STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1498E
	)	
MIAMI-DADE 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 Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on August 30, 2012, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: [redacted], Parent
(address of record)

For Respondent: Mary C. Lawson, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

STATEMENT OF THE ISSUE

Whether the Miami-Dade County School Board (School Board) denied Petitioner [redacted] ([redacted]). a free appropriate public education by failing to provide [redacted] with a full-time one-on-one aide, as alleged in the due process complaint filed by Petitioner's mother, [redacted] (Mother).

PRELIMINARY STATEMENT

On April 11, 2012, the Mother, on behalf of [redacted], filed with the School Board a due process complaint (Complaint) that was handwritten in Spanish. On April 20, 2012, the School Board transmitted to the Division of Administrative Hearings (DOAH) the Complaint, along with "an English translation," which read verbatim (except where noted by brackets) as follows:

> Translation of Request for Due Process
>
> The problem is that the [child] does not have supervision all the time. [The child] has had misfortunes at the school, Dr. Rolando Espinosa. There is no person assigned to work (sic). It is not known if what is said at school by the [child] is the truth. The [child] comes from [redacted]. I understand the regulations are different but the condition of the [child] merits supervision as [the child] is autistic and bipolar. In [redacted] [the child] had a worker for four years but since [the child] got here they have up until this moment denied it.
>
> A petition that they review the case of my [child] by an administrative judge of the

> Department of Education. I await to have [the child] continue with an assigned worker. . . .of the transportation, school and return home as [the child] has been assigned by a judge in [redacted] for negligence and failure of supervision. The child was mistreated and they assigned [the child] a worker that as of today I continue to petition for.
>
> Thanks for your attention

The Complaint was transmitted to DOAH on April 20, 2012. The case was assigned to the undersigned, who, on that same day, scheduled the requested due process hearing for May 24, 2012, and issued an Order of Pre-Hearing Instructions, which provided, in pertinent part, as follows:

> 4. Not less than five business days before the due process hearing is scheduled to begin, each party shall:
>
> * * *
>
> b. Provide each other and the undersigned with an authenticated set of exhibits (documents) that the disclosing party intends to offer into evidence at the due process hearing. . . .
>
> 5. The parties are hereby notified that (a) any evidence not disclosed to the other party at least five business days before the start of the due process hearing might be excluded from the evidentiary record . . . . Evidence . . . excluded because of nondisclosure will not be relied upon by the undersigned in making the findings of fact relevant to the disposition of this case.[2/]
>
> * * *

> 7. The parties are hereby notified that any request for a continuance or other extension of time shall be deemed to seek, and if granted shall effect, a like extension of the final order deadline.

On April 23, 2012, the School Board filed a Notice of Insufficiency and Response, arguing that that the Complaint should be found insufficient in that it "requests a 'worker,' presumably meaning paraprofessional assistance, but it does not explain how denial of paraprofessional assistance affects [the] provision of FAPE"; it "merely alleges that the student should receive a 'worker' because [redacted] had one in [redacted]"; and "much of [it] is unintelligible." On April 25, 2012, the undersigned issued an Order of Sufficiency, the last paragraph of which read as follows:

> The undersigned has carefully reviewed the English-translated version of the due process complaint filed in instant case by B.G. (in which she is challenging the School Board's refusal to provide her "autistic and bipolar" child with "supervision all the time," through an "assigned worker," as her child had received in [redacted]) and [has] determined that, on its face, the complaint is sufficient to meet the pleading requirements of Florida Administrative Code Rule 6A-6.03311(9)(d), notwithstanding that it may not be a model of clarity and factual specificity. Accordingly, the School Board's request that the undersigned find otherwise is denied.

On April 27, 2012, the School Board filed a motion requesting that the due process hearing be continued on the

grounds that its counsel of record had a scheduling conflict on the scheduled day of hearing, May 24, 2012. By Order issued May 14, 2012, the undersigned granted the motion (to which the Mother had not filed a response) and rescheduled the hearing for May 30, 2012. Doing so extended the final order deadline in this case (which had been June 25, 2012) six days (the length of the continuance) pursuant to paragraph 7 of the Order of Pre-Hearing Instructions, as the undersigned advised the parties in his May 14, 2012, Order Granting Continuance and Re-Scheduling Hearing.

On May 29, 2012, the Mother filed a motion requesting that the due process hearing be continued on the grounds that she had been unable to obtain child care for her children and to arrange for transportation to the hearing site the day of the hearing. Following a telephone conference call with the parties held later that day, the undersigned issued an Order granting the motion and rescheduling the hearing for August 29, 2012. Such action had the effect of extending the final order deadline in this case 91 days (the length of the continuance) pursuant to paragraph 7 of the Order of Pre-Hearing Instructions, as the undersigned advised the parties in his May 30, 2012, Order Granting Continuance and Re-Scheduling Hearing.

On July 24, 2012, the undersigned issued an Amended Notice of Hearing, advising the parties that the due process hearing

then scheduled for August 29, 2012, had been moved back a day to August 30, 2012, to accommodate the undersigned's hearing calendar.

The due process hearing was held on August 30, 2012, as scheduled.

At the hearing, the Mother presented her own testimony (through a Spanish-English interpreter[3/]). She also attempted to offer certain exhibits into evidence to supplement her testimony, but the School Board effectively exercised its right to "prohibit the introduction" of these exhibits on the ground that they were not identified by the Mother as proposed exhibits in accordance with the aforementioned "five-day rule." These exhibits were therefore rejected by the undersigned. See L.J. v. Audubon Bd. of Educ., Case No. 06-5350 (JBS) (Civil), 2008 U.S. Dist. LEXIS 71122 **14-15 (D. N.J. Sept. 10, 2008)("The five-day rule furthers the goal of 'prompt resolution of questions involving the education of handicapped children,' by providing unambiguous requirements and strong incentives for pre-hearing disclosures. That is, the rule puts parties to IDEA administrative proceedings on notice as to precisely what must be disclosed ('any evidence at [a] hearing') and when ('at least five business days before the hearing'), and reduces the likelihood that a hearing would have to be delayed or adjourned on account of disputes or confusion over a party's disclosure

obligations. Notwithstanding Defendant's complaint about the ALJ's 'hyper[-]technical' application of the five-day rule in this case, then, it is precisely the categorical, unambiguous nature of the rule that serves 'the IDEA's goal of prompt resolution of disputes . . . concerning the disabled student's education.'")(citations omitted).

