BEFORE THE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA

N. S.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Special Education Case No: 12-101**
	)	
MADISON CITY BOARD OF EDUCATION,	)	
	)	
	)	
Respondent.	)	

DUE PROCESS DECISION

I.

Procedural History

A due process hearing was held as a result of a request by the attorney for Petitioner. The due process hearing request was received by the State Department of Education on August 29, 2012. (Hearing Officer Exhibit 1)(hereinafter referred to as HO __). The hearing request was made pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). 20 U.S.C. §1400 et seq.

The initial due process complaint alleged that the school system had failed to develop an appropriate individualized education plan (IEP) for the child. Included in that accusation was the alleged failure of the school system to implement a behavior intervention plan (BIP) for the youngster. The complaint insisted that the school system had failed to develop a program to adequately instruct an autistic child such as Petitioner. There was a claim of a failure of the local education agency to provide extended school year (ESY) services. Because of those deficiencies, the complaint alleged that the child had regressed in his behaviors. He was enrolled in a private

education facility by his parents. His parents sought tuition and travel reimbursement from the local education agency for the private enrollment.

On September 4, 2012, a prehearing conference was held. (HO 2). At that time the allegations stated in the complaint were discussed by the Hearing Officer and the parties' attorneys.

On September 7, 2012, the school system filed its response to the due process complaint. (HO 4). Counsel for the school system maintained that a free appropriate public education (FAPE) had been provided to the child by the Madison City Board of Education. According to the lawyer for the school system, the system had complied with the State Department of Education regulations including providing an Applied Behavior Analysis (ABA) program for Petitioner. The lawyer wrote that ABA methodology was appropriate for autistic students. Accordingly, the attorney for the school system insisted that there was no reason for a private placement. He insisted that the school system could have provided a free appropriate public education if the parents had allowed the child to attend public school and receive a full day program.

Counsel for the local education agency also stated that the private placement was not appropriate. In particular, the program provided by the private facility violated Petitioner's right to receive services in his least restrictive environment (mainstreaming). 20 U.S.C. §1412(a)(5)(A); M.M. v. District of Lancaster Co. Sch., 702 F. 3d 479 (8th Cir. 2012) M.N. v. State of Hawaii, 2011 WL 6020861 (D. Hawaii 2013); D.D. v. Southold Union Free Sch. Dist., 2012 WL 6684585 (E.D. N.Y. 2012).

The due process hearing was set for November 7, 2012. (HO 2). On November 2, 2012, counsel for the child requested a continuance of this matter. There was no objection to the continuance expressed by the attorney for the school system. The case was continued. (HO 5). Counsel for the parties requested an extension of the forty-five (45) day deadline for a decision in

this matter. Alabama Admin. Code, 290-8-9-.08(9)(c)12(v). (Id.)

The due process hearing began on February 14, 2013 at the office of the Madison City Board of Education. The hearing continued on February 15, 2013. It resumed on April 11, 2013 and April 12, 2013. The hearing resumed again on June 12, 2013. Additional due process hearing dates were conducted on June 26, 2013 and June 27, 2013. The hearing was completed on June 27, 2013. The lawyers for both parties filed post-hearing briefs and arguments. (HO 6, HO 7 and HO 8).

At the request of the parents the hearing was closed. The presence of Petitioner was waived. Petitioner did appear at one session of the due process hearing. The remaining witnesses were sequestered as the result of the agreement of the parties.

Petitioner was represented at the hearing by his lawyer. Also present on behalf of Petitioner was his mother. Petitioner's father attended several of the due process hearing sessions.

The Madison City Board of Education was represented by its attorney. The special education director for the school system served as the representative of the local education agency. The special education director supervises personnel responsible for providing special education services to disabled students under the IDEA. One such individual is designated as a special education coordinator. The special education coordinator is a different individual than the special education director.

II.

Issues Presented

The primary issue was whether the school system offered and/or provided a free appropriate public education to the child during the 2011-2012 school year. If the answer to that question is in the negative, the school system may be obligated to reimburse the parents for private

schooling provided that the private schooling is appropriate.

Next, there was an allegation that the school system refused to offer extended school year services to the child during the summer of 2012.

As a procedural issue, it was asserted that the parents of the Petitioner were not treated as equal partners in the development of their son's educational program. The specifics of that allegation were that certain members of the child's individualized education plan (IEP) team had predetermined the special education placement of the Petitioner.

The remaining procedural issue was the failure of the school system to develop a behavior intervention plan for the child during his [] school year.

III.

Finding of Facts

When the due process proceeding began Petitioner was [] years and [] months old. He was born in[]. He is the son of [] and [] Petitioner lives with his mother, father and [] in [], Alabama.

According to the parents, the child communicates with gestures. He is described as non-verbal. He can speak a few words. He uses gestures and short sentences to communicate what he wants. He does not interact with other children. He likes to play by himself.

The child has some behavioral issues including self-biting, biting others and engaging in tantrums when he does not get what he wants. The director of the day program at the [] Center where the child is presently enrolled said that Petitioner is currently functioning at the developmental levels of a child [] to [] months old. The Petitioner's disability designation for IDEA purposes is autism. Autism is a developmental disorder that significantly impacts communication and social interaction.

The parents first noticed the child's condition at two and half years of age. At that time,

the boy had delayed speech, engaged in self stimulation (stemming) and would not make eye contact with others. He was diagnosed by a pediatrician as autistic. Ala. Admin. Code, 290-8-9-.03(1)(defining the disability category of autism).

The child was placed in special education early intervention. Early intervention services are provided to infants and toddlers by means of federal funds. At the age of three, Petitioner transitioned into special education. 20 U.S.C. §1419(b)(2); 34 CFR §300.124(a). (Respondent's [Board] Exhibit 2) (hereinafter referred to as Bd.___). A disabled child is entitled to receive special education services at the age of three. 20 U.S.C. §1412(a)(1)(A). At that time Petitioner received services at a preschool operated by the school system. His mother related that the first two years of pre-[] went well. However, when Petitioner changed teachers at the beginning of the [] pre-[] year he began to exhibit behavior problems. That was the 2010-2011 school year. (Bd. 46).

For the 2011-2012 school year the child attended an elementary school operated by the local education agency. He was enrolled in a [] class. During the first semester of that period the child also received private services at the [] (hereinafter the [] Center). The [] Center specializes in the treatment and education of children within the autism spectrum. Petitioner also received occupational therapy from a private provider. The therapy was paid for by his parents. There was some contribution to the therapy costs through the family's insurance.

On April 20, 2011 an individualized education plan (IEP) meeting was held. This IEP meeting was at the conclusion of the boy's [] pre-[] school year. The IEP allowed Petitioner to check out from his pre-[] class to attend the [] Center. The purpose of his attendance of the [] Center was to enhance his social skills. (Bd. 10). The IEP noted, however, that once the child began [] he would have to attend school a full day. Due to school board policy, Petitioner would not be allowed early check out to attend the [] Center program. (Id.).

On May 9, 2011, the parents enrolled Petitioner in the [] Center. Petitioner was placed in a pre-[] therapy program. It was an outpatient program by which means the little boy received therapy and services three times a week from 1:00 p.m. to 5:00 p.m. At that time Applied Behavior Analysis therapy (ABA) was provided to the youngster. The therapy was provided in a 1:1 setting.

ABA is the systematic application of the general principle that behavior is directed by reinforcers. Thus, it is believed that individuals can effectively learn new skills by breaking the skills down into small steps. The director of the day program at the [] Center characterized ABA as a methodology that focuses on behavior manifestations through the determination of the functions of antecedent behavior. Upon that determination, therapists intercede with respect to the antecedent behavior and the consequences of any behavior that has occurred as a result of the antecedent behavior. ABA is a recognized method for educating children with autism. It involves intensive interaction between the child and a trained ABA instructor. ABA focuses on separating complex skills into their simplest discrete components. The components are then taught to the child through repetition and positive reinforcement. When the child demonstrates mastery of the components, the goal becomes to "reassemble" the components back into the more complex skill.

At the beginning of the 2011-2012 school year Petitioner entered [] at the elementary school where he had attended preschool. Initially, his [] teacher allowed the youngster to check-out from school so that he could attend the therapy provided at the [] Center in the afternoon. Both the mother and teacher stated that the teacher arranged her instruction so that Petitioner could check out early without missing instruction required by the school system.

Because the child was leaving school early an IEP meeting was held. It took place on August 23, 2011. The meeting was requested by Mrs. [] The purpose of the meeting was to consider whether the child could be released from school early to attend the [] Center. It was

determined by the IEP team that the boy did not qualify for a shortened school day. School system officials insisted that he attend [] full time. At that time the consensus of the IEP team was to reject a shortened school day. The IEP team concluded that "[Petitioner] does not exhibit any physical medical issues which would limit his strength and vitality and would warrant a shortened school day and allow excused check outs. Teachers expressed concern about the amount of instruction [Petitioner] would be missing were he to continue to be checked out on a regular basis. The team agreed that he continued to need to attend for the full school day." (Bd. 11).

Although she was not present at the IEP meeting, the special education director remarked that the IEP team decision was correct. She explained that local education agency policy required that Mrs. [] produce information demonstrating a weakened condition of her son that would justify a shortened school day. Mrs. [] did not provide the IEP team with that information.

Many of the IEP team, including the special education coordinator who attended as the local education agency representative (LEA), were critical of the [] Center. Mrs. [] said that the coordinator exclaimed that she could not believe that the parents thought that the [] Center could do better than the school system in educating the child. According to the father and mother, the students at the [] Center were later described by the director of special education for the school system as acting "like robots".

The special education director explained that children who had transitioned into the local education agency from the [] Center had difficulty adjusting to public school instruction. They were unable to respond to instruction without repeated prompting. They could not generalize. They were reluctant to interact with other students. They only did well when exposed to a skill that was taught to them over and over at the [] Center.

Mrs. [] disagreed with the decision reached by IEP team at the meeting on August 23, 2011.

