

Collier County School District
No. 06-1428E
Initiated by: Parent
Hearing Officer: Bram D. E. Canter
Date of Final Order: June 7, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)
)
Petitioner,)
)
vs.) Case No. 06-1428E
)
COLLIER COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

CORRECTED FINAL ORDER

The final hearing in this case was conducted on January 24 through 26, 2007, in Naples, Florida, by Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Paul E. Liles, Esquire
Alvarez, Sambol, Winthrop & Madson, P.A.
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Fort Myers, Florida 33916-7947

For Respondent: Richard W. Withers, Esquire
School Board Attorney
Collier County School Board
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent provided Petitioner a free appropriate public education (FAPE), and whether Petitioner's proper educational placement following [REDACTED] demand for a due process hearing was at home or at [REDACTED] School ([REDACTED]).

PRELIMINARY STATEMENT

On March 1, 2006, Petitioner demanded a due process hearing by email correspondence from Petitioner's attorney to the attorney for the School Board, based on a one-sentence objection to the Individual Education Plan created on February 17, 2006 (February 2006 IEP), "that takes [REDACTED]¹ out of Hospital/homebound and requires [REDACTED] to attend a school that is not currently appropriate for [REDACTED]".² On April 21, 2006, a five-page letter was sent by regular mail and telecopy from Petitioner's attorney to the School Board attorney, setting forth a "Description of problems":

- a. The District
 - (1) failed to provide [REDACTED], a child with disabilities, a free and appropriate public education ("FAPE"), by
 - (a) failing to design and implement an appropriate IEP; and
 - (b) requiring [REDACTED] to return to a public school too soon.
 - (2) failed to provide [REDACTED's parents] with a listing of the types and locations of

all education records maintained by the District and the titles and addresses of the officials responsible for those records;

- (3) failed to provide [redacted]'s parents] with their son's educational records;
 - (4) violated "stay put" by refusing to continue services after a demand for due process had been made;
- b. [redacted]'s parents] had to engage the law firm of Alvarez, Sambol, Winthrop & Madson, P.A. to assist them in having [redacted]'s] legal rights enforced.

The April 21, 2006, letter included a statement that "this letter serves as our client's demand for a due process hearing." During a telephonic pre-hearing conference held on April 28, 2006, Petitioner requested that [redacted] April 21, 2006, letter be treated as [redacted] amended demand for a due process hearing under applicable state and federal law.

The parties jointly requested that the proceeding be abated to allow time for the completion of certain psychological and psychiatric testing and to allow for the parties' experts to review and confer about the test results. The final hearing was later scheduled, but twice continued at the request of the parties, who expressly agreed to extend the time for the filing of the Final Order as provided by state and federal law.

Before the final hearing, Petitioner filed a Motion to Determine "Stay Put" During Pendency of Due Process Hearing. In

the motion, Petitioner argued that Petitioner's proper educational placement during the pendency of the due process hearing was at home with continued Hospital/Homebound services provided by the School Board. A response was filed by Respondent in which it argued that the appropriate placement was ■■■. The parties stipulated that the facts necessary to make the stay put determination were undisputed and set forth in the motion and response. The undersigned issued an Order determining that ■■■ was the proper stay put placement.

At the hearing, Petitioner presented the testimony of ■■■'s parents and J. Christopher McGinnis, Ph.D., who was accepted as an expert in school psychology, applied behavior analysis, and child developmental disabilities and education. Respondent presented the testimony of Frank Zencuch, Principal of ■■■; Christine Barbuto, the Exceptional Student Education (ESE) program specialist at ■■■; Candice Sanderson, a school psychologist; Beverly Hiltabidle, a teacher who provided Hospital/Homebound instruction to ■■■; Nichole Fowlie, an ESE teacher; Diana Thames, ■■■'s teacher for language arts and U.S. history; Catherine Crowley, an ESE teacher who taught ■■■; Katherine Stelmacki, the ESE assistant director at ■■■; and Frank Lehninger, M.D., a psychiatrist.

In lieu of reconvening the final hearing to take the testimony of Respondent's last witness, Michael McDowell, a

psychologist, a deposition was conducted on February 22, 2007, and the transcript of the deposition was filed at DOAH and offered into evidence by Respondent. Following the testimony of Mr. McDowell on the transcript, there is some testimony by ■'s mother, which the undersigned assumes was offered as rebuttal testimony. Petitioner objected to the admission of the transcript of Mr. McDowell's testimony as irrelevant. The basis stated for Petitioner's relevance objection was that Mr. McDowell had not evaluated or treated ■ until after the demand for due process hearing. However, Petitioner also presented the testimony of a psychologist, Dr. J. Christopher McGinnis, who did not evaluate ■ until after the demand for due process hearing. The testimony of both psychologists is relevant to the issues in dispute because their psychological evaluations occurred close enough in time to the February 2006 IEP to assist in determining the nature of ■'s exceptionality and whether the proposed accommodations would have provided ■ FAPE. The entire deposition transcript was admitted into evidence and marked as Volume 5 of the final hearing Transcript.

Respondent's binder of exhibits with pages Bates stamped from 100000 to 101148 was admitted into evidence. Petitioner's composite exhibits designated A through BB were admitted into evidence.

The five-volume Transcript of the final hearing was filed with DOAH. At the request of the parties, they were allowed additional time to submit their Proposed Final Orders (PFOs). The PFOs were carefully considered in the drafting of this Final Order.

FINDINGS OF FACT

1. ■ was ■ years old when the request for due process hearing was filed. ■ is now ■. ■ is the youngest of ■ parent's three natural children.

