Philip Carter Strother
Strother Law Offices PLC
The Hillyard-Maury House
15 E Franklin St
Richmond, VA 23219

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

J.P., a minor, et al.,

Plaintiffs,

v. Civil Action No. 3:06cv28

COUNTY SCHOOL BOARD OF
HANOVER COUNTY, VIRGINIA,

Defendant.

ORDER

Having determined that Judgment is to be entered on behalf of the Plaintiffs and having made certain declarations in their favor and being aware that the Plaintiffs intend to seek attorneys fees, it is hereby ORDERED that:

(1) by January 12, 2009, the Plaintiffs shall submit a properly documented application for fees and expenses (other than costs), said application must address the issues raised by the Defendants previously and by the Court of Appeals during oral argument;

(2) in that regard, if the Plaintiffs persist in their previously stated intent to claim fees for the proceedings on the previous appeal, an entirely separate application shall be filed on January 12, 2009 for any such fees and expenses;

(3) by February 16, 2009, the Defendants shall file separately their responses to each of the submissions made by Plaintiffs pursuant to paragraphs (1) and (2) above;

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(4) by February 26, 2009, the Plaintiffs shall file their replies to the Defendants' responses.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: December 16, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

J.P., a minor, et al.,

Plaintiffs,

v. Civil Action No. 3:06cv28

COUNTY SCHOOL BOARD OF
HANOVER COUNTY, VIRGINIA,

Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Judgment is entered in favor of the Defendant on Count I of the Complaint by virtue of the decision on the United States Court of Appeals for the Fourth Circuit entered on February 14, 2008;

(2) Judgment is entered in favor of the Defendant on Count VI of the Complaint;

(3) Judgment is entered in favor of the Plaintiffs on Counts II, III, IV, V and VII; and

(4) It is declared that the 2005-2006 Individual Educational Plan did not provide JP with a Free Appropriate Public Education;

(5) It is declared that the Dominion School was an appropriate placement of JP during the 2005-2006 school year.

It is further ORDERED that the Defendant shall pay to the Plaintiffs the cost of educating JP at the Dominion School and

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that, to that end, the Plaintiffs shall file, by January 12, 2009, a complete statement of that cost.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: December 16, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

J.P., a minor, et al.,

Plaintiffs,

v. Civil Action No. 3:06cv028

COUNTY SCHOOL BOARD OF
HANOVER COUNTY, VIRGINIA,
Defendant.

MEMORANDUM OPINION

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit for reconsideration. See J.P. ex rel. Peterson v. County School Bd. of Hanover County, Va., 516 F.3d 254, 263 (4th Cir. 2008) (hereinafter J.P.II). The Court of Appeals vacated this Court's earlier decision, 447 F.Supp.2d 553 (E.D.Va. 2006), holding that, in finding that the State Hearing Officer's ("SHO") decision was of no utility, this Court had not given sufficient deference to the decision of the SHO and remanding the case for reconsideration of the adequacy of the 2005 IEP. J.P.II, 516 F.3d at 263. For the reasons set forth below, the Court finds that, after according deference to the SHO's decision, the 2005 Individual Education Plan ("IEP") was inadequate to fulfill the defendant's obligation to provide JP with a free appropriate public education; that the Dominion

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School was an appropriate placement for JP; and that JP's parents are entitled to reimbursement for the cost of educating JP at the Dominion School for the 2005-2006 school year.

I. THE IDEA

The Individuals with Disabilities Education Act ("IDEA"), originally entitled the Education of the Handicapped Act ("EHA"), was enacted by Congress to ensure that all children, including those with disabilities, would have access to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(c); Gadsby ex rel. Gadsby v. Grasmick, 109 F.3d 940, 942 n.1 (4th Cir. 1997). "A FAPE consists of 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." J.P. II, 516 F.3d at 257 (quoting Board of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982))(internal quotation marks omitted).

In order to provide a FAPE, a school must develop an IEP for the disabled student that contains "statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." M.M. v. School Dist., 303 F.3d 523, 527 (4th Cir. 2002). The IEP must be "'reasonably calculated to enable the

child to receive educational benefits.'" J.P. II, 516 F.3d at 257 (quoting Rowley, 458 U.S. at 207). The IEP must also, of course, be implemented as articulated. 34 C.F.R. § 300.500.

The IDEA allows the parents of the disabled student to contest the sufficiency of an IEP. 20 U.S.C. § 1415. If the parents do so, they must notify the school district of their complaints and enter mediation with the school district. Id. In the event that the mediation does not resolve the issue, the parents have the right to a due process hearing before an impartial state hearing officer. Id.

Either party aggrieved by the decision of the SHO may bring an independent civil action in federal district court. 20 U.S.C. §1415(i)(2). In that action, the district court must decide upon the appropriateness of the IEP under a preponderance of the evidence standard. 20 U.S.C. §1415(i)(2)(c)(iii). The district court is obligated to give "due weight" to the record of the due process hearing and the SHO's decision. J.P. II, 516 F.3d at 259 (quoting Rowley, 458 U.S. at 206). If the factual findings of the hearing officer are regularly made, they are considered prima facie correct. Id. If the district court, after giving the SHO's decision the requisite deference, reaches a different conclusion on the appropriateness of the IEP, the district court must explain its reasoning. Id. at 263.

II. BACKGROUND FINDINGS OF FACT AND PROCEDURAL HISTORY[1]

JP, born January 4, 1994, is an autistic child who resides in Hanover County, Virginia with his parents, KP and LP. Autism, a condition recognized as a disability under the IDEA, is a developmental disorder that significantly affects the acquisition of verbal and nonverbal interaction skills. 34 C.F.R. § 300.7(c)(1)(i). The disorder is generally apparent before age 3. Autistic children suffer from deficits in attention and language skills and are frequently unresponsive to exterior stimuli. Additionally, autistic children frequently engage in repetitive movements, known as "stimming," and react poorly to change in their environment or daily routine. These developmental difficulties mean that autistic children require special education in order to learn.

JP's relationship with Hanover County Public Schools ("HCPS") began in January 2001, when JP entered Battlefield Park Elementary School as a first grader. JP was placed in the special education program upon enrollment and continued in that program until May 2003, repeating first grade during that time.

In May 2003, JP's parents, KP and LP, removed JP from HCPS and enrolled him in a private specialty school for children with

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[1] These Findings of Fact are taken from the record, including both the evidence adduced before the SHO and during the additional evidence hearing before this Court. They are essentially not in dispute.

autism. That action was taken because KP and LP concluded that JP was not making progress at Battlefield Park and, based upon expert advice, they judged that JP would make progress at a specialty school like the Spiritos School ("Spiritos").

Spiritos uses a specialized system, known as applied behavior analysis ("ABA"), to teach autistic students. The centerpiece of ABA is intensive, one-on-one instruction. Use of ABA is intended to teach autistic students the skills needed to learn academic subjects. While learning under the ABA system at Spiritos, JP made substantial progress. Dr. Michael Hayes, a clinical psychiatrist, used a variety of skills tests to chart and confirm JP's substantial progress at Spiritos.[2]

KP and LP decided to remove JP from Spiritos and re-enroll him in HCPS. Under the aegis of the IDEA, JP's parents sought to work with the school district to create an IEP for JP that would, in many ways, emulate the learning environment of Spiritos. As provided by the IDEA, an IEP team, including the parents, convened in the summer of 2004 to design an appropriate IEP for JP. The product of these meetings was an IEP signed August 17, 2004 ("2004 IEP"), which placed JP in a special

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[2] The record indicates that Dr. Hayes used the Woodcock Johnson III ("WJ-III"), Verbal Motor Integration ("VMI"), and Peabody Picture Vocabulary Test III ("PPVT-III") tests to chart JP's progress while at Spiritos. Further analysis of these test results will be set forth in Section IV.b.2.B, supra.

education program at Rural Point Elementary School ("Rural Point").

The parents testified that, because, in their view, HCPS had not provided JP with an adequate education at Battlefield Park and, because JP had made significant progress at Spiritos, they sought to obtain an educational program at Rural Point that would utilize many of the same methods used at Spiritos. HCPS offered no evidence to the contrary.

In fact, the 2004 IEP incorporated parts of an agreement between HCPS and the parents that had resulted in the settlement of a previous due process challenge by the parents wherein the parents claimed that HCPS had denied JP a FAPE during his year at Battlefield Park and wherein the parents sought reimbursement for the costs of JP's year at Spiritos. That claim was settled before the due process hearing on that dispute was held, and the settlement included a monetary award as well as settlement terms pertinent to JP's further education by HCPS. The terms of the settlement agreement became significant parts of the 2004 IEP and a considerable part of the parents' case focuses on the terms of the settlement agreement that were incorporated in the 2004 IEP. (See HCPS-3, p.29b, 29c.)

Under the 2004 IEP, JP was to attend a regular 4th grade classroom for home room, recess, lunch, music, and art. A

special education teacher was to teach JP reading, writing, and math in a so-called "self-contained" classroom that was designed for the instruction of autistic children. As set forth in the settlement agreement that was incorporated into the IEP, JP's classroom was to include small, partitioned learning areas, special sensory tools that aid in keeping autistic children focused, dimmed lighting, and a special swing and oversized ball that many autistic children use to reduce anxiety and overstimulation. JP was also to have a one-on-one teacher's aide who would be trained in the use of the "discrete trial method" that is an important aspect of ABA-type instruction. The one-on-one aide also was to provide assistance in all of JP's activities, including reading, writing, mathematics, and daily living/social skills. In addition, JP was to receive speech therapy five times per week, including once in a group session, for thirty minutes each and thirty minutes of occupational therapy per month.

As proposed, the 2004 IEP had 18 goals. At the August 17, 2004 IEP meeting, three of the goals were deleted at the parent's request (goals 11, 13 and 14). At an October 20, 2004 meeting, a new goal 12 was inserted, and goal 13, dealing with writing motor skills, and which seemingly had previously been deleted, was added back. The 2004 IEP described JP's present

level of performance, and it included several accommodations that were to be made for JP. These accommodations read as follows:

> •direct one on one instruction to include opportunities for discrete trials where appropriate.
> •structured environment with visual schedule
> •short clear directions and wait time provided
> •Teacher/aid [sic] to maintain attention to task, model, modify, and reinforce
> •Therapeutic Listening
> •Sensory Diet (to be developed, revised, and monitored by the OT who will consult with the SPED teacher and 1:1 aide.) Consult with OT.
> •Trained instructional assistant** to support J[P]'s program. Training will entail methods such as repetition, data collection, step by step methods, that is proven to work with children with autism. HCPS will arrange for the aide to receive training from a Certified Behavior Analyst from a program such as Faison School or a comparable program in Fredericksburg with which HCPS is already conducting similar training sessions.
> ** The aide will be supervised by the Special Education teacher and will provid [sic] instruction to James at the teacher's, the occupational therapist's and/or the speech therapists direction.

(2004 IEP, p. 24.)

