

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 10-0329E
)
DESOTO COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on February 23 through 26, 2010, in Arcadia, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: Gabriela Ruiz, Esquire
Jodi Siegel, Esquire
Natalie Maxwell, Esquire
Southern Legal Counsel, Inc.
1229 Northwest 12th Avenue
Gainesville, Florida 32601-4113

For Respondent: Connie L. Collins, Esquire
Eugene E. Waldron, Jr., P.A.
124 North Brevard Avenue
Arcadia, Florida 34266

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent provided Petitioner with a free and appropriate public education (FAPE),

as that term is defined by the Individuals with Disabilities Education Act (IDEA), and more specifically: 1) Whether Petitioner must be taught using the total communication method by a teacher trained in hearing impairments; 2) Whether the speech and language therapies provided were appropriate; and 3) Whether the behavioral intervention plans prepared for Petitioner were appropriate.

PRELIMINARY STATEMENT

On or about January 12, 2010, Petitioner, [REDACTED], filed a Request for Due Process Hearing with Respondent, DeSoto County School Board. The request was forwarded to the Division of Administrative Hearings ("DOAH") so that a formal administrative hearing could be conducted. The hearing was held on the dates set forth above, and both parties were in attendance.

At the final hearing, Petitioner called 11 witnesses: [REDACTED], Petitioner's mother; Wayne Onofri, assistant principal at DeSoto Middle School (the "School"); Dr. Joann Gates, licensed school psychologist; Angela Craft, teacher at [REDACTED] [REDACTED] school; Cecilia Quave, staffing specialist and school psychologist for the DeSoto County School District (the "District"); Kaycee Mays, teacher at the School; Carolyn Reddick, teacher at the School; Shirley Hagelberg-Klemish, speech and language therapist at the School; Brenda Johnson, assistant director of Exceptional Student Education ("ESE") at the School; John Sculley, school

psychologist at the School; and Dr. Peter Feuerstein, licensed psychologist. Petitioner's exhibits were pre-marked and utilized by both parties. In its case-in-chief, Petitioner offered the following exhibits which were accepted into evidence: 1 through 4, 6, 9, 14, 16, 20, 21, 23, 27, 31, 35, 37, 38, 44, 49, 51, 56 through 58, 58A, 59, 62, 64, 68, 69, 71A, 72, 75, 76, 79, 80, 85 through 87, 89, 90, 92, 93, 95 and 100.

Respondent called seven witnesses: Dr. Roosevelt Johnson, director of ESE for the District; Cecilia Quave; Kaycee Mays; John Sculley; Carolyn Reddick; Lydia Richardson (formerly Stewart) ESE liaison; and Brenda Johnson. Pre-marked Exhibits 45 through 47, 51, 62A, and 69A were admitted, as well as Respondent's exhibits D1 through D5.

A Transcript of the final hearing was ordered by the parties and filed with DOAH on March 22, 2010. The Transcript was provided to the parties as soon as each volume was available. By agreement, the parties were to submit proposed final orders on or before March 22, 2010. Each party timely submitted a Proposed Final Orders, and each was duly considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is a student at the School.¹ At all times relevant hereto, Petitioner was an exceptional education student deemed eligible for ESE services under the IDEA. Petitioner has

a diagnosis of various disabilities, including: deaf/hard of hearing ("DHH"), emotional behavioral disorders, and speech impairment. Petitioner also suffers from hyperactive disorder, tics disorder, and language impairment. Petitioner's mother also described Petitioner as being bipolar, having attention deficit hypertension disorder ("ADHD") and oppositional defiant disorder, and suffering from depression. There is disagreement as to whether Petitioner suffers from autism disorder.

Petitioner is a [REDACTED], [REDACTED] child and resides in DeSoto County. Petitioner's IQ, pursuant to the Full Scale Intelligence Quotient testing method, is 71 or 72, placing Petitioner in the borderline category of intelligence. Using the General Ability Index, Petitioner ranks between 81 and 85, which falls within the Low Average range. (Persons with an IQ of 70 or below are deemed mentally retarded.) Petitioner has been deemed by experts to have the cognitive ability to progress in reading and mathematics given the appropriate training.

2. Petitioner has been hard of hearing since an early age. Petitioner's mother first suspected a problem when Petitioner was about age two. Petitioner was diagnosed with mild to moderate profound hearing loss in 2004, at about age seven or eight. After suffering further loss of hearing, Petitioner was later diagnosed with an ongoing progressive sensorineural hearing loss. Petitioner is currently completely deaf to voices

in the right ear. Petitioner can read lips and has had training in American sign language although Petitioner's mother does not believe Petitioner has any proficiency in sign. Petitioner communicates with Petitioner's mother and teachers through verbal communication, i.e., hearing and speaking, though it is obvious Petitioner has difficulties in that regard.