2. ■ was born two months premature and was in a neo-natal intensive care unit for six weeks. When ■ was finally brought home, ■ heart rate had to be monitored for several months due to bradycardia (abnormally low heart rate).

3. ■ lagged in development of motor functions and fundamental abilities such as sitting up and walking. ■ continues to exhibit fine and gross motor function deficits, causing ■ to have difficulty in such things as dribbling a basketball, tying ■ shoes, or operating a can opener. ■ has processing deficits which cause ■ to be easily distracted from tasks and to read with less fluency than ■ peers. ■'s handwriting is also deficient for ■ age.

4. ■ father testified that ■'s emotional development also lagged as a child, and ■ remained "babyish" longer than ■ siblings. ■ is particularly sensitive to teasing and

perceived insults. ■ was uniformly described by ■ parents and teachers as quiet and polite.

5. ■, ■, and ■ have a history of agoraphobia (fear of open or public places) and panic disorder. ■'s older ■ received ESE services for a learning disability.

6. ■ and ■ family moved to Naples in 2001 from the Chicago, Illinois, area. In Illinois, ■ was determined to have a learning disability and to be eligible for special education services pursuant to Illinois and federal law under the designated learning disability "Other Health Impaired."

7. ■ testified that "It's always been very hard for anyone that's worked with ■ or tested ■ to come up with an accurate, trustworthy diagnosis."

8. When the family moved to Naples, ■ was enrolled in ■ School as a fourth grader. In order to obtain special education services for ■ at ■, the School Board required an application form to be filled out by a medical doctor that indicated ■'s diagnosed learning disability. ■'s mother took the application form to an "urgent care walk-in" and told a family physician there, Dr. Daniel Kaplan, that ■'s disability was Other Health Impaired. Dr. Kaplan wrote "Other Health Impaired" on the form and signed it.

9. According to ■'s mother, ■ struggled with schoolwork at ■ and it caused ■ to lose self-esteem and generally feel

frustrated and unhappy. For middle school, ■ first attended ■ School in Naples. ■ referred to several objections ■ had with the education ■ received at ■, which are irrelevant to the matters at issue in the present case, except regarding ■ claim that ■ developed an extreme anxiety at ■ due to being bullied, which carried forward to ■.

10. ■ began to have recurring bouts of stomach aches, indigestion, and diarrhea in the mornings before school because ■ feared new encounters with the boy who was bullying ■. The bully was also an ESE student. To avoid the bully, ■ transferred ■ to ■ for seventh grade. That was the first academic year for ■, which had just opened. Unfortunately, the bully had also been transferred to ■ and was in classes with ■. Six weeks into the school year, ■ and the bully were separated and no longer had a class together.

11. However, on December 15, 2004, there was an incident in the lunchroom at ■ in which the bully teased and antagonized ■ to point that ■ became extremely upset. ■ reported the incident to the Collier County Sheriff's office, which conducted a formal investigation and issued an official report. After this incident, ■ more anxiety about going to school and ■ says ■ struggled with ■ almost every morning to get ■ to school. ■ missed school on some occasions when ■ anxiety was particularly acute and, when ■ went to school,

■■ often went to the bathroom because of diarrhea and to the school clinic.

12. Despite ■ educational problems, ■ was always promoted to the next grade. ■ parents acquiesced in ■ promotions, but they testified at the final hearing that they believe ■ grades were exaggerated and did not accurately reflect ■ educational progress.

13. The bully was a year older than ■ when ■ began eighth grade at ■, the bully had moved on to high school. Nevertheless, ■ mother testified that ■ anxiety continued with the physical manifestations of stomach pain, indigestion, and bloody diarrhea.

14. ■'s eighth grade teachers who testified at the final hearing saw ■ differently than ■. ■ started eighth grade with an ESE class for several subjects and a regular (inclusion) class for language arts and history. Diane Thames, who taught the two inclusion classes, testified that ■ sometimes appeared nervous about new class material, but not upset or agitated. She observed that ■ got along well with other students, responded when she called on ■ in class, and was willing to ask questions. She testified that ■ made progress in her classes. Ms. Thames was assisted by Nichole Fowlie, an ESE teacher. Ms. Fowlie testified that ■ was a good student who was making progress. She did not see ■ display anxiety.

15. Catherine Crowley, who taught █ in █ ESE classes, described █ as "smart." She observed that █ was occasionally "uptight" and sometimes asked to use the restroom, but that █ made "great progress." She thought █ was doing well at █ and felt strongly that █ should be on a standard diploma track.

16. Christine Barbuto, the ESE program specialist, testified that █ was progressing well. █ participated in class, completed projects, had a positive attitude, worked well with █ peers, and was meeting grade level expectations. █ was making C's or higher grades.

17. Although █ regularly observed █'s behavior when █ was with her outside of school and when she took █ to and from school, she never observed █ in the classroom setting. █ did not appear at the final hearing. Therefore, much of █ testimony about █ feelings and thoughts about what caused, exacerbated, or diminished █ anxiety at █, was hearsay. The evidence is persuasive that █ was more successful at managing █ anxiety at school, and █ coping skills were better than █ believed. This finding is not based on a view that the teachers and school officials were more credible than █, but on the competent substantial evidence that █ behaved differently when █ was with █ than when she was not around.

17. In September 2005, Ms. Barbuto contacted [REDACTED] to find out why [REDACTED] had been absent from school two consecutive days, and [REDACTED] said she had pulled [REDACTED] out of school and did not plan on returning [REDACTED] because [REDACTED] "crashed" emotionally. Ms. Barbuto suggested an IEP meeting to discuss [REDACTED] concerns, and a meeting was held on September 27, 2005. Ms. Barbuto's notes from the meeting indicate that [REDACTED] "expressed sincere satisfaction with the education and ESE support services that [REDACTED] had received at [REDACTED] School," but that she had observed a decline in [REDACTED]'s emotional and mental status.