The parents continued to check their child out early and send him to the [] Center. The check-outs were marked as unexcused absences. In accordance with school policy, a child may not exceed the number of days that the local education agency allows for unexcused absences. The elementary school principal said that she explained that policy to Mrs. []

Petitioner check-outs from the elementary school operated by the local education agency continued throughout the first semester of the 2011-2012 school year. School system officials intervened. These persons demanded that the child attend the [] program for a full day. A letter stating the reason for the school system's position was provided to the parents on December 15, 2011. (Petitioner's Exhibit 5) (hereinafter P.___). The parents then gave notice to the [] Center that their child would be withdrawn. He was withdrawn from the [] Center on January 31, 2012.

Mrs. [] explained that her husband and she continued to send the child to the [] Center after the August 23, 2011 IEP meeting because the director of special education had told Mrs. [] that "she would take care of it." It was the understanding of Mrs. [] that the director would contact the truancy office (student services) about the unexcused absences. Mrs. [] agreed that the special education director's statements regarding the matter were very vague.

The special education coordinator who attended the August 23, 2013 IEP meeting testified that after the IEP team rejected a shortened school day she suggested to Petitioner's mother that the mother discuss with the elementary school principal other options for checking Petitioner out of school early. The coordinator suggested that as a alternative, student services (division in charge of truancy) might allow an early checkout. These options were apparently the cause of the delay in the decision of student services not to allow Petitioner to leave school before classes concluded.

Mr. [] described that his son progressed at the [] Center. In his view, the services received by Petitioner at the elementary school operated by the school system were not reasonably

calculated to provide his son educational benefit. He described the services provided to the boy as "babysitting". For example, Mr. [] stated that the records finally provided to the parents by the school system after the due process complaint was filed were insufficient to inform the parents as to their child's progress. Indeed, when the parents met with school system personnel, staff could not explain what educational services the youngster was receiving. Mr. [] complained that school system staff set annual goals for his son when the boy needed weekly goals.

The records presented by the local education agency contradicted that testimony. Each day the child's pre-[] teacher and later his [] teacher supplied the parents with daily progress reports that reviewed a number of areas of instruction and behavior. (Bd. 46 and 47). The mother also received daily verbal reports from the youngster's teachers. Every three weeks the parents were provided annual goal progress reports. Those reports revealed the Petitioner's progress toward his IEP goals. The special education director expressed that the evaluations and data collected by the school system complied with the IDEA.

During the [] year the child was receiving speech services twice a week for thirty minutes. Both Mr. and Mrs. [] testified that they asked for more speech services for their child. The school system declined to provide additional speech services. As a consequence, the parents paid for private speech therapy for Petitioner. Speech services were not provided to Petitioner at the [] Center.

In addition, the parents wanted more social integration of the child with neurotypical (i.e. nondisabled) peers. In response to that request, approximately thirty minutes each day the child was placed in a room with non-disabled children. At that time Petitioner sat at a computer in the rear of the general education classroom with earphones on. Both his mother and his special education [] teacher for the first semester testified that the regular education teacher in charge of

that classroom remarked that there "really wasn't a good time" for Petitioner to attend her general education class. (P. 6) (Tr. 59). The special education [] teacher for the first semester added that she was told by the aide who accompanied the child to that class that Petitioner wore headphones because the classroom teacher complained of the noise that the little boy made.

Mrs. [] said that when a new [] teacher began the second semester of the 2011-2012 school year the teacher told Mrs. [] that the exposure to the regular education class was not benefitting Petitioner. The attempts to socialize the child with his non-disabled peers were described by the teacher as "way too much for the child". (Tr. 577). The teacher expressed that there "was nothing to gain" from the boy's exposure to typical students. (Tr. 577) The [] teacher for the second semester acknowledged that she recommended to Mrs. [] that Petitioner not attend the regular education class. She explained that Petitioner cried every time that he was removed from the self-contained special education class to the regular education class. Based on the recommendations of the [] teacher, Mrs. [] agreed that her son would not go into the regular education classroom anymore. The special education director responded that the child continued to be exposed to non-disabled peers at lunch, assemblies and special events.

Despite behavioral problems exhibited by her son in his [] class during the initial months of the 2011-2012 school year, Mrs. [] agreed that Petitioner made academic progress. The special education director added that the child made progress in all areas of instruction. He did so despite frequent absences from public school as well as his attendance at the [] Center for a portion of the school day throughout the first semester of the year. Mrs. [] complained that her son did not meet his annual IEP goals. But on cross-examination she admitted that Petitioner had mastered a number of the goals from his 2011-2012 IEP.

In regard to Petitioner's behavior, the mother related that there had been another child in

the classroom throughout the school year who had a severe behavior problem. Mrs. [] described that the child in her son's class was biting the aides and other children as well Petitioner. That child physically attacked the classroom aides and other students. Although the special education [] teacher for the first semester requested help with the troublesome child, Mrs. [] said that the elementary school principal denied the teacher that assistance. The incidents of biting were taking up the aides' time. Mrs. [] was told by the first semester [] teacher that the teacher "didn't have enough hands to do what she needed to do throughout the day to give [Petitioner] an appropriate education or to meet his IEP goals". (Tr. 539).

Mr. [] described that one of the two aides assigned to his son's [] class had a physical impairment which prevented that aide from being of adequate assistance to the teacher and the remaining aide. Both Mr. and Mrs. [] said that because of the activities of the troublesome child, the [] teacher for the first semester of their child's [] year suggested that the parents keep their son out of school when the teacher could not be there. Mrs. [] commented that Petitioner's absences were because she feared for his safety when that teacher was not in attendance.

Based on that circumstance, as well as others, the parents testified that their son's [] teacher could not fulfill the requirements of Petitioner's IEP. The first semester [] teacher did not have the personnel or other assistance she needed. The one troublesome child in the nine member class took up most of the teacher and the non-physically disabled aide's time. The parents stated that the [] teacher told them to pull their child out of her class and place him in the [] Center.

While not agreeing with the assessments of Petitioner's mother and father, the special education coordinator admitted that the first semester [] teacher complained about the number of children in the classroom. The teacher complained about the aides. The teacher stated that she had difficulty teaching her students. The coordinator responded to the teacher by recommending

that some of the children's schedules be revised and that the periods that the children received related services be restructured.

The principal of the elementary school was also aware of the teacher's complaints. The first semester [] teacher complained to the principal about the teacher's own physical problems. The principal investigated but said that she could not find any evidence that would support the teacher's complaints. In the view of the principal, the complaints of the teacher were too vague.

Mrs. [] was also critical of the absence of one-to-one instruction for her son. When she observed the class the children were not receiving any one-on-one instruction.

A significant incident occurred at the conclusion of the first semester of the 2011-2012 school year. At that time Petitioner's [] teacher resigned from the school system. (P. 7). She expressed that her job had become completely overwhelming and that she could no longer continue effectively. (P. 8). The teacher no longer felt that she could prevent injuries to her other students, her co-workers and herself as a result of "the injurious behavior of a couple of my current students." (Id). (None of the testimony elicited in this due process hearing implied that Petitioner was one of those students).

It was shortly after the teacher's resignation that the parents withdrew their son from the [] Center. The withdrawal was because the local education agency would no longer allow the child to leave school before the completion of the school day. Petitioner ceased to receive services from the [] Center ABA therapy program.

A new teacher was assigned to Petitioner's [] class. Upon beginning as the disabled children's [] teacher the teacher stated that the aide who suffered from a medical impairment ([]) was reassigned. She became the "floater" aide operating between Petitioner's [] class and another [] class. The "floater" aide accompanied disabled students to various therapies or to general

education classes. Apparently, however, the "floater" aide spent most of her time with Petitioner's class. A new aide was assigned to the class to assist the other aide held over from the first semester. The class size was reduced to six children. Thus, the student to teacher to aides became a more manageable 6:1:3 ratio. The second semester [] teacher described all three aides as being "very good".

Initially, Mrs. [] was pleased with the new teacher. On January 30, 2012 the mother wrote "we are so happy with you as [Petitioner's] teacher." (P. 2). On March 12, 2012 in response to a written inquiry about her concerns about Petitioner's progress, Mrs. [] wrote "I am happy with the new teacher and would love to do a social story about [Petitioner's] day." (P. 2). Despite those assessments, Mrs. [] testified that during the second semester Petitioner became increasingly violent at home. The boy began to pull his mother's hair. He frequently engaged in biting and self-mutilation. He would smear fecal matter on the walls of their home.

School records also suggested deteriorating behavior. On March 21, 2012 the child bit and scratched his teacher. (P. 2). However, between April 3, 2012 and April 9, 2012 staff reported that Petitioner had mastered his IEP behavior goals. On April 9, 2012 Petitioner bit two times. (Id.). On April 17, 2012 he engaged in excessive pinching. (Id.). The next day in her progress report to Petitioner's parents, his second semester [] teacher noted an increase in pinching and biting. (Id.). On April 30, 2012 the teacher discussed with Mrs. [] the teacher's concerns with an increase in biting and pinching by the youngster. (Id.). The teacher's notes of May 7, 2012 revealed that "biting and pinching was handled by providing distance between student and staff. Decreased as ignored." (Id). On May 17, 2012 in an email to the mother the teacher wrote that the child was biting himself and others. (Id.).

Despite these incidents of biting the second semester [] teacher believed that the behavior

was typical of a [] year old. When Petitioner did not want to cease an activity that pleased him, he engaged in biting himself because he could not communicate in any other manner. The teacher remarked that toward the end of the school year the child had a number of absences from school. When he returned he had difficulty transitioning back into the classroom. The child engaged in several instances of biting. When the child first returned to school after a significant absence Petitioner had four biting incidents the week of his return. The teacher was able to eliminate that behavior by teaching strategies such as "fading" and "ignoring". (Tr. 1069, 1109). "Fading" is the technique of separating the child from others. The teacher thought that some of the incidents were the result of the fact that the child was teething. (Petitioner's mother thought that teething might be occurring as well. She testified that she took her son to the dentist and the dentist concluded that the child was not teething).

The special education director expressed that her review of daily data compiled by the second semester [] teacher revealed that incidents of biting occurred when Petitioner returned to school after several days of absences. The biting was controlled by Petitioner's teacher. In the director's opinion there was no need to implement a behavior plan to address the biting.