Petitioner's mother knows some basic sign language, but primarily communicates verbally and with "family signs" created between her and Petitioner. Petitioner recently received a Cochlear implant in the left ear, but its success has not yet been determined. It is currently impossible to assess how much the Cochlear implant is working or whether it is working at all.

3. Petitioner was enrolled in ██████████ in Sarasota County during the 2004-2005, 2005-2006 and 2006-2007 school years which would correspond with Petitioner's ████████, ████████ and ████████ grade years, chronologically. However, the ████████ School did not specifically address a student's chronological school year. Instead, each student was expected to attempt work at his or her level of ability.

4. All of the students at ██████████ had disabilities or exceptionalities to some degree. ██████████ was called a "center school" and provided instruction to many deaf or hard of hearing students. Petitioner, another hearing impaired student, and one autistic student from DeSoto County benefitted from the

instruction at [REDACTED] [REDACTED]. DeSoto County did not then, nor does it now have a center school.

5. Petitioner's teacher at [REDACTED], Angela Craft, would communicate with Petitioner via verbal communication and would use American sign language at the same time. She would also utilize pictures and other visual aids while talking with her students. The use of verbal, sign and visual aids is referred to as the "total communication" method. There were five or six other hearing impaired students (besides Petitioner) in Craft's class at [REDACTED]. Craft, her paraprofessionals, and all the students in that class used sign language. Craft holds a degree from Flagler College in education for deaf students.

6. While attending [REDACTED] school, Petitioner resided in DeSoto County. Petitioner would take a school bus from DeSoto to Sarasota County each day, leaving early each morning and returning in the late afternoon. Petitioner's school bus driver served as an aide or assistant at [REDACTED] each day in between transporting students to and from school. That is, the bus driver remained at the school, rather than drive back and forth to Sarasota County twice each day.

7. Petitioner made some academic progress while at [REDACTED] [REDACTED], but was performing at about a second or third-grade level during the chronological [REDACTED]-[REDACTED] year. Petitioner had some history of behavioral problems at [REDACTED]. Petitioner's

teacher at that school described Petitioner as "behaviorally challenged" with some aggression. These problems interfered with Petitioner's academic work on a weekly basis.

8. In calendar year 2007, the District made a decision to begin providing its own programs to meet the needs of exceptional students such as Petitioner. A decision was made to transfer Petitioner from [REDACTED] to the School beginning in January 2008. Part of the reason for the District's decision was that Sarasota County withdrew its approval of the school bus driver as a paid assistant during the school day at [REDACTED]. That decision then placed the financial onus on the District to pay for the bus driver/aide each day, a cost that the District did not feel it could afford.

9. On or about January 11, 2008, Petitioner commenced classes at the School. Petitioner was allowed a reduced school day period (i.e., half days) at the beginning of the transition to the School. However, Petitioner fared well and soon began attending classes for the full school day. There is no DHH-certified teacher under employment by the District, though it continues to seek such a person.

10. Petitioner was initially assigned to a varying exceptionalities class taught by Kaycee Mays. There were approximately nine other students in Mays's class at that time, one of whom was hearing impaired. Mays's classroom had two

full-time paraprofessionals. Mays did not know sign language, so she communicated with Petitioner verbally. However, a sign language interpreter was assigned to the class for the purpose of assisting Petitioner. The first interpreters were a husband and wife team under contract with the District. These two interpreters did not hold degrees in sign language, but were proficient in American sign. The next interpreter was degreed in sign language, and became certified in hearing impaired instruction while at the School. When she left, another interpreter was hired. [REDACTED], Petitioner's mother, did not approve of the use of an interpreter because she did not believe Petitioner was proficient enough in sign language to benefit from that service (despite the fact that Petitioner had used sign language at [REDACTED] for the past three years). The District felt like use of an interpreter was a reasonable accommodation for Petitioner's needs.

11. Mays has a teaching certificate, a certification for teaching students with behavior disorders; is certified in English Speakers of Other Languages ("ESOL"); and is currently working on certification for teaching autistic students. Mays did not engage in the practice of total communication with Petitioner or any of her other students. Rather, she felt comfortable that Petitioner could understand her verbal statements and relied upon the sign language interpreters to

fill any gaps. When Petitioner did not understand Mays, there was opportunity for Petitioner to have Mays repeat her statements.