18. There was no evidence presented that [REDACTED] was bullied in eighth grade at [REDACTED], but [REDACTED] believed that [REDACTED]'s anxiety was caused by the past bullying [REDACTED] had experienced there. The more persuasive psychological and psychiatric evidence presented does not support the proposition that [REDACTED]'s anxiety was caused to a significant degree by the fact that [REDACTED] was the place where [REDACTED] had been bullied a year before.

19. Ms. Barbuto told [REDACTED] about the possibility of temporary Hospital/Homebound (H/H) instruction for [REDACTED] and provided her with an application form for obtaining the doctor's recommendation that was necessary for H/H placement. Soon afterward, [REDACTED] and [REDACTED] went to Ft. Lauderdale to see Dr. Diana Martinez, a neurologist. On October 7, 2005, after spending about an hour with [REDACTED] and [REDACTED] parents, Dr. Martinez filled out

the H/H application form, indicating that her medical diagnosis of ■ was "encephalopathy."

20. Encephalopathy is a very general term encompassing "any diffuse disease of the brain that alters brain function or structure." If Dr. Martinez had written "something is wrong with ■ brain," she would not have conveyed less information. ■ candidly testified that Dr. Martinez did not have time to make an accurate diagnosis, but ■ insisted that Dr. Martinez make a diagnosis because "it was a medical authorization we drove two hours to receive."

21. In response to the question on the application form "In your professional opinion, is the child's diagnosed problem sufficiently severe to cause significantly debilitating effects on the child's physical or psychological health?" Dr. Martinez wrote, "[Patient] cannot attend school at this time, has a lot of anxiety and unable to go."

22. The H/H application form includes a place for the doctor to indicate the beginning and start dates for the student's required absence from school. According to ■, Dr. Martinez asked ■ how long ■ wanted the H/H placement to last and Dr. Martinez would have put down any period of time that ■ requested. The time period that Dr. Martinez wrote on the H/H application form, October 2005 to February 2006, was the time period that ■ requested. This evidence substantially

undermines the credibility of Dr. Martinez' medical recommendation. Dr. Martinez did not testify at the final hearing.

23. Dr. Martinez indicated on the H/H application form that "[Patient] is under workup for diagnosis." However, Dr. Martinez did not intend to provide the "workup." She recommended that additional assistance be sought locally. Soon thereafter, ■ 's parents took ■ to the ■ in the Naples area, where ■ was further evaluated. ■ 's parents did not share the reports of these evaluations with the School Board because the reports included information about other family members or family circumstances that ■ 's parents preferred to keep confidential.

24. Zoloft was prescribed for ■ by a doctor at the David Lawrence Center to help ■ manage ■ anxiety.

25. The IEP team, including ■ and ■, met on October 14, 2005, and produced a new IEP that called for H/H placement. The October IEP was only to cover the period of the H/H status, ending in February 2006.

26. Began to receive instruction a couple of hours each weekday in ■ home. Beverly Hiltabilde was one of ■ H/H teachers. She got along well with ■ and ■ parents. She regularly checked with ■ 's former classroom teachers to "stay in line with their teaching." ■ had less anxiety at home and Ms.

Hiltabidle said ■ made progress, although ■ had difficulty with math and reading.

27. Another IEP meeting was held on December 13, 2005, to discuss the need to re-evaluate ■. ■ agreed to a social-emotional assessment and a psychiatric evaluation at School Board expense. The social-emotional assessment was to be conducted by Candice Sanderson, the school psychologist, and the psychiatric evaluation was to be performed by Dr. Frank Lehninger.

28. Ms. Sanderson conducted her assessment on December 16, 2005. It involved interviews with ■, ■, and two of ■ teachers. All three adults rated ■ as having a tendency to be overly sensitive about relatively minor physical problems or discomforts. All three adults rated ■ as having anxiety and internalizing problems. However, ■ 's self-rating for anxiety was average. One teacher and ■ reported withdrawal. One teacher indicated difficulty in adapting to changes in the environment. Neither ■, nor the adults, saw odd behavior. ■ 's self ratings showed feelings of alienation, hostility, and dissatisfaction with school. It was Ms. Sanderson's opinion that ■ 's anxiety was not long term, persistent, or maladaptive.

29. Dr. Lehninger met with ■ and ■ and produced a report of ■ evaluation of ■ on December 15, 2005. The report states

that ■ was concerned about continuing homebound schooling because of "lack of social and interpersonal skills," but ■ did not want ■ to return to public school. ■ wanted ■ to go to Journeys, a private school in Naples, because ■ thought it would provide smaller classes, less distraction, and more personal assistance from teachers.

30. Dr. Lehninger diagnosed ■ as having "anxiety disorder NOS" (not otherwise specified) because ■ did not meet the criteria for a specific type of anxiety, such as separation anxiety or post traumatic stress disorder.

31. Dr. Lehninger noted in his report that "Although [■] has problems with social reciprocity, sensory defensiveness, and maintaining same-age peer relationships, it is questionable at this time if ■ actually meets full criteria for a pervasive developmental disorder."

32. Dr. Lehninger explained that a diagnosis of encephalopathy is very general and does not, of itself, indicate a need for home schooling. He did not see any immediate concerns that would indicate ■ needed to continue with H/H instruction. He recommended that ■ return to ■ as soon as possible.

