

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

■,

Petitioner,

Case No. 13-4276E

vs.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Diane Cleavinger, held a formal hearing in the above-styled case on February 18 and 19, and March 27 and 28, 2014, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Beverly Brown, Esquire  
Three Rivers Legal Services  
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For Respondent: Gaby C. Young, Esquire  
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Office of General Counsel  
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STATEMENT OF THE ISSUE

The issue in this case is whether the Duval County School Board (Respondent, DCSB, or School Board), provided Petitioner

with a free and appropriate public education (FAPE) as required by the Individual with Disabilities Education Act, 20 U.S.C. § 1400, et seq. (IDEA).

PRELIMINARY STATEMENT

On October 23, 2013, Petitioner's parents filed for a due process hearing against the Duval County School Board. On November 4, 2013, DCSB forwarded the parents' request to the Division of Administrative Hearings to conduct a due process hearing.

Thereafter, a resolution conference was held by the parties on November 15, 2013. The resolution conference did not resolve the case and an amended request for due process hearing was filed on November 18, 2013. After a pre-hearing conference with the parties, the case was set for hearing on February 17 and 18, 2014. The hearing was convened on February 17, but due to an emergency had to be continued. After coordination with the parties, the case was reconvened on March 27 and 28, 2014.

During the hearing, Petitioner presented the testimony of 10 witnesses and introduced Petitioner's Exhibits 1 through 5 and 7 through 12 into evidence. Additionally, Petitioner presented two demonstrative videos. Respondent presented the testimony of 7 witnesses and introduced Respondent's Exhibits 1 through 39 into evidence. Respondent also presented two demonstrative computer presentations.

At the conclusion of the hearing, the parties discussed the amount of time necessary to obtain the transcript; review the transcript and evidence; and prepare proposed orders based on that review. Based on that discussion, a deadline of May 21, 2014, was established for submission of the parties' proposed final orders. On April 28, 2014, and by agreement of the parties, the deadline for proposed final orders was extended to May 27, 2014. Thereafter, both parties filed Proposed Final Orders on the designated date.

FINDINGS OF FACT

1. At the time of the hearing, Petitioner was an [REDACTED]-year-old in the [REDACTED] grade at [REDACTED] school in Duval County, Florida. Petitioner was enrolled at [REDACTED] in August 2013, at the beginning of the school year. Subsequently, at the request of Petitioner's parents and after the first two days of the hearing but before the last two days of the hearing, Petitioner was transferred to [REDACTED] school in Duval County due to implementation issues of the current IEP and safety concerns regarding the [REDACTED] school.

2. Petitioner was born on [REDACTED]. Petitioner's parents noticed developmental delays when Petitioner failed to hit developmental milestones at the age of one. In June of 2007, at the age of [REDACTED], Petitioner was diagnosed with [REDACTED].

3. Since the diagnosis, and at the time of hearing, Petitioner functions in the severe [REDACTED]. Petitioner has "[REDACTED]" with very limited communication skills, poor eye contact, very short attention span, hyperactivity, aggressive behaviors, and stereotypic mannerisms. Petitioner has never talked. Vocalizations have consisted of "grunts" and "screaming." Petitioner engages in self-stimulating behaviors and [REDACTED]. Petitioner also engages in attention-seeking and avoidance behaviors, including running away so that others will chase, banging, throwing objects, and sweeping furniture clear of objects on it. Petitioner is a social child and desires to engage with others, but has very poor social skills or ability. Petitioner appears to have cognitive potential, but due to Petitioner's inability to communicate, it is difficult to ascertain such potential.

4. Around May 2008, when Petitioner was [REDACTED] years old, Petitioner's parents provided Applied Behavior Analysis (ABA) services to Petitioner. ABA is a structured behavior modification program. Unfortunately at the time, ABA services were not effective at significantly modifying Petitioner's behavior due to Petitioner's resistance to the program and increased tantrums. As such, the services were discontinued by the parents.

5. Around the same time in May 2008, Petitioner was identified as a child requiring special education and found eligible for ESE services by DCSB as a student with [REDACTED]. At the time, Petitioner did not demonstrate any significant school readiness skills.

6. Since that time, Petitioner has received services through the communication and social skills (CSS) class offered by DCSB and has had Individual Educational Plans (IEP) in 2008, 2009, 2010, 2011, 2012, and 2013. Each IEP has been established and approved by the IEP team of which the parents were a part. Further, the parents admit that all of Petitioner's IEPs have been appropriate, but take issue with how some of them have been implemented.

7. Under each IEP, Petitioner received speech therapy, physical therapy, occupational therapy, and Extended School Year (ESY) primarily to teach [REDACTED] school readiness skills or build on those skills. Since 2009, Petitioner received toilet training. Petitioner's parents have tried feeding Petitioner gluten-free and casein-free diets. Currently, the parents provide Petitioner a therapy dog. They also, under advisement of Petitioner's doctor, currently provide Petitioner a low dose of an [REDACTED] medication that has "taken the edge off some of the irritability." However, Petitioner's progress in

school has been slow to non-existent, as well as uneven, throughout Petitioner's education.

8. As a child with [REDACTED], Petitioner was enrolled at [REDACTED] school in Duval County in 2008 for the [REDACTED] school year as a [REDACTED] student. While at that school, Petitioner's site coach was [REDACTED], a Professional Crisis Management (PCM) instructor and an ESE teacher and administrator with a degree in psychology.

