

Duval County School District
No. 08-2546E
Initiated by: Parent
Hearing Officer: Suzanne F. Hood
Date of Final Order: February 3, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,)
)
vs.) Case No. 08-2546E
)
DUVAL COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on November 13 and 14, 2008, in Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elizabeth S. Holton, Esquire
1794 Rogero Road
Jacksonville, Florida 32211

For Respondent: Michael B. Wedner, Esquire
City of Jacksonville
117 W. Duval Street, Suite 480
Jacksonville, Florida 32202-3700

STATEMENT OF THE ISSUES

The issues are whether Respondent failed, procedurally and substantively, to provide Petitioner with a Free Appropriate Public Education (FAPE) pursuant to the Individuals with

Disabilities Act (IDEA), 20 U.S.C. Section 1401, from April 7, 2007, through May 22, 2008, and if so, what remedy is available.

PRELIMINARY STATEMENT

On May 16, 2008, Respondent Duval County School Board (Respondent) received Petitioner [REDACTED]'s (Petitioner) written due process hearing request dated May 12, 2009. Shortly thereafter, Petitioner's parent (parent/[REDACTED]) advised Respondent that the hearing request was being withdrawn. Accordingly, Respondent did not forward the hearing request to the Division of Administrative Hearings.

On or about May 22, 2008, [REDACTED] advised Respondent that Petitioner intended to go forward with the request for a due process hearing. That same day, Respondent referred the hearing request to the Division of Administrative Hearings.

Petitioner's May 12, 2008, hearing request raises the following specific issues: (a) whether Petitioner's accommodations were followed as listed on Petitioner's individual education plan (IEP); (b) whether Respondent held an IEP meeting on May 25, 2007, without notice to [REDACTED] and without the parent's permission; (c) whether accommodations from the last operative IEP were improperly removed; (d) whether items to be provided to the parent on a regular basis were so provided; and (e) whether, as a result of any or all of these, Petitioner was denied FAPE.

Also at issue is what remedy, if any, Petitioner might be

entitled to receive if Petitioner prevails on the merits. Counsel for Petitioner stated at the hearing that the relief being requested was that all accommodations be implemented consistently, and that reimbursement be ordered for any outside expenses that ■■■■ expended to provide necessary accommodations.

On May 29, 2008, the undersigned conducted a telephone conference with the parties. As agreed by the parties, a subsequent Notice of Hearing dated June 2, 2008, scheduled the hearing for September 3, 2008.

On August 26, 2008, Respondent filed a Consent Motion for Continuance of Pre-hearing Deadlines and Final Hearing. The motion stated that the impact of Tropical Storm Fay had interfered with a scheduled mediation.

On August 28, 2008, the undersigned conducted a telephone conference with the parties. As a result of that conference, the undersigned issued an Order Documenting Telephone Conference, Granting Continuance, and Rescheduling Hearing for October 9, 2008.

On October 7, 2008, Respondent filed a Consent Motion for Continuance. That same day, the undersigned issued an Order Granting Continuance and Rescheduling Hearing for November 13 and 14, 2008.

On October 31, 2008, Respondent filed a Motion to Dismiss Amended Complaint that was served on Respondent on October 24, 2008. After receiving Respondent's Motion, the undersigned's

office advised Respondent that the Amended Complaint had not been filed with the Division of Administrative Hearings.

On November 3, 2008, Respondent filed a copy of Petitioner's Amended Complaint. On November 5, 2008, the undersigned issued an Order, stating that the hearing would proceed as scheduled on the initial hearing request because the Amended Complaint did not comply with 34 C.F.R. Section 300.508(d)(3).

Petitioner presented four witnesses during the case in chief: LaTonya Floyd; Petitioner's parent, [REDACTED]; Brenda Jones; and Shirley Dunson. Respondent presented eight witnesses during its case in chief: Christopher Nnoduechi; Dana Kriznar; Deborah Smith; Sondra Smith; Jason Greer; Emily Perkins; Lisa Brennan; and June Marshall. Petitioner's parent testified briefly in rebuttal.

Petitioner offered no exhibits in evidence. Respondent introduced a large binder of exhibits into evidence, containing 157 separately numbered exhibits that were accepted as evidence. In addition, Respondent introduced composite exhibit 158 that was accepted as evidence.

At the close of the hearing, the parties agreed to file proposed final orders no later than December 15, 2008.

The hearing Transcript was filed on December 8, 2008. On December 16, 2008, the parties filed a Joint Motion for Enlargement of Time to File Proposed Final Orders. The

undersigned granted the joint motion in an Order dated December 17, 2008.

Petitioner filed a Proposed Final Order on January 5, 2009. Respondent filed a Proposed Final Order on January 6, 2009.

FINDINGS OF FACT

1. At the time of the hearing, Petitioner was in the eighth grade in Respondent's [REDACTED] School ([REDACTED]). Petitioner has attended school and received instruction under an IEP as Other Health Impaired since Petitioner was in the third grade during the 2003-2004 school year.

2. In October 2003, Petitioner had a stroke and a heart attack during a medical procedure to repair a heart valve. Petitioner was deprived of oxygen for approximately 45 minutes. As a result, Petitioner suffers from a traumatic brain injury, cortical visual impairment, a tendency for seizures, and poor memory, writing, and organizational skills.

