DUE PROCESS HEARING REQUEST
STUDENT - _____
CASE NO. 10132010-9

PRE-HEARING CONFERENCE
NOVEMBER 19, 2010

I. LIST OF ATTENDEES (by phone):

1. [redacted]
2. , Attorney for Parents/Student
3. Josh Gettys, Oxford School District, Director of Special Education
4. Paul Watkins, Attorney for District
5. Ann Box, Adams and Reese
6. Jeannie Hogan Sansing, Hearing Officer
7. Sharon Welch, Paralegal

II. PRELIMINARY MATTER - Conflict of Interest

Hearing Officer questioned the parties about the following statement in the October 25, 2010, letter from Attorney Watkins to Attorney Lewis:

> You have indicated that you believe my law firm's previous representation of Ms. Sansing's husband, Perry Sansing, in connection with his employment at Mississippi University for Women, creates a conflict of interest for Ms. Sansing. The District does not oppose Ms. Sansing's service as our hearing officer, but we need to resolve this issue before moving forward with this matter.

Counsel for the Student/Parents stated the potential conflict which he initially raised had been reconsidered and that the parties had determined to move forward with the Hearing Officer assigned by the Mississippi Department of Education, Special Education division

III. SCHEDULING INFORMATION FOR HEARING

1.	Date:	December 9, 2010 (to continue on Dec. 10-11, if necessary)
2.	Time:	8:30 a.m. to 3:00 (new time); Dec.10 (8:00 until 6:00); Dec. 11 (9:00 until conclusion)
3.	Place:	Location to be provided by District
4.	Court Reporter:	To be provided by District (expedited transcript)
5.	Open/Closed:	Closed

IV. SUMMARY OF LEGAL AND/OR FACTUAL ISSUES

PARENTS/STUDENT:

1. Failure to provide a free appropriate public education.
2. Failure to provide appropriate placement
3. Failure to place student in the least restrictive environment.
4. Reimbursement for private placement by Parents.
5. Failure of District to provide services after rejection of recommendation
6. Failure to provide final version of September 24, 2010 IEP

OXFORD SCHOOL DISTRICT:

1. Whether each of the District IEPs were appropriate?
2. Whether private placement chosen by parents was appropriate?
3. Least restrictive environment issue.
4. Whether District was given adequate notice of withdrawal?
5. Whether District was given adequate opportunity to evaluate?
6. Were parents' actions unreasonable?

V. EVIDENTIARY ISSUES RAISED DURING PRE-HEARING CONFERENCE:

1. Parents plan to call at least one and possibly two witnesses to testify by telephone, a teacher at school and in Virginia. District may object to testimony by telephone, stating a concern about the opportunity to conduct cross-exam.

2. Parents may offer a DVD of taken at school. The District currently objects to introduction of the DVD. The District and its counsel have had no opportunity to review the DVD. The DVD has not been sent to the Parents.

3. Reports and evaluation of Dr. Anderson, the physician who diagnosed with Asperger's Syndrome. District objects to use of evaluation, based in part on its concerned about having copies of all documentation for cross examination.

4. Parents may agree to the authenticity of th evaluation, but will not agree with the recommendations.

VI. MISCELLANEOUS:

1. By the end of business on December 2, 2010, the Parties will exchange and will provide the hearing officer with the following:

   (a) List of Exhibits; and

   (b) List of Witnesses.

2. Exhibits to be marked:

   Parents - P-1, etc.
   District - D-1, etc.

DUE PROCESS HEARING REQUEST

CASE NO. 10132010-9

I. INTRODUCTION

In the fall of 2009, [redacted]. was a new [redacted] grade student at Oxford Elementary School (OES) in the Oxford School District (the "District"). Prior to enrollment at OES, [redacted]. attended school in Virginia, where he received special education and related services under the Individuals with Disabilities Education Act (the "IDEA" or the "Act"). [redacted].'s transition to OES proved difficult. After several incidents during the first weeks of school, [redacted]'s parents withdrew him from school, and [redacted]. and his father traveled to Virginia for evaluation in a familiar medical setting. As a result of the evaluation, [redacted]. was diagnosed for the first time with Asperger's syndrome.

The District was notified of the Asperger's diagnosis. An Individualized Education Plan ("IEP") was developed, and [redacted]. returned to OES. [redacted] continued to experience significant problems at school and after a particularly difficult week in January 2010, the District created a new IEP for [redacted] that required a change of placement to a day treatment facility in Pontotoc, Mississippi. [redacted].'s parents disagreed with the District's proposed placement, and unilaterally enrolled [redacted]. in an out-of-state private, residential program. [redacted]'s parents now seek reimbursement under the IDEA for the private school tuition, other costs and attorney's fees.

Based on the evidence presented at the hearing, [redacted].'s parents met their burden of proving the District's provision of educational services to [redacted]. failed to meet the requirements of the IDEA. The IEP developed by the District and provided to [redacted].'s parents on January 14, 2010, and the

change of placement failed to provide a free appropriate public education for [redacted]. As a result, [redacted]'s parents are entitled to reimbursement for costs associated with the unilateral placement. The evidence also establishes the amount of reimbursement requested by the parents should be reduced for the reasons detailed below. Finally, [redacted]. s parents did not meet their burden of proving the offer of services made by the District in September 2010 violated the IDEA.[1]

II. PROCEDURAL BACKGROUND

[redacted]'s parents filed a due process hearing request on October 13, 2010.[2] The request specifically identified the matters from which the request arose as (1) proposal to initiate or change (a) the child's educational placement and (b) the provision of a free appropriate public education; and, (2) refusal to initiate or change (a) the child's educational placement and (b) the provision of a free appropriate public education. The District responded to the due process hearing request and the parents' specific allegations on October 25, 2010.[3] At the parents' request, the District agreed to waive the formal resolution session.

A pre-hearing teleconference was held on November 19, 2010.[4] [redacted]'s parents identified the

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[1] References to the hearing transcript are cited to the volume and specific page. For example, testimony found on page 10 of Volume I is cited as Tr. I, 10. References to exhibits introduced at the hearing are cited to the number assigned by the court reporter, for example, Ex. 2. When necessary, this decision identifies specific page numbers of an exhibit, or, in some cases, to the numbers applied to exhibits by the parties. Exhibits submitted by [redacted]'s parents are numbered consecutively without any prefix. Exhibits introduced by the District are consecutively numbered in handwriting on each exhibit. Documents produced by the District contain numbering with the prefix "OSD".

[2] *See* Ex. 52; Ex. 68. A complaint, submitted by the parents on October 8, 2010, was attached to the due process hearing request. [redacted]'s parents introduced attachments to the complaint as separate exhibits at the hearing.

[3] *See* Ex. 67 (District's response). Josh Gettys, the District's Special Education Director, testified that he assisted in the preparation of the response.

[4] The parents, Mr. Gettys, Ann Box, a special education consultant to the District, and the parties' counsel participated in the conference. A summary of the Pre-hearing conference was forwarded to counsel for both parties for their comment. Counsel for the District requested that issues set forth in the summary be reworded. A copy of the revised Summary is attached to the Opinion at Tab A.

specific issues for the hearing and the District detailed its response. The issues and defenses are addressed below.

At the request of counsel for [redacted]'s parents, subpoenas were issued and served upon Denise Collier, Ph.D. ("Dr. Collier") and Emily Johnson, Ph.D ("Dr. Johnson"). A subpoena was issued and served upon Sheila Williamson, Ph.D. ("Dr. Williamson") at the request of the District's counsel.

The due process hearing was conducted and evidence received over a two day period. [redacted]'s parents testified at the hearing, and called the following persons to testify: Dr. Collier, Dr. Johnson, Mark Wildmon, Ph.D., Priscilla Grantham, J.D., Jim Kemmerer (telephonic), Kellie Latulippe (telephonic), and Jane Smith, MSW. The Hearing Officer also viewed a video taken of [redacted] during math class at The Hunter School in Rumney, New Hampshire. The District called Suzanne Ryals, Nancy Maxwell, Kay Whitehead, Helen Hale, Dr. Williamson and Josh Gettys, the District's Director of Special Education.

After the conclusion of the hearing, the parties submitted post hearing and rebuttal briefs.[5]

III. FACTS

A. Albemarle County Public Schools

During the 2008-2009 school year, [redacted] and his family lived in Charlottesville, Virginia. [redacted] attended second grade in the Albemarle County Public Schools system, where he received special education and related services. [redacted] received special education services during his first year of kindergarten pursuant to an eligibility ruling with a classification of emotionally disturbed. Tr. I, 9. After a reevaluation during the fall of the 2008-2009 school year, [redacted] was ruled eligible for services with a primary disability ruling of OHI/ADHD. Tr. I, 10-11; Ex. 7, at Bates no. OSD000011.

[5] The hearing began at 8:15 a.m. on December 9, 2010 and concluded at approximately 8:30 p.m. on December 10. [redacted] has been receiving services at The Hunter School ("Hunter School") from the time [redacted]'s parents submitted the due process hearing request to date. As a part of their relief, [redacted]'s parents have requested that he remain at the Hunter School until the end of 2010-2011 school year in June 2011. Additionally, [redacted]'s mother testified that Hunter School's transition plan is conducted over several months, starting two to three months prior to the date the child's planned departure. Tr. I, 142-43.

During the 2008-2009 school year in Virginia, [redacted]. received a report card every nine weeks with student performance observations (grades) in the following areas: Reading, Writing, Word Study, Mathematics, Science, Social Studies, Technology, Social Developmental/Citizenship, and Work Habits. Tr. I, 9-11; Ex. 1. The teacher's observations were marked with a 3, 2, 1, or 0, representing "Meets Nine Weeks Expectations", "Developing", "Needs Improvement" or "Not Assessed", respectively. [redacted].'s marks that year were either "Meets Nine Weeks Expectations" or "Developing." *Id.* None of the observations for [redacted]. reflected "Needs Improvement." Ex. 1. For the final nine weeks, [redacted] received "Meets Nine Weeks Expectations" for 44 of the 52 marked observations. *Id.*

B. Oxford Elementary School ("OES")

[redacted]'s family moved to Oxford, Mississippi prior to the beginning of the 2009-2010 school year. On June 1, 2009, [redacted]'s mother visited OES where she met its principal, Evelyn Smith, and guidance counselor, Nancy Maxwell. Tr. I, 15-16. [redacted]'s mother testified she told Ms. Maxwell that [redacted] had a SPED ruling in Virginia. She remembered Ms. Maxwell asked if [redacted] had an IEP, and that she asked Ms. Maxwell to describe the SPED services at OES. Tr. I, 16. Although she admitted the conversation was brief, [redacted]'s mother testified she told Ms. Maxwell that [redacted] had an IEP. *Id.* Ms. Maxwell did not remember the conversation, but she admitted it was possible it occurred. Tr. II, 382-83. In any event, OES did not have the IEP before school began.[6]

On July 27, 2009, [redacted].'s father enrolled him as a [redacted] grader at OES. Tr. I, 23. On July 28, 2009, an OES school official sent [redacted].'s school in Virginia a request seeking transfer of his records. Ex. 2. A handwritten notation on the July 28, 2009 form states, "Sent via mail 7/28/09." *Id.* OES

[6] Although some special education records for Virginia were introduced at the due process hearing, the IEP from [redacted]'s elementary school in Virginia was not introduced.

received some of [redacted].'s records on August 8, 2009, but no special education records were included.[7] Ex. 3; Tr. II, 323 (OES Ass't Principal, Ryals); Tr. II, 370, 386 (OES Counselor, Maxwell).

On August 6, 2009, [redacted]. started [redacted] grade at OES in a *regular* education classroom. [redacted] quickly began to have problems during school. [redacted]'s mother described an incident that occurred on August 14, 2009, during the second week of school:

> [redacted] totally fell apart about three days into school. I believe he went to an art class where he ended up breaking crayons or whatever they were working with, [and] hid under the desk. I was called, and he was in [the principal's] office with his head inside of a ... shredded shirt.

Tr. I, 26-27.[8] The District contends it had no knowledge prior to August 14, 2009, that [redacted]. had previously received special education services in Virginia, but was informed on that day by [redacted].'s mother. Tr. II, 323; Tr. II, 373.[9] Ms. Maxwell testified that [redacted]'s mother told her that she had not given his IEP to OES because she wanted [redacted] to have a "fresh start" at his new school.[10] Tr. II, 374. Ms. Maxwell called [redacted]'s Virginia school to request a copy of the IEP on

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[7] It is unclear when OES actually sent the transfer form to the Virginia school. The "For office use only" section indicates the first request was faxed on "9/27." Ex. 2. The 9/27 date was later changed to 7/27. Ex. 3. In any event, the testimony clearly establishes the District did not have any special education records for [redacted] until after August 14, 2009. Tr. II, 323, 370. [redacted]'s mother testified her husband signed a "release" for [redacted]'s records in July. Tr. I, 19, 21. No "release" signed by [redacted]'s father was presented at the hearing. [redacted]'s mother testified that she had intended to meet with Ms. Maxwell before school began, but "she dropped the ball" and assumed OES had [redacted] special education records. Tr. I, 19. After [redacted]'s successful second grade year, however, she was not concerned he would have issues. *Id.*

[8] Although it was not apparent at that time, [redacted]'s school behavior arose from his developmental disability and the circumstances in which he found himself; that is, a [redacted] year old child with Asperger's, in new city, in a new state, attending [redacted] grade in an unfamiliar school with unfamiliar teachers and staff. *See* Ex. 6 (Dr. Susan Anderson, October 23, 2009 report); Ex. 61 (Dr. Williamson, July 13, 2010, Psychological Assessment).

[9] Ms. Maxwell specifically remembered feeling relief for [redacted]. when she learned he had an IEP, "hoping we could get him some supports that would help him." Tr. II, 382-83.

[10] Ass't principal Ryals testified about a conversation with Mark Green, the current principal at [redacted]'s elementary school in Virginia. Tr. II, 324. At the time of the conversation, it was Mr. Green's first year as principal. *Id.*, 330. Ms. Ryals took notes contemporaneously with the conversation, which she then typed. *See* Ex. 54. While Ms. Ryals was a credible witness, her notes are based, in part, on information that occurred before Mr. Green was principal and about which he could have no personal knowledge. *Id.*, 330 (information about [redacted] in kindergarten). As a result, information Ms. Ryals received from Mr. Green included his summary of [redacted]'s records, which were apparently never provided to the District. While the evidentiary standards are relaxed in administrative hearings, some of the information recorded in Ms. Ryals' notes is not reliable and/or necessary to the determination of issues surrounding the January 14, 2010, IEP and September 24, 2010, IEP. Consequently, information about the conversation recorded by Ms. Ryals does not form a basis for this decision.

August 14, 2009, but the school refused to release the information without a signed release from [redacted].'s parent. *Id.* at 384-85. OES made a second request for the Virginia school records, with a handwritten note by [redacted].'s mother authorizing release of the records.[11] Ex. 3.

During the August 14, 2009, meeting, [redacted].'s parents told school officials that they planned to withdraw [redacted] from OES, and return to Virginia for a medical evaluation with a developmental specialist. Tr. I, 29-30; Tr. II, 374. Ms. Maxwell asked [redacted]'s mother to contact her if they decided to re-enroll [redacted]. at OES so an IEP could be developed. Tr. I, 28-30. [redacted].'s parents formally withdrew him from OES on August 17, 2009. Ex. 5.

C. Medical evaluation in Virginia - Asperger's syndrome diagnosis

While waiting for an appointment for the evaluation, [redacted]. was re-enrolled at his former Virginia school. Tr. I, 30. On October 1, 2009, [redacted]. was evaluated by Dr. Susan Anderson, an associate professor of pediatrics with the University of Virginia Medical Center and Kluge Children's Rehabilitation Center and Research Institute. Tr. I, 30, Ex. 6. Dr. Anderson diagnosed [redacted] with static encephalopathy, Asperger/autism spectrum disorder ("Asperger's") and cognitive issues. Tr. I, 38, Ex. 6.

D. IEP Meeting - October 13, 2009

In preparation for developing an IEP for [redacted] and prior to his Asperger's diagnosis, the District's psychometrist, Helen Hale, began the process of obtaining information relating to his eligibility ruling in Virginia. Tr. II, 420-21. At the request of [redacted].'s father, the eligibility summary and supporting reports were sent from Virginia to Ms. Hale on October 6, 2009.[12] Ex. 7. Ms. Hale

[11] Ms. Maxwell stated it was *unusual* for another school district to require a parent's signature for the release of special education records. Tr. II, 384-85. At OES, special education records typically are provided from school to school with the District's standard form. *Id. See* 34 CFR § 300.323(g)(2) (previous public agency in which child is enrolled must take steps to respond promptly to request from new public agency).

