-1111; SD-14)

28. MAWA-Holder was unable to implement Student's in-home ABA program with fidelity because of limitations Parents placed on the program, including:
    a. Inconsistency of scheduling, including scheduling other activities during prescheduled ABA times, starting sessions late and ending session early; disrupting sessions in order to allow meals, snacks or naps.
    b. Refusing to allow coverage staff to work with Student;
    c. Forbidding use of primary reinforcers;

d. Removing Student from programming for meals and snacks;
e. Removing Student from programming for naps;
f. Removing Student from programming when he cried or whined;
g. Preventing staff from helping Student work through frustration to task completion;
h. Forbidding supervisors from training staff by demonstrating proper implementation of programs with Student;
i. Forbidding supervisors from training staff by observing staff working with Student and providing staff with real time feed-back.

(NT 59-90, 987-1110, 1111-1215; SD-1; SD-51; SD-52; SD-54A; SD-54B; SD-54C)

29. In order to implement an ABA program with fidelity, the interventions must be applied intensively and consistently, by trained staff who are able to utilize the basic elements of behavioral teaching such as working through extinction busts, using primary reinforces, modeling and shaping. (NT 276-363, 437-522, 1111-1215; SD-28)

30. During fall 2008 the progress the Student made in his MAWA-Holder provided in-home ABA program was comparable to the progress he had made during the summer in his Lovaas provided program. (NT 1111-1215)

31. While Parents expressed satisfaction with Student's progress, ABA-staff believed that Child could make more progress if that ABA program was implemented with fidelity. (NT 1093; SD-1)

32. When Student transferred to MAWA-Holder provided ABA programming, Parents believed that he had ceased to make significant progress using an ABA methodology that focused on Discrete Trial Training (hereinafter referred to as "DTT"), so a more naturalistic teaching methodology was employed by the MAWA-Holder. (NT 1121-1122)

33. At an IEP meeting held on December 12, 2008 Parents requested that:
    a. MAWA-holder discontinue working on programs and just focus on incidental teaching;
    b. Student attend an integrated classroom program;
    c. Parents be given time to explore utilizing a Floortime methodology before making any changes to Student's IEP.

    (NT 987-1111, 1111-1215; SD-1, p.11; SD-9, p. 1; SD-11)

34. The IEP Team agreed to explore placement in an integrated classroom. It was also recommended that Parents visit the integrated classroom at UPC where Student was already successfully receiving OT and PT services. *Id.*

35. Ten days later on December 22, 2008 Parent advised that the Student could not attend any class at UCP and that she was, in fact, withdrawing <redacted> from current PT and OT services at UCP. (*Id.*; SD-1)

36. Although Child had never suffered any allergic reactions from his therapy at UCP, Parents' decision to withdraw the Student from programming there was based upon a UCP staff person asking that Child not eat in the hallway as it could attract mice. (NT 987-1110, 1111-1215)

37. Parents were again informed that MAWA-Holder staffs were not able to implement the in-home ABA program with fidelity because of the restriction placed on staff by Parents, including not allowing the team to run ABA teaching programs. (*Id.*; SD-1)

38. MAWA-Holder requested another IEP Meeting, and asked Parents to visit additional sites for placement in an integrated classroom. (*Id.*)

39. The IEP Team reconvened on January 12, 1009. At the IEP Meeting the professional members of the team again shared their concerns with Parents about interferences

in implementing the in-home ABA program, and recommended a preschool based ABA program. (NT 987-1110, 1111-1215; SD-1; SD-9; SD-13)

40. The IEP was amended to provide 12 hours a week of ABA programming in a preschool classroom setting, 10 hours a week of 1:1 ABA programming in the school setting, 1.5 hours a week of SI; 1 hour a week of OT, 90 minutes a week of PT, and continuation of the Preschool Language Group for 4 hours a week. (NT *Id.*; SD-1; SD-9)

41. On January 21, 2009 MAWA-Holder issued the revised IEP and a NOREP to implement the preschool based ABA program in an Early Childhood Special Education Environment (NT *Id.*; SD-1; SD-9; SD-14)

42. On January 30, 2009 Parents disapproved the NOREP and returned it to MAWA-Holder and took the position that Student was making progress in his then current EI program. (NT *Id.*; SD-14)