The nine provisions that were part of the settlement agreement were added as an addendum to the August 2004 IEP. (See 2004 IEP, pp. 29b, 29c.) Included among those provisions are:

> 2. J[P] will receive support from a one-to-one instructional aide who receives training in methods that are proven to work with children with autism. HCPS will arrange for the aide to receive training from a Certified Behavior Analyst from a program such as the Faison School or a comparable program in Fredericksburg with which Hanover County Public

> Schools is already conducting similar training sessions.
> 3. The one-to-one aide will serve James at all times that he is involved in school work or activities. The aide will be supervised by the special education teacher, and will provide instruction to James at the teacher's, the occupational therapist's, and/or the speech therapist's direction.
> 4. J[P] will receive academic instruction in a self-contained setting. The setting will include will include opportunities for J[P] to receive discrete trials when and where the instructional personnel deem appropriate all, of course, designed to meet J[P]'s individual educational needs[.]
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> * * *
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> 7. Hanover School Board policy invites and encourages parents to be involved closely with their students' education, including making visits to classrooms to view the academic environment. HCPS appreciates the P[...]s' willingness to coordinate their visits through J[P]s' special education teacher and/or through the school administration to limit any disruptions to J[P]' and other students' learning.

(Id.) During the October IEP meeting, the IEP team decided to order a Functional Behavioral Assessment, which was completed on November 22, 2004. The parents signed the 2004 IEP as well as the October 20, 2004 additional goals.

Michael Warner, a psychologist working for HCPS, completed a psychological evaluation of JP on November 22. That evaluation recommended several strategies aimed at curbing JP's behavioral difficulties. On the same day, JP's speech therapists completed an oral-motor assessment that the parents had requested in September. The IEP team held several other meetings in December 2004, one of which (the December 1 meeting)

led to an addendum to the 2004 IEP implementing a Behavior Intervention Plan/Positive Behavior Support Plan.

By February 8, 2005, JP's parents had become sufficiently concerned with JP's inadequate progress that they filed a complaint with HCPS requesting that HCPS provide the credentials of all individuals working with JP. The parents thereafter, on April 25, requested a Speech and Language Evaluation, which was completed on May 12. The 2004 IEP was again amended on June 16 to implement the mouth strengthening exercises that had been recommended for JP the previous autumn.

The parents also requested that the school district conduct an Assessment of Basic Language and Learning Skills ("ABLLS") test on JP. ABLLS is designed to be a comprehensive test that assesses a child's pre-academic and social developmental strengths and weaknesses. It tests skills such as reading, language, and calculations as well as the ability to imitate, pay attention, and interact socially. Several of the parents' experts testified before the hearing officer and this Court that ABLLS is the only test that comprehensively assesses basic learner skills. The undisputed record establishes that, until a child is competent at the full range of basic learner skills tested by the ABLLS, that child is not prepared to be taught the state standard curriculum used in public schools.

HCPS decided that ABLLS testing was unnecessary because, in its view, it had sufficient other sources of information to assess JP's pre-academic and developmental strengths and weaknesses. However, confronted by continued parental insistence and the views of the educational experts advising the parents, HCPS reluctantly relented and ordered the ABLLS testing. The results from this testing were not yet available in June 2005, when the IEP at issue in this case was crafted.

Because JP's progress during the 2004-2005 school year under the 2004 IEP is central to whether the June 2005 IEP was sufficient under the IDEA and governing decisional law, the facts pertaining to JP's progress will be discussed in full in Section IV of this Memorandum Opinion. At this point, it is sufficient to say that, throughout the 2004-2005 school year, the parents remained concerned that JP was not making progress toward the goals set in the 2004 IEP and, due to repeated but unanswered requests for objective data demonstrating JP's progress, they remained dissatisfied with HCPS's assertions that JP was in fact making progress. Between the middle and end of the 2004-2005 school year, the parents came to the view that JP was actually regressing rather than progressing and so informed HCPS. In contrast, the HCPS members of JP's IEP team expressed the view that JP was making sufficient progress. HCPS contends that its belief was based on observations of JP, assessments of

his classroom work, progress journals kept by the speech therapists, and anecdotal evidence.

The April 25 IEP team meeting led to a plan to implement an Extended School Year ("ESY") for JP; this extra term was to run from July 7 to August 11, 2005. However, all but one day of this extra term was consumed by JP's family vacation and ABLLS testing.

By June 2005, the parents and HCPS had developed different views on whether the 2004 IEP had provided JP with educational benefit. Both the parents and HCPS based their judgments on their respective views of the progress, or lack thereof, that JP had made under during the 2004-2005 school year. On June 16, 2005, the IEP team met to discuss a new IEP for the 2005-2006 year. The parents were of the view that JP needed a more intense, one-on-one curriculum like that provided at Spiritos and that HCPS had not fulfilled the terms of the settlement agreement that were incorporated to that end in the 2004 IEP. HCPS felt that JP had made progress at Rural Point, did not need ABA-based instruction, and could continue to make progress at Rural Point during the coming 2005-2006 year.

The IEP proposed at the June 16, 2005 meeting is somewhat in the nature of a draft IEP for the 2005-2006 school year. That is, the June 2005 IEP consists of the 2004 IEP as it stood in June 2005 (i.e., less the goals that had been deleted, plus

the goals that had been amended or added), plus a statement of JP's current level of performance as of June 15, 2005 and three goals proposed on June 15, 2005 dealing with language, behavioral self-regulation, and oral motor skills. Thus, in essence, the 2005 IEP was little but a slightly modified version of the 2004 IEP.

Having already removed JP from HCPS to place him at Spiritos for the 2003-2004 school year, having observed JP's significant progress at Spiritos, and having observed that JP had regressed in certain areas or made no meaningful progress in other areas at Rural Point under the 2004 IEP, the parents, at the June meeting, requested HCPS to provide JP with a private placement at public expense at a local specialty school such as Spiritos. HCPS refused this request. Thereupon, the parties reached an impasse, and the parents rejected the proposed 2005 IEP.

On June 28, 2005, the parents filed their request for a due process hearing which was held on July 25, September 29 and 30, 2004.[3] In a written decision dated October 14, 2005, the SHO held that JP had made more than minimal progress during the 2004-2005 year, and that both the 2004 and 2005 IEPs were appropriate under the IDEA and governing law.

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[3] The delay between the sessions resulted because the parents changed counsel after the July 25 session.

Meanwhile, the parents had enrolled JP at the Dominion School ("Dominion"), a small specialty school for autistic children that first opened on September 12, 2005 with a total enrollment of three students, including JP. By the time of the September due process hearings, JP had attended Dominion for two weeks. Dominion administered several tests to JP when he first arrived to determine his then current level of performance.

On January 11, 2005, the parents filed a seven count Complaint in this Court:

- Count I alleges that the State Hearing Officer violated their due process rights by failing to adequately consider the opinions of the parents' witnesses, and by refusing to consider the parents post-hearing points of authority while, at the same time, considering the points of authority provided by HCPS.
- Count II alleges that HCPS used inappropriate and poorly administered assessment tools (i.e. education tests) to assess JP and therefore his IEP could not have been reasonably calculated to provide him with an educational benefit.
- Count III alleges that HCPS failed to take into account the failure of the 2004 IEP to provide educational benefit to JP when it designed the 2005 IEP, and that the 2005 IEP thereby denied JP a FAPE.

- Count IV alleges that Goals three and four of the IEP were inappropriate, as they set goals for JP which were unrealistically high in light of his then-current academic ability.
- Count V alleges that JP's condition and social development made socialization and mainstreaming an inappropriate goal that will not provide JP with educational benefit because of the severity of his disability.
- Count VI alleges that HCPS denied the parents a meaningful opportunity to participate in JP's education.
- Count VII alleges that several material accommodations and services promised in the 2004 IEP were not implemented or improperly implemented and that JP was thereby denied a FAPE.

The parties agree that, notwithstanding the manner in which the claims are articulated, the real issue is whether the 2004 IEP (and thus the 2005 IEP, as it is materially the same as the 2004 IEP) complied with the requirements of the IDEA and its implementing decisional law. That issue, in turn, has devolved in this case into whether JP made more than minimal progress under the 2004 IEP. Both parties agree that, if he did not, the 2004 IEP (and hence its successor, the 2005 IEP) fails to satisfy the statutory requirement that HCPS must provide JP with

a FAPE. In the same fashion, the parties have treated the issue of JP's progress under the 2004 IEP as a proxy for whether JP received educational benefit under that IEP. The relief sought by the parents is the cost of educating JP at Dominion during the 2005-06 school year.

In a decision issued on August 28, 2006, this Court held that the 2005 IEP was inappropriate and that JP's parents were entitled to reimbursement for the expense of educating JP at Dominion during the 2005-06 school year and for their attorney's fees. J.P. ex rel. Peterson v. County School Board of Hanover County, Va., hereinafter J.P.I, 447 F.Supp.2d 553, 591 (E.D.Va. 2006).[4] On appeal, the United States Court of Appeals for the Fourth Circuit held that this Court had accorded insufficient deference to the SHO's decision, vacated the Court's decision, and remanded for reconsideration the merits of the case. J.P. II, 516 F.3d at 263.[5] Now, it is time to turn to reconsideration

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[4] After that decision was issued, the parents and the school district agreed that JP was to attend private, specialized school at public expense, and he has been thusly enrolled and educated ever since. Therefore, the 2005-06 school year is the only one at issue.

[5] The Fourth Circuit also vacated and remanded the related decision, J.P. ex rel. Peterson v. County School Board of Hanover County, Va., 2007 WL 840090, Civil Action No. 3:06cv028 (E.D.Va. 2007), fixing the amount of attorneys' fees awarded to the parents.

of the parents' claim in light of the Fourth Circuit's direction.[6]

III. STANDARD OF REVIEW

Civil actions brought under the IDEA require the district court to consider the record of the state administrative hearing along with any new evidence offered by the parties pursuant to 20 U.S.C. §1415(i)(2)(B)(ii). County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir.2005). The district court must then make its own decision based on what the preponderance of the evidence demonstrates while giving due weight to the SHO's decision. Id.

The decision of the SHO, if regularly made, is to "be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 105 (4th Cir.1991). In this case, the Fourth Circuit has determined that the SHO's decision was regularly made. J.P. II, 516 F.3d at 263. "After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by the statute." Doyle, 953 F.2d at 105 (citations omitted).

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[6] By holding that the SHO's decision was regularly made, the Fourth Circuit has effectively ruled against the plaintiffs on Count I of their Complaint. See J.P.II, 516 F.3d at 262.

Parents are entitled to reimbursement their expenses related to placing a disabled child in a private school if they demonstrate that: (1) the public placement violated the IDEA and (2) the private school placement was proper under the IDEA. Florence County Sch. Dis. Four v. Carter, 510 U.S. 7, 15, (1993); see also A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 320 (4th Cir. 2004). Because the SHO found for HCPS, JP's parents bear the burden of proof on these elements. See Spielberg ex rel. Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 258 n. 2 (4th Cir. 1988).