Testifying on behalf of the School Board at the hearing were Margaret Espinoza, Denise Kelly, Lilia Martinez, Carolina Correa, Norella Gutierrez, Jacqueline Stephens, Reva Vangates, and Josephina Derby. In addition to the testimony of these witnesses, the following School Board exhibits were offered and received into evidence: School Board Exhibits 2, 3 (pages 64 and 65 only), 7 (pages 141 and 142 only), 9, 10, and 14.

At the conclusion of the evidentiary portion of the due process hearing on August 30, 2012, the undersigned, with input from the parties, established a September 14, 2012, deadline for the filing of proposed final orders. The undersigned also reminded the parties that the final order deadline had been extended to Monday, October 1, 2012.

The School Board timely filed its Proposed Final Order on September 14, 2012. The Mother has not filed any post-hearing submittal.

The Transcript of the due process hearing (consisting of one volume) was filed with DOAH on September 18, 2012.

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

FINDINGS OF FACT

1. [redacted] is a [redacted] "mild[ly]" autistic child with average intelligence (as reflected by [redacted] IQ scores). [redacted] was born to the Mother in October 2002.

2. [redacted] has resided in Miami-Dade County (County) in a household with [redacted] younger sister and the Mother since coming to Florida from [redacted] sometime around the beginning of the 2011-2012 school year.

3. The Mother has entrusted [redacted] with a key to the family residence so that [redacted] may gain entry after school on those days that the Mother is not home.

4. At present, [redacted] is a [redacted] student on a regular diploma track at [redacted] (School), a County public school operated by the School Board, having successfully completed [redacted] third-grade year at the School last school year.

5. At all times material to the instant case, the School Board has provided [redacted] with special education and related services (as a Student with Autism Spectrum Disorder and a Student who Requires Occupational Therapy[4/]), as well as ESOL

(English for Speakers of Other Languages) services (inasmuch as Spanish, not English, is [redacted] primary language), at the School. [redacted] has received instruction in science and social studies, as well as in Spanish, physical education, art, and music, in a general education setting (with non-disabled students). Instruction in all other academic subjects has been provided in a self-contained, disabled students-only class of 12 students (taught by Margaret Espinoza, with the assistance of a full-time classroom aide).[5/] [redacted] has also received at the School occupational therapy, language therapy, and, starting more recently, counseling services.

6. At no time has the School Board assigned a one-on-one aide to serve [redacted], notwithstanding the Mother's persistent requests that it do so. [redacted] nonetheless has been able to safely access, and gain meaningful educational benefit from, [redacted] education at the School, making especially notable progress in [redacted] English language, reading, and comprehension skills. [redacted] frequent absences from school (particularly towards the end of the 2011-2012 school year) have prevented [redacted] from making more progress than [redacted] has.

7. [redacted] has proven to be a non-aggressive, pleasant, friendly, social, outgoing, and enthusiastic student who loves to share with others in [redacted] class information obtained from books [redacted] reads[6/] and from other sources, albeit sometimes at

inappropriate times. [redacted] is able to communicate in complete sentences and, when necessary, express [redacted] feelings and advocate for [redacted] ([redacted] deficits in communication being quite mild).[7/] Although [redacted] knows [redacted] way around the School and is able to safely navigate its hallways independently, [redacted] understands that there is a School rule prohibiting [redacted] from walking in the hallways alone and [redacted] abides by that rule.

8. In class, [redacted] has some difficulty staying focused and transitioning from one subject to another, but only minimal prompting is necessary to redirect [redacted] and get [redacted] on-task. With additional time, [redacted] is generally able to complete [redacted] classwork.

9. In [redacted] [redacted] grade general education class in which [redacted] was taught science and social studies (by Denise Kelly), [redacted] was an average performer, doing better than some students and not as well as others. [redacted] was able to complete [redacted] work in class "mostly on [redacted] own, with little redirection."

10. At the time [redacted] left [redacted], [redacted] was receiving special education and related services pursuant to an IEP, dated May 20, 2011 (Puerto Rico IEP), which was still "active." In [redacted], [redacted] had a full-time one-on-one aide to assist [redacted] in, and to and from, school. Such assistance, however, was not provided for in the [redacted] [redacted] IEP. Rather, it was ordered as a result of litigation initiated by the Mother after [redacted] had

arrived home from school one day with, what appeared to the Mother to be, a laceration to [redacted]'s private area.

11. From the beginning of the 2011-2012 school year until October 12, 2011, the School Board provided [redacted] with the special education and related services described in the [redacted] IEP.

12. A new IEP, modeled on the [redacted] IEP, was developed for [redacted] at a meeting held on October 12, 2011 (October 2011 IEP). Participating in the meeting were the Mother; Ms. Espinoza; Ms. Kelly; Carolina Correa, a school psychologist and evaluation specialist; and Ana Fernandez Casanas, an assistant principal at the School (who served as the LEA Representative at the meeting).

