

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. ██████████
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Florida Administrative Code Rule 6A-6.03311 and section 1003.57, Florida Statutes,^{1/} before ██████████, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on August 29, 2012, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: ██████████ Esquire^{2/}
7350 Northwest 5th Street
Plantation, Florida 33324

For Respondent: ██████████, Esquire
Office of the School Board Attorney
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether Petitioner [REDACTED] should be moved from [REDACTED] current placement in an "[REDACTED]" classroom in a regular school ([REDACTED]) to a "[REDACTED]" with [REDACTED] students ([REDACTED]), as [REDACTED] parents have requested.

PRELIMINARY STATEMENT

On July 19, 2012, Petitioner's mother, [REDACTED], on behalf of [REDACTED] and Petitioner's [REDACTED] [REDACTED] (hereinafter referred to collectively as the "[REDACTED]"), submitted to the Broward County School Board (School Board) a request for a due process hearing (Complaint), in which they asserted the following:

Our [REDACTED] year old [child] [REDACTED] has [REDACTED] and is currently enrolled in [REDACTED] [REDACTED] program [and has been enrolled in that program] since we relocated to Florida in November 2011. Pursuant to the request and recommendation of the school's E.S.E. coordinator [REDACTED] and [REDACTED] coach [REDACTED] we have allowed them to evaluate and access [REDACTED] and [REDACTED] needs. The result of this has proven their methods are grossly inefficient and detrimental to [REDACTED] progress and quality of life as witnessed by [REDACTED] daily behaviors and obvious regression.

[REDACTED] has several behaviors, such as [REDACTED], [REDACTED], [REDACTED] [REDACTED] and at times [REDACTED] stemming from [REDACTED]. All of these behaviors are part of [REDACTED] everyday life however the school states a behavior plan is not

pertinent because [REDACTED] behaviors are [REDACTED] of an aggressive enough nature. However, we have received at least 3 home notes from [REDACTED] teacher stating, "[REDACTED] the teacher today open-handed," and "[REDACTED] hit a teacher in the mouth today splitting [REDACTED] lip." These are all very common behaviors of [REDACTED] that must be addressed on a daily basis through routine and regimented [REDACTED] as well [as] a maintenance plan to avoid regression and reoccurrence.

This being our sole problem. [REDACTED] [REDACTED] have a[n] [REDACTED] program or [REDACTED] program in place nor do they intend to initiate one. Statistics as well as our own personal documentation proves undoubtably this method works for our [REDACTED].

At our last I.E.P. meeting for [REDACTED] in early May 2012 any resolution of an appropriate program for our [child] came to a standstill . . . point blank. Applied Behavioral Analysis is what [REDACTED] needs to progress to [REDACTED] fullest in spite of [REDACTED] lifelong, all consuming disability and they cannot supply [REDACTED] with this.

At the recommendation of the [REDACTED], we collectively decided a center based school would be the most appropriate and effective place for [REDACTED]. The meeting ended with us being told they would look into this option and let us know. As our [REDACTED] most aggressive advocates we [sought] this information on our own and toured [REDACTED]. [I]t brought us tears and we knew without a doubt this is where our [REDACTED] needs to be.

Our process began by contacting [REDACTED] the E.S.E. coordinator who after 2 weeks of unreturned phone calls advised us that they feel [REDACTED] has made sufficient progress and they are not willing to sign off on the

center based checklist needed to execute placement into the appropriate school.

This is APALLING to us and we [REDACTED] allow [REDACTED] to lose any more precious time.

Thank you so much for your time and consideration in this matter.

The Complaint was transmitted to DOAH later that same day, July 19, 2012. The case was assigned to the undersigned, who, still later that same day, scheduled the requested due process hearing for August 29, 2012.

The due process hearing was held on August 29, 2012, as scheduled. At the hearing, the Parents presented their own testimony and no other evidence. Testifying on behalf of the School Board were [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. In addition to the testimony of these witnesses, the following School Board exhibits were offered and received into evidence: School Board Exhibits 1, 3, 6 through 8, 16 (pages 189 through 216 only) through 34, 36, 37, and 43 through 46.

At the conclusion of the evidentiary portion of the due process hearing on August 29, 2012, the parties agreed to the following extended deadlines, which the undersigned thereupon imposed: proposed final orders to be filed no later than October 5, 2012; and the final order to be issued no later than October 25, 2012.

The Transcript of the due process hearing (consisting of two volumes) was filed with DOAH on September 12, 2012.

The Parents and the School Board timely filed their Proposed Final Orders on October 5, 2012.

For stylistic convenience, the undersigned will use masculine pronouns in this Final Order when referring to [REDACTED]. The masculine pronouns are neither intended, nor should they be interpreted, as a reference to [REDACTED] actual gender.

FINDINGS OF FACT

1. [REDACTED] is the [REDACTED] [REDACTED] child of [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]). [REDACTED] will celebrate [REDACTED] [REDACTED] birthday in [REDACTED] of this year.

2. [REDACTED] has resided in [REDACTED] (County) in a household located in the [REDACTED] ([REDACTED]) zone with [REDACTED] [REDACTED] younger siblings and the Parents, since the family moved to [REDACTED] from [REDACTED] in November 2011, approximately a month prior to [REDACTED] [REDACTED] birthday.

3. [REDACTED] is a public school operated by the School Board. It serves both [REDACTED] and [REDACTED] students.

4. [REDACTED] was diagnosed with [REDACTED] when [REDACTED] was [REDACTED].

5. [REDACTED] thereafter received services through Part C of the Individuals with Disabilities Education Act until [REDACTED] [REDACTED] birthday.

6. As a [REDACTED], [REDACTED] started receiving special education and related services through Part B of the Individuals with Disabilities Education Act.

7. At the time [REDACTED] left [REDACTED] in November 2011, [REDACTED] was receiving [REDACTED] and [REDACTED] provided by the [REDACTED] School District pursuant to an IEP, developed at a meeting on October 25, 2011, not due to expire until May 9, 2012 (New Jersey IEP).^{3/} The special education [REDACTED] was being provided was based upon the principles of [REDACTED] ([REDACTED]), which uses repetition and reinforcement to facilitate learning. Learning-wise, [REDACTED] experience as a student in [REDACTED] was characterized by periodic peaks of modest progress followed by regression.

8. The New Jersey IEP contained the following "Eligibility Statement":

[REDACTED] [REDACTED] has been diagnosed with [REDACTED] and presents with [REDACTED] in [REDACTED] and [REDACTED]. [REDACTED] requires special education and related services to meet [REDACTED] specific needs.

It identified the "[REDACTED]" as the "Special Education Services" that [REDACTED] would be receiving during the regular school year and indicated that these services would be provided on a "[REDACTED]" basis in a "[REDACTED]" the entire "school day except for time spent in lunch, specials, and recess," giving [REDACTED] "less than 40% [but more than 0%] in g[eneral] e[ducation]." The following were the "[REDACTED]" provided for in the IEP:

"██████" in the ████████ area" for 20 minutes five times a week; "██████-group of two students" in the "██████ area" for 20 minutes three times a week; "In-Home Behavioral Assistance" eight hours monthly; "████ [████████] Individual" in the ██████ area" for 30 minutes two times a week; "1:1 aide" at all times "throughout [the] school and on the school bus"; and "Transportation-door-to-door with aide on the bus" to and from school each day. The foregoing "Special Education Services" and "Related Services" were intended to help █████ meet the various "Academic and/or Functional Goals" set forth in the IEP.

9. According to the New Jersey IEP, █████ was being "integrated in the general education population for an hour and a half a day," and the IEP provided that, for that time that █████ was in the "general education classroom," the following "Modifications" would be made in to "enable █████ to participate in the general education curriculum":

Prompt █████ to use gestures, signs, or words to make simple requests;

Modify classwork to meet █████ level;

Frequent breaks;

Maintain eye contact;

Use short simple directions when speaking to █████

Use positive reinforcement with gestures or praise;

Give [REDACTED] (2 minutes) time to process information given to him.

10. The "Rationale for Removal from General Education" section of the New Jersey IEP provided, in pertinent part, as follows:

1. Identify the supplementary aids and services that were considered to implement the student's annual goals.

In class resource programming, including [REDACTED] and [REDACTED], was considered but rejected due to [REDACTED] unique needs due to [REDACTED]. [REDACTED] requires intensive individualized instruction.

2. Document the comparison of the benefits provided in the general education class and the benefits provided in the special education class.

The general education class would provide [REDACTED] with opportunities to interact with age appropriate peers. It would provide [REDACTED] with opportunities to participate in typical grade level activities and access to the general education curriculum. It would provide [REDACTED] with peer models.

A special education setting would provide individualized instruction based on applied behavioral analysis. [REDACTED] would benefit from intensive instruction. The special education class would address [REDACTED] special attentional needs, and distractions could be minimized.

3. Document the potentially beneficial or harmful effects which a placement (in the general education class) may have on the student with disabilities or the other students in the class.

Full inclusion in the general education setting may be too stimulating for [REDACTED] and [REDACTED] get the [REDACTED] that [REDACTED] needs during the entire school day.

11. Included in the New Jersey IEP was a "Behavioral Action Plan" addressing the "Target Behavior" of "[t]ask [a]voidance through [REDACTED] including movements such as [REDACTED], [REDACTED], [REDACTED], and [REDACTED]." The plan described the "Function" of this "Target Behavior" and the desired "Replacement Behavior" as follows:

Function: Escape-control maintained.

Replacement Behavior: [REDACTED] will be redirected to follow through with work tasks.

The plan then went on to enumerate specific "Classroom Strategies" to be used to deal with the "Target Behavior."

12. With respect to self-care skills, the New Jersey IEP noted that [REDACTED] "need[ed] support with self care within the classroom including [REDACTED] and [REDACTED]." Concerning [REDACTED] specifically, the further comment was made in the IEP that "[REDACTED] had moved to a 75 minute [REDACTED] schedule which [was] [REDACTED] being implemented at home."

13. Shortly after the New Jersey IEP was developed, [REDACTED] and [REDACTED] family relocated to the County, and the School Board assumed the responsibility of providing [REDACTED] [REDACTED] and [REDACTED].

14. From on or about November 10, 2011, until the end of the 2011-2012 school year,^{4/} ██████ received ██████ (at times on a one-to-one basis) and ██████, including ██████ and ██████ at ██████ as a ██████ grader in a self-contained, ██████ students-only class (referred to by the School Board as an "██████ cluster" class) of 6 students (including ██████ taught by ██████ (utilizing ██████ principles) with the assistance of a full-time classroom aide, ██████, and with the support of ██████ ██████ coach, ██████, who visited ██████ classroom "a lot" on a daily basis^{5/}; and ██████ had supervised contact with ██████' nondisabled students (whom ██████ was able to, and did, mimic) outside of ██████ classroom during "specials" (such as ██████, ██████, ██████, ██████, and ██████),^{6/} At no time did ██████ have ██████ own personal "1:1 aide," as ██████ had had in New Jersey; nor was any "In-Home Behavioral Assistance" provided by the School Board.

15. As a student at ██████ during 2011-2012 school year, ██████ made meaningful ██████ behaviorally, socially, and academically,^{7/} notwithstanding that ██████ was brought to school late, and thus had to deviate from ██████ established daily schedule in ██████ classroom,^{8/} virtually every morning.^{9/}

16. Compared to the when ██████ started at ██████, by the end of the school year, at school, ██████ had more self-

control and thus fewer "emotional tantrums" (of the type described in the New Jersey IEP's "Behavioral Action Plan")^{10/}; ■■■ strayed away from ■■■ seat during nonpreferred activities less frequently (in fact, it hardly ever happened)^{11/}; ■■■ was able to focus and stay engaged for longer periods of time, particularly when receiving one-on-one instruction; ■■■ was able to transition in the classroom and throughout the school with less verbal prompting; ■■■ interacted more with ■■■ classmates^{12/}; ■■■ was better at sharing with classmates and not taking away things from them; ■■■ had fewer toileting "accidents" (reaching the point where, on most days, ■■■ did not have any)^{13/}; ■■■ needed less (hand-over-hand) help to write the letters of ■■■ name; and ■■■ was able to read an entire sentence, recite all of the alphabet (at least on some days), match lower and upper case letters, and add single digit numbers with manipulatives, academic skills ■■■ display upon arriving at ■■■.