9. A school's ESE site coach ensures the quality of the ESE program at the coach's assigned school by, among other things, assisting teachers in strategies and techniques, ensuring IEP compliance, and aiding in the set-up of classrooms, as well as behavior plans. A site coach also functions as a liaison between the school, parents and DCSB staff to ensure services, evaluations and reviews are completed.

10. [REDACTED] was acquainted with Petitioner and Petitioner's parents prior to Petitioner's enrollment with DCSB and helped to set up a Picture Exchange Communication (PEC) system at their home during the summer before Petitioner attended [REDACTED] school. PEC is an evidence-based, alternative communication system that uses generic drawings and colors to provide a verbally-limited person with a means of communication in a social setting through increasing layers of choices provided by the images, drawings, or pictures used in the system. It was one of

the alternative systems of communication used at [REDACTED] school and throughout the CSS classes in Duval County. In 2008, PEC, as a communications program, was an appropriate starting point for Petitioner

11. At school, [REDACTED] interacted with Petitioner on a daily basis and was well-liked by the parents.

12. After Petitioner began attending [REDACTED] school, [REDACTED] transferred to [REDACTED] school in Duval County. Later in 2010, Petitioner's parents transferred Petitioner to the same [REDACTED] school where [REDACTED] was transferred. Petitioner attended [REDACTED] school for the 2010-2011 school year where [REDACTED] was once again the site coach for the school.

13. Petitioner's October 15, 2010, IEP provided that Petitioner receive instruction under the Sunshine State Access Points Standards (special standards). However, the main goals in Petitioner's education remained training Petitioner in developing skills, like communication, focus and appropriate behavior, necessary to enable Petitioner to engage in a more academic curriculum. The IEP also identified that Petitioner has a condition called "[REDACTED]." [REDACTED] is a disorder characterized by a person swallowing objects or other inedibles such as dirt or mulch. Petitioner exhibits [REDACTED] by placing things in the mouth for sensory stimulation. The evidence did not show that Petitioner swallows such objects, but will spit them out.

14. Additionally in October 2010, at the request of Petitioner's parents and in agreement by the rest of the IEP team, the school board provided a one-on-one paraprofessional. The aide was necessitated because Petitioner was self-injurious, aggressive, running away, and "wasn't capable of participating in the classroom without assistance for set-up and everything else." The paraprofessional provided continuous assistance to Petitioner throughout the school day and Petitioner has had a one-on-one paraprofessional in school since 2010.

15. Petitioner's paraprofessional from the initial provision of that service in October 2010 until August 2013 was [REDACTED].

16. On May 6, 2011, an IEP was created by the IEP team for [REDACTED] and [REDACTED] grade. The goals on the May 6, 2011, IEP were:

a. By the IEP review date, [Petitioner] will participate in a sensory diet to decrease self-stimulatory behavior by completing 3 teacher/therapist selected activities to facilitate processing of sensory input 5 out of 5 days per week with visual and gestural prompting . . . .

b. By the IEP review date, [Petitioner] will participate for 10 minutes by initiating, persisting, and completing 5 teacher/therapist selected 1-2 step fine motor activities with gestural prompts (with gestural supports and sensory diet provided) in 4 out of 5 opportunities . . . .



c. By the IEP review date, given encouragement in the ESE setting, [Petitioner] will follow a demonstrated gross motor pattern (such as PE activity) with tactile cueing 3 out of 4 times . . . .

d. By the IEP review date, [Petitioner] will demonstrate self-feeding skills in 4 out of 5 opportunities . . . .

e. By the IEP review date, when given a pre-determined toileting schedule, [Petitioner] will use the bathroom by entering the bathroom, walking to the toilet, lowering pants and underwear/pull-up, sitting on the toilet, . . . in 4 out of 5 opportunities . . . .

f. By the IEP review date, from a choice field of 3, [Petitioner] will use pictures or alternative communication system to respond to curriculum based questions with 80 percent accuracy 4 out of 5 opportunities . . . .

g. By the IEP review date, [Petitioner] will accurately indicate "yes" or "no" to Petitioner's wants either by shaking/nodding head, exchanging a picture or voicing with an alternative communication system in 4 out of 5 opportunities . . . .

h. By the IEP review date, when given a verbal direction (with visual cues as needed) from an adult within 5 feet of [Petitioner], [Petitioner] will follow the direction with gestural and verbal prompts only (no physical prompts) in 4 out of 5 opportunities . . . .

17. The May 6, 2011, IEP was initially implemented by another teacher. However, Petitioner eventually had [REDACTED] as an ESE teacher. A prior teacher had been let go in December allegedly because the teacher was not performing adequately. The evidence indicated that this teacher's lack of performance

impacted Petitioner's services and education since Petitioner made very little progress on the IEP goals up to that time, and, in particular, made little to no progress on the IEP's communication goal.

18. [REDACTED] substituted in Petitioner's class from August 2011 to March 2012, first as a paraprofessional and later as an ESE teacher. [REDACTED] also substituted in Petitioner's class from January to February of that school year, after which [REDACTED] became the teacher. [REDACTED] left the school in March 2012 for personal reasons. At the time of the hearing, both [REDACTED] and [REDACTED] were employed at [REDACTED] [REDACTED] where the student body consists of around 23 students with a small ratio of adults to students, varying from 1:2 to 2:3. [REDACTED] was replaced by [REDACTED] from March 2012 until the end of the school year in June 2012.

19. By the review date in May 2012, goals a, d, f, and h were either mastered by the IEP review date or short-term objectives under those goals were mastered by the IEP review date. Goals b, c, e and g were not mastered by the IEP review date. In particular, the communication goal was not met.

