

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 11-2807E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted on July 13 and 14, 2011, by video teleconference at sites in Miami and Tallahassee, Florida, and on August 1 and 3 by webcast and telephone conference call between sites in Miami and Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Lilliam Rangel-Diaz
Qualified Representative
Center for Education Advocacy, Inc.
5973 Southwest 42nd Terrace
Miami, Florida 33155

For Respondent: Teddra Joy Gadson, Esquire
Mary C. Lawson, Esquire
Melinda L. McNichols, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

STATEMENT OF THE ISSUE

Whether Respondent denied Petitioner, [REDACTED] (the Student) a free, appropriate public education (FAPE) within the meaning of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., in the least restrictive environment (LRE) and, if so, the relief to which Petitioner is entitled.

PRELIMINARY STATEMENT

The Student is referred to in this Final Order by the Student's initials to protect the Student's privacy. This Final Order has been written in compliance with the standing request of the Florida Department of Education that DOAH ALJs write orders involving IDEA in a gender-neutral fashion without naming the Student's school. All state statutory references are to Florida Statutes (2011).

At the times relevant to this proceeding, the Student was enrolled in a public elementary school in Miami-Dade County, Florida. At all time relevant to this proceeding, the Student was receiving services from Respondent's exceptional student education program (ESE).

The following contentions are asserted by Petitioner in its request for a due process hearing filed May 27, 2011:

1. Respondent failed to timely determine the Student to be eligible for ESE services under the diagnosis Autism Spectrum Disorder (ASD).

2. The Individual Education Plan (IEP) developed February 4, 2010, was not reasonably calculated to provide the Student FAPE in the LRE.
3. The IEP developed May 28, 2010, was not reasonably calculated to provide FAPE in the LRE.
4. The decision made February 24, 2011, to remove the Student from the Student's general education classroom to a special education classroom without supplementary aids and services for language arts, reading, and math was made in violation of the LRE requirement and section 1003.57(1), Florida Statutes.^[1]
5. The School Board did not conduct an objective and appropriate functional behavior assessment (FBA) for the Student.
6. The School Board did not develop an appropriate behavior intervention plan (BIP) for the Student.
7. The decision made by the School Board on February 24, 2011, to deny the Student full-time 1:1 paraprofessional support was pre-determined.
8. The School Board modified the Student's curriculum outside the IEP team.
9. The School Board is not providing the Student FAPE in the LRE.
10. The School Board has not considered the Student's independent educational evaluation (IEE) in drafting an appropriate IEP.
11. The School Board has not considered the Student's neurological consultation in drafting an appropriate IEP.

At the final hearing, Petitioner presented the testimony of the Student's mother, and Dr. Ketty Patino Gonzalez (a psychologist who conducted the IEE for the Student, the cost of which was paid by Respondent). Petitioner presented pre-marked Exhibits B, D, E, F, G, H, J, K, L, M, N, P, Q, R, S, T, U, X, CC, DD, EE, FF, GG, HH, II, JJ, KK, and, LL, each of which was admitted into evidence.²

Respondent called as witnesses the following School Board employees: Norka Concepcion (a school psychologist), Lourdes Maria Alonso (a special education staffing specialist), Isel Porras (the Student's special education teacher), Jennifer Mirabal (the Student's general education teacher), Edna Waxman (the School Board's supervisor for autism instruction), and Ann Marie Sasseville (the School Board's supervisor for special education and a licensed clinical psychologist). Respondent offered the following pre-marked exhibits, each of which was admitted into evidence: 1a, 1c, 2a, 2b, 2c, 2d, 2e, 2h, 9e, 11a, 12, 15, and 17.³

Four volumes of the Transcript for the proceedings conducted on July 13 and 14 were filed August 4. Two volumes of the Transcript for of the proceedings conducted on August 1 and 3 were filed August 11, 2011.

Petitioner and Respondent timely filed proposed final

orders, which have been duly considered by the undersigned in the drafting of this Final Order.