IV. FINDINGS OF FACT ON THE APPROPRIATENESS OF THE 2005 IEP

A. General Principles Guiding the Inquiry

In order for an IEP to provide a FAPE, it "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." M.M., 303 F.3d at 527 (4th Cir. 2002); see 20 U.S.C.A. § 1414(d)(1)(A). The test for the sufficiency of an IEP is whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207. While a public school is not required

to "maximize each child's potential," the IEP must "provide educational benefit." Id. at 198, 207.[7]

The IDEA requires IEPs to include "a statement of the special education and related services and supplementary aids and services to be provided the child." § 1414(d)(1)(A)(iii). Regulations promulgated under this accommodations and services clause state that "each public agency must . . . provide special education and related services to a child with a disability *in accordance with the child's IEP.*" 34 C.F.R. § 300.500 (emphasis added). The Secretary of Education has interpreted these regulations to require that "[t]he public agency must ensure that *all* services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP." Notice of Interpretation, 34 C.F.R. Pt. 300, App. A. Question 31, 66 Fed.Reg. 347666 (emphasis added).

In order to determine whether an IEP was appropriate, it is necessary first to determine whether HCPS provided JP with an IEP that was reasonably calculated to provide JP with an educational benefit. See Part III, *infra*. Thereafter, the task

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[7] The findings of fact set forth below come from the administrative record compiled by the SHO during the due process hearing in 2005 and from evidence presented to this Court during an "additional evidence hearing" held pursuant to 20 U.S.C. §1415(i)(2)(B)(ii) on July 20, 2006.

is to ascertain whether HCPS fully and correctly implemented JP's IEP.

The Fourth Circuit has explained "educational benefit" to mean "some form of meaningful education." Conklin v. Anne Arundel Board of Education, 946 F.2d 306, 308 (4th Cir. 1991). This meaningful education must consist of more than "trivial" or "minimal academic advancement." Id. Further, the amount of progress required under the IDEA is to be determined with reference to the individual characteristics and abilities of the disabled child at issue. See Rowley, 458 U.S. at 202. Thus, while severely disabled children might require only "minimal results," "such results would be insufficient in the case of other children." Hall ex. rel Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985).

B. Whether JP Made More Than Minimal Progress During The 2004-2005 Year Under The 2004 IEP?

JP's parents contend that JP did not make progress during the 2004-2005 school year at Rural Point under the 2004 IEP. According to the parents, JP made minimal progress in some areas and actually regressed in other areas and that overall he made only minimal progress. They then correctly state that the proposed 2005 IEP was the same as the 2004 IEP, except for the addition of three goals and a summary of JP's then-current condition. The parents argue that, because JP had made no

progress under the 2004 IEP, JP could not reasonably be expected to make progress during the 2005-2006 school year under essentially the same program. HCPS argues that, during the 2004-2005 school year, JP made progress that was sufficient to make the June 2005 IEP reasonably calculated to provide JP with educational benefit.

Thus, before the SHO and in this Court, the parties have made the question of whether JP made more than minimal progress under the 2004 IEP the dispositive issue respecting whether HCPS provided a FAPE to JP in 2004 and hence in 2005. As explained in the findings of fact set forth below, the record as a whole shows that JP's progress was minimal at best.

1. JP'S Benchmark Scores Under the 2004 IEP

One measure of JP's progress over the year should be the benchmark grades written on JP's IEP. JP's goals are set forth in the 2004 IEP.

In summary, Goal 1 dealt with following a schedule, Goals 2, 3, and 4 were reading-related Goals, Goal 5 dealt with addition and subtraction, Goal 6 dealt with measuring and geometric shapes, Goal 7 sought to teach JP to count change up to five dollars, Goal 7a dealt with "more than" and "less than" concepts, Goal 8 dealt with telling time, Goals 9, 12, and 16 sought to improve JP's spontaneous conversation, use of language to accomplish tasks, and ability to answer basic questions, Goal

10 dealt with following verbal directions, Goal 13 dealt with fine motor skills like using a pencil and paper, and Goal 15 and 17 sought to teach JP methods to regulate his behavior and calm himself down.

Each IEP Goal sheet includes a place for Rural Point staff to give JP grades that state his progress for each month he is in school. The possible grades are:

SP-student demonstrates Sufficient Progress to achieve the Goal within the duration of the IEP;

ES-student demonstrates Emerging Skill but may not achieve this Goal within the duration of the IEP;

IP-student has demonstrated Insufficient Progress to meet this Goal and may not do so within the duration of the IEP;

NI-student has Not been Instructed on this Goal;

M student has Mastered this Goal.

The record does not state who at Rural Point actually wrote these grades into JP's 2004 IEP over the course of the year, so the scores cannot be measured in perspective of the testimony of specific witnesses. In addition, no explanatory comments are included with the notations, making it difficult to assess the basis for, and hence the reliability of, the benchmark scores.

A summary of the benchmark scores, set forth by month, is in Appendix A. On their face, the benchmark grades report that JP made "Sufficient Progress" on Goals 1, 2, 4, 5, 6, 7, 7a, 8,

12, 13, 15, and 17. On Goal 3, his score was "Emerging Skill" until April, at which point his score was "Sufficient Progress" through the remainder of the year. No benchmark scores were recorded for Goal 9 or Goal 16. Goals 11 and 14 were deleted before the 2004 IEP was signed.

At the due process hearing, LP testified about her assessment of JP's abilities on each of the goals. She stated he made some progress on Goals 1, 2, 5, 13, and 17. Respecting Goal 8, she stated that JP could tell time with sufficient skill before he started at Rural Point, but that he made no further progress while at Rural Point. For all other Goals, LP testified, with supporting explanations, that JP did not make more than minimal progress or that he regressed.[8]

2. The Record as to JP's Progress in Speech and Language

Like many autistic children, JP has particular difficulty with speech and language. During the years involved in this case, JP rarely engaged in so-called "spontaneous utterances," i.e., spontaneously speaking without being asked to do so. The record shows that in 2004 JP had a very limited ability to talk, a limited but expanding vocabulary, did not use multi-word phrases, could not fully articulate many of the words that he did know, and consequently found speech and language very

[8] A side-by side comparison of LP's testimony on the benchmarks and the scores on the IEP is presented in Appendix A.

frustrating. Indeed, while JP had significant difficulty with other basic and academic skills, the record demonstrates that his difficulties with speech and language presented perhaps his central challenges.

Accordingly, the measure of his progress in speech and language is a critical component in assessing JP's overall progress during the 2004-2005 school year because proficiency in speech and language is an essential prerequisite to learning other subjects and to deriving educational benefit. His progress in speech and language can be assessed, to some extent, by reviewing the results of educational testing done in 2004 and 2005 and on evidence submitted by HCPS, including a speech and language therapy log and anecdotal testimony from HCPS personnel.

a. Speech and Language Evaluations and Tests

In August 2004, Rebecca Bucci, MS, CCC-SLP,[9] of Virginia Rehabilitation Center, conducted a Speech and Language Evaluation on JP (then age 10 years 7 months). In May 2005, Debbie Augustine and Lori Levy, HCPS's speech-language pathologists and JP's speech and language therapists at Rural Point, conducted a Speech-Language-Hearing Evaluation of JP. In

[9] CCC-SLP stands for Certified Clinical Competence in Speech Language Pathology.

June 2005, Childrens' Hospital tested JP's speech and language at the request of Dr. Colleen Kraft. The results of these Speech and Language Evaluations are summarized in Appendix B.

None of the test administrators tested JP in all categories. See App. B. However, scores were obtained for Receptive Picture Vocabulary, Expressive Vocabulary (One Word Picture Vocab Test-R), and for categories tested using either the Preschool Language Scale-4 test ("PLS-4") or the Oral and Written Language Scale test ("OWLS"). Bucci, in the August 2004 testing, and Children's Hospital, at the 2005 testing, used the PLS-4 test, while HCPS used OWLS at the May 2005 testing. PLS-4 tests for expressive communication, auditory comprehension, and total language while OWLS categories are oral expression, oral comprehension, and total language. While OWLS and PLS-4 are not the same tests, Lori Levy, HCPS's speech pathologist, testified that these two tests provide comparable types of results.

The tests show that, between August 2004, when Bucci tested him, and May 2005, when HCPS tested him, JP progressed ten months on the receptive picture vocabulary test, regressed three months on the expressive vocabulary test, regressed five months on the expressive communication (PLS-4)/oral expression (OWLS) tests, regressed seven months on the auditory comprehension

(PLS-4)/oral comprehension (OWLS) tests, and regressed six months on the total language test (PLS-4/OWLS). The scores from Children's Hospitals tests in February and June 2005 reflect similar results. Indeed, comparing JP's scores in August 2004 to his scores on Children's Hospital's tests in June 2005 reveals that JP had regressed in every category just discussed except for receptive picture vocabulary, which showed JP had progressed by one year and nine months between August 2004 and June 2005. See App. B. By any measure, with the exception of JP's receptive picture vocabulary skills, these tests results reflect significant regression in speech and language.

In an effort to demonstrate JP's progress under the 2004 IEP, HCPS presented evidence from Raymi Catron, Lori Levy and Debbie Augustine. The SHO cited that testimony as the basis for his finding that JP made more than minimal progress under the 2004 IEP and that the virtually identical 2005 IEP was therefore appropriate.

Raymi Catron was one of three Rural Point educators who had daily contact with JP. JP was one of 26 students taught by Catron and was the third autistic student with whom she had experience. She testified at the due process hearing that JP's

unprompted verbalizations had increased as the year progressed and that he was worthy of promotion to the fifth grade.

Levy, a speech pathologist employed by HCPS, worked at both Rural Point and Stonewall Jackson Middle School. JP received speech therapy five times per week, typically provided by Levy but sometimes provided by Debbie Augustine. Levy testified that JP "made sufficient progress" throughout the school year. (State Hearing Op. at 17.) According to Levy, JP demonstrated reduced echolalia, repetitive vocalizations frequently made by autistic children, by the end of the school year when in familiar surroundings. JP also improved his retention of other individuals' names, and began to spontaneously initiate conversation. Levy also testified that JP demonstrated improved use of pronouns, increased his participation in group activities, learned lyrics to new songs, learned to request to get up from the group work table instead of doing so without asking, could sit for 45 minutes in a group, improved his understanding of spatial positions, time, memory, quantity, and became 100 percent accurate in calendar skills.

Levy also presented the contents of her speech therapy log, which purports to note what and how JP did in each therapy session. This log, however, is only minimally useful as

evidence of JP's progress because the log skips many days of therapy and contains no explanation for the gaps in recording) and because the log does not contain any standardized, comparable, test-based measures of JP's progress. Generally, when test scoring information is included, the log does not indicate what questions were asked on the test that generated the scores. Sometimes, however, the converse is true: the log indicates a task or test that was given to JP without describing the results. The SHO may have found these logs useful, but, given that he did not comment on them, the Court cannot find that he made any specific findings based on them.[10]

Debbie Augustine, JP's other speech therapist, also testified that JP had received an educational benefit during the 2004-05 school year at Rural Point. Her testimony largely echoed that given by Levy. However, she also stated that, because of the importance of socialization, JP should be placed in a standard school setting, rather than an ABA-type school.