20. During this school year and in prior school years, the school used the PEC program to facilitate Petitioner's communication. Notably, [REDACTED] also used a PEC system as one of its alternative communication systems.

21. The evidence demonstrated that Petitioner was provided the PEC system to communicate at school, but generally was not making sufficient progress on [REDACTED] IEP goals with that system from 2010 through 2011. During the current year, Petitioner was not achieving the overall communication goal and had not achieved it in over two years using the PEC system. Clearly, a change needed to be made in the strategies and programs being provided under Petitioner's IEP.

22. Petitioner's parents were not happy with the PEC program because Petitioner did not relate well to it and had not progressed under it. In their experience at home, Petitioner needed a communications program that was more dynamic than PEC, used real-world pictures and provided more choices than the PEC system. Thus, the parents used the Verbal Victor communication program at home, which operated on an iPad and used real world pictures to represent choices that Petitioner could make. Eventually, at some point during this school year, the parents provided the iPad to the school so that Petitioner could use it at school. The evidence showed that Petitioner used the parent-provided iPad to communicate at school and also had the PEC system available to [REDACTED] along with other supports for communication.

23. After [REDACTED] left the [REDACTED] school, [REDACTED] became Petitioner's substitute teacher. However, even with the dual

communications programs, the evidence showed that Petitioner did not make significant progress during the 2011-2012 school year. There was some improvement in focus, aggression and sitting for five minutes. However, communication goals remained unmastered with insufficient progress since Petitioner could communicate by only choosing from a field of one. Otherwise, Petitioner communicated by gestures or inappropriate behaviors. Additionally, Petitioner continued to require maximum physical prompts to engage in classroom activities. Not unexpectedly Petitioner's progress was variable across domains. But, even with such variability, the evidence demonstrated that Petitioner did not receive FAPE during the 2011-2012 school year.

24. On May 4, 2012, an IEP was developed by the IEP team for the 2012-2013 school year. The goals on the IEP were similar to the previous year's goals. There was no evidence of any procedural deficiencies regarding this IEP.

25. In August 2012, at the beginning of the 2012-2013 school year, Petitioner's parents moved Petitioner to [REDACTED] school because they were unhappy with the loss of [REDACTED] and [REDACTED] and because Petitioner's parents were concerned about a Hispanic language barrier with the new teacher. [REDACTED], Petitioner's one-on-one paraprofessional, voluntarily transferred with Petitioner to the new school. The May 2012 IEP followed Petitioner to the new school.

26. For the first three months at the new school, Petitioner had a substitute teacher, along with [REDACTED] paraprofessional, [REDACTED]. There was no substantive evidence that this teacher was not qualified to teach this ESE class. Petitioner was then provided a permanent teacher, [REDACTED]. However, Petitioner was the only non-verbal child in the class. Although there is no evidence of such, the parents were concerned that the other students were higher functioning than Petitioner. The parents were also concerned that Petitioner was not being taught in the substitute/[REDACTED] class, and that [REDACTED] provided all the instruction. The evidence indicated that such lack of instruction may have been the case since, by January 7, 2013, Petitioner, with the exception of independent functioning (supervised walking around the school), had not achieved progress on the May 2012 IEP goals and consistently required maximum prompting to address the short-term objectives under those goals. At this point, this lack of instruction and implementation of the IEP for close to a third of the school year again denied FAPE to Petitioner.

27. After only two weeks with [REDACTED], Petitioner's very concerned parents requested Petitioner be moved to a different classroom due to the reasons stated above. Notably, DCSB did not initiate the transfer, but granted the parents' request, and, in

November 2012, transferred Petitioner, along with [REDACTED] paraprofessional, [REDACTED], to [REDACTED] classroom.

28. The evidence showed that [REDACTED] was a well-qualified ESE teacher.

29. When Petitioner first came into [REDACTED] classroom, Petitioner had regressed to the point of primarily communicating through grunting or vocalization, running away from tasks, beating on the chest, and banging on tables, and was only able to spend limited time on tasks, and only able to maintain eye gaze for less than five seconds. Petitioner would frequently get frustrated with more difficult tasks and would throw the food tray. Petitioner could not eat without assistance and would put an excessive amount of food in the mouth. Indeed, Petitioner "was not focusing long enough" for [REDACTED] to document Petitioner's progress under the May 2012 IEP or the Universal Learning System (ULS) curriculum provided under the May 2012 IEP. Such regression demonstrated that Petitioner had not received FAPE under the May 2012 IEP.

30. Shortly after Petitioner was transferred to the new classroom, and based on her observations of Petitioner, [REDACTED] appropriately concluded that the May 2012 IEP was not working and that Petitioner was in need of a new IEP. [REDACTED] requested that [REDACTED], the DCSB's Instructional Program Support Representative, observe Petitioner due to Petitioner's difficulty

with engaging in the current curriculum's rituals and routines in the classroom.

31. ██████████ observed that Petitioner needed continuous assistance and adult guidance to access the direct instruction of the teacher or to follow the rituals and routines in the classroom. ██████ observed Petitioner acting aggressively, communicating through physical interaction such as pulling the person to the desired object or activity, and failing to use verbal vocalizations to communicate. ██████ observed Petitioner's inability to focus on a given task and the need for constant adult assistance. Again, the evidence showed that Petitioner had regressed from the limited progress made during the previous school year.

32. Based on ██████ assessment, ██████████ recommended that the Strategies for Teaching based on Autism Research (STAR) program be used for Petitioner's curriculum. The STAR curriculum is an evidence-based curriculum specifically designed for students with autism and is based on the principles of ABA. The STAR curriculum uses discrete trials and pivotal response and functional routine training and presents a way for autistic students to develop responsive, expressive and spontaneous language.