FINDINGS OF FACT

1. The Student was born in [REDACTED].
2. At the time of the formal hearing, the Student was eligible for and ESE services in the categories "Intellectual Disabilities" and "Language Impaired."
3. The Student has received occupational therapy and speech/language therapy at all times relevant to this proceeding. Petitioner did not prove that the levels of services the Student has received in occupational therapy and speech/language therapy were inappropriate.
4. As will be discussed in detail below, the Student is cognitively impaired, hyperactive, and easily distracted.
5. The Student has language delays.
6. The Student has attended the same public elementary school for [REDACTED] during the 2008-09 school year, [REDACTED] during the 2009-10 school year, and [REDACTED] for the 2010-2011 school year. The Student was retained in [REDACTED] for the 2009-2010 school year because the Student did not pass the Sunshine State Standards for [REDACTED] during the 2008-2009 school year.

7. At the times relevant to this proceeding, the Student has been on a standard curriculum and has been required to meet Sunshine State Standards imposed on general education students. Petitioner's contention that Respondent has modified the Student's curriculum is rejected because that contention is contrary to the credible evidence.

8. The Student was initially determined to be eligible for ESE services under the general category of Developmentally Delayed (DD). Pursuant to Florida Administrative Code Rule 6A-6.03027, the DD category is for children ages three through six. Pursuant to Florida Administrative Code Rule 6A-03027(6), the school is required to determine a child's continued eligibility for ESE services before the child attains the age of six years.

9. Norka Concepcion and an intern working under her supervision examined the Student on November 30, December 7, and December 9, 2009, for the purposes of evaluating the Student for continuing eligibility for ESE services. The Student's mother consented to the reevaluation. The Student was approximately [REDACTED] and eight months when the evaluation occurred.⁴

10. Ms. Concepcion prepared a report (Respondent's exhibit 9E) entitled, "Reevaluation Report,"⁵ that contained the following summary:

[The Student] is a kind, friendly, student who attends [REDACTED] at [the Student's school]. [The Student] repeated

██████████ due to academic difficulties. [The Student] continues experiencing academic difficulties. As such, during the reevaluation meeting it was determined to conduct a psychoeducational evaluation to take a closer look at [the Student's] levels of functioning. Furthermore, results reported herein are to be used to guide the decision making process in educational programming and developing recommendations and intervention strategies as needed.

Cognitively, [the Student] presents overall cognitive functioning within the Very Low range [The Student's] verbal comprehension ability fell within the Very Low range [The Student's] nonverbal reasoning abilities fell within the Low range [The Student's] visual processing abilities were found to be within the Very Low range Based on review of cognitive findings, [the Student's] academic difficulties appear to be explained by specific cognitive weaknesses in the areas of verbal reasoning, nonverbal reasoning, short-term/working memory, long-term retrieval, and visual processing. These help to explain the underlying processes that contribute to [the Student's] difficulties in all academic areas. For example, [the Student's] difficulties with short-term memory will make it difficult for [the Student] to decode letters into sounds and then hold these sounds in [the Student's] memory, as [the Student] tries to decode the remaining letters in the word and then blend them together to form the word. Subsequently, difficulties with short-term memory will result in poor ability to encode information, which is directly related to long-term retrieval. [The Student] will benefit from additional time to process incoming information in order to improve [the Student's] ability to encode information. [The Student's] visual processing difficulties most likely interfere with orthography, that is, being

able to recognize words by the way they look.

Academically, [the Student] demonstrated significant difficulties in all academic areas. [The Student] presented with lower than expected achievement in the areas of basic academic skills. [The Student] had difficulty identifying letter sounds and numbers. [The Student] had difficulty rote counting and indicating one-to-one correspondence. Additionally [the Student's] listening comprehension skills are also [sic] below age expectations. [The Student] was unable to use [the Student's] receptive and expressive vocabulary skills in identifying specific objects. Given these findings, [the Student] will most likely experience frustration in the classroom and will require additional support to facilitate learning.

[The Student's] Broad Independence, an overall measure of adaptive behavior, is comparable to and [sic] individual of 4-years, 2-months of age. [The Student's] personal living skills were found to be limited to age-appropriate. [The Student's] adaptive behavior assessment indicate that [the Student] has limitations in the following adaptive skill areas: language expression, time and punctuality, work skills, and home/community orientation.