17. Each school day, ■■■ sent home with ■■■ for the Parents a "Daily Home Note," in which ■■■ described how ■■■ school day had gone. The Parents were asked to return it signed, with any written comments they desired to make. Rarely did the Parents write anything on a returned "Daily Home Note" other than their signatures.

18. The first teacher/parent conference [REDACTED] had with either Parent after [REDACTED] had started at [REDACTED] was on January 18, 2012, at around the end of the second grading period,^{14/} when [REDACTED] met with the father to discuss [REDACTED] academics, behavior, and attendance.^{15/} [REDACTED] was also in attendance. At this conference, [REDACTED] presented the Father with a completed Conference Form, in the "Comments" section of which [REDACTED] had written:

[REDACTED] seems to be better adjusted to [REDACTED] new class and teachers at this time. When [REDACTED] arrives to school on time, or by 8:30 at the latest, [REDACTED] seems to be able to follow [REDACTED] schedule without tantrum behavior. I am very concerned about how many hours [REDACTED] misses as a result of being late daily.

19. Until February 2, 2012, [REDACTED] followed the New Jersey IEP in addressing [REDACTED] needs in [REDACTED] classroom. On February 2, 2012, a meeting was held to consider developing a new IEP for [REDACTED] (February 2 IEP Meeting). Participating in the meeting were the [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED], a School Board-hired [REDACTED] who was servicing [REDACTED] in [REDACTED] classroom; [REDACTED] [REDACTED] therapist; [REDACTED], [REDACTED]' ESE Specialist, who served as the LEA Representative at the meeting; and [REDACTED], a general education teacher.

20. By the end of the February 12 IEP Meeting, the meeting participants had determined that [REDACTED] [REDACTED] to receive special education and related services from the School Board as a student with [REDACTED], a student with a [REDACTED], and a student who requires [REDACTED], and they had developed a new IEP for [REDACTED], effective February 2, 2012, to February 1, 2013, which was reasonably designed to provide [REDACTED] with the opportunity to make meaningful educational progress (February 2012 IEP).

21. The February 2012 IEP contained discussions of [REDACTED] "Present Level of Academic Achievement and Functional Performance" in the domains of "Curriculum and Instruction," "Social/Emotional Behavior," "Independent Functioning," and "Communication."

22. In the first paragraph of the discussion of [REDACTED] "Present Level of Academic Achievement and Functional Performance" in the domain of "Curriculum and Instruction" (PLCI Discussion), it was noted that [REDACTED] participate[d] in a highly structured classroom environment and [was] given 1:1 and 1:3 small group instruction."

23. The next six paragraphs of the PLCI Discussion addressed the various assessment tests that [REDACTED] had administered to [REDACTED] in December 2011 and January 2012. These paragraphs read as follows:

In the area of Reading, on the [REDACTED] administered on Tuesday, January 17th and Thursday January 19, 2012, [REDACTED] [REDACTED] respond to any of the questions except the subtest area of capital letter and lowercase letter names. In this area [REDACTED] scored as follows: Naming Capital letters- [REDACTED], misnaming, G, N and J. Naming Lowercase Letters- [REDACTED], naming m, p, r and x. For the duration of the test, over the course of two separate sessions, [REDACTED] repeated some of the words spoken in the questions but [REDACTED] respond with an oral answer, or with a gesture. [REDACTED] sometimes held the pages of the book and turned the book over or flipped through the pages. [REDACTED] was very physically active, moving [REDACTED] hands and feet rapidly and, at times, had to be prompted verbally and physically to remain in [REDACTED] seat. At this time, the [REDACTED] is considered [REDACTED] as a result of [REDACTED] behavior.

According to an IRI (Informal Reading Inventory) administered on January 11, 2012, [REDACTED] could not read the words on the Pre Primer word list. During the assessment, [REDACTED] played with [REDACTED] fingers, was verbally prompted and physically redirected to remain in [REDACTED] seat, and was given a choice of reward to look at the words at hand. [REDACTED] was focused on external stimuli during both sessions. This test is considered unscorable as a result of [REDACTED] nonresponsive behavior.

It was shown on the Letter Name and Sound Recording Sheet administered on December 8, 201[1], that [REDACTED] [REDACTED] respond to any of the letters, even when shown letter cards with pictures. During this testing time, [REDACTED] moved around on [REDACTED] chair and [REDACTED] respond verbally or with a gesture for any of the presented letters. [REDACTED] has shown to know some of [REDACTED] letters during other instructional tasks. In teacher guided instruction on 12/3/11, [REDACTED] named all

upper case letters [REDACTED] for C, H, D, S, T, U, V, and Z. It is difficult to obtain an accurate score because of [REDACTED] varying levels of attention and participation on a given day and/or task.

[REDACTED] [REDACTED] respond by speaking or pointing to any of the questions on the Concepts of Print Test administered on December 8, 2011. When handed the book, [REDACTED] flipped through the pages while the book was upside down. [REDACTED] was prompted multiple times while being asked the question. This test was [REDACTED].

[REDACTED] [REDACTED] respond to any sections of the Phonemic Awareness Inventory administered on December 8, 201[1]. [REDACTED] nonparticipation renders this assessment [REDACTED].

[REDACTED] was given an [REDACTED] on January 10, 2012. A score [REDACTED] obtained due to [REDACTED].

24. The next two paragraphs of the PLCI Discussion discussed the Brigance Diagnostic Comprehensive Inventory of Basic Skills test that [REDACTED] administered to [REDACTED]. They read as follows:

Given the Brigance Diagnostic Comprehensive Inventory of Basic Skills test, administered over the course of 7 days, and given [in] multiple short sessions on each of the 7 days, [REDACTED] [REDACTED] master the personal data section. [REDACTED] did not answer any of the questions in this section. [REDACTED] could recognize colors red, blue, yellow, purple and pink, scoring 5 out of 11 in the area of recognizing colors. In the area of self help skills, [REDACTED] scored 2 out of 7, knowing how to put on [REDACTED] own clothes and caring for [REDACTED] toileting needs, including flushing the toilet and washing/drying [REDACTED] hands. When given a

drawing of a person, [REDACTED] could identify the mouth, eyes, nose, hair, tongue, head, ears, and teeth by pointing to each part. In this area [REDACTED] scored [REDACTED] out of 30. [REDACTED] [REDACTED] respond to any of the questions or prompts in the areas of [REDACTED] or [REDACTED]. In the area of reciting the alphabet, [REDACTED] exhibited [REDACTED] behavior by [REDACTED] and [REDACTED] on the floor. When this test was continued after a brief break, [REDACTED] was able to read all uppercase letters except [REDACTED]. In the area of lowercase letters [REDACTED] scored [REDACTED] out of 31. [REDACTED] scored [REDACTED] in both areas involving printing upper and lowercase letters in sequence when dictated. [REDACTED] [REDACTED] participate in printing personal data. In the area of Word Recognition, [REDACTED] [REDACTED] read any of the words presented to [REDACTED]. [REDACTED] would repeat the words "a," "go" and "is" when read to [REDACTED]. This portion is unscorable. In the area of Oral Reading and Reading Comprehension, [REDACTED] [REDACTED] participate rendering a score of [REDACTED] in each area. In the area of Word Analysis, [REDACTED] [REDACTED] participate in answering the questions but [REDACTED] repeat many of the sounds after the instructor. [REDACTED] [REDACTED] write any letters or words in the Writing section but [REDACTED] hold [REDACTED] pencil functionally after verbal prompts.

Over the course of the 7 days, [REDACTED] exhibited [REDACTED] behavior demonstrated by [REDACTED] [REDACTED] away from the designated area, and sometimes throwing [REDACTED] on the ground. When this occurred, [REDACTED] was [REDACTED] and [REDACTED] redirected and [REDACTED] sometimes complied and continued to work. [REDACTED] was frequently stimulated by external stimuli.

25. The final five paragraphs of the PLCI Discussion read as follows:

██████ took the Mid-Year Benchmark Assessment Test on January 10, 2012. ██████ assessment was ██████. ██████ circled the numbers in the test question rather than bubbling in the correct answer. ██████ was supported with ██████ and ██████ prompts for the duration of the test.

During instructional groups, ██████ is learning letter sounds. Thus far, ██████ is practicing letters A-D. ██████ enjoys file folder games based on the sounds of these four letters and is showing progress with additional practice. ██████ can attend to a very short story and can sometimes repeat words stated in the story.

In the area of Math, according to the Key Math Diagnostic Inventory of Essential Mathematics 3 administered on January 19, 2012, ██████ test is ██████ based on ██████ behavior. During this test, ██████ remained in ██████ seat but ██████ answer any of the questions ██████ or by ██████.

Given the Brigance Diagnostic Comprehensive Inventory of Basic Skills test, administered over the course of 7 days and given [in] multiple short sessions on each of the 7 days, ██████ spoke the word "eight" when the number was shown to ██████. ██████ ██████ vocalize any of the other numbers from 1-9 in the Numbers section. ██████ ██████ understand quantitative concepts such as big/little. ██████ was able to count 3, 6, and 8 objects when placed in front of ██████. In the area of numeral comprehension, ██████ was able to show quantities to match symbols (numerals), numbers 1-9. ██████ ██████ participate in the areas of writing numerals in sequence, standing gross motor skills, walking gross motor skills, running and skipping gross motor skills or understanding directional and positional concepts. ██████ was able to arrange numbers 1-10 in order

and could identify a penny when shown a large picture from a calendar math.

Based on teacher observation and classroom math activities, [REDACTED] enjoys counting. [REDACTED] is often the first student to participate in counting at calendar math daily. [REDACTED] can consistently rote count to 16 and has shown to be able to count to 27 sometimes. [REDACTED] can often fill in the missing numbers if one is left out of sequence. [REDACTED] can sometimes tell which number comes next in the sequence when starting at one. [REDACTED] sometimes identifies a penny in calendar math and is working on identifying the nickel and dime. At [REDACTED] independent work station, [REDACTED] can match counters 1 through 4 to correct numbers and can complete a puzzle based on associating basic shapes to hole[s] in the puzzle with the same shape. [REDACTED] can also find the missing numbers for a sequence file folder game. [REDACTED] [REDACTED] many prompts to stay at [REDACTED] independent work area and to focus on [REDACTED] task bucket, but rarely needs assistance completing these tasks. At teacher time, [REDACTED] [REDACTED] to focus on a task for more than 5-7 minutes. [REDACTED] [REDACTED] to start counting at a number other than one. [REDACTED] frequently [REDACTED] to comply with completing activities or tasks that are [REDACTED] preferred. [REDACTED] has exhibited many [REDACTED]-like behaviors during instructional and independent sessions in [REDACTED], similar to [REDACTED]. [REDACTED] sometimes works for a reward of [REDACTED] choice. It is hard to obtain a valid score on [REDACTED] [REDACTED] assessment because of [REDACTED] varying degree of participation.

In the area of Writing, [REDACTED] can [REDACTED] trace [REDACTED] own name while repeating the letters when verbally and physically prompted. [REDACTED] writing skills are considered to be at the [REDACTED] level of holding a pencil functionally and tracing.

26. The February 2012 IEP contained the following discussion of ██████ "Present Level of Academic Achievement and Functional Performance" in the domain of "██████████":

██████████ shows affection to ██████ teachers daily. ██████ responds to verbal praise such as being told that ██████ is doing a great job. ██████ also loves high fives and hugs. ██████ is becoming more ██████ with the rules of the classroom and is able to ██████ with some of them easier. For example, ██████ will sometimes work for the computer or play area ██████ behavior. ██████ interact with the students in ██████ classroom independently but will often listen to them if they tell ██████ to do something. For example, at recess, when it is time to leave, one of the students will walk over to ██████ and will tell ██████ it is time to go. ██████ will take ██████ hand and will walk with ██████ to the exit area. ██████ has a very ██████ time with ██████ and ██████ to ██████ routine. When ██████ is late for school ██████ routine is thrown off and ██████ tends to exhibit more ██████ behavior and has a ██████ time following the rules. In the 24 days that ██████ has attended our school, ██████ has been late ██████ out of 24 occasions. On many of these occasions, ██████ has ██████ and ██████ to the ground, ██████ shoes off and screaming for a period of time anywhere between 5-60 minutes.

██████████ loves a clapping game when we count to 10 and then ██████ gets tickled. ██████ will frequently use the word "more" when playing this game as a reward for ██████ behavior.