12. Mays implemented the directives from Petitioner's IEP, to wit: Petitioner was seated close to the teacher for better communication; Mays used a signal to alert Petitioner that directions for an assignment were about to be given; Mays would repeat directions (and, though not required by the IEP, would have Petitioner read directions or instructions back to her); and Mays gave Petitioner additional time to complete assignments.

13. Mays attempted to learn some sign language. She purchased a basic Bingo game that used sign language as a learning tool so that she could communicate better with Petitioner. As a result, Mays believes she and Petitioner communicated very well.

14. In the Spring of 2009, it was decided by Petitioner's Individual Education Plan ("IEP") team that Petitioner should be transferred to another classroom. (There was a negative relationship between Petitioner and another student in Mays's class; the two students needed to be separated.) On or about May 9, 2009, Petitioner was moved to Carolyn Reddick's class.

15. Reddick's class has approximately eight students with exceptionalities other than Petitioner. None of the other

students in that class are DHH. Reddick is a certified teacher and has training in ESE education and in ESOL. There is a full-time paraprofessional in Reddick's class and, once Petitioner transferred in, also a sign language interpreter. Reddick communicates with Petitioner primarily by way of verbal communication. Based on her review of Petitioner's work, Reddick believes that Petitioner understands her and comprehends her instructions. In fact, Reddick believes that Petitioner understands her directions the first time (most of the time). As of the dates of final hearing, Petitioner was still in Reddick's class.

16. Petitioner also communicates with other students verbally. There are no other DHH students in Reddick's class (or, apparently, in the School). Reddick provided anecdotal evidence of Petitioner engaging in conversation with fellow students, sometimes in an inappropriate way, but communication nonetheless.

Behavior and Intervention

17. Petitioner began having behavioral problems at the School almost immediately upon starting. During the first year (second half of the 2007-2008 school year), the following events appear in Petitioner's records:

- February 19, 2008 -- three-day suspension for fighting;
- May 7 -- in-school suspension for aggressive behavior;

- May 15 -- a period of time-out for aggressive behavior;
- May 21 -- work detail due to rebellious behavior.

18. Upon return to the School for Petitioner's [REDACTED] grade (chronological) school year, i.e., 2008-2009, Petitioner experienced the following behavioral events:

- August 26, 2008 -- administrative conference for rebellious behavior;
- September 29 -- in-school suspension for showing disrespect to a teacher, plus an in-school suspension and a teacher conference relating to rebellious behavior;
- September 30 -- administrative conference relating to rebellious behavior;
- October 27 -- three-day suspension for fighting;
- November 4 -- administrative conference for rebellious behavior;
- December 3 -- time-out in administrative office for rebellious behavior;
- December 8 -- guidance conference for rebellious behavior and disrespect;
- January 13, 2009 -- guidance conference for refusing to obey directions;
- February 2 -- in-school suspension for aggressive behavior and swearing;

- February 9 -- in-school suspension for aggressive behavior and swearing, plus a parent contact relating to refusal to obey directions;
- February 10 -- one-day suspension for refusing to obey directions;
- February 26 -- student incident report for throwing food and inappropriate behavior;
- March 3 -- in-school suspension for refusing to obey directions;
- March 11 -- time-out for refusing to obey directions;
- March 25 -- one-day suspension for fighting.

19. When Petitioner began Petitioner's chronological [REDACTED] grade ([REDACTED]) school year, there were initially fewer behavioral incidents. The first was on October 27, 2009, when Petitioner received a one-day, in-school suspension for fighting. It had been almost seven months since the last behavioral incident prior to that one (although part of that time period was Summer break). After that incident, it was almost three months before Petitioner's behaviors again began to warrant disciplinary action. Petitioner's records show the following:

- January 15, 2010 -- a bus driver referral was entered;
- January 21 -- in-school suspension for aggressive behavior (simple battery);

- January 28 -- in-school suspension for making threats;
- February 11 -- five-day suspension for making threats to a teacher;
- February 22 -- a disciplinary summary relating to improper use of a cell phone.

20. The School sees a correlation between Petitioner acting out and events relating to the instant matter. That is, on days the depositions were taken or Petitioner's mother met with her lawyer, Petitioner's bad behaviors seemed to escalate.

21. In response to Petitioner's behavioral issues, the School attempted to create a behavioral intervention plan (BIP). A BIP is normally developed to shape the behaviors of a child who exhibited behaviors that are interfering with his or her ability to function in the classroom or learn up to his or her potential. The classroom teacher is the person primarily responsible for implementing the BIP, but it should be written in such a way as to allow any adult working with the child to follow the plan.