11. Isel Porras teaches special education classes at the Student's school. Ms. Porras has taught the Student language arts, reading, and math for the three school years set forth above. Ms. Porras holds a bachelor's degree and a master's degree in special education, a Florida teaching certificate in general education for kindergarten through ninth grade, and a Florida endorsement for English for Speakers of Other Languages

(ESOL). Ms. Porras has a special interest in reading. She has created specialized reading materials for her classes and has utilized various reading strategies in her class. Ms. Porras is a highly qualified teacher with over 20 years of teaching special education.

12. Ms. Porras was a member of the IEP team for each IEP discussed in this Final Order. The IEP team considered the Reevaluation Report prepared by Ms. Concepcion at an IEP meeting on February 4, 2010. The IEP team determined that the Student was eligible for ESE services in the categories "Intellectual Disabilities" and "Language Impaired," and an IEP was drafted.

13. An issue at that meeting was whether the Student should be changed from a standard curriculum to a modified curriculum. A modified curriculum would lower the expectations for the Student and would enable the Student to learn at the Student's own pace. However, a student on a modified program is typically placed on a track to graduate with a special diploma, not a standard diploma.

14. A representative from another elementary school with a class consisting solely of children with disabilities attended the meeting to determine whether that class would be appropriate for the Student.

15. On February 4, 2010, the IEP team did not place the Student on a modified curriculum, and the Student did not transfer to the other school.

16. The IEP developed February 4, 2010, provided that the Student would be taught in the general education classroom for science, social studies, special areas, and Spanish. The IEP provided ESOL services for the Student. The IEP provided that the Student would be taught in an ESE classroom for language arts, reading, language therapy, and math. The Student's ESE classes were taught by Ms. Porras. The IEP provided for the Student to be in the resource room 41 percent to 79 percent of the school day. The Student's goals were measurable and drafted to meet the Student's needs. The Student's mother participated in that IEP meeting and consented to the plan. The IEP developed February 4, 2010, was reasonably calculated to provide the Student FAPE in the LRE.

17. Although the Student did not achieve all of the IEP goals during the 2009-2010 school year, the Student did make meaningful progress towards achieving those goals during that school year, and advanced to the [REDACTED] grade for the 2010-2011 school year.

18. The IEP dated February 4, 2010, listed the following areas of difficulty for the Student:

The mother stated that she realizes that [the Student] is not at the level that [the Student] should be. She is aware that [the Student] needs more assistance. At times [the Student] does give her a hard time when having to complete [the Student's] homework. [The Student's] involvement and progress in the general education curriculum is affected by difficulties in expressive and receptive language skills. [The Student] has difficulties decoding words and identifying rhyming patterns found in words. [The Student] is unable to read a passage written above a pre-primer level and answer questions pertaining to main idea and supporting details. [The Student] has difficulties copying from the board and has poor handwriting skills. [The Student] has difficulties understanding abstract concepts. [The Student] is not able to answer "wh" questions pertaining to a story that has been read to [the Student]. [The Student] is unable to independently count from 6-10. [The Student] has difficulties counting with one-to-one correspondence. [The Student] requires constant redirection in order for [the Student] to remain on-task and complete [the Student's] work.

19. The following were identified as the Student's "Priority Educational Needs" (PENs) on the IEP dated February 4, 2010:

1. Receptive/Expressive Lang. Skills
2. Reading Skills
3. Written Communication Skills
4. Number Concepts
5. English Language Acquisition Skills
6. On-Task Behavioral Skills

20. On May 28, 2010, the Student's IEP team met for its annual review and completed an IEP. Ms. Porras was a member of

that team. The Student's mother participated in the meeting and agreed with the plan.

21. The IEP developed May 28, 2010, was similar to the IEP developed February 4, 2010. The IEP developed May 28, 2010, provided that the Student would be taught in the general education classroom for science, social studies, special areas, and Spanish. Jennifer Mirabal taught the Student's general education classes. The IEP provided that the Student would be taught in an ESE classroom for language arts, reading, language therapy, and math. Ms. Porras taught the Student's ESE classes. The IEP provided for the Student to be in the resource room 41 percent to 79 percent of the school day. The Student's goals were measurable and drafted to meet the Student's needs. The Student's mother participated in that IEP meeting and consented to the plan. The IEP developed May 28, 2010, was reasonably calculated to provide the Student FAPE in the LRE.