43. The letter contained opinions to support the assertions against any change in programming which were attributed to Dr. <redacted>, <redacted> and <redacted>, the Parents' Floortime Consultant. However, Parents did not provide any reports from <redacted> or <redacted> substantiating those assertions, and the report provided by Dr. <redacted> simply opined that Child "has respiratory sensitivities and on exposure to new things which are known to outgas chemicals <redacted> contracts coughing spells and asthma" and "recommended that [Student] not be in the newly renovated Elwyn Seedlings Center due to this problem." (NT 154-273, 262-415; Compare SD-14, with SD-14). Subsequent reports from <redacted> and <redacted> in March 2009 also contradicted those assertions attributed to them by Parents. (Compare SD-14, with SD-19; SD-21)

44. As Parents demanded, Student continued to receive programming under his original IEP and placements. (NT 987-1111)

45. The Student had continued to make progress, which was reported to Parents at the Team Meeting held in Parents' home on January 30, 2009. (NT 1111-1215; SD-15; SD-54B) At that meeting Parents again demanded that no primary reinforcers be used in the Student's ABA program and that the program be discontinued "when [Student] is distressed" and that Parents would intervene whenever the Student appeared distressed to "assist in helping [Student] to express what <redacted> needs or is feeling during these times." (NT 1111-1215; SD-16; SD-54B)

46. On February 12, 2009 Parents limited the clinical consultant's access to the home to observe ABA staff working with the Student, forbade the clinical consultant from providing real time feed-back to staff, and directed that feedback and demonstrations of correct applications be provided to staff without Student being present after the session was completed. (NT *Id.*; SD-54B)

47. The IEP Team reconvened again on March 4, 2009 for the third time since MAWA-Holder began implementing the IEP. (NT 987-1110, 111-1215; SD-1, p. 10; SD-9; SD-15; SD-16)

48. The Team reviewed a report from <redacted> regarding the Student's progress in his preschool language group. Ms. <redacted> reported that the Student took 12 weeks to adjust to the program, which was slightly longer than the typical 8-10 weeks, that <redacted> "ability to function independently within the group continues to improve, that <redacted> was "most verbal during snack, suing the carrier phrase "I want chips" spontaneously, and spontaneously requesting foods <redacted> saw other children eating. Ms. Chaplick stated that the Student "has demonstrated the ability to learn within a small group. <redacted> is a child who would benefit from participating in a specialized preschool group that programmed for <redacted> daily. [Student] demonstrates mild regression of acquired skills after a vacation or an illness. <redacted> quickly regains the skills, but it is this

therapist's opinion that following a daily routine, with the same teachers and peers, would only benefit <redacted>." (NT *Id.*; SD-19)

49. At the IEP Meeting Parents hand delivered a letter asking for a new constellation of services for the Student, including 10 hours a week of Floortime, 5 hours a week of 1:1 ST, an ABA program using Verbal Behavior Methodology; and in increase in OT from 1 hour a week to 2 hours a week. The Team did not reach a decision on the new services and decided to reconvene on March 25, 2009. (NT 987-1111, 1111-1215; SD-1; SD-20; SD-23)

50. On March 4, 2009, 12 sessions of DIR/Floortime therapy in order to include a child directed component of the child's overall treatment plan was recommended by parents' private consultant. (NT *Id.*; SD-21)

51. The March 25, 2009 IEP meeting was canceled by the MAWA Holder. A telephone conference with the MAWA Holder followed wherein, Parent requested and MAWA-Holder agreed to amend the IEP without the need to meet further and return to the original services including in-home ABA program, add a second session of OT and continue Student's time in his preschool language group through the summer session. (NT 987-1111; SD-1; SD-24; SD-26)

52. Attempts were made to schedule Student's second session of OT, but Parents rejected all such offers. Parents wanted the second session of OT to be scheduled with the Student's current therapist only. Following the Student's already scheduled second session of PT. Ms. <redacted> was not available at that time, so Parents were offered the other options, including scheduling the second session after the Student's second PT session with a new therapist, scheduling the Student's second session at a different time with the current therapist, scheduling both OT sessions after Student's already scheduled PT sessions with a new therapist, and scheduling the current therapist in a session that overlapped with Student's second PT session. (NT 987-1111; SD-48, p. 11, 12, 14)