33. Dr. Lehninger's recommendation was based in part on the professional literature of the American Academy of Child and Adolescent Psychiatry, of which he is a member, the American

Academy of Family Physicians (AAFP), and the American Academy of Pediatrics (AAP). For example, in the case of children with "school refusal," the AAFP states that the primary treatment goal is early return to school. An AAP article on homebound instruction based on medical reasons states:

It must be clear that homebound instruction is meant for acute and catastrophic health problems that confine a child or adolescent to home or hospital for a prolonged but defined period of time and is not intended to relieve school or parent of the responsibility for providing education in the least restrictive environment.

34. Dr. Lehninger testified that separation from school for a student that has anxiety about school usually causes the next visit to school to provoke increased anxiety.

35. ■■■ told Dr. Lehninger about ■■■'s past experience with bullying and said one of her reasons for pulling ■■■ out of school was that ■■■ did not think the Collier County public school system could provide ■■■ a safe and healthy academic environment. However, Dr. Lehninger thought it was significant that in his one-on-one session with ■■■, ■■■ did not talk about past bullying or being afraid ■■■ might be bullied again. Dr. Lehninger saw no symptoms of post traumatic stress disorder associated with the past bullying. Petitioner's evidence was not sufficient to show that ■■■ was an unsafe environment due to ongoing bullying, or

that the school staff was unwilling or unable to respond appropriately to any future bullying incident.

36. Dr. Lehninger's December 15, 2005, report of his evaluation of ■ contained eight recommendations, including the following, which is most relevant to the issues in this case:

[■] is currently receiving hospital home bound schooling. Due to the limited social and interpersonal interactions available in this type of academic setting, [■] will benefit from returning to school as soon as possible. Since initiation of Zoloft 100mg daily, [■]'s anxiety and depressive features have improved; thus, ■ ability to cope with daily school related stressors may be less overwhelming. Initially, [■] will most likely do best in a small, highly structured, and predictable classroom setting; integration into larger classes should occur slowly and with appropriate external support. Continuing regularly scheduled school meetings with [■] and ■ parents, and allowing for appropriate measures to decrease [■]'s anxiety (e.g., ability to meet with a designated school staff member on a regular basis; providing appropriate individualized time if desired; substituting difficult tasks with other projects) may be helpful. Identifying and promoting [■]'s academic and social strengths (e.g., enthusiastic; hard working; kind; organized) will certainly further assist in building a positive self-esteem.

37. ■ testified that ■ was impressed with Dr. Lehninger and pleased with his recommendations.

38. On January 17, 2006, another IEP meeting was held, which ■ attended. A draft IEP was prepared for the meeting which included a note that "[■] is currently on

Hospital/Homebound through the end of February 2006. ■■■■■ homebound services will end at that time." However, due to ■■■■■ objection to a statement in the draft IEP that ■■■■■ had attention deficit disorder (ADD), the meeting ended without further review or finalization of the draft IEP.³

39. ■■■■■ reported at the January meeting that when ■■■■■ took Zoloft, ■■■■■ anxiety "went away."

40. In a February 6, 2006, letter to Principal Frank Zencuch, ■■■■■ said, "I made it clear that Hospital/Homebound was to be a temporary solution, and several times since I have expressed to those involved that [■■■■] is isolated at home in a restrictive environment, and this is not in ■■■■■ best interest." Nevertheless, ■■■■■ preferred H/H services to returning ■■■■■ to ■■■■■.

41. Another IEP meeting was held on February 17, 2006, which was attended by ■■■■■. The IEP reviewed at the meeting was similar to the draft IEP brought to the meeting in January. The February 2006 IEP also contained the note that ■■■■■'s homebound services would terminate at the end of February.

42. The February 2006 IEP included several elements specifically designed to assist ■■■■■ to transition from homebound instruction to ■■■■■. For two weeks, ■■■■■ would attend school for one class per day, while continuing the same level of homebound instruction. The ■■■■■ class would have been English, which Ms. Barbuto said was chosen because it is a "highly structured safe

environment with a smaller number of students." Then ■ would return to school full time, but ■ was to have four classes that were co-taught (by a regular teacher and an ESE teacher), whereas before ■ H/H status, ■ had just two co-taught classes. ■ would have been placed in a "learning strategies" class, which teaches organizational skills, study skills, and test preparation skills. In addition, ■ was to be provided weekly psychological counseling at school and monthly psychotherapy and psychiatric services to be paid for by the School Board. However, ■ parents were not satisfied with these IEP accommodations.

43. Petitioner claims that the February 2006 IEP meeting was conducted without appropriate time and consideration given to the concerns expressed by ■ 's parents. Estimates of the length of the meeting were "more than two hours" (Ms. Barbuto) and "several hours" (Ms. Sanderson). The more persuasive evidence shows that the other IEP team members were willing to spend more time on any subject that ■ 's parents had questions about or wanted to discuss further. There was no point during the meeting when ■ 's parents were cut off from further discussion or told that a subject could not be discussed.

44. However, ■ 's parents were frustrated at the February IEP meeting because they wanted ■ to stay at home, but the rest of the IEP team thought that ■ should return to ■ at the end

of February. Ms. Sanderson, for example, testified that she thought the longer ■ stayed at home, the more challenging it would be to get ■ back into the school setting.⁴

45. ■'s parents asked the school officials to extend ■'s H/H status two weeks so they could obtain an independent educational evaluation (IEE). Ms. Stelmacki agreed to contact Dr. Lehninger to ask him whether he would consider authorizing an extension. On February 20, 2006, Dr. Lehninger told Ms. Stelmacki that the Zoloft had proven to be effective in reducing ■'s anxiety, and he saw no reason for H/H instruction to continue beyond the end of February. Dr. Lehninger stated that he was ready to begin treating ■ and, if a problem occurred during ■'s "reentry" to ■, it could be addressed immediately.