Augustine's testimony at the due process hearing actually undercuts both the reliability of her conclusion and the

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[10] Even if it is assumed that he did make such a finding, it cannot stand as dispositive proof of progress because, without evidence of consistent measurement of the results of identical tasks taken over a span of time, the logs are not helpful in assessing JP's progress over time.

testimony of Levy. First, Augustine testified that JP had very limited verbal output, made very few spontaneous utterances, and had difficulty with "yes/no" questions and pronouns. In contrast, and inexplicably, the log actually shows that JP did very well with these last two areas. That conflict undercuts Augustine's testimony and the reliability of the logs on this important point.

Second, Augustine admitted that proficiency in language and communication is a necessary prerequisite to gaining educational benefit from social interaction and that JP lacked the communication skills necessary to interact with his peers. This significantly and adversely affects the credibility of Augustine's testimony, as well as Levy's corresponding testimony, that the reason Rural Point was appropriate for JP was because it included socialization components necessary to improve his language skills. To the contrary, the record shows, without refutation, that socialization would do JP little good if he could not communicate with his peers, and could actually cause him frustration, anxiety, and emotional trauma.

Augustine's credibility is also diminished by the proof that, in 2003-2004, JP did well at Spiritos, an ABA-type school,

where socialization was minimal. The same evidence casts doubt upon Levy's like conclusions.

HCPS also offered the testimony of Michael Werner, HCPS's school psychologist, who also testified that the 2004 IEP was successful and that JP was progressing under the plan. The SHO did not cite Werner's testimony as a ground for his decision and, because Werner's testimony was based on two brief observations of JP, the Court likewise finds it unhelpful.

Taken as a whole, the record respecting JP's progress in speech and language is at odds with the conclusory benchmark scores and the testimony of Catron, Augustine and Levy. Further, the record respecting speech and language progress is best reflected in objective test results. Those results confirm LP's testimony and show that, in these critical areas, JP's progress, as a whole, was minimal at best.

b. Other Record Evidence Respecting JPs Progress under the 2004 IEP

The parents also presented other evidence in the administrative hearing that was relevant to the question of JP's progress at Rural Point. As summarized above, JP's mother testified that JP had made little or no progress under the 2004 IEP. LP also testified that several statements of progress found on the 2004 IEP were inaccurate. For instance, she said

that JP was unable to count money up to $5.00 and was completely unable to use a ruler, notwithstanding the comments by school officials that he had made "sufficient progress" toward those goals. LP also explained how statements in the benchmark scores were in error. The SHO found LP's testimony to be credible, based on her extensive experience with JP and her self-education in autism-related educational issues and methods. A review of her testimony, and the fact that it corresponds with the factual record as a whole, leads to the conclusion that she is a highly credible and reliable witness.

The parents offered evidence of educational testing by Dr. Michael Hayes that assessed JP's academic development between 2003 and 2005. Dr. Hayes, a clinical Ph.D. psychologist at Dominion Behavioral Healthcare, tested JP during three different time periods. He first assessed JP on August 6 and 11 and September 5, 2003; then again on May 6 and 13, 2004; and again on April 18, 2005. Dr. Hayes tested JP in JP's school in 2003 and 2004, and in Dr. Hayes' office, which was unfamiliar to JP, in 2005.

Dr. Hayes administered three tests to JP: the Woodcock Johnson III ("WJ-III"), which has seven subject areas, the Visual Motor Integration test ("VMI"), and the Peabody Picture

Vocabulary Test III ("PPVT-III"). Both VMI and PPVT-III test a child's nonverbal abilities. In the VMI test, the child uses a paper and pencil to copy a figure. The PPVT-III tests receptive language: the tester says a word and the child identifies a picture most closely resembling that word. The WJ-III tests seven different academic skills.

Summing up the results of his testing, Dr. Hayes testified that JP made more progress between 2003 and 2004 while at Spiritos than he did between 2004 and 2005 while at Rural Point. Having not conducted a statistical analysis on his results, Dr. Hayes testified that he could not testify with certainty whether the 2003-2004 gain was statistically significant. However, based on his experience, he opined that, between 2003 and 2004 (i.e., while JP was at Spiritos), JP made statistically significant progress in the following areas:

- Letter/Word Identification
- Spelling
- Receptive Vocabulary (PPVT-III)
- Word Attack
- Calculations

Dr. Hayes testified that, between the 2004 and 2005 testing rounds (while JP was in HCPS), JP made some degree of progress in:

- Letter/Word Identification
- Applied Problems (he stated it "could be significant")
- Word attack (he stated it "could be significant")
- Visual Motor Integration

In contrast, Dr. Hayes did not observe that, between the 2004 and 2005 testing rounds (while JP was in HCPS), JP made statistically significant progress in:

- Spelling
- Academic Knowledge
- Receptive Vocabulary
- Applied Problems

Overall, Dr. Hayes' results show that JP made progress in some areas and regressed in others while under the 2004 IEP.[11]

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[11] With the caveat that his testing of the calculations category was for observational purposes, and were therefore not sufficiently reliable to support a conclusion, Dr. Hayes opined that the scores show that JP made significant progress in the calculations area. JP went from an age equivalency of six years three months in 2003 to eight years one month in 2004, to nine years in 2005. Dr. Hayes testified that in 2003, JP could not add without a number line. In 2004, JP could do some addition problems without the number line, but needed it for most problems. In 2005, JP could do some addition without the number

HCPS argues that, because Dr. Hayes is not an educator and had not observed JP in JP's educational environment nor attended any IEP meetings, his testimony should be given less weight than that of their educators. However, those points do not adversely effect the weight of Dr. Hayes' testimony because Dr. Hayes' testified solely to show JP's relative progress in the areas tested, and Dr. Hayes was qualified as an expert to testify on that subject.[12] Further, the results of these standardized, well-respected, and correctly administered tests deserve consideration. Those test results show that JP's progress under the 2004 IEP, taken as a whole and considering advancements and regressions, can be characterized, at best, as minimal.

In further support of their position that, at best, JP made only minimal progress under the 2004 IDEA, the parents also submitted the opinions of several physicians who had treated JP. These physicians were Dr. Ronald David, Dr. Colleen Kraft, Dr. Jerry Kartzinel, and Dr. Mary Megson. While none of the parents' physicians who reported on JP actually observed JP at Rural Point or participated in the IEP meetings, it is uncontested that the physicians are qualified experts in their respective

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line, and could subtract with the number line. However, he could not do problems outside the number line's range.

[12] The Court finds no reason to discount Dr. Hayes' testimony and, indeed, finds it to be balanced and credible.

fields. Further, the SHO himself found all of these witnesses to be credible, qualified experts. The record fully supports that finding as to these experts.

Dr. Kraft is a board certified pediatrician who received her M.D. from the Medical College of Virginia in 1986. Since that time, she has practiced in a number of settings and currently runs a company she started called Medical Homes Plus, Inc., which provides home-based medical treatment for children with special needs, including autism. Dr. Kraft was qualified by the SHO as an expert in interpreting Woodcock Johnson scores and the results of speech and language evaluations. With sixteen years of experience in so doing, Dr. Kraft clearly was appropriately qualified to that purpose. Dr. Kraft also has been treating JP since May 2004.

Based on her review, Dr. Kraft concluded that JP had regressed in the areas of academic knowledge, spelling, and passage comprehension during his time at Rural Point under the 2004 IEP. Additionally, she concluded that HCPS was not sufficiently addressing JP's behavioral issues and that the failure to do so was a significant cause of the stagnation of his academic progress. Dr. Kraft stated plainly that "I believe that given this data, J[P] needs an environment which will

support his academic progress. This clearly is not being provided with his current placement [Rural Point]." (HCPS-90 at p. 4.) Thus, it was the expert opinion of Dr. Kraft that JP was not receiving a meaningful academic benefit at Rural Point.

The parents submitted a report dated May 24, 2005 from Dr. Jerry Kartzinel, a pediatrician who has specialized in autism since 1990, and who has known JP since JP was five. Dr. Kartzinel was the Chief of Pediatric Services at Nellis Air Force Base, is Board Certified in Pediatrics, a fellow in the American Academy of Pediatrics and American College of Pediatrics, and has published articles on pediatric autism. Dr. Kartzinel stated that "[i]t seems that J[P] has not made progress over the past year [at Rural Point], in fact in some areas he has fallen behind." Dr. Kartzinel also opined that "[i]t is medically necessary that J[P] participate in ABA therapy that will provide a Certified Behavioral Analyst on a one to one basis." (HCPS-90 at p. 5.)

The parents also submitted a June 9, 2005 report from Dr. Mary Megson, M.D., FAAP, a pediatric autism specialist who reviewed JP's test results. Dr. Megson opined that JP's speech and language functioning had regressed from three years eleven months in May of 2004 to three years nine months in February

2005. That period of time, of course, corresponds to that covered by the 2004 IEP. Dr. Megson also stated that, over the same time period, JP's Woodcock Johnson scores remained the same at four years two months, his expressive one word picture vocabulary score showed four months of regression, and his expressive language score showed six months of regression. These assessments are based on her interpretation of Dr. Hayes' test results and the results of the speech and language testing discussed above.

Finally, the parents offered a report by Dr. Ronald David, JP's pediatric neurologist. Dr. David is a specialist in medical and educational treatment of autistic children who has practiced at the Mayo Graduate School of Medicine, served as a professor of Pediatrics at MCV, is an Emeritus member of the Learning Disabilities Council, and he has authored several texts and numerous articles on pediatric neurology. Dr. David concluded that HCPS had not been able to provide JP with an educational benefit and that placing JP in a specialized school for autistic children was necessary.

3. The Testimony of KP about the Discrete Trial Data

The principal purpose of the additional evidence hearing conducted before this Court on July 20, 2006 was to determine

whether Dominion was an appropriate placement for JP. That being the case, little evidence relevant to the question of whether JP received any educational benefit from HCPS was presented. However, the Court did receive relevant testimony and exhibits from KP, JP's father.

KP testified briefly at the due process hearing concerning his efforts to compile and analyze the data collected about JP's progress through use of the discrete trial method at Rural Point. However, for reasons that are unclear, KP was not allowed to fully develop this testimony. As a result, the due process hearing record was unclear as to KP's methodology and findings. While KP is not a professional educator, he is a professional engineer with fifteen years of experience in quantitative analysis of data. Having heard KP's full testimony and reviewed the data on which he based it, the Court finds KP's analysis of the data to be useful in assessing the discrete trial data sheets.[13]

KP's process can be summarized as follows. The discrete trial data sheets, which are found in the record as HCPS 2-4, provide answer grids keyed to the IEP Goals and sub-Goals where

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[13] As KP is not a trained educator and did establish a foundation for an expert opinion in the realm of childhood education, KP's opinion testimony concerning the expected range of child achievement will not be considered by the Court.

the aide was to record JP's answers to each question. For example, IEP Goal 2 has two sub-Goals, 2.1 and 2.2, and there is an answer grid for each sub-Goal on the discrete trial sheets. KP first determined how many days data was recorded for each sub-Goal. He determined that data was recorded 57 percent of the time, where 100 percent would mean data was recorded for each sub-Goal on each day of the school year. KP's graph of the days on which data was recorded shows that data was very inconsistently recorded from September to April. Those results illustrate that the discrete trial data was not collected properly. As correct collection of discrete trial data is the heart of the discrete trial method, this finding is highly significant.