53. Parents received a formal report of Student's progress at the Team Meeting held on March 6, 2009. (NT 1111-1215; SD-54B) Parents declined to participate in any more Team meetings, cancelling the meetings scheduled for April 17, 2009 and May 18, 2009. (NT *Id.,* 59-90; SD-52) Also in Spring 2009, Parents began withholding access to Student's program book from MAWA-Holder. (SD-1; SD-54)

54. Shortly thereafter, on April 22, 2009, the Student was seen by Dr. <redacted> who observed the same lethargy and low functioning which was now being seen by people working with the Student. Dr. <redacted> report which was written on May 1, 2009, recommended, among other things, the use of primary reinforcers such as food. Immediately following the visit to Dr <redacted>, Parents allowed the in-home ABA staff to utilize edible reinforcers for a brief time, before again precluding them. (NT 1111-1215; SD-28; SD-54C)

55. On April 23, 2009, the Student was seen privately by an Occupational Therapist who uses Floortime methodologies. (NT 615-737; SD-24)

56. Parents provided a copy of Dr. <redacted> May 1, 2009 report to Elwyn with a letter dated May 18, 2009, stating that Child had suffered regression since the last IEP meeting in March 2009. (SD-27)

57. MAWA-Holder contacted Dr. <redacted> to discuss her report and ask her to attend the IEP Meeting at which the IEP Team would consider her report. Parents did not request Dr. <redacted> attend the meeting, and she did not attend or participate. (NT 276-363, 1111-1215; SD-36)

58. Student's IEP Team met again on June 9, 2009 at which time, based on expert recommendations, the parents requested a program including: a 30-40 hour a week in-home "verbal behavior program", 2 hours a week of 1:1 speech therapy, 2

hours a week of OT, and a continuation of 45 minutes of OT a week and 90 minutes a week of PT with. (NT 1111-1215; SD-31; SD-32; SD-33; SD-36)

59. Dr. <redacted> recommendations for programming was to increase the frequency of ABA intervention to 30-40 hours per week because the Student was losing ground and the recommendation to increase intervention was to help <redacted> meet <redacted> developmental potential. (NT 320-321)

60. Dr. <redacted> further recommended a home based ABA program, combined with other therapies since, during her testing in her office – a low stimulus environment, the Student was easily distracted. She further opined that the Student did not possess pre-requisite skills was not to learn from <redacted> peers. (NT 321– 322)

61. Parents made requests of the MAWA Holder for specific therapists to deliver services and requests for specific methodologies to be implemented.

62. At the IEP Meeting the Team reviewed all available information. The Occupational and Physical Therapists working with the Student, and Parents, reported that the Student was doing well working with other children, including imitating other children, during <redacted> OT and PT sessions. (NT 987-1110, 1111-1215; SD-48; SD-49)

63. The IEP Team requested an updated written report from regarding the Student's progress in his preschool language group. The progress report from the preschool reported that the Student has regressed since the last report in March, and that the only change reported by the Parents was the more restrictive carbohydrate-free diet Parents had implemented and recommended that the Student attend a class-room based program daily, and that an hour of 1:1 ST per week be added to his program.

64. The speech/language therapist running the language group pre-school program requested by the Parents, worked with the Student both in individual

Speech/Language sessions as well as 4 hours a week in a small group, center-based classroom setting continuously from July 2008 through the date of her June 11, 2009 report. (NT *Id.*; SD-9; SD-35; SD-36)

65. The IEP Team drafted an IEP which considered all of the information presented by those at the meeting, and the reports of the preschool, OT, private expert psychological report, and the parent's private Floortime expert recommending a center based program which the Parents rejected.

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "Free Appropriate Public Education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Shore Reg'l High Sch. Bd. of Ed. v. P.S.,* 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 182-85 (3d Cir.1988). In assessing whether an individualized program of instruction is "reasonably calculated" to enable the student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999)*

These federal regulatory requirements apply no less to children between the ages of three and five than to any other eligible child suspected of having a disability. Indeed, Pennsylvania has explicitly adopted into its Early Intervention regulations the federal IDEA provisions on evaluations, IEPs and early intervening services. 22Pa. Code Section

14.102(a)(2); 34 CFR Section 300.226.