Although during the April period it appeared that maladaptive behaviors were increasing, that issue was not addressed at an IEP team meeting held on April 10, 2012. (Bd. 15). Nor did the IEP team include in Petitioner's IEP the single behavior goal that he had not mastered. That goal was managing and recognizing feelings. According to his second semester [] teacher the boy was not developmentally ready for such a goal. It was determined by the IEP team that the child's behavior did not impede his learning or the learning of others. (Id.). Behavior goals were removed from the IEP proposed for the 2012-2013 school year.

The IEP team agreed that Petitioner's least restrictive environment was small group and

1:1 instruction. That instruction was necessary for Petitioner to reach his potential and to maximize his capabilities.

Because of the deteriorating behavior of their child at their home as well as their fear for his safety at school, the parents re-enrolled Petitioner in the [] Center on May 23, 2012. He has attended [] Center since that date. His attendance at the [] Center included receiving ABA therapy in the summer of 2012.

Although the opportunities for publicly funded occupational therapy (OT) and speech therapy existed, the parents chose not to have Petitioner participate in those therapies because it would prevent the child from receiving a full day of therapy at the [] Center. Mrs. [] commented that the OT and speech therapy available were not the correct program for her son.

On July 26, 2012 Mrs. [] wrote the local education agency. (P. 10 and Bd. 23). She requested that the school system pay for Petitioner's tuition at the [] Center for the 2012-2013 school year. (Id.).

The director of the day program at the [] Center related that when Petitioner re-enrolled at her facility she saw instances of self-injurious behavior and aggression that her therapists had not seen during the youngster's earlier enrollment. She observed the child biting his fingers, spitting, scratching his face and pinching staff. Occasionally the child would run out of the room. On June 25, 2012 the child scratched himself in the face with an ink pen. (P. 1). On August 7, 2012 he bit his therapist's finger. (Id.). As a consequence of these behaviors, the [] Center developed a behavior intervention plan (BIP) for the youngster. The BIP was designed to address the child's tendency to bite himself, his teacher and his therapist and to prevent him from pulling the hair of the [] Center staff. Petitioner's parents also reported instances of aggressive behavior at home. The day program director expressed that such behaviors interfered with the Petitioner's ABA

therapy.

On August 13, 2012, Petitioner transferred from the [] Center ABA clinic to its day school. At the day school children receive both ABA therapy and academic instruction.

On August 24, 2012, the school system conducted an IEP meeting. (Bd. 18). The primary purpose of the meeting was to consider the parents' July 26, 2012 request for the local education agency to pay for Petitioner's private placement. (Bd. 18). An independent education evaluation (IEE) of the child was discussed. School system personnel believed that the child had progressed while enrolled in public school. The special education director who attended the meeting expressed that the boy had progressed. His [] teacher for the second semester agreed. She remarked that Petitioner's only regression would occur after he had been absent from school. She said the boy's absences from school were frequent. (Bd. 21)(absentee record). The elementary school principal provided her input that Petitioner's absences from school caused him to miss a significant amount of instruction. Nevertheless, annual IEP progress reports revealed mastery of toileting, printing and sight words. (Bd. 23). Mastery was anticipated in other areas. (Id.). The reports noted that Petitioner still needed multiple prompts to stay on task and remember routines. The special education director stated that the data compiled by staff demonstrated that the program offered to the child by the school system was appropriate. From the data that she reviewed, the boy had made progress even though he was frequently absent from school.

The data compiled by the second semester [] teacher supported the opinion of the special education director. (Bd. 49). Both the director and the second semester [] teacher said that a free appropriate public education had been provided to Petitioner by the school system. As a consequence, the IEP team declined to fund the placement of the youngster at the [] Center. (Bd. 19). Mrs. [] disagreed. She refused to sign the IEP. She advised the IEP team that her son would

continue at the [] Center.

At the August 24, 2013 IEP meeting school system personnel did agreed to conduct additional evaluations of the child in the areas of speech, occupational therapy and assistive technology. (Bd. 18). The school system also proposed to evaluate Petitioner's behavior. (Bd. 16).

On August 29, 2012 a due process hearing request was filed by the parent's attorney. (HO 1).

At the [] Center Petitioner is in a classroom with five students, a teacher and an aide. That aide assists the child one-on-one. His parents described that the boy is making progress at the [] Center. There is less regression in self-injurious behavior because at the [] Center the Petitioner receives a full day of intervention and team programs that implement the principles of Applied Behavior Analysis (ABA) therapy. The parents and the day program director explained that ABA therapy focuses on teaching the child verbal behavior skills, language acquisition, fluency training, social skills development and self-regulation of behavior. The ABA program uses naturalistic teaching strategies where the natural consequences of an act serve as reinforcement. Negative reinforcement is not implemented. Sometimes rewards are provided to address a reduction in maladaptive behaviors. The program also has picture schedules, written work and work statements. The recommendation of the [] Center for Petitioner is a minimum of 20 hours a week of intervention up until the age of five. That recommendation concurred with the recommendations of Petitioner's family doctor. When a child reaches the mandated school age the day school program director for the [] Center suggested that the child be enrolled in a school program that is utilizing research based and effective interventions. The program should include a curriculum that is researched based.

The parents testified that their son's language had improved since his re-enrollment in the [] Center. On occasion he speaks in short sentences. He now makes eye contact. There are still deficits in his socialization skills and his interaction with peers. The [] Center has incorporated social skills activities to address those deficits.

Although Mr. and Mrs. [] agreed that their child still bites, the instances of that particular maladaptive behavior have been reduced since he has attended the [] Center. The day school director characterized the decrease in the Petitioner's biting behaviors as "dramatic". (Tr. 216).

The parents seek to recover the costs of the therapy at [] Center. Those costs are $3600.00 per month. (P. 9 and P. 9A). However, the parents are only charged half of that tuition because they receive financial assistance from the [] Center. They also seek mileage reimbursement for transporting the youngster to and from his ABA therapy.

In support of their claim for reimbursement, Mrs. [] described a number of incidents which she maintained revealed that her child was not receiving a free appropriate public education. These incidents occurred both before and after the resignation of his first semester [] teacher. On November 8, 2011, the mother personally observed her son's [] class. The aide assigned to her son did not assist him at gym time. Mrs. [] intervened. If Mrs. [] had not intervened at that time she said her child would have spent the entire period running in circles. In the classroom the aide did not use hand-over-hand prompting. Mrs. [] commented that hand-over-hand prompting was one of the techniques that Petitioner needs to learn. (The second semester [] teacher stated that hand over hand prompting is considered a physical prompt. Because it is the most intrusive manner of instructing an autistic child it is not the preferred technique). According to Mrs. [], the aide who did not use hand-over-hand prompting had an oxygen tank. She could not bend over to her child's level.

Mrs. [] asserted that there was no data compiled regarding the attempts by staff to stop the child from acting out. Mrs. [] remarked that one of the reasons she filed a due process complaint was the lack of behavior data from the school system. Although the boy's teacher would verbally report to the mother that Petitioner had had a meltdown at school, on that same day his written report would show a smiley face or acclaim his behavior as "great" or "good". (Bd. 47).

On the date of another visit to the school, Mrs. [] observed her son lying on his stomach putting rocks in his mouth. Mrs. [] stopped him. She complained that school system officials made no effort to redirect her son away from that behavior. She commented that the teacher and her aides were just trying to keep the students in the class from running. The first semester [] teacher complained to Mrs. [] that because of behavioral issues in the class the teacher did not believe that she could meet the child's IEP goals.

On another occasion, Mrs. [] arrived at school to find her child wandering in the parking lot without supervision. That event occurred during the second semester of the 2011-2012 school year.

Mrs. [] did not observe a full day of her son's [] class the second semester of the 2011-2012 school year. She did go to the school once or twice a week at lunchtime. However, because the boy had a meltdown when she attempted to leave, his second semester [] teacher suggested that Mrs. [] not come to lunch anymore.

After the child's teacher resigned at the conclusion of the first semester, Mrs. [] testified that Petitioner's behavior regressed. He was extremely hostile at home. He bit his mother and pulled her hair. He also developed new behaviors such as spitting and being non-compliant. When the Petitioner returned to the [] Center, those behaviors decreased. Mrs. [] testified that the severe biting and violence have all but been extinguished. Although on occasion the child still bites, that

behavior has diminished since he has returned to the [] Center.

Upon examination by the lawyer for the school system, Mrs. [] recognized that during Petitioner's three years in the Madison City school system her son's symptoms had improved in some areas. She added, however, that they had regressed in other areas.

Mrs. [] also described the IEP meeting held to discuss whether her child would be allowed to check out of school early to attend the [] Center. According to her, the special education coordinator who chaired the meeting was very rude. The coordinator would not use Mrs. []'s name, instead, referring to her as "you parents." The coordinator insisted that Petitioner was not disabled. At one point she yelled at Mrs. [] Mrs. [] stated that the elementary school principal who attended the meeting said that there was no need to have the meeting. (The documents in evidence show that the principal did not attend the IEP meeting). (Bd. 11). The coordinator commented that school policy must be followed. That policy did not permit a shortened school day unless a physical problem prevented a child's attendance for a full school day.

The first semester [] teacher attended the IEP meeting at which Mrs. [] asked for an amended schedule to allow her son to go to outside therapy at the [] Center. The teacher testified that the coordinator became agitated. The coordinator raised her voice to Mrs. [] She spoke to Mrs. [] "harshly". (Tr. 343). The coordinator commented that there would be no outside therapy for the child. The coordinator said that the child could not be pulled out early to attend the [] Center. The teacher apologized to Mrs. [] afterwards about the tone of the meeting.

The special education coordinator to whom many of these remarks were attributed testified that she did not recall making them. She said she was not rude to Mrs. [] The coordinator added that the parent reacted in a negative manner because the coordinator was telling Mrs. [] something that the mother did not want to hear. The coordinator explained to Mrs. [] that based on the

observations of her son's teachers, the strength and vitality of her child would not cause him to be physically unable to participate in a full school day. She apologized to Mrs. [] that the school system could not agree to what the parent wanted.