C. Ultimate Finding: Appropriateness of the 2005 IEP

Based on the entire record, the Court finds that JP's progress under the 2004 IEP was minimal, at best, and that HCPS did not provide JP with an educational benefit under the 2004 IEP. As the parties agree that the 2005 IEP was essentially identical to the 2004 IEP, the Court also finds that the 2005 IEP was not reasonably calculated to provide JP with an educational benefit. Therefore, the Court finds that HCPS failed to provide a FAPE for JP during the 2005-2006 school

year. This conclusion differs from that reached by the hearing officer, so the Court is obliged to give an explanation for that difference. See J.P. II, 516 F.3d at 259.

D. Reasons for Disagreement with the SHO and for the Court's Contrary Conclusions

While the SHO's decision is to be considered *prima facie* correct, the Court is not permitted merely to serve as a rubber stamp for the SHO's decision. See Doyle, 953 F.2d at 105. Indeed, the IDEA quite clearly requires district courts to engage in its own review of the record, including the evidence presented at the additional evidence hearing, and to decide the case based on the familiar preponderance of the evidence standard. 20 U.S.C. §1415(i)(2)(B)(ii). Thus, while the SHO's decision is entitled to due weight, that thumb on the scale does not preclude a judgment in favor of the parents if the preponderance of the evidence calls for such a result. Based on the Findings of Fact made in Section IV and for the reasons that follow, the Court cannot agree with the SHO's decision that JP made more than minimal progress under the 2004 IEP and that, therefore, the virtually identical 2005 IEP was appropriate to provide JP with a FAPE in the 2005-2006 school year. To the contrary, the parents have carried their burden to prove that the 2005 IEP would not provide JP with a FAPE.

It is settled that a school district has not provided a disabled student with an educational benefit if that student's academic progress is minimal or trivial. See Conklin, 946 F.2d at 308. Furthermore, the measure of academic achievement must be calibrated to the particular capabilities of the student in question. See Rowley, 458 U.S. at 202; Hall ex rel. Hall, 774 F.2d at 636. A school need not provide the maximum educational benefit possible in order to have provided a FAPE, but the capabilities of the student are highly relevant to the question of whether any academic benefit has been provided. See Rowley, 458 U.S. at 198. The first issue in deciding whether or not JP received an academic benefit while at HCPS, therefore, is to determine his capabilities.

During his time at Spiritos, JP made significant progress in the areas of speech, behavior, and academic ability. As Dr. Hayes' indicated, JP made gains in all areas tested by the WJ-III, VMI, and PPVT-III tests. Further, during his short time at Dominion, JP once again made significant gains in speech, behavior, and academic ability. Therefore, the record establishes that JP was capable of making significant gains during any given school year, even while adjusting to a new environment.

As noted above, this capability to learn and to grow need not have been maximized by HCPS in order for it to have provided JP with a FAPE. See Rowley, 458 U.S. at 198. The Court, therefore, expressly does not hold that HCPS failed to deliver an educational benefit simply because JP did not receive the maximum possible benefit from his time at Rural Point under the 2004 IEP. However, the evidence of JP's capability for greater performance demonstrates that JP was entitled to be provided with an IEP that was calculated to produce more than a minimal or trivial advance in his skills and abilities. The SHO implicitly reached the same conclusion, but did so with no factual exegesis on the record.[14]

JP's lack of progress under the 2004 IEP is evident from the record as a whole. To begin, it is important to remember the three main sources of documentation of progress offered by HCPS - the IEP benchmark scores, the discrete trial records, and the speech therapy log - were irregularly kept and are missing critical data. Further, there is evidence that many of the activities which were used to generate the data that fills these forms were improperly administered, particularly in the case of

[14] If the Court erroneously understands the SHO's implicit conclusion and he, in fact, reached the opposite conclusion, the Court would disagree with it for the reasons set forth above.

the discrete trial data. The record establishes, rather clearly, that the documentary evidence on which HCPS bases its position is simply not reliable support for the conclusions urged by HCPS.

Further, the testimonial evidence proffered by HCPS is not persuasive. Augustine's testimony that JP made "significant progress" was contradicted by her own speech logs. That contradiction casts doubt on the accuracy of both the written logs and the testimony of Augustine and her co-worker, Levy. Catron's testimony, while useful, was based on holistic impression rather than systematized, objectively assessable test scores. While a holistic impression certainly can be valuable, Catron's impressions of JP's progress are contested by other credible witnesses who spent more one-on-one time with JP, such as his mother who, as the SHO found, had thoroughly educated herself on the education of autistic children. More importantly, the record, taken as a whole, clearly refutes the testimony given by Catron, Augustine and Levy, the witnesses on whose testimony the SHO relied to find that JP's progress was more than minimal.[15]

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[15] As professional educators, the opinions of Catron, Levy and Augustine are entitled to a measure of deference, but that deference does not require that the Court overlook the

The evidence offered by HCPS must be assessed in perspective of the accurately administered and well-documented test results that were collected and interpreted by Dr. Hayes. As interpreted by Dr. Hayes, a qualified expert, these tests indicate that JP made statistically significant progress in a few areas, minimal progress in others, and actually regressed in others. This testimony is corroborated by Dr. Kraft, who concluded that JP had made minimal progress in some areas and regressed in others. Further, Dr. Kraft found that staying at Rural Point would actually exacerbate some of JP's adverse behavioral problems. Dr. Megson, reviewing these test results, agreed with the analyses of Drs. Hayes and Kraft.

It is correct that the reports submitted by the parents' expert witnesses disagree with the conclusions reached by HCPS' experts. However, because the parents' experts formed their opinions based on properly conducted, recorded, and analyzed testing data, the Court disagrees with the SHO that the parents' experts are less persuasive than those offered by HCPS.

In addition to this significant expert testimony, the testimony of JP's parents that he had not made any progress is

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significant conflicts between their testimony and the documentary and other evidence with which their testimony is at odds. See Z.P., 399 F.3d at 307.

worthy of substantial consideration. As the SHO recognized, both of JP's parents expended significant effort in educating themselves in the field of education of autistic children and both had the opportunity to observe and interact with JP on a daily basis. LP's testimony as to JP's lack of progress is valuable corroborative testimony to that of the several experts that they offered, particularly in the areas of speech and behavior.

The SHO made fifteen findings of fact. Findings No. 1 through 4 are not disputed. Finding No. 13, that the 2005 IEP was the same as the 2004 IEP, is similarly undisputed.

Findings No. 5 through 10 are disputed by the parents. As set forth below, the points made by the parents correctly point out the errors that appear in those five summarily presented findings.

In Finding No. 5, the SHO stated:

> They [the parents] say James did not get a free appropriate public education at Rural Point, and that the only proper placement for him is at a school devoted to the applied behavior analysis (ABA) method of instruction, such as Dominion School or Spiritos School, which James attended for the 2003-2004 school year, or the Faison School.

That finding is not entirely correct; the record establishes that the parents did not insist on the wholesale application of

the ABA method. They did seek, and HCPS agreed to, the incorporation of some aspects of the method into the 2004 IEP. As explained above, an important part of the ABA method that was incorporated in the 2004 IEP was not implemented by HCPS.

Finding No. 6 was that: "Some of the ABA methods were employed by his teachers at Rural Point." That finding is superficially true, but it is highly misleading. The record shows that HCPS only *partially* implemented the ABA methods that were included in the IEP. For example, the discrete trial method, where nominally employed, was employed incorrectly. Further, the aide who was to be provided under the settlement provisions incorporated in the 2004 IEP was so inadequately trained as to be ineffective. Thus, the finding does not completely and accurately reflect the record.

Finding No. 7 purports to set out the 2004 IEP. It is accurate as far as it goes, but the finding is not a full statement of the 2004 IEP.

Finding No. 8 states: "An additional amendment at the end of the school year would have provided James in 2005-2006 with additional speech and occupational goals." That finding is partially correct. A speech goal was added in June 2005, but it was essentially the same as new Goal 12 set by the IEP team in

October 2004. The parents correctly point out that it is inconsistent to reposit the added goal at the end of the school year in June of 2005 if JP had made no progress under the virtually identical goal set in October 2004. As explained above, JP made no meaningful progress on the speech goals. The other two added Goals are related to occupational therapy and are not presently in issue.

Finding No. 9 was that: "It also provided for extended school year services during the summer of 2005, but this program was cut short." The statement is correct but incomplete; it does not explain that the ESY was shortened because HCPS scheduled it to occur when JP's family was to be on vacation and because all but one of the remaining days was consumed with the ABLLS testing that HCPS had failed to conduct during the school year.

Finding No. 10 was that: "As of February, 2005, James still had a severe speech and language disorder." The finding is technically correct but is incomplete for failure to note, as explained above, that JP had regressed in speech and language under the 2004 IEP.

The outcome determinative finding made by the SHO appears in the CONCLUSION which recites that HCPS "has provided [in

2004-05] and offered [for 2005-06] a FAPE." (SHO Opinion, p. 25). The CONCLUSION was based on Finding No. 11 and Finding No. 12. Those two findings are integrally related and thus must be assessed as a piece.

Finding No. 11 was that:

> During the 2004-2005 school years, [JP] made progress in speech, language, behavior, and academics.

The support offered for that conclusion was the testimony of Raymi Catron, Lori Levy, and Debbie Augustine.[16] The related finding, Number 12, was that:

This progress [referring to No. 11] was not minimal or trivial. There is no citation of support for this finding but it appears also to be based on the testimony of Catron, Levy and Augustine.

As explained above, the testimony offered by Catron, Levy and Augustine, on which the SHO relied, is not supported by the documentary evidence maintained by HCPS. Nor can the testimony of those witnesses be squared with the results of the testing performed by Dr. Hayes or with the well-grounded opinions given by the parent's expert witnesses (Dr. David, Dr. Kraft, Dr.

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[16] The citation for that finding was the SHO's opinion at pages 14 and 17-19. Those pages are the SHO's summary of Catron's, Levy's and Augustine's testimony which appear on pages 14, 17-19 of the SHO's opinion, respectively. At the foot of page 14, there is a summary of another witness' testimony (Earle), but that witness only addressed occupational therapy.

Kartzinel and Dr. Megson). The record, taken as a whole, shows quite clearly that, while JP made some slight progress in certain areas, he made no progress in some and actually regressed in others. When the few areas of progress are considered in perspective of the areas where no progress was made and where JP regressed, it is just wrong to characterize the overall results as progress at all. That is particularly so because the areas of stagnation and regression are speech, language, behavior and academics - the very areas in which the SHO found that JP had made progress.