22. The IEP developed May 28, 2010, did not reflect that the Student was to receive ESOL services. This error did not impact whether the Student received FAPE because the Student continued to receive ESOL services.

23. Ms. Porras had a full-time paraprofessional assisting her in her classroom during the 2010-2011 school year.

24. On September 20, 2011, Ms. Porras suggested to the Student's mother that the Student needed the assistance of a one-on-one paraprofessional.

25. On October 18, 2010, the principal of the Student's school made the following request to Respondent's Special Education Instructional Supervisor:

Please accept this memorandum as a request for one to one paraprofessional assistance for [the Student], a first grade SPED [special education] student with special needs in the resource and general classes. After observation by school staff and parent meetings, I am making this request in order to ensure the safety and academic progress of this child. The student is highly distractible and requires constant redirection and support to access [the Student's] educational goals. In addition, [the Student} often exhibits inappropriate social skills which interfere with [the Student's] learning as well as that of [the Student's] peers.

26. Between the principal's request for one-on-one paraprofessional assistance and the February 24, 2011, the date of the next IEP meeting, observers from Respondent's Special Education Instructional program observed the Student in the regular classroom and the resource room. The observers recommended to the IEP team that a one-on-one paraprofessional not be provided. The observers did not testify at the formal hearing.

27. On February 24, 2011, the IEP team, which included Ms. Porras and the Student's mother, discussed whether the Student should be placed on a modified curriculum. The Student's mother objected to placing the Student on a modified curriculum. The IEP team decided to defer a decision on that issue to the next annual review of the Student's IEP. The IEP team also voted not to provide a one-on-one paraprofessional for the Student.⁶ At its meeting on February 24, 2011, the IEP team made no material changes to the IEP dated May 28, 2010.

28. The Student has made minimal progress towards meeting the goals of the May 28, 2010, IEP. The Student did not pass language arts, reading, and math taught by Ms. Porras because the Student could not meet the Sunshine State Standards for first grade. At the end of first grade, the Student was eight months behind the Student's peers in reading and language arts, and the Student was approximately two years behind in math. The Student passed science, social studies, art, music, and physical education taught by the Student's general education teacher, Ms. Mirabal.

29. The Student is unable to pass the regular curriculum in the subjects of language arts, reading, and math without the assistance of a one-on-one paraprofessional. There is a substantial question, given the Student's limitations, whether the Student can pass the regular curriculum even with a one-on-

one paraprofessional. There is a possibility that the Student could pass a modified curriculum without a one-on-one paraprofessional.

30. During the 2010-2011 school year, Ms. Porras was assisted by a full-time paraprofessional. There are 19 students with disabilities in the Student's language arts and reading classes. There are 16 students with disabilities in the Student's math class.

31. At the IEP meeting on February 24, 2011, meeting, it should have been apparent to the IEP team that the Student was making only minimal progress towards meeting the IEP goals and that the Student needed more assistance in the subjects taught by Ms. Porras if the Student was to remain on the standard curriculum. The IEP team had two options. The Student could have been provided a one-on-one paraprofessional and remain on the regular curriculum, or the Student could have been placed on a modified curriculum. The IEP team's failure to select either option constituted a denial of FAPE.

32. An IEP meeting was held on May 6, 2011. An IEP was not completed on that date. The IEP dated May 28, 2010, expired May 27, 2011. At the time of the formal hearing, there was no active IEP for the Student.

33. The Student's mother has long suspected that the Student was a child with autism. At school, the Student did not

exhibit symptoms that are typical of a child with autism. The Student is always happy, friendly, and popular with classmates. The Student actively participates in whole group instruction. The Student is able to identify routines, accepts change in routines, and can function independently. The Student is hyperactive and easily distracted. Ms. Porras (who has taught children with autism for 20 years), Ms. Concepcion (an experienced school psychologist), and the other members of the IEP team(s) did not have sufficient reason to suspect that the Student was a child with autism. Petitioner's contention that Respondent failed to timely identify the Student as a child with autism is rejected.