13. A Reevaluation Team Documentation Form completed by Ms. Correa (Completed RT Form) was reviewed at the meeting. The Completed RT Form contained a brief description given by Ms. Correa of [redacted]'s "Current Levels of Performance" in ten "Assessment Areas" based on information obtained from various identified sources. It provided, in pertinent part, as follows:

> Assessment Area: Academic Achievement- Current Level of Performance: Reading: at 1st grade Level, Math: adding single digits; Informant: Teacher;
>
> Assessment Area: Intellectual- Current Level of Performance: Average; Informant: Evaluation;
>
> Assessment Area: Perceptual Processing- Current Level of Performance: [redacted] will be

evaluated to receive occupational therapy; Informant: Teacher;

Assessment Area: Emotional- Current Level of Performance: Happy; Informant: Mother;

Assessment Area: Adaptive Behavior- Current Level of Performance: Independent; Informant: Teacher;

Assessment Area: Speech/Language/Hearing- Current Level of Performance: Will start receiving language therapy; Informant: Teacher;

Assessment Area: Vision- Current Level of Performance: Needs glasses; Informant: Mother;

Assessment Area: Physical/Medical- Current Level of Performance: Focalin-XR, Risper[i]done; Informant: Mother;

Assessment Area: School Attendance (Last 6 months)- Current Level of Performance: Good school attendance; Informant: School records;

Assessment Area: Social- Current Level of Performance: Has friends; Informant: Teacher/Mother;

14. The October 2011 IEP described, as follows, [redacted] "strengths," the "[e]ffects of [redacted] disability," and [redacted] "Priority Educational Need(s)" in the domains of "Curriculum and Learning Environment," "Social/Emotional Behavior," "Independent Functioning," and "Communication":

Domain: Curriculum and Learning Environment

The strengths of the student:

Review of I.E.P. from [redacted], Parent input and teacher input indicate that [redacted] can answer basic comprehension questions, can use picture clues to interpret information from a story, can copy from the board, but slowly, can write simple sentences with some assistance. In regards to Math, [redacted] is able to count and write numbers 1-200 with ASSISTANCE; can add/subtract single digit numbers w/out regrouping with assistance.

The [e]ffects of the disability:

[redacted] needs assistance with inferential reading comprehension skills. [redacted] has difficulty determining the main idea/analyzing details/cause & effect and sequencing events. [redacted] doesn't read with fluency. In regards to written communication [redacted] requires assistance with writing sentences, providing supporting detail, using descriptive words and staying on topic. [redacted] needs assistance with punctuation and capitalization as well. In regards to math [redacted] ha[s] difficulty adding/subtracting multi-digit numbers with regrouping as well as solving multi-step problems. [redacted] needs to be able to identify the key words and use correct application.

The student's Priority Education Need (PEN) is:

English Language Acquisition Skills in Language Arts

English Language Acquisition Skills in Reading

Math Skills

Domain: Social/Emotional Behavior

The strengths of the student:

[redacted] is social. [redacted] responds well to positive reinforcement.

The [e]ffects of the disability:

Teachers and parent state that [redacted] is very impulsive and easily distracted. [redacted] constantly needs to be redirected to stay on task and complete assignments.

The student's Priority Education Need (PEN) is:

Impulse Control Skills

On-Task Behavioral Skills

Domain: Independent Functioning

The strengths of the student:

[redacted] is independent in regards to functional daily living skills.

The [e]ffects of the disability:

[redacted] needs assistance with fine motor skills. [redacted] has difficulty using correct letter size, proper spacing and writing between the lines.

The student's Priority Education Need (PEN) is:

Fine Motor Skills

Domain: Communication

[redacted] speech skills appear to be within normal limits.

The [e]ffects of the disability:

[redacted] needs assistance with expressive and receptive language skills.

The student's Priority Education Need (PEN) is:

Receptive/Expressive Language Skills.

15. The October 2011 IEP had eight annual "Measurable Goals": three in the domain of "Curriculum and Learning Environment"; two in the domain of "Social/Emotional Behavior"; one in the domain of "Independent Functioning"; and two in the domain of "Communication."

16. The "Curriculum and Learning Environment" annual "Measurable Goals" were as follows:

When given a prompt [redacted] will write 3-4 sentences using correct grammar and punctuation as well as staying on task in 3 out of 4 occurrences using ELL strategies.

When presented with addition/subtraction problems, [redacted] will add/subtract single digit numbers independently with 70% accuracy.

When given a reading selection [redacted] will determine the main idea with 70% accuracy using ELL strategies.

17. The "Social/Emotional Behavior" annual "Measurable Goals" were as follows:

When given a task/assignment [redacted] will complete the task with minimal prompting and accept redirection from teacher.

> During the school setting [redacted] will follow school/classroom rules by not yelling out and staying in [redacted] seat in 3 out of 4 occurrences.

18. The "Independent Functioning" annual "Measurable Goal" was as follows:

> When given a written assignment [redacted] will write using proper letter size, proper spacing and stay within the lines 3 out of 4 occurrences.

19. The "Communication" annual "Measurable Goals" were as follows:

> In a structured small group setting [redacted] will answer comprehension questions after listening to a short story with 80% accuracy.
>
> In a structured small group setting [redacted] will answer "wh" questions while using grammatically correct sentences in 3 out of 4 occurrences.

20. The October 2011 IEP enumerated the "Accommodations/ Modifications in the Educational Setting," the "Specialized Instruction," and the "Related Services" that [redacted] would be receiving from October 12, 2011, to June 7, 2012, and from August 22, 2012, to October 11, 2012.

21. The "Accommodations/Modifications in the Educational Setting" provided for in the October 2011 IEP were as follows:

> Allow use of manipulatives;
>
> Do not penalize for poor handwriting/motor skills;

Flexible Presentation-Approved Dictionary;

Flexible Presentation-ESOL Strategies;

Flexible Scheduling/Timing-Extra time for assignments;

Flexible Setting-Small group for testing; and

Shortened Assignments based on mastery of key concepts;

22. The "Specialized Instruction" provided for in the October 2011 IEP was: "English Acquisition Skills in Language," for 30 minutes each school day, in the "ESE Class"; "English Acquisition Skills in Reading," for 90 minutes each school day, in the "ESE Class"; "Math Skills," for 60 minutes each school day, in the "ESE Class"; "Fine Motor Skills" (with no "duration," "frequency," or "service location" specified); "Receptive/Expressive Language Skills," for 30 minutes each school week, in the "ESE Class"; "Impulse Control Skills," for 60 minutes each school week, in the "General Education Class"; and "On-Task Behavioral Skills" (with no "duration," "frequency," or "service location" specified).