The SHO also expressed the view that "[w]hile the parents felt {JP's} IEP as amended did not provide him with educational benefit, none of their expect [sic] witnesses said so; they simply said that an ABA school would give him greater benefits." (SHO Opinion, p. 21.) That statement reflects a material misapprehension of what the parents' expert witnesses said and of the significance of their testimony.

While Dr. Kraft did not use the words "no educational benefit," she said that JP's "academic progress is stagnant." Dr. Kartzinel said that JP "has not made progress over the past year, in fact in some areas he has fallen behind." Dr. Megson said that JP had regressed in speech and language function and in vocabulary. Dr. David opined that "[a] special school

catering to this type of child would be in my opinion appropriate and necessary." Thus, the record flatly refutes the finding that the parents' expert witnesses did not testify that the 2004 IEP did not provide JP with educational benefit, and the Court rejects that finding because the parents' experts uniformly testified, in substance, to a lack of educational benefit from the 2004 IEP.

The SHO also stated that "there is no real conflict on the relevant facts." (SHO Opinion, p. 21.) The testimonial and documentary record demonstrates the clear inaccuracy of that conclusion. To the contrary, there is, as explained extensively above, a serious disconnect between the testimony of the HCPS witnesses and the documentary record maintained by HCPS as to the relevant facts. Additionally, there are significant differences between the views of the HCPS witnesses and the evidence offered by the parents both before the SHO and the Court.

The SHO did not weigh explicitly the conflicting evidence because of the perception that there was "no real conflict on the relevant facts." (SHO Opinion, p. 21.) The Court has considered and weighed all of the evidence in the record, testimonial and documentary, and has concluded that the SHO's rather restricted consideration led to a result that is not

supported by the record as a whole. Indeed, the result reached by the SHO is convincingly refuted by the record as a whole.

The SHO also found all witnesses to be credible (SHO Opinion, pp. 2, 20) which, according to the Court of Appeals, "simply means that the hearing officer determined that all of the witnesses believed what they told the hearing officer." JP II, 260 F.3d at 260. Credibility determinations by a state hearing officer are entitled to due deference as are explicit findings.

However, considering the record as a whole, the finding that the testimony offered by Catron, Levy and Augustine (the witnesses whose testimony the SHO cited as support for Finding of Fact. No. 11 and hence his CONCLUSION) was credible does not withstand scrutiny. The generally accepted instructions to finders of fact on credibility require consideration of:

- the witness' opportunity and ability to see, hear or know the things testified about,
- the quality of the witness' memory,
- the witness' appearance and manner while testimony
- the witness' interest in the outcome of the case,
- any bias or prejudice the witness may have,
- other evidence that contradicts the witness' testimony, and
- the reasonableness of the witness' testimony in light of all the evidence.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, - Civil § 101.43 (5th ed. 2000); see also 4-71

Modern Federal Jury Instructions, - Civil § 76-1 (Matthew Bender 2007).

Applying those precepts to the testimony of Catron, Levy and Augustine, the Court finds that their testimony is not credible in the face of all the other evidence that contradicts their testimony that JP made acceptable progress under the 2004 IEP. Likewise, their testimony on that subject is not reasonable in light of all the evidence that demonstrates JP's lack of progress under the 2004 IEP. For the foregoing reasons, and in consideration of the record as a whole (which is outlined in detail above), the Court cannot subscribe to, and indeed rejects, the SHO's conclusion that the witnesses on which he based the finding that JP made more than minimal progress under the 2004 IEP were credible in the legally dispositive meaning of that term even accepting the proposition that those witnesses did believe what they were saying.

More importantly, the record taken as a whole, convincingly demonstrates that, if JP made progress, it was trivial, at best. And, in fact, the record actually shows that JP regressed in some significant areas and that his progress was stagnant in other significant areas. Therefore, the Court finds that the parents have carried their burden to prove by a preponderance of the evidence that the SHO's finding that HCPS "has provided [in

2004-05] and offered [in 2005-06] a FAPE" for JP is not supported by the record.

V. FAILURE TO IMPLEMENT

A. Background

Federal regulations governing the IDEA require that a school district must fully implement the IEP as it is designed. 34 C.F.R. § 300.500; Notice of Interpretation, 34 C.F.R. Pt. 300, App. A. Question 31, 66 Fed.Reg. 347666. While the Fourth Circuit has not squarely addressed whether failure to implement an IEP is a per se denial of a FAPE, other circuits have addressed the issue. The Fifth Circuit's decision in Houston Independent School District v. Bobby R., 200 F.3d 341 (5th Cir. 2000) cert. denied, 531 U.S. 817 (2000), is particularly instructive on the issue. In Bobby R., the Fifth Circuit held that:

> to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities *failed to implement substantial or significant provisions of the IEP*. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

200 F.3d at 349 (emphasis added). This standard has been adopted by three other Courts of Appeals and one district court

in the Fourth Circuit. See Fisher ex rel. T.C. v. Stafford Tp. Bd. of Educ., 2008 WL 3523992, *3 (3d Cir. 2008); Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 821-22 (9th Cir. 2007); Melissa S. v. Sch. Dist. of Pittsburgh, 2006 WL 1558900, *2 (3d Cir. 2006) (adopting Bobby R. standard); Neosho R-V School Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003) (citing Bobby R. with approval); see also Manalansan v. Bd. of Educ. of Baltimore City, 2001 WL 939699, 2001 U.S. Dist. LEXIS 12608 (D.Md. 2001) (finding denial of a FAPE based on the standard articulated in Bobby R.).

The Bobby R. standard strikes an appropriate balance between requiring perfect performance of an IEP and allowing unacceptable laxity in implementation. The Fifth Circuit, in Bobby R., made clear that failing to implement a de minimis portion of the IEP does not constitute a denial of a FAPE. Instead, the parents must demonstrate that "the school board or other authorities failed to implement substantial or significant provisions of the IEP." Bobby R., 200 F.3d at 349. Failure on such a scale indicates that the school has failed to provide the disabled child with an educational benefit. Id.

Counts VI[17] and VII of the parents' Complaint allege that HCPS failed to implement or improperly implemented several key provisions of the 2004 IEP. As discussed above, the parents are not seeking relief for the 2004-2005 school year when JP was in public school. They are seeking monetary relief for the cost of educating JP at Dominion for the 2005-2006 year. Thus, the so-called "failure to implement" allegations go toward proving that the 2005 IEP was inappropriate. If HCPS did fail to implement material provisions of the 2004 IEP during the 2004-2005 school year, that failure is probative of whether the 2005 IEP was reasonably calculated to provide educational benefits to JP because the 2005 IEP was essentially the same as the 2004 IEP. With no new proposed accommodations or demonstration by HCPS that the IEP would be implemented as designed during the 2005-2006 school year, the parents reasonably could expect another year of failed implementation. Therefore, the Court must assess the parents' failure to implement claims.

The parents allege that HCPS failed to implement the 2004 IEP in essentially three respects. First, while the 2004 IEP

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[17] The Complaint frames Count VI, the parents' allegation that they were denied a meaningful opportunity to participate in their son's education, as a separately actionable claim. However, later briefing and oral argument have framed the issue as part of the general failure to implement claim. Thus, as agreed upon by the parents at oral argument, the Court will treat the parental participation claim as part of the failure to implement claim.

included a referral for an Oral Motor Skills Assessment, that assessment was not timely completed, and the recommendations generated from the results of that assessment were not implemented. Second, the use of the discrete trial method was promised as part of a settlement agreement between the parents and HCPS and was included in the 2004 IEP, but was inadequately implemented, and materially so, by an under-trained education aide. Third, while the 2004 IEP, HCPS policy, and IDEA itself encourage robust parental involvement with their child's education, the parents allege that HCPS denied the parents the opportunity to participate in JP's education. HCPS argues that it either properly implemented the provisions as they were stated in the IEP, or the failure to do so was either justified or immaterial to JP's progress.

The SHO did not make any explicit findings of fact respecting the implementation of the 2004 IEP, presumably because he saw no need to do so after finding that the 2004 IEP provided JP with an educational benefit. Therefore, the Court must analyze the claim in Counts VI and VII based on the factual record as adduced at the due process hearing and the additional evidence hearing.

B. Oral Motor Skills Assessment

JP's parents wanted HCPS to conduct an oral motor skills

assessment on JP before the 2004-2005 school year began. An oral motor skills assessment, according to speech therapist Lori Levy, assesses one's physical ability to articulate words. The 2004 IEP provides that HCPS will "[r]efer [JP] for further testing to assess oral motor skills[.]" The provision of such an assessment was a factor that influenced the parents' agreement to the IEP.

HCPS did not make the referral required by the IEP. Early in the 2004 school year, LP became more concerned about JP's behavior; he was more aggressive and disruptive in school. LP wrote Martha Thompson, the head of special education for HCPS at Rural Point, and expressed these concerns. LP also sought some behavioral testing for JP. Finally, the correspondence reiterates LP's hope that HCPS had gone forward with the oral motor skills testing.

The oral motor skills testing issue was also discussed by the IEP team at their October 14, 2004 meeting. Notes taken by Debbie Augustine concerning the meeting indicate that HCPS felt that an oral motor skills assessment was not necessary at that time because the school was focused on "speech/lang output." Levy testified that the school believed that an oral motor skills assessment would not provide much useful information at that point in the school year for two reasons: first, the focus

was on JP's speech output, not articulation; second, JP was still adjusting to his new school environment. The parents renewed their request for an oral motor skills assessment after the October 20, 2004 IEP team meeting, at which meeting the parents' request was not discussed.

HCPS only initiated the assessment after the parents submitted a report written by JP's private speech therapist recommending the referral. On October 28, 2004, three months after agreeing to make the referral, HCPS made a referral for an oral motor skills assessment.

The results of the assessment, which was conducted over eight sessions in November 2004, were that JP's oral skills were basically normal except for some weakness in his jaw and instability in his tongue. The assessment also concluded that exercises which conceptually might resolve those deficiencies would have little impact because JP was unable to self-monitor during the exercises. Testimony demonstrated that self-monitoring is the ability to hear one's self-mispronouncing words and make appropriate corrections. Many autistic children initially lack this ability. Augustine and Levy did recommend that JP's classroom teachers implement an exercise plan later that year.

The only copy of the Oral Motor Assessment on the record is

undated, but it is clear that the parents did not receive the results until March 2005. On March 9, 2005, the IEP team agreed that the IEP would be amended to add the exercises recommended by Augustine and Levy. The exercises, however, were never implemented.

The Court finds that the failure to implement the oral motor skills assessment in a timely fashion and the failure to implement the recommended exercises by HCPS were not material. HCPS's failures in this regard are of concern, but given that the delay in performing the assessment was not substantial and that JP's benefit from performing the exercises would have been minimal, the failure to implement these accommodations did not deprive JP of a FAPE.

C. Discrete Trial Method

The parents also allege that HCPS failed properly to implement the so-called "discrete trial method." The discrete trial method tracks a child's progress by recording data that chronicles a student's performance on each discrete component of the task.