22. The BIP was meant to identify certain of Petitioner's behaviors (the target behaviors) and to suggest ways of decreasing such behaviors. BIPs are commonly relied upon by educators when dealing with students having serious behavioral issues.

23. The first BIP created for use at the School was implemented on October █, █, i.e., during Petitioner's chronological █-grade year. The target behaviors in that BIP were listed as:

- When given directions to begin an academic task, [Petitioner] often makes a negative verbal response, or demonstrates some other behavior rather than beginning the task. (This was listed as a "Behavior of Concern").
- [Petitioner] will begin and complete the academic task in a quiet manner. (Behavior targeted for increase.)
- [Petitioner's] talking aloud instead of completing the academic task. (Behavior targeted for decrease.)

24. The BIP indicates that crisis management procedures are needed for Petitioner to insure safety and de-escalation of the student's behavior. The procedure implemented was as follows: "If the situation arises that an adult in the classroom feels that [Petitioner] must be physically restrained for [Petitioner's] own safety, or the safety of others, the School Resource Deputy will be called." The first draft of the BIP did not indicate any need for a crisis management plan. It is unclear why such a plan was included in this BIP.

25. The BIP concludes with an Implementation, Monitoring and Evaluation section. That section indicates that "[t]he

classroom teacher will continue reading social stories to the class." This activity would commence "[b]eginning in November." And the person responsible is listed as Mays (the teacher). There is little else in the BIP addressing how to handle Petitioner's behavioral issues. The BIP is signed by Mays and by a school psychologist. It is not signed by Petitioner's mother, who did not agree that it was sufficient. Petitioner's mother did not believe the BIP addressed issues such as: how to respond to Petitioner when Petitioner gets frustrated or angry; addressing Petitioner's difficulty making transitions; and teaching Petitioner appropriate behaviors for interacting with other students so that behavior did not escalate to aggression.

26. The BIP did not address other issues concerning behavior by Petitioner, such as speaking out of turn, cursing and refusing to complete assignments. The BIP was also unclear as to whether the intervention settings would include all of or only certain areas within the School. Although Petitioner's propensity to draw pictures instead of doing classroom work was identified as a targeted misbehavior, the BIP used drawing pictures as a reinforcer activity. The school psychologist who developed the BIP explained that the drawing activity would have to be considered in context to determine when it was a reinforcer and when it was a misbehavior.

27. A second BIP was implemented on January █, █, i.e., during Petitioner's chronological eighth-grade year, by Ms. Reddick, with some assistance from her in-class paraprofessional, and Lydia Richardson (formerly Stewart), the ESE liaison. That BIP includes two target behaviors: "Defiant behavior--yelling and cursing directly at adults" and "Time on task." The BIP reports that the function of those behaviors is to seek attention and escape work. Replacement behaviors in the BIP are to "[r]espond appropriately too [sic] adult authority at all times" and to "[c]omplete task after being given time and space (continue working)." Reinforcers for good behavior are listed as computer time, drawing, and verbal praise. The BIP is extremely scant in its directives and serves little use for someone attempting to implement the BIP. There is a Functional Assessment Interview attached to the BIP, but its utility is minimal. Reddick describes the BIP as being "as successful as it can be."

28. A practical approach to Petitioner's behavioral issues (other than a BIP) was also implemented at the School. This approach involved the daily interaction between Petitioner and the ESE liaison. Petitioner would come to Richardson's office regularly at the beginning of the school day. Petitioner would also visit with Richardson whenever some behavioral issue arose in the classroom. Richardson would afford Petitioner the

opportunity to cool down, relax, and think about the problem behavior. Then Petitioner could verbalize Petitioner's feelings to Richardson, and they would talk about more appropriate responses to those feelings. Richardson had a box of small gifts from which Petitioner could choose a token of appreciation for good behaviors exhibited by Petitioner. All in all, this informal intervention worked as well as anything contemplated in the BIPs.

29. It is apparent that Petitioner's hearing loss has had an impact on Petitioner's social maturity and behavior. Other co-morbidities such as ADHD, bipolar disorders and retardation can also be adversely affected by deafness and hearing loss. Neither of the BIPs formulated for Petitioner totally addressed this dynamic. The BIPs, in the words of Petitioner's expert clinical psychologist/behavioral analyst, contained insufficient background data concerning all of Petitioner's issues to have much value as a modification tool for Petitioner's behavior.