23. The October 2011 IEP indicated that [redacted] would receive, as "Related Services," "Language" and "Occupational Therapy," both for 30 minutes a week in a single weekly session on the "General Education Campus."

24. With respect to transportation, the October 2011 IEP provided that the "Primary Transportation Mode" would be "Individualized Stop Without Supervision."

25. With respect to placement, the October 2011 IEP noted that [redacted] would have a "Resource Room" placement, where [redacted] would be with non-disabled students "41%-79%" of the time, and that the following "factors [were] considered in selecting [redacted] placement and ensuring that it [was] in the least restrictive environment": "student frustration and stress"; "student self-esteem and worth"; "distractibility"; "need for lower pupil-to-teacher-ratio"; "time required to master educational objectives"; and "difficulty completing tasks."

26. The Mother indicated in the "Parent(s)/ Guardian(s)Comments" section of the October 2011 IEP that [redacted] was in "agreement" with the IEP.

27. The "Conference Notes" section of the October 2011 IEP read as follows:

> Student entered MCDS with a current IEP and psychological from [redacted]. [redacted] was receiving SPED services in a resource setting for Reading/Math/Language Arts with the related services of Language Therapy and Occupational Therapy. Parent received a copy of procedural safeguards. An RT will be held. Parent brought in a letter from [redacted] stating the need for para-professional assistance, however this was not documented on the current IEP from [redacted]. Parent was informed that student is transitioning well in the school

> and there are no concerns with the exception of [redacted] distractibility. She was also informed that [redacted] will continue to be observed to see if there is a need/concern and that MCDS procedures will be implemented (if needed) in [de]termining if student requires that related service. Parent is in agreement and stated that [redacted] is doing well.
>
> OT was transferred from Puerto Rico IEP

28. One school day afternoon sometime shortly before February 2, 2012, following a "math session" in Ms. Espinoza's class, [redacted] and a classmate with whom [redacted] was friendly (Friend) approached Ms. Espinoza, and the Friend told Ms. Espinoza that, towards the end of the "math session," another student in the class had "made a little thrust or circling motion" behind [redacted] back as [redacted] walked past him (Alleged Incident).[8/] When Ms. Espinoza asked [redacted] if [redacted] had felt something, [redacted] responded, "I don't know. I think I did." Ms. Espinoza then escorted [redacted] and the Friend to their general education class, after which she went to the School office to report what she had been told by [redacted] and the Friend. Shortly thereafter, the principal of the School and the School's assistant principal conducted student interviews to investigate the matter. Later that afternoon, following the completion these interviews, the assistant principal telephoned the Mother to tell her about the Alleged Incident and what the School's investigation had revealed. The Mother was later given a different, more troubling, version of

the Alleged Incident by the Friend's mother,[9/] who purported to relate to the Mother what her [redacted] had told her. This prompted the Mother, out of concern for the safety of her child, to contact the School and request a full-time one-on-one aide for [redacted].

29. In response to the Mother's request, the School Board provided the Mother with written notice, dated February 2, 2012, that a meeting would be held on February 8, 2012, to review the October 2011 IEP.

30. The meeting was held on February 8, 2012, as scheduled. Participating in the meeting were the Mother; Ms. Espinoza; Ms. Kelly; Lilia Martinez, a speech/language pathologist who was providing services to [redacted]; and Jacqueline Stephens, a staffing specialist who served as the LEA Representative at the meeting.

31. At the meeting, revisions were made to the October 2011 IEP (resulting in a revised IEP that will be referred to herein as the "February 2012 Interim IEP"). These revisions were as follows: adding the following "Accommodation/ Modification in the Educational Setting": "Provide positive reinforcement for following rules or directions"; and adding "Counseling," for 30 minutes a week in a single weekly session, in the "General Education Class," as a "Related Service."[10/] No other change to the October 2011 IEP was made.

32. The Mother indicated in the "Parent(s)/Guardian(s) Comments" section of the February 2012 Interim IEP that she was in "agreement" with the IEP.

33. The "Conference Notes" included in the February 2012 Interim IEP read as follows:

> Interim Held. Student's progress was reviewed. Parent is requesting para-professional assistance. Parent was informed that District procedures will be followed in determining the need for paraprofessional assistance. The related service of counseling was added for a frequency of 30 mpw.

34. As part of the School Board's effort to follow "District procedures . . . in determining [redacted] need for paraprofessional assistance," Ms. Stephens observed [redacted] on March 2, 2012, in a classroom setting and then filled out and submitted a "Student Observation Form for Student Supports and Services" (Observation Form), in which she stated, among other things, the following:

> Student is not disrupting the educational environment. When student is off-task [the student] accepts redirection.
>
> * * *
>
> Another student in the gen. ed setting has a para and that para also assists the other students in the class. Gen. ed and SPED teacher state that student is doing well and is a[cc]essing [redacted] curriculum.

Accompanying the Observation Form Ms. Stephens submitted was a cover letter, in which Ms. Stephens wrote the following:

> [redacted] was observed on March 2, 2012 to determine the need for the supplementary aide of para-professional assistance. [redacted] was observed during [redacted] Math resource class in which there were 10 students. [redacted] was able to work independently as well as with another student. [redacted] behavior was satisfactory. [redacted] was also observed in [redacted] general education reading class in which there is a total of 19 students. One of the students in the class receives para-professional assistance; therefore during the general education setting there is a total of 2 adults and 19 students.
>
> Throughout the observation, [redacted] was compliant and well-behaved. [redacted] was working on Success Maker independently. [redacted] general education teacher states that [redacted] is doing well, is an independent worker and is able to access the curriculum.