In response to the remarks of the special education coordinator, Mrs. [] obtained a prescription from a doctor stating that her son was disabled. The doctor again reiterated the diagnosis of autism. The physician recommended twenty hours a week of ABA therapy. Mrs. [] took the prescription to the principal of the elementary school. Despite the prescription, the principal continued to mark the child as unexcused when he left early to attend the [] Center. The principal agreed that she marked the child's early check-outs as unexcused absences in accordance with school policy. (Bd. 21).

In November or December 2011 the special education director (not the special education coordinator) and the principal met with Mrs. [] They apologized for the coordinator's behavior at the August IEP meeting.

According to Mrs. [] and the first semester [] teacher, the conduct of the IEP meeting which discussed a shortened school day so that Petitioner could receive therapy at the [] Center was not a "team effort". Mrs. [] complained that the meeting subjected her to a "dictatorship". The teacher remarked that in her opinion the remaining members of the team had determined prior to the meeting that the child would not be allowed to attend the [] Center.

The special education coordinator who chaired the meeting responded that she did not know that the parent was requesting a shortened school day in order for Petitioner to receive ABA therapy at the [] Center until she was told that the parent's request for such therapy was the purpose of the IEP meeting. The coordinator was told about the purpose of the meeting by the first semester of [] teacher approximately five minutes before the meeting began. The coordinator denied that

she made up her mind to reject that request before the IEP meeting. In her view, taking the child out-of-school would have jeopardized Petitioner's ability to receive a free appropriate public education.

The teacher who instructed Petitioner during the first semester of the 2011-2012 school year described her classroom. It was a self-contained classroom There were nine students. All were disabled. At any one time the fewest number in the classroom was six. There were two aides. However, one aide suffered from severe [] ([]). The aide used an oxygen tank. The teacher stated that that aide did not implement the aide's training. The aide was not physically capable of assisting with the class. Because of the situation, the remaining aide had to take up most of the duties of the disabled aide. The teacher expressed concern about that aide's condition to the principal. The principal responded that she was concerned as well. The principal agreed that the disabled aide could not meet the physical demands of her job. The teacher said that despite inadequate staff, no additional assistance was offered to correct the situation.

When questioned about training for the aides, the [] teacher for the first semester expressed that one aide participated in training. The other did not – presumably because of her disabling condition. The condition of that aide limited the teacher's ability to control the classroom activities. (See P. 8).

In addition to the aide with [] (others described the aide's condition as []) the [] teacher suffered from a debilitating condition.

The special education director acknowledged that one of the aides suffered from []. She added that even with that condition the aide had the skills to do her job.

The first semester [] teacher agreed with Mrs. [] that there was one student in the class who demonstrated significant maladaptive behaviors. Those behaviors included biting and spitting. As

a consequence, she was concerned not only for her own safety, but for the safety of the other children. (P. 8). The child who exhibited the aberrant behaviors interfered with the teacher's ability to educate the remaining children. The teacher agreed that when she was absent, she suggested that Mrs. [] keep Petitioner out of the class so he would not get hurt. The teacher explained the classroom situation in the following manner:

> It was very concerning to me that a student in my class that was – had injurious behavior. That my – the assistance level that was provided in my classroom demanded that the one aide that I have that was very, very capable be used to keep that one particular student from having – from being able to injure the others. She [aide] was injured herself. And I was unable to prevent that because I was trying to provide instruction to the other students.
>
> It was discouraging to not see any changes being made. It was physically – the students that I had were difficult to manage. There were several students that had behavioral issues. And the one aide that I had was not able to provide the physical assistance that I needed." (Tr. 394-95).

Despite her concerns, the first semester [] teacher stated that she was well-trained to work with the students. She did her best every day. Nevertheless, the first semester [] teacher felt that she did not have the tools to be successful. Particularly, there were insufficient personnel to provide adequate supervision of the students. She felt overwhelmed by the situation. When asked if Petitioner had made meaningful progress she did not believe she could answer without knowing what the term "meaningful" implied. She remarked that it was a "close call". (Tr. 338-39).

The teacher also explained that Petitioner would occasionally have an outburst. He cried daily. However, the youngster did not have aggressive behavior. As a consequence, the first semester [] teacher thought that ABA therapy would benefit the Petitioner. She agreed that such therapy was a beneficial component of teaching students with autism. Indeed, upon questioning by the attorney for the school system, the first semester [] teacher testified that she implemented

numerous ABA strategies in her classroom. But she remarked that she never drafted an individualized ABA therapy plan for Petitioner. And, unlike the second semester [] teacher, she did not collect daily data on the child's progress in the various activities in which he was engaged.

Upon examination by the lawyer for the local education agency, the first semester [] teacher testified that she felt that she provided an education that would allow Petitioner to make meaningful progress. In that regard, she did the best that she could. In fact, she aspired to excellence. Yet she commented that the State Department of Education regulations require much less.

Although contradictory to her testimony on direct examination, upon cross-examination by counsel for the school system the first semester [] teacher said Petitioner made "some" progress toward his annual goals. (Bd. 22 p. 34). IEP progress notes revealed that the youngster's teacher anticipated mastery of his IEP goals by the end of the year. The teacher added that she used playtime, redirection, modeling, discreet trials, social studies, picture schedules and positive reinforcement to instruct the child. She agreed that all of those techniques are ABA strategies. The use of ABA techniques – including discrete trial training – by the first semester [] teacher was observed by the special education coordinator. The first semester [] teacher stated that she provided instruction by means of the State Department of Education approved curriculum. She was not in the classroom just to babysit the children.

The special education director for the school system expressed that the school system staff implemented many ABA strategies. When she observed Petitioner's class the children were well-behaved. They were working in small groups. And although the director recognized the concerns of the first semester [] teacher about the staff to student ratio, the director said that the teacher who replaced the first semester teacher did not have such concerns. Nevertheless, an aide who "floated"

between two [] classes was added to the staff.

In response to the parent's complaints about the absence of data being compiled during the school year, the director explained that the IDEA did not require the compilation of such data. The IDEA did not require the data used in ABA therapy such as discrete trial tallies.

The [] teacher for the second semester produced extensive data collection concerning her activities with Petitioner. (Bd. 49). That data appeared to be similar to the type information recorded by the [] Center therapists. (P. 4). The data compiled by the second semester [] teacher was obtained in the "natural environment," i.e. during classroom routines. (Tr. 1054). The teacher explained that she used many techniques that are consistent with the framework of ABA therapy. She provided discrete trial training to Petitioner. That training was based on the IEP goals of the youngster. She commented that ABA therapy was embedded in the classroom "all day, every day". (Tr. 1058). Her data supported that conclusion. (Bd. 49).

The director of the day program at the [] Center testified. She supervises K-7th grade at the [] Center. She is a licensed board certified behavior analyst (BCBA). At the [] Center there are four BCBAs and one assistant BCBA. There are eleven therapists and four state certified teachers of special education. All personnel are trained in ABA therapies. Each member of the staff receives forty hours of ABA training. All employees receive ongoing training once a month. The staff follows the principles set forth in the 2009 National Autism Center Standard Practice (summary). (P. 3).

At the [] Center there are two components. The ABA Clinic is for outpatient individuals. At that clinic an autistic child receives twenty hours a week of ABA therapy. The therapy is provided by means of one-on-one intensive intervention. No experimental practices are allowed. The second component is a day program. In addition to ABA therapy, the day program provides

academic instruction. Petitioner has been enrolled in the day program since August 13, 2012.

Each student at the [] Center has a behavior modification plan written by a BCBA. The children receive discreet trial training which is a methodology backed by peer reviewed research. According to the National Autism Center of Standard Practice there are eleven established treatments and twenty-two emerging treatments. All of those treatments are used at the [] Center

The witness consulted in the establishment of Petitioner's behavior plan. An assistant BCBA actually wrote the plan. The director of school services reviewed and approved it.

The day school operated by the [] Center relies on the principles of ABA methodology. The director of day school services explained that "components of the Alabama State Department of Education standards for preschool are provided" to students. (Tr. 229). She said that the [] Center does not specifically follow Alabama Developmental Standards for Preschool Children because many of the children at the [] Center do not demonstrate developmental levels that would make teaching such standards a valid use of time. For example, the witness agreed that one such item contained in the state-wide standards for instruction of [] students - the discussion of the four seasons - was not provided to the students by the [] Center teachers. She remarked that it would be useless to address that topic with a boy like Petitioner because he cannot communicate his basic wants.

In addition, the [] Center provides parents of the students ABA and discreet trial training. Mrs. [] has availed herself of that training.

The director of day school services described that ABA is the only peer reviewed therapy for a child with autism. ABA includes behavior modification through reinforcement. The needs of children with autism are constantly addressed. Behavior programs are developed which analyze the antecedent behavior to determine a target behavior. Then there is intervention. There is much

data collection. The data examines antecedent events, behavior and the consequences of the behavior. The witness stated that without data collection there is no ABA therapy. In Petitioner's situation behavior modifications are charted by means of a frequency chart. Academics are charted by worksheets and teacher observations just as in public school.

According to the director of day school services, Petitioner is in a small group. Usually he is with one teacher and two students or one teacher and three students. Frequently, Petitioner is pulled out of that setting to receive one-on-one instruction.

The director of day school services described that Petitioner's present condition prevents him from being instructed with neurotypical (non-disabled) peers. If placed with those children he would not learn from modeling their behavior. Although the goal is to eventually allow him peer interaction with such individuals, at present Petitioner is not capable of such interaction. The witness stated that the child must first learn to master various skills so that he can use them in a generalized setting. In support of that view the director of the day program explained that the parent reported that after [] Center services ceased in January 2012, the child's self-injurious behavior and aggression to school system staff increased. Those behaviors are still of concern at the [] Center. However, Petitioner's engagement in such behaviors has decreased. Those behaviors will continue to be addressed whenever instruction is provided.

The director of day school services testified that Petitioner progressed at the [] ABA clinical program when he was there the first time. He has progressed since his re-enrollment. The Verbal Behavior Milestone Assessment and Placement Program (VB-MAPP) is a criterion referenced assessment tool specifically designed for children with autism. The VB-Mapp identifies the level of a child's skills by comparing the child to his/her typically developing peers. Petitioner's VB-MAPP verbal behavior assessment showed a [] point gain. The witness

commented that those scores were objective evidence of progress. She related that Petitioner's is progressing in behavior, classroom routines and in academics. He is currently at Stage 2. That is a developmental level of an [] month old child.