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. *Schaffer v.Weast U.S, 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006)*. Because a student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The United States Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., student's parents) must lose because the party seeking relief bears the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006).* Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Having been found eligible for special education, the student is entitled by federal law, the Individuals with Disabilities Education Act (IDEA) as reauthorized by Congress December 2004, 20 U.S.C. *Section 600 et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a Free Appropriate Public Education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

As previously noted, a student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)*. The

IEP must be likely to produce progress, not regression or trivial educational advancement *Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986]*. *Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989),* citing *Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986)* held that "*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in *Polk* held that educational benefit "must be gauged in relation to the child's potential." This was reiterated in later decisions that held that meaningful educational benefit must relate to the child's potential*. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003.)* (District must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. *Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose supra.*

Districts need not provide the optimal level of service, maximize a child's opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity*. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra.* In creating a legally appropriate IEP, a school district is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. *In Re A.L., Spec. Educ. Opinion No. 1451 (2004); See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)*

What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving Parents.'" *Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989)*. Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290,*

297 (7th Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "Free Appropriate Public Education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education. The IEP simply must propose an appropriate education for the child. *Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993)*. (See also *Board of Education v. Murphysboro v. Illinois Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994)* (Under the IDEA a District must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the district has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing *Rowley, 458 U.S. at 206-07.)* More recently, the Eastern District Court of Pennsylvania ruled, "Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534,* citations omitted. . See also, *Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008)*.

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that provided it is implemented; there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

Tuition reimbursement claims by Parents of children with disabilities are subject to the well-settled test as set forth in the United States Supreme Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 10 (1993) and *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985)[5]. In *Burlington*, the Court established that Parents do not have an automatic, unfettered right to tuition reimbursement for Parents' unilateral placement of their child in a private school. Rather, it is only when the Parents prove that (1) the District has failed to offer FAPE, and (2) the private school selected by the Parents is appropriate, and (3) relevant equitable considerations favor reimbursement. *See Carter*, supra; *Sinan L., et al. v. School District of Philadelphia*, 2007 WL 1933021 (E.D. Pa. 2007); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 248 (3d Cir. 1999). If it is determined that the District did in fact offer the Student an appropriate program and placement, no further inquiry is necessary and the Parents' request for tuition reimbursement must be denied. *See* 20 U.S.C. § 1412(10)(C)(ii) (LEA does not have to pay tuition reimbursement for unilateral placement chosen by Parents if LEA made an offer of FAPE in timely manner before private enrollment); *See Also* *Sinan L., supra*, at 11 (after

[5] While Parents in this case did not enroll the Student in a private school as contemplated by the specific language of the Act, they provided the Student with unilaterally selected, parentally directed early intervention program, so that an analogues application of 20 U.S.C 1412(a)(10)(C)(ii) or the ability to fashion equitable remedies to the Parents' request for reimbursement of their private educational program would appear to be appropriate. The only published decisions awarding parental reimbursement for unilaterally selected in-home educational programs were decided under a prior version of the Act, IDEA 1997 and it's predecessor, which allowed reimbursement of such programs as a part of the courts ability to fashion appropriate relief under *Burlington-Carter analysis. See, e.g. Sect. 615(i)(2)(B)(3), IDEA 1997; Board of Educ. Of County of Kanawha v. Michael M., 95 F. Supp.2d (S.D.W.Va.2000)* (reimbursement for after school in-home ABA program necessary to a FAPE); *T.H v. Board of Educ. Of Palantine Community Consol. School Dist. 15,55F. Supp.2d 830(N.D.Ill. 1999* (reimbursement for in-home ABA program)

Court found District's proposed program and placement to be appropriate, Court did not consider the appropriateness of Student's private placement or equitable principles.)