3. Before Petitioner's medical incident, Petitioner was an above-average student. Petitioner has made a very good recovery due to the diligent work of Petitioner, Petitioner's family, and other medical, therapeutic and educational professionals. The remaining effects are memory and visual impairments, difficulty in handwriting, and poor organizational skills.

4. Petitioner's first IEP was dated November 12, 2003. Subsequent IEPs were dated January 12, 2005; May 5, 2005; October 1, 2005; and April 6, 2006. Petitioner was in the [REDACTED]

grade when the April 6, 2006, IEP was developed and implemented at ■■■ School (■■■) for the balance of the 2005-2006 school year and for part of Petitioner's ■■■-grade year at ■■■ during the 2006-2007 school year.

5. The review date for the IEP dated April 6, 2006, was scheduled to occur on April 7, 2007, at ■■■. However, an IEP review did not take place on a timely basis. The delay was due in part to a motor vehicle accident that caused Respondent's sixth-grade Exceptional Student Education (ESE) teacher, Ms. Angela Moody, to end up being absent from school from approximately the spring break through the end of the 2006-2007 school year.

6. Petitioner does not allege that the April 6, 2006, IEP was deficient in substance or implementation. Petitioner has not shown that Respondent failed to provide Petitioner with FAPE by implementing the expired April 6, 2006, IEP, through the end of the 2006-2007 school year.

7. On the last day of school, May 25, 2007, and approximately seven weeks after it was due, Respondent's staff at ■■■ attempted to develop a new IEP for Petitioner and other students. No timely written notice was provided to ■■■ of the proposed IEP meeting.

8. On May 25, 2007, ■■■ was asked by phone to consent to an IEP meeting occurring that day. The parent, an elementary school teacher employed by Respondent, was involved in planning the

close of the school year at the parent's school. The principal of the parent's school would not allow ■■■ to go to ■■■ for an IEP meeting.

9. Respondent's staff decided to proceed with the May 25, 2007, IEP development without the consent or participation of ■■■. Only two ■■■ representatives signed the proposed IEP. Other necessary signatures of the IEP team were missing, including that of the ESE teacher.

10. The May 25, 2007, IEP was procedurally invalid. It also was substantively incomplete because it did not include certain accommodations set forth in the prior IEP.

11. School adjourned for the summer. It resumed for the 2007-2008 school year on August 18, 2007.

12. During the pre-planning period before school started in August 2007, ■■■ began efforts to schedule an IEP meeting with ■■■'s staff to review Petitioner's IEP and make any changes that might be necessary for the upcoming ■■■-grade school year. ■■■ talked with Petitioner's new inclusion teacher, Jay Marinelli, on or about August 16, 2007. At that time, ■■■ learned about the existence of the May 25, 2007, IEP.

13. During the August 16, 2007, telephone conversation with Mr. Marinelli, the parent expressed a concern that a number of accommodations may have been omitted from the May 25, 2007, IEP. The parent and Mr. Marinelli agreed that he would review Petitioner's cumulative folder, talk to Petitioner's teachers,

and once he got to know Petitioner, report back to [REDACTED].

14. Later during the pre-planning period, Mr. Marinelli discussed Petitioner's May 25, 2007, IEP with all of Petitioner's [REDACTED] grade teachers. He advised them that the IEP might need to be revised based on the parent's concerns.

15. On or about September 14, 2007, Petitioner received the first [REDACTED] grade progress report. Petitioner had a grade of B in social studies, a Satisfactory in reading, science, and language arts, and an F in math. Petitioner's parent immediately requested a conference with Ms. Gooden, Petitioner's math teacher.

16. Mr. Marinelli and Ms. Gooden subsequently met with [REDACTED]. At that time, [REDACTED] saw the May 25, 2007, IEP for the first time. During the meeting, the parent gave Mr. Marinelli a list of accommodations from the April 6, 2006, IEP, some of which were not included on the May 25, 2007, IEP.

17. On September 26, 2007, approximately five weeks into the 2007-2008 school year, [REDACTED] met with the [REDACTED] teachers and staff to review Petitioner's IEP. The ultimate result was the preparation and adoption of a new IEP for Petitioner dated September 26, 2007.

18. Almost immediately after the September 26, 2007, IEP was adopted; the parent requested another meeting to make further provisions regarding Petitioner's accommodations. This resulted in the adoption of an IEP addendum dated October 17, 2007. The

addendum provided further specificity as to Petitioner's accommodations, including the provision of memory cues, minimizing the amount of necessary writing, and allowing alternative response modes.

19. Finally, one additional IEP for Petitioner was adopted at the end of Petitioner's [REDACTED] grade year in school. That IEP is dated June 2, 2008. Petitioner's parent received proper notice and fully participated in all of the IEP meetings after May 25, 2007.

20. [REDACTED] testified at the hearing. The parent teaches third grade for Respondent and has a class that includes students with special needs. The parent is familiar with IEPs and with accommodations that go into IEPs.