Use of the discrete trial method was incorporated into the 2004 IEP produced by virtue of the requirement of the settlement agreement of the earlier dispute relating to JP's education at Battlefield Park School: "direct one-on-one instruction to

include opportunities for the discrete trials where appropriate." (HCPS-3, p. 24.) The 2004 IEP further stated that HCPS would provide a "[t]rained instructional assistant to support J[P]'s programs. Training will entail methods such as repetition, data collection, step by step methods that is [sic] proven to work with children with autism. HCPS will arrange for the aide to receive training from a Certified Behavior Analyst from a program such as the Faison School or a comparable program...." (Id.) These requirements, which were originally part of the settlement agreement between HCPS and the parents, were reiterated in clarifications attached to the 2004 IEP.

A discrete trial consists of posing the task to the child, providing prompting and fading if needed, and reinforcing the child if the child succeeds. The nature of the child's response (correct, incorrect or prompted) is recorded on data sheets, which are kept routinely and in standardized form. Even the type of prompt used (full physical, part physical, point, gestural, verbal) is recorded. After a certain time period, the instructor graphs the data to assess the child's progress towards a particular goal. The use of standardized data collection methods enables graphing, whereas non-standardized data cannot be graphed. Janet Lachowsky, the parents' expert in ABA therapy, testified that graphing is an essential and

indivisible part of the discrete trial method. No witness testified otherwise. The only graphing done regarding the HCPS discrete trial method data was performed by JP's father. As discussed above, the data sheets reflect, and KP's analysis of them confirmed that the data was collected irregularly.

HCPS alleges that, because the language in the IEP provides for discretionary use of the discrete trial method, its failure to use the method was not a failure to implement the IEP. According to HCPS, the decision not to use the discrete trial method was a reasoned opinion of educators, which is to be accorded deference by the court. M.M., 303 F.3d at 533.

The parents argue, however, that these provisions made ABA-style data collection mandatory, not discretionary. The discrete trial method is primarily used in ABA-style therapy. Thus, the fact that the provisions require that the aide be trained in ABA-style therapy by a Certified Behavior Analyst from an ABA specialty school indicates that the discrete trial method was to be used to gather information on JP's progress. Further, the record is clear that the intent of the parties in incorporating the settlement provision into the 2004 IEP was to emulate at Rural Point where possible the ABA-style curriculum under which JP had flourished at Spiritos. Considering the facts leading to the incorporation of the discrete trial method

in the settlement agreement and considering the 2004 IEP provision and the record as a whole, the Court finds that it was the obligation of HCPS to provide an aide trained in that method, to make informed, good faith assessments as to when the method was to be used and to correctly implement the method when used.

Having found that HCPS failed to implement a portion of the 2004 IEP, the Court must now turn to the question of whether this failure was material. Bobby R., 200 F.3d at 349. For the reasons that follow, it is clear that the discrete trial method provision was a material one.

To begin, JP had made considerable progress at Spiritos where the discrete trial method was a core feature. And, the record shows that JP was returned to HCPS on the condition that HCPS would undertake to emulate the methods used at Spiritos. Taking those facts into account, it is clear that incorporation of the discrete trial method was a material provision of the 2004 IEP. The parents' conduct in repeatedly attempting to secure compliance with the provision by HCPS underscores the point.[18]

[18] The parents, however, did not receive such data until June 2005, after they had filed their due process action. KP testified that the parents requested more than ten times that HCPS provide them with the discrete trial data.

Moreover, it is undisputed that HCPS actually attempted to implement the 'discrete trial method. That, of course, demonstrates that HCPS had decided that it was appropriate to do so. Indeed, it is difficult to believe that HCPS would have undertaken that task if it had not been a material aspect of the 2004 IEP.

The lack of discrete trial data inhibited JP's progress. Had discrete trial data been provided, it would have been extremely valuable in tracking JP's progress and devising more effective teaching methods. Discrete trial data would have allowed HCPS to more carefully tailor JP's curriculum to his current educational progress on an ongoing basis. Therefore, if discrete trial data collection had been properly implemented, it would have had a significant impact on later educational design. That further confirms that the discrete trial method provision constituted a material part of the IEP.

While HCPS undoubtedly had some discretion in implementing the use of the discrete trial method, it did not have the discretion to implement the method ineffectively. For example, while JP was provided with the promised individual aide, that aide was significantly under-trained. She received only six days of training, which the testimony of knowledgeable experts indicates, without refutation, was insufficient.

Further, examination of the discrete trial data sheets produced by HCPS's attempts to implement the discrete trial method reveals its failure to implement the method competently. Testimony concerning the HCPS data sheets from Janet Lachowsky, an ABA-style expert provided by the parents, shows that the data contained on the sheets was collected incorrectly and would have been of no real use in assessing JP's progress. The data were collected sporadically, as opposed to regularly, and thus the data sheets were unusable for their intended purpose, which is to track progress over time.

Additionally, the specific details of the tasks given to JP that created the data collected on the sheet are not indicated. Therefore, there is no way to track JP's progress in any discrete task - the very heart of the discrete trial method.

Based on these facts, the Court finds that HCPS failed to implement the discrete trial method which was a material portion of JP's IEP. Therefore, HCPS' failure to correctly implement the discrete trial method was a substantial and material failure to implement the 2004 IEP. There is nothing in the record to permit a conclusion that implementation would be improved in 2005. Thus HCPS denied JP a FAPE in the 2005 IEP as well.

D. Parental Participation

The parents also allege that HCPS denied them a meaningful

opportunity to participate in their son's education in violation of HCPS policy and § 1400(c)(4)(B) of the IDEA. As mentioned above, while this may be an independently actionable claim under the IDEA, it will be treated in this case as part of the failure to implement claim because of the agreements to that effect made during oral argument. Therefore, whether the parents' statutory right to be involved in JP's education was violated will be considered as part of deciding whether the 2005 IEP was appropriate.

Dispute over the level and method of parental participation first became an issue between the parties in December 2004, when LP sought to video tape JP's speech therapy sessions so that she could emulate the teacher's techniques when working with JP at home. HCPS denied this request, however, stating that the videotaping would be against HCPS policy and that it would represent an intrusion on the HCPS staff. HCPS presented no evidence that there was any prior policy statement, written or otherwise, that videotaping of educational sessions was prohibited. Nor did HCPS offer evidence that taping would be intrusive.

Notwithstanding HCPS' letter refusing LP's request, LP videotaped JP playing on the HCPS playground on May 12, 2005. In response, HCPS sent the parents another letter, informing

them that LP had violated school policy and the earlier letter. As a result of this alleged violation of school policy, HCPS prohibited both parents from coming on Rural Point's campus except if given prior permission, to pick up and drop off JP, for parent-teacher conferences, for medical emergencies, or for events generally open to the school community.

It was this prohibition that the parents allege violated their right to have meaningful participation in JP's education. In their Complaint, the parents cite the IDEA to support their argument that the denial of parental participation in the education of a disabled child can constitute denial of a FAPE. The parents cite § 1400(c)(5)(B) of the IDEA, which is part of the findings of Congress and which states that educational outcomes for disabled students can be improved by ensuring "parents have meaningful opportunity to participate in the education of their children at school and at home." Id. As a finding of Congress, this provision does not create a substantive right. Instead, at most, it expresses a purpose of the statute. *See* Pennhurst v. Halderman, 451 U.S. 1, 19 (1981) (finding that a provision in the nature of a congressional "Finding" of the "Developmentally Disabled Assistance and Bill of Rights Act" did not create a substantive right binding on the States).

The parents also cite two Fourth Circuit cases in support of their argument. The first, Hall v. Vance County Board of Education, 774 F.2d 629, 634 (4th Cir. 1985), states that "Rowley recognizes that parental participation is an important means of ensuring state compliance with the Act." The second, C.M. v. Board of Education, 241 F.3d 374, 380 (4th Cir. 2001), states that "[a]n equally important IDEA policy is to encourage parents to participate in the education of their disabled children and to provide them with the procedural tools to enforce the mandate of the Act." These cases, while valuable as statements of policy, do not control the parents' claims here because those claims both deal with the requirement that parents be allowed to participate in IEP development, not in ongoing educational ventures.

Further, the Fourth Circuit requires that the district court extend deference to the decisions of local educators. M.M., 303 F.3d at 533. Facts on the record indicate that HCPS otherwise invited and permitted the parents to observe JP at school, held numerous meetings with the parents, used various methods of corresponding with the parents to keep them updated on JP's progress, and allowed the parents ample opportunity for input.

In light of these legal and factual considerations, the

Court finds that HCPS did not violate the IDEA, fail to implement the 2004 IEP, or deny JP a FAPE by failing to permit LP to videotape JP's speech therapy sessions.

VI. APPROPRIATENESS OF DOMINION SCHOOL PLACEMENT

A. Background

Because the SHO decided that the school district had provided a FAPE for JP, he made no explicit conclusions or findings of fact with respect to whether Dominion was an appropriate placement for JP in light of HCPS's failure to offer a FAPE. Therefore, this Court will take up the issue of whether Dominion was an appropriate placement *de novo*.

B. Educational Benefit at The Dominion School Placement

For the parents to be reimbursed for a private school placement, they must demonstrate not only that the private school placement did not provide a FAPE, but also that the private school placement was appropriate. See Carter 510 U.S. at 15. For a private school to be appropriate, it must provide an educational benefit to the disabled student. See Burlington v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 370 (1985).

C. Findings of Fact as to the Propriety of Dominion as a Placement

Notwithstanding that it was a new, very small institution, Dominion was fully licensed and certified by the Virginia

Department of Education and the City of Richmond. Both regulatory entities conducted thorough investigations of Dominion's campus and operations, reviewed the qualifications of Dominion's staff, reviewed the proposed curriculum for autistic students, and certified Jennifer Woods as Director of the school. Dominion, at the time, had three students including JP - another autistic student JP's age and a two and a half year old autistic child.

At the time of the due process hearing, Woods had been a licensed teacher in Virginia for two years and had taught in a specialized autism classroom in Henrico County Public Schools. She is endorsed in Virginia in education and learning disability. Woods graduated from Ryan University with degrees in psychology, elementary education, and special education of children. Woods was further educated at the Princeton Child Development Institute in Princeton, N.J., one of the nation's leading centers for training educators in ABA-style education.

At the time of the due process hearing, Dominion's staff consisted of Woods and two other individuals - a teacher and a teacher's aide. The teacher was licensed in special education, had several special education endorsements, and had worked with autistic children using the ABA-style for many years. The teacher's aide was a graduate student at VCU studying special

education. Woods also conducted two weeks of additional training for these staff members.

Rather than keeping specialists, such as speech therapists, psychologists, and occupational therapists, on staff, Dominion, with the involvement of parents, arranged for these types of services on an as-needed basis. According to Woods, this arrangement is typical of private specialty schools. For example, the Faison School, a long-established and well regarded Richmond-area private school for the education of the autistic, uses a similar arrangement.