27. The February 2012 IEP stated the following regarding ██████ "Present Level of Academic Achievement and Functional Performance" in the domain of "██████████ Functioning"^{16/}:

█ can sometimes follow a "first-then" task card when the reward is a preferred activity such as the computer or play area. █ has shown to work for up to 3 minutes without trying to move away from the task, or █ needing verbal cues to remain at █ area. █ participates in activities during direct instruction (teacher time) using a token reinforcement system, which allows █ to earn happy faces for a reward. █ tasks are carried out in brief segments with the opportunity to play or go to the computer in between.

Based on teacher and █ Observations, during classroom activities, █ █ to focus on a task for more than 3-5 minutes. Although █ walks independently, █ requires supervision walking in the hallway to class in the morning after █ arrival to ensure safety. █ is guided to enter the classroom, put away █ folders and backpack and to follow █ picture schedule. █ █ demonstrate hand dominance and █ has █ coordinating █ two hands to complete activities. If █ hand is guided towards a zipper on █ bag, █ can open and close it. █ can eat █ breakfast independently provided the plastic dishes are opened for █ and █ meal is assembled for █. (For example, syrup is poured on █ pancakes.) █ is working on stabilizing objects with one hand while the other hand works on activities such as cutting, coloring, and opening containers. █ needs to be physically guided to █ schedule but can sometimes select the next item on █ own. █ needs assistance going in the proper direction for the scheduled activity unless it is computer or play area. █ can walk to those areas independently. █ can attend to a lesson or group activity for up to 3 minutes but needs to be praised and rewarded █ in order to █ focused. █ struggles to sit appropriately and often has to be

physically moved to the center of [REDACTED] seat, facing the direction of the teacher. [REDACTED] is on a 75 minute toileting schedule but has wet [REDACTED] [REDACTED] a number of times even on this schedule. [REDACTED] rarely indicates that [REDACTED] needs to use the bathroom but has said "bathroom" twice since [REDACTED] started school. [REDACTED] was praised for using this word and taken immediately to the bathroom. [REDACTED] can dress [REDACTED] if given verbal cues but sometimes refuses to do so and will require assistance. [REDACTED] can pull [REDACTED] pants on and off when using the restroom with verbal cues and can wash [REDACTED] hands, sometimes with assistance, in a hand-over-hand action. [REDACTED] has washed and dried [REDACTED] hands independently on a few occasions. [REDACTED] wears shoes that require the tying of laces, which [REDACTED] cannot do. [REDACTED] can independently put [REDACTED] shoes on if the laces are loose and [REDACTED] is given enough time. In the cafeteria, [REDACTED] can eat [REDACTED] lunch unassisted but needs verbal, visual and gestural cues to stay seated. [REDACTED] sometimes cleans up [REDACTED] area independently with verbal prompts. At recess [REDACTED] plays alone daily, even when physically guided to a group activity with teacher supervision. With one-on-one physical guidance, [REDACTED] will copy how to play with a toy appropriately if shown by a teacher. If there is no guide, [REDACTED] has [REDACTED] playing with toys in an age-appropriate way. [REDACTED] continues to [REDACTED] to verbalize to show [REDACTED] wants and needs through gestures or signs. [REDACTED] [REDACTED] uses words to communicate but has used bathroom, again, no, yes, more, tickles, computer and play. [REDACTED] can [REDACTED] name colors and has counted to 27 in calendar math when prompted.

28. With respect to [REDACTED] "Present Level of Academic Achievement and Functional Performance" in the domain of

"Communication," the following was reported in the February 2012

IEP:

█████ current level of performance in the area of expressive and receptive language was determined through █████, data collection, Teacher interview and the Communication Profile and Assessment of Elementary Students with █████ administered in January 2012. The Comprehensive Assessment of Spoken Language (CASL) was attempted; however, an accurate reflection of █████ abilities were █████ to be obtained due to █████ levels of █████, █████ and █████ behavior. The Goldman Fristoe Test of Articulation-2 was also attempted; however █████ articulation █████ be evaluated due to █████ language skills and █████ behavior.

Expressively, █████ language is beginning to █████ manner of communication is characterized by a combination of █████, █████, █████ and █████ language. █████ demonstrates some prior experience with the Picture Exchange Communication System demonstrated by █████ ability to request highly desirable items. When motivated █████ demonstrates the ability to communicate using 1-2 word utterances. █████ is becoming █████ in █████ ability to label objects, request highly desirable objects, request activities, assistance and recurrence (more) independently. When the desirability is not a high, █████ benefits from verbal prompting. █████ can █████ or █████ independently by saying NO when an item is undesirable.

In the area of █████ language, when focused, █████ follows basic 1-step instructions in context through completion. █████ █████ from repetition and

redirection when distracted by a student or object. [REDACTED] has been observed to demonstrate the proper use of age level toys. When focused, and [REDACTED] attention is obtained, [REDACTED] comprehends basic common nouns and action words. [REDACTED] sometimes retains newly learned vocabulary and comprehends short simple sentences in context. [REDACTED] additionally demonstrates an understanding of yes/no questions (specifically no) in regards to pictures demonstrated via pointing to verify [REDACTED] response.

Socially, [REDACTED] responds to [REDACTED] name by looking at the speaker once [REDACTED] attention is obtained through eye contact. With [REDACTED] levels of visual, verbal and gestural prompting, [REDACTED] demonstrates the ability to participate in a structured turn taking activity and can [REDACTED] joint attention with the [REDACTED] on a familiar object. With a model, verbal and gestural prompts, [REDACTED] will sometimes greet the [REDACTED] when arriving to [REDACTED]. When presented with a task that is undesirable to [REDACTED], [REDACTED] will get up and attempt to run, kick [REDACTED] shoes off, or [REDACTED] in avoidance of the task. [REDACTED] is easily redirected with verbal and visual prompts, as well as a token reinforcement system to return back to the designated area.

In [the] area of [REDACTED] and [REDACTED], [REDACTED] was observed to [REDACTED] produce age level phonemes when verbalizing; however, as [REDACTED] expressive language [REDACTED] to develop and become more consistent, a more accurate articulation profile can be obtained.

29. The February 2012 IEP also described, as follows, with respect to each of the foregoing domains, the "impact of [REDACTED]

disability on [REDACTED] [REDACTED] and [REDACTED] in the general curriculum" and [REDACTED] "priority educational need(s)":

Domain: Curriculum and Instruction

The impact of the disability on [REDACTED] involvement and progress in the general curriculum:

Due to the impact of [REDACTED] [REDACTED] [REDACTED] [REDACTED] has [REDACTED] learning and generalizing base skills at the [REDACTED] [REDACTED] as [REDACTED] grade level peers, which effects [REDACTED] ability to participate and [REDACTED] in a large group setting. [REDACTED] is [REDACTED] level in reading, reading comprehension, spelling, math and writing and is working on prerequisite skills.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To [REDACTED] [REDACTED] reading, writing, and math skills.

Domain: [REDACTED]

The impact of the disability on [REDACTED] involvement and progress in the general curriculum:

Due to the impact of [REDACTED] [REDACTED] [REDACTED], [REDACTED] has [REDACTED] following rules and directions as expected in the school setting. [REDACTED] displays [REDACTED] behavior and becomes upset [REDACTED] than [REDACTED] grade-level peers. [REDACTED] yet have the [REDACTED] to cope with [REDACTED] or to [REDACTED] behavior.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To improve [REDACTED] ability to [REDACTED] behavior and to follow rules and directions as expected in the school setting.

Domain: Independent Functioning

The impact of the disability on [REDACTED] involvement and progress in the general curriculum:

Due to the impact of [REDACTED] [REDACTED] [REDACTED], [REDACTED] has [REDACTED] remaining in [REDACTED] assigned area, attending to, and participating in instructional activities. [REDACTED] has [REDACTED] following directions. [REDACTED] demonstrates fine motor [REDACTED].

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To improve [REDACTED] independence in the classroom and to attend and participate in instructional activities.

Domain: Communication

The impact of the disability on [REDACTED] involvement and progress in the general curriculum:

Due to the impact of [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], [REDACTED] demonstrates [REDACTED] in [REDACTED] ability to utilize verbalizations to expressively label familiar objects/actions, request using a 3 word mean length of utterance, to consistently follow 1 step directions incorporating details and to greet an adult when arriving into the classroom.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

[T]o [REDACTED] expressive, receptive and pragmatic language skills.

30. The February 2012 IEP had 17 "Annual Measurable Goals": seven in the domain of "Curriculum and Instruction"; two in the domain of "[REDACTED]"; four in the domain of "Independent Functioning"; and four in the domain of "Communication."

31. The "Curriculum and Instruction" annual goals were as follows:

1. Annual Measurable Goal: Given one [REDACTED] prompt and presentation of a letter card, [REDACTED] will produce the correct sound for every letter of the alphabet with [REDACTED] accuracy in [REDACTED] out of 5 opportunities by February 2013.

2. Annual Measurable Goal: Given one verbal prompt and presentation of letter cards, [REDACTED] will match lowercase letters to the correct uppercase letter with [REDACTED] accuracy in [REDACTED] out of 5 trials by February 2013.

3. Annual Measurable Goal: Given a passage that is read to [REDACTED] and visual and gestural prompts, [REDACTED] will answer who and where questions about the story by orally answering or pointing to the answer with [REDACTED] accuracy in [REDACTED] out of 5 opportunities by February 2013.

4. Annual Measurable Goal: Given number cards 1-20 in random order and a verbal prompt, [REDACTED] will sequence the number cards in counting order with [REDACTED] accuracy in [REDACTED] out of 5 trials by February 2013.

5. Annual Measurable Goal: Given manipulatives and verbal prompting, [REDACTED] will add one digit numbers and produce an accurate answer shown with manipulatives with [REDACTED] accuracy in [REDACTED] out of 5 opportunities by February 2013.

6. Annual Measurable Goal: Given a visual model and a gestural prompt, [REDACTED] will spell [REDACTED] first and last name with proper letter formation with [REDACTED] accuracy in [REDACTED] out of 5 trials by February 2013.

7. Annual Measurable Goal: Given a visual model and an oral prompt for the letter, [REDACTED] will write the uppercase letters of the alphabet in an optimum format with [REDACTED] accuracy in [REDACTED] out of 5 opportunities by February 2013.

32. The "Social/Emotional Behavior" annual goals were as follows:

8. Annual Measurable Goal: Given a gestural prompt and the sound of a timer to

signal transition, [REDACTED] will independently transition to the next scheduled area without displaying [REDACTED] behavior in [REDACTED] out of 5 situations by February 2013.

9. Annual Measurable Goal: Given a visual feelings card, [REDACTED] will identify [REDACTED] feelings when there is a change in routine using a preferred mode of communication in [REDACTED] out of 5 opportunities by February 2013.

33. The "Independent Functioning" annual goals were as follows:

10. Annual Measurable Goal: By February 2013, given gestural and verbal prompts, [REDACTED] will copy prewriting strokes in [REDACTED] out [of] 5 opportunities.

11. Annual Measurable Goal: By February 2013, given thick paper and adapted scissors [REDACTED] will cut a boldly drawn 2" square within 1/4" accuracy in [REDACTED] out [of] 5 opportunities.

12. Annual Measurable Goal: By February 2013, given verbal and gestural prompts, [REDACTED] will open and close bags and containers used in school in [REDACTED] out [of] 5 opportunities.

13. Annual Measurable Goal: Given gestural prompts, when at an instructional activity, [REDACTED] will attend to the lesson for 5 minutes without attempting to leave the assigned area in [REDACTED] out of 5 opportunities by February 2013.

34. The "Communication" annual goals were as follows:

14. Annual Measurable Goal: Given a visual stimulus and a verbal prompt, [REDACTED] will verbally label familiar objects/actions with [REDACTED] accuracy in [REDACTED] trials by February 2013.

15. Annual Measurable Goal: Given a verbal, visual and gestural prompt, [REDACTED] will request an object or activity using a 3 word mean length of utterance with [REDACTED] accuracy in [REDACTED] opportunities by February 2013.

16. Annual Measurable Goal: Given 1 repetition and a verbal prompt, [REDACTED] will . . . consistently follow 1 step directions incorporating details with [REDACTED] accuracy in 4/5 opportunities by February 2013.

17. Annual Measurable Goal: Given a gestural prompt and once attention is maintained, [REDACTED] will greet an adult when arriving into the classroom in [REDACTED] opportunities by February 2013.