21. [REDACTED] testified in some detail as to accommodations which had been removed from the IEP dated May 25, 2007. These included shortening of assignments and tests; requiring Petitioner to demonstrate an understanding of directions for assignments and tests; giving extra examples for practice; use of a calculator; providing Petitioner with a copy of class notes and outlines; providing Petitioner with an extra set of school materials for use at home, including text books; providing alternate seating near the front of the class; highlighting key words and phrases; providing the student an agenda and schedule; peer assistance; repeating, clarifying and/or summarizing directions; and minimizing the amount of writing. Once these accommodations were

added to the September 26, 2007, IEP, and the October 17, 2007, addendum was developed, ■■■ was comfortable that the accommodations were appropriate for Petitioner.

22. There is no persuasive evidence that Petitioner's accommodations in the ■■■ and ■■■ grades were not properly implemented. Sometimes Petitioner did not bring things home that were supposed to be brought home. The parent also received occasional notes indicating that assignments were overdue. However, Petitioner continued to make educational progress. There is no credible evidence showing that Petitioner was unduly "penalized" by reductions in scoring and grades.

23. It is true that Petitioner was not provided shortened tests at times. However, when Petitioner was given the same tests to take that other students were given, Petitioner was graded based only on the number of questions completed, rather than all of the questions appearing on the test.

24. As to the complaint that Petitioner's parent "didn't ever receive any" class notes and outlines at home, the greater weight of the evidence indicates that class notes and outlines were provided in hard copy, on the Internet, or on the board for all students to copy. To the extent class notes and outlines were not provided, Petitioner's operative IEPs do not contain any statement or requirement that the parent receive a copy of everything that the teachers presented to Petitioner's classes.

25. ■■■ contends that communication was "just one way,

usually from [REDACTED] to the school." However, the most persuasive evidence shows that Petitioner's teachers attempted to respond to most comments and inquiries from Petitioner's parent. In any event, there is no persuasive evidence that the failure of Petitioner's teachers to communicate with [REDACTED] resulted in the loss of FAPE.

26. [REDACTED] did not always receive weekly assignment sheets through the [REDACTED] grade. The last one the parent received was at the end of the [REDACTED] grade. However, the IEPs in effect no longer required that weekly assignment sheets be provided.

27. The September 26, 2007, IEP does not require weekly assignment sheets. It requires a daily homework log with a list of missing assignments on the log. However, Petitioner's parent and the school decided by mutual consent to use an agenda, rather than a daily homework log.

28. The parent contended that Respondent did not send home notices of incomplete assignments. This claim is belied by several of Respondent's exhibits showing the assignments and the status thereof.

29. Petitioner could not refer to specific documents in the exhibits showing progress reports, weekly assignments, homework logs, or agenda without any communication from Petitioner's teachers regarding Petitioner's work. If such documents exist, they were not timely disclosed to counsel for Respondent prior to the hearing.

30. Additional accommodations were included in the June 2, 2008, IEP, which was adopted at the end of Petitioner's seventh-grade year. However, as the complaint for due process is dated May 12, 2008, it is inappropriate to consider any alleged shortcomings with the June 2, 2008, IEP.

31. According to [REDACTED], it was necessary to hire a tutor for Petitioner. However, the parent provided no evidence as to the name of the tutor, what services the tutor allegedly provided, or any alleged payments made to the unidentified individual. In addition, there is no reference to having to obtain a tutor in the May 12, 2008, hearing request.

32. [REDACTED] admits that [REDACTED] provided Petitioner an education. The parent also acknowledges that Petitioner did not actually fail any classes in school.

33. [REDACTED] asserted that Petitioner's grades were not a concern. At the same time, the parent complained when Mr. Marinelli told Petitioner that Petitioner's child was better than a C student. There is no persuasive evidence that Mr. Marinelli's statement caused Petitioner to feel bad about the grades Petitioner was receiving.

34. The requirement for provision of a laptop computer was included in the June 2, 2008, IEP. That provision was not a requirement before the end of seventh grade. The IEP in place as of October 17, 2007, provided for Petitioner to use an Alpha Smart. However, Petitioner did not like to use that device.

35. Petitioner sometimes claimed that the teachers had not provided certain items as required by the IEP. However, when [REDACTED] checked on the truth of Petitioner's statements, the parent learned that Petitioner had received but not given [REDACTED] the items. In fact, Petitioner has told "fibs" and "whoppers" in this regard.

36. [REDACTED]'s concerns that Petitioner was not given extra time to complete [REDACTED] work is without merit. The IEPs do not have specific time requirements as to the amount of extra time Petitioner is supposed to be given to complete assignments. In many instances, Petitioner has been given considerable extra time to complete assignments.

37. During the hearing, [REDACTED] conceded that Petitioner is now making A's, B's and C's in school. Petitioner is getting good grades, is getting a good education, is making progress, and is successful in school. Petitioner's classes include some rather difficult courses, including algebra and science. Petitioner is making all passing grades in the eighth grade so far, and has not failed any courses.

38. Petitioner's teachers are not supposed to inspect or pack Petitioner's backpack. That activity is the student's responsibility.

39. [REDACTED] requested several parent conferences because seventh-grade teachers did not always write comments on Petitioner's agenda. Writing on the agenda has not been done

consistently by the teachers. However, there is no showing that Petitioner's education has suffered because every teacher did not make a comment on the agenda every day.