35. [redacted] speech/language pathologist, Ms. Martinez, also provided written information for consideration "in determining [redacted] need for paraprofessional assistance." It was in the form of the following written statement concerning [redacted] "Current Levels and Performance in Language Therapy," as of March 29, 2012:

> I have had the pleasure of working directly with [redacted]. [redacted] is a [redacted] year old third grade student who is receiving language therapy 30 minutes per week. [redacted] is cooperative and is able to make friends easily. During therapy, in a small group setting, [redacted] is able to answer comprehension questions related to grade level stories [when] provided minimal

> prompts with 60% accuracy. [redacted] is enthusiastic, creative, and loves to participate in discussions related to grade level stories. [redacted] raises [redacted] hand in order to ask why and how questions. [redacted] maintains the topic of conversation with minimal redirections to task. [redacted] also encourages [redacted] peers to participate and comply during language activities. [redacted] is able to walk independently to [the] therapy room and back to [redacted] classroom. There are no behavioral concerns during therapy at this time. [redacted] continues to grow into a more independent learner with minimal verbal and visual cues needed during language activities.

36. On March 26, 2012, the School Board provided the Mother written notice that a meeting would be held on March 29, 2012, to review the February 2012 Interim IEP.

37. The meeting was held on March 29, 2012, as scheduled, with the same participants as the February 2, 2012, meeting in attendance.

38. [redacted] need for "paraprofessional assistance" was discussed at the meeting. Contrary to the Mother's position on the matter, the rest of the meeting participants believed (reasonably, based on the information available to them[11/]) that [redacted] did not need "paraprofessional assistance" to meaningfully access with safety, and benefit from, [redacted] education, and, as a result, [redacted] IEP was not revised to include this service.[12/]

39. The IEP document prepared at the March 29, 2012, meeting (March 2012 Interim IEP) contained the following "Conference Notes" explaining what had occurred at the meeting:

> Interim held to review request for para-professional assistance. At this time it is the IEP team's recommendation that [redacted] not receive para-professional assistance. [redacted] general education teacher, SPED teacher and SLP report that [redacted] is doing very well academically and behaviorally. [redacted] is able to access [redacted] curriculum independently. Parent brought in a private evaluation (psychiatrist) [which] will be given to school psychologist. [redacted] teachers don't agree with evaluation as they stated to parent that [redacted] doesn't exhibit oppositional/disrespectful terrible behavior in [redacted] educational setting.

In the "Parent(s)/Guardian(s) Comments" section of the March 2012 Interim IEP, the Mother indicated her "disagreement" with the meeting's outcome.

40. An Informed Notice of Proposal or Refusal was also prepared at the March 29, 2012, meeting, and it was given to the Mother to formally advise her of the following:

> Description of the action proposed by Miami-Dade County Public Schools (M-DCPS): Not provide the supplementary service of para-professional at this time.
>
> Explanation of why this action is being proposed: Student is making satisfactory progress academically and behaviorally. [Student] is able to access [Student's] curriculum independently.
>
> Description of any action being refused by M-DCPS: To provide the supplementary

> service of para-professional assistance at this time.
>
> Explanation of why that action is being refused: Student is making satisfactory progress academically and behaviorally. [Student] is able to access [Student's] curriculum independently.
>
> * * *
>
> Evaluation procedures, tests, records, or reports used as a basis for the proposed or refused action:
>
> Teacher, parent, SLP input
>
> Other factors relevant to the above proposal or refusal:
>
> I.E.P. team recommendation.

41. On April 11, 2012, after receiving this Informed Notice of Proposal or Refusal, the Mother submitted to the School Board the due process hearing request that is the subject of the instant proceeding challenging the School Board's refusal "[t]o provide [[redacted] with] the supplementary service of para-professional assistance."

42. A new IEP was developed for [redacted] at a meeting held on May 7, 2012. At that meeting, an IEP Closeout Document was provided to the Mother. It reflected the following regarding the progress [redacted] had made on the eight annual "Measurable Goals" set out in the IEP that was being "closed out":

> 1. Annual Measurable Goal: When given a task/assignment [[redacted]] will complete the task

with minimal prompting and accept redirection from teacher.

Results: Some Progress

2. Annual Measurable Goal: During the school setting [redacted] will follow school/classroom rules by not yelling out and staying in [redacted] seat in 3 out of 4 occurrences.

Results: Some Progress

3. Annual Measurable Goal: When given a written assignment [redacted] will write using proper letter size, proper spacing and stay within the lines 3 out of 4 occurrences.

Results: Some Progress

4. Annual Measurable Goal: In a structured small group setting [redacted] will answer comprehension questions after listening to a short story with 80% accuracy.

Results: Adequate Progress

5. Annual Measurable Goal: In a structured small group setting [redacted] will answer "wh" questions while using grammatically correct sentences in 3 out of 4 occurrences.

Results: Adequate Progress

6. Annual Measurable Goal: When given a prompt [redacted] will write 3-4 sentences using correct grammar and punctuation as well as staying on task in 3 out of 4 occurrences using ELL strategies.

Results: Mastered

7. Annual Measurable Goal: When presented with addition/subtraction problems, [redacted] will add/subtract single digit numbers independently with 70% accuracy.

Results: Mastered

8. Annual Measurable Goal: When given a reading selection [redacted] will determine the main idea with 70% accuracy using ELL strategies.

Results: Adequate Progress

That [redacted] made such progress demonstrates that, not only was the "closed out" IEP (which made no provision for "paraprofessional assistance") reasonably calculated to provide [redacted] with meaningful educational benefit, it in fact did produce such a result.[13/]

CONCLUSIONS OF LAW

43. District school boards are required by the "Florida K-20 Education Code"[14/] 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)(l) 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[15/]; a speech impairment; a

language impairment; an orthopedic impairment; an other health impairment[16/]; 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."

44. "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).

45. It is undisputed that [redacted] is an "exceptional student," within the meaning of section 1003.01(3)(a), who, at all times material to the instant case, was eligible for and received exceptional student education as a student with an autism spectrum disorder. It is also undisputed that, at all times material to the instant case, [redacted] was eligible to, and did, receive occupational therapy.

46. The "Florida K-20 Education Code's" imposition of the requirement that district school board's "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students" 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),[17/] 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."[18/] 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.").

47. 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).").

48. "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).

49. 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).