[12] The reevaluation in Virginia included testing administered in September of 2008 of the following components: Educational, Medical, Psychological, and Speech/Hearing/Language. Ex. 7, at Bates nos. OSD000017-29; OSD000004-10.

began creating a Reevaluation Report, using the former eligibility ruling and supporting data from Virginia. In completing the form, Ms. Hale listed the eligibility classification made in Virginia as OHI, with the subcategory of ADHD. Tr. II, 418, 421. By checking a box on the form, Ms. Hale indicated "No additional assessment [was] needed." *See* Ex. 9. Ms. Hale also noted on the form that the information reviewed for the reevaluation was a "Previous Evaluation Report", with the date of the most current information listed as October 23, 2008.[13] *Id.*, *see also* Ex. 7 (information from Albemarle County Public Schools).

After Ms. Hale started preparing the Reevaluation Report, [redacted]'s mother informed her that [redacted] had recently been evaluated and diagnosed with Asperger's. Tr. II, 419. Ms. Hale testified she told [redacted]'s mother that "we would need to look at that information before we could move forward with the [Asperger's] ruling." *Id.* Ms. Hale also told [redacted]'s mother that "we need to look at the evaluation [by Dr. Anderson] to determine whether it meets Mississippi State Department guidelines or if we need to move forward with reevaluation for ours." *Id.* According to Ms. Hale, [redacted]'s mother said she would get the evaluation information to them. Tr. II, 419-20.

An IEP meeting was held October 13, 2009.[14] [redacted]'s mother provided significant input during the meeting and was satisfied with the resulting IEP. Tr. I, 42. Notes from the IEP meeting contain many of the suggestions made by [redacted]'s mother. Tr. I, 42-44; Ex. 8, at Bates no. OSD00082. The October 13, 2009, IEP listed [redacted]'s eligibility category OHI/AS and stated, '[redacted] will need accommodation and modifications in order to be successful in the general education classroom."

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[13] There was some confusion at the hearing regarding the date on the reevaluation report, October 23, 2008. [redacted]'s mother was questioned by her counsel about why the reevaluation report listed the eligibility category as OHI/ADHD when only 10 days before, that is, October 13, 2009, the IEP had listed [redacted]'s eligibility as OHI/AS. Tr. I, 49-52. However, the date listed on the reevaluation report was not as counsel suggested (October 23, 2009),but instead was the date of the eligibility determination on October 23, 2008, after [redacted]'s reevaluation in Virginia in the fall of the 2008-2009 school year.

[14] The individuals present at the initial meeting were [redacted]'s mother, his special education teacher (Ms. Mason), his general education teacher (Ms. Ellis), the District's psychometrist (Ms. Hale), the OES principal (Ms. Smith), and its assistant principal (Ms. Ryals). Ex. 8, at p. 8. Ms. Mason, Ms. Ellis, and Ms. Smith did not testify at the due process hearing.

Ex. 8, at p. 155, Bates No. OSD000074. Services were to be provided in the "Gen. Ed. Clm. w/ cons.serv." *Id.*, at p. 157. The IEP provided that [redacted]'s LRE classification was "SA/Inside the General Education Class 80% or more of the Day." Ex. 8, at p.160, OSD000079. Based upon the discussions during the IEP meeting and the OHI/AS classification, [redacted]'s mother believed the IEP recognized that [redacted] was on the autism spectrum and that OES would provide services accordingly. Tr. I, 41-42. OES records establish some of the District personnel working with [redacted] knew about and were providing services on the basis of the Asperger's diagnosis. Ex. 14, at p. 319.

When [redacted]'s parents informed OES that [redacted] had been diagnosed with Asperger's, they initially gave the District a one page document with a short summary by Dr. Anderson, stating:

> To whom it may concern:
>
> [redacted] was seen as a patient at Kluge Children's Rehabilitation Center-University of Virginia Children's Hospital, Charlottesville, Virginia 22901 on Oct. 01, 2009. He was found to have a diagnosis of Asperger disorder by criteria in DSM-IV. Recommendations will follow with his report of services.

Tr. I, 31-33, 35; Ex. 57. Sometime after the October 13, 2009, IEP meeting, [redacted]'s parents provided the District with a two page report by Dr. Anderson that documented the findings of her evaluation of [redacted] *See* Ex. 6. Dr. Anderson reported that her "impressions" included:

- Asperger/autism spectrum disorder (ASD), high functioning, is the primary cognitive diagnosis by DSM IV criteria.[15]
- Difficulty with attention and focus due to both internal distraction (related to Asperger/ASD diagnosis and serotonin pathway). . . .
- Behavioral meltdowns at times associated with aggression, usually precipitated by transitions or behavioral rigidity/thwarting of rigidity. Children with Asperger/autism, due to their neurochemical wiring, have a very difficult time with transitions, change and novel experiences. Children with Asperger/autism thrive on routine, predictability, and what is familiar.

[15] DSM is an abbreviation for the American Psychiatric Associations's *Diagnostic and Statistical Manual of Mental Disorders*.

- [redacted] has experienced multiple changes in the past two months. . . . Any of these changes may be difficult for a typical child but the impact of multiple changes for a child who has Asperger/autism may be associated with very significant behavior changes.

Ex. 6. at p. 7 (underscoring in original). Dr. Anderson also made "recommendations" relating to [redacted]'s education, including:

- Strongly recommend small class size with a high teacher to student ratio and a teacher who has had significant experience working with children who are on the autism spectrum.
- Strongly recommend ongoing speech therapy to work on pragmatic communication.
- Strongly recommend occupational therapy consultation.
- Strongly recommend a very structured behavioral program based on positive reinforcement of desired behavior. Recommend consistent consequences which are globally understood as never acceptable behavior (e.g. hitting). If behavior becomes problematic, a Functional Behavioral Analysis (FBA) should occur. At that time, may consider a full-time behavioral aide.

Ex. 6., at p. 7-8.

E. Problems continue at OES

When [redacted] returned to OES, Ms. Collier provided assistance in his general education class. Ms. Mason, the special education teacher, also began working with [redacted], and implemented breaks. Ms. Mason's classroom was considered a "safe" place for [redacted] Tr. II, 47-50; Ex.8; Ex. 14.

On October 20, 2009, [redacted] had another significant incident that resulted in a three day suspension. *See* Ex. 11. According to the Disciplinary Referral Notice, [redacted] left Ms. Mason's room, moving toward an exit. [redacted] refused to stop and exited the building. *Id.* When Ms. Mason placed herself between [redacted] and the school driveway, he climbed under a fence, ran onto the school playground, and hid in a wooded area. While the area is surrounded by a fence, the fenced area

backs up to a highway. *Id.* The guidance counselor and the assistant principal were called for assistance. *Id.* [redacted] became physically aggressive, but was eventually restrained by the three staff members. An OES custodian carried [redacted] to the principal's office. A school resource officer was called to the office for additional assistance. *Id.* [redacted] attempted to leave the office, but was restrained by the resource officer. *Id.*

On that same day and in response to the incident, Josh Gettys, the District's special education director, emailed Denise Collier, a behavior technician for OES, and sought her help in developing a "Crisis Plan" for [redacted] Ex. 70. The email mentioned that [redacted] "had a crisis today that involved running from the building, hitting, biting, spitting, etc." Mr. Gettys also noted that [redacted] was currently ruled OHI, but that the Parents had reported "that he was identified as being on the spectrum, but we haven't seen any report yet." *Id.*

Ms. Collier developed an Interim Crisis Management Plan for [redacted] addressing "three crisis situations: classroom meltdowns, flight from the building, and physical aggression." Ex. 12. The Crisis Management Plan suggested restraining [redacted] as follows:

> Physical Aggression
>
> If [redacted] does not respond to the interventions outlined above and ***there is clear and convincing evidence that [redacted] poses a threat of imminent physical injury to himself or another***, it may be necessary to place him in a therapeutic hold for his safety and the safety of those around him.
>
> Physical intervention rests on the principles of: 1. A maximum amount of caring combined with a minimum amount of force; 2. The goal of de-escalating the situation by reducing stimulation.

Ex. 12, at p. 303, Bates no. OSD000154. Ms. Collier attached an illustration of a Small Child Restraint or "basket hold" and suggested the hold should be slowly released after one to two minutes. *Id.* Ms. Collier also created an Interim Behavior Plan to reinforce positive behavior. *Id.*, at Bates no. OSD000152.

F. The District seeks consent to perform evaluation of [redacted]

Although the parties did not establish the exact date, at some point after October 23, 2009, [redacted]'s father provided the District with Dr. Anderson's two-page report.[16] *See* Ex. 6. The report, however, did not identify any tests or assessments performed during [redacted]'s evaluation. Tr. II, 432. The District concluded the report did not contain sufficient information to meet Mississippi's eligibility guidelines.[17] Tr. II, 422-23; Tr. III, 528-30. The District called [redacted]'s mother several times in November, leaving messages that asked her to call about scheduling a reevaluation of [redacted] and an IEP meeting. Tr. II, 435. After getting no response to calls and two written requests, the District sent a letter by certified mail on November 30, 2009, notifying the Parents of an IEP meeting and the need for reevaluation. Tr. II, 438-39, 531-32; Ex. 49.

In early November, OES implemented a shortened school day for [redacted] with significant supports, which were reported as mildly successful. Ex. 40. [redacted] however, continued to have problems at school. On November 10, 2009, after [redacted] refused to enter OES upon arrival, Ms. Collier sent an email to the Mr. Gettys, notifying him of the problem and stating:

> Given [[redacted]'s] tendency to flee and his disregard for his safety and that of others, [the school counselor] and I are very concerned that O.E. is not set up to meet [[redacted]'s] needs. We are not even sure that the Day Treatment program can successfully contain him at this point. What other options are there? What is the district's obligation to [[redacted]] if he needs residential treatment for a period of time?

Ex. 13. Mr. Gettys forwarded Ms. Collier's email to the District's Superintendent "to put this student on [her] radar" and to raise the possibility "that the IEP team could make a referral for a change in placement." *Id.*

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[16] Dr. Anderson's report is not dated, but it does identify the transcription dates as D: "T: 10/23/2009 1:01 P." Ex. 6, at p. 2.

[17] The State's evaluation requirements for Autism require the eligibility team to gather, document and carefully consider: A. Results of instruments, observations and/or other data which address 1. Receptive and expressive language skills . . ., 2. Social Interactions . . ., 3. Responses to sensory experiences . . ., 4. Engagement in repetitive activities and stereotyped movements . . . and 5. Resistance to environmental change or change in daily routines; . . . B. A developmental history and/or other documentation which serves to determine the age of onset of autistic characteristics; C. A statement by a qualified professional supporting the multidisciplinary evaluation team's conclusion that the student meets the eligibility criteria for Autism as defines by federal regulations and State policy." MDE, Special Education Disability Categories, at pp. 279-80.

On November 16, 2009, Ms. Maxwell, the school counselor, met with [redacted]'s mother and asked her to sign medical releases so the District could determine the basis for Dr. Anderson's Asperger diagnosis and the underlying testing performed by Dr. Anderson. Tr. II, 353-54, 379-80; Ex. 54, Ex. 56. [redacted]'s mother did not sign the releases because she wanted to review them with [redacted]'s father. *Id.* While Ms. Maxwell and [redacted]'s mother were meeting on November 16, [redacted] became agitated in class and Ms. Mason implemented the crisis management plan. Ex. 15, at Bates no. OSD000178; Ex. 53. [redacted]'s behavior escalated. He threw objects, broke pencils and crayons, knocked desks over, chewed crayons and spit them on the floor, poured glue on the floor and on his head. *Id.* Ms. Mason contacted Ms. Maxwell for assistance. After calming [redacted], they took him to the office where they met his mother. [redacted] was suspended for three days for "inappropriate school conduct." *Id.*

Two days later, on November 18, [redacted] was seen for a neurological consult by Dr. Collette C. Parker, Chief of Pediatric Neurology at the University of Mississippi Medical Center.[18] Dr. Parker noted her diagnostic impression as "Patient with autistic spectrum disorder." Ex. 17. She continued the medicine prescribed by Dr. Anderson to see whether there would be any behavioral improvement. *Id.* In the PLAN section of her note, Dr. Parker stated, "At this point, the family has undergone significant stress. I have agreed to home-bound schooling until work-up can be completed." *Id.* At the hearing, [redacted]'s parents submitted a "Certificate to Return to School/Work," which stated [redacted] had been under her care from 11/18/09 to 12/4/09, and would be able to return to school on 12/7/09. Ex. 17, at Bates no. 33. The certificate was signed by Dr. Parker, but dated 1/5/10. *Id.* At the November 11 evaluation, Dr. Parker also gave [redacted]'s mother a prescription for an occupational evaluation ("OT prescription"). Ex. 18, at p. 176, OSD000183. [redacted]'s mother gave

[18] When [redacted] was evaluated in Virginia earlier that fall, Dr. Anderson recommended an EEG to rule out "partial complex seizures as cause of behavioral outbursts." Ex. 6. Dr. Parker recommended an MRI, and later diagnosed [redacted] with a non epileptic seizure disorder. Ex. 17.

the prescription to the District on December 4, 2009. When asked at the hearing what significance the OT prescription had on the District, 's mother stated, "None, [the District] made a copy and gave it back." Tr. I, 78. This statement is incorrect, the record establishes an occupational evaluation was performed on January 14, 2010, aft 's parents consented to a reevaluation. Ex. 52, at p. 17; Ex. 67, at p. 11.

's mother testified that when they received the results of Dr. Parker's evaluation, she called Helen Hale, a psychometrist with the District, and told her the doctor was recommending a homebound educational program for two weeks. Tr. I, 75. According to 's mother, Ms. Hale said they did not do a homebound program in those circumstances. *Id.*, 76.

G. IEP Meeting - December 4, 2009.

An IEP meeting was held on December 4, 2009, with the following attendees:

's mother	Suzanne Ryals, Ass't Principal
Evelyn Smith, OES Principal	Josh Gettys, SPED Director
Dana Mason, SPED Teacher	Laurie Beth Ellis, General Ed Teacher
Denise Collier, Behavior Tech.	Helen Hale, Psychometrist
Tammie Brown, Behavior Tech.	Nancy Maxwell, School Counselor

Ex. 18. The committee determined th would continue to attend OES on an abbreviated schedule with one-on-one support from district personnel to complete work assigned by his general education teacher. *Id.*, at p. 166. 's mother said the IEP committee wanted to move him from the general education classroom to a sensory room whe could work with one-on-one support. Tr. I, 82. She testified that she later learned, and was "slightly horrified" the sensory room was converted from a school storage closet. *Id.*, 83-84; Ex. 19.

The December 4, 2009, IEP change s LRE classification to read "SC/inside General Education Classroom Less than 40% of the Day." Ex. 18, at p.170, Bates no. OSD000088. The

explanation of nonparticipation in general education services stated, "[redacted] will be on an abbreviated schedule for school. He will work one on one with school district personnel to complete assigned work from the general education teacher." Ex. 18, at p.166, OSD000084. The notes from the meeting stated IEP services said [redacted]'s mother wanted a smaller classroom and that [redacted] "sees building as a negative place." Ex. 18, at p.174. The schedule attached to the IEP stated the services for the first week would be provided in the "sensory room, with Ms. Collier, Ms. Brown and Ms. Mason with suspension of physical rewards." Ex. 18, at p.175, Bates no. OSD000092.

At the IEP meeting, the District gave [redacted]'s mother a permission form, and ask that [redacted]'s parents sign the form, consenting to a reevaluation of [redacted] Tr. III, 531-34. The "EVALUATIONS" section of the IEP did not list any plans to conduct an evaluation, but the minutes of the IEP meeting state, "Request for evaluation to change ruling from OHI to determine more appropriate ruling." Ex. 18, at Bates no. 174. The minutes of the IEP meeting also state, "sign medical release with Neurologist." *Id.*, at Bates no. 175. An email from OES's assistant principal to Mr. Gettys stated "[redacted]'s father would not sign the medical release because he was offended that we did not trust them with the sharing of the information." Ex. 54; *see also* Tr. II, 352-54. The District never received any medical releases, or a signed consent form for the evaluation. Ex. 56. [redacted]'s mother did not sign the IEP, but took it home to review with her husband and others, "because, frankly we [[redacted].'s parents and the District] were no longer on the same page." Tr. I, 79.