35. The February 2012 IEP enumerated the "Special Education Services," "[REDACTED]," and "Supplementary Aids and Services" that [REDACTED] would be receiving from February 2, 2012, to June 7, 2012, and from August 20, 2012, to February 2, 2013.

36. The "Special Education Services" provided for in the February 2012 IEP were: "[REDACTED]" in the "ESE Class" [REDACTED] times a week for a total of [REDACTED] minutes a week; and "Intensive Instruction in Academics, Behavior, Independent Functioning, [and] Communication" in the "ESE Class" [REDACTED] times a week for a total of [REDACTED] minutes a week.

37. The February 2012 IEP indicated that [REDACTED] would receive, as a "[REDACTED]," "[REDACTED]" in the "ESE Class" [REDACTED] times a week for a total of [REDACTED] minutes a week. No other "[REDACTED]" was listed on the IEP.

38. The "Supplementary Aids and Services" provided for in the February 2012 IEP were:

Flexible Presentation-Repeat, clarify, summarize directions (teacher);

Flexible Presentation-Use means to direct attention to test/task items;

Flexible Presentation-Verbal encouragement;

Flexible Scheduling/Timing-Add'l time for tasks (Total time = more than twice the allotted time);

Flexible Scheduling/Timing-Extra time for processing/responding (oral);

Flexible Scheduling/Timing-Lessons broken into smaller segments;

Flexible Scheduling/Timing-Visual Schedule;

Flexible Setting-Allow movement as needed;

Flexible Setting-Close proximity when giving directions or lessons;

Flexible Setting-Preferential seating;

Flexible Setting-Small group for testing up to 3;

Flexible Setting-Study carrel for independent work;

Teacher created home note: daily progress in writing provided to parent.

39. The "Special Considerations" section of the February 2012 IEP provided as follows:

Special Considerations identified below have been determined necessary for the student to benefit from [his/her] educational program

and are funded through the Local Education Agency (LEA).

Health Care Needs

() Yes (x) No

Specially Designed/Adaptive PE (description of student needs)

() Yes (x) No

Assistive Technology Needs

(x) Yes () No

- visual schedule
- other

Details: [REDACTED] receives visual cues and/or peps to communicate [REDACTED] feelings. [REDACTED] uses a full day word-picture visual schedule.

Behavioral Needs

(x) Yes () No

Details: Behavior plan is in place as per IEP.

Transportation Needs

(x) Yes () No

- bus attendant
- closest safest stop-ESE bus
- safety vest

Rationale for Request: Door to door - safety awareness.

Communication Needs

(x) Yes () No

- other

Details: Goals addressed in the IEP

Communication is addressed through Goals and Objectives

(x) Yes () No

Supports for School Personnel (special training or materials required or needed by staff)

Training by the [REDACTED] to create visual schedules, incorporate instructional strategies.

40. The "Placement" section of the February 2012 IEP indicated that [REDACTED] would be "with non-disabled students" [REDACTED] of the time (for "electives/specials, hallway passages, lunch, and recess") and "Removed," in a "Separate Class" having only disabled students, the rest [REDACTED] of the time, and it gave the following "reason[s] for [REDACTED] separation from instruction with nondisabled peers":

[REDACTED] curriculum or [REDACTED] approach for most learning activities;

Personal assistance or supervision in activities of [REDACTED], [REDACTED] and self management for [REDACTED] or [REDACTED] of the day;

Continuous supervision to ensure physical safety;

On-going [REDACTED] [REDACTED] for participation in learning activities;

[REDACTED] individualized behavior management plan;

[REDACTED] approaches.

41. The following statement (and nothing more) was included in the "Parent Input" section of the February 2012 IEP:

██████ is using more words. ██████ enjoys swing. ██████ likes to play with ██████ Hooked on Phonics toy. ██████ was caught spelling a word after playing with ██████ toy.

42. On May 8, 2012, approximately three months after the February 2 IEP Meeting, ██████ had a parent/teacher conference with the ██████ to discuss ██████ classroom performance.^{17/} During the conference, ██████ presented the ██████ with a completed Conference Form, in the "Comments" section of which ██████ had written:

██████ continues to show ██████ academically, socially and with independent functioning. ██████ ██████ with small group instruction activities. ██████ ██████ to work on attending and focus skills and needs prompting to complete work daily. ██████ has become more ██████ with ██████ teachers and will interact with a peer if assisted by a teacher. I continue to be ██████ about ██████ late arrival daily as ██████ misses important instructional and learning time. ██████ is becoming more verbal when communicating ██████ wants.

43. About two weeks prior to the end of the 2011-2012 school year, ██████ completed a Standards-Based Progress Report that ██████ gave to the Parents. In the report, ██████ indicated that ██████ had "████████ . . . ██████" the "skill" of "[r]espect[ing] authority" and was "learning [art,

music, physical education, and the following] skills with assistance" and:



- Self-corrects when reading;
- Identifies unknown words by supplying words that make sense (context);
- Identifies unknown words by prefixes, suffixes, base words (structure);
- Identifies unknown words by using letter/sound relationships (phonics);
- Applies spelling skills in written work;
- Listens and interprets information accurately;
- Demonstrates phonemic awareness (rhyming, blending, segmentation and manipulation of sounds).



- Demonstrates self-control;
- Respects individual differences;
- Works cooperatively;
- Uses appropriate behavior in a variety of situations;



- Uses appropriate technology effectively;
 - Demonstrates responsibility for personal belongings;
 - Follows directions;
- Shows effort.

The following were noted as "[a]rea[s] of [REDACTED]" in the report:

[REDACTED]

- Comprehends what is read;
- Reads with fluency and expression;
- Uses the writing process to produce a variety of written work;
- Applies rules for written communication;
- Expresses ideas orally;

[REDACTED]

- Attempts new tasks;
- Shows respect for property and rights of others;

[REDACTED]

- Applies information in making decisions and solving problems;
- Stays on task;
- Completes classroom activities/assignments on time;
- Thinks and works independently;
- Selects appropriate materials for learning tasks;
- Completes and returns homework and assignments on time.

The report further indicated that, notwithstanding these

"[a]rea[s] of [REDACTED]," [REDACTED] had made [REDACTED] [REDACTED] to warrant

██████ being promoted to the ████████ grade for the next school year.

44. By the end of the 2011-2012 school year, ██████ had made at least ████████ toward meeting each and every one of the 17 "Annual Measurable Goals" set forth in the February 2012 IEP, and it was anticipated that ██████ would meet all of these goals by the IEP's expiration date, February 1, 2013. The progress ██████ had made toward meeting Annual Measurable Goals 9 (dealing with "identify[ing] ██████ feelings"), 10 (dealing with "copy[ing] prewriting strokes"), and 13 (dealing with "attend[ing] to the lesson") was particularly impressive. The foregoing was communicated to the Parents through the transmission of an Annual Goals Progress Report, dated June 5, 2012.

45. Notwithstanding what ████████ staff had reported to them, the Parents, based on their own personal observations and perceptions of ██████ outside of school,^{18/} were ████████ with the ████████ ██████ had made at ████████. In their view, ██████ had actually ████████ in the areas social, behavior, communication, and self-care/life skill development^{19/}--areas that were of the ████████ importance to the Parents; and they attributed ██████ ████████ to the school's focusing too much on academics and not enough on teaching ██████ "how to just function in everyday life."

46. When, towards the end of year, ██████ learned from the ██████ of the Parents' ██████ "with the programming that ██████ was providing" and that the Parents were looking for "other avenues" for ██████, ██████ told the ██████ that "another cluster [school]^{20/} would probably have the same programming that ██████ provide[s]" and that "besides a cluster [school], the only thing out there is a center school."

47. The "center schools" to which ██████ was referring are School Board-operated day schools having only disabled students (or "special schools"). Of the schools operated by the School Board, they provide the most restrictive setting.

48. In late May or early June 2012, the Parents went to one of these "center schools," ██████, and were given a tour of the school by the assistant principal, ██████.

49. ██████ has approximately 135 students, all of them disabled "with pretty severe disabilities and in generally more than one area." Some are on the ██████. Only a very few students at the school are verbal, and there is little or no peer interaction. ██████ is not a methodology that is utilized at the school.

50. ██████ told the Parents that there was a process which had to be followed before a student could be reassigned to ██████ from a less restrictive school setting. That process, ██████ explained, involved having the staff at the student's

current school complete and sign a "checklist" showing that [REDACTED] met the criteria for placement in a "center school."

51. The Parents were impressed with what they had seen during their tour. They felt that [REDACTED] "would be a place that would benefit [REDACTED]" and wanted [REDACTED] to be reassigned there.

52. Following the tour, the Parents advised the [REDACTED] staff of their desire to have [REDACTED] reassigned to [REDACTED], and they asked that, to facilitate this reassignment, the staff complete and sign the "checklist" [REDACTED] had spoken to them about. The request was refused because the [REDACTED] staff believed--correctly in the opinion of the undersigned--that [REDACTED] [REDACTED] a suitable candidate for a "center school" placement in that [REDACTED] was making meaningful progress in [REDACTED] current, less restrictive placement at [REDACTED].

53. On July 19, 2012, following an unsuccessful mediation session, the [REDACTED], on behalf of [REDACTED] and the [REDACTED], submitted to the School Board the due process hearing request that is the subject of the instant proceeding, which challenges the School Board's [REDACTED] to move [REDACTED] to [REDACTED].

CONCLUSIONS OF LAW

54. District school boards are required by the "Florida K-20 Education Code"^{21/} to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat.

"Exceptional students," as that term is used in the "Florida K-20 Education Code," are students who have "been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder^{22/}; a speech impairment; a language impairment^{23/}; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3)(a). Pursuant to section 1003.57(1)(d), "[i]n

providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

55. "An exceptional student whose physical motor or neurological deficits result in significant dysfunction in daily living skills, academic learning skills or adaptive social or emotional behaviors is eligible to receive occupational therapy." Fla. Admin. Code R. 6A-6.03025(1).

56. It is undisputed that [REDACTED] is now, and was at all times material to the instant case, an "exceptional student," within the meaning of section 1003.01(3)(a), eligible for exceptional student education as a student with [REDACTED], a student with a [REDACTED], and a student who requires [REDACTED].

57. The "Florida K-20 Education Code's" imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., as most recently amended (IDEA),^{24/} which mandates,

among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."^{25/} 20 U.S.C. § 1412(a)(1); see also Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2488 (2009) ("The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State."); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 268 (3d Cir. 2012) ("The IDEA requires states receiving federal education funding to provide every disabled child with a 'free appropriate public education.'"); and J.P. v. Cnty. Sch. Bd. of Hanover Cnty., 516 F.3d 254, 257 (4th Cir. 2008) ("Under the IDEA, all states receiving federal funds for education must provide disabled schoolchildren with a 'free appropriate public education' ('FAPE')."); cf. State of Fla. v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976) ("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

58. Under the IDEA, a "free appropriate public education" consists of "special education" and, when necessary, "related

services." See 20 U.S.C. § 1401(9) ("The term 'free appropriate public education' means special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d)").

59. "Special education," as that term is used in the IDEA, is defined as:

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1401(29).

60. The term "related services," as used in the IDEA, is defined as:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive

a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A). It has been said that "related services are those 'that enable a disabled child to remain in school during the day [to] provide the student with the meaningful access to education that Congress envisioned.'" Ortega v. Bibb Cnty. Sch. Dist., 397 F.3d 1321, 1324 (11th Cir. 2005). "Related services" include "behavioral interventions and supports." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540, 46569 (Aug. 14, 2006).

61. District school board personnel responsible for the provision of "special education" and "related services" to the district's "exceptional students" must be "appropriately and adequately prepared and trained." 34 C.F.R. § 300.156(a). "[P]araprofessionals and assistants" may be used "to assist in the provision of special education and related services," provided they "are appropriately trained and supervised, in

accordance with State law, regulation, or written policy." 34 C.F.R. § 300.156(b)(2)(iii).

62. To meet its obligation under sections 1001.42(4)(1) and 1003.57 to provide an "appropriate" public education to each of its "exceptional students," a district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry Cnty. Sch. Bd. v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986) (quoting Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188 (1982)); see also § 1003.01(3)(b) ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education.").