46. On March 1, 2006, ■'s parents filed a demand for due process hearing. They refused to return ■ to ■ for the balance of the school year. The School Board did not provide homebound services after February 2006, and ■'s parents did not provide a home school tutor at their own expense. Nevertheless, ■'s grades through February 2006 were sufficient, when averaged with the F's ■ received for the final grading period, to promote ■ to ■ grade. ■ is now a ■ grader at ■ School in Naples.

47. The demand for due process hearing insisted that the School Board continue to provide H/H educational services during

the pendency of the proceeding. In addition, it introduced objections to the February 2006 IEP that were not previously raised by ■'s parents, pertaining to alleged deficiencies in the February 2006 IEP's statements of ■'s current performance levels and educational goals.

48. ■ requested that the School Board pay for an IEE by Dr. Patrice Mack, a psychiatrist. ■ also sought an evaluation by a psychologist, Dr. J. Christopher McGinnis.

49. Dr. Mack conducted an evaluation of ■ on or about May 3, 2006. Dr. Mack's notes from her interview with ■ indicate that ■ told her about bullying in ■ grade, but nothing about bullying in the ■ grade. Her notes show ■ told her that ■ "got sick every day - stomach aches."

50. In a place on the interview form used by Dr. Mack entitled "Reason For Referral," Dr. Mack wrote, "crisis point, poor self-esteem, anxiety @ school, 'abusive 6th [grade] teacher,' irritable bowel, teased by 1 kid in front of everyone, school phobia." A reasonable inference from the evidence is that this information was provided to Dr. Mack ■.

51. Dr. Mack diagnosed ■ as having generalized anxiety disorder, OCD (obsessive compulsive disorder), IBS (irritable bowel syndrome), and PTSS (post traumatic stress syndrome). She filled out the H/H application form on March 8, 2006, and indicated that ■ should be out of school from August 2005 to

June 2006. Without explanation, Dr. Mack's recommended homebound placement reached back in time to cover all of ■'s eighth grade school year, even the first part of the year before ■ pulled ■ out of school. Dr. Mack did not testify at the final hearing.

52. The H/H application form filled out by Dr. Mack was provided to ■, but the school officials decided to rely on the recommendation of Dr. Lehninger and require ■ to return to ■.

53. ■'s parents obtained a new psychological evaluation of ■ by Dr. J. Christopher McGinnis in Ft. Myers, Florida. Dr. McGinnis tested ■ on three days in March 2006, and produced a report in May 2006.⁵ Dr. McGinnis found that ■'s own view of ■ anxiety and social functioning was more positive than ■ parents. Dr. McGinnis concluded that that the parent's view was more accurate.

54. It was Dr. McGinnis' opinion that ■ had a combination of post traumatic stress disorder, generalized anxiety disorder, attention deficit with hyperactivity disorder, and nonspecific issues, "making school aversive for this child."

55. Dr. McGinnis noted that ■'s gastrointestinal problems might not be psychosomatic, but reflect a "Celiac disease" or other underlying medical condition. Therefore, he recommended that ■ get a medical examination. The record does not reflect whether this was done.

56. Dr. McGinnis' report included recommendations for educational planning, including the following:

Dr. Lehninger recommended that [] return to school as soon as possible "due to limited social and interpersonal interactions available [while on homebound status]." The undersigned spoke by telephone with Dr. Lehninger on May 2, 2006, regarding this statement, which Dr. Lehninger informed was asserted under the assumption that appropriate accommodations were being extended to [] and that the school building was in fact a safe place to be. He welcomed a future consultation with [] in order to revisit his earlier statement should this not be the case.

The undersigned offers that []'s return to school may exacerbate [] anxiety thereby rendering educational efforts less effective, particularly if the proposed public school does not represent a safe and orderly learning environment conducive to learning for []. In and of itself, being around lots of other children does not necessarily predict that [] will benefit socially or otherwise. If [] is to continue on homebound, then it would be important for [] parents to arrange structured socialization opportunities much like home-schooling parents do for their children. This is not to say, however, that [] cannot benefit from returning to school at some point, especially provided that an effective anti-bullying policy is developed and put into place at the school. [Emphasis in original]

57. Dr. McGinnis' report includes statements such as "Communication must be improved between parties to allow the IEP team to function at its peak performance as intended by law," which appear to reflect a version of events as told to

Dr. McGinnis by [REDACTED].

58. Dr. Lehninger is the only psychiatrist who not only conducted an evaluation of [REDACTED], but also treated [REDACTED]. Dr. Lehninger is still treating [REDACTED], and [REDACTED] is responding successfully to the treatment. Dr. Lehninger said that the disorders diagnosed by Dr. Mack and Dr. McGinnis do not dictate removal from school. He said he treats a number of students who are attending school with these disorders.

59. Dr. Lehninger shares or has adjoining office space with Michael McDowell, an independent psychologist and mental health counselor to whom Dr. Lehninger sometimes refers patients. Mr. McDowell provided psychological counseling services to [REDACTED] for several months beginning in August 2006. It was Mr. McDowell's opinion that [REDACTED] tried to do too much and interfered with [REDACTED]'s ability to be more self-reliant and independent.

60. The opinions offered by the psychiatrists and psychologists regarding [REDACTED] and [REDACTED] need for H/H placement was conflicting and required [REDACTED] officials and the School Board to make a determination of which opinions to follow. Likewise, the undersigned had to determine, de novo, which of the conflicting expert opinions offered into evidence were more persuasive, based on the entirety of the written and spoken record, as well as the demeanor of the witnesses who gave live testimony. It is found that the [REDACTED] officials and School Board chose correctly.