40. [REDACTED] has not visited Petitioner's classes during actual class time. The parent has not sat-in or through any of Petitioner's [REDACTED] or [REDACTED] grade classes. [REDACTED] has occasionally visited the school without signing the guest book, walking with Mr. Marinelli to a class and looking inside to see if Petitioner was on task. [REDACTED] did not appear to be particularly concerned with what the teachers were doing.

41. [REDACTED] contends that it is difficult to read Petitioner's handwriting. According to the parent, Petitioner sometimes can not read Petitioner's own handwriting. However, Petitioner's handwriting examples in the record are quite legible.

42. Christopher Nnodeuchi teaches Petitioner [REDACTED] grade English and reading. Petitioner is the top student in the class. There are 17 students in the class. Three of the students are ESE students.

43. Mr. Nnodeuchi follows Petitioner's IEP and provides the accommodations required. These include shortening assignments and providing extra time to do work. However, Petitioner does not need the extra time. Petitioner always finishes before other students and has never requested any extensions of time. Mr. Nnodeuchi characterized Petitioner as being "very diligent" and interested in attending college.

44. Petitioner took advantage of extra credit available in Mr. Nnodeuchi's class, elevating Petitioner's grade to an A by the last reporting period. According to Mr. Nnodeuchi, Petitioner had some difficulties with the FCAT examination, but did okay with it.

45. Mr. Nnodeuchi provided persuasive evidence that Petitioner would do as well in class even if no accommodations were followed. Petitioner is usually the first student to raise a hand to answer questions. Petitioner does well both with written work and verbal responses. In addition, Petitioner writes in the daily agenda consistently, and by doing so, has earned extra credit.

46. Homework in Mr. Nnodeuchi's class requires reading for 30 minutes at home and monitoring by the parent. A reading response journal also is supposed to be submitted at the end of each week. Petitioner turns in that journal inconsistently. The parent has been advised about this. Mr. Nnodeuchi stated that he communicates consistently with the parent through the agenda.

47. Leon Mungin, Jr. is Petitioner's teacher for eighth-grade homeroom and for first-period Science on "A"-day scheduling. Mr. Mungin testified that Petitioner has earned an A- in this class and is one of the higher achieving students. Petitioner is doing "very well," according to Mr. Mungin.

48. Mr. Mungin follows all of the accommodations required in Petitioner's IEP. Mr. Mungin has never seen Petitioner's

parent come into his class to observe his teaching.

49. Mr. Mungin provides Petitioner with a copy of tests as a study guide before each test. Mr. Mungin does this for all students who have accommodations that require study notes.

50. Mr. Mungin has 29 students in his science class. Sixteen of them have IEPs. The class is titled Comp. Science III. The class includes the laws of physics, waves, electromagnetic spectrum, and planets. In the segment on the laws of physics, the class covered mass, force and acceleration, and topics in general physics.

51. Mr. Mungin testified about a website that is available to parents seeking to be in touch with the teacher. He also testified about assignments being written on the board to be copied. For major projects, Mr. Mungin writes a note to Petitioner's parent. Mr. Mungin does likewise prior to exams. Mr. Mungin also maintains a notebook and photocopies the notebook for students like Petitioner who require notes.

52. Petitioner copies down Science assignments in Petitioner's own agenda. Petitioner also gets a copy of class notes from Mr. Mungin through Mr. Marinelli. Mr. Mungin does not remember ever receiving any emails from [REDACTED] about Petitioner's performance in the science class.

53. According to Mr. Mungin, Petitioner stays on task and is a very hard worker. For example, Petitioner recently earned an A on a homework assignment. The subject concerned net force,

or a combination of forces coming together.

54. Mr. Mungin emphasized the number of times that Petitioner is provided written materials to take home, including lesson plans, syllabus, school notes and agenda. Occasionally Petitioner needs to be reminded to return the agenda, but Petitioner regularly writes in the notebook. Petitioner's parent always initials the agenda.

55. Petitioner received one of only two A's in Mr. Mungin's class. Mr. Mungin characterizes Petitioner as a "very high performer."

56. Mr. Marinelli continues as Petitioner's ■■■ grade inclusion teacher. According to Mr. Marinelli, Petitioner is a different student than Petitioner was in ■■■ grade. Petitioner has matured and is making A's and B's in language arts, sciences and social studies. Petitioner is making a C in math. The math class is eighth-grade Algebra I.

57. Memory is a deficit for Petitioner. Algebra requires a lot of memory work. Petitioner does very well in math class but has problems with recall over several days.

58. According to Mr. Marinelli, Petitioner was a lot more immature in ■■■ grade. Petitioner used inappropriate language at times, was not as organized, would forget a lot of things, and would not write assignments in the agenda. Those deficiencies led to creation of the homework log.

59. The homework log was prepared every Monday. Creation

of the log was not required by the IEP, but was utilized over and above the IEP requirements.

60. Mr. Marinelli testified that Petitioner did pretty well in ■■■ grade except for math. Petitioner had difficulty remembering to break projects down. However, Petitioner's teachers allowed extended time on an as-needed basis so that Petitioner could receive full credit for assignments.

61. The amount of extended time allowed for each student is based upon the needs of the individual child and the judgment of the teachers. Once, in ■■■ grade, a geography project was accepted eight weeks late by Petitioner's teacher, Mr. Jason Greer. The teachers uniformly seem to allow Petitioner extra time if needed. This was more prevalent in ■■■ grade than it has been in ■■■ grade.