63. The instruction and services provided must be "reasonably calculated to enable the child to receive educational benefits." Sch. Bd. of Martin Cnty. v. A.S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999) (quoting Rowley, 458 U.S. at 207). As the Fourth District Court of Appeal further stated in its opinion in A.S., 727 So. 2d at 1074:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful,"

there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997) (citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

see also M.H. v. Nassau Cnty. Sch. Bd., 918 So. 2d 316, 318 n.1 (Fla. 1st DCA 2005) ("A free appropriate public education . . . must be designed to afford the child a meaningful opportunity to learn."); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007) ("This standard, that the local school system must provide the child 'some educational benefit,' Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, has become known as the Rowley 'basic floor of opportunity' standard."^{26/}); Z.W. v. Smith, 210 Fed. Appx. 282, 285 (4th Cir. 2006) ("The IDEA's requirements regarding a FAPE are 'modest.' A school system satisfies its

statutory obligation when it provides sufficient personalized instruction and support services to 'permit the child to benefit educationally.' The IDEA's requirements are this modest, according to the Supreme Court, because Congress intended the IDEA to increase access to public education more so than to 'guarantee any particular level of education once inside.'" (citations omitted); M.M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1101-1102 (11th Cir. 2006) ("The sole issue is whether the two proposed IEPs, which provided for VT instead of AVT, were 'reasonably calculated to enable the child to receive educational benefits,' and, thus, were sufficient to provide C.M. with a FAPE. . . . [U]nder the IDEA there is no entitlement to the 'best' program."); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001) ("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); Doe v. Bd. of Educ. of Tullahoma City Sch., 9 F.3d 455, 459-460 (6th Cir. 1993) ("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. . . . [W]e hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA."); G.D. v. Torrance Unified Sch. Dist., Case No. CV 11-2463-JFW

(JCx), 2012 U.S. Dist. LEXIS 30814 *34 (C.D. Cal. Mar. 8, 2012) ("[T]he IDEA does not require school districts to provide special education students with the best education available, or to provide instruction that maximizes the student's abilities."); and Sch. Bd. of Lee Cnty. v. M.M., Case No. 2:05-cv-5-FtM-29SPC, 2007 U.S. Dist. LEXIS 21582 **9-10 (M.D. Fla. Mar. 27, 2007) ("Under the United States Supreme Court's Rowley standard, a child must be provided 'a basic floor of opportunity' that affords 'some' educational benefit, but the outcome need not maximize the child's education.").

64. "Passing grades and advancement from year to year [and other indicators of nontrivial academic progress] are factors that indicate a child is receiving meaningful educational benefit." Houston Indep. Sch. Dist. v. VP, 582 F.3d 576, 590 (5th Cir. 2009); see also K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 810 (8th Cir. 2011) ("K.E.'s academic progress clearly shows that she did receive that required level of educational benefit [to satisfy the Rowley standard]."). A "child who is not receiving passing marks and reasonably advancing from grade to grade [however] is not necessarily being deprived of a 'free appropriate public education.'" In re Conklin, 946 F.2d 306, 313 (4th Cir. 1991).^{27/} Neither is a child whose educational progress is slow or uneven. See Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 350 (5th Cir. 2000) ("[I]t is not

necessary for Caius to improve in every area to obtain an educational benefit from his IEP."); and K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046, 1057 (N.D. Cal. 2009) ("Slow progress, however, is not necessarily indicative that plaintiff did not receive a FAPE, especially in light of the substantial evidence in the record concerning plaintiff's autism and cognitive impairments.").

65. "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Indep. Sch. Dist. No. 283, St. Louis Park, Minn. v. S.D. By and Through J.D., 948 F. Supp. 860, 885 (D. Minn. 1995), aff'd, 88 F.3d 556 (8th Cir. 1996); see also Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 2012 U.S. App. LEXIS 16293 **19, 21 (5th Cir. 2012) ("Nowhere in Rowley is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability. . . . [O]verall educational benefit, not solely disability remediation, is IDEA's statutory goal."); L.F. v. Houston Indep. Sch. Dist., Case No. H-08-2415 (Civil), 2009 U.S. Dist. LEXIS 86065 *51 (S.D. Tex. Sept. 21, 2009) ("A school district is not required to 'cure' a disability"); B.F. v. Fulton Cnty. Sch. Dist., Case No. 1:04-CV-3379-JOF, 2008 U.S. Dist. LEXIS 76714 *86 (N.D. Ga. Sept. 9,

2008) ("A school district is not required to cure a student of his ailments. The school is required to work with those conditions so that a student receives a Free Appropriate Public Education."); D.B. v. Houston Indep. Sch. Dist., Case No. H-06-354, 2007 U.S. Dist. LEXIS 73911 *31 (S.D. Tex. Sept. 29, 2007) ("Nor is a school district required to 'cure' a disability."); and Coale v. State Dep't of Educ., 162 F. Supp. 2d 316, 331 n.17 (D. Del. 2001) (IDEA does not "require[] the State to 'cure' Alex's disability"). Moreover, "not every need of a particular child is the legal responsibility of the [d]istrict [school] board." San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office, 482 F. Supp. 2d 1152, 1161 (N.D. Cal. 2007); see also Nassau Cnty. Sch. Bd., 918 So. 2d at 318 n.1 ("A free appropriate public education 'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child.'"); and Coale, 162 F. Supp. 2d at 331 n.17 (IDEA does not "require[] the State . . . to produce 'meaningful' progress in each and every weakness demonstrated by a student.").

66. District school boards may take cost into consideration in determining what instruction and services to provide an "exceptional student," but only "when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no

choice." Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984); see also J.P. ex rel. Popson v. West Clark Cmty. Sch., 230 F. Supp. 2d 910, 945 (S.D. Ind. 2002) ("[T]aking financial or staffing concerns into account when formulating an IEP or when providing services is not a violation of the IDEA. A school district is not obligated by law to provide every possible benefit that money can buy. A school district need only provide an 'appropriate' education at public expense. Therefore, it may deny requested services or programs that are too costly, so long as the requested services or programs are merely supplemental."); and Matta By and Through Matta v. Bd. of Educ.-Indian Hill Exempted Vill. Sch., 731 F. Supp. 253, 255 (S.D. Ohio 1990) ("When devising an appropriate program for individual students, cost concerns are legitimate. . . . However, costs may be taken into consideration only when choosing among several appropriate education options. . . . When only one alternative for an appropriate education is available, the state must follow that alternative irrespective of the cost.").

67. For each student found eligible for special education and related services, there must be developed, no less frequently than on an annual basis, an IEP addressing the unique needs of that student. See Forest Grove Sch. Dist., 129 S. Ct. at 2489 n.1 ("An IEP is an education plan tailored to a child's

unique needs that is designed by the school district in consultation with the child's parents after the child is identified as eligible for special-education services."); and R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 941 (9th Cir. 2007) ("Once the child qualifies for special education services, 'the district must then develop [a]n IEP which addresses the unique needs of the child[.]'"). Its development is the responsibility of "an IEP team that must include the parents of the [student], the [student's] regular and special education teachers, and a knowledgeable representative of the [d]istrict [school board]." Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 461 (8th Cir. 2010); see also K.M., 2011 U.S. Dist. LEXIS 71850 at **17-18 ("The core of the IDEA is the cooperative process that it establishes between parents and schools That cooperative process in providing students with a FAPE is achieved through the development of an individualized education program ('IEP') for each student with a disability ").

68. The IEP has been called "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988); see also D.B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012) ("The 'primary vehicle' for delivery of a FAPE is an IEP."). An IEP provides the "the road map for a disabled child's education." M.C. ex rel. J.C. v. Cent'l Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996).

"An appropriate IEP must contain statements concerning a disabled child's [present] 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." C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 65 (3d Cir. 2010).

69. "[I]n developing an IEP for 'a child whose behavior impedes the child's learning [or that of others], [the IEP team] must consider 'the use of positive behavioral interventions and supports, and other strategies, to address that behavior.'" A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 (2d Cir. 2009) (quoting 20 U.S.C. § 1414(d)(3)(B)(i)); see also 34 C.F.R. § 300.324(a)(2)(i) (same); and Fla. Admin. Code R. 6A-6.03028(3)(g)5. (same). However, the team need do no more than "consider" the use of such "strategies." What, if any, such "strategies" should be used is a matter within its sound discretion. See Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 425 (8th Cir.2010) ("If a behavior impedes a child's learning, the IEP team need only 'consider, when appropriate, strategies, including positive behavioral interventions . . . , and supports to address that behavior[.]'"); Williams v. Milwaukee Pub. Sch., Case No. 10-CV-1113-JPS, 2012 U.S. Dist. LEXIS 50854 *16 (E.D. Wis. Apr. 11, 2012) (citing Alex R. v. Forrestville Valley Cmty. Unit Sch.

Dist. # 221, 375 F.3d 603, 615 (7th Cir. 2004)) ("[T]he IDEA does not specify any substantive requirements for behavioral intervention plans. In the absence of any statutory guidance, the Seventh Circuit has declined to manufacture substantive criteria. Instead, in Alex R., the court found the BIP at issue to be substantively adequate, reasoning that it could not fall short of substantive criteria that did not exist. Likewise, this court will not create substantive requirements when neither state nor federal law provide any guidance on such matters."); J.D. v. Crown Point Sch. Corp., Case No. 2:10-CV-508-TLS, 2012 U.S. Dist. LEXIS 24613 *66 (N.D. Ind. Feb. 24, 2012) ("The mere absence of a BIP is not evidence that the CCC did not 'consider' strategies to address K.D.'s behavior, which is all the statute requires. The IDEA does not set forth any substantive requirements for a BIP."); and Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46683 ("Whether a child needs positive behavioral interventions and supports is an individual determination that is made by each child's IEP Team.").

70. Problem behaviors at home that do not carry over into the school setting or otherwise interfere with the child's receiving meaningful educational benefit from his or her schooling need not be addressed by the IEP team. See Luke P.,

540 F.3d at 1150 ("The school district responds that, as a matter of law, generalization across settings is not required by IDEA so long as Luke can be said to be making some progress in school We are constrained to agree with the school district"); L.G., ex rel. B.G. v. Sch. Bd. of Palm Beach Cnty., 255 Fed. Appx. 360, 366 (11th Cir. 2007) ("Although this behavior is alarming, we have said that a free appropriate public education consists of meaningful gains inside the classroom, and that the IDEA does not require that the student be able to generalize behaviors from the classroom to the home setting. Therefore, this evidence of B.G.'s behavior at home does not establish that there is a genuine issue of material fact about whether he had been provided a free appropriate public education at Indian Ridge.") (citation omitted); Devine, 249 F.3d at 1293 ("[G]eneralization across settings is not required to show an educational benefit."); JSK v. Hendry Cnty. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991) ("We in fact do define 'appropriate education' as making measurable and adequate gains in the classroom. If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required by EAHCA or Rowley."); R.C. v. York Sch. Dep't, Case No. 07-177-P-S (Civil), 2008 U.S. Dist. LEXIS 75538 *87 n.32 (D. Me. Sept. 25, 2008) ("[W]hile courts have not hesitated to hold that an IEP must address out-of-

school behaviors that impact a child's ability to progress at school, they have balked at mandating that an IEP address a child's ability to generalize lessons learned at school outside of the school context."); San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office, 482 F. Supp. 2d 1152, 1161 (N.D. Cal. 2007) ("[B]ehavioral and emotional goals are properly addressed through an IEP only to the extent that those problems affect the student's educational progress."); and Brandon H. v. Kennewick Sch. Dist. No. 17, Case No. CT-98-5029-EFS, 2001 U.S. Dist. LEXIS 3606 *24 (E.D. Wash. Feb. 28, 2001) ("[B]ehavior issues that occur in the home that do not affect the student's educational opportunities need not be addressed.").

71. Although an IEP need not identify a specific school location, it must specify the "general environment" or setting in which the services described in the IEP will be provided to the student (which is referred to as the student's "educational placement"^{28/}). See T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412, 419-420 (2d Cir. 2009); see also Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011) (IEP must contain "an explanation of the extent to which the student will not be in the regular classroom."). A district school board must have a "continuum of alternative [educational] placements" available for its students, including (from least restrictive to most restrictive) "instruction in regular classes, special classes,

special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1). On the continuum, placement in a "special class" at a school which also has nondisabled students (such as Tradewinds) is less restrictive than placement in a class at a "special school," where there are no nondisabled students (such as Bright Horizons). See Comb v. Benji's Special Educ. Acad., Inc., 745 F. Supp. 2d 755, 769 (S.D. Tex. 2010) ("The student had been transferred from a school in which he was allowed to interact with non-special education students (at lunch, assemblies and during physical education) to a more restrictive school allowing no interaction with non-special education students . . .").