Individual Education Plans

30. Part and parcel to the education of an exceptional student in public schools is the IEP. An IEP is prepared at least once each year and is updated as often as deemed appropriate by the student's IEP team (made up of teachers, administrators, therapists, parents, and anyone else involved with the student's education process).

31. Petitioner's first IEP at issue in the present proceeding is dated January 8, 2008, and covered the second half of the chronological sixth grade for Petitioner. This IEP indicates Petitioner is functioning at a second-to-third grade academic level, which is compatible with Petitioner's assessment at [REDACTED]. Attending the first IEP meeting were: Petitioner's mother; Richardson; Mays; Jane Mooney, guidance counselor; Judy Owens; David Bremer, principal; Shirley Klemish, speech and language pathologist; and Angela Craft, Petitioner's teacher from [REDACTED].

32. It was decided by the IEP team to place Petitioner in a separate class as the least restrictive environment. Thus, Petitioner was placed initially into Mays's classroom. Petitioner's mother expressed her preference that Petitioner be allowed to attend [REDACTED] and expressed concern that an interpreter might not work for Petitioner.

33. The January 8, 2008, IEP addressed Petitioner's social and emotional goals, noting that Petitioner had difficulty controlling emotions and engaged in physical aggression against staff, peers and family members. As the teacher initially responsible for implementing the IEP, Mays attempted to use redirection and a magnetic board listing positive behaviors to address Petitioner's actions. Mays also used a token economy system wherein Petitioner's positive behavior was rewarded with

play money, which could be spent at the end of each week to buy items from a treasure box.

34. The IEP also provided for interpreter services for Petitioner, despite Petitioner's mother's skepticism about such services. The interpreters positioned themselves as close to the teacher as possible and provided an additional means for Petitioner to understand the teacher. Petitioner obviously had to decide whether to watch the teacher or the interpreter, but there was no competent evidence provided at final hearing as to how this arrangement worked for Petitioner.

35. The IEP provided for speech therapy one time per week for 60 minutes. The goals listed in the IEP addressed speech and language. Petitioner began receiving speech therapy from Shirley Klemish for an hour every other week in response to this provision. (More frequent sessions were prevented, in part, due to a shortage of speech therapists in DeSoto County.)

36. Petitioner's second IEP, done approximately 11 months following the previous IEP, is dated December 17, 2008. This IEP is apparently the annual IEP required by law. The meeting was attended by the same team as the prior IEP, except for Craft and, in addition, Roosevelt Johnson, ESE director; Cecelia Quave, school psychologist, and Brenda Johnson, assistant ESE director. Petitioner's mother expressed concern that too much

was being asked of Petitioner, causing higher levels of frustration.

37. The December 2008 IEP shows that Petitioner's Florida Alternative Test results were: Reading--108 (Independent-Basic), and Math--114 (Independent-Proficient). The December 2008 IEP indicates that Petitioner is operating at a third-grade academic level.

38. The IEP again addresses speech therapy, but breaks the therapy into speech and language, one time per week at 30 minutes each. Klemish continued to provide this therapy to Petitioner. The December 2008 IEP expanded on a specific goal: In January 2008, the goal had been for Petitioner to produce "sh" and "ch" sounds in words and phrases, 80 percent in four of five sessions. The December 2008 goal was to use the correct "sh" and "ch" sounds in words in sentences, with no cues 80 percent of the time. That same goal has continued to appear in all subsequent IEPs.

39. Less than two months following the December 2008 IEP, a new IEP was created on February [REDACTED]. This IEP was apparently meant to cover Petitioner's [REDACTED]-grade school year, or at least one semester of that year. Again, the academic level listed for Petitioner is third-grade level. This IEP meeting was attended by essentially the same team, with the addition of Gabriela Ruiz, attorney for Petitioner's mother.

The February 2009 IEP repeats the language goal set forth in the prior IEP. The IEP notes progress by Petitioner in some areas, but many areas are listed as "on-going" in nature.

40. The February 2009 IEP took into consideration psychological testing done on Petitioner in January by Quave. Upon her review and evaluation, Quave determined Petitioner was actually at a higher level than was indicated by [REDACTED] tests.

41. Some two months following the February [REDACTED] IEP, a new IEP was created on April [REDACTED], [REDACTED], again addressing the chronological [REDACTED]-grade school year. The IEP team remained essentially the same, including Petitioner's mother's attorney. Petitioner was still deemed to be operating on a third-grade level and many of the goals and objectives remained the same.