The school system called on its behalf a witness who has expertise in autism. This individual was a professor at the University of California Los Angeles (UCLA). She specialized in autism and its treatments. She has taught and developed Applied Behavior Analysis (ABA) therapies. In that regard, she developed an outpatient autism clinic for UCLA that sought to treat autistic individuals through ABA therapy. (Bd. 51).

The expert witness testified that based on her review of the [] Center records Petitioner had not regressed when he returned to the [] Center from the school system on May 23, 2012. Indeed, she commented that her review of the records revealed that the child had actually improved in the public school setting. She based that opinion on her comparison of school records with the records from Petitioner's previous treatment at the [] Center from May 2011 to January 2012.

The expert in autism was also critical of the [] Center assessment of the child when he returned to that facility on May 23, 2012. In her opinion the [] Center conducted only the VB-MAPP as an assessment. In order to diagnose and treat autistic children, the facility treating such children must have much more information than a VB-MAPP. That information must be obtained from a variety of different sources. In the expert's view, the [] Center should have used more information in assessing the child upon his return to its facility.

In addition, her review of the VB-MAPP conducted by the [] Center contained contradictory information. When the expert compared school system records with the VB-MAPP, the VB-MAPP stated that Petitioner could not do many of the tasks that school system records demonstrated that he had previously mastered. Thus, personnel at the [] Center began to re-teach

Petitioner tasks that he had already been taught and could perform. The witness was critical of the fact that the [] Center had not cross-referenced its assessment with data from the school system. She believed that the VB-MAPP performed by the [] Center was an incomplete assessment. She stated that the [] Center did not examine what Petitioner could not do, as opposed to what he would not do. She thought that was the fundamental issue with the child, i.e. that he is capable of performing many tasks but simply refuses to do them. She desired an assessment that would determine what actions or instructions by the treating facility would motivate the Petitioner to do what he has already shown a capacity to do.

Likewise, the autism expert was critical of the August 13, 2012 behavior plan developed for Petitioner by the [] Center. (Bd. 52 p. 71). In her opinion the plan did not work. She stated that the [] Center behavior plan reinforced the Petitioner's biting behavior. By September 2012, she insisted that data accumulated by the [] Center demonstrated that the biting behavior had become worse. In her view Petitioner's self-injurious behaviors (SIB) had increased. In addition to biting, the child was screaming and crying which the witness also characterized as a self-injurious behavior. She noted that the [] Center conducted a functional behavior assessment of the child on December 12, 2012 because of the escalating maladaptive behavior. After that point, the child's self-injurious behavior reduced, but later increased. According to the expert witness, behaviors such as that demonstrated by the Petitioner interfere with his learning. (Bd. 52).

Lastly, the autism expert expressed that the parents of Petitioner and the personnel at the [] Center had confused ABA techniques with the mass discrete trials conducted in the isolated setting of the [] Center. The witness commented that if you want an autistic child to be able to go to school, you teach them in school by means of a program provided in that natural environment. She said that use of ABA techniques in a student's classroom was the treatment of choice for

children on the Autism spectrum. Based on her review of Petitioner's records and her interviews with his preschool teacher and his second semester [] teacher, the youngster received ABA therapy.

IV.

Discussion of Issues

In order to comply with the IDEA, a school system must satisfy two obligations. One procedural and the other substantive. Hendrick-Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 188-89 (1982). Initially, a school district must comply with the guaranteed procedural safeguards provided in the IDEA. Id. at 206-207; Board of Education of Murphreesboro Community Sch. Dist. #186 v. Illinios State Board of Education , 41 F. 3d 1162, 1166 (7th Cir. 1994). Secondly, a school system must develop an IEP that includes special education and related services tailored to meet the unique needs of a particular child and be "reasonably calculated to enable a child to receive educational benefits." Id.; Walczak v. Florida Union Green Sch. Dist., 142 F. 2d 119, 122 (2d Cir. 1998).

The due process complaint in this case alleged that the local education agency had failed to treat the parent as an equal partner in the education of her child. That claim involved an accusation that at the August 2011 IEP meeting when the shortened school day was discussed, the IEP team had predetermined its decision not to allow the child to leave school early to attend his ABA therapy. If that situation occurred, that is a procedural violation of the IDEA.

Predetermining a child's placement or educational program may constitute a denial of a free appropriate public education. K.D. v. Department of Educ., 665 F. 3d 1110, 1123 (9th Cir. 2011); H.B. v. Las Virgnes Unified Sch. Dist., 239 F. App'x. 342, 345 (9th Cir. 2007)(appeals court declined to decide whether it was predetermined to remove autistic child from private school because federal district court must determine if school district was "unwilling to consider other

placement" even if parents provided input).; Deal v. Hamilton Co. Bd. of Educ., 392 F. 3d 840, 857 (6th Cir. 2004); Spielberg v. Henrico County Pub. Schools, 853 F 2d 256, 259 (4th Cir. 1998); Young v. State of Ohio, 2013 WL 146365 *8 (S.D. Ohio 2013). In such instances predetermination denies the parent meaningful participation in the student's IEP development. Deal, 392 F. 3d at 857; P.C. v. Milford Exempted Village Sch., 2013 WL 209478 *9 (S.D. Ohio 2013); Sam K. v. Department of Educ. State of Hawaii, 2013 WL 638603 *12 (D. Hawaii 2013).

In this case the outcome of the August 2011 IEP meeting was predetermined. The outcome was based on a misconception that school system policy overrides the IDEA requirement that placement and programs be individualized. That misconception existed prior to and throughout the August 2011 IEP meeting. It was the view of the members of the IEP team that school system policy required a full school day unless a child's disability compelled the conclusion that he/she be released early from school to undergo therapy or treatment due to physical weakness or loss of vitality. In her testimony the special education coordinator who chaired the meeting did not suggest that any other option was considered by the IEP team. The majority of the team rejected out-of-hand the notion that Petitioner be released early from his [] class to receive ABA therapy at the [] Center. They did not make their decision on an "individualized" basis. The first semester [] special education teacher said that she felt like the team members had decided what they were going to do before coming into the meeting. The IEP written in April 2011 stated that the child would not be allowed to check out early for private therapy due "to school board attendance policy". (Bd. 10). The evidence, however, revealed that the outside therapy was benefitting the child more than the classroom instruction that would be provided at the public school.

Moreover, the basis for the IEP team decision was that the child would miss academic instruction yet Mrs. [] and the first semester [] teacher testified that the teacher had arranged her

day so that the boy would not miss any instruction. Based on these facts, the Petitioner's mother was denied a meaningful opportunity to participate in that IEP meeting. The predetermination by the school system IEP team members resulted in substantive harm that amounted to a denial of a free appropriate public education to Petitioner. Spielberg v. Henrico County Pub. Schools, 853 F. 2d at 259; P.C. v. Milford Exempted Village Sch., at *9.

In predetermining that the child would not receive a shortened school day the IEP team ignored the requirements of State Department of Education regulations. The applicable regulation states that a special education program must be in operation for at least the length of the regular school day "unless the IEP team specifies a different length of time based on the **individual needs** of the child". Ala Admin Code 290-8-9.05(2)(c). According to the child's family doctor, Petitioner needed twenty (20) hours a week of ABA therapy. That was the amount of therapy provided to Petitioner by the [] Center.

On the other hand, despite the mother and her counsel's insistence otherwise, the decision of the IEP team in August 2012 not to fund the private placement at the [] Center was not predetermined. The IEP decision was supported by the various data reviewed by the IEP team. The data included an evaluation of the child's IEP goals as well as input from his teacher and speech pathologist. The IEP team evaluation revealed "appropriate progress towards [Petitioner's] IEP goals and objectives". (Bd. 19). The IEP team rejected placement at the [] Center because that placement was not necessary to provide Petitioner with a free appropriate public education. (Id.). The consensus of the team was that Petitioner was making progress in public school.

Furthermore, the July 26, 2012 letter by Mrs. [] to the special education director revealed that it was the parents who had "predetermined" to enroll their son at the [] Center and seek public reimbursement. (P. 10). As the second semester [] teacher who attended the meeting testified:

the parents had already made up their mind to obtain ABA therapy at the [] Center. (Tr. 1041). That decision was made by the parents after an April 2012 IEP had been drafted proposing the services that Petitioner would receive for the 2012-2013 school year. (Bd. 15).

The attorney for the Petitioner also asserted that during the 2011-2012 school year Petitioner did not have a behavior intervention plan (BIP) in place. The failure to conduct a functional behavior assessment (and presumably develop a behavior plan) when a disabled child's behavior warrants such an assessment is viewed as a serious procedural violation of the IDEA. R.E. v. New York City Dept. of Educ., 694 F. 3d 167 (2d Cir. 2012). Multiple procedural violations may be deemed a denial of a free appropriate public education. R.E. v. New York City Dept. of Educ., supra at 190. But the failure of a local education agency to create a behavior intervention plan does not render an IEP inadequate where a child's behavior can be addressed by other means. R.P. v. Alamo Hts. Indep. Sch. Dist., 2012 WL 6701939 (5th Cir. 2012); R.C. v. Byram Hill Sch. Dist., 2012 WL 5862736 (S.D. N.Y. 2012). As the autism expert for the school system testified, behavioral goals were embedded in every IEP goal and objective that involved Petitioner. The behavior goal was to cause the child to cooperate with instruction. In her opinion that goal addressed Petitioner's behavior.

Petitioner's behavior goals in his 2011-2012 IEP were to understand and follow class rules and routines, participate in group activities and manage and recognize feelings. As his second semester [] teacher recognized, none of those goals addressed the concerns of Petitioner's parents about self-injurious behaviors and Petitioner's biting and pinching students and staff. However, based on the testimony those particular behaviors seldom occurred during the first semester of the 2011-2012 school year. Crying was the only behavior of concern. His teacher for the first semester stated that although Petitioner frequently cried, he was not aggressive. His mother agreed that

Petitioner was not aggressive until the second semester of the 2011-2012 school year. (Tr. 1134). Mrs. [] did not relate but one incident of self-injurious behavior during the first semester (Petitioner putting a rock in his mouth). Daily progress reports compiled for the first semester demonstrated that Petitioner's behavior was satisfactory. (Bd. 47). None of the behaviors disclosed in those reports seemed to concern either his teacher or Mrs. [] Accordingly, there was no reason for school system staff to conclude that Petitioner's behavior should be addressed by a behavior intervention plan.