62. Mr. Marinelli testified there is no penalty for homework being turned in late in the ■■■ grade. On occasion, Petitioner has required extra time to turn in homework, but to Mr. Marinelli's knowledge, no penalty was applied.

63. Mr. Marinelli explained the difference between the agenda and the log book. A log was created for Petitioner's ■■■ grade year. An agenda book is given to every student and is called a planner. It has a calendar for every day. Students are supposed to write down what is going on in class each day and what the homework is every day. There is also room for hall passes and the like. Like other students, Petitioner is supposed

to write in [REDACTED] agenda book every day. The teachers initial it, and occasionally Mr. Marinelli will initial it as well. The only teachers who do not initial the planner or agenda book every day are the science and social studies teachers, because those courses occur every other day.

64. Mr. Marinelli is able to read Petitioner's writing in the assignment book. He also sees notes [REDACTED] writes in the book.

65. Petitioner is pretty consistent in writing down assignments in each class. The teachers also routinely initial the assignment book. Every once in a while, Petitioner forgets to write in the planner, but as whole, Petitioner is "pretty consistent with it."

66. Even though the [REDACTED] grade IEP called for a log book, Petitioner did not want to use one and preferred to use the agenda book instead. Mr. Marinelli and the parent mutually agreed to that adjustment.

67. Mr. Marinelli testified that the school does not pick and choose which accommodations its teachers will follow in the IEP. It is school policy to follow IEP accommodations as prescribed. If a problem is discovered, Mr. Marinelli speaks to the teacher involved. The same policy held true in [REDACTED] grade. Sometimes teachers individually may fall short, but not systematically, according to Mr. Marinelli.

68. Mr. Marinelli did not know if teachers were supposed write Petitioner's assignments for Petitioner under any of the

IEPs. However, Mr. Marinelli did know the teachers were supposed to initial and check that Petitioner had written them down. The log essentially recorded that information in [REDACTED] grade.

Mr. Marinelli does not believe that Petitioner would have done better had implementation of the log been adopted earlier.

69. During the hearing, there was a question whether Petitioner's education suffered because some accommodations were not included in the May 25, 2007, IEP. Mr. Marinelli testified persuasively that Petitioner did not regress academically during the first six weeks in [REDACTED] grade. The teachers at [REDACTED] work with students as a team. As a general rule, if work is turned in late during the first two or three weeks of school, it is still accepted. The missing accommodations did not adversely affect Petitioner's education at all.

70. Mr. Marinelli acknowledged that at times he got correspondence from [REDACTED] stating that all accommodations were not being performed. On one occasion the item in issue was missing assignments. However, in that instance, the parent should have known that certain assignments were supposed to have been turned in because they were on Petitioner's log.

71. In addition, a lot of times Petitioner would do the assignment but just forget to turn it in, leaving it in a student locker. On such occasions, Petitioner would be allowed to retrieve the work.

72. Another time, a power-point presentation was not noted

on Petitioner's log. Even though it was not properly recorded on the log, the work was completed and sent to school. Petitioner received full credit for the assignment. Obviously, Petitioner knew about the work project.

73. The power-point presentation was offered in a computer elective class in [REDACTED] grade. Petitioner earned a B in the class.

74. Mr. Marinelli testified that Petitioner failed to turn in assignments at all a few times, as opposed to merely turning them in late. When that was the case, and no work was turned in, Petitioner received a zero. That omission was not considered to be a penalty.

75. As stated above, the degree to which teachers would accept late work was up to the individual teachers. As a rule of thumb, after the first few weeks of school, Petitioner was allowed to turn work in up to one week late without losing any credit. If work was turned in more than one week late, half credit could be given. However, if it was a major project or something that could adversely affect a grade, Petitioner's teachers were not allowed to grant anything less than full credit. By way of example, as to the above power point presentation, Mr. Marinelli specifically interceded and allowed full credit for the project, with no penalty.

76. Dana Kriznar is the former Principal at [REDACTED]. Ms. Kriznar knew Petitioner during the [REDACTED] and [REDACTED] grades. While she served as principal at [REDACTED], Ms. Kriznar expected teachers to

follow the accommodations on IEPs. Steps were taken to ensure compliance. If non-compliance was brought to Ms. Kriznar's attention, a meeting would be held with the teachers involved. In many instances, district-wide personnel or cluster personnel would be called in to make sure that the teachers were clear about their responsibilities.

77. Ms. Kriznar first became aware that Petitioner's parent had concerns about accommodations not being followed after the filing of the request for due process occurred in May 2008. She had not received any prior complaints from the parent.

78. At that time, Ms. Kriznar was invited by teachers to a parent conference with [REDACTED]. At first, Ms. Kriznar waited downstairs for the parent to arrive. Ms. Kriznar did not know that the parent already had gone up to the classroom, so she was unable to attend the entire meeting.

79. During the parent conference, there was some discussion about accommodations on a Math test directed to Mr. Marinelli, and questions about an assignment for Social Studies directed to Mr. Greer. After the meeting, Ms. Kriznar concluded that the school's teachers were complying with accommodations. One of the subjects discussed at the meeting was whether Petitioner regularly brought items home to [REDACTED]. Petitioner's parent admitted that Petitioner occasionally did not take work home that the teachers said they had sent. The consensus was that Petitioner was not delivering them.