There were no reported incidents during the remainder of December. [redacted].'s mother testified:

> [redacted] had a fabulous two weeks. We were thrilled. His teacher seemed to be thrilled. We have notes attached in the exhibits that people sent home telling me he was doing well, a great week, a great day. I mean, I finally saw my child again...To be honest with you, I thought we were like turning the corner. I was like, yeah, the medicine is working. He was good. He seemed to be adjusting. The ones that were
>
> working with him to my knowledge, were, you know, kind of getting who he was and, I mean, I felt like we were really building a good rapport, or he was.

Tr. I, 87.

H. Return to OES after Christmas break - January 2010

On January 5, 2010, the first day after the Christmas holiday, [redacted].'s mother called and reported she could not get [redacted] to come to school. Tr. I, 88; Ex. 53. When [redacted] eventually arrived, his teacher was not a familiar teacher, but a substitute who only had one year of experience. *Id.* The behavior technician described the substitute as "slightly unsure of how to deal with [[redacted]]." Ex. 22. [redacted] was non compliant, banged his head on the desk, and threatened to "throw his desk." *Id.* The next day, [redacted]'s mother received a call from the OES principal who asked whether she could meet with her and Mr. Gettys the following week on January 14. Tr. I, 95. January 7 and 8 were snow days. Ex. 53.[19] On the next day of school, January 11, [redacted] became upset and refused to follow the directions of an OES behavior technician. His behavior escalated, and [redacted] attempted to kick and bite the technician until she restrained him. Ex. 21.

On January 13, the day before the scheduled meeting, [redacted]. had another significant incident at school. A behavioral consultant from the University of Mississippi was observing [redacted] while he was working one-on-one with the substitute teacher, Ms. Moss. Ex. 23. [redacted] started arguing with the teacher about his school work, and became noncompliant. *Id.* His behavior quickly escalated and he became physically aggressive with the two adults:

> [[redacted]] kicked [the substitute teacher] a few times while sitting at his desk. He got up and started crawling on the shelves. She asked him to get down and to sit in his seat. He ran to the door to leave. I was sitting next to one door and she was standing next to the other. He tried to get out of the door next to me. When he was unsuccessful, he went to her door and attempted to bite her arm several times . . . [The substitute teacher] used her radio to call for help. No one came. I asked [the substitute teacher] to try to get someone again. He repeatedly elbowed me in my stomach. I blocked the hits that I could and ignored others. However, he continued relentlessly to the point where I was hurting.

Id.

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[19] [redacted]'s mastery of the annual goals as set forth in his IEP were reviewed and recorded, with the date of the review listed as 1/7/10, one of the school's snow days. Ex. 18, at p. 167-68, Bates nos. OSD000085-86. For each of [redacted]'s five annual goals, the reviewer recorded "2" in the Progress Record, indicating "Do not anticipate meeting goal." *Id.*, at 167, Bates no. OSD000085.

I. January 14, 2010, IEP meeting at OES

[redacted]'s parents came to the school the next day for the meeting with the principal and Mr. Gettys. Tr. I, 95, 97. After a discussion between the [redacted]'s parents, the principal and Mr. Gettys, they were joined by Ms. Ryals (the assistant principal), Ms. Mason (the special education teacher), and Ms. Ellis [redacted]'s general education teacher). *Id.*, 97-98; Ex. 24, at p.9. Several staff members who were present at the December 4, 2009, IEP meeting did not attend this IEP meeting. Specifically, the following four persons were absent:

- Denise Collier, Behavior Technician
- Tammie Brown, Behavior Technician[20]
- Nancy Maxwell, OES Counselor
- Helen Hale, District's Psychometrist

See Ex. 24 (January 14, 2010 IEP); Ex. 18 (December 4, 2009 IEP). The IDEA does not expressly require attendance by any of the four individuals,[21] but Mr. Gettys agreed that Ms. Maxwell was a primary member of the IEP team. Tr. III, 638.

[redacted]'s parents were given a copy of the "Policies and Procedures regarding Children with Disabilities under the [IDEA]" and a draft IEP. Ex. 24, at Bates nos. OSD000102-103 (IEP minutes). [redacted]'s mother testified, "[T]he meeting had never been set up as an IEP meeting. We never had any notice that it was going to be an IEP meeting." *Id.*, 98. The District also gave the Parents the following:

- Parent Invitation Response Form
- Notice of Committee Meeting

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[20] The Notice of Committee Meeting form states that behavior specialist, T. Brown, was invited to the IEP meeting. Ex. 24, at p. 191.

[21] *See* 34 C.F.R. § 300.321.

- Notice of IEP Committee's Decision for Reevaluation
- Notice of Change in Placement
- Manifestation Determination Review

Ex. 24, at pp. 190-96. All of the documents were dated January 14, 2010, the same day as the meeting. *Id.* There is no evidence in the record that the District provided any of the documents to [redacted]'s parents prior to the IEP meeting. The draft of the January 2010 IEP provided to [redacted]'s parents was based on an eligibility ruling for "OHI, ADD/ADHD." Ex. 24, at 178, Bates no. OSD000093. The District contends that the January 2010 IEP was developed and based upon all data information available to the IEP team at the time of the IEP meeting.[22] Tr. III, 521.

1. Manifestation Determination Review

The notes from the January 14, 2010, IEP meeting state, "In order to have a change of placement, [Mr. Gettys] presented the Manifestation of Determination questions to the parents. . . [redacted]'s father] wanted to take the questions home to look over, but the responses were completed during the meeting. The questions decided that [redacted]'s] IEP is not appropriate." Ex. 24, at p. 187, Bates no. OSD000102. At the due process hearing, Mr. Gettys testified about the review performed at the IEP meeting:

> [W]e did a manifestation determination at this meeting, whether or not his behavior was caused by his disability, and we said it was not because his ruling at the time was other health impaired and ADHD. And we didn't believe his ADHD was causing behavior such as hitting, biting, kicking, you know, running from the school and that sort of thing. So [the Parents] disagreed with that decision.

Tr. III, 522. The Manifestation Determination Review ("MDR") form is a brief, standardized form with instructions to be followed for completion. One question on the MDR form asked: "Does the student's disability impair the ability of the student to control the behavior subject to disciplinary

[22] District representatives testified that once an eligibility determination is made, then services and modifications are developed to meet the child's specific needs; that is, an IEP team is not "limited" by the child's eligibility categorization. Tr. II, 444-45; Tr. III, 562. A child can have multiple disabilities, but the overriding disability determines the category for eligibility purposes. Tr. II, 443-44.

actions?" The form was marked with a check mark √ next to the word, NO. Ex. 24, at p. 196. In the "Discussion" section for that question, a District representative wrote, "Although we suspect [redacted] may have other disabilities, his current ruling is OHI:ADHD." *Id.* The next (and last) question on the form asks, "Is the behavior subject to disciplinary action a manifestation of the student's disability?" The instructions for the question stated, "NOTE; You may answer "NO" to the following question ONLY if Determination Section A1, A2 AND A3 are answered "YES" and B & C are answered "NO." *Id.* at p. 196. (capitalization and underscoring in original). The two form answers state:

> ____ YES The IEP and placement must be reviewed and revised as appropriate, including development or review of a behavior intervention plan.
>
> ____ NO Disciplinary action may be taken, but the school district must continue to make a FAPE available to the student.

The District representative placed a check mark √ next to the word, NO, in contradiction to the instructions preceding the question. Ex. 24, at p. 196. In other words, in spite of the fact A1 and A2 were not marked "YES", the District chose "NO", indicating that disciplinary action could be taken against [redacted] to the maximum degree allowed under OES policy (as long as a FAPE was provided). Ex. 24, at p. 195-96. Further, taking that approach allowed the District to recommend a change of placement without developing or review of a behavior intervention plan.

[redacted]'s parents disagreed with the conclusion that [redacted]'s disability was not causing his behavior problems. [redacted]'s father "said that the medical issue [Asperger's] is causing behavior problems." *Id.*, at p. 187, Bates no. OSD000102. The District "did not believe ADHD OHI was the full measure of his disability or the most accurate one, but, yet, we haven't had the opportunity to evaluate him. . . . [A]s of January . . . we were still providing services even though . . . technically we weren't required to provide any services, but we were doing so, anyway." *Id.* When asked why the District continued to provide services despite the failure of [redacted]'s parents to consent to an

evaluation, Mr. Gettys replied: "Generally it is [the District's] intent to work with the parents of any child. Obviously, the child, we felt the child needed services, but we still had . . . not . . . been able to evaluate the child.. . . And I understand that IDEA says if we are not given that chance, then we are not obligated to serve a child.[23] *Id.*, 522-23.

The MDR and the associated decisions were guided by the OHI/ADHD classification given to [redacted] by the Virginia school system in the fall of 2008.

2. Change in placement from OES to Millcreek

At some point, Mr. Gettys told [redacted]'s parents that "they had exhausted all of their curriculum and services" and the IEP team was recommending a change of placement to Millcreek. Tr. I, 98. Regarding the change in placement, the January 2010 IEP states:

> On January 14, 2010, the IEP committee determined placement in the current setting is not appropriate to meet [redacted]'s needs. The IEP committee determined that [redacted]'s] least restrictive environment is at a separate school due to the frequency and intensity of his behaviors. The committee recommends placement at Millcreek. [redacted]'s] parents are concerned with his educational placement. Currently, they agree that Oxford Elementary is not his least restrictive environment but they do not agree with his placement at Millcreek.

Ex. 24, at p. 1. Regarding the change of placement, the minutes from the IEP meeting reflect the following discussion took place:

> [Mr. Gettys] was not discussing labels, just talking about Day Treatment in Oxford is an inappropriate placement. Millcreek was discussed as a placement for [redacted]. The Day Treatment program at Millcreek was recommended. OSD would pay for the program and provide transportation.
>
> [redacted]'s mother ask if they could pick the place. [Mr. Gettys] said that it was an IEP committee decision and that if consensus is met today, they could move forward (Mom's [sic] asked if they could move forward).
>
> The parents stepped out to discuss what to do. When they returned, [redacted]'s father] asked about Millcreek and if he could visit Millcreek. Information about Millcreek was provided to them.

[23] If a student's parents do not provide consent for reevaluation, and a school district chooses not to pursue a reevaluation via a due process hearing or mediation, the district may cease providing services after it gives prior written notice to the parents.

Ex. 24, at p. 187, Bates no. OSD000102. According to the meeting notes, "[[redacted].'s mother] stated that [[redacted]] is not going there - they want to visit so no one can say they didn't go and didn't see anything about Millcreek." Ex. 24, at p. 188, Bates no. OSD000103.

A one page description of Millcreek of Pontotoc's history was attached to the IEP. *Id.*, at p. 197. Initially opened as a 48 bed psychiatric residential treatment facility, Millcreek later began providing therapeutic mental health and educational services for emotionally disturbed children and adolescents. Millcreek is a "for profit program" owned by Youth and Family Centered Services of Austin, Texas. *Id.* At the due process hearing, Mr. Gettys testified about why the District considered Millcreek to be an appropriate placement:

> We felt like we had exhausted the services at [OES], in particular. We felt that . . . [[redacted]] seemed to be a flight risk. He had demonstrated that more than once. He had been aggressive towards adults on numerous occasions. . . . Some of the things [Millcreek] would provide -- I remember . . . like if a student knew . . . they were getting upset or could identify that in any way, it's something they teach. At Millcreek, I believe they have somebody they can go and talk to . . . a safe person of sorts they can go and . . . just cool off or talk to. I can't remember all the specifics, but . . . I just feel [Millcreek] . . . had the services we couldn't provide at [OES] that were appropriate for [[redacted]]. . . . [B]ased on the information at the time, I felt [Millcreek] was the best place for him, or that was an appropriate placement.

Tr. III, 526-27.

Regarding the LRE reclassification, the IEP committee determined that a separate school was the least restrictive environment. Tr. III, 517; Ex. 24, at p. 179, Bates no. OSD000094.

The January 2010 IEP states in part:

> [[redacted]]'s behavior affects his continued involvement/progress in the general education setting. [[redacted]] has exhibited some behaviors that were not appropriate for the general education classroom. He has been non-compliant, hitting, biting, kicking, spitting, breaking/throwing pencils, and leaving his assigned area. . . .A reevaluation will be completed to determine whether or not the current disability accurately reflects [[redacted]]'s disability.

Id.

Other than the change of placement, the only other substantive change in services was the addition of counseling for 30 minutes, on a daily basis. *Id.*, 519; Ex. 24, at p. 183, Bates no. OSD000098. [redacted]'s parents agreed at the IEP meeting to allow an evaluation of [redacted] Tr. I, 117; Ex. 24, at p. 193. Two evaluators were requested by [redacted]'s parents and the District provided contact information for Emily Johnson, Ph.D.[24] When [redacted]'s mother called for an appointment with Dr. Johnson, she was told Dr. Johnson's office did not have a contract with the District. Tr. I, 118. An appointment was eventually scheduled, but [redacted] was reported to be ill the day of the appointment, and did not go. [redacted]'s parents did not reschedule the appointment. *Id.*, 119.

J. Proposed educational placement at Millcreek of Pontotoc

[redacted]'s parents agreed that OES could not provide the services and accommodations [redacted] needed, but they disagreed with the IEP team's placement choice. Tr. I, 101-02; Tr. III, 520. [redacted]'s mother testified that she questioned the people present at the IEP meeting about Millcreek, and only Mr. Gettys knew anything about the facility. Tr. I, 110; Tr. II, 333. According to [redacted]'s mother, none of the other IEP team members "had ever visited Millcreek, nor did they know anything about it or had talked to any of the staff there."[25] *Id.* Mr. Gettys recognized the parents were uncomfortable with the IEP team's choice of placement, and arranged for [redacted]'s mother to visit Millcreek. Tr. III, 523.

On January 21, 2010, Mr. Gettys, [redacted]'s mother, and [redacted], a family friend who had

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[24] [redacted]'s parents asked the District for names of other evaluators, and contacted the Mississippi Department of Education, Special Education Office for a list of other persons who could perform the requested evaluation. Tr. I, 117. [redacted]'s parents complained about the lack of other evaluators. While a longer list of evaluators in Mississippi may have helped get an evaluation in a more timely manner, the District is entitled to conduct the assessments or chose the professionals to evaluate a particular student. *See Andress v. Cleveland Ind. Sch. Dist.*, 64 F.3d 176, 178 (5th Cir. 1995) ("If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation").

[25] Ms. Ryals testified that Ms. Mason, the special education teacher, knew about Millcreek. Tr. II, 367. Ms. Mason did not testify at the hearing, so the extent of her knowledge and her contributions at the IEP meeting were not established at the hearing.

experience working with Asperger's children, met at Millcreek.[26] Tr. I, 103. [redacted]'s mother and [redacted] toured a part of the facility, and spoke with three staff members: Kay Whitehead, Millcreek's educational director (responsible for duties like those of a school principal), the person who would teach [redacted], and another person who served as a part time psychologist, there. Tr. I, 104-05. [redacted]'s mother testified that she took a list with 37 questions, but the staff at Millcreek could only answer two (2) of the 37 questions. Tr. I, 102. After touring Millcreek, [redacted]h stated her impression that "[i]n no way under any circumstances would I have ever asked somebody to even remotely send a child there."[27] *Id.*, 278. She also questioned the wisdom of requiring an Asperger's child to travel by bus to and from school each day.

> [K]nowing the kids that I worked with . . . first of all, there are -- the sensory issues -- the sensory integration disorders, smells and repetitive sounds like a motor, it just makes them kind of off. [T]hese kids are really susceptible to it, smell and sounds.
>
> * * *
>
> The transportation thing worried me the most at first. . . . You wake up a child that struggles with change, you wake him up at the crack of dawn, you put him on a school bus with an aid and a driver, and then you drive [to Pontotoc]. . . . [W]ith the smells and the sounds and the confusion, that's enough for an Asperger's child usually for a whole day.

Tr. II, 276, 289. Regarding Millcreek's policy that visitors (like [redacted]'s mother) could not observe the children there, [redacted] stated that "you can't expect a mom to . . . sign on to a school when you don't see a student body. . . . [T]hat would be reckless behavior on a mother's part." *Id.*

Ms. Smith admitted she had never observed [redacted] in the educational setting. Tr. II, 283.

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[26] [redacted]a has a masters in social work. Tr. II, 270. During a one-year fellowship at Oscher Hospital in New Orleans, she worked 75% of the time with children. Her fellowship entailed working with two physicians, and one of the physicians has a special interest in children with Autism spectrum disorders. She acted as the co-leader for an Asperger's group. *Id.* [redacted]h, however, did not appear to be familiar with the IDEA. *See* Tr. II, 284-85 (e.g. lack of knowledge regarding meaning of "least restrictive environment" in context of IDEA). Many of [redacted]'s answers were not based upon facts but upon what she believed to be true.