42. Five months following the April [REDACTED] IEP, an IEP dated September [REDACTED], was prepared to address Petitioner's [REDACTED] grade school year. The IEP suggests that Petitioner is operating at a third-grade academic level. On January [REDACTED], this IEP was amended to reflect a change in services. That is, Petitioner's speech and language therapies were changed from one time a week, 30 minutes each session, to two times per week, 60 minutes per session and a sign language class, to be held at the local high school, was added. The increase in services and added class commenced on or about February [REDACTED]. These

changes were made primarily in response to Petitioner's new Cochlear implant.

Communication Between Student and Teachers

43. Petitioner has always communicated with teachers and administrators verbally, i.e., by listening and then responding with oral language. Petitioner has extreme difficulty hearing and used hearing aids during most school years. Petitioner has some ability to read lips as well.

44. The April 29, 2009 (████████ grade), IEP provides for speech therapy one time a week for 30 minutes and language therapy one time a week for 30 minutes. Klemish provided those therapies to Petitioner for the remainder of that school year. The September 1, 2009 (████████ grade), IEP provided for the same amount of speech and language therapy. Due to Klemish assuming new responsibilities with other schools in the District, she was only able to see Petitioner every other week. Recently, the District contracted with another therapist to supplement the work Klemish was doing with Petitioner.

45. Klemish communicates with Petitioner verbally. When Klemish first started providing therapies to Petitioner, a sign interpreter accompanied Petitioner. However, once it became clear the interpreter was not needed, because Klemish and Petitioner communicated well, the interpreter was discontinued for the therapy sessions. During her involvement with

Petitioner, Klemish has seen an improvement in grammar and vocabulary. Klemish reported an improvement, followed by a period of decline as Petitioner's hearing loss continued. Then, after a Cochlear implant operation, Klemish has seen improvement again.

46. In September 2009, Petitioner underwent surgery to have a Cochlear implant. This device assists persons who are hard of hearing by changing the way the brain processes sound. The implant bypasses one step of the process and replaces it with an electrical impulse. The implant can help a person like Petitioner significantly, but it may take up to two years for any improvement in hearing to be manifested.

47. After the Cochlear implant, Klemish began to use more barrier techniques, i.e., hiding her mouth when she talked to Petitioner and adding background noises. Petitioner continues to improve and seems to be more aware when Petitioner's words are spoken correctly.

48. Petitioner's mother allowed Klemish to talk to and share notes with the other speech therapist working with Petitioner. That therapist, Beth Record, works with Petitioner on Mondays; Klemish works with Petitioner on Wednesdays and Fridays.

49. It is unclear whether Petitioner has yet benefitted from the Cochlear implant, although Petitioner's mother says

that Petitioner "talks more since the Cochlear implant."
Petitioner's speech and language therapist states that since the implant, Petitioner has shown improvements in ability to discriminate correct sounds. The therapist's use of barrier activity has resulted in some indication that Petitioner can "hear" sounds better with the implant. Nonetheless, the ultimate success or failure of the Cochlear implant remains to be seen.

50. During the current school year, Petitioner began taking a sign class at the local high school. Petitioner takes a bus from the School to the high school each morning for a one-to-one, half-hour class on American sign language.

51. It is obvious that Petitioner's ability to fully understand and comprehend sounds may be affected by environment, e.g., in a one-on-one setting versus a classroom setting. However, there was not sufficient evidence presented at final hearing to make a determination as to how much Petitioner's hearing is affected by changes in environment.

52. Petitioner could possibly benefit from having a teacher who knows American sign language. A teacher who can utilize the total communication technique would help ensure that Petitioner is better able to understand all instructions and directions which are given. Likewise, being in a class where all the other students are deaf or hard of hearing would be a

benefit to Petitioner. That is, Petitioner would be on a more level field as far as communications are concerned. However, there was no showing by Petitioner that the absence of those desirable elements, in favor of the School's approach, denied Petitioner a basic education. Petitioner's expert in instruction for children with hearing impairments opined that a classroom using total communication would be the "most appropriate" setting for Petitioner. However, there is no evidence that the existing classroom setting is not appropriate as well.²

Petitioner's Request vs. District's Position

53. Petitioner has requested a change in circumstances. There is dispute whether Petitioner wants to return to [REDACTED] school in Sarasota County or simply wishes a different classroom setting in DeSoto County. While no specific evidence was presented as to the former, there was a strong underlying presumption that Petitioner was seeking a return to [REDACTED].

54. Remaining in DeSoto County would require the following from Petitioner's perspective: A teacher certified in DHH education and proficient in American sign language; Use of the total communication method of interaction; Other deaf or hard-of-hearing students in the classroom; and An intensive, workable behavior intervention plan.