33. Discrete trials under the STAR curriculum are based on a reward system for specific, targeted behaviors, where

reinforcers are used to reward completion of the desired targeted behavior. At the same time, this same system is used to deter problem behaviors. Like PEC, the STAR curriculum is also part of the curriculum choices used by JAS. The evidence showed that the STAR program was an appropriate program for Petitioner.

34. Under the STAR program, data is collected to chart progress made toward mastery of the targeted goal. However, no expert or other reliable testimony was introduced to establish the exact method to collect such data under the program. More importantly, there was no substantive evidence that the data collected by DCSB staff on Petitioner's performance under the STAR program was inappropriate or invalid.

35. Also in the fall of 2012, Petitioner's parents provided Petitioner with a personal iPad loaded with the communications program, Verbal Victor, for Petitioner's use in the classroom to assist in [REDACTED] communication development. Petitioner's May IEP did not require an augmentative communication device, but identified a picture exchange communication book as Petitioner's alternative communication system. However, at the request of Petitioner's parents, [REDACTED] implemented the use of the iPad.

36. Unfortunately, at some point after Petitioner began using the iPad at school, Petitioner's parents decided not to allow Petitioner to bring it to school anymore because the iPad



was damaged at school. Petitioner continued to have access to the classroom iPad for use as an alternate communication device. However, Petitioner's access was subject to the times when it was not being used by other students. Such lack of access decreased spontaneous or initiated communication by Petitioner and did not meet the communication goal to increase such interaction behavior by Petitioner. Further, the evidence was not clear what communication program was on the iPad for Petitioner to use.

37. After consultation with the parents and the rest of the IEP team, in January 2013, [REDACTED] drafted a new IEP for Petitioner to readdress the existing goals from the May 2012 IEP and incorporate new goals. The new goals included the ability to focus on a given task, to use tools around Petitioner more appropriately, develop functional skills, and a focus on toileting. The January 2013 IEP also identified that Petitioner ran away from adults and had exhibited such behavior in the past.

38. The goals under the January 2013 IEP were:

a. By the IEP review date, [Petitioner] shall descend 4-6" steps, using a single handrail . . . in 4 out of 5 opportunities  
. . . .

b. By the IEP review date, [Petitioner] shall transfer standing to/from sitting on an adult-sized toilet, in 4 out of 5 opportunities . . . .

c. By the IEP review date, with continuous supervision, [Petitioner] will express desires, feelings, or physical needs using an

augmentative communication device given a field of 8 choices in 3 out of 5 opportunities . . . .

d. By the IEP review date, with continuous adult supervision, [Petitioner] shall gain attention to visual stimuli by increasing eye gaze shifting when presented with an activity paired with highly reinforced item in 3 out of 5 opportunities . . . .

e. By the IEP review date, with continuous adult supervision, [Petitioner] will exhibit listening behaviors (i.e. eyes on speaker, body still, quiet hands, head nods etc.) and follow simple commands during adult led small/large group activities . . . .

f. By the IEP review date, [Petitioner] will use staff selected classroom items appropriately with continuous adult supervision with fewer than 3 gestural, verbal, or physical prompts in 8 out of 10 trials . . . .

g. By the IEP review date, with continuous adult supervision, [Petitioner] shall reciprocate playful interactions from classroom peers and staff by responding with positive behaviors (sharing, walking away nicely, using no thank you or all done button on [redacted] computerized augmentative communication device) in 7 out of 10 opportunities . . . .

h. By the IEP review date, with continuous adult supervision when provided an individual picture/object schedule, [Petitioner] will transition appropriately by looking at the schedule, carrying the card to the designated area/activity and placing the card in a check-in spot without running off or exhibiting aggressive behaviors for 9 activities each in 8 out of 10 trials . . . .

i. By the IEP review date, with continuous adult supervision, and verbal/gestural

prompting given a predetermined toileting schedule and an, "I want bathroom," tab on [REDACTED] communications device, [Petitioner] will complete toileting process successfully, 8 out of 10 opportunities . . . .

j. By the IEP review date, with continuous adult supervision, [Petitioner] will demonstrate the ability to spoon feed up to 3 food items by grasping and holding a spoon, scooping food with the utensil to her mouth, placing the spoon in [REDACTED] mouth, chewing and swallowing the food item . . . 8 out of 10 trials . . . .

k. By the IEP review date, given a developmentally appropriate activity, [Petitioner] will actively engage in the activity (e.g. Focus on given task, eyes on the paper and use material for intended purposes, etc.) without displaying socially unacceptable behaviors (e.g., wandering, throwing objects, etc.) for 10 minutes in 4 out of 5 opportunities . . . .

l. By the IEP review date, with continuous adult supervision, [Petitioner] will improve [REDACTED] ability to touch/manipulate a target/spot or area for classroom and self-care activities. With verbal, visual, and fading physical cues in 6 out of 10 trials . . . .

39. The new IEP was implemented on January 7, 2013. The evidence showed that the new goals were appropriate for Petitioner. However, the new goals, apart from curriculum based on ABA principles, did not include any formalized ABA program provided by certified ABA instructors to address Petitioner's regression in behavior and establish protocols and proven methods to address Petitioner's [REDACTED], toileting, and behavioral needs. Such ABA instruction was necessitated because of the lack of

provision of FAPE to Petitioner. By the end of the school year in June 2013, Petitioner was progressing, but not mastering, on some of these goals and had mastered some of the independent functioning goals. However, the evidence demonstrated that Petitioner was only catching up due to the lack of progress under and implementation of previous years' IEPs and required a formal ABA program to compensate for the lack of FAPE in previous years.