The opinions of Dr. Lehninger, generally, and his specific opinion that ■ should return to school as soon as possible, were more credible and persuasive.

61. The program of education outlined in the February 2006 IEP, as well as the accommodations designed to minimize and manage ■'s anxiety, would have provided ■ with FAPE if ■ had been allowed to return to school in March 2006.

62. Petitioner also claimed that the February 2006 IEP failed to adequately state ■'s present levels of performance or establish measurable objectives for ■. For example, the IEP calls for ■ to receive three days of counseling each week, but Petitioner objected that the IEP does not make clear what days of the week or how long the counseling would last. This and other alleged imprecision in the IEP which Petitioner complained of were not of such a nature as to render the IEP confusing or difficult to implement so as to deny FAPE.

63. Petitioner complained that ■'s educational records were not promptly provided when requested by ■'s parents or their attorney. The evidence shows that the School Board attempted to provide the records as soon as possible, a substantial majority of the records were provided immediately, and there was no intent to delay or refuse to produce any record. Petitioner did not show how Petitioner's case at the final hearing was prejudiced or somehow diminished by the School

Board's failure to provide any record sooner. Petitioner was not denied due process.

CONCLUSIONS OF LAW

64. DOAH has jurisdiction over the subject matter pursuant to Section 120.569 and Subsections 120.57(1) and 1003.57(1)(e), Florida Statutes (2006).⁶

65. Respondent is a recipient of federal funding for education of students with disabilities and is subject to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et. seq.; and Florida law applicable to special students instruction, Section 1003.57, Florida Statutes.

66. In Town of Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984), aff'd 471 U.S. 359 (1985), the court described the relationship of state and federal statutory and regulatory law as one in which "States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations. Congress provided for federal executive oversight through states' annual plans to assure basic compliance with the federal minimum standards but the states supply the machinery necessary to effectuate the guarantees provided by the federal Act on a daily basis." 736 F.2d at 785.

67. Subsection 1003.57(1), Florida Statutes, requires each school district to provide "an appropriate program of special

instruction, facilities, and services for exceptional students as prescribed by the State Board of Education."

68. Subsection 1003.01(3)(a), Florida Statutes, defines an "exceptional student" as any student determined to be eligible for a special program pursuant to rules of the State Board of Education. Subsection 1003.01(3)(b), Florida Statutes, defines "special education services" as "specially designed instruction and such related services as are necessary for an exceptional student to benefit from education."

69. Florida Administrative Code Rule 6A-6.03015 provides in relevant part:

6A-6.03015 Special Programs for Students who are Physically Impaired.

(3) Students who are other health impaired. Other health impaired means having limited strength, vitality or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affect a child's educational performance.

(a) Criteria for eligibility. A student is eligible for a special program for the physically impaired if the student has a health impairment which results in reduced efficiency in school work because of temporary or chronic lack of strength, vitality or alertness.

70. Florida Administrative Code Rule 6A-6.03028 provides in relevant part:

An Individual Educational Plan (IEP) or Individual Family Support Plan (IFSP) must be developed, reviewed, and revised for each eligible child with a disability served by a school district, or other state agency that provides special education and related services either directly, by contract, or through other arrangements, in accordance with this rule. Parents are partners with schools and school district personnel in developing, reviewing, and revising the individual education plan (IEP) for their child. . . Procedures for the development of the individual educational plan, including procedures for parental involvement, and the required contents for the IEP shall be . . . consistent with the following requirements:

- (1) Role of parents. The role of parents in developing IEPs includes, but is not limited to:
 - (a) Providing critical information regarding the strengths of their child;
 - (b) Expressing their concerns for enhancing the education of their child so that their child can receive a free appropriate public education;
 - (c) Participating in discussions about the child's need for specially designed instruction and related services;
 - (d) Participating in the determination of how the child will be involved and progress in the general curriculum, including participation in the statewide assessment program and in district-wide assessments;
 - (e) Participating in the determination of what services the school district will provide to the child and in what setting; and

(f) Participating in the determination of whether the child is pursuing a course of study leading towards a standard diploma, consistent with Section 1003.43, Florida Statutes, or a special diploma, consistent with Section 1003.438, Florida Statutes.

* * *

(6) Considerations in IEP development, review, and revision for students with disabilities. The IEP team shall consider the following in IEP development, review, and revision:

(a) The strengths of the student and the concerns of the parents for enhancing the education of their child;

(b) The results of the initial or most recent evaluation of the student;

(c) As appropriate, the results of the student's performance on any general state or district assessment;

* * *

(7) Contents of the IEP for students with disabilities. Each district, in collaboration with the student's parents, shall develop an IEP for each student with a disability. . . The IEP for each student with a disability must include:

(a) A statement of the student's present levels of educational performance, including how the student's disability affects the student's involvement and progress in the general curriculum. For students with disabilities who participate in the general statewide assessment program, consistent with the provisions of Rule 6A-1.0943, F.A.C., a statement of the remediation needed for the student to achieve a passing score on the statewide assessment, or for prekindergarten children, as appropriate,

how the disability affects the student's participation in appropriate activities;

(b) A statement of measurable annual goals, including benchmarks or short term objectives related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum or for preschool children, as appropriate, to participate in appropriate activities and meeting each of the student's other educational needs that result from the student's disability;

(c) A statement of the specially designed instruction and related services and supplementary aids and services to be provided to the student, or on behalf of the student, and a statement of the classroom accommodations, modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals; to be involved and progress in the general curriculum in accordance with paragraph (7)(a) of this rule; to participate in extracurricular and other nonacademic activities; and to be educated and participate with other students with disabilities and nondisabled students in the activities described in this paragraph;

(d) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in paragraph (7)(c);

(e) A statement of any individual accommodations in the administration of the state or district assessments of student achievement that are needed in order for the student to participate in state or district assessments.