[27] [redacted]th, who lived at one time in Oxford, served for four years as the President of the Oxford School Board. Tr. II, 286. While [redacted]'s testimony about Asperger's and the behaviors associated with the syndrome was credible, in connection with [redacted]'s testimony that Mr. Gettys told her [redacted] had been expelled, the hearing officer finds Mr. Gettys testimony to be more credible. *See* Tr. III, 569-70.

When questioned about the use of restraints, h testified that "a lot of injuries" occur with the use of baskethold restraint in younger kids. *Id.*, 291. Further, during her one year fellowship and work with an Asperger's group, restraint was never required. *Id.*

Millcreek's educational director, Kay Whitehead, testified for the District at trial. Millcreek transports students from their homes to Pontotoc. Tr. II, 398-99. Ms. Whitehead testified that she believes students are transported on a 10 to 15 passenger van, and that the trip from Oxford typically takes from 45 minutes to an hour. She believes the largest group ever transported from Oxford was 6 or 7 children.[28] Tr. III, 400. Further, "there are always two staff on the van, and then there are times that a child would have one on one [assistant] if so ordered by the doctor." *Id.*

In describing the school at Millcreek, Ms. Whitehead explained that the school has eight teachers, three of which are "departmentalized and provide educational services to basically middle school kinds of kids." Tr. II, 394. Millcreek also has a self-contained high school class, an adult GED class, and an elementary self-contained class for Millcreek's younger students. *Id.* [redacted] would have been in the elementary class, with a teacher who had worked for 29 years at a Region III Mental Health facility. The elementary class typically has 10 students with a teacher and an assistant. Tr. II, 395.

Ms. Whitehead described the typical day for students. The children arrive at Millcreek around 8:00, eat breakfast, see the school nurse and then are taken to their classrooms at 8:30. Tr. III; 410-11. At 11:40 on two days of the week, the students break and go to the day treatment area for group therapy. Students have some form of recreation activity on the other three weekdays. Class resumes at 12:40 and ends around 1:40, when the children prepare to go home. *Id.*, 411-12. Twice a month the children have individual therapy, and family therapy twice a month. *Id.*, 412.

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[28] While Ms. Whitehead was a credible witness, portions of her testimony was not based on specific facts. Instead, Ms. Whitehead's testimony was couched in terms of what she "believed."

When questioned about Millcreek's academic program, Ms. Whitehead testified, "We are an accredited non-public special school through the Department of Ed." Tr. II, 407. As a special school, "Millcreek, really [does not] meet the criteria for what you would say Oxford public school meets. The standards are slightly reduced. But we are monitored on a five-year cycle by the Department of Ed and then meet the standards that they set forth." *Id.* Millcreek does not have any staff members who are ABA certified, but they all have certification in the area of emotional disabilities. *Id.*, 409-10. Ms. Whitehead agreed that "the primary focus of the Millcreek facilities is therapeutic." *Id.*, 415. When questioned if Millcreek has served children with Asperger's in the day treatment program, Ms. Whitehead replied, "I believe so." Tr. II, 399. The question posed to Ms. Whitehead assumed [redacted] was being placed at Millcreek as a child with Asperger's, but the January 2010 IEP did not identify [redacted] as a child with Asperger's nor was the placement based on his Asperger's diagnosis or recommendations made by Drs. Anderson or Parker.

K. Attempts by [redacted]'s parents to locate different educational placement

At some point prior to January 14, 2010, [redacted]'s parents began to research other possible placements for [redacted], including residential programs.[29] [redacted]'s father called Eckerd Academy in Deer Lodge, Tennessee, but learned the school was not a good fit for [redacted][30] Tr. II, 297-98. The administrator, however, recommended two potential schools she believed could be a good fit for [redacted]: Little Keswick School in Keswick, Virginia and The Hunter School in Rumney, New Hampshire ("Hunter School"). *Id.*, 298. The annual cost for the Virginia School was $96,000 per year. *Id.* The annual cost at Hunter School is currently $68,500. *Id.*, 298-99. [redacted].'s parents also

[29] The notes from the January 14, 2010, IEP meeting state [redacted]'s parents had been looking at other schools. Ex. 24.

[30] [redacted]'s father testified the schools are based upon peer group admittance, and first seek to determine if the potential student has peers in the school. Tr. II, 297-98. If a child does not "fit" within the peer group at a particular school, the school will not recommend admittance. *Id.*, 298.

visited Wediko School in New Hampshire, which cost $120,000 for a 12 month period, but [redacted] did not fall within the school's age group. *Id.*

On February 3, 2010, counsel for [redacted]'s parents wrote the District's counsel, providing Dr. Parker's January 2010 report, and stating "[[redacted]s parents] are going to visit the Hunter School in Rumney, New Hampshire next week. The Hunter School is a 501 (c)(3) non-profit institution." Ex. 25, at p. 508. The letter asked the District's counsel to provide the information "to the school administrators and let me know what their position is at this time. . . . I appreciate your efforts in attempting to expedite this matter as [[redacted]] needs to get on with his education as soon as possible." *Id.*, at p. 509. In reply, the District's counsel explained the MDE's requirements for an eligibility ruling based upon an Autism spectrum disorder, listed the web address to find the requirements, and provided the name and number of a contact person at the MDE, Special Education Division. *Id.*, at p. 510-11. The letter did not respond to the information provided to her about Hunter School, other than to say the information had been forwarded to the Superintendent and Mr. Gettys. *Id.* [redacted]'s parents visited Hunter School during the first week of February 2010. By letter dated February 5, 2010, counsel for the Parents wrote the District's counsel, stating:

> There is no need for further diagnosis of [redacted]'s specific disabilities. The Hunter School provides school personnel to deal with ADHD and OHI students. Furthermore, the Hunter School works with public schools throughout the country and has an excellent track record. Since there's not need for further evaluation of his specific disability and since the School District has conceded he needs other placement, the Hunter School is at least as impressive as Millcreek and probably substantially better. And, finally, since the Parents are willing to pay the difference between what the School District would pay Millcreek and the expense at Hunter, I do not understand the opposition to this decision by the [Parents].

Ex. 25, at p. 514.[31]

[31] The hearing officer does not give any weight to counsel's statement that "Hunter School is at least as impressive as Millcreek and probably substantially better." The IDEA does not allow a parent to dictate a "better" or "more impressive" placement for a child. The IDEA requires the provision of individualized instruction and services - a basic floor of opportunity, not an education that will maximize a child's potential or is "better" than the placement chosen by a school district.

[redacted]'s parents were unable to find another school for [redacted] in Mississippi or one that was closer to Oxford. *Id.*, 299-300. While the District was not required to do so, it did not dispute this testimony or put on any evidence of a similar school closer to Oxford.

L. The Hunter School

The executive director and principal of Hunter School, Jim Kemmerer, testified telephonically for [redacted]'s parents. Tr. II, 238. The Hunter School is an intermediate residential program for students who are ADD, ADHD, and Asperger's, and sometimes Other Health Impaired is part of the diagnosis. *Id.*, 238-39. The Hunter School is a part of the New England Salem Children's Trust and both organizations are non-profit organizations. Tr. II, 239.

Hunter School has five classroom teachers and a number of supporting one-on-one aides, if so indicated in the child's IEP. *Id.*, 240. The current size of the student body is twenty students, ten residential and ten day students. The Hunter School requires that its teachers be certified in a particular content area, or close to certification or highly qualified in their academic areas. All of the faculty are either certified or approaching certification. *Id.* The school has a coordinator of special services who is certified in special education, and another who is close to being certified in special education. *Id.*, 240-41. The staff at Hunter School has also had training and staff development in Asperger's, ADD and ADHD. *Id.*, 241.

All of the students enrolled at Hunter School are disabled. As a result, [redacted] does not interact with non-disabled peers in the school setting.[32] Tr. II, 262-63. Transitioning back to a less restrictive environment is a part of each student's treatment and educational plan. Tr. II, 254. The

[32] When questioned concerning the video taken at Hunter School in her classroom, Ms. Latullipe testified, "[It] was just a regular day. I didn't set anything up for [redacted] I just -- the gentleman that videotaped, that got the videotape set up, since the student didn't know it was being done, just picked that time, and that's when we did it, during the math time." Tr. II, 267-68.

Hunter School works in conjunction with parents and school districts to develop a transition plan for each student. Tr. II, 239-40. According to [redacted]'s mother, transitioning back to the public school starts two to three months prior to the end of the school year in June. At that time, "The Hunter School would start contacting the District, and making connections with whoever would be dealing with [redacted], making sure [redacted] had enough time to be up to speed. [I]f the home district was ahead in areas of academic performance, the Hunter School would get [redacted] up to speed. She understands the Hunter School would give the District information about what works, and what doesn't." *Id.*, 143.

On June 28, 2010, the Mississippi Department of Education approved Hunter School's application for participation in the Educable Child Program for the 2009/2010 school year. Ex. 50. The deadline listed for filing for reimbursement for the 2009-2010 school year had passed by the date Hunter School was approved.[33] *Id.*

According to records from Hunter School, [redacted]'s first day of class was February 12, 2010. Ex. 65, at p. 16. [redacted]'s current teacher, Kelly Latuillipe, testified for the Parents. Tr. II, 257. Ms. Latuillipe, who is certified as a K-8 elementary education teacher, teaches [redacted] all of his academic subjects. She described [redacted]'s current academic performance:

> [A]t this point, [redacted] is on grade level. He is at the 4th grade level here at the school. He is doing a fantastic job in my math class. [A]ll the students have advanced to beginning 5th grade math. And he is doing a fantastic job. He does need some redirection at times. He does need support. He needs to have strong rules and guidelines, and [redacted] is doing a fantastic job in following through with those.

Tr. II, 258-59. There is a certified teacher in the classroom at all times. *Id.* at 267. Ms. Latuillipe also addressed [redacted]'s behavior, stating that "he is doing very well," although he tends to "have a little bit more of a difficult time being in the classroom" when he is not feeling well. *Id.* at 259. She

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[33] In any event, the hearing officer finds the Educable Child program was not applicable to [redacted]'s private placement in New Hampshire. The funds are not guaranteed, and there is no factual basis in the record that the local school board had the authority to enter into an agreement as suggested by [redacted]'s parents.

described working with [redacted] to express his feelings and "how to control the outbursts that he has had at times." *Id.* According to Ms. Latuillipe, [redacted] "is able to go to the quiet room, regain focus and get back into class." *Id.*

The quiet room at Hunter School is a small room, without a door in the hall, that is "painted in bright colors to uplift children." Tr. II, 265. The students "go in and take a breather. Basically they would talk with the staff about the situation they are upset about, regain control, and they come back. But that's basically what it is, a place to take some space." *Id.* The school's radio system allows its teachers to "contact people to be with the students if they need to be in the quiet room, [and] . . . extra staff that work one-on-one . . . in the quiet room. *Id.* at 266-67.

Ms. Latuillipe was not familiar with the standards set by the Mississippi Department of Education. She is not certified in Applied Behavior Analysis.[34] Tr. II, 264. If [redacted] was in a dangerous situation, or about to harm himself or others, she would restrain him, if he was in her direct contact area. If someone else was in his direct contact area, that person would be the one to restrain him. *Id.* Ms. Latuillipe is certified in Jireh technique, which she described as the least restrictive type of restraint. *Id.*, 260.

M. Evaluation of [redacted] at Hunter School

[redacted] was evaluated at Hunter School by Andrew R. Connery, Ed.D. in March and April of 2010. Ex. 26. Dr. Connery is a psychologist licensed in New Hampshire, and a nationally certified school psychologist. *Id.*, at p. 39. According to Dr. Connery, [redacted]'s father requested the evaluation, asking that he determine, "What DSM-IV criteria does [redacted] meet?" *Id.*, at p. 40. Dr. Connery observed and/or evaluated [redacted] on seven different occasions at Hunter School. *Id.* As a result of

[34] During the hearing, [redacted] parents and their witness, Priscilla Grantham, stressed the importance of ABA certification. The hearing officer did not find any data in the record or any testimony by the persons with Asperger's expertise to establish ABA certification was required for teaching or working with a child with Asperger's.

the evaluation, Dr. Connery concluded [redacted] met the DSM-IV criteria for Asperger's Disorder and the DSM-IV criteria for ADHD, Combined Type. *Id.*, at p. 51.

[redacted]'s parents provided the District with Dr. Connery's report. Mr. Gettys noted that Dr. Connery gave standardized assessments, and that his report was "more in line with what [the District] needed." Tr. III, 535. However, Dr. Connery's report "didn't have any educational placement decision or . . . educational recommendations." *Id.* Mr. Gettys emailed Dr. Connery's report to Dr. Emily Johnson on April 28, 2010, asking whether the District needed "an additional diagnostic scale to be completed to determine if [[redacted]] has Asperger's." Exh. 42, at p. 389. Dr. Johnson replied:

> Based on a review, if I were the district, and the child moved in with an eligibility as Autism (Asperger's), I would take the eligibility and then at 3 year reeval assess whether there were any members that felt that he needed further testing to examine whether a different eligibility was needed based on my staff's interactions. I wouldn't do it now. HOWEVER, as eligibility is a IEP team decision, you guys are completely free to do what you feel is best in the area. . . . No further assessment seems necessary.

Id. Mr. Gettys also asked, "[B]ased on what you've read, do you believe [redacted] meets the state of MS eligibility guidelines for autism?" Ex. 42, at p. 391. Dr. Johnson replied:

> Though I have not seen the child in person, based on what I read, I do feel like they justify his meeting of the eligibility criteria. . . . According to information received from the state re: another case, we are to be trusting other states to make the eligibility decision appropriately and if we have the same eligibility within our state, MDE SPED has indicated in at least one case that their expectations are that we would not nullify a IEP team's decision when that committee was supposed to know the child better than us. . . . Now - I know this case and understand he was not with the other state that long. However, I also know that he is severely impacted by his current constellation of behaviors as he was not coming to school full day. I would make it easy on myself and just go with it.

Exh. 42, at p. 389. Dr. Johnson testified for the Parents, stating she did not see any need for further testing for an eligibility determination based on Asperger's. Tr. I, 178. However, when a school district conducts a comprehensive assessment or reassessment, one purpose of an assessment is to

determine appropriate programming for the IEP, something that was not included by Dr. Connery. *Id.*, 180-81. In developing an IEP, the IEP team needs "the present level of performance and they have to have enough information [from the assessments] . . . to be able to develop that." *Id.* The IEP team has the responsibility of determining the educational programming and how to educationally program. *Id.* Dr. Johnson noted the need for a multi-disciplinary team stating, "That's why typically there's a regular ed teacher and a special ed teacher that is part of that team, as well." *Id.*,181.

When asked at the due process hearing about the motivation for Dr. Connery's evaluation, [redacted]'s mother testified:

> We knew that the District needed another evaluation, and we felt that since [the District] couldn't offer us more than one person [in Mississippi] to evaluate the child and since we felt that the two medical doctors had as much, if not more, background criteria to make that diagnosis over the person in the District that they wanted to do it, Dr. Johnson, that we needed to have him evaluated, but he was in his school setting, and we thought that was the best place for him to be evaluated and, therefore, we researched who was prominent in New Hampshire, who was close by in the area who could do a complete full evaluation and assessment in the school setting.

Tr. I, 127. This testimony shows the reluctance of [redacted]'s parents to recognize the District's right to conduct the evaluation and to chose the professional evaluators. This continued lack of cooperation impeded the District's ability to address eligibility and educational programming after the private placement.

After [redacted].'s one year follow-up visit with Dr. Anderson on July 7, 2010, Dr. Anderson, "Strongly recommend continued placement in current residential educational setting." Ex. 36. There was no indication in the record, however, concerning the basis for her recommendation; that is, it is unclear whether the recommendation was based upon antidotal information from [redacted]'s parents, or the results of a separate evaluation of [redacted] Without the underlying data and tests, Dr. Anderson's report, alone, does not provide a sufficient basis for continuing [redacted].'s private placement after an appropriate IEP is created by the District.

Mr. Gettys testified that he was "very" explicit with [redacted]'s mother about why additional testing was needed. Tr. III, 531. He believed that at the end of the December 4, 2009, IEP meeting that [redacted]'s mother was comfortable about having [redacted] evaluated. She took the consent forms and the medical releases to discuss with [redacted]'s father. *Id.* Approximately one month later, at the January 14, 2010, IEP meeting, Mr. Gettys again explained to [redacted]'s parents why meeting DSM-IV criteria was not sufficient for an eligibility ruling. *Id.*, 534-35. Mr. Gettys explained one reason the DSM IV criteria did not provide enough information: "[It's] great to find out if a child is officially diagnosed autism . . .[but] every child is different, even if Asperger's or autism." Tr. III, 536.