Conversely, it appeared that Petitioner's maladaptive behavior was escalating as the 2011-2012 school year drew to a close. (P. 1). Despite that fact, no behavior interventions were proposed for the 2012-2013 school year. Petitioner's second semester [] teacher said that the IEP team considered such interventions but concluded that Petitioner's behavior did not impede his learning or the learning of others. She described the incidents of biting as sporadic and inconsistent. They were "isolated events." (Tr. 1071). There was no consistency in such behavior except one week when his mother held the child out of school. That week Petitioner had difficulty transitioning back into the classroom. In that instance his teacher was able to eliminate the biting through recognized teaching interventions. Otherwise, the teacher described the youngster's behavior during the second semester as typical behavior for a five year old. On occasion, when Petitioner was mad because he was required to cease an activity in which he was interested, he bit. His second semester teacher remarked that the child engaged in that behavior because he cannot verbally communicate his reluctance to change activities.

The autism expert who testified on behalf of the school system explained that behavior goals are not needed in an IEP if the maladaptive behavior can be managed in the classroom in the same manner in which it is managed for non-disabled children. Based on the data that she

reviewed, the second semester [] teacher managed Petitioner's behavior. (Bd. 49). The expert continued by emphasizing the fact that the Petitioner missed 9-10 days out of 18 the last month of the second semester. That situation interfered with the consistent instruction that the child required. According to the records reviewed by the expert, the biting and scratching engaged in by the child occurred on Mondays. Petitioner's behavior would improve through the remainder of the week. Lastly, she commented that the maladaptive behaviors which occurred took place in May 2012 after the 2012-2013 IEP had been written.

In the development of an IEP the IEP team must only consider the use of positive behavioral interventions and supports (and other strategies) to address any behavior of a disabled child that impedes the child's learning or that of others. 20 USC §1414(d)(3)(B)(i). Regardless of the behaviors that the parents observed at home, the experiences of those who taught Petitioner at school lead the IEP team to determine that Petitioner's behavior was not severe or persistent enough to cause its members to conclude that Petitioner needed positive behavioral interventions and supports. G.H. v. Great Valley Sch. Dist., 2013 WL 2156011 *9 (E.D. Pa. 2013)(although child's behavioral issues [tantrums] surfaced at home, fact that such behavior was not observed at school justified IEP team's decision not to offer parents additional behavioral services). Nevertheless, at the August 24, 2012 IEP meeting school system officials agreed to conduct a behavior evaluation of the child. (Bd. 16). Based on the evidence, the local education agency did not engage in a procedural violation of the IDEA by not formulating a behavior plan for the second semester of the 2012-2013 school year.

The next issue was whether the local education agency denied the child extended school year services. That is a substantive issue. Normally, extended school year services are only required if interruption in the child's education is likely to deny the child a free appropriate public

education. Ala. Admin. Code, 290-8-9-.05(9). In this case the answer to that question need not be determined because both parents acknowledged that school system personnel offered to allow the child to attend a summer program at the end of the 2011-2012 school year. The summer program offered by the local education agency was four hours a day, five days a week. The program lasted four weeks. Services were proposed to prevent regression of Petitioner's progress. The parents were confused as to the length of the program (it was four weeks), but nevertheless, declined the services because of a planned family vacation and other summer activities enjoyed by their son. (Bd. 18, p. 2). As a consequence of its offer of extended school year services, Petitioner's parents are not entitled to reimbursement for the costs of their child's attendance at the [] Center from May 23, 2012 to August 13, 2012.

The parents also allege a second substantive violation of the Individuals with Disabilities Education Improvement Act (IDEA) by the local education agency. They alleged that Petitioner was denied a free appropriate public education for the 2011-2012 school year. That violation caused them to enroll their child in a private school. The parents seek tuition reimbursement and the cost of travel to and from the private placement.

If a school system fails in its obligation to provide a free appropriate public education (FAPE) to a child with a disability, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the school district. School Commission of Town of Burlington v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 370 (1985). Private placement may be appropriate regardless of whether the child previously received special education through the public school. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009). Review of such circumstances is subject to what is referred to as a Burlington/Carter analysis. A parent is entitled to tuition reimbursement when: (1) the proposed individualized education plan

(IEP) was inadequate to afford the child an appropriate public education; and (2) the private schooling obtained by the parents was appropriate to the child's needs. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993); Frank G. v. Board of Educ. of Hyde Park, 459 F. 3d 356, 363 (2nd Cir. 2006); M.N. v. State of Hawaii, 2011 WL 6020861 (D. Hawaii 2011)(reimbursement denied in part because private placement failed to provide information about child and parent avoided participation in proposed IEP meeting). If there is an affirmative finding on both prongs, equitable considerations relating to the reasonableness of the action taken by the parent are relevant. Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); C.L. v New York City Dept. of Educ., 2013 WL 93361 (S.D. N.Y. 2013)(reimbursement awarded where parent cooperated with school system officials including observing proposed class); Lauren G. v. Westchester Area Sch. Dist., 2012 WL 5400215 (E.D. Pa. 2012)(although reimbursement awarded for one period, it was denied for another because parents did not make child available for district's proposed evaluation on basis that they had moved the child from public school); R. B. v. New York City Dept. of Educ., 713 F. Supp. 2d 235, 238 (S.D. N.Y. 2010)(failure of school district to recommend public school placement negated statutory requirement regarding parent's notice of intent to privately place child); D.G. v. Cooperstown Central Sch. Dist., 2010 WL 4269127 (N.D. N.Y. 2010).

Parents who believe that their child's IEP does not afford the appropriate education to which the child is entitled, may "at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of private school from the state." School Comm. of Town of Burlington, Mass v. Dept. of Educ. of Mass., 471 U.S. 359, 370 (1985); Galiardo v. Arlington Central Sch. Dist., 489 F. 3d 105, 111(2nd Cir. 2007). Parents seeking reimbursement bear the burden of showing that the school district's suggested placement was inappropriate and their placement was appropriate. Galiardo, 489 F. 3d at 111; Frank G. v. Bd. of Educ. Hyde Park,

459 F. 3d 464, 65; D.D.-S v. Southold Union Free Sch. Dist., 2012 WL 6684585 *1 (2nd Cir. 2012).

When deciding reimbursement cases, courts and hearing officers employ a three step analysis. First, it must be determined whether there has been procedural compliance with the IDEA. Secondly, the court or hearing officer considers whether the challenged IEP is appropriate to meet the educational needs of the child, i.e. whether the IEP is "reasonably calculated to enable a child to receive educational benefits". Rowley, 458 U.S. 206-07. It is only if the challenged IEP is "procedurally or substantively deficient that the reviewing body must consider the final step of an analysis, i.e. whether the parent's unilateral placement is appropriate within the meaning of the IDEA." Burlington at 370. As noted, the issue of "appropriateness", whether considering the challenged IEP or the parent's placement, centers on whether the placement plan at issue is one that is "reasonably calculated to enable a child to receive educational benefits". Rowley, 458 U.S. 207.

The IDEA and its corresponding regulations provide that if a school district makes a free appropriate public education (FAPE) available to a child residing within their district, the school system is not obligated to reimburse tuition when the parent rejects an offer of FAPE and places the child in private school. 20 U.S.C. §1412(10)(C)(i); 34 CFR §300.148(c). A number of factors may be examined in determining the reimbursement issue including the ratio of disabled students to teachers and aides, whether the students are on different functioning levels and whether the student seeking reimbursement needs more attention than the other disabled students. C.L. v. New York City Dept. of Educ., 2013 WL 93361 *5-6 (S.D. N.Y. 2013). Safety may also be a factor for consideration. Sam K. v. Department of Education, State of Hawaii, 2013 WL 638603 *11 (D. Hawaii)(where disabled child was provided services with a student who assaulted staff and other students who were subject to juvenile proceedings public placement was not appropriate). In

seeking reimbursement for private placement parents have no right to participate in the selection of their child's classmates. J.L. v. City School Dist. of City of new York, 2013 WL 625064 (S.D. N.Y. 2013). However, parents of disabled children should not be compelled to continue their child in a school that fails to provide adequate safety due to the behavior of other students, a shortage of staff or the inability of a teacher to secure her classroom or provide the necessary behavioral interventions.

In this case the testimony of both Mrs. [] and the first semester [] teacher demonstrated that one – possibly two – other students in the class were attacking other children and staff. One of the two aides assigned to the class was engaged primarily to control the conduct of the student(s). The teacher expressed to school system officials her concerns for her safety and that of her students. (P. 8). The other aide assigned to assist the teacher was unable to do so because of her disabilities. Despite notice to school system administrators, nothing was done to alleviate that situation until shortly before the beginning of the second semester of the 2011-2012 school year. (The Hearing Officer finds that the principal's testimony that she investigated the teacher's concerns was not credible. (Tr. 1148-49; 1177; 1179-83). The principal had ample written information upon which to conclude that there safety and staffing issues in Petitioner's class). (P. 6 and P. 8).

Nor was safety the only problem during the first semester of the 2011-2012 school year. Petitioner's IEP stated that "due to significant delays in communication and socialization [Petitioner] requires specialized instruction in a small group and/or one to one instruction in a highly structured/specialized environment". (Bd 11 p. 4). One of the child's IEPs noted that Petitioner had a shortened attention span. (Bd. 15). He had difficulty focusing. (Id). Given the lack of effectiveness of one of the two aides assigned to the first semester [] class and the fact that the other aide's attention was drawn to the maladaptive behavior of another student(s), it cannot

be said that Petitioner received the instruction required by his IEP. The reality of a 9:1:1 student to teacher to aide classroom (or in some situations a 9:1:0 ratio) can hardly be called small group or one to one instruction. Even when there were only six disabled students in the class which circumstance occurred at various times during the school day that circumstance did not comply with the "small group" or one-on-one instruction required for the child to succeed in the communication, academics and socialization anticipated by the IEP. The special education coordinator agreed that "these children are difficult to teach in a group setting". (Tr. 962). The absence of appropriate staffing and the first semester [] teacher's inability to control the class caused her to remark that it was a "close call" if the Petitioner received meaningful benefit from his instruction[1]. The class certainly did not appear to be "highly structured" as required by Petitioner's IEP.