72. Educational placement decisions must be made "on an individual case-by-case basis depending on each child's unique educational needs and circumstances," (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46587), and be in accordance with the following "mainstreaming" or "LRE" principles:

- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational

environment^[29/] occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2); see also Fla. Admin. Code R. 6A-6.03028(3)(i) ("Placement determinations shall be made in accordance with the least restrictive environment provisions of the IDEA). A child must be placed in the least restrictive environment appropriate to his or her needs, regardless of whether it is the placement preferred by the parents.^{30/} See Ruffin v. Houston Indep. Sch. Dist., 459 Fed. Appx. 358, 362 (5th Cir. 2012) ("The IDEA requires students to be placed in the least restrictive environment."); Ellenberg v. N.M. Military Inst., 478 F.3d 1262, 1278 (10th Cir. 2007) ("Parents may challenge a state's proposed IEP, but courts must defer to the state's proposal if that plan is reasonably calculated to provide the child with a FAPE in the least restrictive environment, even if a parent believes a different placement would maximize a child's educational potential."); J.N. v. Dist. of Columbia, 677 F. Supp. 2d 314, 324 n.1 (D.D.C. 2010) ("[E]ven though the IDEA guarantees each child a FAPE, it does not guarantee an 'education that is designed according to a parent's desires.' Because High Road is not the least restrictive environment, the hearing officer's finding that J.N.'s placement at High Road is inappropriate will be upheld

despite [the mother's] desire to have J.N. placed at High Road."); and Letter to Gantwerk, 41 IDELR 66 (OSEP^[31/] Nov. 4, 2003) ("Public agencies can only offer parents choice about the type of placement consistent with the LRE requirements.").

73. "The [IDEA's] preference for mainstreaming does not require that a [district school board] reject intermediate degrees of mainstreaming when such a placement is otherwise justified by a [disabled] child's educational needs." Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 296 n.7 (7th Cir. 1988); see also J.H. v. Fort Bend Indep. Sch. Dist., Case No. 11-20718, 2012 U.S. App. LEXIS 15481 *11 (5th Cir. July 26, 2012) ("Schools are required to take incremental steps where appropriate in placing disabled students in general education classes. Incremental steps may include creating a program that involves both mainstream and special education courses."); Hartmann, 118 F.3d at 1005 ("Loudoun County properly proposed to place Mark in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with nonhandicapped students to the greatest extent possible."); and Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989) ("[T]he school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for

nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops.").

74. In the end, to comply with both the FAPE and LRE requirements mandated by the IDEA in its selection of a child's educational placement (as part of the IEP development process), the IEP Team must "'place the child in the least restrictive environment . . . that will provide [the child] with a meaningful educational benefit.'" Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 799 (E.D. Pa. 2011) (quoting T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000)); see also Williams, 2012 U.S. Dist. LEXIS 50854 at *23 ("[I]f the student's education at the regular (or less restrictive) placement was satisfactory, the school district would be in violation of the IDEA by removing her and placing her in a more restrictive placement.").

75. The parents of the child must be provided a meaningful opportunity to participate in the IEP development process. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 530 (2007) ("The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program."); and Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486

F.3d 267, 274 (7th Cir. 2007) ("Throughout, the statute assures the parents an active and meaningful role in the development or modification of their child's IEP."). This requires, as a threshold matter, that they be provided adequate advance notice of the meeting at which the IEP is developed. See 34 C.F.R. § 300.322; and Fla. Admin. Code R. 6A-6.03028(3)(b).

76. "The [parents'] right to provide meaningful input [in the development of the IEP, however] is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003); see also Lessard, 518 F.3d at 30 ("[P]arents cannot unilaterally dictate the content of their child's IEP."); Bradley v. Ark. Dep't of Educ., 443 F.3d 965, 975 (8th Cir. 2006) ("[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit."); AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004) ("[T]he right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions."); J.C. v. New Fairfield Bd. of Educ., Case No. 3:08-cv-1591, 2011 U.S. Dist. LEXIS 34591 *48 (D. Conn. Mar. 31, 2011) ("[T]he Parents may attend and participate collaboratively, but they do not have the power to veto or dictate the terms of an IEP."); Fitzgerald

v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 551 (E.D. Va. 2008) ("While this focus on parental involvement is understandable based on the IDEA's goals, there is a difference between parental involvement and parental consent. Congress certainly intended parents to be involved in the decisions regarding the education of their disabled child; nevertheless, this participation does not rise to the level of parental consent or a parental veto power absent an explicit statement by Congress."); B.B. v. Haw. Dep't of Educ., 483 F. Supp. 2d 1042, 1050-1051 (D. Haw. 2006) ("[T]he IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. Rather, the IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions.") (citation omitted); and A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 (D. Conn. 2006) ("Both of the IEP[]s were legally sufficient, despite the fact that the parents did not agree with the content. Nothing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that parents have an opportunity to participate in the drafting process."). "The mere fact that the [p]arents were unsuccessful [at the meeting] in securing all of their

wishes . . . does not equate [to] a lack of meaningful opportunity for parental involvement." J.C., 2011 U.S. Dist. LEXIS 34591 at *49; see also L.G. v. Fair Lawn Bd. of Educ., Case No. 2:09-cv-6456 (DMC), 2011 U.S. Dist. LEXIS 69232 *15 (D. N.J. June 27, 2011), aff'd, 2012 U.S. App. LEXIS 13227 (3d Cir. June 28, 2012) ("If the standard for measuring meaningful parental participation was that the parents always prevailed, there would be no process at all. The standard must be based not on the outcome, but on the extent to which the parents were allowed to advocate for their child.").

77. "[T]he IDEA does not require the [district school board] and the parents [in developing an IEP] to reach a consensus regarding the education . . . of a disabled child. Instead, if a consensus cannot be reached, the [district school board] must make a determination, and the parents' only recourse is to appeal that determination." Fitzgerald, 556 F. Supp. 2d at 558; see also J.T. v. Dep't of Educ., Case No. 11-00612 LEK-BMK (Civil), 2012 U.S. Dist. LEXIS 76115 *28 (D. Haw. May 31, 2012) ("[I]n the absence of agreement between IEP team members, the agency has a duty to formulate the IEP to the best of its ability.").

78. "IEPs . . . for students who transfer from outside Florida" are governed by 20 U.S.C. § 1414(d)(2)(C)(i)(II), 34

C.F.R. § 300.323(f), and Florida Administrative Code Rule 6A-6.0334(2), which provide as follows:

20 U.S.C. § 1414(d)(2)(C)(i)(II)

Transfer outside State. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

34 C.F.R. § 300.323(f)

IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency--

(1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

Florida Administrative Code Rule 6A-6.0334(2)

IEPs . . . for students who transfer from outside Florida. If an exceptional education student who had an IEP . . . that was in effect in a previous school district in another State transfers to a Florida school district and enrolls in a new school within the same school year, the new Florida school district (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP . . . from the previous school district), until the new Florida school district:

(a) Conducts an initial evaluation pursuant to subsections 6A-6.0331(4) and (5), F.A.C., (if determined to be necessary by the new Florida school district); and

(b) Develops, adopts, and implements a new IEP . . . , if appropriate, that meets the applicable requirements of Rules 6A-6.03011 through 6A-6.0361, F.A.C.

(c) The new school district is not required to obtain parental consent for the initial provision of services for transferring exceptional students determined eligible for services in Florida under this rule.

"[W]hen used with respect to a child who transfers to a new public agency from a previous public agency in the same State (or from another State), 'comparable' services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP from the previous public agency, as determined by the child's newly-designated IEP Team in the new public agency." Assistance to States for the Education of

Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46681; see also Sterling A. v. Washoe Cnty. Sch. Dist., Case No. 3:07-CV-00245-LRH-RJJ, 2008 U.S. Dist. LEXIS 94222 *14 (D. Nev. Nov. 10, 2008) ("[T]his court finds that 'comparable' services within the meaning of 20 U.S.C. § 1414(d)(2)(C)(i)(II) means that, in the interim IEP, WCSD needed to provide services that were 'similar' or 'equivalent' to those provided for in the California IEP. Thus, WCSD was not obligated to adopt the California IEP in its exact form. All that the IDEA requires is that the interim IEP be similar or equivalent to the California IEP.").

79. After the student's IEP has been developed, the specific school or other physical location where the IEP is to be implemented must be chosen "based on the . . . IEP." 34 C.F.R. § 300.116(b)(2); and Fla. Admin. Code R. 6A-6.03028(3)(i)4.b.(II); see also Brad K. v. Bd. of Educ. of the City of Chicago, 787 F. Supp. 2d 734, 740 (N.D. Ill. 2011) ("[P]lacing a student at a location where the IEP cannot be implemented would be a failure to provide adequate educational benefits."); and O.O. v. Dist. of Columbia, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) ("Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP."). The site selected should

be "as close as possible to the student's home," and, "[u]nless the IEP . . . requires some other arrangement," should be the "school that [the student] would attend if nondisabled." 34 C.F.R. § 300.116(b)(2)-(3) and (c); and Fla. Admin. Code R. 6A-6.03028(3)(i)4.b.(III) and c.

80. While district school boards have "some flexibility in implementing IEPs," they are nonetheless "accountable for material failures and for providing the disabled child a meaningful educational benefit." Bobby R., 200 F.3d at 349; see also Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."). Deviations from an IEP not resulting in a deprivation of meaningful educational benefit, however, are not actionable.^{32/} See Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011) ("[T]he failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education."); and Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006) ("To prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school failed to implement substantial or significant provisions

of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit.").

81. Under the IDEA, parents with "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f). In Florida, by statute, a DOAH administrative law judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(1)(b). During the pendency of this "impartial due process hearing," the child must remain in his or her current educational placement, unless the parents and the district school board agree to another placement. See 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518; and Fla. Admin. Code R. 6A-6.03311(9)(y).

82. Absent the district school board's consent, the administrative law judge may only consider those issues raised in the parent's due process complaint. See 20 U.S.C. § 1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing

that were not raised in the notice filed under subsection (b) (7), unless the other party agrees otherwise."); and 34 C.F.R. § 300.511(d) ("The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise."); see also R.E. v. N.Y.C. Dep't of Educ., Case No. 11-1266-cv, 2012 U.S. App. LEXIS 19816 **43-44 n.4 (2d Cir. Sept. 20, 2012) ("The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit them to add a new claim after the resolution period has expired would allow them to sandbag the school district. Accordingly, substantive amendments to the parents' claims are not permitted."); Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 555 (N.D. Ohio 2009) ("Under the IDEA, the party filing the due process complaint cannot raise issues outside of the complaint unless the other party agrees otherwise."); and Haw. Dep't of Educ. v. C.B., Case No. 11-00576 SOM/RLP, 2012 U.S. Dist. LEXIS 60748 *31 (D. Haw. May 1, 2012) ("[T]he AHO erred by considering the substance of C.B.'s paraprofessional services when C.B. complained about only the frequency of those services in his impartial due process hearing complaint."). In the instant case, the School Board has not consented to the undersigned's

consideration of any issue outside the scope of the Parents' Complaint.

83. At the "impartial due process hearing" held on their complaint, the complaining parents bear the burden of proving their entitlement to the relief they are seeking. See Schaffer v. Weast, 546 U.S. 49, 62 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."); Luke P., 540 F.3d at 1148 ("The burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts, here Luke's parents."); Ross, 486 F.3d at 270-271 ("[T]he burden of proof in a hearing challenging an educational placement decision is on the party seeking relief."); Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 594 (7th Cir. 2006) ("The Supreme Court recently has clarified that, under the IDEA, the student and the student's parents bear the burden of proof in an administrative hearing challenging a school district's IEP."); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 392 (3d Cir. 2006) ("Appellants would also have us limit the holding in Schaffer to the FAPE aspect of the analysis. Although, to be sure, the facts in Schaffer implicated only the FAPE analysis, the Supreme Court made it quite clear that its holding applied to the appropriateness of the IEP as a whole."); and Sebastian M. v. King Philip Reg'l Sch. Dist., Case No. 09-10565-JLT, 2011 U.S. Dist. LEXIS 35501

*32 (D. Mass. Mar. 31, 2011) ("Sebastian's parents had the burden of proof to demonstrate that BICO was an inappropriate placement for Sebastian."). In the instant case, it is the Parents who are seeking relief, and they therefore bear the burden of proving their entitlement to the relief they are seeking.