34. The Student was evaluated by Dr. Roberto Tuchman, M.D., an internationally renowned neurologist and expert on autism, on April 18, 2011. Dr. Tuchman prepared a report, styled "Neurologic Consultation" which reflects the history he took of the Student from the Student's mother. Dr. Tuchman's report reflects his "impression" that the Student suffers from Autism Spectrum Disorder and Encephalopathy.

35. Dr. Tuchman recommended to the parents that they have a psychologist evaluate the Student and that they seek help from the Center for Autism and Related Disabilities (CARD). CARD is a non-profit organization based at the University of Miami and

at Nova Southeastern University that helps parents of children with autism and children with autism.

36. Following Dr. Tuchman's recommendation, the Student's mother took the Student to CARD on May 19, 2011. CARD registered the Student and accepted the Student as a client.

37. Dr. Patino Gonzalez, Ph.D., a licensed psychologist in private practice, evaluated the Student on May 25 and 26 and June 2 and 3, 2011. M. Whitney Ward, Ph.D. (a psychology resident) and Tricia Cassal, Ph.D. (a licensed psychologist) assisted Dr. Patino Gonzalez with the evaluation and the preparation of a report (Petitioner's exhibit Q) summarizing their findings and opinions, styled "Psychoeducational Evaluation." The evaluators determined that the Student's full scale IQ was 52 using the Wechsler Intelligence Scale for Children - Fourth Edition. The evaluators determined that the Student's cognitive ability was in the "Lower Extreme" range using the Kaufman Assessment Battery for Children, Second Edition (KABC-II). The results of the KABC-II were similar to the results found by Ms. Concepcion in December 2009. The Student's cognitive ability may be understated by these evaluations due to the Student's lack of attention and impulsivity.

38. Dr. Patino Gonzalez's report summarizes the findings as to the Student's comprehension/knowledge abilities, in relevant part, as follows:

Comprehension/knowledge abilities is a broad ability that involves an individual's breadth and depth of general and cultural knowledge, verbal communication, and reasoning with previously learned procedures. Comprehension/knowledge abilities, especially language development, are important for all achievement areas but, most saliently, reading comprehension and mathematics.

* * *

[The Student's] verbal reasoning and fund of accumulated knowledge are Impaired. All other tasks are best conceptualized as Borderline.

39. Dr. Patino Gonzalez's report summarizes the findings as to the Student's fluid reasoning, in relevant part, as follows:

Fluid reasoning refers to mental operations used primarily when individuals are faced with tasks that cannot be performed automatically. . . .

. . . [The Student's] fluid reasoning is in the Borderline range.

40. Dr. Patino Gonzalez's report summarizes the findings as to the Student's visual processing, in relevant part, as follows:

Visual processing is the ability to analyze and synthesize visual stimuli. It involves perceptions and manipulations of visual

shapes and forms, typically figural or geometric in nature. Visuospatial abilities, defined as the spatial appreciation of attributes frequently processed through visual pathways, are important for success in several academic areas. For example, students with such difficulties may run into delays in the early grades with sight vocabulary acquisition. They may run into difficulty mastering certain concepts in mathematics and science (e.g. geometric concepts and appreciation of spatial attributes), interpreting diagrams, maps, graphs and complex charts, copying from the chalkboard, in arts and crafts classes, and learning how [to] tell time due to the visuospatial nature of analog clocks. Visual processing is also related to social perception, the ability to read nonverbal facial expressions and body language, and the ability to understand one's social environment.

* * *

. . . [The Student's] visual processing abilities are best described as Impaired.

41. Dr. Patino Gonzalez's report summarizes the findings as to the Student's auditory processing, in relevant part, as follows:

Auditory processing is the ability is the ability to analyze and synthesize auditory stimuli. Phonological awareness, a type of auditory processing, is the awareness of and access to the phonological structure of oral language. It involves perceiving and cognitively manipulating the individual sounds that form language and is important in the development of reading and spelling skills and is essential in early reading acquisition. Inadequate phonological awareness translates into problems discerning some features of a work but not

all of them, having problems distinguishing between similar-sounding phonemes, and having reduced capacity to contain language sounds in active working memory.