Only if there is a finding that the District failed to offer the Student an appropriate program should the aforementioned second and third prongs of the analysis then be considered. *See* Carter, 510 U.S. at 15-16; *Sinan L., supra*, at *5, *quoting Burlington*, 471 U.S. at 374; *Rairdan M., By and Through Kerry M., v. Solanco School Dist.* 1998 *WL 401637, *4-7 (E.D.Pa. 1998)* (if District's IEP is deemed inappropriate, then Court moves to second prong of test and must decide if private placement is appropriate; if private placement is then deemed appropriate, Court moves to third prong of test and considers equities).

Was the Program and Unilaterally Secured Complement of Private-Home Based Services the MAWA Holder Offered to the Student Appropriate?

To satisfy the first prong of the tuition reimbursement test under *Burlington-Carter*, Student must establish that the School District did not offer FAPE. Having been found eligible for special education, the Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. *Section 600 et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). As aforementioned, the federal protections are specifically incorporated in Pennsylvania law to apply to early intervention. FAPE is defined in part as: individualized to meet the educational or early intervention needs of the Student; reasonably calculated to yield meaningful educational or early intervention benefit and Student or child progress; provided in conformity with an Individualized Educational Program (IEP).

As previously noted, a Student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996))*. The IEP must be likely to produce progress, not regression or trivial educational advancement [*Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]*. *Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989)*, citing *Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986)* held that "*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in *Polk* held that educational benefit "must be gauged in relation to the child's potential." This standard is particularly critical as the intervention team noted on several occasions that the Student was not making as much progress as he could if the intervention program was implemented the way it was intended to be. Credibility to this position is afforded by the testimony of the parents expert when she testified that she would have expected at least a maintenance of skills if the Student had received a competent program from the time of initial evaluation follow up when, in fact, the Student presented as regressed upon follow up.

This standard is reiterated in later decisions that held that meaningful educational benefit must relate to the child's potential*. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003)* (District must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an

IEP must be based upon information available at the time a District offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. *Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose supra.*

Districts need not provide the optimal level of service, maximize a child's opportunity, or even a level that would confer additional benefits. More recently, the Eastern District Court of Pennsylvania ruled, "Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534,* citations omitted. . See also, *Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).*

Under the IDEA Parents do not have a right to compel a school District to provide a specific program or employ a specific methodology in educating a Student. *M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)* It is noted here that, although the law clearly supports a Districts ability to formulate an educational program grounded in whatever metholodgy irrespective of parental wishes so long as it is appropriate, in this case, the MAWA Holder supported parental methodological preferences. If personalized instruction is being provided with sufficient supportive services to permit the Student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. Once the District has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing *Rowley, 458 U.S. at 206-07.)*

Thus the analysis for reimbursement of a private program begins with the analysis of whether the program offered by the MAWA Holder was indeed appropriate. The Parent argues that the program offered by the MAWA Holder is inappropriate for three basic reasons: (1) the environment is inappropriate to protect against the Student's allergies and [2]is inappropriate to provide for meaningful learning. (3) Lack of intensity of services.

The argument that the environment is insufficient to protect against the Student's allergies fails for several reasons. First and foremost, no documented medical evidence was presented to support the Parent's position that the Student suffers from environmental allergies which impair his ability to learn or to be present in a certain environment. Secondly, even if medical evidence was introduced, the Student regularly participated in community activities and outside therapies in clinical settings where either the allergies did not pose a problem or the issues were easily accommodated for. (NT 93-107; 154-273; 363-415; 523-614; 615-737; SD-3; SD-54C)

The assertion that the proposed center based setting does not allow for meaningful learning centers on the level of distractibility inherent in center based learning. The Parents presented expert testimony to support their position that the proposed program was not appropriate. The basic floor of opportunity for learning for this student begins with his ability to be available for instruction. The evidence establishes, through testimony of many witnesses, that the Student's availability to learn is grounded in an environment where distractions are managed and minimized.