40. Because of Petitioner's current crisis regarding communication, an assistive technology (AT) review was conducted by DCSB on January 1 through 13, 2013. The conclusion of the AT review was that Petitioner be provided a static display device known as a Seven Level Communicator because Petitioner was rough with equipment. This choice was made even though DCSB was aware that Petitioner had been using a dynamic display device (iPad) successfully at home for at least two years. On January 15, 2013, Petitioner received the Seven Level Communicator. The evidence demonstrated that the communicator would have been an appropriate device for Petitioner had Petitioner not already been familiar with and trained on the iPad. Normally, the choice of equipment or methodology is not a decision that the parent can impose on a school district; however, substitution of a new and unfamiliar device at this late juncture in Petitioner's already lagging education did not provide FAPE to Petitioner. Later, around the end of March or the beginning of April 2013, DCSB

provided an iPad to Petitioner as an alternative communication device, but instead of using Verbal Victor, the program Petitioner was familiar with on the iPad, selected a different computerized communication program known as Sounding Board.

41. At the time, Verbal Victor could not be loaded onto the DCSB-issued iPad due to it being technologically incompatible with the new iPad's operating system. However, there was no reason why an iPad with an older operating system compatible with Verbal Victor could not be utilized.

42. The Verbal Victor application presents a series of photos on different "pages" on the iPad, which can be accessed by scrolling through the "pages" to ultimately arrive at the desired item or activity. It does not have the ability to link different pages to create a more dynamic communication interface. It is considered to be a more introductory communication application. On the other hand, the Sounding Board application is a dynamic communication program that allows a user to more easily access different "pages" because they can more readily be linked together. It has the ability to be used as a high-end communication device that can learn and understand the user's dynamic capabilities such that the application can "grow" with the user and his or her communication needs.

43. Again, the change to an unfamiliar communications program for a student trying to catch up after being denied FAPE

when a familiar and successful program was available did not provide FAPE to Petitioner, especially since the evidence demonstrated that Petitioner was making slight progress, but not mastering, [REDACTED] communications goals.

44. While Petitioner was in [REDACTED] classroom, the parents initially thought very highly of [REDACTED] and felt that Petitioner was making some educational progress under [REDACTED] care. However, there were several episodes which changed the parents' attitude towards the safety of [REDACTED] class, as well as, the safety of the [REDACTED] school. On one occasion, Petitioner came home covered in ant bites. On another occasion, there was an episode where Petitioner had placed homemade edible play-doh in [REDACTED]'<sup>1/</sup> mouth during the school day. Making and playing with play-doh was a frequent activity in [REDACTED] class, since it assisted in furthering the students' social skills and tactile sensitivity. There was no evidence that Petitioner ingested, choked or gagged on the play-doh and Petitioner was redirected at the time. However, there were also times where Petitioner put sand or mulch in [REDACTED] mouth while on the playground, and, at least one time, when Petitioner covered [REDACTED] face and clothes with sand and play-doh. The evidence was unclear whether Petitioner was redirected during these times on the playground. The incidents are particularly troubling and demonstrate a need for a structured ABA pica program to address, through extinction or

substitution of appropriate behaviors, Petitioner's pica. Other than redirection, Petitioner's IEPs relevant in this case have not addressed Petitioner's [REDACTED] and in that regard have failed to provide FAPE to Petitioner.

45. More significant to this case, the parents also noted that [REDACTED] was an open campus and that the gates frequently remained open providing access to traffic. The gates were frequently left open even after the parents complained to school officials about the danger open gates posed to Petitioner who would run away from others. Additionally, [REDACTED] often propped the back door to [REDACTED] classroom open with a chair. The back door opened onto an area where a gate was often open that led directly into traffic. Petitioner's parents requested Petitioner be moved to a different classroom because of the play-doh incident and other safety concerns. DCSB granted this request.

46. Ultimately, because of the [REDACTED] issues and the back door issues, Petitioner, along with Petitioner's paraprofessional, [REDACTED], was transferred to [REDACTED] classroom in March 2013. The transfer was one more disruption to Petitioner's already delayed education. Petitioner finished the school year with [REDACTED] and Petitioner's parents requested that [REDACTED] continue to teach Petitioner over the summer of 2013 during ESY.

47. When Petitioner was transferred to [REDACTED] class, Petitioner was communicating via the static communication device. It was after this transfer that DCSB provided Petitioner with an iPad, which Petitioner has continually had since that time.

48. By the end of the school year in June 2013, Petitioner was not using Sounding Board to make appropriate choices. However, [REDACTED], the DCSB's assistive technology person, observed Petitioner successfully using Sounding Board and that [REDACTED] use of the iPad and Sounding Board application were increasing, at least up to the time of the hearing. The evidence was unclear if the iPad with Sounding Board will provide FAPE to Petitioner in the future. However, given Petitioner's already delayed education, the introduction of an unfamiliar program in April of 2013 did not provide FAPE to Petitioner.

49. At the end of July 2013, Petitioner started receiving at-home, private ABA therapy from the [REDACTED] [REDACTED]. Under current insurance payor restrictions, private ABA therapists were not permitted to work or interact with the schools. Therefore, [REDACTED], Petitioner's private ABA therapist, did not work with anyone at DCSB or share any of the plans, protocols or replacement behaviors developed by them with anyone at DCSB. However, the evidence did not demonstrate that the parents were prohibited from providing such information to DCSB staff. By the time of



the hearing, some but not all, of the ABA program developed for Petitioner was shared by the parents with DCSB. The lack of sharing was partly due to the flux in Petitioner's public school education and the opportunities to discuss such information with school personnel.