84. The appropriateness and adequacy of a challenged IEP must be judged by the administrative law judge presiding at the "impartial due process hearing," not in hindsight, but prospectively, taking into consideration the circumstances as they existed at the time the IEP was developed. See M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011) ("[T]he appropriateness of an IEP 'can only be judged by examining what was objectively reasonable at the time' the case conference committee created the IEP."); K.E., 647 F.3d at 808 ("[W]hen the District developed K.E.'s IEPs it had received contradictory information about whether K.E. suffered from bipolar disorder. The District also did not yet have the benefit of Dr. Unal's testimony from the administrative hearing concerning the severity and complexity of K.E.'s mental illness and the psychological and social work services that might be necessary for the District to monitor and address it. For those reasons, while we may agree with K.E. that additional services and adaptations may well be warranted now in light of the information that Dr. Unal has provided, it would be improper for

us to judge K.E.'s IEPs in hindsight."); B.S. v. Placentia-Yorba Linda Unified Sch. Dist., 306 Fed. Appx. 397, 399 (9th Cir. 2009) ("An IEP cannot be judged in hindsight; rather, the court looks to the IEP's goals and goal achieving methods at the time the plan was implemented and ask[s] whether these methods were reasonably calculated to confer a meaningful benefit on the student."); Luke P., 540 F.3d at 1149 ("[B]ecause the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, our precedent instructs that 'the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.'"); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995) ("[A]ppropriateness [of an IEP] is judged prospectively. . . ."); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) ("[A]ctions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); L.R. v. Bellflower Unified Sch. Dist., Case No. CV 11-06396 RGK (VBKx), 2012 U.S. Dist. LEXIS 89999 *5 (C.D. Cal. June 27, 2012) ("An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged

in hindsight. Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed.") (citation omitted); and J.R. ex rel. S.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 (S.D. N.Y. 2004) ("[W]e turn our attention to the SRO's decision upholding the IHO's determination that the IEP at issue is 'reasonably calculated to enable [S.R.] to receive educational benefits.' This determination is necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of S.R.'s subsequent progress at Eagle Hill, but rather consider the propriety of the IEP with respect to the likelihood that it would benefit S.R. at the time it was devised.").^{33/}

85. Accordingly, to mount a successful challenge to an IEP, a parent must do more than show that the IEP's goals were not ultimately achieved or that it turned out that the IEP did not yield the desired results. See, e.g., S.H. v. Plano Indep. Sch. Dist., Case No. 11-40518, 2012 U.S. App. LEXIS 17369 *21 (5th Cir. Aug. 17, 2012) ("[A]lthough positive educational outcomes can signal that an IEP is appropriate under the IDEA, the appropriateness of S.H.'s IEP ultimately turns on whether it was reasonably calculated to provide an educational benefit and does not hinge on the showing of an actual positive outcome."); Scott P., 62 F.3d at 530 ("[A]ny lack of progress under a

particular IEP, assuming arguendo that there was no progress, does not render that IEP inappropriate."); Doe v. Defendant 1, 898 F.2d 1186, 1191 (6th Cir. 1990) ("[W]e cannot conclude that appellant's poor grades indicate the inadequacies of the IEP."); Tyler V. v. St. Vrain Valley Sch. Dist. No. RE-1J, Case No. 07-cv-01094-PAB-KLM, 2011 U.S. Dist. LEXIS 34449 *15 (D. Colo. Mar. 21, 2011) ("The Parents, by failing to address anything other than the ultimate lack of progress, have not met their burden of showing that the IEP was not reasonably calculated to provide their child with some educational benefit."); James D. v. Bd. of Educ. Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 (N.D. Ill. 2009) ("[A] student's failure to master IEP goals does not compel the conclusion that the IEP was not reasonably calculated to provide a FAPE, particularly where the student made progress towards achieving those goals."); and Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, Case No. 06-2200, 2007 U.S. Dist. LEXIS 62478 **8-9 (C.D. Ill. Aug. 10, 2007) ("[S]imply because Schroll never achieved an IEP goal does not make the IEP inappropriate and does not constitute a denial of a FAPE. Likewise, it is irrelevant whether Schroll's IEP conferred a meaningful educational benefit on him as long as the IEP was reasonably calculated to do so.") (citation omitted).

86. "Although a [district school board] can meet its statutory obligation even though its IEP proves ultimately

unsuccessful, the fact that the program is unsuccessful is strong evidence that the IEP should be modified." Bd. of Educ. of the Cnty. of Kanawh v. Michael M., 95 F. Supp. 2d 600, 609 n.8 (S.D. W.Va. 2000); see also Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 (11th Cir. 2003) ("An IEP must be amended if its objectives are not met"). An IEP, however, must be given a reasonable opportunity to succeed before it can be deemed to be a failure. See Doe, 898 F.2d at 1191 ("Although willing to implement the IEP, the teachers were 'frustrated in this endeavor by the frequent absences of the child and by the lack of coordination due to the restrictions placed by the parents on communicating with the tutor.' In short, the IEP was never given a chance to succeed. . . . We agree with the ALJ and the District Court that appellant's IEP was calculated to allow him to receive educational benefit from the instruction."); and J.K. v. Fayette County Bd. of Educ., Case No. 04-158-JBC (Civil), 2006 U.S. Dist. LEXIS 3538 *11 (E.D. Ky. Jan. 30, 2006) ("[A]n IEP must be given a chance to succeed before it can be deemed inappropriate."); see also Independent Sch. Dist. No. 432 v. J.H. by & Through R.H., 8 F. Supp. 2d 1166, 1175 (D. Minn. 1998) ("A parent who seeks educational services for a child must give the School District an opportunity to provide those services before administrative or judicial relief may be sought or provided."). If the IEP is

succeeding in enabling the student to make meaningful progress, it need not be revised. See Hamilton Southeastern Sch., 668 F.3d at 863 ("Because the record supports the conclusion that M.B. was making progress toward his IEP goals as of the May committee meeting, it was reasonable for the administrative tribunals to conclude both that M.B. did not require double-session kindergarten, and that the proposed IEP was reasonably calculated to confer an educational benefit on M.B."); and P.K.W.G. v. Indep. Sch. Dist. No. 11, Case No. 07-4023 ADM/AJB, 2008 U.S. Dist. LEXIS 46046 *31 (D. Minn. June 11, 2008) ("Given the success the Student experienced in the first quarter, and the fact that the 2005-2006 IEP and BIP addressed the problematic behaviors that occurred in the last three quarters, it was entirely reasonable for the staff to work within the existing IEP. The District did not violate IDEA by failing to modify the IEP during the 2005-2006 school year.").

87. In making a determination as to the appropriateness of a student's educational program, the administrative law judge should give deference to the reasonable opinions of those witnesses who have expertise in the field of education. See MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 533 (4th Cir. 2002) ("[A]dministrative officers [conducting due process hearings under the IDEA] . . . must give appropriate deference to the decisions of professional educators. As we

have repeatedly recognized, 'the task of education belongs to the educators who have been charged by society with that critical task'); Sch. Dist. of Wisc. Dells v. Z.S. ex rel. Littlegeorge, 295 F.3d 671, 676-77 (7th Cir. 2002) ("Administrative law judges . . . are not required to accept supinely whatever school officials testify to. But they have to give that testimony due weight. . . . The administrative law judge substituted his own opinion for that of the school administrators. He thought them mistaken, and they may have been; but they were not unreasonable."); Devine, 249 F.3d at 1292 ("[G]reat deference must be paid to the educators who develop the IEP."); Bd. of Educ. of the City of Chicago, 787 F. Supp. 2d at 738 ("Like the IHO, the court is to give deference to the opinions of professional educators as regards educational issues. The same deference does not necessarily apply to psychologists and other non-educators involved in developing the IEP.") (citations omitted); Wagner v. Bd. of Educ. of Montgomery Cnty., 340 F. Supp. 2d 603, 611 (D. Md. 2004) ("[T]his court owes generous deference (as did the ALJ) to the educators on Daniel's IEP Team."); and Johnson v. Metro Davidson Sch. Sys., 108 F. Supp. 2d 906, 915 (M.D. Tenn. 2000) ("[I]f the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only

be that the ALJ presiding over such a [due process] hearing must give due weight to such policy decisions."). If the expert's opinion testimony is unrebutted, it may not be rejected by the administrative law judge unless there is a reasonable explanation given for doing so. See Heritage Health Care Ctr. v. Ag. for Health Care Admin., 746 So. 2d 573, 573-74 (Fla. 1st DCA 1999); Weiderhold v. Weiderhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997); Fuentes v. Caribbean Elec., 596 So. 2d 1228, 1229 (Fla. 1st DCA 1992); and Brooks v. St. Tammany Sch. Bd., 510 So. 2d 51, 55 (La. App. 1987). Where there are competing and conflicting expert opinions, it is within the administrative law judge's sound discretion to choose which to credit. See Sudbury Pub. Sch. v. Mass. Dep't of Elem. & Secondary Educ., 762 F. Supp. 2d 254, 262 (D. Mass. 2010) ("Credibility determinations are the province of the factfinder, in this case the Hearing Officer.").

88. It is not the function of the administrative law judge, in passing upon the appropriateness of an educational program, to determine the "best methodology for educating [the] child. That is precisely the kind of issue which is properly resolved by local educators and experts" and is not subject to review in a due process hearing. O'Toole By and Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); see also B.D. v. Puyallup Sch. Dist., 456

Fed. Appx. 644, 645 (9th Cir. 2011) ("The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit."); M.M., 437 F.3d at 1102 (quoting Lachman, 852 F.2d at 297) ("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."); Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1038 (8th Cir. 2000) ("[A]utism experts have a variety of opinions about which type of program is best. Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible."); Tucker By and Through Tucker v. Calloway Cnty. Bd. of Educ., 136 F.3d 495, 506 (6th Cir. 1998) ("Case law is clear that the Tuckers are not entitled to dictate educational methodology or to compel a school district to supply a specific program for their disabled child."); S.M. v. Haw. Dep't of Educ., 808 F. Supp. 2d 1269, 1279 n.16 (D. Haw. 2011) (citing R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1122 (9th Cir. 2011)) ("R.P. underscores the discretion that educators have to choose

methodologies. While it involves an IEP that specified the use of ABA, it does not require that all IEPs developed for children with autism include ABA."); K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 813-814 (E.D. Pa. 2011) ("[W]hile parents play a role in the development of an IEP, parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student."); Rocklin Unified Sch. Dist., 2008 U.S. Dist. LEXIS 26745 at **6-7 ("[A]s long as a district offers an appropriate educational program, the choice regarding the methodology used to implement the IEP is left to the district's discretion."); S.A. v. Riverside Delanco Sch. Dist. Bd. of Educ., Case No. 04-4710 (RBK) (Civil), 2006 U.S. Dist. LEXIS 22302 *11 (D. N.J. Mar. 30, 2006) ("Because the IDEA does not obligate schools to provide 'the optimal level of services,' parents may not demand a program founded on a 'competing educational theory,' such as ABA, where the IEP already provides for education that will meaningfully benefit the child.") (citation omitted); and Leticia H. v. Ysleta Indep. Sch. Dist., 502 F. Supp. 2d 512, 519 (W.D. Tex. 2006) ("Once a court concludes that a student's IEP is reasonably calculated to provide him with a FAPE, the court must leave 'questions of methodology' to the state.").

89. "An [administrative law judge's] determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a procedural violation, an [administrative law judge] may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit. This [does not, however] preclude an [administrative law judge] from ordering a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011 through 6A-6.0361, F.A.C." Fla. Admin. Code R. 6A-6.03311(9)(v)4.; see also 34 C.F.R. § 300.