* * *

. . . [The Student's] phonological awareness are in the Impaired range . . .

42. Dr. Patino Gonzalez's report summarizes the findings as to the Student's short-term memory, in relevant part, as follows:

Short-term memory is the ability to hold information in immediate awareness and then use it within a few seconds. Working memory is a subset of short-term memory which involves the ability to hold information in immediate awareness while performing a task or developing an idea. Adequate short-term and working memory capacity is important for planning, comparing and contrasting, performing multi-step tasks, and integrating and developing ideas.

* * *

. . . [The Student's] short-term memory is best described as Borderline.

43. Dr. Patino Gonzalez determined that an area of relative strength for the Student was an average ability to incorporate information into long-term memory. Her report summarizes the findings as to the Student's long-term storage and retrieval, in relevant part, as follows:

Long-term storage and retrieval is the ability to store information and fluently retrieve it later through association. Individuals with well-developed long-term

retrieval abilities are able to easily retrieve information by associating it with events, ideas, names, or other concepts. They often use self-generated associations and associations provided by others to facilitate storage and retrieval. Individuals with less proficient long-term retrieval association processes have difficulty gaining access to acquired knowledge. Rapid language retrieval is part of this construct.

* * *

. . . [The Student's] ability to incorporate and retrieve information into long-term memory is in the low end of the Average range and is an area of strength for [the Student].

44. Dr. Patino Gonzalez's report summarizes the findings as to the Student's processing speed, in relevant part, as follows:

Processing speed is the ability to quickly perform automatic cognitive tasks while under pressure to maintain concentration. It measures the fluency and automaticity of transmitting and processing information. Since learning often involves a combination of routine information processing, such as reading, and complex information processing, such as reasoning, a weakness in the speed of processing routine information may make the task of comprehending new information more time consuming and difficult. Thus, a weakness in processing speed may leave children less time and mental energy for the complex task of understanding new material.

* * *

. . . [The Student's] processing speed is best conceptualized as Borderline.

45. Dr. Patino Gonzalez's report also noted deficits in attention and executive functions which she described, in relevant part, as follows:

Executive functions include self-regulation of physical and mental energy, set-maintenance (staying on task or switching tasks), selective inhibition of verbal and nonverbal responses, cognitive flexibility, planning, and organization of time, space, and output efficiency. They are involved in all steps of problem solving, such as choosing a strategy, monitoring progress to see if the strategy is working, and modifying or abandoning an inefficient strategy. Ability to sustain attention is considered a part of executive functions.

46. As part of her evaluation, Dr. Patino Gonzalez solicited and received information from the Student's general education teacher (Ms. Mirabal) and the Student's special education teacher (Ms. Porras). Dr. Patino Gonzalez reviewed the Student's neurological reports, developmental and medical history, as well as Ms. Concepcion's evaluation of the Student in December 2009. Dr. Patino Gonzalez evaluation also included the use of various psychological tests. Dr. Cassal administered to the Student the Autism Diagnostic Observation Schedule. That evaluation tool is divided into three sections: Communication, Qualitative Impairments in Reciprocal Social Interaction, and Total Score. The Student met criteria for autism in all three areas. Dr. Patino Gonzalez gave the diagnostic impressions of Autistic Disorder, which includes symptoms of Attention Deficit

Hyperactivity Disorder, Combined Type. Dr. Patino Gonzalez opined that the Student's hyperactivity and distraction are symptoms of the Autistic Disorder.

47. The undersigned finds the testimony of Dr. Patino Gonzalez, which is consistent with the diagnostic "impression" of Dr. Tuchman, that the Student suffers an Autistic Disorder and that the symptoms of Attention Deficit Hyperactivity Disorder are part of the Autistic Disorder to be credible and persuasive.

