THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

B.H., *et al.*, Plaintiffs	)	
v.	)	5:12-cv-405-FL
JOHNSTON COUNTY BOARD OF EDUCATION, Defendant	)	

FIRST AMENDED COMPLAINT &
PETITION FOR ATTORNEYS' FEES

Plaintiffs respectfully submit this First Amended Complaint and Petition for Attorneys Fees pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure to address issues raised by Defendants' Answer [ECF No. 9].

THE PARTIES

1. PLAINTIFF, B., is a ten year old boy with Autism who, by reason of his disability, requires special education and related services to derive benefit from instruction, and he requires supplementary aids and services to be educated satisfactorily in regular education settings and to facilitate his participation in extracurricular activities with his typically developing peers. B. is and was, at all times relevant to this action, a citizen and resident of North Carolina.

2. PLAINTIFFS T.H. and J.H. are B.'s mother and father, respectively. T.H. and J.H. are and, at all relevant times, were citizens and residents of North Carolina.

3. DEFENDANT JOHNSTON COUNTY BOARD OF EDUCATION ("the County") is a Local Educational Agency as that phrase is used in Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400, et seq. Defendant is is a Local Educational Agency as that phrase is used in IDEA, 20 U.S.C. 1400, et seq., and, at all relevant times, was the entity responsible for safeguarding Plaintiffs' rights under IDEA and for providing a free appropriate public education to B., as that phrase is used in IDEA, 20 U.S.C. 1400, et seq.

JURISDICTION & VENUE

4. This is an action for all appropriate relief available under IDEA and the parallel provisions of North Carolina law. As such, the action arises under the constitution and laws of the United States and the State of North Carolina.

5. This Court has jurisdiction over the subject matter and the parties pursuant to IDEA, 20 U.S.C. §1415(i)(3)(A), which confers upon the Court jurisdiction over the subject matter and the parties "without regard to the amount in controversy." The Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which confers original jurisdiction upon the district courts of the United States over civil actions arising under the laws of the United States.

6. Venue is proper in the Eastern District of North Carolina pursuant to 28

U.S.C. § 1391(b)(1) and 28 U.S.C.§ 1391(b)(2).

7. The Western Division of the Eastern District is the proper division because the conduct giving rise to this action occurred in Johnston County.

FACTS

8. B. is a ten-year-old boy with autism.

9. B. lives in Johnston County, North Carolina, with his mother, T.H., his father, J.H., his sister, L.H., and his brother, C.H., who is also disabled.

10. Until the County's superintendent directed B.'s IEP Team to move B. to a "Homebound" placement on 29 March 2011, all of B.'s formal education has been in the public schools of North Carolina.

11. B.'s formal education began in Currituck County's pre-kindergarten program after B.'s parents submitted an Exceptional Children's Referral, citing concerns in his academic performance, speech-language skills, and expressive-receptive skills.

12. Pursuant to his parents' referral of B. as a suspected child with a disability, B. was diagnosed with Autism.

Autism

13. The Fourth Circuit explained autism in the context of an action arising under IDEA in the following way:

Autism is a developmental disorder that affects a child's ability to communicate, use imagination, and establish relationships with others. Children with autism generally have significant deficits in language development, behavior, and social interaction. One of the primary ways that children learn is through imitation of the actions and sounds that they see and hear. Autistic children, however, generally have a greatly reduced ability to imitate. Autistic children also lack normal joint attention skills - the ability to follow another's gaze and share the experience of looking at an object or activity. Because these deficits affect the way autistic children learn and develop, early diagnosis is crucial.

Education (of children as well as of parents and teachers) is the primary form of treatment, and the earlier it starts, the better. Education covers a wide range of skills or knowledge - including not only academic learning, but also socialization, adaptive skills, language and communication, and reduction of behavior problems - to assist a child to develop independence and personal responsibility. …

[M]any autistic children ... when given the opportunity will in self-stimulatory behavior, often referred to as 'stimming.' Stimming consists of repetitive patterns of behavior such as flapping of the hands, rocking back and forth, or repeating a word or a sound. Stimming is often an all-consuming behavior that directly interferes with an autistic child's ability to engage in the environment appropriately, and directly interferes with the child's ability to learn. Self-stimulatory behavior in autistic children is self-reinforcing, such that the more they engage in the behavior, the more they want to engage in the behavior. Absent appropriate supervision or intervention, stimming can become the dominant behavior for kids with autism. …

Without early identification and diagnosis, children suffering from autism will not be equipped with the skills necessary to benefit from educational services.

County Sch. Bd. v. Z.P., 399 F.3d 298, 300-301 (4th Cir. 2005) (internal citations and quotations omitted).

B.'s Autism

14. By the age of five, B. was enrolled in kindergarten and identified as a child with Autism. B.'s placement was in an Autism classroom. B. received occupational therapy and speech-language therapy as related services under IDEA.

15. Speech-language evaluations that year, including articulation and receptive/expressive language testing, showed that B. was "very reliant on prompts."

16. The evaluations also revealed a wide scatter of skills. For example, he demonstrated "excellent scanning skills" while he "demonstrated difficulty comprehending comparative size (small, tall, big, short), degrees of similarity (alike, similar, different, match), position (off, on, closed, under), quantity (many, a lot, full), and verbs ending in 'ing' (e.g., crying, laughing)." Similarly, B. had a strength for naming items but could not categorize them.

17. B's evaluators described him as "cooperative" and "friendly." While he "participated fully in the testing procedures," B. required redirection frequently because "he would often stare around the room, use echolalia as a filler, and needed his attention and eye gaze brought back to the task at hand." B.

"respond[ed] well to multi-modal cuing/prompting, reinforcements, and rewards."

18. In October of 2007, B. was six years old and was educated in the regular education setting for half of his school day.

19. CCPS reevaluated B. to assess his expressive, receptive, and pragmatic language skills. The evaluations showed that B. was experiencing delays across all three speech-language domains. The CCPS evaluation recommended speech and language therapy services "to address [B.]'s receptive, expressive and pragmatic language delays."