55. The District does not now employ any teachers certified in exceptional education who are proficient in American sign language. Efforts to hire such a person in DeSoto County have been unsuccessful. In an effort to accommodate Petitioner, the District has provided sign language interpreters for Petitioner in every classroom.

56. The District feels like the hour-long bus ride to Sarasota County (and hour-long return) are not in Petitioner's best interests. The commute takes up most of the day and does not allow Petitioner time to interact with friends in DeSoto County. The ride is, in the District's estimation, counterproductive to Petitioner's social development.

57. Further, the District believes Petitioner has shown improvement and advancement under the present program. The District administered the Florida Alternate Assessment test (a test utilized to determine whether students with disabilities are making progress in their existing curriculum) to Petitioner in the Spring of 2008. Petitioner obtained a score in the reading portion of 108 with a complexity level of independent and a performance level of basic. In math, Petitioner obtained a score of 114 with a complexity level of independent and a performance level of proficient. When Petitioner was re-tested in Spring 2009, the score for reading was 129 and the math score was 96. Petitioner progressed some in reading and regressed in

math. However, those scores, while viewed by the District as positive, do not indicate whether Petitioner was meeting the goals set by the IEPs. Rather, the test results would provide the IEP team with benchmarks for setting new goals in subsequent IEPs.

CONCLUSIONS OF LAW

58. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to the IDEA, 20 U.S.C. Section 1400, et seq.; Subsection 1003.57(1)(b), Florida Statutes (2009)³; and Florida Administrative Code Rule 6A-6.03311.

59. Subsection 1003.57(1)(a), Florida Statutes, requires each school district to "provide the necessary professional services for diagnosis and evaluation of exceptional students." It is undisputed in this case that Petitioner is an exceptional student for whom such services must be provided.

60. The IDEA, 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities a FAPE, which must be tailored to the unique needs of the handicapped child by means of an IEP program. See also Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

61. In Florida, by statute, a DOAH Administrative Law Judge must conduct an impartial due process hearing to which a

complaining parent is entitled under the IDEA. § 1003.57(1)(b), Fla. Stat.

62. In a due process hearing, Petitioner has the burden to establish by a preponderance of the evidence that Respondent failed to provide Petitioner a FAPE. See Schaffer v. Weast, 546 U.S. 49 (2005). More specifically, Petitioner must prove that Respondent is not providing the assistance needed to allow Petitioner to learn despite the hearing deficiency and other disabilities.

63. Respondent acknowledges Petitioner's need for specialized programs relating to persons who are deaf or hard of hearing. That fact is evidenced by the transport of Petitioner to Sarasota County's center school, [REDACTED], until such time as DeSoto County created its own programs. When it became no longer feasible to transport Petitioner and similarly-situated students to Sarasota County, Respondent took steps to provide for Petitioner's needs. Petitioner obviously feels the steps taken are not sufficient.

64. In M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085, 1102 (11th Cir. 2006),⁴ the court, quoting Lachman v. Illinois Board of Education, 852 F.2d 290, 297 (7th Cir. 1988), said, "'Rowley and its progeny leave no doubt that parents, no matter how well motivated, do not have a right under the [statute] to compel a school district to provide a specific

program or employ a specific methodology in providing for the education of their handicapped child.'" However, any program provided must be adequate and appropriate.

65. That holding begs the question of whether DeSoto County's efforts to educate Petitioner through its selected program is adequate and appropriate. From the evidence presented, it is clear Petitioner is having problems and still has behavioral issues. However, Petitioner's IEPs show some, albeit little, improvement. Petitioner's teachers express some positive development by Petitioner. The general consensus of the District is that, apart from some behavioral issues, Petitioner is continuing to benefit from the program that is in place.

66. In Florida, students who are deaf or hard of hearing must have their language and communications needs addressed by the IEP team. There must also be opportunities for direct communication with peers and professionals in the student's communication mode. 20 U.S.C. § 1414(d)(3)(B)(iv); 34 C.F.R. § 300.324(a)(2)(iv); and Fla. Admin. Code R. 6A-6.03028(3)(g)(9). The IEPs in this case clearly address Petitioner's need for language and communication assistance. Petitioner communicates with professionals (teachers and therapists) in Petitioner's own communication mode. There are

no DHH students at the School with whom Petitioner may communicate.

67. The U.S. Court of Appeals for the Fifth Circuit has articulated a standard for determining whether a student has received FAPE in compliance with the Act. In Cypress-Fairbanks Ind. School District v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997), the Court opined:

[A]n . . . IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit."