48. The Student suffers from Autism Spectrum Disorder and functions in the "Lower Extreme" range cognitively.

49. On November 7, 2008, a Functional Assessment of Behavior and a Behavior Intervention Plan was developed for the Student (BIP). The BIP has been utilized by the IEP teams at the meetings discussed in this Final Order. The BIP has not expired, as contended by Petitioner. The BIP has appropriately addressed behaviors exhibited by the Student. However, this plan was developed prior to the information contained in Dr. Tuchman's report and the receipt of the IEE. Respondent should review this new information to determine whether any strategies should be modified, added, or deleted based on the new information.

CONCLUSIONS OF LAW

50. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1003.57(5), Florida Statutes. See also Fla. Admin. Code R. 6A-6.03311(11).

51. Petitioner has the burden of proving by a preponderance of the evidence that Respondent failed to offer the Student FAPE. Petitioner must prove the elements of their case by a preponderance of the evidence. Schaffer v. Weast, 126 S. Ct. 528 (2005).

52. Section 1003.01(3) defines the terms "exceptional student" and "special education services." There is no dispute that the Student is an exceptional student and is entitled to special education services.

53. The Student has received services in the categories "Intellectual Disability" and "Language Impaired" since the IEP dated February 4, 2010. In paragraph 10 of Petitioner's Proposed Final Order, there is an assertion that the Student's "needs arising from [the Student's] disability do not stem from an Intellectual Disability but from Autism Spectrum Disorder." The contention that the Student does not have an Intellectual Disability is rejected as being contrary to the evidence. Florida Administrative Code Rule 6A-6.03011 defines the term "intellectual disability" as being significantly below average

general intellectual and adaptive functioning manifested during the developmental period. The Student meets that definition.

54. Once eligible, a student's specialized instruction and related services must provide a free appropriate public education based on the child's educational needs, not on the category of eligibility.

55. 20 U.S.C. Section 1401(9), defines the term FAPE as follows:

(9) Free appropriate public education. 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) [20 USC §1414(d)].

56. The instruction and services provided in the IEP must be reasonably calculated to enable the child to receive educational benefits. The applicable standards only require that a program of specialized instruction and related services be reasonably calculated to provide educational benefit to the child, not that the program maximize the child's potential. See Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v.

Rowley, 458 U.S. 176 (1982). However, the educational benefits under IDEA must be more than trivial or de minimis. See J.S.K. v. Hendry Cnty. Sch. Dist. 941 F.2d 1563 (11th Cir. 1991).

57. An ALJ may find a procedural violation denied a child FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE, 2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child, or 3) caused a deprivation of educational benefits. See Rowley, supra. Petitioner did not establish any procedural violation on the part of Respondent or its staff in developing any of the IEPs discussed in this Final Order that constituted a denial of FAPE.

58. In determining the appropriateness of an IEP, it must be determined whether the placement allows the student to receive his or her educational benefits in the least restrictive environment (LRE). Section 1003.57(1)(f), Florida Statutes, provides, as follows:

(f) In 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.

59. 20 U.S.C. Section 1412(5)(A) provides as follows:

(5) Least restrictive environment.

(A) In general. 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 not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

60. The Student's mother agreed with all IEPs developed for the Student until the IEP meeting of February 24, 2011.

61. The appropriateness of an IEP must be judged prospectively, taking into consideration the circumstances that existed at the time of the IEP's development. See Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999). Based on the applicable standards, it is concluded that the May 28, 2010, IEP did not deny the Student FAPE in the LRE.

62. Denial of FAPE occurred at the February 4, 2011, IEP meeting when the IEP team, in the face of compelling evidence that the Student was making only minimal progress on the Student's IEP goals, refused to either place the Student on a modified curriculum, provide the Student with the assistance of a one-on-one paraprofessional, or determine other appropriate changes to the IEP to provide the Student more support.

63. The IEP team should reconvene and determine, based on all information available to it, whether the Student should be placed on a modified curriculum, should be provided the services of a one-on-one paraprofessional for some or all classes, or whether other educational services should be provided. This action is required because of the denial of FAPE and because the May 28, 2010, IEP has expired.