50. [REDACTED] created a Behavior Support Plan for Petitioner. The plan addressed the problem behaviors of elopement, aggression, property destruction, [REDACTED], screaming, self-injurious behaviors, undressing in public, and inappropriately touching strangers.

51. Initially, Petitioner was provided treatment twice a week; however, it was later increased to more times per week, but fluctuated, depending on whether school was in session. Family training was also provided under the Behavior Support Plan. The therapy sessions occur in the home and a variety of community locations with a variety of rewards being used that Petitioner can choose on [REDACTED] iPad.

52. Because of the ABA therapy, Petitioner is using [REDACTED] iPad for communication without prompting, a behavior that DCSB could not achieve under several years of education. Evidence also showed that Petitioner learned and consistently uses the sign for "eat" and, because of these intense therapy sessions, has been successful in ameliorating some of the problem behaviors

being addressed. The parents have noticed a difference in Petitioner's behavior.

53. Petitioner began the 2013-2014 school year in August 2013 with [REDACTED] at [REDACTED] school. [REDACTED] drafted a new IEP for Petitioner in October 2013, which sought, in part, to address Petitioner's parents' toileting and communication concerns. Also, [REDACTED], at the request of Petitioner's parents, introduced Petitioner into a larger group of students in the classroom.

54. Petitioner's current IEP, for school year 2013-2014, contains special education and related services including language therapy and toileting skills training; accommodations, including visual symbols for activity choices, supervision for transitions and allowance for use of augmentative communication devices; sensory strategies for classroom participation; least restrictive environment; and present levels of performance, measurable annual goals/objectives, and progress reporting. Again, the evidence did not show any procedural violations under IDEA for this IEP.

55. Petitioner's IEP goals for school year 2013-2014 include the ability to carry out one and two step oral instruction within time and frequency constraints; complete two staff-selected assignments during structured work time with minimal physical assistance; transition from three classroom

activities while maintaining a calm and alert state with visual and/or gestural cues; independently and actively engage in a developmentally appropriate activity without displaying unacceptable behavior; feed appropriately; demonstrate isolated index finger control to indicate a response or activate an assistive technology device; independently and appropriately use workbook/work sheets in daily activities; safely and appropriately negotiate her school environment; use a computerized communication device to express desires, feelings and physical needs; and successfully complete toileting procedures. As with the other IEPs, the goals are appropriate for Petitioner.

56. Each listed goal provides benchmark achievement objectives to evaluate Petitioner's progress toward mastery of the agreed-upon goals. Additionally, the DCSB provides periodic updates to chart Petitioner's progress towards meeting those goals. Each of those updates indicates Petitioner has either mastered or is making progress towards mastery of each goal listed in [REDACTED] IEP. However, much of Petitioner's progress is a result of the parent-provided ABA services which have greatly improved Petitioner's ability to function in and attend to a classroom setting.

57. Petitioner's teachers and care providers collected data throughout the school day on Petitioner's progress toward

achieving the IEP's goals. They also communicated daily data to Petitioner's parents through home notes.

58. [REDACTED] has been Petitioner's occupational therapist for the past three years, commencing while [REDACTED] was a [REDACTED] at [REDACTED] school. When [REDACTED] first started working with Petitioner, Petitioner demonstrated difficulty in all aspects of Petitioner's sensory processing which interfered with [REDACTED] ability to sit still and attend to a lesson for as little as a few seconds to less than a minute. [REDACTED] observed Petitioner escaping [REDACTED] table and running to another part of the classroom. [REDACTED] observed that Petitioner was not able to hold crayons, pencils and similar items. Petitioner's behaviors were such that Petitioner was unable to access any part of the curriculum as a result. In response to these concerns, [REDACTED] developed a sensory diet for Petitioner, which was then implemented by Petitioner's teachers and other support personnel. Over the three years that [REDACTED] has been working with Petitioner, [REDACTED] has recognized significant improvement in Petitioner's ability to engage and be productive in the classroom setting. [REDACTED] testified that [REDACTED] has seen improvement in Petitioner's ability to make and maintain eye contact, engage in communicative behavior, and Petitioner's ability to remain in Petitioner's seat while on task ([REDACTED] testified that Petitioner is now able to sit still and remain on task for up to 20 minutes).

Additionally, [REDACTED] evaluated Petitioner's use of Petitioner's iPad communication program. [REDACTED] identified that Petitioner initially made selections by pressing the selection with all four fingers, which was sloppy and caused Petitioner to choose the improper choice. [REDACTED] has assisted Petitioner in this regard by training Petitioner to make selections using just the index finger, which required development of Petitioner's fine motor skills and learning to control the force of Petitioner's finger push. Through this therapy, Petitioner is now able to make selections more appropriately and has progressed toward mastery of Petitioner's IEP Independent Functioning goal.