68. In the instant case, the District clearly recognized and attempted to address Petitioner's language and communications needs. The District's efforts in this regard are not insufficient just because the parent of the student believes there are better ways to address the needs.

69. The courts have set the bar fairly high for parents seeking to prove that their child is being denied FAPE. The Supreme Court has established a two-part test to determine whether FAPE was provided under the IDEA. In Rowley, the Court said a determination must be made as to whether the school

district complied with procedures set forth in the IDEA, and, if so, whether the IEP developed pursuant to the IDEA was reasonably calculated to enable the child to receive educational benefit. Rowley, 450 U.S. 206-207.

70. The 11th Circuit has concluded that "[i]f these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991), citing Rowley, 458 U.S. at 206-207. Like so many courts, the 11th Circuit has determined that a school district cannot be made to provide the best possible education or to provide an education that will maximize a child's potential. Rather, the educational opportunities provided to an exceptional student need only be a "basic floor of opportunity" that affords some educational benefit. Walker County School District v. Bennett, 203 F.3d 1293, 1296 n.10 (11th Cir. 2000).

71. As to the sufficiency of the BIPs created for Petitioner, the bar is, again, quite high. In T.W. v. Unified School District No. 259, 136 Fed. Appx. 122, 129 (10th Cir. 2005), the Court found that:

To the extent plaintiff argues that the BIP is substantively deficient, he faces an uphill battle. Neither the IDEA nor its implementing regulation prescribe any specific substantive requirements for a BIP. [Citations omitted.] Courts should be leery of creating such substantive requirements

"out of whole cloth" where neither Congress nor the Department of Education, the agency charged with promulgating regulations for the IDEA, have done so.

The BIPs at issue in this proceeding, even if less than complete or thorough, cannot be shown to be deficient. It is clearly not an extremely helpful tool for dealing with all of Petitioner's behaviors, but it is minimally sufficient for its intended purpose.

72. In fact, the term "behavioral intervention plan" only appears in one section of the IDEA, 20 U.S.C. Section 1415(k)(1). That section addresses behavioral assessments, followed by a plan, for students who have brought a weapon on school grounds. That section obviously does not apply to the case at bar. Florida Administrative Code Rule 6A-6.0328(g) does specify that a child's behavior does need to be considered and addressed as part of the IEP. Behavioral interventions, though not expressly called BIPs, should be a part of the IEP. Based on Petitioner's behavioral history, a BIP would be appropriate for him.

73. Petitioner's counsel in this case made an extraordinary effort to show that Petitioner's education at the School was deficient. However, despite their efforts, the law concerning FAPE does not allow for the best educational programs, only a program which is at least minimally sufficient.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the relief sought in the due process hearing request is denied on the basis that:

1. There is no need to provide the total communication method of teaching Petitioner so long as other methods are reasonably successful;

2. The speech and language therapies provided Petitioner are appropriate; and

3. The behavioral intervention plans created for Petitioner meet minimal requirements for sufficiency.

DONE AND ORDERED this 29th day of March, 2010, in Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2010.

ENDNOTES

1/ References to Petitioner in this Final Order shall be gender neutral in order to preserve, to the extent possible, Petitioner's identity.

2/ Petitioner's expert did, by conjecture, opine that the use of an interpreter might not be the best arrangement if Petitioner was totally focused on the interpreter, rather than the teacher; if the interpreter was not highly skilled; and if there were other distractions. That conjecture is not credible evidence.

3/ Unless otherwise specifically stated herein, all references to Florida Statutes shall be to the 2009 version.

4/ The M.M. case has facts very similar to the instant action. M.M. received a Cochlear implant, and her parents believed that a program called auditory-verbal therapy was the best program for M.M. The school district offered a program known as the verbatonal approach instead. The Court ruled that the best or most desired program was not required as long as the district offered a reasonably appropriate alternative.

COPIES FURNISHED:

Adrian H. Cline, Superintendent
DeSoto County School Board
530 LaSolona Avenue
Post Office Drawer 2000
Arcadia, Florida 34266

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

Kim C. Komisar, Dispute Resolution
Program Administrator
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Connie L. Collins, Esquire
Eugene E. Waldron, Jr., P.A.
124 North Brevard Avenue
Arcadia, Florida 34266

Gabriela Ruiz, Esquire
Jodi Siegel, Esquire
Natalie Maxwell, Esquire
Southern Legal Counsel, Inc.
1229 Northwest 12th Avenue
Gainesville, Florida 32601-4113

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 90 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.