Mr. Gettys also explained the District's rationale for requesting Dr. Anderson's and Dr. Parker's medical records: "Our hope was that there was just something . . . left out of the [physician's] reports . . . [T]hey had done these tests, but for some reason, . . . I almost got the sense the report was a summary . . . and not . . . like Dr. Williamson's report or Dr. Connery's report. [Dr. Anderson's report] was one and a half pages so . . . it was not exhaustive at all." Tr. III, 632-33.

N. Evaluation of [redacted] by District's chosen evaluator, Sheila Williamson, Ph.D.

The District asked Dr. Williamson, one of its consultants, to perform an assessment of [redacted]. Tr. III, 471. The District specifically asked Dr. Williamson "to make appropriate . . . educational programming recommendations." *Id.*, 535. According to Dr. Williamson, the assessment "was undertaken to review previous assessments and medical information and to gather additional information to help ascertain the most appropriate diagnosis and subsequent educational disability category for [[redacted]]." Ex. 33, at p. 68.[35] In addition, Dr. Williamson also addressed "educational programming recommendations for consideration by the IEP committee." *Id.*, at pp. 54, 68.

Dr. Williamson's one day assessment of [redacted] took place on July 1, 2010, at the Scott Center

[35] Dr. Williamson's Psychological Assessment was admitted into evidence twice, as Exhibits 33 and 61. As introduced at the hearing, Exhibit 61 lacks pages 10 and 13. References in the Opinion to Dr. Williamson's Psychological Assessment will be to Exhibit 33.

in Oxford, Mississippi. Tr. III, 474. The assessment occurred during [redacted]'s summer break. *Id.* In her report, Dr. William stressed, "[I]t is important for the IEP committee members to understand the unique set of circumstances that lead to the development of the behavioral set [redacted].] was demonstrating while enrolled in [OES]." Dr. Williamson then discussed [redacted]'s disability, his experience at OES, and his behavior set, stating, in part:

> First, Asperger's Syndrome is an autism spectrum disorder in which the areas of communication and socialization are impacted. The area of communication is not always impacted in the typical way as there may not be a lack of language and in many cases, including [redacted], but a very verbose presentation with lots of conversation, especially about topics of interest. However, close examination of skills usually shows that the huge vocabulary and over talkativeness actually mask deficits in areas such as verbal comprehension skills (e.g., actually defining vocabulary words, answering social comprehension questions). These weaknesses often lead to development of avoidant and escape type behaviors around these type of verbal tasks. Adding to the development of inappropriate escape behaviors is poor social navigation skills inherent to Asperger's Syndrome. That is, children with Asperger's Syndrome often become overwhelmed in social situations that may not cause trouble for typical children and then lack ways of appropriately escaping these situations.
>
> In [redacted]'s] case, he transitioned to a new educational setting with his Asperger's Syndrome not yet identified. Adding to the difficulties, in this examiner's opinion, was that [redacted] was entering the third grade. In third grade, in many educational situations, the expectation for independent work completion and academic expectations increase significantly . . . This increase in rigor is often accompanied by higher social demands in third grade, especially related to peer relationships. . . . [redacted]'s skill set in the social arena are impacted by his diagnosis of Asperger's Syndrome and manifested in difficulties with interaction with peers and social immaturity (as noted by Dr. Parker). Additionally, as with many children with Asperger's Syndrome, [redacted] has a history of trouble with transitions, especially in novel situations (e.g., when he transitioned to Kindergarten).
>
> It is the examiner's opinion that this situation was overwhelming for [redacted] and he engaged in inappropriate behavior not only to escape difficult academic tasks but to escape high demand social situations he was unsuccessful in. Additionally, as noted above, the anxiety related to these situations have reportedly lead to the exhibition of flight and freezing responses. Escape was often to the lower social demand of home in which interactions were more longstanding and predictable.[36]

[36] Corrine Johnson provided a similar, although briefer, analysis on November 11, 2009, in an email she sent to members of the IEP team. *See* Ex. 14. Ms. Mason, Ms. Ryals, Ms. Smith, Mr. Gettys and others received a copy of this email. *Id.*

Ex. 33, at pp. 70-71. Dr. Williamson noted [redacted]'s favorable response to the implementation of supports after problems developed in kindergarten. *Id.*, at p. 61. She also noted that the supports put in place in kindergarten were faded away by the time [redacted] entered second grade. *Id.*, at p. 60. Based upon [redacted]'s success with supports, Dr. Williamson is optimistic [redacted] could be successful in an educational setting, including a general education placement. *Id.*

Dr. Williamson's assessment set forth detailed recommendations for [redacted]'s educational placement, including staff training, and environmental recommendations such as visual supports, and written checklists. Ex. 33, at pp. 71-74. The report concluded with Dr. Williamson's placement considerations, including a discussion of placement in the regular education classroom. *Id.*, at p. 74.

At the due process hearing, Dr. Williamson testified that a successful transition from Hunter School back to a placement in Oxford would require "pretty specific" recommendations that teachers and staff would need to follow. She also advise that any teachers and staff who would be working with [redacted] needed education and training. *Id.* at 495. Dr. Williamson stated she could work with [redacted]'s transition from Hunter School if the IEP team determined she should. *Id.*, 497-99.

O. Eligibility determination and September 24, 2010, IEP Meeting

An Eligibility Determination Meeting was held on August 30, 2010. Ex. 34. The multidisciplinary team found [redacted] met the State's eligibility criteria for Autism/Asperger's or "AU/AS". *Id.*, Tr. II, 433-34. The District used Dr. Williamson's Psychological Assessment to develop an IEP for [redacted] that it considered to be appropriate. Tr. III, 549. Mr. Gettys stressed that Dr. Williamson's evaluation of [redacted] enabled the District create an IEP that could address [redacted]'s needs at a school within the District. Tr. III, 661-62. The District also included information in September IEP that had been provided by Hunter School. *Id.*, 549-50.

The District convened an IEP meeting on September 24, 2010. Although [redacted] was not enrolled in an Oxford school, the District made an offer of services it felt was appropriate for him.

Tr. III, 538. The IEP developed by the IEP team included very specific recommendations, and educational plans. Ex. 35. Mr. Gettys discussed the difference in the January 2010, IEP and the goals, accommodations and services listed in the September 24, 2010, IEP. Tr. III, 552-56. Mr. Gettys also stated that the September 2010 IEP was reasonably calculated to provide educational benefit. *Id.* at 660-61. Mr. Gettys did mention that since [redacted] had been away from the District fro so long, then certain assessments needed to be performed when he returned.

[redacted]'s mother testified that she believes she was told at the August eligibility meeting and the September IEP meeting that the District was going to implement Dr. Williamson's recommendations. Tr. I, 137-38. Mr. Gettys testified that the District now has personnel with appropriate experience and training to work with [redacted] *Id.*, 543-44. Dr. Williamson also testified that, in her opinion, the District has staff with the experience and qualifications needed to work with [redacted]., including people who were not there in 2009. *Id.*, 477-78, 500. Dr. Williamson will be available to work with [redacted] when he returns to the District if the IEP team decides that is appropriate. *Id.*, 484-85, 495.

P. Request for reimbursement and additional relief

[redacted]'s father testified to the costs incurred in connection with Hunter School. Tr. II, 304-05. Exhibit 51 to his testimony sets forth the expenses for which [redacted]'s parents request reimbursement. Those costs are addressed below.

In the complaint served with the due process request, [redacted]'s parents seek several remedies that fall outside of the authority granted a due process hearing officer by the IDEA. For instance, [redacted]'s parents requested that the hearing officer require implementation of a thorough anti-bullying class at all grade levels and that program be monitored by a committee that included them. Further, [redacted]'s parents requested that "all District personnel" be trained by a certified instructor, and that the District be required "to aggressively attack" certain perceived problems and require an audit of the

qualifications of personnel. Ex. 68, at pp. 37-38. These requests exceed the scope of authority granted to due process hearing officers.

IV. DISCUSSION

Parents have the burden of proof when they challenge their child's educational placement and seek reimbursement for the costs of private school education. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 n.4 (5th Cir. 2009) ("[P]arty challenging the IEP bears the burden of showing that the IEP and the resulting placement are inappropriate under IDEA.").

A. Individuals with Disability Education Act ("IDEA")

The IDEA "is designed to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[37] "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings."[38] "Related services" include transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."[39] The IDEA's guarantee to a free appropriate public education does not require a public school to the provide a child with a disability with the best possible education, or to maximize the child's educational potential. *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-09 (5th Cir. 2003). Instead, a public school must offer a basic floor of opportunity, consisting of a program of specialized instruction and related services designed to provide the child with a meaningful educational benefit and one that is likely to produce progress. *Id.*

[37] 20 U.S.C. § 1400(d)(1)(A).

[38] 20 U.S.C. § 1401(29)(A).

[39] 20 U.S.C. § 1401(26).

In order to receive federal assistance under the IDEA, a state must have policies and procedures in place to ensure a free appropriate public education (a "FAPE") is available to all children with disabilities residing in the state.[40] On July 20, 2009, the Mississippi Board of Education adopted State Policies Regarding Children with Disabilities under IDEA, as amended (the "State Policies"), which generally track the federal regulations.[41] The State also adopted Special Education Eligibility Guidelines, and Disability Categories. *See* State Policies, at p. 271 ("Eligibility Guidelines") and at p. 278 ("Disability Categories").

As a local education agency, the District must "(1) provide each disabled child within its jurisdictional boundaries with a [FAPE] tailored to his unique needs, and (2) assure that such education is offered . . . in the least restrictive environment consistent with the disabled student's needs." *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576, 584 (5th Cir. 2009) (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997)). The least restrictive environment ("LRE") requirement provides that

> [t]o the maximum extent appropriate children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). Known as "mainstreaming" this provision requires "participating States to educate handicapped children with nonhandicapped children whenever possible." *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 & n.4 (1982). The IDEA's mandate for mainstreaming is not absolute, but instead requires "that a child be placed in the [LRE] in which the child can achieve an *appropriate* education." *V.P.*, 582 F.3d at 587. As a result, the LRE for implementing a student's IEP may be a special education classroom, a day treatment program or residential treatment facility.

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[40] 20 U.S.C. § 1412(a)(1)(A). The Act applies to children between the ages of 3 and 21, inclusive.

[41] http://www.mde.k12.ms.us/special_education/policies/2009/Policy_06-17-09.pdf. (Effective 07/20/09).

1. Identification and evaluation of disabled students

The IDEA requires a school district to identify and to evaluate disabled children residing within its jurisdiction.[42] In conducting an evaluation, a school district "shall . . . use a variety of tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining . . . whether the child is a child with a disability, and the content of the child's [IEP]", as well as information "related to enabling the child to be involved in and progress in the general education curriculum."[43] A school district must also "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."[44] Further, a school district must "ensure that the child is assessed in all areas of suspected disability"[45] and that the "assessment tools and strategies . . . that directly assists persons in determining the educational needs of the child are provided."[46]

As defined in implementing regulations,

> *Evaluation* means procedures used in accordance with §§ 300.304 through 300.111 to determine whether a child has a disability **and** the nature and extent of the special education and related service that the child needs.

34 C.F.R. § 300.15 (emphasis added). A school district is obligated to "conduct a full and individual evaluation," and must ensure the eligibility determination "is made by a team of qualified professionals and the parent of the child."[47] In connection with a child's evaluation, notice must be

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[42] 20 U.S.C. § 1414(a)-(c).

[43] 20 U.S.C. § 1414(b)(2)(A)(i)-(ii).

[44] 20 U.S.C. § 1414(b)(2)(C).

[45] 20 U.S.C. §1414(b)(3)(B).

[46] 20 U.S.C. § 1414(b)(3)(C).

[47] 20 U.S.C. § 1414(b)(4)(A).

given to parents that "describes any evaluation procedures such agency proposes to conduct."[48] A school district must obtain the parents' consent before conducting an initial evaluation.[49]

The State Department of Education's requirements for eligibility determinations generally track federal regulations. The State's guidelines require, among other things, a comprehensive evaluation to "identify all educational needs to be addressed in development of an IEP, regardless of whether those needs are typically linked to the disability category." *See* State Policies, at p. 272, ¶ A(4). A school district's personnel must gather information about the student from a variety of assessment tools and strategies, including evaluations and "other information provided by the parent." *Id.*, at p. 273, ¶ B(9). The multi-disciplinary evaluation team is responsible to determine appropriate ways to measure each area, as well as "the instruments necessary to obtain information sufficient to determine the presence of a disability, eligibility for special education, and programming needs." *Id.*, at pp. 273-74. State guidelines also require evaluation and testing data to be timely. *Id.*, at p. 274-75, ¶ C. For instance, if intelligence measures or a physical exam are required by a MDE policy or the evaluation team, the data can not be more than one year old. *Id.* Data from social, behavioral, adaptive and emotional measures may not be more than six months old. *Id.*

The use of DSM criteria in an eligibility determination is specifically addressed in the State Guidelines:

> Generally, a diagnosis . . . using criteria from the Diagnostic and Statistical Manual of Mental Disorders (DSM) . . . is not required to determine special education eligibility, *nor is such diagnosis alone sufficient to determine eligibility for special education*. . . .When diagnostic or prescriptive information from a health care professional or psychologist is available to the public agency, the team must consider the information when making an eligibility determination for special education.

Id., at p. 277 (emphasis added).

In its "Disability Categories," the Mississippi Department of Education states:

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[48] 20 U.S.C. § 1414(b)(1).

[49] 20 U.S.C. § 1414(a)(1)(D)(i). If parents refuse to consent to an initial evaluation, or fail to respond to a request for an evaluation, the local education agency may pursue the evaluation via a due process hearing. 34 C.F.R. §300.300(c)(1).

> "Autism (commonly referred to as Autism Spectrum Disorder) means a developmental disability significantly affecting verbal and nonverbal communication and social interaction . . . that generally affects a child's educational performance." Additional characteristics often associated with Autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."

State Guidelines, at 279. Included in the Autism category are the "Pervasive Developmental Disorders, including . . . Asperger Disorder." *Id.*

2. Individual Education Program ("IEP")

Once a child is identified as disabled and entitled to special education services, an IEP must be created that is specifically designed to meet that child's unique needs.[50] The "core of [the IDEA] is the cooperative process that it establishes between parents and schools," and the "central vehicle for this collaboration is the IEP process."[51] Each IEP must include an assessment of the child's current educational performance, including "how the child's disability affects the child's involvement and participation in the general education curriculum."[52] An IEP must also articulate measurable educational goals, and must specify the nature of the special services that will be provided.[53] The IEP committee or team must consider the child's strengths, the concerns of the parents, the results of evaluations, and the academic, developmental and functional needs of the child. 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(2)(iv).

Once an IEP is developed and a child receives services under the IDEA, a reevaluation of the disabled child must be conducted every three years or if a school district "determines that the

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[50] 20 U.S.C. § 1414(d).

[51] *Schaffer v. Weast*, 546 U.S. 49, 54 (2005).

[52] 20 U.S.C. §1414(d)(1)(A)(i)(I)(aa).

[53] 20 U.S.C. §1414(d)(1)(A)(i).

educational or related services needs . . . warrant a reevaluation."[54] The local education agency must obtain the parents' consent before conducting a reevaluation.[55]

A school district must have an IEP in effect for each disabled child at the beginning of a school year.[56] Different requirements apply when a child transfers to a new school, depending on whether the child's transfer occurs during the school year, and whether the transfer is from another state.[57] When a child transfers to a new school, the district must provide a FAPE, including services comparable to those in the previous held IEP, in consultation with the parents, until such time as the school district conducts an evaluation . . . if determined to be necessary by [the district], and develops a new IEP, if appropriate."[58]

3. Procedural safeguards under the IDEA

The IDEA contains numerous, specific procedural requirements to ensure a disabled child receives a FAPE, with an IEP "developed through the Act's procedures [that is] reasonably calculated to enable the child to receive educational benefit."[59] Participation by a student's parents is stressed throughout the IDEA, and a school district must provide "written prior notice" to parents when it "(A) proposes to initiate or change or (B) refuses to initiate or change - the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(3). While the IDEA grants

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[54] 20 U.S.C. § 1414(a)(1). A reevaluation of a disabled child must be conducted every three years, unless the parent and the local educational agency agree it is not necessary. *Id.*, § 1414(a)(2)(B)(ii)

[55] 20 U.S.C. § 1414(c)(3). Consent need not be obtained if the local education agency can demonstrate that it took reasonable measures to obtain consent and the child's parent failed to respond. *Id.*

[56] 20 U.S.C. §1414(d)(2)(A).