59. [REDACTED] had been Petitioner's one-on-one paraprofessional from Petitioner's initial enrollment at Petitioner's first [REDACTED] school in August 2010 through May 2013 at Petitioner's second [REDACTED] school. When [REDACTED] first started working with Petitioner, Petitioner would routinely reach for things, throw things to the ground, take other people's food items, hit [REDACTED] in the chest, dump toy baskets, and leave the chair to get away from tasks. [REDACTED] has seen improvement in Petitioner's ability to check into the classroom and follow the assigned classroom routine. [REDACTED] has seen improvement in Petitioner's ability to connect and interact socially with other children. [REDACTED] has seen Petitioner now be able to walk to the cafeteria without requiring [REDACTED] hand to be held. [REDACTED] has

witnessed Petitioner's ability to communicate with [REDACTED] iPad increase to the point where Petitioner can now independently select [REDACTED] educational choices. [REDACTED] has witnessed a huge decrease in Petitioner's self-injurious behaviors. [REDACTED] has seen a decrease in the frequency of Petitioner putting non-edibles in Petitioner's mouth. [REDACTED] has seen improvement in Petitioner's ability to maintain eye contact, remain seated and attending to a task, and a "phenomenal" improvement in Petitioner's eating capabilities. However, the evidence showed that such behavioral improvement has not been maintained over the years.

60. [REDACTED], [REDACTED], [REDACTED], and [REDACTED] each testified that Petitioner has shown significant progress toward meeting the tasks and activities associated with Petitioner's IEP goals and objectives.

61. On the other hand, Petitioner's parent observed [REDACTED] [REDACTED] class after the beginning of the school year on two occasions for approximately two hours each time. During those visits, the parent observed four and one-half minutes of direct instruction on one occasion and seven minutes of direct instruction on the other occasion. There was no use of the iPad by Petitioner during these visits. In fact, Petitioner spent the bulk of the time during these visits playing music on the computer, rocking or playing with "fidgets."

62. The evidence also showed that the iPad with the Sounding Board application was not delivered to Petitioner until sometime in October 2013, two months after the beginning of school. Additionally, the iPad, once it was available, was never used during Petitioner's physical therapy sessions. Given earlier failures to implement Petitioner's IEPs, Petitioner's repeated lack of mastery of the communications goals contained in those IEPs, and the delay in Petitioner's education, the two-month delay to provide the iPad during the 2013-2014 school year denied FAPE to Petitioner.

63. Additionally, even with the testimony of DCSB staff regarding Petitioner's progress, the better evidence demonstrated that Petitioner has not mastered over 50 percent of the goals set on the various IEPs and has had points where the IEPs were simply not implemented by various service providers. Petitioner has not made significant progress under those IEPs and has had delays in education due to lack of implementation of those IEPs at various times. Current progress is attributable to the parent-supplied ABA program. Additionally, the current IEP for 2013-2014 does not include necessary ABA services to make up for past failures of FAPE especially in the area of communication. Under these facts and given the history of DCSB's periodic failure to implement Petitioner's IEPs, Petitioner is entitled to reimbursement for past ABA program expenditures and compensatory

education to remediate these past failures. Such compensatory education requires that Petitioner be provided full-out ABA services similar to the services Petitioner is being provided by the parents, including family training in that program. Further, any such compensatory education, as well as Petitioner's IEP communication goals, should be consistent with the technology and applications used by Petitioner in Petitioner's ABA therapy.

#### CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 1003.5715, Florida Statutes, and Fla. Admin. Code Rule 6A-6.03311(9) (2014).

65. The Individuals with Disabilities Act (IDEA) requires state and local educational agencies to provide disabled children with a "free appropriate public education" (FAPE). 20 U.S.C. § 1400(c). Further, IDEA entitles disabled students to receipt of FAPE in the least restrictive environment (LRE). In general, FAPE must be available to all children residing in a state between the ages of 3 and 21, inclusive. 34 C.F.R. § 300.101(a). To accomplish these things, Congress established an elaborate procedural framework under IDEA, the cornerstone of which is the individual education plan (IEP).

66. The IEP is a document that serves as the blueprint for a particular child's education for a given school year. See



Honig v. Doe, 484 U.S. 305, 308-312 (1988) (history and purpose of and procedural framework created by IDEA). It is developed based on relevant information by an IEP team consisting of local school personnel, relevant experts, if needed, and the parents, at a formal meeting for which the parents are given adequate notice and an opportunity to attend and participate. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.501. Importantly, IDEA does not give any one member of the IEP team the right to veto a decision made by the IEP team or to micromanage the details of a decision made by the IEP team. A.W. 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.”); and B.B. v. Haw. Dep't of Educ., 483 F. Supp. 2d 1042, 1050-1051 (D. Haw. 2006).

67. A “free appropriate public education” is defined in 20 U.S.C. section 1401(9). That section states as follows:

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. . . .

68. "Special education" is defined in U.S.C. section 1401(29). That section states, in pertinent part:

The term "special education" means 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.

69. "Related services" are defined in U.S.C. section 1401(26). That section states:

(A) In General - The term "related services" means 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.

(B) EXCEPTION - The term does not include a medical device that is surgically implanted, or the replacement of such device.

70. "Individualized education program" is defined in U.S.C. section 1401(14). That section states, in pertinent part, as follows:

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised . . . .

71. The Code of Federal Regulations (C.F.R.) implements the federal statutes. Section 300 is the regulation applicable to IDEA.

72. The regulation related to FAPE is 34 C.F.R. section 300.17. That section states as follows:

Free appropriate public education or FAPE means special education and related services that-

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA [State educational agency], including the requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

73. The regulation related to the individualized education plan is 34 C.F.R. section 300.22. It states as follows:

Individualized education program or IEP means a written statement for a child with a disability that is developed, reviewed and revised in accordance with §§ 300.320 through 300.324.

74. The regulation related to special education is 34 C.F.R. section 300.39. That section states, in pertinent part, as follows:

(a) General.