B's Transformation When an Evidence-Based Methodology Was Integrated into His Educational Program in Currituck County Schools

20. At the beginning of the 2009-10 school year, J.H. and T.H. moved B. to Central Elementary School in Currituck County. At Central Elementary, B. was placed in regular education setting for the entire school day. One aide was assigned to serve that entire classroom of 21 children, including B. JH and TH expressed their growing concern that B.'s barriers to learning were increasing and their related frustrations without adequate support in the regular education setting to CCPS officials, but to no avail.

21. As a result of that impasse, on 10 November 2009, J.H. and T.H. filed a formal complaint with the North Carolina Department of Public Instruction, despite

their best efforts to avoid it.

22. In their complaint, Plaintiffs cited to violations of IDEA, and on 18 December 2009, DPI concluded that Plaintiffs were correct, found CCPS non-compliant on both grounds, required CCPS to take corrective action as to the first violation, and, because CCPS corrected the second voluntarily before DPI's ruling, CCPS was not directed to take additional corrective action.

23. The report of B.'s December 2010 evaluation revealed that intelligent employment of reinforcers enabled B. to maintain joint attention on difficult academic tasks. Initially, B. selected chocolate as a reinforcer for completing the assessment tasks, but he sat at the table without completing his work. The examiner reported that:

> [B.] was redirected to work with a gestural prompt of pointing to the page to complete writing and then to his reinforcement system. B. continued to look about the room and then stood up wandering about the room. This examiner ignored B. as he walked safely about the room and also when he continued to repeat "See Ya!" to this examiner as he was not near the door to leave the classroom. When B.H. independently returned to the table after 10 minutes, [the] examiner asked if he wanted to work for popcorn instead. B. stated 'yes' so [they] transitioned to the main office to obtain popcorn. Once the popcorn was made, B. and this examiner returned to the classroom and began working to earn popcorn. B. completed the rest of testing remaining in his seat and working to earn popcorn which was written in his reinforcement system. He needed redirection (pointing to his reinforcement board) when he was not on task, yet remained at the table and completed his work.

24. In January of 2010, B.'s IEP team reported that, while B. continued to demonstrate appropriate articulation, voice, and fluency skills, his vocabulary and overall language skills were below average, he was making little progress in developing functional communications skills, and he was unable to express himself to others or understand the spoken communications of others. His communication skills were limited to simple words and telegraphic sentences. He required prompting and cues to define, describe, compare, and contrast items. Perhaps most significantly, B. was "unable to request clarification in unknown situations and require[d] prompts to engage in these tasks."

25. Shortly after Plaintiffs' filed their complaint, Currituck's Superintendent agreed to retain an autism expert, Lori Stuart, to observe and make recommendations to B's IEP Team regarding the elements of B.'s educational program. Ms. Stuart recommended incorporating into B.'s educational program the set of strategies often denominated as Verbal Behavior Analysis (V.B.A.) or Applied Behavioral Analysis (A.B.A.)[1] because she believed they would enable B. to participate in the general curriculum and make meaningful educational progress. The V.B.A. strategies Ms. Stuart recommended were very similar to those the evaluator employed to enable B. to complete his December 2010 assessment. While B.'s IEP Team and the Currituck County administrators were unfamiliar with

[1] A.B.A. and V.B.A. strategies often overlap; Plaintiffs will refer to them collectively as "V.B.A."

V.B.A, they nevertheless agreed to integrate V.B.A. into B.'s IEP.

26. Currituck County hired Ms. Stuart to train the teachers and staff who would work with B. in school. Very quickly, the V.B.A. strategies enabled them to engage B. successfully in his educational program and to acquire the functional communication and pragmatic language skills he needed to learn in order to eliminate the barriers to his learning his autism presented, reduce frustrations, and develop the skills that, by reason of his disability, B. could not acquire naturally.

27. When B. arrived at Central, he was placed in a regular education second-grade classroom all day, with Ms. Elaine Snider serving only as his case manager. In that capacity, Ms. Snider only observed B. in his classroom, but did so frequently. Ben was not given a one-to-one assistant. The assistant was a classroom assistant who served all 21 children, including Ben. The lack of redirection and direct instruction led to the emergence of escape behaviors that prompted B's parents to seek relief through their state complaint. Ms. Snider testified that it was evident before long that "it was not working."

28. Ben remained in the second-grade classroom until Lori Stuart was secured as a consultant. Then, around the midpoint of the school year, B.'s placement was changed to a hybrid: he would be in Ms. Snider's resource classroom for a portion of his school day and in the regular education classroom for the remainder of the day, with an assistant assigned to him.

29. Ms. Snider observed clear evidence that B. was accessing the curriculum, noting, for example, that B. "would get on the computer and Google things that the teacher had specifically talked about in science class." The problem was that "we just couldn't get him to get it back to us."

30. To address that and to enable B. to develop functional communication skills, Ms. Stuart introduced the evidence-based V.B.A. strategies into B.'s educational program.

31. Thus, for the second half of the 2009-2010 school year, B.'s IEP team members concluded that V.B.A. was the evidence-based methodology most likely to succeed in enabling B. to acquire the skills needed to participate meaningfully in a general education setting, derive benefit from the curriculum, and make meaningful educational progress. Ms. Snider testified, "we had to teach him how to ask questions, how to pay attention, how to learn from other children," and the V.B.A. strategies they would employ in the second half of the 2009-10 school year enabled B. to acquire those skills.

B.'s consistent progress with evidence-based teaching methods was integrated into B.'s educational program in Currituck County.

32. After V.B.A. methodologies were integrated into B.'s educational program, B.'s maladaptive "behaviors decreased, and, if he did [have] a meltdown or need a break, it was so much less intense; it was much more manageable."

33. For example, without V.B.A. strategies, B. often needed to leave the classroom "to get him over being so upset," which could take up to 45 minutes. But using V.B.A. strategies enabled B. to learn and to communicate effectively, his frustrations were diminished, he became upset far less frequently, needed to leave the classroom less frequently as time went on, and, when he did, he would not need to be out of the room for more than 10 minutes.