* * *

(f) The projected date for the beginning of the specially designed instruction, services, accommodations and modifications described in paragraph (7)(c) of this rule and the anticipated frequency, location, and duration of those services;

(g) A statement of how the student's progress toward the annual goals will be measured and how the student's parents will be regularly informed (at least as often as parents are informed of their nondisabled children's progress) of the student's progress toward the annual goals and the extent to which that progress is sufficient to enable the student to achieve the goals by the end of the year;

(h) During the student's eighth grade year or during the school year of the student's fourteenth birthday, whichever comes first, a statement of whether the student is pursuing a course of study leading to a standard diploma or a special diploma.

(i) Beginning by the student's fourteenth birthday (or younger, if determined appropriate by the IEP team), including the student and the student's parents, and updated annually:

1. A statement of the student's desired post-school outcome which shall be developed through a student-centered process;

2. A statement of the student's transition service needs under the applicable components of the student's IEP that focuses on the student's courses of study, such as participation in advanced-placement courses or a vocational education program; and

3. Consideration of instruction or the provision of information in the area of self-determination to assist the student to be able to actively and effectively

participate in IEP meetings and self-advocate, if appropriate.

* * *

(10) Review and revision of the IEP. The school district shall ensure that the IEP team:

(a) Reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved; and

(b) Revises the IEP as appropriate to address:

1. Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate,
2. The results of any reevaluation conducted,
3. Information about the student provided to, or by, the parents,
4. The student's anticipated needs or other matters,
5. Consideration of the factors described in subsection (6) of this rule, and
6. The remediation of skills needed to obtain a passing score on the statewide assessment.

(c) Responds to parent's right to ask for revision of the student's IEP or to invoke due process procedures in accordance with subsection 6A-6.03311(11), F.A.C., if the parent feels that the efforts required to provide specially designed instruction related services are not being made.

(11) IEP implementation and accountability. The school district . . . is responsible for

providing the specially designed instruction and related services to students with disabilities in accordance with the students' IEPs. However, it is not required that the school district, teacher, or other person be held accountable if a student does not achieve the growth projected in the annual goals and benchmarks or objectives

71. Florida Administrative Code Rule 6A-6.03311 provides in relevant part:

(4) Parents' opportunity to examine records and participate in meetings.

(a) The parents of a child with a disability shall be afforded an opportunity to inspect and review their child's educational records including all records related to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child in accordance with Rule 6A-1.0955, F.A.C., Section 1002.22, Florida Statutes, 34 CFR 300.569, 300.571, and 300.572 and this rule.

(b) The right to inspect and review education records under this rule includes the right to have a representative of the parent inspect and review the records.

* * *

(7) Independent educational evaluation.

(a) The parents of a child with a disability have the right to obtain an independent educational evaluation for their child and be provided upon request for an independent educational evaluation information about where an independent educational evaluation may be obtained and the qualifications of the evaluation

specialist in accordance with paragraph (4)(a) of Rule 6A-6.0331, F.A.C.

(b) Independent education evaluation is defined to mean an evaluation conducted by a qualified specialist . . . who is not an employee of the school board.

* * *

(f) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

72. The burden of proof in this case is on the Petitioner because [REDACTED] is the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

73. The standard in determining whether an IEP provides FAPE is to determine whether it is reasonably calculated to provide the student with educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982). An appropriate education is one that allows a student to make measurable and adequate gains in the classroom. J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991). Under the IDEA there is no entitlement to the best program available. School districts are not required to maximize educational programs for a handicapped student.

74. In School Board of Martin County v. A. S., 727 So. 2d 1071 (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. Educational benefits under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 at 192, 198.

Id. at 1074.

75. The February 2006 IEP was reasonably calculated to provide ■ with educational benefit. Although it did not satisfy ■ parents' notions of the accommodations necessary for ■ to learn despite ■ general anxiety syndrome, the evidence shows that ■ parents' perception of ■ needs was distorted. They gave ■ less credit than the more persuasive evidence showed ■ deserved for being able to cope and manage ■ anxiety in the classroom. The parents' perception of ■ 's teachers and other ■ staff members was also distorted. ■ 's teachers and the other ■ staff members were genuinely concerned for the physical and emotional wellbeing of ■, and willing and capable of providing ■ with educational benefits.

76. Subsection 1003.57(1)(e), Florida Statutes, provides in part:

Notwithstanding any law to the contrary, during the pendency of any proceeding conducted pursuant to this section, unless the district school board and the parents otherwise agree, the student shall remain in his or her then-current educational assignment or, if applying for initial admission to a public school, shall be assigned, with the consent of the parents, in the public school program until all such proceedings have been completed.

77. An Administrative Law Judge lacks the authority to order an educational placement or specify an educational setting. "Stay put" placement during the pendency of a due process hearing is injunctive relief that only a court may order. An Administrative Law Judge may address stay put only to assist a court in the exercise of its judicial discretion as to stay put or possibly to assist the parties in negotiating a placement pending litigation. The parties requested that the undersigned rule on their legal dispute about the proper placement of ■ during the pendency of the hearing and a ruling was made that ■ was ■ 's appropriate placement.