[57] 20 U.S.C. §1414(d)(2)(C). Here, [redacted] initially enrolled at OES before the start of the 2009-2010 school year, as a transfer student from another state. However, [redacted]'s parents formally withdrew him from OES and re-enrolled him at his former school in Virginia. [redacted] returned to OES on October 19, 2009. Ex. 53. At that time, services were being provided to [redacted] pursuant to a new IEP developed on October 13, 2009.

[58] 20 U.S.C. §1414(d)(2)(C)(i).

[59] *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 378 (5th Cir. 2003) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)).

parents a significant measure of participation in the IEP process, an IEP does not require a parent's approval to be effective. The "right to provide meaningful input" provided to parents does not equate to the right to dictate a particular outcome, or to require adherence to a "laundry list of items" desired by a parent. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003); *Adam J.*, 328 F.3d at 812 n.26.

4. Change in placement

Parents must be part of any group considering a change of placement. 20 U.S.C. § 1414(e). Placement refers to the different programs (services) on the education continuum (general education, special education class, special school, home instruction, hospital, institution or residential facility) and not to the location or the specific site where services are provided.[60] *White*, 343 F.3d at 379-81; *see also Veazey v. Ascension Parish Sch. Bd.*, 121 Fed. Appx. 552, 554 (5th Cir. 2005). A school district has "significant authority to select a school site, as long as it is educationally appropriate." *White*, 343 F.3d at 382. If parents believe their child's IEP and placement is inappropriate, they may request a due process hearing.[61]

B. Payment for private school education of disabled children

The IDEA contemplates a FAPE will be provided whenever possible in regular education classes in public schools. However, when a suitable or appropriate public placement is not available within a local school district, the district must pay the costs of sending the child to an appropriate private institution. *Michael F.*, 118 F.3d at 252. Section 1412(a)(10)(C) of the IDEA addresses a school district's obligation when parents unilaterally enroll their child in private school. The IDEA

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[60] The District contends the Parents' dispute over placement should be classified as a dispute concerning the location of services; that is, both parties agreed a different placement was necessary, but disagreed over the location where services would be provided. The District admitted, however, that the manifestation determination review was performed because the placement to Millcreek was going to be a more restrictive placement with different supports. Ex. 67, at p. 12.

[61] 20 U.S.C. §1415(f).

does not require a school district "'to pay for the cost of [private] education if that agency made a free appropriate public education available to the child' and the parents nevertheless elected to place him in a private school." *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2493 (2009) (quoting 20 U.S.C. § 1412(a)(10)(C)(i)).

"A 'hearing officer may require [a public] agency to reimburse the parents for the cost of [the private-school] enrollment if the . . . hearing officer finds the agency had not made a free appropriate public education available,' and the child has 'previously received special education and related services under the authority of [the] agency." *Forest Grove*, 129 S. Ct. at 2493 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii)). Interpreting § 1412(a)(10)(C) and *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993), the Supreme Court stated: "In those cases, we construed [IDEA] to authorize reimbursement when a school district fails to provide a FAPE and a child's private-school placement is appropriate, without regard to the child's prior receipt of services." *Forest Grove,* 129 S. Ct. at 2495. Parents are entitled to reimbursement "only if a federal court [or hearing officer] concludes both that the public school placement violated IDEA and the private school placement was proper under the Act." *Id.* at 2497 (quoting *Carter*, 510 U.S. at 15). "The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purposes of the Act." *Forest Grove,* 129 S.Ct. at 2493 n.9.

C. Reimbursement of cost of [redacted]'s private school education

When a parent challenges an IEP and the resulting educational placement, two questions must initially be addressed. First, did the state or local education agency comply with the procedural requirements prescribed by the IDEA? Second, was the IEP reasonably calculated to enable the child to receive educational benefits? *V.P.*, 582 F.3d at 584 (quoting *Rowley*, 458 U.S. at 206-07). If an IEP failed to provide for an appropriate placement (one reasonably calculated to provide educational

benefit), the school district may be required to reimburse the parents for the cost of sending the child to an appropriate private placement. *V.P.*, 582 F.3d at 585.

To receive reimbursement for the cost of [redacted]'s private school education at Hunter School, [redacted]'s parents were required to prove by a preponderance of the evidence that (1) [redacted]'s January 2010, IEP calling for placement at Millcreek was inappropriate under the IDEA and (2) his private school enrollment at Hunter School was proper under the IDEA. *R.H.*, 607 F.3d at 1011.

1. Appropriateness of the January 2010 and the September 2010 IEPs

To determine whether the January 2010 IEP appropriately placed [redacted] at Millcreek, first requires determining whether the District complied with the procedural requirements of the IDEA. If the District complied with IDEA's procedural requirements, then the question becomes whether the IEP changing [redacted]'s placement to Millcreek was reasonably calculated to provide an educational benefit. *V.P.*, 582 F.3d at 584-85.

a. Compliance by the District with IDEA's procedural requirements

A school district is required to take steps to ensure the parents "are present at each IEP meeting" or "are afforded the opportunity to participate."[62] Specifically, the IDEA requires "written prior notice shall be provided to the parents of the child . . . whenever the local educational agency - (A) proposes to initiate or change; or (B) refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a [FAPE]." 20 U.S.C. § 1415(b)(3). A hearing officer may find a denial of a FAPE on procedural grounds *only* if the school district failed to follow IDEA's procedural mandates, and the failure "(I) impeded the chid's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE]; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *see Adam J.*, 328 F.3d at 812-13.

[62] 20 U.S.C. § 1414(d)(1)(B)(I); 34 C.F.R. § 300.345(a).

As an initial matter, the question arises whether [redacted]'s parents adequately asserted denial of a FAPE based upon procedural violations by the District. The Complaint, which was served with the due process hearing request, expressly addressed procedural violations. *See* Ex. 52, at pp. 16, 35-36. Additionally, during the due process hearing, [redacted]'s mother testified that the District did not provide any notice that an IEP meeting would be taking place on January 14. Specifically, [redacted]'s mother testified the OES principal called her on January 6, 2010, asking if she could meet with Mr. Gettys and her on January 14. The principal, however, did not tell [redacted]'s mother that the January 14 meeting would be an IEP meeting.[63] No credible evidence was presented at the due process hearing that the District notified [redacted]'s parents that the meeting was an IEP meeting. Similarly, no evidence at the hearing indicated [redacted]s parents received written prior notice that the District planned to address a change in placement to a special school, or that a MDR would be conducted. Other IEP team members, however, were aware of the agenda for the January 14 meeting. Tr. II, 344.

[redacted]'s parents do not contend that on January 14, 2010, [redacted] belonged in a regular education classroom at OES. However, the District's failure to give notice significantly hampered the ability of [redacted]'s parents to invite persons from the District who were knowledgeable about the diagnosis their son had received, Asperger's, as well as the impact of Asperger's syndrome on their son's behavior and education. For example, Ms. Collier, one of the District's behavior technicians, had over 12 years of experience in working with students on the Autism spectrum. Tr. I, 152. Similarly, Corrine Johnson, one of the psychologists who worked with [redacted] had experience with Asperger's. *See* Ex. 14. Ms. Johnson made suggestions on ways to deal with the behavior associated with [redacted]'s Asperger's diagnosis and his "escape task" behaviors in an email on

[63] No objection was lodged at the time of her testimony, and the District did not produce any evidence contradicting this statement. On January 14, [redacted]'s parents signed the Parent Invitation Response form, but a handwritten note by [redacted].'s father stated the meeting was called on January 12, 2010. Ex. 24, p. 190.

November 11, 2009. Her input could have been helpful to the IEP team during the MDR. The failure to provide notice also impeded the ability of [redacted]'s parents to research other placement options in a timely, deliberate manner. [redacted]'s parents could have provided the IEP team additional placement options for its consideration.

Additionally, before a school district refers a child to a private school or facility, or changes a child's placement from the public setting to a private facility, federal regulations require a representative from the private school to attend the IEP meeting when a new IEP is being developed and placement changed. 20 C.F.R. § 300.325(a)(2). The failure to have a representative of Millcreek present, and the failure to have prior notice of the IEP meeting, deprived [redacted]'s parents of the ability to discuss Millcreek with a knowledgeable person from that facility in the presence of the IEP team, to address concerns about their son's Asperger's diagnosis with the Millcreek representative, to speak with the representative about transitioning [redacted] to Millcreek, and to have the new IEP incorporate other specific concerns about Millcreek. The IEP meeting, and the resulting IEP, lacked the collaboration called for by the IDEA.

At the IEP meeting, the District offered Millcreek as the only placement option. While [redacted] was scheduled to attend OES the next day for testing, the IEP listed January 14, 2010, as the commencement date for the new IEP. Ex. 24, at p. 179-81, OSD000094-96. Daily counseling services at Millcreek were scheduled to start on Tuesday, January 19, 2010, before [redacted]'s parents had the opportunity to tour the facility. *Id.*, at p. 183, OSD000098. As a result, [redacted] was deprived of educational services from January 15, 2010, until his mother was able to tour the facility on January 21. Further, no other options or services were offered after the District understood [redacted]'s parents objected to Millcreek, and were perceived by the District as "refusing services." *See* Ex. 72 (email string dated January 23 to 25, 2010). As a result, [redacted] did not attend school and was without any special education services until his first day at Hunter School on February 12, 2010.

On January 14, 2010, the District also conducted a MDR without prior notice to [redacted]'s parents. By failing to provide notice to [redacted].'s parents, the District deprived them of the right to request the presence of other team members, or others that they believed would aid the MDR. The IDEA requires a MDR when a disabled child's placement is being changed, for a period of more than 10 days, based upon a violation of the code of student conduct. 20 U.S.C. § 1415(k). [redacted]s parents (and their counsel) have interpreted the change of placement to Millcreek as a de facto expulsion. While expulsion is not an accurate portrayal or a legally proper interpretation, it is understandable why [redacted]'s parents were confused by the use of the MDR in this circumstance. On one hand, the District stated it had exhausted all of the curriculum and services available at OES, and [redacted] needed a different placement. On the other hand, the District conducted a MDR indicating the change in placement was the result of a code of conduct violation. In any event, the consensus of the persons at the IEP meeting was that [redacted]'s behavioral problems did not result from his disability. By making that determination, the District could apply to [redacted] the disciplinary procedures applicable to children without disabilities, as long as a FAPE was still provided. 20 U.S.C. § 1415(k)(1)(C). A determination that the behavior was a manifestation of his disability would have allowed [redacted] to remain in the placement from which he was removed until certain actions occurred. *Id.* at § 1415(F).

In addition, the MDR was conducted without the presence of the psychologists and the behavior technicians at the District who had seen [redacted]'s incidents, and who had extensive training in analyzing behavior and/or in psychology. The documentation for the MDR establishes an absence of attentiveness to the procedural and substantive provisions of the IDEA. For instance, the form instructs the completer to document "the evaluation and diagnostic results, and other information considered in connection with the described behavior (subject to review)." Ex. 24, at p. 195. The only information documented in this section stated, "Neurologist said her 'Impression: Patient with autistic spectrum disorder.'" *Id.* (quoting from Dr. Parker's report); *see* Ex. 17, at p. 32. While the

form did reference consideration of observations made by "the teacher and administrator as well as behavior specialist," the behavior specialist was not identified. The "report" from the behavior specialist was not attached or summarized and it is unclear what was actually considered. *Id.*

Based upon this evidence, I find that the procedural violations occurring with the January IEP, alone, resulted in the loss of a significant educational benefit to [redacted] and impeded [redacted]'s Parents' ability to participate in the IEP and placement process. Moreover, the failure to follow the notice provisions relating to the MDR resulted in a further violation of IDEA procedures and a substantive denial of educational benefits to [redacted]

b. Provision of FAPE - Educational benefit to [redacted]

[redacted]'s parents allege the District denied [redacted] a FAPE. A FAPE must include "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley*, 458 U.S. at 188-89. The Fifth Circuit Court of Appeals explained the contours of a FAPE as follows:

> The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit. This educational benefit cannot be a mere modicum or *de minimis*, but must be meaningful and likely to produce progress.

Adam J., 328 F.3d at 808-09 (citations omitted). The Fifth Circuit has identified four factors "that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether

> (1) the program is individualized on the basis of the student's assessment and performance;
>
> (2) the program is administered in the least restrictive environment;
>
> (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and

(4) positive academic and non-academic benefits are demonstrated."

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 348-49 (5th Cir. 2000)(quoting *Michael F.*, 118 F.3d at 253).

i. Individualized program based upon [redacted]'s unique needs, assessment, and performance

January 2010 IEP

The January 2010 IEP listed [redacted]'s eligibility category as OHI/ADD/ADHD. Although the District had asked [redacted]'s parents to consent to an evaluation for determining [redacted]'s appropriate disability classification, consent had not been provided. Prior to January 14, 2010, the District was stymied in its efforts to make an eligibility determination based upon Mississippi's regulations and criteria. The District decided to continue providing special education services to [redacted] without an eligibility determination and the assessments it believed were needed for [redacted]'s educational programming and placement. District personnel testified, however, that the services provided to a disabled child are not based upon the particular eligibility classification or designation. Tr. II, 444-45; Tr. III, 562. Once an eligibility determination is made, services and modifications can be developed to meet the child's specific needs; that is, an IEP team is not "limited" by the eligibility categorization. *Id.*

At the time the District created the January 2010 IEP, it had received (1) verbal notification from [redacted]'s parents that he had an Asperger's diagnosis (at least by October 13, 2009), (2) a one paragraph memo from Dr. Anderson stating [redacted]'s diagnosis (October 2009), (3) a two-page consultation report from Dr. Anderson that provided her diagnostic impressions and recommendations (received by District after October 23, 2009, but before mid-November 2009),[64] (4) Dr. Parker's evaluation note dated November 18, 2009, and (5) a prescription by Dr. Parker for

[64] Tr. II, 436 (OES Psychometrist, H. Hale).

an occupational evaluation and treatment (provided to the District on December 4, 2009). As a result of receiving Dr. Anderson's two-page report, the District also had access to specific recommendations that [redacted] needed (a) a teacher with experience working with Asperger's children, (b) a small size class, (c) an occupational evaluation, (d) ongoing speech therapy to work on pragmatic communications and (e) a functional behavior analysis and a full time aide, if behavior became a problem. *See* Ex. 6. There is no indication, however, that the draft IEP delivered to [redacted]'s parents on January 14, 2010, took into account information received about [redacted]'s Asperger's diagnosis. *See* Ex. 24. The IEP does not mention Asperger's, or refer to the reports provided by Drs. Anderson and Parker. *See* Ex. 24. The first mention of Asperger's appears in the notes from the IEP meeting that reflect statements made by [redacted]'s father. *Id.*, at p. 187.

The IEP *only* mentioned an eligibility category of OHI/ADD/ADHD. This document served as the IEP under which Millcreek would have started providing services, but it gave Millcreek no information regarding the Asperger's diagnosis or the fact that [redacted]'s behaviors could have been a symptom of or caused by a manifestation of Asperger's. The District unambiguously stated that [redacted] was not receiving an educational benefit in his current placement, and that he needed additional supports that were not available at OES. Nevertheless, the only substantive change in the January 2010 IEP (other than the change of placement) was the addition of 30 minutes of daily therapy. Neither the behavior technician, Ms. Collier, nor the three interns who were all doctoral candidates in psychology (Ms. Brown, Ms. Johnson and Ms. Hankton) were present at the IEP meeting. District documents establish Ms. Johnson considered Asperger's in her planning and encounters with [redacted] *See* Ex. 14, at p. 318-19. The District presented no evidence that these individuals were consulted about the specific placement at Millcreek or the services that should be provided for [redacted] to receive an educational benefit in that particular setting. The special education

teacher, Ms. Mason, and [redacted]'s regular education teacher, Ms. Ellis, did not testify at the hearing. As a result, the evidence is lacking that an educational benefit would be derived by changing [redacted]'s placement to Millcreek. Although [redacted]. parents had not consented to an evaluation prior to preparation of the IEP, this lack of consent did not prevent the District from at least addressing the Asperger's diagnosis and, more particularly, each of the specific recommendations made by Dr. Anderson that related to [redacted]'s educational needs. *See* Ex. 6. The way in which Millcreek would address [redacted]'s flight risk was not adequately explained.