80. Ms. Deborah Smith is the [REDACTED] grade algebra teacher at [REDACTED]. Ms. Smith met Petitioner on the first day of school in [REDACTED] grade. She has never met Petitioner's parent.

81. Petitioner is making average progress in Ms. Smith's class. Ms. Smith follows all of the accommodations in the IEP to the best of her ability, including copies of class notes and study guides being provided in advance, and extended time being allowed.

82. As per a Statement of Student Progress prepared by Ms. Smith, Petitioner has some difficulty with some concepts in algebra. However, the class work is not easy. Respondent made a C in algebra for [REDACTED] first-term grade. This represents reasonable progress.

83. Ms. Smith testified that if Petitioner's work is over a week late, she allows only half credit. When Petitioner forgets an assignment, but turns it in shortly thereafter, she allows full credit. This policy is followed for all students in Ms. Smith's class. Petitioner has been significantly late on only one or two assignments.

84. Ms. Smith is aware of Petitioner's memory deficit. The weekly report that is prepared every Monday (i.e., the agenda) is a communication tool that Ms. Smith uses with Petitioner because of the student's memory difficulties. Ms. Smith provided a specific example of her communications with a parent in this regard.

85. Ms. Smith testified that she is diligent about providing required copies of class work to Petitioner. In fact, she personally purchased a copier and put it in her classroom so that she could make copies of required work for Petitioner. There is redundancy in the systems of notification, as copies are provided in the notebook, from the copier, and in a toolkit checkup.

86. Ms. Sondra Smith was Petitioner's [REDACTED] grade Science teacher. Petitioner maintained a C average in [REDACTED] grade biology. Ms. Smith diligently provided the accommodations required by Petitioner's IEPs. She allowed extra time for assignments and gave shortened tests to Petitioner by basing the score only on the number of questions Petitioner was able to complete.

87. Petitioner's parent never contacted Ms. Smith to observe her class. The parent never made any direct complaints about Ms. Smith's alleged failure to provide accommodations.

88. In one instance, there was an indirect issue raised as to whether or not assignments were being properly recorded on the homework log. Subsequently, extra care was taken to ensure that Petitioner always had a completed homework log and that the teachers were signing off on the log.

89. On cross-examination, Ms. Smith discussed a certain progress grade of D+. Ms. Smith testified that the grade should have been rounded to a C-. Petitioner received some low grades on tests and homework. On the other hand, Petitioner earned some

good grades for class work, projects, and labs, in which Petitioner earned grades of A and A+.

90. Ms. Smith also was questioned on cross-examination regarding lack of entries in Petitioner's Weekly Assignments for the weeks of September 17-24, October 1-5, and October 10-12, 2007. Ms. Smith testified that one possible reason for the lack of entries was Petitioner's problem getting the homework log from class to class. In any event, there is insufficient entry of notations in the documents for the periods of time indicated, whatever the reason.

91. Ms. Smith testified that Petitioner made progress during the year. In one area of measurement, Petitioner's grade rose from C- at the beginning of the year to a solid B average. In another area, Petitioner's grade improved from D+ at the beginning of the year to a B. Ms. Smith accepted assignments late in order to accommodate Petitioner as required under the IEP.

92. Mr. Greer taught Petitioner in a [REDACTED] grade world geography class. Petitioner made progress from the beginning of the year through the end of the year in this class. Petitioner never earned less than a C grade.

93. Mr. Greer followed the accommodations required in Petitioner's IEP. He allowed extended time, shortened assignments, and provided teacher notes. Mr. Greer accepted one assignment three weeks after it was due and gave full credit for

it.

94. Mr. Greer communicated with the parent via email and telephone. He endeavored diligently to address matters [REDACTED] brought to his attention.

95. Mr. Greer noticed no difference in Petitioner's performance from one IEP to the next because Petitioner never had any challenges outside of meeting some demands of time when things were due. Mr. Greer also noted on a Statement of Student Progress that one of Petitioner's needs was better organizational skills.

96. Emily Perkins taught Petitioner reading from January through June of 2008. During that time, Petitioner showed progress with comprehension. Ms. Perkins endeavored to diligently provide all of the accommodations required by Petitioner's IEP.

97. Petitioner earned an A from Ms. Perkins on one of the writing samples in the record. Another writing sample was not graded, but had comments indicating good, acceptable work. Petitioner's writing is legible.

98. Ms. Perkins allowed Petitioner extra time to complete work as needed. Assignments were accepted late. Communications with the parent occurred, and no problems were recollected.

99. Lisa Brennan is an Instructional Program Support Specialist for Respondent's ESE office. She first learned about Petitioner when Petitioner attended [REDACTED]. She made a presentation

for [REDACTED] teachers concerning students with traumatic brain injury.

During the presentation, Ms. Brennan passed out a document on the subject to the teachers. Ms. Brennan also worked with [REDACTED] in preparation of the IEP addendum dated October 17, 2007.

100. Ms. Brennan testified that Petitioner made educational progress from the end of [REDACTED] grade through the beginning of the [REDACTED] grade. Ms. Brennan provided persuasive evidence that Petitioner did not suffer any injury, damage or educational disadvantage from not having an operative IEP in effect during that period of time.