78. Generally, the courts have interpreted the term "current educational placement" to mean the current education and related services and placement provided in accordance with the most recently approved IEP. Thomas v. Cincinnati Bd. of Education, 918 F.2d 618, 625 (6th Cir. 1990). The term

"placement" in this context includes a student's entire educational program and is not limited to the physical location where the program is implemented. There is no change in placement when the change does not affect Petitioner's general educational program even if, for example, it occurs at a different school. Concerned Parents and Citizens for Continuing Education at Malcolm X v. New York City Board of Education, 629 F.2d 751 (2d Cir. 1980). There is no change in placement when there is no significant change in Petitioner's program or services. DOE v. Maher, 793 F.2d 1470 (9th Cir. 1986).

79. It is not disputed that the October 14, 2005 IEP was the stay put IEP. The dispute involves whether the October 2005 IEP authorized H/H placement and H/H educational services beyond February 2006, or called for ■ 's return to ■ in March 2006. The evidence shows that the IEP team, including ■ 's parents, understood at the time the October 2005 IEP was signed and put into effect that it called for ■ 's return to ■ in March 2006, because ■ entitlement to homebound educational services was only possible because it was based on a physician's recommendation, and the physician had prescribed it for only five months, to end in February 2006.

80. Petitioner cited a number of cases that interpret and discuss the IDEA stay put provision and argues that, because ■ was in H/H placement pursuant to the October IEP, this body of

federal decisional law makes ■ 's appropriate stay put placement at home. However, none of the cases cited involve the facts presented here. It is the view of the undersigned that the requirement of Florida Administrative Code Rule 6A-6.3020 that H/H placement be prescribed by a licensed physician, and the facts in this case that (1) Dr. Martinez prescribed homebound instruction for ■ for only five months, (2) the IEP team understood that the October 2005 IEP called for temporary H/H placement, (3) prior to the conclusion of the five months, Dr. Lehninger confirmed that homebound instruction beyond February 2006 was not medically necessary for ■, and (4) continued homebound placement would likely worsen ■ 's anxiety about school, set this case apart from the cases cited by Petitioner.

81. A fundamental goal of both the federal and state ESE laws is to educate students with disabilities in the least restrictive environment and preferably with the regular student population. Subsection 1003.57(1)(f), Florida Statutes, requires that school districts providing ESE instruction and services use the regular schools "to the maximum extent appropriate" and segregate ESE students only if education in regular classes, with supplemental aids and services, "cannot be satisfactorily achieved." 20 U.S.C. Section 1412(a)(5)(a) requires that public schools, to the "maximum extent appropriate," provide for the education of disabled children

with children who are not disabled. Dr. Lehninger's recommendation that ■■■ ■ return to ■■■ and the adoption of the recommendation by Respondent were consistent with the fundamental goal of the state and federal law to provide disabled students a public education in the least restrictive environment.

82. H/H placement is inherently temporary because it is derived from a medical recommendation regarding the time period needed to effectuate a cure, recuperation, or stabilization of a medical condition. H/H placement should be temporary because it is one of the most restrictive educational environments and, therefore, conflicts directly with the state and federal goal.

83. With regard to educational placement, the court in School Board of Martin County v. A.S., supra, stated:

The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." [citations omitted]

727 So. 2d at 1074.

84. Citing the U.S. Supreme Court's decision in Rowley, supra, the court in Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988), stated, "[P]arents, no matter how well-motivated, do not have a right . . . to compel a school

district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."

85. Respondent was prepared to provide ■ with personalized instruction and sufficient supportive services at ■ under the February 2006 IEP to permit ■ to benefit from the instruction. H/H placement was not necessary for ■ to receive educational benefits.

86. With regard to Petitioner's objection to the School Board's failure to timely produce educational records that were demanded after the February 2006 IEP meeting, there was no claim or evidence that Respondent intentionally failed to produce documents. Furthermore, Petitioner did not claim or show that any omitted or tardily-produced records resulted in prejudice to Petitioner in the presentation of factual and legal issues at the hearing. Respondent's failure to immediately produce all educational records did not deprive ■ of an educational benefit or deny due process.

87. In evaluating whether a procedural defect has deprived a student of FAPE, the court must consider the impact of the procedural defect. A procedural defect is not a per se denial of FAPE. Weiss v. School Board of Hillsborough County, 141 F.3d 990, 997 (11th Cir. 1998). The evidence in this record does not establish that Respondent violated any procedural requirement so

as to impede ■ 's right to FAPE, or significantly impeded ■ parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits to ■.

ORDER

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

1. The February 2006 IEP provided Petitioner with a free appropriate public education at ■ School; and
2. All claims asserted by Petitioner in its amended demand for a due process hearing are denied as contrary to law and the preponderance of the evidence.

DONE AND ORDERED this 7th day of June, 2007, in Tallahassee, Leon County, Florida.

S

BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2007.

ENDNOTES

^{1/} Throughout this Final Order, all references to Petitioner by name are replaced with ■■■ initials for purposes of confidentiality.

^{2/} Except where noted, all the claims and allegations attributed to Petitioner in this Final Order are the claims and allegations presented by ■■■'s parents on ■■■ behalf.

^{3/} ■■■ was angry that the School Board had improperly labeled ■■■ as having ADD, but that diagnosis originated from Dr. Kaplan's original paperwork that was used to first establish ■■■'s eligibility for ESE services in Florida. Subsequently, both Dr. Lehninger and Dr. J. Christopher McGinnis, a psychologist, identified ADD as a possible exceptionality for ■■■

^{4/} Ms. Hiltabidle, ■■■'s H/H instructor, did not attend the February 2006 IEP meeting, but she also thought ■■■ should be integrated back into school.

^{5/} This date is inferred from other evidence. Dr. McGinnis's report is not dated.

^{6/} All references to the Florida Statutes are to the 2006 codification unless otherwise indicated.

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 1003.57(1)(e), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.