64. Whether the Student should receive ESE services under the category Autism Spectrum Disorder should be initially determined by the IEP team and not by the undersigned. The IEP team should consider the reports by Dr. Tuchman and Dr. Patino Garcia in making that determination. In making its determination, the IEP team should be guided by Florida Administrative Code Rule 6A-6.03023, which is entitled "Exceptional Student Education Eligibility for Students with Autism Spectrum Disorder" and provides as follows:

(1) 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.

(2) General education interventions and activities. Prior to referral for evaluation the requirements in subsection 6A-6.0331(1), F.A.C., must be met.

(3) Evaluation. In addition to the procedures identified in subsection 6A-6.0331(5), F.A.C., the evaluation for determining eligibility shall include the following:

(a) Documented and dated behavioral observations conducted by members of the evaluation team targeting social interaction, communication skills, and stereotyped patterns of behavior, interests, or activities, across settings. General education interventions and activities conducted prior to referral may be used to meet this criterion, if the activities address the elements identified in this paragraph;

(b) A comprehensive social/developmental history compiled with the parents(s) or guardian(s) that addresses the core features of autism spectrum disorder;

(c) A comprehensive psychological evaluation to identify present levels of performance and uneven patterns of development in language, social interaction, adaptive behavior, and cognitive skills;

(d) A comprehensive speech/language evaluation; and,

(e) Medical information provided shall be considered.

(4) Criteria for eligibility. A student with Autism Spectrum Disorder is eligible for exceptional student education if all of the following criteria are met:

(a) Evidence of all of the following:

1. Uneven developmental profile as evidenced by inconsistencies across or within the domains of language, social interaction, adaptive behavior, and/or cognitive skills; and
 2. Impairment in social interaction as evidenced by delayed, absent, or atypical ability to relate to people or the environment; and
 3. Impairment in verbal and/or nonverbal language or social communication skills, and
 4. Restricted repetitive, and/or stereotyped patterns of behavior, interests, or activities; and
- (b) The student needs special education as defined in paragraph 6A-6.03411(1)(kk), F.A.C.

Based on the foregoing, it is ORDERED that:

1. Respondent shall promptly conduct a Functional Behavior Assessment for the Student that considers all appropriate information as to the Student, including Dr. Tuchman's report and the Psychoeducational Report prepared by Dr. Patino Gonzalez and revise the Behavioral Intervention Plan for the Student, as appropriate.

2. After the Behavioral Intervention Plan has been developed, the IEP team shall promptly reconvene and develop an appropriate Individual Education Plan for the Student. The IEP team shall consider all appropriate information as to the Student, including Dr. Tuchman's report and the Psychoeducational Report prepared by Dr. Patino Gonzalez.

3. Petitioner's remaining claims for relief are denied.

DONE AND ORDERED this 31st day of August, 2011, in
Tallahassee, Leon County, Florida.

S

CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2011.

ENDNOTES

¹ Petitioners failed to prove this allegation. As reflected in the findings of fact, the IEP team made no material change to the May 28, 2010, IEP at the IEP meeting of February 24, 2011.

² Petitioner's Proposed Final Order incorrectly refers to an exhibit BB. The correct reference is to exhibit DD.

³ Respondent's Proposed Final Order incorrectly states that Exhibits 19 and 21(a), 21(b), and 21(c) were admitted into evidence. While these exhibits were referenced and discussed, the exhibit were not moved into evidence by Respondent.

⁴ The delay in reevaluating the Student had no impact on the educational services provided the Student and is irrelevant in deciding whether Respondent failed to provide the Student FAPE.

⁵ Petitioner faults Ms. Concepcion's report because it did not reference a Neurological Consultation from Dr. Robert F. Cullen, Jr., M.D. dated July 18, 2005. In that report, Dr. Cullen requested that the mothers video tape the Student at home so

that Dr. Cullen can see if the Student exhibited any autistic behaviors. This report contains no diagnosis, whether of autism or otherwise. The fact that Ms. Concepcion's report did not reference the report is irrelevant to the issues of this proceeding.

⁶ Petitioners did not prove their assertion that the decision not to provide the assistance of a one-on-one was predetermined and made outside of the IEP team meeting.

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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 (2009), 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), and Florida Administrative Code Rule 6A-6.03311(9)