101. Ms. Brennan observed that from the beginning of the 2007-2008 school year through the end of the year, Petitioner's low grade in some subjects were brought up to higher year-ending grades. Petitioner made satisfactory progress under the State of Florida's Sunshine State Standards. Thus, it cannot be concluded that Respondent failed to provide Petitioner with an educational opportunity to perform in accordance with the mandates of IDEA.

102. June Marshall is the present Principal at [REDACTED]. According to Ms. Marshall, [REDACTED] currently has 975 students. The school is an academic magnet program with a focus on Science, Math and Technology. The school teaches ESE students and gifted students, among others. All students need to apply to attend. [REDACTED] could request a transfer to another school for Petitioner without question.

103. Ms. Marshall testified that middle school is a hectic,

busy place at times. That probably was an understatement. The general class size is approximately 25 students per class. The average size of Petitioner's classes ranged from 22-to-25 students. Classes are taught with a team-teaching concept. The team concept has all four core academic teachers on the same team, plus an attached ESE teacher for the team. The ESE teacher assists the academic teachers with planning of curricula. Ms. Marshall testified that the team concept is working in an excellent fashion at the school.

104. Ms. Marshall is personally familiar with Petitioner's instructors. In her opinion, they have tried to do a good job, and in fact have done an excellent job in making sure that Petitioner receives appropriate service. Ms. Marshall acknowledges that on occasion, paperwork completion is not perfect at the school, including in the case of Petitioner.

105. Petitioner's parent never contacted Ms. Marshall to discuss any educational issues or concerns. It is not uncommon for Ms. Marshall to be contacted by parents with concerns about their children's education.

106. As to the issue of whether Petitioner's IEP team should have consulted records from Petitioner's hospitalization back in 2003, Ms. Marshall testified that such records were available to the team to consult if they thought it necessary; however, she would not criticize the team if it did not elect to consult such records, particularly if the parent did not bring

them to the team's attention.

107. Ms. Marshall testified about Petitioner's scores and progress on the FCAT examination. Petitioner made considerable progress in Reading between █ and █ grade. Petitioner's scores increased from level one to level two, from a score of 1449 to a score of 1693, or almost two full years of growth.

108. In █ and █ grade Math, Petitioner, likewise, exhibited progress on the FCAT. Petitioner went from a █ grade score of 1149 to a █ grade score of 1494.

109. In the first term of the █ grade, from the opening of school in August through the end of September or early October, Petitioner's grades were B-, B, B, B-, A, C and C. Thus, based on the results obtained, it does not appear that Petitioner suffered adverse academic results during the first grading period in █ grade, except for the interim progress report in Math.

110. Ms. Marshall admitted that Petitioner has not been on grade level for several years, from 2005 through 2008. That level in itself does not negate the considerable academic and educational progress Petitioner has made under the circumstances.

111. Petitioner's performance at the beginning of the █ grade year was not as good as it had been at the beginning of the █ grade year when a valid IEP was in place. It does not necessarily follow, however, that the relatively lower level of performance at the beginning of the █ grade year was due to the lack of a timely or valid IEP being in place, or from

accommodations from ■■■ grade to ■■■ grade not being carried over. It could have been that the course work overall was simply more difficult.

112. Ms. Marshall noted that one factor in scoring levels on the FCAT examinations of the Petitioner could relate to memory difficulties because the examinations are administered at a time of year when they cover information taught several months previously. Given Petitioner's memory challenges, it is credible to believe that this lapse of time influences Petitioner's scoring on the examinations.

CONCLUSIONS OF LAW

113. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to Sections 120.569, 120.57(1) and 1003.57(3)(i)(e), Florida Statutes (2008), and Florida Administrative Code Rule 6A-6.03311.^{1/}

114. Petitioner has the burden of proof on the Petition. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); Devine v. Indian River County School Board, 249 F.3d 1289, 1291-92 (11th Cir. 2001); cert. denied, 537 U.S. 815, 123 S. Ct. 82, 154 L. Ed. 2d 19 (2002).

115. The IDEA defines FAPE at 20 U.S.C. Section 1401(a)(8), as:

[S]pecial education and related services that have been provided at public expense, under

public supervision and direction, without charge; meet the standards of the State educational agency; include an appropriate preschool, elementary, or secondary school education in the state involved; and are provided in conformity with the individualized program required under section 1414(d).

116. The legal standard to be applied in determining whether a student has received FAPE is a two-pronged test described by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), which states as follows in pertinent part:

First, has the State complied with the procedures set forth in the IDEA? And second, is the individualized education program developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress.

117. IDEA's requirement for FAPE has been interpreted in Rowley to be satisfied when the school system provides the student with a "basic floor of opportunity consist[ing] of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201-203.

118. In School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999), the court discussed the nature and extent of the educational benefits which Florida school districts must provide to exceptional students, stating:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Education benefits 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.

119. As the Eleventh Circuit stated in Devine, in characterizing the Supreme Court's decision in Rowley, "a student is only entitled to some educational benefit; the benefit need not be maximized to be adequate." Devine, supra, 249 F.3d at 1292.