50. 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). However, as was explained in Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46612:

> [T]his provision [34 C.F.R. § 300.156(b)(2)(iii)] [does] not . . . permit . . . the use of paraprofessionals as a replacement for teachers or related services providers who meet State qualification standards. To the contrary, using paraprofessionals and assistants as teachers or related services providers would be inconsistent with the State's duty to ensure that personnel necessary to carry out the purposes of Part B of the [IDEA] are

> appropriately and adequately prepared and trained. Paraprofessionals in public schools are not directly responsible for the provision of special education and related services to children with disabilities; rather, these aides provide special education and related services to children with disabilities only under the supervision of special education and related services personnel.

51. To meet its obligation under sections 1001.42(4)(l) 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.").

52. 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 (Fla. 1st DCA 2005)("A free appropriate public education 'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child,' but must be designed to afford the child a meaningful opportunity to learn.")(citation omitted); 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."[19/]); 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. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we 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.").

53. "Passing grades and advancement from year to year 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). 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).[20/] 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.").

54. "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, Case No. 10-20694, 2012 U.S. App. LEXIS 16293 **19, 21 (5th Cir. Aug. 6, 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 . . . ."); 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)("If the IDEA required the State to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student, then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive technology might be more problematic. But the court does not understand the IDEA to impose such requirements on the State."). 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).

55. 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.").

56. For each student found eligible for "special education" and "related services," there must be developed annually 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."); 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[.]'"); and Hupp v. Switzerland of Ohio Local Sch. Dist., Case No. 2:07-CV-628 (Civil), 2008 U.S. Dist. LEXIS 85883 **2-3 (S.D. Ohio Sept. 2, 2008)("If the individual needs of plaintiffs' minor child warranted one-on-one assistance, he was entitled to such assistance regardless of the assistance provided to [other] children. Conversely, if the minor child in this case was not entitled to [these] special services under the law, the fact that other children received such services cannot alter that conclusion. Thus, the diagnoses of and services offered to other children are simply not particularly relevant to the determination of whether or not the denial of special services to plaintiffs' minor son was proper.").

57. 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."); and 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 "). It provides the "the road map for a disabled child's education." M.C. ex rel. J.C. v. Cent. 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).

58. "[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, it need not do any more than "consider" such strategies. 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[.]'"). 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."); 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."). "Whether a child needs positive behavioral interventions and supports is an individual determination that is made by each child's IEP Team." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46683.

59. 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"). 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). It also must, when necessary, "[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115(b)(1).

60. 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[21/] 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 CFR § 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 . . . .). Providing [redacted] with "supervision all the time," through an "assigned worker," would make her current educational setting more restrictive than it already is. See I.G. v. Miami-Dade Cnty. Sch. Bd., Case No. 00-4252E, 2001 Fla. Div. Adm. Hear. LEXIS 2430 **19-20 (Fla. DOAH Jan 9, 2001)("The December 11 IEP contemplates a fulltime paraprofessional support person to insure I.G.'s safety in the regular classroom and to aid her in doing things * lacks the cognitive ability to do on her own. The presence of the paraprofessional would render a regular classroom a more restrictive environment for I. G., in that she would lose some of the independence she cherishes").

61. Notwithstanding the IDEA's "general preference" for educating children with disabilities in the "regular educational environment" (Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895, 905 (7th Cir. 1996)), there are circumstances where a more restrictive setting on the continuum is the appropriate choice for a particular child. See B.S. v. Placentia-Yorba Linda Unified Sch. Dist., 306 Fed. Appx. 397, 400 (9th Cir. 2009)("The findings that the educational and non-academic benefits to be derived from a mainstream program were minimal and the blended program would be better suited to meet B.S.'s

unique abilities and needs are sufficient to overcome the preference for mainstreaming."); Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 779 (8th Cir. 2001)("Because the preponderance of the evidence shows that she will not receive educational benefit in the less restrictive setting, the statute's preference is overcome here."); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), withdrawn, 956 F.2d 688 (1992), reinstated in part, 967 F.2d 470 (1992)("[T]he [IDEA's] mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education."); D.F. v. Western Sch. Corp., 921 F. Supp. 559, 571 (S.D. Ind. 1996)("The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the maximum extent appropriate."); and Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46585 ("The LRE requirements in

§§ 300.114 through 300.117 express a strong preference, not a mandate, for educating children with disabilities in regular classes alongside their peers without disabilities.").

62. "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 by Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1005 (4th Cir. 1997)("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.").

63. In the end, selecting the appropriate educational placement (as part of the IEP development process) involves "balanc[ing] the goal of providing [the] disabled child with some educational benefit with the goal of providing that benefit in the least restrictive environment." O'Toole By and Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 223, 963 F. Supp. 1000, 1010 (D. Kan. 1997), aff'd, 144 F.3d 692, 709 (10th Cir. 1998); see also Kerkam v. Superintendent, D.C. Pub. Sch., 931 F.2d 84, 86 (D.C. Cir. 1991)("The least restrictive environment is the one that confers some educational benefit but most closely approximates education with nonhandicapped children in the school that the handicapped child would attend if he had no handicap.").

64. 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).

65. "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, 443 F.3d at 975 ("[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.").

66. "[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. Haw. 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.").

67. "IEPs . . . for students who transfer from outside Florida" are governed by 20 U.S.C. § 1414(d)(2)(C)(i)(II), 34 CFR § 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.[22/] 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 CFR § 300.323(f)

IEPs for children who transfer from another State.[23/] 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.").

68. 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 Chi., 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.

69. 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.[24/] 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.").

70. 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).

71. 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 CFR § 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 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."); 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."); and Haw. Dep't of Educ. v. D.K., Case No. 05-00560 ACK/LEK, 2006 U.S. Dist. LEXIS 37438 *13 (D. Haw. June 6, 2006)("[T]he Court concludes that the parties are precluded from raising new issues at an administrative hearing that were not previously raised. All parties should have fair notice of the contested issues and the right to defend themselves at the hearing. In addition, a hearings officer should limit the issues he considers in reaching his determination to those that were raised prior to the hearing."). In the instant case, the School Board has not consented to the undersigned's consideration of any issue outside the scope of the Mother's Complaint.