The District contends that the January 2010 IEP was developed and based upon all data and information available to the IEP team at the time of the IEP meeting.[65] Although he did not discuss [redacted]'s academic goals with any specificity, Mr. Gettys did testify that the academic goals were appropriate. Tr. III, 517. When asked whether the IEP was reasonably calculated to provide an educational benefit, Mr. Gettys replied, "Yes. It was, again, based upon information we had at the time, which was unfortunately limited. . . . The team made the best decision that it could given the information we had." *Id.*, 521. Mr. Gettys did testify that the Asperger's diagnosis was considered "all along" but documentation of that consideration is absent. The District did not provide other evidence to support Mr. Gettys' position, especially as it relates to the significant decision to change [redacted]'s placement to Millcreek. Given that the IEP is a "roadmap" for the provision of services based upon a student's disability and unique needs, there is a lack of direction and an absence of detail in the January 2010 IEP.

[redacted]'s parents called Mark Wildmon, Ph.D., as an expert witness. Dr. Wildmon is a licensed school psychologist who completed a one-year pre-doctoral internship with Johns Hopkins School of Medicine, and a one-year post-doctoral supervision at Emory School of Medicine. Tr.

[65] District representatives testified that when an eligibility determination is made, services and modifications are developed to meet the child's specific needs; that is, an IEP team is not "limited" by the eligibility categorization. Tr. II, 444-45; Tr. III, 562.

I, 187. For the past 14 years, Dr. Wildmon has worked in the areas of Autism, Asperger's and related developmental disabilities. He has contracted with school districts in Mississippi and in neighboring states, helping to establish programs for children on the Autism spectrum. He also trains teachers on Autism spectrum disorders, as well as providing ongoing support to them.

Although Dr. Wildmon has not toured a Millcreek facility or spoken with its administration, the Oktibbeha County School District contacted him to help provide services for an Asperger's child at the Millcreek facility in Starkville, Mississippi. *Id.* He was not allowed "to enter the Millcreek facility because of confidentiality reasons for other students," but instead provided a comprehensive assessment of the student. *Id.*, 189.

When asked whether it was appropriate for a child with Asperger's to be "housed and schooled with children suffering from DSM-IV mental illnesses, emotional particularly," Dr. Wildmon replied:

> I think the academic intervention, academic remediation, however you want to determine it for children with Asperger's and behavioral intervention is approached much differently than that you would approach a child with a mental health issue or emotional behavior disorder.

Id.,193-94. When asked about the impact of educating a child with Asperger's with persons who have emotional disorders, Dr. Wildmon testified that the needs of a child with Asperger's for consistency and structure made the learning environment "very important." *Id.*, 194. Awareness of the triggers in the environment for a particular child with Asperger's could influence or impact treatment. *Id.*

Dr. Wildmon agreed that a child with Asperger's could be educated in a general education setting if the child had a personal aide, or in other words, "appropriate supports." *Id.*, 198-99. However, the environment in treating children with emotional disabilities is "going to be more chaotic for the child with Asperger's compared to a regular education setting and a personal aid."

[sic] *Id.*, 199. Dr. Wildmon admitted that a child with Asperger's could be educated with children diagnosed with DSM IV mental health disability if the educator has the training and experience to deal with both. *Id.*, 199. Dr. Wildmon stated, however, that it would be "very, very, very unusual" for a clinical or educational psychologist to be trained in both emotional disabilities and Asperger's. *Id.*, 198.

When asked about a child with Asperger's being transported 30 minutes in a van with a child with emotional disabilities, Dr. Wildmon testified that the modeling aspect of a high functioning Asperger's child around disruptive behavior heightens the child's senses and could potentially lead to a crisis situation or an outburst. *Id.*, 202. Regarding whether children with Asperger's require a residential placement to achieve educational benefit, Dr. Wildmon testified, "No. As long as the proper resources provided [in the other settings] are adequate. I work with children across the state with Asperger's in the public schools that are making strides, making progress." *Id.*, 204. Those children, however, all have personal aides. *Id.*, 198.

While the District had the obligation to address [redacted]'s safety at school, and the right to prevent aggressive actions by [redacted] toward its staff. Since [redacted] was receiving services from the District as a child with a disability, the District was required to abide by IDEA mandates when it attempted to address the problems associated with [redacted]'s behaviors. The hearing officer finds the January 2010 IEP did not address [redacted]'s unique needs and the potential impact of Asperger's on [redacted]'s educational performance. The IEP was not reasonably calculated to provide an educational benefit to [redacted]

September 2010 IEP

[redacted] was evaluated in Oxford, Mississippi by Dr. Williamson. Her report was provided to the District on July 13, 2010, and an eligibility meeting was held in August. The September IEP the District presented to [redacted]'s parents reflects a deliberate and thorough analysis developed using

Dr. Williamson's report, and information from Hunter School. The IEP included specialized instruction and services designed to address [redacted]'s unique needs. Unlike the January 2010 IEP, the September 2010 IEP was calculated to provide educational benefit to [redacted]

ii. Least Restrictive Environment ("LRE")

January 2010 IEP

This indicator addresses whether [redacted]'s proposed placement at Millcreek was the LRE in which [redacted] could achieve an appropriate education. The District initially attempted to educate [redacted] in the general education classroom, with supports and modifications. *See* Ex. 8. The October 2009 IEP provided [redacted] would be in the general education classroom 80% or more of the school day. *Id.* at p. 160.

The December 4, 2009, IEP changed the LRE classification to "SC/inside General Education Classroom Less than 40% of the Day." Ex. 18, at p.170, OSD000088. The December 2009 IEP explained [redacted]'s nonparticipation in general education services, stating: '[redacted] will be on an abbreviated schedule for school. He will work one on one with school district personnel to complete assigned work from the general education teacher." *Id.*, at p.166, OSD000084. The notes from the meeting stated [redacted]'s mother wanted a smaller classroom and that [redacted] "sees building as a negative place." *Id.*, at p.174. The schedule attached to the IEP stated the services for the first week would be provided in the "sensory room, with Ms. Collier, Ms. Brown and Ms. Mason with suspension of physical rewards." *Id.*, at p. 175, OSD000092.

Regarding whether Millcreek met the IDEA's LRE requirement, the January 14, 2010, IEP states:

> [redacted]'s] behavior affects his continued involvement/progress in the general education setting. [redacted] has exhibited some behaviors that were not appropriate for the general education classroom. On January 14, 2010, the IEP committee determined placement in the current setting is not appropriate to meet [redacted]'s] needs. The IEP committe [sic] determined that [redacted]'s] least restrictive environment is at a separate school due to the frequency and intensity of his behaviors. The

> committee recommends placement at Millcreek, [[redacted]'s] parents are concerned with his educational placement. Currently, they agree that Oxford Elementary is not his least restrictive environment but they do not agree with his placement at Millcreek.

Ex. 24, at p.178, OSD000093. The January 2010 IEP also states: "[[redacted]] will attend a separate school in order to ensure that he is educated in his [LRE]." *Id.*, at p.179, OSD000094. There is no indication in the January 2010 IEP that the day treatment placement at Millcreek was limited in time. *Id.* The time frame listed on the January 2010 IEP listed the same "ending" date for services as the two earlier IEPs, May 21, 2010. *Id.* The only exception was the ending date for daily counseling (new entry), May 24, 2010. *Id.*, at p. 183. Similarly, nothing in the IEP suggests the District intended for [redacted] to return to public school at OES. While Mr. Gettys testified that the District does not want to leave any student in an outside placement any longer than necessary, the January 2010 IEP failed to document the District's intent. By its terms, the January 2010 IEP did not place [redacted] in his LRE.

While a residential placement is generally considered to be a more restrictive environment than a day treatment facility, the Hunter School's education plan includes a section that addresses transitioning each student back to a less restrictive environment. Tr. II, 239-40, 254. [redacted]'s plan at Hunter School, dated February 15, 2010, states: "Transition planning for [[redacted]] will be discussed every year at the end of his Hunter Education Plan (HEP), or anytime during the school year as requested by the parent or school staff." Ex. 47, at p. 243. The private placement was a more restrictive environment for [redacted], but the terms of the HEP also addressed an intent to discuss transitioning [redacted] to a less restrictive environment.

September 2010 IEP

Unlike the January 2010 IEP, the IEP presented to [redacted]'s parents on September 24, 2010, specifically addresses the District's plan to move [redacted] from the day treatment classroom to the general education classroom. The September 2010 IEP provides different ways that [redacted]. will

participate with his non-disabled peers. First, the LRE classification in the September 24, 2010, IEP states, "SC/Inside General Education Classroom Less than 40% of the Day." Ex. 35, at p. 210. In the explanation of nonparticipation in general education services, the IEP provides:

> [redacted] will attend Della Davidson elementary school. He will attend specials, recess, and lunch with his non-disabled peers. He will receive instruction in the core academic areas in a special education classroom. He will also attend library 40 minutes a week and science lab 1 time a week with this [sic] non-disabled peers. Transition strategies will be developed by a behavior specialist to increase his time with his non-disabled peers ***as quickly as possible***.

Ex. 35, at p. 204 (emphasis added).

[redacted]'s parents had the opportunity at the September 24, 2010 meeting to express their desire regarding [redacted]'s placement for the rest of the 2010-2011 school year. Additionally, attached to the September 2010 IEP is a list of recommendations submitted by [redacted]'s parents. After noting the Parents preferred placement for the next 12 months was a "Therapeutic Boarding School," the list states, "the supports, modifications, and interventions within a school setting should be carried out by . . . a regular classroom teacher with additional training in AS and/or special educator." *Id.*, at p. 213. The recommendations by [redacted]'s parents also included the following items:

> "2. Dedicated aide, teaching assistant or paraprofessional (i.e., devoted just to [redacted], and
>
> 3. Full time aide: . . .
>
> 9. All trained staff for AS/OHI should be trained by certified instructor of JIREH (non violent restraint process). FYI, the final step of JIREH (Therapeutic hold is never to be used on [H.D.]"[66]

Id. While parents' desires for their children must be considered, no parent has the right to implementation of a laundry list of items, or to hold the IEP process hostage. *White*, 343 F.3d at

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[66] [redacted]'s parents made several complaints regarding the "restraints" used by staff at OES. Mr. Gettys testified that District personnel received training by a certified CPI instructor during December 2009. According to Mr. Gettys only Ms. Brown restrained [redacted] after the training. Tr. III, 537. The type of restraint to be used if necessary to protect [redacted] or others from harm is an IEP team decision based upon the evaluations, tests and medical data, if any, available to the IEP team. While the decision regarding the methodology or practice is a team decision, the decision must include input from [redacted]'s parents.

380; *Adam J.*, 328 F.3d at 812 n.26. As long as a school district meets the IDEA procedural requirements, and parents are provided an opportunity for meaningful input, IEP decisions belong to the IEP team. If the District provides a placement in the LRE in which the child can receive an appropriate education, it has met the requirements of the IDEA.

The testimony by Dr. Williamson at the hearing also supports a finding that the placement proposed in the September 2010 IEP, at Della Davidson, was an appropriate placement for [redacted] was not enrolled to attend school in the Oxford school district prior to the start of the school year, but the proposed placement and the services set forth in the IEP were nevertheless reasonably calculated to provide [redacted] with an educational benefit in the LRE, and therefore a FAPE. As a result, the hearing officer finds that while the January IEP did not meet the IDEA's requirements for the LRE for [redacted], the September 2010 IEP did meet the IDEA's LRE mandate.

iii. Coordination and collaboration of services

January 2010 IEP

Regarding whether the January 2010 IEP provided for coordination and collaboration of services, the IEP did not address the manner in which Millcreek and the District (or OES) would work together for [redacted]'s educational benefit. The language in the January 2010 IEP relating to the provision of services, modification and accommodations did not differ from that in the December 2009 IEP. There was no evidence that the District made a thoughtful, deliberate consideration of the way the two entities would work together. The testimony relating to the January 2010 IEP did not provide sufficient evidence to establish the implementation of the IEP was likely to produce a coordination and collaboration of services.

September 2010 IEP

The September 2010 IEP reflects a deliberate approach to the coordination of services. The IEP calls for training in the area of [redacted]'s disability for his teachers, the behavioral assistant and

the administration. An understanding of Asperger's and its impact on [redacted] would have allowed the key stake holders to collaborate and coordinate services more effectively. The specificity in the September 2010 IEP also provided District personnel with what accomodations and services it needed to provide. In providing a clearer picture of [redacted]'s instruction and service, the District increased the probability that [redacted] would have received an educational benefit at Della Davidson.

iv. Positive academic and non-academic benefits

January 2010 IEP

The January 2010 IEP does not provide sufficient detail to explain why the change of placement would result in positive academic and non-academic benefits for [redacted] To meet the requirements of the IDEA, the educational benefit must be more than a mere modicum or *de minimis*. The January 2010 IEP did not provide sufficient detail to show how the change in placement was reasonably calculated to result in a positive academic and non-academic benefits for [redacted] The District was required to address [redacted]'s disability and his unique needs. While the District did not have everything it believed was necessary to determine educational programming, the IEP did not address the Asperger's diagnoses made by Drs. Anderson and Parker. The failure to address, in any form or fashion, Asperger's impact on [redacted] makes the possibility of any educational benefit dubious at best. The January 2010 IEP did provide an appropriate placement or a FAPE.

September 2010 IEP

The September 2010 IEP tells a completely different story. This IEP clearly emphasized special education and related services designed to meet [redacted]'s unique needs. Dr. Williamson's testimony established that the September 2010 IEP could have more likely than not provided positive academic and non-academic benefits to [redacted] The District indicated its willingness to provide what had previously been missing at OES during the 2009-2010 school year. While [redacted]'s mother questioned whether the District had the staff and ability to provide the services, the

September 2010 IEP did offer a FAPE to [redacted]

The IEP was not in place before the beginning of the 2010-2011 school year, but [redacted] was not enrolled to attend OES before the eligibility determination in August, or even at the time of the IEP meeting. [redacted]'s parents did not make [redacted] available for evaluation before he was enrolled at Hunter School, during his April break, or during the summer break until July 1, 2010. The hearing officer finds the failure to make [redacted] available before he was evaluated by Dr. Williamson prevented the District from developing an IEP before the beginning of the 2010-2011. [redacted]'s parents did not accept the offer of services on September 24, 2010, and instead chose to exercise their right to challenge the IEP. When [redacted]'s parents made the choice to reject the services offered in September 2010, they did so at their own financial risk. *Michael Z.*, 580 F.3d at 295 n.4.

2. Appropriateness of the residential placement at Hunter School

In order for a residential placement to be appropriate under the IDEA, the Fifth Circuit applies the following two-part test:

> (1) Is the placement essential in order for the disabled child to receive a meaningful educational benefit?
>
> (2) Is the placement primarily oriented toward enabling the child to obtain an education?

Michael Z, 580 F.3d at 301. The first part "requires a finding that the placement is *essential* for the child to receive a meaningful educational benefit." *Id.* (emphasis in original). If the placement is necessary for a child to obtain special education and related services, the placement satisfies the first part of the test. *Id.* A unilateral residential placement is not essential "if a child is able to receive an educational benefit without the residential placement." *Id.* The fact that the parents' choice of placement may be "better" academically, socially, or medically is not pertinent if a school district's placement is reasonably calculated to provide an educational benefit to the child. *Id.*

As early as November 10, 2009, an OES behavior technician, Denise Collier, recognized that [redacted] might need "*residential treatment for a period of time*," and asked Mr. Gettys about the District's obligations and different options available for [redacted] *See* Ex. 13. Of the District employees who testified at the hearing, Dr. Collier had the most experience working with children on the spectrum. According to the District, the intensity and frequency of [redacted]'s behavioral problems escalated through January 2010. If Ms. Collier believed residential treatment might be appropriate in November, the need for a residential placement should have been even more apparent with the escalation in behavioral incidents.

Additionally, on October 22, 2009, [redacted]'s mother specifically questioned the school counselor, Ms. Maxwell, about the possibility of [redacted] attending the day treatment program at Della Davidson, an elementary school in the District.[67] Ex. 56. According to Ms. Maxwell, [redacted]'s mother mentioned the small number of students at Della Davidson and the potential for daily therapy.[68] *Id.* Approximately one month later, [redacted]'s mother asked about home schooling during the time [redacted] was adjusting to new medications. According to [redacted]'s mother, Ms. Hale told her the District did not provide home instruction under those circumstances. At the January 14, 2009, meeting, Mr. Gettys stated the District had no other curriculum or services to address [redacted]'s needs and that the day treatment program was not appropriate for [redacted] in January 2010.