The federal government and the State Department of Education require that a free appropriate public education be provided to a disabled child. Educational performance means academic, social/emotional, and/or communication skills. Ala. Admin. Code, 290-8-9-00(4). In this case Petitioner's mother agreed that her son made progress in academics the first semester of his [] year. However, it was the areas of social/emotional and communication skills that most concerned her husband and her as it does many of the parents of children with autism. Despite his disability, Petitioner was described as a "happy" and "artistic" child. It was his propensity to bite, his condition of pica (putting objects in his mouth), his inability to socialize with his peers and his inability to communicate his wants and feelings that alarmed his parents. In those areas the more credible evidence disclosed that Petitioner's teacher and her aides failed to provide sufficient

[1] J.L. v. Mercer Island Sch. Dist., 592 F. 3d 938, 951 (9th Cir. 2010)("meaningful benefit" and "some benefit" is same standard under 1997 reauthorization of IDEA). The Eleventh Circuit uses the term "some" benefit. J.S.K. v Henry Cnty. Sch. Bd., 941 F. 2d 1563 (11th Cir. 1991).

support during the first semester. If there was any progress made by Petitioner in the parents' areas of concern during that semester the progress must be attributed to his one-to-one therapy at the [] Center. See G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 585 (S.D. N.Y. 2010)(disabled student's private placement may remedy public placement's IDEA violation) aff'd., 2012 WL 4946429 (2d Cir. 2012). As a consequence, Petitioner was deprived of a free appropriate public education during the first semester of his [] year. Petitioner's parents are entitled to reimbursement for the private therapy that they obtained for him during that period.

In a similar vein, private school reimbursement is available for procedural errors that deny a free appropriate public education. Gersten v. District of Columbia, 2013 WL 620379 (D. D.C.); Board of Educ. of Oak Park & River Forest High Sch. V. Illinois State Bd. of Educ., 21 F. Supp. 2d 862 (N. D. Ill. 1998). Accordingly, the procedural violation of predetermining the issue of whether the child would be permitted to leave school early to attend the [] Center warrants reimbursement to his parents for his attendance at that facility from August 23, 2011 to January 31, 2012.

Conversely, there was substantial evidence that Petitioner was provided a free appropriate public education the second semester of the 2011-2012 school year. The staff to student ratio was increased. There were less students in the class. The "floater" aide focused her attention on Petitioner's class. The duties of the disabled aide were revised. The newly assigned teacher had better control of the classroom. Apparently, safety issues were alleviated. These responses to the complaint of Petitioner's parents and first semester [] teacher allowed the school system to provide instruction in the 1:1 or small group required by the 2011-2012 IEP.

Likewise, the individualized education plan (IEP) proposed for the 2012-2013 school year offered the child a program reasonably calculated to enable the child to receive educational benefit.

(Bd. 15). That IEP was proposed on April 10, 2012. The parents signed the IEP. Their signature at the conclusion of the IEP meeting, while not confirming their agreement with the services proposed, was at least an indication of their agreement with the IEP team's assessment of Petitioner's deficits. One of those deficits was Petitioner's lack of functional communication skills. The little boy does not initiate communication. The IEP that was drafted intended to address that problem by having Petitioner respond when he was spoken to. Staff would work with him on his capability of verbally expressing his wants and needs. The child also had a deficit in social interaction with students and teachers. The IEP addressed that deficit by requiring Petitioner to participate in group science activities. The child is not fully independent in functional skills such as toileting. The IEP intended to address that difficulty by teaching Petitioner to communicate when he needed to go to the bathroom and assist him in self-care including improving his ability to don and doff his clothes during toileting. And although evaluations of the child revealed that his gross motor skills were in the average range, Petitioner's weakness in grasping was to be addressed by accommodations including extra time to perform written tasks and extra attempts to correct fine motor work and written classwork. Petitioner was to receive occupational therapy on a consultative basis for his visual-motor integration even though his evaluation score in that area was average. Because Petitioner has a short attention span and often cries when he is asked to cease a task and move to another task, the IEP proposed to address that situation. Specifically, staff were to discourage the boy's tendency to resist writing what is requested by his teacher and instead write or draw what he wants. That intervention was to be on a one-to-one basis.

The autism expert stated that the child can do many of the tasks to which he is exposed yet he refuses to do them. She explained that because of that situation the issue should be to engage in activities that will motivate Petitioner to do what he has already shown the capacity to do. In

her opinion the IEP proposed for the 2012-2013 school year addressed that issue.

The IEP contained a math goal as well. Although Petitioner demonstrated math skills on the computer, his IEP goal was to improve his pencil/paper math addition and subtraction skills and to teach Petitioner to assign months of the year to events such as his birthday.

Lastly, the IEP provided for speech language services one time a week for thirty minutes as well as adaptive physical education. All services were to be provided 1:1 or in small groups.

In addition to the proposed IEP, school system officials agreed to additional outside evaluations of the child in the areas of speech, occupational therapy and assistive technology. (Bd. 17). The school system proposed a behavior evaluation of the youngster as well. (Bd. 16).

The evidence further demonstrated that the school system incorporates ABA therapies in its classroom instruction of the children with autism who are enrolled in its preschool and [] program. The fact that its staff may not maintain the same amount of data as suggested by proponents of ABA therapy does not constitute a denial of FAPE. The IDEA contains no such requirements with respect to data compilation. (The Hearing Officer would also point out that despite counsel for Petitioner's repeated references to the data maintained by the first semester [] teacher as "smiley face" sheets and "potty" sheets, those "sheets" were daily progress notes provided to Mr. and Mrs. [] which contained information on feeding, toileting, behavior, special services such as gym and related services, reading, math, science and circle time. [Bd. 47]. Certainly, such information complies with the IDEA. 20 U.S.C. §1414(d)(1)(A)(III)).

In regard to the second prong of the Burlington/Carter analysis, it is apparent that the [] Center is an appropriate educational placement. Despite the fact that there are no neurotypical (non-disabled) peers in the Petitioner's class at the [] Center, the evidence was that youngster cannot benefit from instruction with such individuals.

Although parents of disabled children may not be subject to the same mainstreaming requirements as a school district, the IDEA's requirement that a disabled child be educated in the mainstream environment to the extent possible may be considered when determining if the parent's unilateral placement was appropriate. L.K. v. Northeast Sch. Dist., 2013 WL 1149065 *16 (S.D. N.Y. 2013).

Mainstreaming, or placing Petitioner in a less restrictive environment, was not appropriate in the present case. The applicable statutory provision provides that to the maximum extent appropriate, children with disabilities be educated with children who are not disabled. 20 U.S.C §1412(a)(5)(A). Separate schooling or removal of children with disabilities from the regular education environment is appropriate where the severity of the disability is such that education in regular class with the use of supplementary aids and services cannot be achieved satisfactorily. Id. The presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to the student. I.P. ex rel Mr. and Mrs. P. v. Newington Bd. of Educ., 546 F. 3d 111, 119 (2nd Cir. 2008). It has thus been held that "where the nature of the severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate." Briggs v. Bd. of Educ. of Conn., 882 F. 2d 688, 692 (2nd Cir. 1989). See Greer v. Rome City Sch. Dist., 950 F. 2d 688 (11th Cir. 1991)(examining factors in determining if congressional preference for mainstreaming may be overridden).

In this case there was substantial evidence that Petitioner's behavior prevents him from being educated in regular classes. The IEPs drafted by school system staff for the 2011-2012 and 2012-2013 school years contain numerous references to the fact that Petitioner's non-compliance with directives and routines prevent him from participating in the general education classroom. (Bd. 10 and Bd. 15). The board certified behavior therapist for the [] Center stated that the child

could not engage with his non-disabled peers at this time. She remarked that he would not learn from the behavior of those individuals. When the school system attempted to place the Petitioner in a general education class its efforts resulted in the Petitioner being placed in the rear of the class at a computer with earphones on because the general education teacher complained that he was making too much noise. Later, his new special education [] teacher advised Petitioner's mother that nothing would be gained from attempting to expose the child to the regular education students. Consequently, the fact that there are no non-disabled students at the [] Center does not violate the Petitioner's right to be served in his least restrictive environment. Sam K. v. Department of Educ., State of Hawaii, 2013 WL 638603 *14 (D. Hawaii 2013)(rejecting LRE spectrum despite child's lack of opportunity to interact with non-disabled students). See C.P. v. State of Hawaii, 2011 WL 1962944 *8 (D. Hawaii)(isolating child who was physical danger to teachers and staff did not indicate that child was not provided with his LRE); J.P. v. New York City Dept. of Educ., 2012 WL 359977 (E.D. N.Y. 2012)(disruptive acts by child requiring teacher attention justified placement where teacher could specifically deal with child's emotional needs). As the director of services at the [] Center day school explained, the purpose of the intense therapy provided by its personnel to the Petitioner was to allow him to one day be educated with non-disabled students. Petitioner has not yet obtained that capability.

VI.

Conclusions

Predetermination occurs when an educational agency has made a determination prior to the IEP meeting, including when it presents one educational placement option at the meeting and is unwilling to consider other alternatives. Deal v. Hamilton County Bd. of Educ., 392 F. 3d 840, 858 (6th Cir. 2004). Predetermination violates the IDEA because the Act requires that an

educational placement be based on the IEP, and not vice versa. K.D. v. Dept. of Pub. Educ., 665 F. #d 1110, 1123 (9th Cir. 2011); Spielberg v. Henrico County Pub. Sch., 853 F. 2d 256, 259 (4th Cir. 1988). Parents must have the right "to participate in meetings with respect to the identification, evaluation and educational placement of the child." 20 U.S.C. §1415(b)(1). "The IDEA imposes upon the school district a duty to conduct a meaningful meeting with the appropriate parties." W.G. v. Board of Trs of Target Range Sch. Dist. No. 23), 960 F. 2d 1479, 1483 (9th Cir. 1992). In this case the school system adopted a rigid, non-IDEA sanctioned requirement of a physical medical condition which limited a disabled child's strength and vitality in response to allowing Petitioner to be excused early from his [] classes to attend ABA therapy at a private school. (Bd. 12). In so doing, it violated the IDEA. See Ms. S. v. Vashon Island Sch. Dist., 337 F. 3d 1115, 1131 (9th Cir. 2003)(school district violates IDEA procedures where it develops IEP without meaningful parental participation); W.G. v. Target Range, 960 F. 2d at 1484 (finding predetermination when school district independently developed IEP without input from parents and some of students' teachers).