72. "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking

relief." Schaffer, 546 U.S. at 62; see also 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."); and 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.). In the instant case, it is the Mother who is seeking relief, and she therefore bears the burden of proving her entitlement to the relief she is seeking.

73. The appropriateness of, and adequacy of the services provided in, an IEP must be judged, 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. v. Indep. Sch. Dist. No. 15,

647 F.3d 795, 808 (8th Cir. 2011)("[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 . . . .").[25/]

74. 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 l, 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, 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.")(citation omitted).

75. "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."[26/] Bd. of Educ. of the Cnty. of Kanawh v. Michael M., 95 F. Supp. 2d 600, 609 n.8 (S.D. W.Va. 2000). A successful educational program, on the other hand, may remain in effect until it is due to expire. See High v. Exeter Twp. Sch. Dist., Case No. 09-2202, 2010 U.S. Dist. LEXIS 7965 **16-17 (E.D. Pa. Feb. 1, 2010)("Plaintiffs conceded Stephanie received actual benefits through the services provided by the District, even though those services did not involve assistive technology. Stephanie's progress also shows she received a meaningful educational benefit without assistive technology. Thus, the District was not required to provide Stephanie with assistive technology."); 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.").

76. In making a determination as to the appropriateness and adequacy of an IEP, 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, 532-33 (4th Cir. 2002)("We have always been, and we should continue to be, reluctant to second-guess professional educators. . . . In refusing to credit such evidence, and in conducting its own assessment of MM's IEP, the court elevated its judgment over that of the educators designated by the IDEA to implement its mandate. The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also 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."); Beth B. v. Van Clay, 282 F.3d 493, 499 (7th Cir. 2002)("The school officials' decision about how to best educate Beth is based on expertise that we cannot match. . . . Although we respect the input Beth's parents have given regarding her placement and the their continued participation in IEP decisionmaking, educators 'have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents.'"); Devine, 249 F.3d at 1292 ("[G]reat deference must be paid to the educators who develop the IEP."); Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997)("[T]he deference is to trained educators, not necessarily psychologists."); Bd. of Educ. of the City of Chi., 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."); Arlington Cnty. Sch. Bd. v. Smith, 230 F. Supp. 2d 704, 713 (D. Va. 2002)("[T]he hearing officer's findings lack support

in the record, and he failed to defer to the considered judgment of the educational experts, who uniformly and consistently testified that Jane would receive educational benefit from her placement in the Interlude program."); 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. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the educational expertise of the local school authorities and then require such deference by the district court would be inefficient and thus counter to sound jurisprudence."); see also Hamilton Se. Sch., 668 F.3d at 862 ("[I]t is inappropriate to defer to the opinion of a single psychologist, particularly where that opinion is in conflict with the opinions of 'teachers and other professionals.'"). 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.").

77. In the instant case, in her Complaint, which was filed with the School Board on April 11, 2012, the Mother takes issue with the School Board's refusal (formally announced in its March 29, 2012, Informed Notice of Proposal or Refusal) to add "paraprofessional assistance" (in the form of a full-time one-on-one aide) as a "supplementary service" to [redacted] IEP, arguing that "the condition of the [child] merits [the provision of such] supervision." While the Mother's concerns regarding [redacted] safety and well-being are unquestionably genuine and heartfelt, the proof she submitted at the due process hearing on her Complaint--which consisted entirely of her own non-expert testimony--failed to show (as was her burden) that the School Board denied [redacted] a free appropriate public education by refusing to provide [redacted] with such "paraprofessional assistance." Not only did she fail to meet her burden of making such a showing, but the School Board 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 did provide [redacted] (through the implementation of the October 2011 IEP, the February 2012 Interim IEP, and the March 2012 Interim IEP, the latter of which was in effect at time the Mother filed her Complaint) were reasonably calculated to, and in fact did, produce meaningful educational benefit and that there thus was no need for it, at any time material to the instant case, to also provide [redacted] with a full-time one-on-one aide (whose presence would make [redacted] educational setting more restrictive and pose a threat to [redacted] social development and independent functioning[27/]) in order to meet its FAPE obligation under the IDEA and Florida law. See J.D. v. Kanawha Cnty. Bd. of Educ., Case No. 2:06-cv-00167, 2007 U.S. Dist. LEXIS 56947 **27-29 (S.D. W.Va. Aug. 3, 2007)("[T]he hearing officer properly found that the March 23, 2005 IEP gave J.D. a FAPE. As the hearing officer determined, the experts and other witnesses called by the school 'testified credibly that the March 23, 2005, IEP was reasonably calculated to confer meaningful educational benefit upon the student and that the student could receive such educational benefit in his current preschool classroom without a one-to-one aide or any additional staff.' . . . [T]he evidence within [the] record supports his conclusion. The IEP included many applicable goals

and objectives. Staff members that the hearing officer found to be credible testified that J.D. made progress within the regular LEAP curriculum, without a one-on-one aide. Parental discontent over the services provided in the IEP, which is required to be reviewed and developed annually, is insufficient to overrule the opinions of the education professionals under the IDEA review process and does not preclude the court finding that a child received a FAPE. . . . Because credible testimony exists that J.D. made progress in the LEAP classroom, without a 1:1 assistant or DTT therapy, I must FIND by a preponderance of the evidence that the March 23,2005 IEP provided J.D. with a FAPE. The educational benefit of the March 23, 2005 IEP was more than trivial or de minimus, and was calculated to give a benefit to J.D. Thus, the IEP meets the standard of Rowley, as articulated by the Supreme Court.")(citation omitted); and Reinholdson, 2005 U.S. Dist. LEXIS 15764 *26 ("[T]he preponderance of the evidence in the instant case indicates the Student does not require full time one-to-one paraprofessional assistance to receive a FAPE. The quantitative, qualitative, and anecdotal evidence in the Record demonstrates the Student is making meaningful educational progress with variable paraprofessional support.").