As the SHO noted, a great deal of testimony was presented at the due process hearing that indicated the benefit of ABA-style teaching, such as that provided by Dominion, would provide to JP. Testimony by Woods indicated that JP showed substantial progress in just a short time - 3 weeks - at Dominion. While at Dominion, JP received full-time ABA-style therapy. Woods testified that JP's anxiousness was reduced and his transition between HCPS and Dominion was eased by providing him with a set schedule. JP's behavioral problems were significantly lessened, his communication skills improved substantially, and his overall mood improved, as well. There was no evidence to the contrary.

An example of JP's progress was his newly-learned ability to self-report his frequent headaches. The staff at Dominion

was able to teach JP to identify his head and to spontaneously inform them when his head was hurting him. Before attending Dominion, JP demonstrated no ability to self-report headaches.

Further evidence of educational benefit of Dominion was provided by Dr. Kraft who, after visiting the school, testified that the school was an appropriate placement for JP based on his observation of JP there. Kristin Mapp, JP's aide, testified at the additional evidence hearing that JP had made significant progress while at Dominion and that the school was appropriate for JP. Mapp's testimony was based on JP's significant improvement in ABLLS testing results between September of 2005 and February 2006. JP had acquired the ability to do seventy-three discrete skills between those dates, an improvement largely caused by his time spent at Dominion. Subsequent testing in September of 2006 indicated that JP had retained all seventy-three skills and Mapp testified that JP had gained proficiency in even more skills.

Additionally, Frank Uvanni, who became the speech therapist at Dominion on February 1, 2006, testified at the additional evidence hearing that JP had made substantial progress in his speech and language skills while at Dominion. Uvanni has a long history working as a speech pathologist and therapist, dating back to 1951, when he began work in New York state schools.

Uvanni then, after working in private practice and at Lewis County General Hospital, came to work at St. Joseph's Villa, a rehabilitation center for children in Richmond. The Court finds that Uvanni is a well-qualified and credible witness in his areas of expertise.

Uvanni kept detailed records of JP's daily activities and progress while working with him at Dominion. Uvanni is justifiably optimistic about JP's ability to learn academic subjects - while under Dominion's tutelage, JP had advanced from a pre-first grade reading level to a fourth grade reading level. Uvanni testified that JP is able to read popular children's stories such as "Heidi" with minimal assistance and that he is increasingly able to express himself spontaneously.

Taken as a whole, the testimony from Woods, Dr. Kraft, Mapp, and Uvanni indicate that JP was receiving substantial educational benefit while at Dominion. That, taken together with the fact that Dominion was properly licensed and certified by the City and the State, supports a finding that the parents have demonstrated that Dominion conferred an educational benefit on JP.

D. Least Restrictive Environment

As interpreted by the Fourth Circuit, the least restrictive environment requirement of the IDEA "directs that the disabled

student be assigned to a setting that resembles as closely as possible the setting to which he would be assigned if not disabled." A.W. ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 681 (4th Cir. 2004) (citing Rowley, 458 U.S. at 202-03 & n.24). This requirement derives from the expressed intent of IDEA, found in 20 U.S.C. § 1412(5)(B), that the educational experience of disabled children be as "mainstream" as possible. See also A.W., 372 F.3d 681 (discussing the mainstreaming requirement).

Although some Courts of Appeals also require that the parents demonstrate that the private school placement is the "least restrictive environment" necessary for achieving educational benefit, the Fourth Circuit has not yet confronted the issue. See, e.g., M.S. ex rel. S.S. v. Board of Educ. of the City School Dist. of the City of Yonkers, 231 F.3d 95, 105 (2d Cir. 2000).

The reasoning in the Sixth Circuit's decision in Knable ex rel. Knable v. Bexley City Schl. Dist., 238 F.3d 755, 770 (6th Cir. 2001) is persuasive on the point:

> parents who have not been treated properly under the IDEA and who unilaterally withdraw their child from public school will commonly place their child in a private school that specializes in teaching children with disabilities. We would vitiate the right of parental placement recognized in *Burlington* and *Florence County* were we to find that such private school placements automatically violated the IDEA's

mainstreaming requirement.

(internal citations omitted). Like the Sixth Circuit, the Court holds that parents are not required to demonstrate that their chosen private placement is the least restrictive environment that may provide educational benefit to their child.

However, because the Fourth Circuit has expressed a strong preference for mainstreaming and has said that mainstreaming can be a consideration in private placements, it is appropriate to assess whether Dominion was the least restrictive environment in which JP could gain an educational benefit. See A.B., 354 F.3d at 330-31.

The evidence adduced during both the due process hearing and the additional evidence hearing consistently established that JP requires a significant amount of specialized instruction in order to receive an educational benefit. With HCPS failing to provide JP with a FAPE, the parents were responsible for considering which alternative both would provide JP with an educational benefit and "resemble[] as closely as possible the setting to which he would be assigned if not disabled." A.W., 372 F.3d at 681.

Public schools in the area in which JP's family lived were not able to provide JP with an educational benefit. A typical private school, i.e., one not catering to disabled students,

would not be able to provide JP with the needed specialist therapy. The only remaining option for JP's parents, therefore, was to enroll JP in one of a few ABA-style specialty schools in the Richmond area. From the perspective of the mainstreaming requirement, the record indicates that the education at all three of the relevant specialty schools (Dominion, Faison, and Spiritos) were materially similar. All focus on the education of children with special needs, all use one-on-one interaction with a professor as their basic method, and all utilize ABA-style activities and data collection. While Dominion is substantially smaller than the other schools, that alone does not render it more restrictive than any other similar specialty school, because all similar schools utilize a necessarily restrictive one-on-one method of teaching.

Further, the attempts made at mainstreaming JP during his time at HCPS did not result in educational benefits for JP. The record shows that, if JP could not communicate with his peers socialization would do him little good, and could actually cause him frustration, anxiety, and emotional trauma. For example, attempts to introduce JP to the "buddy program" at Rural Point ended with both JP and his classmates frightened and unproductive. Additionally, Dr. Kraft testified that autistic children with insufficiently developed language skills, like JP,

would not benefit from interaction with non-disabled students. Debbie Augustine also testified that JP's problems interacting with other students prevented him from deriving educational benefit from interactions with non-disabled students. Significantly, Augustine, the HCPS speech therapist, testified that JP would not receive an educational benefit from mainstreaming until his language abilities were sufficiently well advanced to allow him to communicate with other children. Therefore, the record rather clearly demonstrates that the Dominion was the least restrictive environment in which JP could gain an educational benefit, and the Court so holds.

CONCLUSION

For the foregoing reasons, the Court finds that the decision of the SHO is not consistent with the record, taken as a whole, and that HCPS did not provide JP with a FAPE during the 2005-2006 school year because it did not proffer an IEP that was reasonably calculated to provide JP with an educational benefit. This lack of reasonable calculation is evident by the essentially identical 2004 IEP's failure to provide JP with educational benefit and because of HCPS' failure to implement material portions of the 2004 IEP.

Further, the Court finds that Dominion was an appropriate placement for JP during the 2005-2006 school year. Therefore,

the parents in this case have satisfied their burden under Carter, 510 U.S. at 15, and are entitled to reimbursement for the expense of educating JP at Dominion during the 2005-2006 school year.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/ Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: December 16, 2008

Appendix A: Benchmark grades from JP's 2004 IEP and Mrs. P.s assessment

	10/7/04	11/12	12/9	2/4/05	3/3	4/15	5/12	6/17	**Mrs. P's assessment**
Goal 1	SP	SP	SP	SP	SP	SP	SP	SP	Made Progress (MP)
Goal 2	SP	SP	SP	SP	SP	SP	SP	SP	MP
Goal 3	ES	ES	ES	ES	ES	SP	SP	SP	No - Goal is over-expectation
Goal 4	SP	SP	SP	SP	SP	SP	SP	SP	No - JP lacks comprehension
Goal 5	SP	SP	SP	SP	SP	SP	SP	SP	MP
Goal 6	SP	SP	SP	SP	SP	SP	SP	SP	No
Goal 7	SP	SP	SP	SP	SP	SP	SP	SP	No - JP could count up to $.70 while at Battlefield. Can't count up to $5.00 now.
Goal 7a	SP	SP	SP	SP	SP	SP	SP	SP	Not sufficient progress
Goal 8	SP	SP	SP	SP	SP	SP	SP	SP	No - JP was at SP at beginning of year, but made no additional progress.
Goal 9	-	-	-	-	-	-	-	-	No - JP cannot initiate conversation. JP has regressed.
Goal 10	ES	-	-	-	-	-	-	-	No - JP can do only as much as when he left Spiritos

Goal 11	Deleted	Per		Parents					
Goal 12 (new)	SP	SP	-	-	-	-	-	-	NO - Sub-goal 1: no, 2:no, 3:no, 4:yes - could do it when left Spiritos, 5:no, 6:no, 7: yes - could do it when left Spiritos, 8: no, 9: no - did it better at Spiritos.
Goal 13	NI	SP	SP	SP	M	-	-	-	Mastery
Goal 14	Deleted	Per		Parents					
Goal 15	SP	SP	SP	SP	SP	SP	SP	SP	Not sufficient progress - J will repeat "that's okay" but not initiate statement.
Goal 16	-	-	-	-	-	-	-	-	Not sufficient progress
Goal 17	SP	SP	SP	M	-	-	-	-	MP

Key:
ES - Emerging Skill
IP Insufficient Progress
SP - Sufficient Progress
NI - Not been provided Instruction on this goal.
M - Mastered

Appendix B: Speech and Language Testing
Shows: "Standard Score / Year - Month age equivalency" or only "Year - Month age equivalency"

	August 2004 (Bucci's test)	May 2005 (HCPS's test)	Children's Hosp. Test		Change (May/Feb/ June)
			Feb. 2005	June 2005	
Receptive Picture Vocab	<3-0	3-10 (using diff. but comparable test than in 8/04)	3-9	4-5	+10 /+9 / + (1-5)
Dr. Hayes' Results for Receptive Vocab (PPVT-III) (see chart below)	2003: 40 / 3-0	2004 46/4-2 '03-04 Change +6/+1-2	2005: 44 / 4-2		'04-05 Change: -2/0
Expressive Vocab (One Word Picture Vocab Test-R)	<55 / 3-8	55 / 3-5	NT	3-4	- 3 / - 4
Relational Vocab	Unable to test	Not Tested	NT		NT
Oral Vocab	Unable to test	Not tested	NT		NT
Grammatical Understanding	<3-0	Tested but not comparable	NT		NT
Sentence imitation	3-0	Not tested	NT		NT

PLS-4* 1. Expressive Communication	2-11	OWLS** Oral Expression 40/2-6	2-5	-5/ -6
PLS-4 2. Auditory Comp.	3-11	Using OWLS - Oral Comp. 40/ 3-4	3-3	-7/ -8
PLS-4 Total Language	3-5	Using OWLS Total Lang. 40 / 2-11	NT	NT/ -(1-6)

* PLS-4 = Preschool Language Scale-4
** OWLS = Oral and Written Language Scale
NT = Not tested.
Source: HCPS-1, HCPS-83