A procedural violation of IDEA may warrant reimbursement for private placement. G.G. v. District of Columbia, 2013 WL 620379 (D. D.C. 2013); Board of Educ. of Oak Park & River Forest High Sch. v. Illinois State Bd. of Educ., 21 F. Supp. 2d 862 (N.D. Ill. 1998). In this case the predetermination of the child's placement at the August 23, 2011 IEP meeting requires the local education agency to reimburse the parents the cost of ABA therapy at the [] Center from August 23, 2011 to January 31, 2012.

The Individuals with Disabilities Education Improvement Act (IDEA) requires that children with disabilities have available to them a free and appropriate education that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. §1400(d).

When a local education agency receiving IDEA funding fails to provide a free appropriate education, a disabled student's parents may remove the student to private school and seek tuition reimbursement from the local education agency. 20 U.S.C. §1412(a)(10)(C).

A parent of a disabled child is not entitled to private school reimbursement merely by proving that the private school placement is superior to the educational services publicly provided. The parent must prove that a public school system is unable to provide an appropriate public education. If the parents can demonstrate that their child failed to make meaningful progress while following the program set out in his IEP, the parents have provided evidence that the IEP was substantially unreasonable. K.K. v. Alta Loma Sch. Dist., 2013 WL 393034 *8 (C.D. Calif. 2013). See J.L. v. Mercer Island Sch. Dist., 592 F. 3d. 938, 951 (9th Cir. 2010)("some" educational benefit and "meaningful" education benefit are the same standard); N.B. v. Hellgate Elementary Sch. Dist., 541 F. 3d 1202, 1213 (9th Cir. 2008)(after 1997 amendments to IDEA special education plan must provide student with a "meaningful benefit."); In this case, the parents demonstrated that the IEP implemented during the first semester of the 2011-2012 school year did not provide a free appropriate public education to Petitioner because it failed to address the staff deficits and safety issues to which Petitioner was exposed. Similarly, the one-on-one/small group instruction promised by the IEP did not occur because of those issues and the large size of the class of disabled students. Petitioner failed to progress in the areas of social interaction and communication as a result of his public school instruction. Ala. Admin. Code, 290-8-9.00(4)(defining educational performance).

According to the parents and the day school director of the private program, the Petitioner progressed in all areas of his instruction at the [] Center. G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 579 (S.D. N.Y. 2010)(under IDEA parents play the role of a child specific

expert because they are uniquely situated to provide global understanding of the child's abilities and are able to report on a child's progress in ways a teacher cannot) aff'd., 2012 WL 4946429 (2d Cir. 2012). Thus, Mr. and Mrs. [] have fulfilled their burden under the Burlington/Carter analysis.[2] They are entitled to reimbursement for the costs of therapy (including mileage for transporting Petitioner to and from the therapy) for the period of August 23, 2011 to January 31, 2012.

On the other hand, the parents should be aware that while they desire a program that will maximize the potential of their child, such is not required by the IDEA. Board of Educ. v. Rowley, 458 U.S. 176, 200 (1982)(IDEA does not require providing the best possible education); J.W. v. Fresno Unified Sch. Dist, 626 F. 3d 431, 439 (9th Cir. 2010)(compliance with the IDEA does not require school districts to provide the "absolutely best" or potential maximizing education); Hood v. Encinitas Union Sch. Dist., 486 F. 3d 1099, 1107 (9th Cir. 2007)(inquiry whether program is reasonably calculated to enable child to receive educational benefit); Edison Community Consol. Sch. Dist. #65 v. Michael M., 356 F. 3d 798, 802 (7th Cir. 2004)(school districts "are not required to do more than to provide a program reasonably calculated to be of educational benefit to the child, they are not required to educate the child to his or her highest potential"); Doe v. Bd. of Educ. of Tullahoma, 9 F. 3d 455, 459-60 (6th Cir. 1993)(a free appropriate public education does not require Cadillac, but does require a Chevrolet); Kerkam v. McKenzie, 862 F. 2d 884, 886 (D.C. Cir. 1988)("proof that loving parents can craft a better program than the state offers does not alone, entitle them to prevail under [IDEA]"); Hessler v. State Bd. of Educ., 700 F. 2d 134, 139 (4th Cir. 1983)(school system need not ensure that a student has access to "the best education, public or non-public that money can buy"). S.C. v. Department of Education of Hawaii, 2013 WL 2156475 *11 (D. Ha. 2013)(fact that child progressed through 1:1 therapy outside of classroom setting does

[2] The Hearing Officer makes no determination about the appropriateness of the [] Center program regarding events, instruction or therapy provided to Petitioner by that facility after the due process request was filed on August 29, 2012.

not mean that school district is obliged to provide such an intensive program).

Based on the testimony of school system staff, the program provided to the child during the second semester of the 2012-2013 school year complied with the above authority. Although Mrs. [] complained about escalating maladaptive behaviors at Petitioner's home, school system staff did not observe those behaviors in the classroom or on the playground. Petitioner's behavior at school did not have a significant effect on his ability to learn. G.H. v. Great Valley Sch. Dist., 2013 WL 2156011 *6 (E.D. Pa 2013)(emotional issues which occur at home are only relevant to IDEA analysis if those problems have a significant effect on the child's ability to learn). When confronted with a brief increase in biting and pinching behaviors one week, the [] teacher explained that she attributed those events to the fact that Petitioner had been absent from school for several days and had difficulty transitioning back into the school environment. She remarked that she was able to eliminate the behavior by separating the child from his classmates and ignoring the behavior. Accordingly, the parents of Petitioner failed in their burden to prove that Petitioner was denied a free appropriate public education during the second semester of the 2011-2012 school year. Schaffer v. Weast, 546 U.S. 49, 52 (2005).

In a similar vein, the IEP drafted and offered to the parents by the local education agency for the 2012-2013 school year was appropriate to meet the educational needs of Petitioner. It was reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. 206-07. The IEP team considered the strengths of Petitioner, the concerns of his parents, evaluation results, the special needs of the child including whether his behavior needed to be addressed, the parents' desire for speech/language services and the academic, developmental and functional needs of the Petitioner. 20 U.S.C. §1414(d)(3)(A)-(B). As a consequence, the parents of the child are not entitled to reimbursement for the tuition and transportation costs they incurred by enrolling

their son at the [] Center from May 2012 through the 2012-2013 school year.

VI.

Specific Findings

1. The predetermination of the August 23, 2011 IEP team that Petitioner would not be allowed to leave school one hour early to attend therapy at the [] Center was a procedural violation of the IDEA. The parents of Petitioner are entitled to reimbursement of the cost of their son's attendance at the [] Center for the period of August 23, 2011 to January 31, 2012. The parents are also entitled to reimbursement of the mileage to transport Petitioner to and from the [] Center in the amount typically reimbursed by the Madison City Board of Education to its employees. 34 CFR §300.34(a)(related services includes transportation).

2. The failure of the local education agency to ensure small group and 1:1 instruction as well as the safety of Petitioner by means of adequate staff and other measures deprived Petitioner of a free appropriate public education for the first semester of Petitioner's [] year. The parents of Petitioner are entitled to the cost of their son's attendance at the [] Center from August 23, 2011 until January 31, 2011. The parents are also entitled to reimbursement for the mileage to transport Petitioner to and from the [] Center in the amount typically reimbursed by the Madison City Board of Education to its employees. 34 CFR § 300.34(a).

3. The local education agency provided Petitioner with a free appropriate public education the second semester of the 2011-2012 school year.

4. The local education agency did not commit a procedural violation of the IDEA by its failure to implement a behavior intervention plan for Petitioner for the 2011-2012 school year.

5. The local education agency offered an individualized education plan (IEP) to the parents of Petitioner which was reasonably calculated to enable Petitioner to receive educational

benefit for the 2012-2013 school year. The parents are not entitled to reimbursement for the cost of their son's attendance at the [] Center for the 2012-2013 school year.

6. The local education agency offered extended school year services to the parents of Petitioner for the summer of 2012. The parents are not entitled to reimbursement for the cost of their son's attendance at the [] Center from May 23, 2012 to August 12, 2012.

7. The parents demonstrated that the private placement provided educational instruction specifically designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. Baquizero v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1159 (9th Cir. 2011). See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993)(private placement need not provide an education that meets the IDEA's definition of a FAPE); Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 523 (S.D. N.Y. 2011)(the standard applied to parental placement is less restrictive and subject to fewer constraints than that applied to school districts); M.H. v. New York City Dept. of Educ., 712 F. Supp. 2d 125, 163 (S.D. N.Y. 2010)(unilateral placement does not have to meet the IDEA definition of a free appropriate public education).

8. The equities favor reimbursement to the parents for the 2011-2012 first semester placement of their son at the [] Center. The parents advised school system officials of the private placement by means of an IEP meeting in which all parties participated. When the result was unfavorable, the parents requested that school system officials review the IEP team decision. On December 15, 2011 the parents received notice that the local education agency had rejected their request for reconsideration of the IEP team decision. At that time they withdrew Petitioner from the [] Center subject to seeking reimbursement for the costs of therapy for which they had already paid.

VII

Notice of Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. § 1415(i)(2). The party dissatisfied with this decision must file a notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code, 290-8-9-.8(9)(c)16.

DONE this the 8th day of August, 2013.

Wesley Romine
Hearing Officer

cc: Shane Sears
Jim Sears
Rod Lewis
Clark Wiggoner