CONCLUSION

78. In view of the foregoing, the Mother's Complaint is found to be without merit. Accordingly, no relief can be awarded to her in this proceeding.

DONE AND ORDERED this 25th day of September, 2012, in Tallahassee, Leon County, Florida.

S

_____
STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 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/] In including this language in paragraphs 4 and 5 of the Pre-Hearing Order, the undersigned was advising the parties of the so-called "five-day rule" codified in 34 C.F.R. § 300.512(a)(3) and in its Florida counterpart, Florida Administrative Code Rule 6A-6.03311(9)(v)1.c, which provide, respectively, as follows:

34 C.F.R. § 300.512(a)(3)

> General. Any party to a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, has the right to--
>
> Prohibit the introduction of any evidence at the hearing that has not been disclosed to
>
> that party at least five business days before the hearing.
>
> Florida Administrative Code 6A-6.03311(9)(v)1.c
>
> Minimum procedures for due process hearings shall include the following:
>
> Hearing rights. Any party to a due process hearing has the right:
>
> To prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing;

[3/] The Mother had the assistance of a Spanish-English interpreter, not only when she testified, but throughout the entire hearing.

[4/] On May 7, 2012, following the filing of the Mother's Complaint, [redacted] was found eligible to receive special education and related services from the School Board under the additional eligibility category of Other Health Impairment based on documentation from [redacted] physician that [redacted] had Attention Deficit Disorder.

[5/] At times during the school day, [redacted] and another student have been the only students in the classroom with Ms. Espinoza and her aide. On these occasions, [redacted] has received considerable individualized attention.

[6/] [redacted] is currently reading at a high second-grade level. [redacted] lacks the English vocabulary to be able to read at a fourth-grade level.

[7/] For instance, on one occasion in third grade, [redacted] told [redacted] science and social studies teacher that [redacted] was upset because a classmate would not return a toy that, according to [redacted], belonged to [redacted]. (The teacher wound up confiscating the toy after hearing from the other student, who claimed that the toy was hers.)

[8/] What, if anything, actually happened, the record evidence does not reveal.

[9/] The Friend's mother was a neighbor of the Mother's.

[10/] Counseling was added at the behest of the Mother, who was concerned that [redacted] was not able to express [redacted] feelings.

[11/] In making this finding of reasonableness, the undersigned has relied on the hearing testimony of the educational professionals who testified, credibly, on behalf of the School Board.

[12/] There was the legitimate concern that providing [redacted] with "paraprofessional assistance" would have a counterproductive impact in that it would isolate [redacted] from his classmates and thwart the development of [redacted] functional independence.

[13/] See Bradley v. Ark. Dep't of Educ., 443 F.3d 965, 974 (8th Cir. 2006)("The factual finding regarding David's academic progress shows not only that the IEPs were reasonably calculated to provide educational benefit to David, but that they had the desired effect.").

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

[15/] Students with "autism spectrum disorder" are described in the "rules of the State Board of Education" as follows:

> Definition. Students with Autism Spectrum Disorder. Autism Spectrum Disorder 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. Autism Spectrum Disorder 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. Autism Spectrum Disorder may include Autistic Disorder, Pervasive Developmental Disorder Not Otherwise Specified, Asperger's Disorder, 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.").

[16/] "Other health impairment" is defined in Florida Administrative Code Rule 6A-6.030152(1) as follows:

> Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems. This includes, but is not limited to, asthma, attention deficit disorder or attention deficit hyperactivity disorder, Tourette syndrome, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and acquired brain injury.

[17/] "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.").

[18/] 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 CFR Subtitle B, part 300 et.seq. which is hereby incorporated by reference to become effective with the effective date of this rule, ...

[19/] 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. Compare Rowley, 458 U.S. at 187-89 (quoting EHA definitions) with 20 U.S.C. § 1401(9), (26), (29)(current IDEA definitions). Indeed, the Supreme Court has recently cited approvingly Rowley's discussion of the meaning of FAPE in Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2000-01, 167 L. Ed. 2d 904 (2007)."); 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 Aptakisic-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.").

[20/] 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.

[21/] 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.

[22/] "State," as used in 20 U.S.C. § 1414(d)(2)(C)(i)(II), includes the Commonwealth of Puerto Rico. 20 U.S.C. § 1401(31).

[23/] "State," as used in 34 CFR § 300.323(f), includes the Commonwealth of Puerto Rico. 34 CFR § 300.40.

[24/] 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 CFR § 300.324(a)(4) and (6); and Fla. Admin. Code R. 6A-6.03028(3)(k).

[25/] 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.").

[26/] An IEP, however, must be given a reasonable opportunity to succeed before it can be deemed to have failed. 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."); 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 Indep. 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.").

[27/] See J.S. v. Springfield Twp. Bd. of Educ., Case No. 05-cv-04891 (DMC), 2007 U.S. Dist. LEXIS 44611 **22-23 (D. N.J. June 19, 2007)("Dr. Barenbaum also stated that part of mainstreaming a child requires that the school district foster independence so that a child can be doing the work on his own. The ALJ agreed that such dependence on an in class aide is a heavy restriction on any child. Additionally such a finding is consistent with the broader policy goals of the IDEA, including Congress' goal of fostering independence and social productivity in children.")(citations omitted); and Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11, Case No. 02-4225 ADM/AJB (Civil), 2005 U.S. Dist. LEXIS 15764 **26-27 (D. Minn. Aug. 2, 2005), aff'd, 187 Fed. Appx. 672 (8th Cir. 2006)("[V]ariable paraprofessional support [when contrasted with full time one-to-one paraprofessional assistance] is in keeping with the IDEA's mandate of providing students with education in the least restrictive environment. Furthermore, variable paraprofessional support will assist the Student in becoming more independent and self-sufficient, goals identified by Dr. Wagner, the Parent, and the Student's educators.")(citations omitted).

COPIES FURNISHED:

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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, 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).