120. Applying these standards, it is clear that Respondent has provided Petitioner with FAPE. Respondent proved that Petitioner received FAPE both in the [REDACTED] grade and [REDACTED] grade at [REDACTED]. The factual findings expressed above and documentary evidence in the record amply support the conclusion that Petitioner made good progress across the board at [REDACTED] from the beginning of each year to the end of each year in virtually every area upon which evidence was presented at the hearing. The only exception is Petitioner's Math grade on the first progress report in mid-September 2007.

121. The preponderance of the evidence also establishes that Petitioner was not deprived of FAPE notwithstanding the procedural violations which occurred in notification to the parent regarding the May 25, 2007, IEP meeting, and in the

omission of certain accommodations from IEP developed at the meeting on that date and temporarily implemented when school commenced in August 2007.

122. Respondent did not adequately explain why it waited until the last day of school in May 2007 to attempt development of an IEP. However, Respondent provided Petitioner FAPE at all times, notwithstanding that there was not a timely operative IEP in place between April 2007 and September 26, 2007, when a new IEP was adopted, with Petitioner's parent's participation and input.

123. Under the governing federal regulation, 34 C.F.R. Section 300.513 (2)(i)-(iii), a procedural violation can only be found to result in a denial of FAPE in limited circumstances. That regulation provides, in relevant part:

300.513 Hearing decisions.

(a) Decision of hearing officer on the provision of FAPE. (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

124. The foregoing regulations and the applicable judicial decisions require that there be an adverse substantive impact on

Petitioner's education in order for there to be a finding that FAPE was denied by a procedural violation. Alternatively, the parent must have been significantly impeded in an opportunity to participate in the decision making process for Petitioner's education. E.g., Weiss v. School Board of Hillsborough County, 141 F.3d 990, 994-98 (11th Cir. 1998); Doe v. Alabama State Department of Education, 915 F.2d 651, 660-64 (11th Cir. 1990) (analysis of harm flowing from alleged procedural violation is required); C. H. v. Cape Henlopen School District, 566 F. Supp. 2d 352-58 (D. Del. 2008) (procedural flaws in an IEP do not automatically signify a deprivation of FAPE; failure to have IEP in place on first day of school did not deprive student of FAPE). See also, e.g., Kingsmore v. District of Columbia, 466 F.3d 118, 119-20 (D.C. Cir. 2006).

125. Starting with the latter issue first, it must be concluded that while Petitioner's parent was not given proper notice and not given an adequate opportunity to participate in the May 25, 2007, effort to adopt a new IEP for Petitioner, Petitioner suffered no substantial adverse educational impact from the efforts at school on that date. It was the last day of school. Compare Cape Henlopen School District, supra, 566 F. Supp. 2d at 357-60.

126. [REDACTED] was afforded the opportunity immediately at the commencement of the next school year to participate in development of a new IEP for Petitioner. This began with the

telephone calls which occurred before school recommenced between Petitioner's parent and Mr. Marinelli. They agreed that the school staff would be provided a period of several weeks within which to get to know Petitioner before the parties would get together to develop a new IEP. It has not been proven that the parent was significantly impeded in providing [REDACTED] input.

127. Petitioner's parent, as a school teacher for the District [REDACTED]self, was well aware of [REDACTED] procedural rights and [REDACTED] rights to participate in the process had [REDACTED] elected to timely exercise them. [REDACTED] testimony that [REDACTED] tried repeatedly to make telephone contact with the school is not accepted as credible, particularly given [REDACTED] acknowledgement of having spoken with Ms. Stinson and Mr. Marinelli during the pre-planning time frame in August 2007. This does not excuse the School's failure to timely implement an operative IEP before the April 6, 2006 IEP expired. Other timely arrangements could have and should have been made.

128. As stated above, the absence of some accommodations, and the failure to timely complete a new IEP before September 26, 2007 did not damage Petitioner academically. Following the adoption of the September 26, 2007 IEP, an addendum dated October 17, 2007 was adopted, and another IEP was adopted at the end of the [REDACTED] grade, on June 2, 2008. Petitioner's parent participated in the development of each of these three documents. As time went on, Petitioner matured and continued to make more

than adequate educational progress.

129. While Respondent's school staff fell short in various particulars as demonstrated at the hearing concerning completion of paperwork, some lack of communications with the parent, and in the inappropriate removal of accommodations from the year-end sixth grade proposed IEP; nevertheless, Petitioner still made measurable and substantial progress in school. The requisite basic floor of educational opportunity has been provided. Petitioner has flourished and in some areas excelled.

130. In light of the foregoing findings and conclusions, the issue of relief need not be reached. Had Petitioner been able to establish the requisite damage and failure to provide FAPE, compensatory education could possibly have been ordered as appropriate relief. However, the petition did not plead or seek such relief. Compare Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003). Similarly, Petitioner provided no competent evidence of what services the purported tutor provided to Petitioner, or of any expenses allegedly incurred by the parent with such tutor. Finally, the issue of a tutor being required was not pled in the petition.

ORDER

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

ORDERED:

That Petitioner's claims are denied and hereby dismissed.

DONE AND ORDERED this 3rd day of February, 2009, in
Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2009.

ENDNOTE

^{1/} The referenced rule has undergone significant changes, effective December 22, 2008, but any such changes do not apply to this matter that was heard prior to the effective date of such changes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 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 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 230.23(4)(m)5, Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.