On January 14, 2010, the District offered one placement for consideration by [redacted]'s parents, Millcreek at Pontotoc. At that time, [redacted]'s parents were faced with placing their son, a child with Asperger's, at a new facility, with new teachers, a new counselor, and classmates with emotional

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[67] There is a lack of evidence regarding whether the District attempted to arrange a day treatment program or services for [redacted] at Della Davidson before it made the decision to change [redacted]'s placement to Millcreek.

[68] [redacted]'s parents called Priscilla Grantham to provide information about the District's day treatment program. Ms. Grantham provided general information about another day treatment program in the District, but she lacked first hand knowledge about the Della Davidson program or the persons who worked there. Tr. I, 207, 209.

disabilities. [redacted]'s parents were also faced with the complete cessation of special education services if they did not agree to the Millcreek placement. Mr. Gettys recognized the Parents' discomfort with the placement. Email correspondence between Mr. Gettys and OES's principal reflect their interpretation that [redacted]'s parents were refusing the Millcreek placement, the only one offered by the District. *See* Ex. 72.

Because the January 2010 IEP and the placement at Millcreek did not offer [redacted] a FAPE, it was necessary for [redacted]'s parents to find an educational placement that could provide [redacted] with an appropriate education and related services. The hearing officer finds that [redacted]'s parents met their burden of establishing that placement of [redacted] at Hunter School was essential and necessary for [redacted] to receive a meaningful education benefit.

The second part of the test asks: "Was the residential placement primarily oriented toward enabling the child to obtain an education?" An analysis under this part requires a "fact-intensive inquiry" to determine "the extent to which the services provided by the residential placement fall within the IDEA's definition of 'related services.'" *Michael* Z, 580 F.3d at 301. Reimbursement is permitted only for "'treatments' that are related services as defined by the IDEA at 20 U.S.C. § 1401(22)." *Id.* at 302. If the residential placement, when viewed as a whole, is primarily oriented toward enabling the child to obtain an education, each constituent part of the placement must be then be reviewed to "weed out inappropriate treatments from the appropriate (and therefore reimbursable) ones." *Id.* at 301. The meaningful public education required by the IDEA "was not intended to shift the costs of treating child's disability to the school district." *Id.*

The evidence here supports a finding that the residential placement was primarily oriented toward enabling [redacted] to receive an education. From October 2009 until January 14, 2010, [redacted]'s disability and the range of behaviors associated with his disability resulted in limited participation in school, including a significantly reduced school day. Placement at Hunter School provided

individualized instruction to [redacted], with the modifications and services to allow him to benefit from the instruction. The placement undoubtedly has a therapeutic component for an Asperger's child, but the preponderance of the evidence establishes the placement was predominantly designed for [redacted] (a child with Asperger's and ADHD) to achieve an educational benefit. There was no evidence that any portion of the tuition or residential fees was associated with medical expenses or treatments not considered to be "related services" under the IDEA.

In summary, the January 2010 IEP did not provide [redacted] with a FAPE, and his placement at Hunter School was appropriate. As a result, [redacted]'s parents are entitled to recover tuition, residential fees and travel costs associated with the private placement for the period beginning with [redacted]'s travel to Hunter School in February 2010 until [redacted]'s return to Oxford, Mississippi at the end of the school year in June 2010. The District did not challenge the individual trips or components of the travel costs submitted by the [redacted]'s parents. In any event, given [redacted]'s age and disability, it is reasonable to include the costs associated with an adult taking [redacted] to and from Hunter School.

3. Denial or reduction of reimbursement

Section 1412(a)(10)(C)(iii) of the IDEA discusses circumstances under which the "cost of reimbursement described in clause (ii) may be reduced or denied." Those circumstances include the failure of parents to inform the IEP Team at the most recent IEP meeting (prior to the placement) that they were rejecting the proposed placement, or the parents failure to give written notice to the district at least10 business days before removing the child from public school.[69] Reimbursement may also be refused or denied if a school district gives proper notice of its intent to evaluate the child, and the parents failed to make the child available for evaluation.[70] Finally,

[69] 20 U.S.C. § 1412(a)(10)(C)(iii)(I).

[70] 20 U.S.C. § 1412(a)(10)(C)(iii)(II).

reimbursement may also be reduced or denied upon a finding the actions taken by the parents were unreasonable.[71] "Clauses (ii) through (iv) of section (C) are premised on a history of cooperation and together encourage school districts and parents to continue to cooperate in developing and implementing an appropriate IEP before resorting to a unilateral private placement." *Forest Grove*, 129 S. Ct. at 2494.

The District has asserted reimbursement should be denied or reduced because

- [redacted]'s parents failed to give the District adequate notice of their decision to withdraw [redacted];
- The District was not allowed an adequate opportunity to evaluate [redacted] prior to the unilateral placement; and,
- The parents' actions were unreasonable.

The decision to deny or reduce the amount of a reimbursement award is a discretionary decision based upon equitable principles. *Id.*

Regarding the lack of notice, the records from Hunter School reflect that Friday, February 12, 2010, was the first day [redacted] attended class. Ten business days prior to that date was Friday, January 29, 2010. The District contends the first indication it received regarding the unilateral private placement occurred on February 5, 2010. Tr. III, 587-88 (testimony relating to letter from attorney for [redacted]'s parents (*see* Ex. 25, at pp. 513-14)). Specifically, the February 5, 2010, letter stated, "[[redacted]'s parents] will sign an IEP, which recommends the Hunter School with the current OHI/ADHD determinations, with the understanding that [they] will assume responsibility for all tuition and expenses in excess of what Millcreek would charge the school district." Ex. 25, at p. 514.

While the February 5, letter provided the most specific request relating to Hunter School to that point, the evidence reflects that [redacted]'s parents mentioned residential placement at the January

[71] 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

14, 2010, IEP meeting. Notes from the meeting state [redacted]'s parents indicated they had found a residential boarding school geared to ADHD and Autism spectrum disorders. Ex. 24, at p. 188, Bates no. OSD000103. The record also reflects that by January 25 2010, the District knew [redacted]'s parents had refused services at Millcreek. *See* Ex. 72. Additionally, on February 3, 2010, the District's attorney received a letter stating [redacted]'s parents planned to visit Hunter School. Ex. 25, at pp. 508-09. In the letter, the parents' attorney asked that "school administrators" be given the information about Hunter School and to inform him of the District's position. *Id.*

The lack of written notice to the District within the 10 day time frame is not, in and of itself, a sufficient basis for denying or reducing reimbursement in this case. The District presented [redacted]'s parents an IEP with a change of placement to Millcreek on January 14, 2010. In spite of the fact [redacted]'s mother had been asking District representatives about other day treatment placements for several months, the District did not provide prior written notice that a change of placement would be considered at the IEP meeting. [redacted] did not receive any services between January 14 and the day [redacted]'s mother toured Millcreek on January 21. When faced with a placement they believed was inappropriate, [redacted]s parents attempted to find an appropriate educational placement. [redacted]'s parents also received a notice from a school attendance officer, dated February 8, stating that since [redacted] was not attending school as required, they could be fined $1,000, or incarcerated for up to one year, or both. Ex. 25, at p. 515. Enrolling their son in school was essential. Adequate notice was provided by [redacted]'s parents of their intent to seek a private placement.

The District also contends reimbursement should be denied because [redacted]'s parents failed to make their son available for evaluation prior to the time he was taken to New Hampshire and enrolled at Hunter School. There was a significant amount of testimony at the hearing relating to the failure of [redacted]'s parents to provide underlying data for the Asperger's diagnosis, and their failure to provide consent for testing prior to January 14, 2010. The District asked [redacted]'s parents

to provide medical releases so the District could obtain the underlying basis for the Asperger's diagnosis made by Drs. Anderson and Parker. When the releases were not forthcoming, the District then attempted on numerous occasions to get [redacted]'s parents to consent to an evaluation by the District. At that point, the District could have refused to provide services, and treated [redacted] as a general education student, as long as it complied with the notice provisions of the IDEA before services were ceased. The District, however, did not choose that route. Instead, the District continued to provide services until [redacted]'s behaviors escalated.

The hearing officer finds that prior to January 14, 2010, [redacted]'s parents did take an unreasonable position when they expected the District to provide services on the basis of an Asperger's diagnosis, but refused to cooperate in providing what the educators and staff needed to serve their child and to comply with state and federal law. However, the record also establishes that [redacted]'s parents "did not singlehandedly derail the IEP process." *See Hogan v. Fairfax County Sch. Bd.*, 645 F. Supp. 2d 554, 572 (E.D. Va. 2009) (increasing reimbursement award to parent because hearing officer failed to give proper weight to school district's actions). A school district has an obligation to provide parents with specific information about required assessments, and to ensure an evaluation takes place after parents provide consent. 20 U.S.C. § 1414 (b)-(c); *see e.g.*, *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1209-10 (9th Cir. 2008).

There is an absence of evidence regarding whether the District made [redacted]'s parents aware of the specific type of assessments the District needed. There were no records admitted at the hearing to show that prior to January 14, 2010, [redacted]'s parents were informed of the specific assessments needed for an eligibility determination and for educational programming. It is the obligation of a public school district to describe for parents what assessments are needed.[72] The

[72] An example of a more detailed approach can be found in [redacted]'s records from Virginia. *See* Ex. 7, at p. 109.

District did not do that, here.[73] While district representatives assert that they explained why a diagnosis based on DSM IV criteria did not meet state requirements, the evidence is lacking that the District provided [redacted]'s parents with a sufficient written description of the tests and assessments until its counsel wrote the Parents' counsel on February 3, 2010. Even then, the February 3 letter did not specifically address what the District needed. Instead, the letter quoted from State regulations regarding the information needed to make an eligibility determination based upon an Autism spectrum disorder. *See* Ex. 25. The District introduced a reevaluation form (dated January 14, 2010), but the form only generally references the additional testing as "Autism, Attention, OT, Speech, Behavior." The general listing does not coincide with the actual testing that Dr. Williamson eventually performed. Ex. 59, at p. 2, OSD000115. [redacted]'s mother testified that she and her husband requested but did not receive a list of the evaluations and tests from the District until after June 1, 2009, when the parties were represented by counsel. *Id.*, 134-35; *see* Ex. 32.

Additionally, on January 14, 2010, when [redacted]'s parents consented to an evaluation, two persons were identified as potential evaluators, Dr. Johnson and Ms. Hale. On January 20, 2010, [redacted]'s mother attempted to schedule an appointment with Dr. Johnson, the psychologist chosen by the District. Upon contacting the psychologist's office, [redacted]'s mother was told she needed a doctor's prescription before an evaluation could be scheduled. When she mentioned the evaluation had been requested by the District, she was told the psychologist was not under contract with the District. The District's failure to ensure everything was in place for the evaluation further compounded the Parent's belief that the District was not acting in good faith. Tr. I, 118-20. An evaluation was eventually scheduled, but [redacted] was sick the day of the appointment. [redacted] was not receiving any services and his parents began to look at other schools, and did not make [redacted]

[73] The District's approach varies considerably

available for an evaluation prior to his placement at Hunter School. After [redacted]'s private placement, the District and [redacted]'s parents maintained contact, primarily through their attorneys.

Regarding the September 24, 2010 IEP, the evidence establishes that [redacted]'s parents acted in an unreasonable manner when they failed to make [redacted] available for an evaluation before July 1, 2010. If [redacted]'s parents had arranged for an evaluation during [redacted]'s April Break, at the end of school or before July 1, the District would have had a better opportunity to convene an IEP before the beginning of the 2010-2011 school year. [redacted]'s parents chose to have their son evaluated by a New Hampshire educational psychologist, Dr. Connery, but only directed him to assess [redacted] and determine whether he met the DSM IV criteria for an autism spectrum disorder.[74] As a result, Dr. Connery's evaluation did not provide educational programming or placement information. When coupled with the parents' earlier resistance for an evaluation (from November 2009 until [redacted]'s enrollment at Hunter School), the Hearing Officer finds the failure to make [redacted] available before July 1, 2010, was unreasonable and calls for a reduction in the costs associated with the 2010-2011 school.

4. Reimbursement for the cost associated with Hunter School

As set forth above, [redacted]'s parents are entitled to reimbursement for the cost associated with [redacted]'s private education during the 2009-2010 school year from February 2010, when [redacted] was enrolled at Hunter School, through June 2010, the end of the 2009-2010 school year. Regarding [redacted]'s attendance at the ESY session, there is no evidence regarding the educational benefits addressed during the ESY. As a result, [redacted]'s parents are not entitled to recover costs associated with ESY.

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[74] [redacted]'s parents maintain that they asked the District to identify additional people to evaluate [redacted]. While names of other evaluators could have been provided by the District, and may have aided in a quicker resolution of the evaluation issues, the IDEA has no such requirement. The District is entitled to chose the professionals who administer assessments and interpret results. The District's evaluation request and its insistence to use evaluators of its choosing was reasonable and sanctioned by the IDEA.

At the time school began in August 2010, the District did not have an IEP in place for [redacted]. As a result, [redacted] was enrolled at Hunter School for the 2010-2011 school year. If the January 2010 IEP had initially provided a FAPE and an appropriate placement, [redacted] would not have been enrolled at Hunter School. Further, if the District had informed [redacted]'s parents of the specific assessments it needed in a timely fashion, and made arrangements for evaluation with Dr. Johnson, it is possible that the District could have determined eligibility and provided an appropriate IEP before September 24, 2010. Because there was no IEP in place at the beginning of the school year, the Hearing Officer finds the District should be responsible for a portion of the tuition, residential fees and travel costs submitted by [redacted]'s parents at the due process hearing. According to the testimony of [redacted]'s mother, Hunter School typically begins to transition a child back to the public school two to three months prior to the date of departure. If [redacted]'s parents had accepted the offer of services in September 2010 meeting, [redacted] could have been transitioned back to the District within three months after the September 24, 2010, or closely thereafter. Instead, they challenged the January and September IEPs by filing a due process request on October 13, 2010, and they did so at their own financial risk. The actions of [redacted]'s parents relating to the evaluations needed by the District were unreasonable and contributed to the delay in the preparation of an appropriate IEP. As a result, reimbursement for the 2010-2011 school year is reduced based on equitable principles.

There is no set formula for reducing a reimbursement award. [redacted]'s parents are entitled to recover one third of the tuition and residential cost for the 2010-2011 school year. This reflects three months of tuition and residential costs associated with the transition period from Hunter School to the District.

A summary of the reimbursement award follows:

School Year (2009- 2010)
(February 2010 to June 2010)

Academic tuition	$16,509.20
Residential	$15,940.80
April break deduction[75]	($1666.67)
Travel[76]	$2,399.15 (February airfare and lodging expenses)
	$1,861.66 (April airfare, auto and lodging expenses) Mileage expense, $750.00 ($.50 x 1500)
	$1,161.66 (Travel to Oxford, June 2010)(auto and lodging expenses) (Mileage expense, $750.00 - $.50 x 1500)
TOTAL (2009-2010)	**$36,205.80**

School Year 2010- 2011

Academic Tuition	$11,791.67 (1/3 tuition cost)
Residential	$11,116.67 (1/3 residential cost)
April Break[77]	($1,666.67)
Travel[78]	$1513.88 (1/3 auto, lodging & airfare)
	$510.00 (1/3 round trip cost from Hunter School to Oxford)
TOTAL (2010-2011)	**$23,265.55**
TOTAL REIMBURSEMENT	**$59,471.35**

[75] [redacted]'s parents received a $1666.67discount for costs associated with the Hunter School's April 2010 break. Ex. 51.

[76] [redacted]'s parents calculated mileage expenses at a rate of $0.55 per mile. The basis for the mileage rate is not supported in the record. IRS regulations for 2010 only allow mileage deductions at a rate of $.50 per mile. *See* http://www.irs.gov/taxpros/article/0,,id=156624,00.html. As a result, the mileage submitted by [redacted]'s parents has been reduced by $.05 ($.50 x 1500 = $750.00).

[77] [redacted]'s parents received a $1666.67discount for costs associated with the Hunter School's April 2010 break. Ex. 51. No evidence was submitted to explain why that discount would not apply to the 2010-2011 school year.

[78] *See* http://www.irs.gov/newsroom/article/0,,id=232017,00.html (IRS regulations for 2011allow mileage deductions at $.51.) As a result, the mileage submitted by [redacted]'s parents $.55 has been reduced by $.04 for 2011 travel.

V. CONCLUSION

[redacted]'s parents met the burden of proving their entitlement to reimbursement under the IDEA in the amount of $59, 471.35. This amount reflects a reduction based on equitable principles, as described above.

SO ORDERED, this the 24th day of February, 2011.

JEANNIE HOGAN SANSING
MDOE Hearing Officer