The Parent's expert, a child psychologist who is accepted in this proceeding as an expert in the field of assessment, diagnosis and development of educational programs for young children with ASD (NT 284-285), testified that based upon the assessments she

administered and the comparative improvement/lack of improvement from initial and follow up evaluations as well as her observations during follow-up that, a center based learning environment would be challenging for the student to participate in.[6] The expert testified that "I would be very concerned with the level of outside noise and outside distractions, other children, other programs being run, people walking in and out of the room, visual distractions of things on the walls, toys in the room." (NT 323) The expert recommendation for an appropriate learning environment is one where environmental stimulus and participation in group peer interaction is limited until meaningful participation is demonstrated, and intensity of one to one instruction is high. The environment of the proposed classroom fails each of these considerations. Within the classroom there is a "ton" of material available in a variety of different centers where numerous group activities are conducted including recess and lunch in which three other programs participate. (NT 775-784) There are currently five adults within the classroom with the potential for that number to exponentially increase with the addition of students or if student's needs increase or when related service professionals are intermittently placed in the room. The class has nine students (NT 769-771). As feared by Parent's expert, this is an environment in which the environmental stimulus commands the focus of the Student as opposed to the instruction itself. Further, the programming within the classroom fails to provide sufficient intensity of one on one direct educational and behavioral intervention.

Additionally, the expert testified that the Student is not yet ready to learn from participating with his peers. (NT 322) However, the expert admits that this opinion is

[6] The expert did not observe the center based programming proposed. (NT 326)

based solely on Parent report and not upon any direct observations of her own. (NT 330) This opinion is not only unsupported by direct professional assessment, but is in direct contravention of the observations of the speech/language pathologist who had been working with the Student individually and among peers for some time. (SD-19; SD-35) The appropriateness of the center based placement does not fail on the basis of opportunity to participate with same aged peers but rather from the apparent lack of assessment regarding when meaningful participation reasonably calculated to infer educational benefit can take place and the degree of group instruction that is appropriate. It is not the placement within a classroom setting that is problematic; it is the topography of the classroom and the specially designed instruction that is the lynchpin.

The evidence supports that components of the offered program are appropriate; however, the entire complement of services and the manner in which they are implemented is not. Appropriate supportive services of intense one to one direct instruction, maintainance of low ratios and certain environmental modifications to control distraction, can all serve to structure a center based environment into one where a student who is highly distractible and difficult to motivate can meaningfully advance educationally. These are the components that the MAWA Holder must effectuate in developing a center based program to meet the needs of this student. In accordance with the ORDER which follows the MAWA Holder will be so directed to develop such a classroom. Such an environment is emulated by the students previous center based program and is the recommendation of the speech and language therapist who ran that program as outlined in her reports. These reports support the recommendation for a center based placement and

is the basis for the team's recommendation of a center based placement. (NT 987-1110; 1111-1215; SD-9, pg 23; SD-35; SD-36, pg 110; SD-48, SD-49)

Since the center based program is deemed inappropriate and a failure of a FAPE, the analysis proceeds to the second prong of the test to determine whether the private program is appropriate to meet the Student's needs.

If the Program and Placement Offered to the Student was not Appropriate, was the Unilaterally Secured Complement of Private Home-Based Services Chosen by the Parent Appropriate?

The Parents assert that the only environment in which distractions can be properly managed to result in meaningful learning for the Student is in their home. As will be more fully discussed infra, educating this Student exclusively within his home environment is not realistic.

This dispute, at its core, centers on level of service and where the service is to be implemented. The parties mostly argue the facts in support of their position rather than legal interpretation. While disputes regarding the frequency and duration of services or the environment in which services are to be implemented are common, the unique and complicating factor in this case is that, although the parents argue for and present some evidence in support of increased services, the evidence clearly establishes a previous pattern of the Parents failure to utilize the services available to them. The reasons, explanations, and justifications presented by the Parents for the failure/inability to utilize services to the maximum extent available to them are many. Consequently the analysis of what level of service and the environment in which the services should be implemented is tempered by the reality of the evident inability for follow through and fidelity of a parent driven, home based program. Further, systemic process and legal determinations do not

serve to force a parent to avail themselves of programs deemed appropriate; the system simply is not mandated to fund unilaterally selected alternatives where a parent determines not to avail themselves of appropriate services.