(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including-

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section-

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

- (ii) Travel training; and
- (iii) Vocational education.

75. Specially-designed instruction is defined in 34 C.F.R. § 300.26. That section states, in relevant part:

(b)(3) Specially-designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction -

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

76. Under IDEA, Petitioner bears the burden of proof to establish by a preponderance of the evidence that IDEA was violated, thereby denying FAPE to the student. See Schaffer v. Weast, 546 U.S. 49, 62 (2005); Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1313 (11th Cir. 2003). See also Ross v. Bd. of Educ. Township High Sch. Dist., 486 F.3d 279, at 270-271 (7th Cir. 2007) ("[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."); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289 (7th Cir. 2001); M.M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1096, n.8 (11th Cir. 2006); and Sebastian M. v. King Philip Reg'l Sch. Dist., Case No. 09-10565-JLT, 2011 U.S. Dist. LEXIS 35501 (D. Mass. Mar. 31, 2011).

77. The legal standard for determining whether a disabled student has received FAPE is a two-pronged test described by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

78. Under Rowley, the first prong of the test is whether the State complied with the procedures set forth in IDEA. The second prong of the test is whether the IEP developed through IDEA's procedures was reasonably calculated to enable the disabled child to receive educational benefits. 458 U.S. at 206.

79. The Rowley standard requires administrative law judges to strictly review an IEP for procedural compliance even though technical procedural safe guard violations will not automatically invalidate an IEP. Dong v. Bd. of Educ., 197 F.3d 793, 800 (Fla. 6th Cir. 1999). Additionally, in evaluating whether a procedural defect has deprived a student of FAPE, the defect must be more than a mere technical defect. Weiss v. Sch. Bd. of Hillsborough Cnty., 141 F.3d 990 (11th Cir. 1998). In essence, the Petitioner must prove that there was a procedural defect in the development

of a student's IEP and that such defect materially affected that student's education. Id.

80. In this case, there was no evidence that Petitioner's IEP did not contain any of the necessary elements or was otherwise deficient in terms of its fundamental elements required by IDEA. Likewise, the evidence did not demonstrate that DCSB failed to afford Petitioner or the parents with the necessary procedural requirements provided under IDEA.

81. On the other hand, IDEA requires that the education to which access is provided "be sufficient to confer some educational benefit upon the handicapped child." Rowley at 200. However, there is no one test to be applied to the definition of "appropriate" under the IDEA. Rowley, supra. In determining whether a handicapped child has received educational benefits from the IEP and related instructions and services, courts must determine only whether the student has received "the basic floor of opportunity." J.S.K. v. Hendry Cnty. Sch. Bd., 941 F.2d 1563, 1572 (11th Cir, 1991). Educational benefit need not achieve the handicapped child's "maximum potential," so long as the student received "personalized instruction with sufficient support services to permit the child to benefit educationally." Rowley at 203. Notably, such services must be provided and the IEP materially implemented in order to receive such educational benefit. See L.J. v. Sch. Bd. Of Broward Cnty., 850 F. Supp.

1315 (S.D. Fla. 2012); Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478 (4th Cir. 2011); and Van Duyn v. Baker Sch. Dist. 5J, 502 F. 3d 811 (9th Cir 2011).

82. Further, a demonstration of educational benefit must show more than just trivial or de minimus progress. School Bd. of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999). Although the education benefit must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198. The issue is whether the IEP is appropriate, not whether another IEP would also be appropriate, or even better. 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. Id.

83. In this case, the evidence demonstrated that Petitioner periodically did not provide appropriate instruction, equipment or services under the various IEPs over the years and that progress under those IEPs was not significant or meaningful.

84. Petitioner presented evidence of the ABA therapy services that Petitioner has recently been receiving at home and Petitioner's success under that treatment regime. Most, if not all, of that therapy has been directed at the same issues targeted by Petitioner's many IEPs over the years. The evidence did not demonstrate that the STAR program offered by DCSB on Petitioner's IEP provided the same or similar intense ABA therapy



needed by Petitioner to compensate for DCSB's past failures to provide FAPE to Petitioner. Such therapy has achieved what DCSB has not, and has enabled Petitioner to at least be able to begin progressing on ■■■ IEP goals to the point where mastery might be achieved.

85. As noted earlier, even with the testimony of DCSB staff regarding Petitioner's progress, the better evidence demonstrated that Petitioner has not mastered over 50 percent of the goals set on the various IEPs and has had points where the IEPs were simply not implemented by various service providers. Petitioner has not made significant progress under those IEPs and has had delays in education due to the lack of implementation of those IEPs at various times. Current progress is attributable to the parent-supplied ABA program. Additionally, the current IEP for 2013-2014 does not include necessary ABA services to make up for past failures of FAPE especially in the area of communication. Because of these facts, Petitioner is entitled to reimbursement for the ABA therapy provided by the parents and compensatory education to remedy the multiple denials of FAPE to Petitioner.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is found that Petitioner is the prevailing party in this action and that DCSB has not provided FAPE to Petitioner. Further, it is

ORDERED that:

1. Petitioner is entitled to reimbursement for ABA therapy provided to Petitioner, and

2. Petitioner is entitled to compensatory education as outlined in this order.

DONE AND ORDERED this 7th day of July, 2014, in Tallahassee, Leon County, Florida.

**S**

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DIANE CLEAVINGER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of July, 2014.

ENDNOTE

<sup>1/</sup> For ease of reading, personal pronouns have been used. They are not necessarily indicative of the actual gender of the child.

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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 (2011), 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).