34. Every credible witness with personal knowledge of B.'s performance before and after the integration of V.B.A. strategies into B.'s educational program testified that B.'s improvement after V.B.A. was implemented was obvious, consistent, and dramatic, particularly in light of his significant difficulties without V.B.A..

35. Substantial documentary evidence corroborates the testimony of those who personally observed B.'s progress, which continued steadily through to the conclusion of his ESY program in August of 2011.

B.'s TRANSFER TO JOHNSTON COUNTY SCHOOLS

36. Before the 2010-11 school year began, Plaintiffs had to move from Currituck County to Johnston County. Plaintiffs had little choice but to move so that they could care for T.H.'s mother, who was in declining health.

37. J.H. and T.H. planned for the move far in advance, with their primary focus on facilitating a seamless transition of their sons into a new school.

B's PARENTS' DILIGENT EFFORT TO

FACILITATE HIS TRANSITION INTO DEFENDANT'S SCHOOL

38. T.H. testified to her many efforts to ensure a smooth transition for B. and for those who would be working with him at his new school. T.H. and J.H. took every opportunity to communicate B.'s unique needs and B.'s remarkable progress with V.B.A. to the officials, teachers, and staff at B.'s new school.

39. Plaintiffs made telephone calls to B.'s new school, spoke to its principal, spoke its staff, and carried B.'s IEP to the school administration in early August. And, as many times as she could, TH explained to them B.'s difficulties without V.B.A. and his remarkable success with it in Currituck County. Above all, she told anyone who would listen that, if V.B.A. is in place when B. begins school, they will have a great year, but if not, the outcome would likely be the same as it was until V.B.A. was used in Currituck: "a disaster."

THE COUNTY'S ADMINISTRATORS FAILED TO IMPLEMENT MATERIAL ELEMENTS OF B.'S IEP AND IGNORED HIS EDUCATIONAL NEEDS

40. Even though B's mother had delivered B's IEP to his new school weeks before school started, B.'s new principal chose to ignore it. First, she placed B. in an autism classroom, with undefined opportunities for instruction in the resource room, another special education classroom, and no time in the regular education classroom. The Principal, Nancy Nettles, suggested this placement

for no longer than the first couple of days to ease B.'s transition into the new school, and T.H. agreed, but only for "two or three days." Principal Nettles thereafter failed to place B. according to his IEP, and B. remained in the self-contained autism classroom until Defendant's Superintendent directed that B.'s placement be changed to homebound. While enrolled in Defendant's school, B. was never educated in a classroom with his nondisabled peers, as was stipulated in the IEP B. carried with him from Currituck. B.'s IEP Team did not make the decision to place B. in a self-contained autism classroom until Oct. 11, 2010, and it did so over B.'s parents objections.

41. Notwithstanding Plaintiffs' dogged efforts, B.'s teachers and principal were indifferent to the V.B.A. strategies that proved so successful for B. Correspondence among the Board's employees showed that, for some who worked with B., the indifference to B.'s need for V.B.A. strategies bordered on opposition to it. The IEP that accompanied B. into Johnston County even stipulated that "B. will demonstrate improvement with social language skills across academic and functional settings as indicated via Verbal Behavior checklists and observations." The benchmarks stated that "B. will appropriately respond to contrived tasks using Verbal Behavior cards across all settings on 3/4 trials."

42. According to the Board's own consultant, the Board lost instructional control over B. in September 2010, and the Board then ignored their consultant's

recommendation for regaining it.

43. In late September of 2010, the Board retained Tracy Vail, MS,CCC/SLP, to advise the Board regarding B.'s educational program. Ms. Vail is a highly regarded private autism consultant with a long history of successful interventions in educational programs of autistic children exhibiting the most severe behavioral challenges and seemingly intractable barriers to learning.

44. The Board charged Ms. Vail at the outset with evaluating B.'s educational program and designing a plan to address B.'s increasing challenges through modifications of his educational program and by training its teachers and staff in V.B.A. methodologies.

45. Ms. Vail conducted her observation on October 6, 2010. Her recommendations revealed that much of B.'s progress from the prior year was lost. What is more, it was apparent that the Board had lost "instructional control" over B.

46. Without instructional control, a child cannot derive benefit from instruction; it is a condition precedent to learning. Ms. Vail explained in her testimony, for example,

> A. A child might have a lot of skills, but if they're not under instructional control, it means that the learning environment isn't set up such that the child will respond when asked.
>
> Q. How important is instructional control in delivering educational benefits to children?

> A. It's critical. If the child isn't responding consistently, we don't know what he wants or what he needs or what he knows. So it really is the crux of teaching.

47. That is why Ms. Vail recommended that the Board first "regain instructional control" in its educational program for B. Specifically, Recommendation No. 5 advises the Board:

> Regain Instructional Control. Work with his assistant out of the classroom setting until instructional control is established to avoid inadvertent reinforcement by peers or other untrained school personnel. Teach in a low stimulating environment. As soon as instructional control is established and escape and attention motivated behaviors decrease, move him back into teaching with other children.

48. The Board did not follow Ms. Vail's recommendation for regaining instructional control. To the contrary, the Board delivered B.'s instruction through untrained teacher's assistants and aides, and B continued lose the educational skills he had acquired through V.B.A. strategies employed in Currituck County.

49. B.'s teachers and staff failed or refused to employ the V.B.A. strategies B. required to make meaningful educational progress.

50. After Ms. Vail became unable to continue consulting on B.'s educational program for personal reasons, the Board retained Lori Stuart. Ms. Stuart was the autism consultant Currituck County had retained who was trained in V.B.A. methodologies and oversee the successful integration of V.B.A. strategies into

B.'s educational program there.

51. Although Ms. Stuart was successful in transforming B.'s educational program in Currituck County, she could not reproduce that success for B. while enrolled in the Board's schools.

52. Audio recordings and minutes of IEP meetings memorialize Ms. Stuart conclusion that B. was regressing throughout the 2010-11 school year.

53. Near the end of the 2010-2011 school year, Ms. Stuart expressed her growing concerns about B.'s educational program. Among other things, Ms. Stuart advised Ms. Vail that "she was very concerned, and that, ethically, she may have to pull out of [B.]'s case [because] they weren't following through with her recommendations and she wasn't sure if she had provided enough training or they weren't taking the training." By "they," Ms. Stuart was referring to "the people she was training, the school staff working directly with B."

54. After failing to provide a certified teacher for B.'s classroom, the Board hired and retained Helen Westbrook, a teacher who ultimately refused to teach B.

55. In addition to the mounting challenges B. faced throughout the 2010-11 school year, B. faced a revolving door of teachers, teachers' aides, and aides acting as teachers. In fact, the frequency and number of changes in B.'s "teacher" at Powhatan was so great that the Board's witnesses could not identify all of them or when they served in that capacity. B.'s teachers were teacher's assistants, not teachers, and had no certification at all. For example, Ms. Cannada, who was

B.'s "teacher" for significant periods of time at Powhatan, was not a certified teacher. Although she is currently working towards her certification, she testified that "it's going to be years" before she will be qualified to be a certified special education teacher.

56. In light of the heightened need for structure and the harms that can be caused by even subtle changes in an autistic child's educational program, the Board's failure to establish a stable teaching presence in B.'s classroom surely contributed to his regression throughout the year. The undisputed fact that, for most of that year, particularly during the period leading up to his Homebound placement, B's "teachers" were not certified teachers only compounded the harm. And the undisputed fact that none of them were formally trained in V.B.A. strategies compounded the harm still further.

57. And when the Board did introduce a certified teacher who would remain for more than one month, the teacher refused to teach B. This led to the suggestion by Ms. Little in an internal email that the Board's senior administrators should [g]et Ms. Westbrook to agree to have some interaction with [B.] (Kathy [Blankenship], you will have to tell us how much) so that she can be the TOR" (teacher of record) for B.

58. As a direct and foreseeable result of the foregoing failures to implement B.'s IEP and the County's decisions to ignore B.'s educational needs, B. began to regress almost immediately upon his enrollment in the County's school system

in August of 2010. B.'s regression in the County's school system continued and worsened until B.'s parents removed him from the County's schools to educate him in a private educational program beginning in April of 2011.

The Board's Superintendent Directed B.'s IEP Team to Change His Placement to Homebound.

59. IDEA confers upon parents the right to participate in meetings with respect to the their child's identification, their child's evaluation, their child's educational placement, and provision of FAPE to their child. This includes the right to participate in meetings to develop, review, or revise their child's individualized education program (IEP). §300.501(b)(1) (Parent participation in meetings).

60. IDEA also confers upon J.H. and T.H. an affirmative right to be part of:

a. any group that determines whether B. is a "child with a disability" (i.e., is eligible to receive special education and related services under IDEA), 34 CFR § 300.306(a)(1);

b. any group making decisions related to B.'s educational placement, 34 CFR § 300.501(c)(1); and

c. B.'s IEP team, 34 CFR § 300.321(a)(1).

61. In advance of the March 29, 2011 IEP meeting, the Superintendent directed his subordinates, in writing, to change B.'s placement to "homebound."

62. The Superintendent was not a member of B.'s IEP team, nor did the Superintendent attend any of their meetings. His directive was not shared with

J.H. or T.H., so they did not know about it until well into the presentation of their case-in-chief. Plaintiffs' counsel met and conferred with the Board's counsel pursuant to N.C. R. Civ. P. Rule 26 to advise the Board's counsel that there were indications that the Board had not produced certain materials Plaintiffs had requested in their written discovery requests, served on 7 June 2011, particularly correspondence.

63. As a result of the Rule 26 conference, the Board's counsel made inquiries with the Board's staff and produced the evidence of the the Board's directive and his subordinates' responses to it that indicated they would proceed accordingly.

64. The Superintendent communicated his directive to his subordinates who forwarded it on to their subordinates on B.'s IEP team.

65. On 23 March 2011, Gary Ridout, the principal of B.'s school, wrote to Superintendent Ed Croom, with copies to Defendant's chief academic officer Mr. Keith Beamon and to the exceptional children's director Ms. Kathy Blankenship, stating:

> The substitute teacher (Adam Proctor) has indicated that this Friday March 25 will probably be his last day.
>
> It is time to change [B.'s] setting ...
>
> Thanks so much for your help.

66. March 24, 2011, at 1:51 PM, Keith Beamon sent to the Superintendent a

summary of a "scenario" regarding B.'s removal from the public school setting that he discussed with B.'s Principal and Vice Principal Lee Hudson that morning. Beamon's scenario, which was to be executed at the 29 March 2011 meeting of B.'s IEP team, involved a progression of predetermined proposals changing B.'s placement to a residential "group home"--

> Here is what we suggested to Gary Ridout and Lee Hudson this morning[:]
>
> IEP meeting
>
> Suggest homebound which parents will reject.
>
> Lori Stewart will suggest hospitalization with subsequent residential placement, which parents will reject.
>
> Then we suggest hospitalization with subsequent group home placement in the county after involving mental health. We hope this can be a compromise that they will accept, but if not, we will force this to be the IEP decision.
> They will take us to court. B. would be with us after his placement in the group home.
>
> Lee [Hudson] and Gary [Ridout] do not want the kid back. They would agree to the above except that if it is a group home placement that Ben be placed on homebound. With this scenario we are still going to be taken to court. Both scenarios get Mental Health [and] DSS involved ... .
>
> So, which plan you want us to push? ... Let me know and we will proceed.

67. In the same email, dated 24 March 2011, Mr. Beamon told the Superintendent that there is "one week [sic] spot in our defense of a homebound placement"

for B.: minutes of an IEP meeting only 10 days before will show that "we do not recommend homebound" for B. and "we are going to be hard-pressed to justify it now."

68. That evening, at 7:11 PM, Superintendent Croom answered Mr. Beamon's question, "Which plan do you want us to push?" stating, "I think we Homebound."

69. At various points in the hearing, the Board's attorneys asserted that Croom's response was not a "directive." But the Board's officials and its employees on B.'s IEP Team believed the Superintendent directed them to change B.'s placement to homebound, and they proceeded accordingly. For example:

a. On 24 March 2011 at 8:06 PM, Keith Beamon forwarded his exchange with the Superintendent to Kathy Blankenship along with a note advising Ms. Blankenship, who was a subordinate of both Mr. Beamon and the Superintendent:

> Not what you wanted, but this is what we have to do. I know there will be consequences, but he is the boss. We need to make it happen.

b. The next morning, 25 March, 2011 at 7:11 AM, Mr. Beamon communicated the Superintendent's response to other officials who were more directly involved with B.'s educational program than Ms. Blankenship, including members of B.'s IEP team, advising them that:

> The supt. has directed us to move [B.] immediately to homebound. This will happen next week.

70. Thus, the Board's own Executive Vice President admitted that the Superintendent "directed" him and his subordinates on B.'s IEP Team to change B.'s placement to homebound. And they they proceeded accordingly. For example:

    a. Mr. Beamon conveyed to the members of B.'s IEP team that they will have to "immediately begin documenting why we have changed position" on B.'s placement. Beamon explained that "[i]t is in the IEP minutes that we did not recommend homebound, now we are. What has changed that justifies the flip-flop. Get that information to Kathy as soon as possible. We will probably need it in the Tuesday [29 March 2011] meeting."

    b. Principal Ridout responded to Mr. Beamon's 25 March 2011 e-mail immediately, asserting "We will work diligently on this."

71. This was not the first time JCPS officials imposed a placement for B. that was determined outside of the context of an IEP team meeting. Before the Superintendent directed B.'s homebound placement, Beamon, Ridout, Blankenship and others agreed to convert B.'s temporary placement in an isolation setting into B.'s permanent placement for the remainder of the school year. This agreement was never disclosed to Plaintiffs. In fact, the agreement

contradicted assurances to the contrary that they made to J.H. at the 15 March 2011 IEP meeting that the isolation setting would be temporary and brief, and that B. would return to his classroom placement as soon as the Board installed partitions that had been agreed upon at that meeting.

72. It is clear that, within three days of the promises made at the 15 March 2011 meeting of B.'s IEP team, the agreement was in place to make B.'s temporary isolation placement permanent. On 18 March 2011, Robin Little, the Board's Senior Executive Director of Human Resources, summarized the agreement to the officials who had explained it to her:

> [B]ased on conversations with multiple school officials regarding B., her "current understanding" was that "we will place [B.] in a separate room for the rest of this year and provide him with socialization opportunities. In that room will be a teacher and a TA. Left in the other classroom will be a teacher and a TA. Currently allotted to that setting is one teacher (Helen Westbrook) and two TA's (Cannada and Bob Soroka).
>
> Westbrook has said she will not go to the new room with [B.] so we need to advertise that position once we have the plan. Those of us who have talked do not see the need to have two TA's in the original room so one of them needs to go to the new room.

73. To cut the Gordian knot, Ms. Little suggested that the Board resolve the problem of leaving B. without a teacher by:

> [g]et[ting] Ms. Westbrook to agree to have some interaction with [B.] (Kathy you will have to tell us how much) so that she can be the TOR. Reassign one of the

TA's to [B.]'s classroom.

74. On 24 March, 2011, Gary Ridout reported to Kathy Blankenship and Keith Beamon that B.'s father, J.H., had appeared at school and questioned Mr. Ridout about why the partitions had not been installed. Mr. Holland also expressed his concern that it appeared things were being done secretly that were not authorized by B's IEP. Mr. Ridout reported that he did not disclose the "agreement" among Ridout, Beamon, Blankenship, and perhaps others to move B. out of his AU classroom to an isolation room. Mr. Ridout was evasive as Mr. Holland shared his concerns and told Mr. Holland he could take up his concerns with the IEP team the following Tuesday.

75. Beamon responds minutes later directing Mr. Rideout not to change their plan to move B. into an isolation room prior to the IEP team meeting scheduled for March 30th.

76. That agreement regarding B.'s placement was made without the knowledge or participation of B.'s parents, J.H. and T.H. Plaintiffs had no knowledge of this agreement until they obtained Mr. Ridout's e-mail in discovery, but, again, only after their counsel initiated a Rule 26 conference with the Board's counsel.

77. On March 29, 2011, B.'s IEP team changed B.'s IEP placement from the school setting to homebound pursuant to the Superintendent's directive.

78. An hour prior to the IEP team meeting, a number of the key members of the team held a pre-meeting to determine what options would be placed on the

table for the Hollands to consider and which ones would not. As the notes of the Board's in-house attorney, Kara Acree, reveal, the Board's employees determined all other school settings would be "off the table" at the March 29 IEP Team meeting. So when Plaintiffs, during the regular IEP meeting, requested that their son be allowed to move to a different school setting nearby with a program serving students with autism, their request was denied. The Plaintiffs had been denied the opportunity to be present at the table where school officials were determining the options for their son's educational placement.

79. During the regular IEP meeting an hour later, at 3:30 p.m. on March 29, 2011, the Board's lawyer, Kara Acree, asserted that the Board's employees met and concluded "prior to the [IEP Team] meeting" that the only private day school that could meet B's needs in the region was the Mariposa School in Cary, North Carolina, but the Board's employees ruled out Mariposa as a placement for B. because it was "not something that the school feels is an appropriate placement for [B.]." Mariposa was never discussed at any IEP Team meeting to which JH and TH were invited before the Board's employees ruled it out.

80. Shortly thereafter, JH and TH visited the Mariposa School, and learned that Mariposa was willing and capable of designing and delivering an educational program that would meet B.'s needs.

PLAINTIFFS COMPLIED WITH IDEA'S NOTICE RULE

81. Plaintiffs complied with the IDEA's requirement that parents provide notice of their intent to enroll B. in a private placement. Plaintiffs met the statutory notice requirement in two ways (only one is required). First, at the close of the 29 March 2011, IEP meeting, JH and TH informed the IEP Team that they were rejecting the placement proposed by the Board to provide FAPE to B, and that that they intended to enroll B in a private placement at public expense and explained their reasoning. The 29 March 2011 meeting of B.'s IEP team was the most recent IEP Team meeting that the parents attended prior to B.'s removal from the public school, and was therefore the proper meeting for Plaintiffs' notice under 34 C.F.R. § 300.149(d)(1)(i). They repeated their notice at the subsequent meeting of B.'s IEP Team in April of 2011 and again in correspondence to Ms. Blankenship.

82. Thus, Plaintiffs complied with the IDEA's notice requirements prior to initiating B.'s private educational program.

PROCEDURAL HISTORY

83. This civil action asserts claims arising out of the final administrative adjudication of Plaintiffs' Petition for IDEA's due process procedures, 20 U.S.C. 1415.

84. On 26 April 2011, Plaintiffs filed a Petition for Contested Case Hearing with the Clerk of the Office of Administrative Hearings as Case No. 11-EDC-9919.

85. Plaintiffs alleged that the Board deprived B. of a Free Appropriate Public Education ("FAPE") and sought all "appropriate relief" available under IDEA to remedy the deprivation.

86. In North Carolina, the state educational agency ("SEA") responsible for ensuring compliance with IDEA's due process procedures in adjudicating contested cases brought under IDEA is the North Carolina Board of Education.

87. Pursuant to N.C. Gen. Stat. § 115C-109.6 (j), the State Board of Education entered into a binding memorandum of understanding with North Carolina's Office of Administrative Hearings to ensure compliance with IDEA's procedures and timelines for contested cases arising under IDEA.

88. Pursuant to that binding memorandum of understanding OAH assigned Administrative Law Judge Beecher Gray (the "Hearing Officer") to preside over the hearing on Plaintiffs' Petition.

89. The Board sought to conduct extensive discovery pursuant to Article V of the North Carolina Rules of Civil Procedure. The Board issued Notices of Deposition upon oral examination directed to T.H. and J.H., propounded exhaustive interrogatories and requests for production of documents and electronically stored information.

90. The County moved for summary judgment on the day the hearing on the merits was to commence.

91. The Hearing Officer denied the County's motion for summary.

92. The County filed and briefed a Motion for Judgment at the close of Plaintiffs' evidence.

93. The Hearing Officer denied the County's Motion for Judgment.

94. A preponderance of the evidence in the record establishes that the Board deprived B. of a FAPE in multiple ways throughout the 2010-11 school year. As a result, Plaintiffs are entitled to all "appropriate relief" available under IDEA to remedy that deprivation.

B.'s PRIVATE EDUCATIONAL PROGRAM AND PLACEMENT

95. Plaintiffs' private program enabled B. to make documented, meaningful progress which continues today.

96. The record is replete with evidence of B.'s progress in Plaintiffs' private educational program. The testimony of these witnesses detailing B.'s meaningful progress in Plaintiffs' private program was supported by clear documentation discussed and admitted through their testimony. See exhibits introduced, discussed and admitted through the testimony of Ms. Ashley Petty, Ms. Amanda Rutter, Ms. Emily Mendelssohn, Ms. Betsy Pippin, Tracy Vail, and

Plaintiffs.

97. The County offered little, if any, serious challenge to the propriety or the effectiveness of Plaintiffs' private educational placement. Nor could they. In addition to the overwhelming evidence introduced through the testimony cited above, the Board's own autism consultant, Tracy Vail, testified that Plaintiffs' private program is appropriate, reasonably calculated to meet B.'s needs, and reasonably calculated to enable B. to make meaningful progress.

THE COUNTY'S PURPORTED RESOLUTION SESSION

98. IDEA required the County to convene a meeting with B.'s parents for the specific purpose of resolving the issues raised in the Petition.

99. Prior to the scheduled resolution meeting, T.H. and J.H. notified the County's representatives that they intended to record the meeting, just as they and the County had recorded all of the meetings of B.'s IEP Team.

100. When the resolution meeting began, the County's representatives refused to conduct the meeting when B.'s parents put their recorder on the table to record the meeting.

101. B.'s parents advised that, consistent with their prior notice, they wanted to record the meeting. Among other things, B.'s parents wanted to review any proposals made with the professionals who were working with B. in his private placement and they wanted to be sure that their positions were clearly and

accurately conveyed during the meeting.

102. The County continued to refuse to discuss a resolution with B.'s parents if they intended to record the discussion.

103. The County's compliance officer, a lawyer, attended the Resolution session and suggested to J.H. and T.H. that their case would be dismissed if they did not go along with the County's demand that they not record the meeting.

104. When B.'s parents would not agree to forego recording the meeting, they continued to insist that they had come to the table prepared to work hard to come to a resolution of the issues raised in their position.

105. The County's representatives refused to discuss the issues and walked out of the meeting.

106. B.'s parents remained in the then-empty room until it became clear that the County's representatives were not going to return to discuss the issues raised in their Petition.

THE DUE PROCESS PROCEEDINGS

107. The hearing on Plaintiffs' Petition required 23 days to complete, which were spread over nearly six months.

108. The length of the hearing was caused by the County's practice of presenting witnesses to read documents they did not personally author or receive into the record, and cross-examining witnesses by the same means.

109. On the last day of the 23 days of testimony, Defendant abandoned its contention that it had not deprived B. of a FAPE. In all of the 22 prior days of testimony the County aggressively litigated the issue.

110. Plaintiffs are therefore the "prevailing parties" in the due process proceedings below, and, as such, Plaintiffs are entitled to an award of the costs of the due process proceedings, including attorneys' fees, pursuant to 20 U.S.C. § 1415(i)(B)(i)(I).

THE ADMINISTRATIVE PROCEEDINGS ARE NOT ENTITLED TO DUE WEIGHT

111. In these proceedings, the ALJ's decision is not entitled to "due weight" as that phrase is used in IDEA because the Final Decision of the ALJ relies upon findings of fact that were not regularly made and erroneous conclusions of law.

112. The State Board of Education's purported decision is not entitled to "due weight" as that phrase is used in IDEA because it, too, relies upon findings of fact that were not regularly made and erroneous conclusions of law.

COUNT I: DEPRIVATION OF A FREE APPROPRIATE PUBLIC EDUCATION

113. Plaintiffs incorporate by reference all of the foregoing allegations as though fully set forth here.

114. The County deprived Plaintiffs of a FAPE throughout the 2010-11 school year

in the following ways.

FAILURE TO IMPLEMENT THE IEP

115. The County failed to implement material elements of B's IEP. For example:

a. Throughout the 2010-11 school year, the County failed to educate B in the educational placement that B.'s IEP prescribed:

b. The County's principal unilaterally changed B.'s placement from a resource-mainstreamed placement identified in B.'s IEP to a self-contained classroom without modifying B.'s IEP from the first day of school on August 25, 2010, until October 11, 2010;

c. The County's employees unilaterally changed B.'s placement from the self-contained classroom identified in B.'s IEP to an isolated room previously used as a closet, from October 2010 until March 29, 2010.

d. The County's superintendent unilaterally changed B.'s placement to Homebound and directed B.'s IEP Team to do so, which it did on March 29, 2010 by changing B.'s placement from a self-contained autistic classroom to Homebound.

116. The County failed to deliver the supplementary aids and services that his IEP required and previously enabled B. to be educated satisfactorily in a regular education placement during the prior school year in Currituck County, including:

a. a trained, competent aide to facilitate B.'s participation in the regular curriculum with his typically developing peers;

b. aids and communications systems that were effective in facilitating B.'s management of the regular education setting and extracurricular activities with his typically developing peers; and

c. other supplementary aids and services that B. required to be educated satisfactorily in a regular education placement and to participate in extracurricular and non-academic activities with his non-disabled peers.

117. The County failed to provide a certified teacher to deliver classroom instruction to B. Instead, the County employed unlicensed, untrained aide with no teaching certification to deliver the State-mandated curriculum and the special education and related services that B. required, according to his IEP, to derive benefit from the curriculum.

LEAST RESTRICTIVE ENVIRONMENT

118. The County failed to educate B. in the least restrictive environment in which, with the benefit of supplementary aids and services, B. could have been educated satisfactorily.

119. Throughout the 2010-11 school year, B. could have been educated satisfactorily in the regular education-resource placement; the same placement in which B. had been so successful the previous year in Currituck County.

120. Yet, despite the fact that B.'s IEP identified that placement during the first three months of the 2010-11 school year, the County never educated B. in the regular education-resource placement at any time during the 2010-11 school year.

121. Beginning on the first day of school, on August 25, 2011, the County placed B. in more and more restrictive settings until the County's Superintendent directed B.'s IEP Team to change B.'s placement to Homebound, a placement at the most restrictive node of the LRE continuum.

THE COUNTY'S PLACEMENT WAS PREDETERMINED BY AN OUTSIDER TO HIS IEP TEAM

122. The County's Superintendent unilaterally determined that B.'s placement should be changed to Homebound, and directed B.'s IEP Team to do so, which the Team did on March 29, 2010 by amending his IEP placement from a self-contained autistic classroom to Homebound.

THE COUNTY'S PROCEDURAL VIOLATIONS CONSTITUTED A DEPRIVATION OF FAPE

123. To the extent that any of the County's myriad violations of IDEA are deemed "procedural" and not substantive in nature, the violations nevertheless constitute a deprivation of Plaintiffs' right to a FAPE because the violations:

a. impeded B.'s right to a free appropriate public education;

b. significantly impeded J.H. and T.H's right to participate in the decision-making process regarding the Board's provision of a FAPE to B.; or

c. deprived B. of an educational benefit.

124. As a result, the County deprived Plaintiffs of a free appropriate public education.

PLAINTIFFS ARE ENTITLED TO EQUITABLE RELIEF UNDER IDEA

125. Plaintiffs incorporate by reference all of the foregoing allegations as though fully set forth here.

126. Because the County failed to provide Plaintiffs with a free appropriate public education, Plaintiffs are entitled to all appropriate relief available under IDEA.

127. Plaintiffs are entitled to compensatory education in an amount and frequency sufficient to remedy the educational time B. lost throughout the 2010-11 school year during which the County failed to implement B.'s IEP or provide a free appropriate public education.

128. Plaintiffs are entitled to a prospective injunction requiring the County to fund a private program that is both willing and capable of delivering educational benefit to B.

PLAINTIFFS ARE ENTITLED TO REIMBURSEMENT OF THE COST OF B.'s PRIVATE EDUCATIONAL PROGRAM AND PLACEMENT

129. Plaintiffs incorporate by reference all of the foregoing allegations as though fully set forth here.

130. The County failed to provide Plaintiffs with a free appropriate public education.

131. At the last IEP meeting prior to B.'s withdrawal from the County's schools, B.'s parents notified the County of their intent to educate B. in a private program at public expense.

132. J.H. And T.H. advised B.'s IEP team that they were rejecting the proposed IEP and stated their concerns and their intent to educate B. in a private program at public expense.

133. Further, ten business days before removing B. from the County's schools, B.'s parents gave the County written notice of their intent to educate B. in a private program at public expense.

134. B.'s parents investigated their options for educating B. privately, and enrolled B. in an educational program that was calculated to meet his educational needs.

135. B.'s private program met his educational needs; B.'s private program restored the educational control that existed in Currituck County and was lost during his enrollment in the County's schools. With educational control restored, B.

began to make educational progress, which B.'s private providers meticulously documented , and continue to do so.

136. B. continues to be educated in a regular education classroom at Heartwood Montessori School, with the support of V.B.A. strategies provided by behavioral therapists (including a licensed special education teacher) trained to utilize them. B.'s teacher at Heartwood has a Masters in Elementary Education with a concentration in lower elementary education, and she is a state certified teacher in Ohio and North Carolina. She has taught elementary school children since 1995 not only in private Montessori schools but also taught elementary children with special needs in North Carolina's public schools.

137. J.H. and T.H. are therefore entitled to reimbursement for the costs of their educational program, from March 29, 2011 through the present.

138. Because the County continues to fail to offer B. an appropriate IEP, J.H. and T.H. are entitled to continuing reimbursement of all of the costs of their private educational program until B.'s parents agree to an IEP offered by the County or a court of competent jurisdiction determines that an IEP offered by the County provides a free appropriate public education.

PLAINTIFFS ARE ENTITLED TO A "STAY-PUT" ORDER CONTINUING B.'s PRIVATE PLACEMENT

139. Because Plaintiff's private educational program is appropriate for purposes of reimbursement under IDEA, it is also appropriate for purposes of Plaintiff's stay put rights under IDEA.

140. Therefore, Plaintiffs are entitled to an Order establishing Plaintiffs' private educational program as B.'s "stay put" placement pursuant to 20 U.S.C. § 1415, to remain as such until modified by a superseding court order or by agreement of the parties.

PLAINTIFFS ARE ENTITLED TO ALL COSTS INCLUDING ATTORNEYS' FEES

141. Plaintiffs incorporate by reference all of the foregoing allegations as though fully set forth here.

142. Plaintiffs are "a prevailing party who is the parent of a child with a disability," as that phrase is used in 20 U.S.C. § 1415(i)(3)(B)(i)(I).

143. Plaintiffs incurred substantial attorneys fees in connection with the due process proceedings, the SRO review, and in these proceedings.

144. As prevailing parties, Plaintiffs are entitled to an award of attorneys' fees as part of the costs incurred in vindicating their rights in the due process proceedings and in preparing written arguments ordered by the State Board of Education's

Review Officer.

145. The County is not entitled to any of the IDEA's limitations on a prevailing parents' entitlement to attorneys' fees as part of the costs of the action because:

a. the County made no settlement offer to Plaintiffs within the time prescribed by 20 U.S.C. § 1415(i)(D)(i)(I);

b. Neither B.'s parents nor their attorney, during the course of the proceeding, unreasonably protracted the final resolution of the controversy;

c. The amount of attorneys' fees charged by Plaintiffs' attorneys in the proceeding did not exceed the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

d. The time spent and legal services furnished by Plaintiffs' attorneys were not "excessive," considering the nature of the action or proceeding; and

e. Plaintiffs did not initiate the action and therefore could not have violated any of the pleading requirements described in 20 U.S.C. § 1415(b)(7)(A).

146. Further, even if any of the foregoing bases existed for reducing Plaintiffs' attorneys' fees, the County forfeited any claim of entitlement to any such reduction by unreasonably protracting the final resolution of the proceeding. For example, the County:

a. repeatedly delayed the hearing in order to conduct depositions of B.'s parents (not their experts);

b. Filed and briefed frivolous motions (to dismiss, for summary judgment, and for judgment) before abandoning all of its arguments and testimony by stipulating to its deprivation of Plaintiff's right to a FAPE;

c. the County concealed damning evidence despite multiple requests and forced Plaintiffs to move to compel the discovery that ultimately inexorably fixed the County's liability; and

d. the County conducted witness examinations consisting of little more than asking witnesses to read documents into the record for 23 days only to stipulate at the close of all the evidence that the County had deprived Plaintiffs of a free appropriate public education.

PRAYER FOR RELIEF

147. WHEREFORE, Plaintiffs respectfully pray that this Honorable Court will issue an Order:

a. Declaring that:

i. Defendant failed to provide a free appropriate public eduction to B. throughout the 2010-11 school year;

ii. Defendant's current Homebound IEP fails to offer a free appropriate public education in the least restrictive environment;

iii. Plaintiffs' private educational program was – and continues to be – reasonably calculated to provide educational benefits to B. and therefore an appropriate private program.

b. Awarding Plaintiffs all "appropriate relief" available under IDEA to remedy the harms caused by Defendant's failure to provide B. a free appropriate public education, including:

i. Reimbursement of the costs, tuition, and expenses Plaintiffs have incurred in providing B.'s private educational placement and program at Heartwood Montessori,

ii. Reimbursement of the expenses Plaintiffs have incurred in providing the services Creative Consultants, including their provision of a certified special education teacher, a Board Certified Associate Behavior Analyst, and a Board Certified Behavior Analyst;

iii. Reimbursement of transportation costs Plaintiffs have incurred in connection with the transporting requirements of B.'s private educational program, including mileage at the federal rate.

iv. Reimbursement of B's private music therapy services; and

v. An Order establishing B.'s private program and placement to be his "stay put" placement under IDEA.

c. Order that Defendant provide compensatory education and related

services for a period of three years in an amount and frequency that the Court deems sufficient to remedy the regression and other harms B. suffered as a result of Defendant's failure to provide him with a FAPE.

d. Award Plaintiffs the costs, including attorneys fees, in connection with this action and all of the proceedings below, pursuant to 20 U.S.C. § 1415.

e. Order all other and further appropriate relief available under IDEA.

Respectfully submitted on this the 9th day of October, 2012, by:

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_____
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THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

B. by his parents, T.H. and J.H.; T.H. and J.H., *Plaintiffs*	)	
v.	)	5:12-cv-405-FL
JOHNSTON COUNTY BOARD OF EDUCATION, *Defendant*	)	

CERTIFICATE OF SERVICE

I certify that Plaintiffs' First Amended Complaint was filed on the date electronically stamped below with the Court's CM/ECF system, which will send a Notice of Electronic Filing via electronic mail to counsel of record Defendant, who is registered with the Court's CM/ECF system:

Carolyn Waller, Esq.
cwaller@tharringtonsmith.com

Respectfully submitted by:

/s/ Robert Ekstrand
Robert C. Ekstrand, N.C. Bar #26673