90. In the instant case, in their Complaint, the Parents have raised a substantive challenge to the School Board's refusal to grant their request, made at or around the end of the 2011-2012 school year, approximately eight months before the February 2012 IEP was due to expire, to change [REDACTED] educational placement from a "special [REDACTED] class" in a regular school, as provided for in the February 2012 IEP, to a "special school" setting--specifically, [REDACTED]. While the Parents are unquestionably sincere in their belief that [REDACTED] [REDACTED] is "where [their child] needs to be" (as they stated in their Complaint), the proof they submitted at the due process

hearing--which consisted entirely of their own non-expert testimony--failed to show (as was their burden) that the School Board, by refusing to make the change in placement they had requested, deprived ■ of a free appropriate public education in the least restrictive environment. Not only did the Parents' evidentiary showing fall short of proving the School Board guilty of such a deprivation, the School Board, although it was not its burden to do so, affirmatively established--primarily through the presentation of credible, unrebutted educator testimony on the matter, to which the undersigned has deferred--that the "special education" and "related services" it was providing ■ (through the implementation of the February 2012 IEP) in the less restrictive setting of a "special [■ ■ ■ ■ ■] class" in a regular school^{34/} were reasonably calculated to produce, and in fact had already produced by the end of the 2011-2012 school year, some meaningful educational benefit, thereby demonstrating that, not only was it legally unnecessary to make the change in placement requested by the Parents, doing so would have been in derogation of the least restrictive environment requirement of the IDEA and Florida law.

CONCLUSION

91. In view of the foregoing, the Parents' Complaint is found to be [REDACTED] merit. Accordingly, [REDACTED] can be awarded to them in this proceeding.

DONE AND ORDERED this 18th day of October, 2012, in Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 2012.

ENDNOTES

^{1/} Unless otherwise noted, all references in this Final Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

^{2/} On September 19, 2012, following the due process hearing, [REDACTED] filed an Amended Unopposed Motion to Withdraw (Motion), seeking leave to withdraw as counsel of record for Petitioner in this matter on the ground that "irreconcilable differences ha[d] developed since the Due Process hearing that prevent[ed] [him] from continuing representation on this case." In the motion, [REDACTED] stated that the "basis of this Motion to Withdraw ha[d] been discussed with the parents for the [Petitioner]" and "they [had] agree[d] with undersigned['s] withdrawing from this matter." By Order issued September 20, 2012, the motion was

granted. Since that date, Petitioner has been without legal representation and has had pro se parental representation.

3/ It was stated in the New Jersey IEP that the October 25, 2011, IEP meeting "was held at the parent's request to discuss

██████ need for an assistive technology device to improve ██████ communication."

4/ The school year ended the first week of June 2012.

5/ Other adults who regularly spent time in ██████ classroom were the ██████ and ██████ therapists who serviced ██████ and other students in the class.

6/ ██████ and ██████ classmates also had the opportunity to interact with nondisabled students in ██████ classroom. Every week, two or three nondisabled ██████ and ██████ graders at the school selected by ██████ came into ██████ classroom to play and socialize with ██████ students.

7/ Through ██████ performance at ██████, ██████ has demonstrated that ██████ is capable of learning academic skills.

8/ The ██████ drove ██████ to ██████ in the morning. In the vehicle, along with the Father and ██████, were ██████ (who is also ██████) and ██████ younger brother. The ██████ had a difficult time getting all three children ready to leave home in time for ██████ to arrive at school before ██████ class began.

9/ Routine and consistency make learning easier for all children, especially those with ██████. ██████ tardy morning arrivals to ██████ classroom upset ██████ daily routine and schedule.

10/ During one such "██████" ██████ had on January 4, 2012, after the winter break, ██████ accidentally hit ██████ with ██████ head and split ██████ lip open, an injury for which ██████ seek medical treatment.

11/ ██████ was always easily redirected back to ██████ seat.

12/ There was one student in ██████ class with whom ██████ was particularly friendly. ██████ would hold the student's hand as they went from one area of the classroom room to another to play.

13/ Every school day, [REDACTED] worked with [REDACTED] on toilet training.

14/ There were four grading periods during the school year.

15/ [REDACTED] had met with the Parents informally before [REDACTED] first day of school at [REDACTED]. During this encounter, the Parents told [REDACTED] that [REDACTED] toilet trained.

16/ The PLCI Discussion, as well as the discussions of [REDACTED] "Present Level of Academic Achievement and Functional Performance" in the domains of "[REDACTED]" and "Independent Functioning," were all authored by [REDACTED].

17/ Contrary to the suggestion made in the Complaint, there was no "I.E.P. meeting for [REDACTED] in early May 2012" (although there was this May 8, 2012, parent/teacher conference).

18/ At no time during the 2011-2012 school year did the Parents observe [REDACTED] at [REDACTED] in a classroom setting.

19/ Among the self-care/life skills about which the Parents were most concerned was toilet training. While the Parents may not have seen a similar improvement at home, at school, as noted above, [REDACTED] actually had fewer, not more, toileting "accidents" as the school year progressed.

20/ That is, a regular school having "[REDACTED]" classes.

21/ Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

22/ Students with "[REDACTED]" are described in the "rules of the State Board of Education" as follows:

Definition. Students with [REDACTED].
[REDACTED] is defined to be a range of pervasive developmental disorders that adversely affects a student's functioning and results in the need for specially designed instruction and related services.
[REDACTED] is characterized by an uneven developmental profile and a pattern of qualitative impairments in social interaction, communication, and the presence

of restricted repetitive, and/or stereotyped patterns of behavior, interests, or activities. These characteristics may manifest in a variety of combinations and range from mild to severe. [REDACTED] may include [REDACTED], [REDACTED] [REDACTED] or other related pervasive developmental disorders.

Fla. Admin Code R. 6A-6.03023(1); see also 34 C.F.R. § 300.8(c)(1)(i) ("Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.").

^{23/} According to Florida Administrative Code Rule 6A-6.030121(1), "[l]anguage impairments are disorders of language that interfere with communication, adversely affect performance and/or functioning in the student's typical learning environment, and result in the need for exceptional student education."

^{24/} "The IDEA was [most] recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004)," effective July 1, 2005. M.T.V. v. Dekalb Cnty. Sch. Dist., 446 F.3d 1153, 1157 n.2 (11th Cir. 2006); see also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 21 n.1 (1st Cir. 2008) ("The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, but the relevant amendments did not take effect until July 1, 2005.").

^{25/} In section 1003.571(1), which took effect on July 1, 2009, the Florida Legislature directed that:

The State Board of Education shall comply with the Individuals with Disabilities Education Act (IDEA), as amended, and its implementing regulations after evaluating and determining that the IDEA, as amended,

and its implementing regulations are consistent with the following principles:

(a) Ensuring that all children who have disabilities are afforded a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(b) Ensuring that the rights of children who have disabilities and their parents are protected; and

(c) Assessing and ensuring the effectiveness of efforts to educate children who have disabilities.

(2) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

Subsection (1) of Florida Administrative Code Rule 6A-6.03028, a State Board of Education rule that was most recently amended effective December 15, 2009, "incorporates [the IDEA's FAPE requirement] by reference." It provides, in pertinent part, as follows:

Entitlement to FAPE. All students with disabilities aged three (3) through twenty-one (21) residing in the state have the right to FAPE consistent with the requirements of the Individuals with Disabilities Education Act, 20 USC Section 1400, et. seq (IDEA), its implementing federal regulations at 34 C.F.R. Subtitle B, part 300 et.seq. which is hereby incorporated by reference to become effective with the effective date of this rule,

^{26/} Long after it was first articulated by the United States Supreme Court, "the Rowley definition of free appropriate public education (FAPE) still survives." Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 301 (D. Me. 2008); see

also J.L. v. Mercer Island Sch. Dist., 575 F.3d 1025, 1037-38 (9th Cir. 2009) ("We hold that the district court erred in declaring Rowley superseded. The proper standard to determine whether a disabled child has received a free appropriate public education is the 'educational benefit' standard set forth by the Supreme Court in Rowley. Our holding is necessary to avoid the conclusion that Congress abrogated sub silentio the Supreme Court's decision in Rowley."); Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 n.5 (10th Cir. 2008) ("Rowley involved an analysis of IDEA's statutory precursor, the Education of the Handicapped Act, but the same textual language has survived to today's version of IDEA."); Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1199 (S.D. Cal. 2011) ("Rowley is still controlling, even though IDEA has been amended multiple times since it was decided."); K.M. v. Tustin Unified Sch. Dist., Case No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850 *19 (C.D. Cal. July 5, 2011) ("[T]he standards set out in Rowley still control."); Anne D. v. Bd. of Educ. of Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 816 n.6 (N.D. Ill. 2009) ("Plaintiffs' contention that Rowley is no longer the governing standard, and that the IDEA requires the District to maximize Sarah's potential to read, is incorrect."); and Joshua A. v. Rocklin Unified Sch. Dist., Case No. CV 07-01057 LEW KJM, 2008 U.S. Dist. LEXIS 26745 *8 (E.D. Cal. Mar. 31, 2008) ("[I]f Congress intended to modify the Rowley standard, it would have said so.").

^{27/} The Conklin court explained: "Due to the severity of their handicaps, some children, even with Herculean efforts by the state, will never be able to receive passing marks and reasonably advance from grade to grade." Id.

^{28/} "[T]he location of the services is not synonymous with 'educational placement.'" Carrie I. v. Haw. Dep't of Educ., Case No. 11-00464 JMS-RLP (Civil), 2012 U.S. Dist. LEXIS 83801 *34 (D. Haw. May 31, 2012).

^{29/} "[The] 'regular educational environment' encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46585.

^{30/} An exception (not shown to be applicable to the instant case) to the requirement that a child be placed in the least

restrictive environment appropriate to his or her needs exists when such a placement would significantly interfere with the education of other students. See, e.g., Hartmann by Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997) ("[M]ainstreaming is not required where . . . the disabled child is a disruptive force in a regular classroom setting."); Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1402 (9th Cir. 1994) ("The record supports the district court's finding that Ryan's behavioral problems interfered with the ability of other students to learn. Disruptive behavior that significantly impairs the education of other students strongly suggests a mainstream placement is no longer appropriate. While school officials have a statutory duty to ensure that disabled students receive an appropriate education, they are not required to sit on their hands when a disabled student's behavioral problems prevent both him and those around him from learning.") (citation omitted); Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991), withdrawn, 956 F.2d 688 (1992), reinstated in part, 967 F.2d 470 (1992) ("[T]he school district may consider what effect the presence of the handicapped child in a regular classroom would have on the education of other children in that classroom. . . . The school district must balance the needs of each handicapped child against the needs of other children in the district. If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate."); and Greenwood v. Wissahickon Sch. Dist., 571 F. Supp. 2d 654, 666 (E.D. Pa. 2008), aff'd, 374 Fed. Appx. 330, 332 (3d Cir. 2010) ("[T]he effect Angela's presence has on the other student[s] in the regular classroom must be considered. This factor focuses on the School District's obligation to educate all of its students and recognizes that, even if a disabled student might benefit from inclusion, she 'may be so disruptive in a regular classroom that the education of other students is significantly impaired.' Additionally, the court must consider whether . . . Angela 'will demand so much of the teacher's attention that the teacher will be required to ignore the other students.'") (citation omitted).

^{31/} "OSEP is the agency charged with principal responsibility for administering the IDEA." Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., 202 F.3d 642, 649 (3d Cir. 2000).

^{32/} Changes to an IEP may be made "by amending the IEP rather than by redrafting the entire IEP." If the district school board and the parents agree, the changes may be made without convening an IEP team meeting. 34 C.F.R. § 300.324(a)(4) and (6); and Fla. Admin. Code R. 6A-6.03028(3)(k).

^{33/} Because the IEP development process is a forward-looking, predictive exercise, it necessarily involves some degree of uncertainty. See Honig, 484 U.S. at 321 ("Overarching these statutory obligations, moreover, is the inescapable fact that the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best."); J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 84 (N.D. N.Y. 2008) ("The requirement that defendant's CSE annually develop an IEP that is reasonably calculated to benefit plaintiff's educational development necessarily implies the CSE must make rational predictions about what will be best for plaintiff in the future."); and Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801, 814 (D. P.R. 1997) ("E]very IEP contains educational plans for the future, and is therefore subject to a degree of speculation and guesswork.").

^{34/} The record evidence reveals that, contrary to assertion made by the Parents in their Complaint, ABA principles were being used to service C. in his "special [autism cluster] class" at Tradewinds.

COPIES FURNISHED:

██████████ and ██████████
(address of record)

████████████████████ Esquire
Office of the School Board Attorney
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

████████████████████, Superintendent
Broward County School District
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

██████████ General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(w);
or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).