The Parent attributed the inability to achieve a recommended level of service to the Students medical conditions. Even if documented medical conditions did interfere with the ability to participate in educational programming, of which no evidence was presented, the resultant level of services would, in fact, be the appropriate level of service for this particular student under those conditions. However, it is not this Student's intervening medical conditions which have thwarted the ability to deliver an appropriate program at an appropriate intensity[7]. The Parents own configured private program does not meet the requisite level of intensity of services either opined by the experts or at the level they now request. For a period of eight months – an inordinately long period of time under the small window of early intervention services intended to intensively address deficits – the Parents were unable to increase services to recommended levels. (NT 437-522; 523-614; 615-737) Further, for the hours the private program did provide intervention, the interventions were not implemented with full fidelity or according to standards acceptable for an ABA program, nor were delivered by competently trained or monitored staff. (NT 59-90; 263-276; 437-522; 914-967; 987-1110; 1111-1215; SD-1; SD-28; SD-51; SD-52; SD-54A; SD-54B; SD-54C)

[7] Only one incidence of "low programming" lasting one week which was due to an asthma attack was referenced. SD – 54C, pg33)

For all of these reasons[8], the private program developed by the Parent was not reasonably calculated to confer meaningful educational benefit.

As the private program is not found appropriate, the third prong of assessing the equities to determine whether factors exist which would limit or eliminate the MAWA Holder's inability for payment for the program is not reached.[9]

CONCLUSION

As the program designed by the MAWA Holder failed to deliver the intensity of services or provide environmental accommodations recommended by the evidence, the proposal failed to provide the Student with a plan that is reasonably calculated to provide meaningful progress. Additionally. as the evidence demonstrated that the Student can socially mediate, the parents desire for home-based services violate the LRE mandates of the IDEA. Moreover, the evidence overwhelmingly demonstrated a lack of fidelity in the implementation of home based services and failed to establish that progress was achieved.

[8] The MAWA Holder also asserts that the Parent's private home-based program is inappropriate in that it violates the Least Restrictive Environment (hereinafter referred to as "LRE") considerations of IDEA. The MAWA Holder asserts that Parents home-based program of instruction is of the most restrictive nature imaginable.[8] It does not provide for Child to receive instruction with, to interact with, or even to see any other children, ever. Consideration of the restrictiveness of the parentally selected educational placement is appropriate in determining the appropriateness of the parental placement. *See, e.g., M.S. ex rel. Simchick v. Fairfax County School Bd.,* 553 F.3d 315 (4th Cir. 2009), *citing M.S. ex rel. S.S. v. Bd. Of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000)("recognizing that 'parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board,' but concluding that the IDEA's mainstreaming requirement 'remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate'")

The effectiveness of home-based intensive early intervention service for students indentified with autism is a research based, widely utilized and accepted service. LRE considerations are not paramount to the decision in this case.

[9] Even if the private program were to be deemed appropriate, the equities prohibit reimbursement. Initially the Parents did not comply with the requirement that they provide the MAWA Holder with at least 10 business days written notice of their intent to remove the Student from his public educational program and begin implementation of their private program. Secondly it was difficult for the Parent to allow the private program to proceed accordingly to the principals of implementation which are required in order for meaningful benefit to occur.

Consequently, the alternative program suggested by the parents is not appropriate. The team is left with the task to incorporate the recommendations for strict low ratios ratio, reduction of distraction, and intensity of instruction into a Center Based program which operates according to the principals of Verbal Behavior. In Order to achieve the instructional intensity within the school day, it is likely that the related services for individual occupational, speech and physical therapy will need to be scheduled and implemented outside the school day.

ORDER

1. The Student was denied a FAPE from
2. A total of up to 30 hours of direct instruction in verbal behavior therapy is to be provided. The MAWA Holder is directed to place the Student in a center based verbal behavior classroom which maintains a low student/instructor ratio not to exceed 5 total students and which provides a minimum of 18 hrs of direct instruction. The balance of direct instruction hours is to be provided in the home in home based services managed by a BCBA with experience in verbal behavior; preferably one connected with the center-based program ultimately selected/developed for placement of the student. Supervision hours of the BCBA are to be supported up to 10 hours per month which includes two hours per month to convene the team at which the student should be available as necessary for modeling, paring, probing. The team shall convene once per month. Related services scheduled outside of the school day are to be provided by the Parents current private therapists as follows: 1hour individual occupational therapy two times per week up to two times per week. 1 hour individual speech/ language therapy up to two times per week

Dated: June 5, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer