

Miami-Dade County School District  
No. 07-1988E  
Initiated by: Parent  
Hearing Officer: Stuart M. Lerner  
Date of Final Order: August 3, 2007

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-1988E  
 )  
MIAMI-DADE COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Florida Administrative Code Rule 6A-6.03311 and Section 1003.57(1)(e), Florida Statutes,<sup>1</sup> before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on June 11, 12, and 13, 2007, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Lilliam Rangel-Diaz, Qualified  
Representative<sup>2</sup>  
Center for Education Advocacy, Inc.  
5973 Southwest 42nd Terrace  
Miami, Florida 33155

For Respondent: Mary C. Lawson, Esquire

Laura E. Pincus, Esquire  
Miami-Dade County Public Schools  
1450 Northeast Second Avenue, Suite 400  
Miami, Florida 33132

STATEMENT OF THE ISSUES

1. Whether Respondent deprived Petitioner of a "free appropriate public education" for the reasons set forth in Petitioner's due process hearing request?

2. Whether the relief requested in Petitioner's due process hearing request should be granted?

PRELIMINARY STATEMENT

On May 7, 2007, [REDACTED] and [REDACTED] (hereinafter referred to collectively as the "Parents") submitted to the Miami-Dade County School Board (School Board) a request for a due process hearing (Complaint) on behalf of their [REDACTED], [REDACTED] ([REDACTED]). In their Complaint, the Parents contended that they were

"requesting a due process hearing for the following reasons":

1. [REDACTED] is a [REDACTED] year-old little [REDACTED].
2. [REDACTED] was previously identified by The Miami-Dade County Public School District (M-DCPS) under the ESE program for students with autism as well as under the language impaired ESE program.
3. The school district has failed miserably in its duty to provide [REDACTED] with a free appropriate public education in the least restrictive environment.
4. [REDACTED]'s most recent annual IEP was developed on February 27, 2007 (see Exhibit A).

5. The 2/27/07 annual IEP was not calculated to provide [REDACTED] with the requisite benefit (see Rowley, 458 U.S., at 207). Although the 2/27/07 annual IEP places [REDACTED] in all general education classes and that is also the educational placement that [REDACTED] parents desire for [REDACTED], M-DCPS has failed to provide [REDACTED] with the rigorous, intensive education program of between 20 and 40 hours of instruction per week [REDACTED] needs in order to be successful and make more than just de minimis progress.

6. Similarly to the previously developed IEPs, [REDACTED]'s February 27, 2007 annual IEP has no measurable annual goals. In addition, [REDACTED] annual goals are inappropriate and are not in accordance with the kindergarten grade-level expectations for the Sunshine State Standards, failing to adhere to the requirements of the No Child Left Behind (see Exhibit A, Section X, insert B).

7. The February 27, 2007 IEP only provides four accommodations for [REDACTED] which are neither individualized nor sufficient to "accurately measure the academic achievement, developmental and functional performance of the student including: the general education curriculum . . . ." (See Exhibit A, Section XI, Insert D).

8. [REDACTED]'s behavioral needs have been ignored by M-DCPS. [REDACTED] has not been provided with a functional behavioral assessment. Although the 2/27/07 annual IEP indicates that the IEP team considered "positive behavioral interventions, strategies, and supports for students whose behavior impedes learning," (see Exhibit A, page 3 of 6, Section VIII), M-DCPS has never developed a behavioral intervention plan (BIP) for [REDACTED] and, consequently, no BIP is attached to [REDACTED]'s 2/27/07 IEP (see Exhibit A, page 2 of 6, Section VI).

9. Subsequently to the 2/27/07 IEP meeting and alarmed by the continued lack of behavioral interventions, ■■■'s parents, who clearly understand that time is of the essence for ■■■, sought an Independent Educational Evaluation (IEE) for ■■■ from Behavioral Analysis, Inc. that conducted a functional assessment of behavior for ■■■ on March 2, 2007.

10. ■■■'s parents began to provide for ■■■ the behavioral services that M-DCPS has denied ■■■ at their expense and at great financial sacrifice. ■■■ began receiving Applied Behavioral Analysis (ABA) therapy services two hours per day, five days a week, from Behavior Analysis, Inc. at the rate of \$100.00 per day or \$500.00 per week. (see Composite Exhibit C).

11. On April 16, 2007, Behavior Analysis, Inc. provided a letter to ■■■, summarizing ■■■'s functional assessment of behavior (see Exhibit D). The April 16, 2007 letter states that ■■■  
" . . . has learned to obtain reinforcers through negative behaviors . . . ." These negative behaviors have been reinforced by the failure of M-DCPS to provide ■■■ with a functional behavioral assessment and failing to develop a positive behavioral intervention plan for ■■■, which should have been attached to ■■■ IEP.

12. Via letter dated March 8, 2007 addressed to Ms. Kathy Maguire, ESE Instructional Supervisor, the deficiencies in ■■■'s 2/27/07 evaluation were communicated to M-DCPS (see Exhibit E). The March 8, 2007 letter also contained certain requests made on behalf of ■■■

13. On March 12, 2007, Ms. Delores Mendoza, Supervisor, Prekindergarten Program[s] for Children with Disabilities, and Ana Gispert, Pre-K SPED Staffing Specialist, sent a reply letter to the March 8, 2007 letter (see

Exhibit F) to the undersigned outlining the "proposed follow-up" and agreeing, among other things, to provide [REDACTED] with a "bilingual ESOL Assessment," and with an "Assistive Technology Evaluation" as requested on March 8, 2007.

14. On March 13, 2007, the undersigned sent a reply letter to Ms. Delores Mendoza and Ms. Ana Gispert (see Exhibit G) offering tentative dates to convene an IEP team meeting for [REDACTED] stating the following:

"We agree with you that 'educational placement' is an IEP team decision. In [REDACTED]'s individual case, [REDACTED] IEP team already made the decision that [REDACTED] educational placement was in 'general education class (80%-100%)' beginning on 2/27/07 through 2/26/08. We agree with that educational placement decision made by [REDACTED]'s 2/27/07 annual IEP team. However, [REDACTED]'s IEP fails to provide [REDACTED] with the necessary and required supports in the form of supplementary aids and services and is also deficient in many other areas. As indicated in our previous letter, [REDACTED] 2/27/07 IEP provides [REDACTED] with no supplementary aids and services (no paraprofessional support, no consultation, no collaboration) and with absolutely no training for the general education teachers, support staff, and parents, etc. to implement [REDACTED] IEP in the general education classroom."

15. On March 20, 2007, Ms. Delores Mendoza wrote a letter in response to the March 13, 2007 letter agreeing to hold a "transition to Kindergarten staffing on April 12, 2007. . . ."

16. On April 12, 2007, [REDACTED]'s IEP team was convened. During the April 12, 2007 IEP team meeting, it was confirmed that contrary to what [REDACTED]'s 2/27/07 annual IEP reflects, [REDACTED]'s school day program consists of a mere

13 [sic] hours per week (2 1/2 hours a day only, beginning at 8:15 A.M. and ending at 10:45 A.M.) Again, this is not reflected anywhere in ■■■'s 2/27/07 IEP (see Exhibit A).

17. During the April 12, 2007 IEP team meeting, the results of the requested bilingual ESOL assessment were discussed and ■■■ was reclassified as an ESOL student in need of ESOL strategies.

18. The results of the Assistive Technology Evaluation (AT Screening/Assessment) requested on behalf of ■■■ were also reviewed at the April 12, 2007 IEP team meeting. Based upon the AT assessment, initial recommendations were made for the use of assistive technology devices and strategies for ■■■. The results of the assistive technology assessment and initial recommendation are contained in a report dated April 10, 2007 (see Exhibit I).

19. The 4/12/07 IEP team meeting was adjourned by M-DCPS representatives without completing ■■■'s IEP following a disagreement regarding the development of annual goals for ■■■. Certain members of the IEP team, including the parents, agreed that an appropriate annual goal for ■■■ should be for ■■■ to learn the letters of the alphabet. However, Ms. Mendoza disagreed with the proposed annual goal and the meeting was adjourned (see Exhibit J).

20. M-DCPS continues to deny ■■■'s access to the free appropriate public education in the least restrictive environment that ■■■ is entitled.

The Parents indicated in their Complaint that a due process hearing "would not be necessary if the district would implement

the following actions" (hereinafter referred to as the "Requested Actions"):

1. Provide reimbursement to [REDACTED]'s parents for the IEE functional assessment of behavior conducted by Behavior Analysis, Inc. in the amount of \$500.00 (see Exhibit B).
2. Provide reimbursement to [REDACTED]'s parents for costs and expenses related to the ABA services provided to [REDACTED] by Behavior Analysis, Inc. at the rate of \$500.00 per week (see Composite Exhibit C).
3. Provide compensatory educational services for [REDACTED] during the summer vacation in the form of intensive one-on-one ABA therapy instruction at public expense, the length of weekly sessions to be determined by Behavior Analysis, Inc.
4. Implement all recommendations contained in [REDACTED]'s 4/10/07 Assistive Technology Assessment report (see Exhibit I).
5. Complete an appropriate IEP for [REDACTED] to address [REDACTED] priority educational needs which at the present time are reflected on the 4/12/07 draft IEP (see Exhibit J, page 2 of 7, Section VI) as: 1. English Language Acquisition Skills; 2. Reading Skills/Language Arts; 3. Number Concepts/Math Skills; 4. Social Skills/Attentive-Listening Skills; 5. Independent Functioning; 6. Receptive/Expressive Language Skills; 7. Fine Motor Skills; and 8. Communication Skills, with measurable and individualized annual goals, supplementary aids (including but not limited to full-time paraprofessional support) and related services (OT and assistive technology).
6. Provide a fully inclusive supported educational placement in [a] general

education class with meaningful access to the general curriculum alongside his non-disabled peers with paraprofessional support to begin in kindergarten at ■■■, ■■■'s neighborhood school.

7. Provide on-going training for ■■■'s teachers, paraprofessionals, administrators, therapists and parents on IEP implementation, inclusion strategies, ABA, assistive technology, understanding autism, to be provided by school district experts and Behavior Analysis, Inc.

8. Provide reimbursement to ■■■'s parents for the pursuit of a free appropriate public education for ■■■ in the least restrictive environment with ■■■ non-disabled peers, including reasonable attorney fees, should it become necessary to hire an attorney.

9. Provide monetary damages available to Petitioners under 42 U.S.C. § 1983.

The Parents' Complaint was transmitted to DOAH on May 8, 2007. The case was assigned to the undersigned, who, on May 9, 2007, issued a Case Management Order. After receiving the parties' Joint Scheduling Report, the undersigned scheduled the due process hearing in this case for June 11 and 12, 2007 (dates on which the parties, in their Joint Scheduling Report, indicated that they would be available for hearing).

On May 17, 2007, the School Board filed a Notice of Insufficiency and Motion in Limine as to Prospective Claims for Relief Concerning Kindergarten IEP, in which it requested that the undersigned "issue a determination in accordance with 34 C.F.R. § 300.508(d)(2) that the Due Process complaint

is insufficient" inasmuch as it "does not contain facts relating to the problem(s) alleged, as required in 20 U.S.C. § 1415(b)(7)(A)[(ii)](III) and 34 C.F.R. § 508(b)(5)"; "require Petitioner to file an amended complaint"; and "exclude from this proceeding any allegation and evidence pertaining to prospective issues (i.e., Kindergarten IEP)." On May 18, 2007, the Parents filed a Reply to Respondent's Notice of Insufficiency and Motion in Limine as to Prospective Claims for Relief Concerning Kindergarten IEP, along with a motion for leave to file said pleading. On May 21, 2007, the undersigned issued an Order on the School's Board's Notice of Insufficiency and Motion in Limine, in which he ruled as follows:

Upon careful consideration, it is hereby ORDERED:

1. Petitioner's due process complaint, on its face, is sufficient to meet the requirements of 20 [U.S.C.] § 1415(b)(7)(A)(ii)(III) and 34 C.F.R. § 508(b)(5). Petitioner therefore will not be required to file an amended due process complaint.
2. While Petitioner has indicated in [REDACTED] due process complaint that "[c]omplet[ion] [of] an appropriate IEP" is among the measures that, if taken, would resolve the instant controversy to Petitioner's satisfaction, the undersigned does not read the complaint as complaining about the contents of any yet-to-be-developed IEP or otherwise challenging any School Board action that has not yet been taken. Any such challenge would be premature and not be

subject to consideration in the instant proceeding.

3. Petitioner's motion for leave to file a reply is denied as moot.

On May 17, 2007, the School Board also filed its response to the Complaint. On May 25, 2007, the Parents filed a Motion to Strike, requesting that the "School Board's Response [to the Complaint] be stricken from the record and that Respondent, School Board, be redirected to file a Response that meets the content requirements in accordance with 20 U.S.C. § 1415(c)(2)(B) and its implementing regulation, 34 C.F.R. [§] 300.508(e)." On June 1, 2007, the School Board filed a Motion for Leave to File Amendments to Response of May 17, 2007, as well as Amendments to Response to Due Process Complaint and a Response to Petitioner's Motion to Strike. On June 5, 2007, the undersigned issued an order granting the School Board leave to amend its response and denying the Parents' Motion to Strike. The School Board's response to the Complaint, as amended, contained the following arguments concerning Requested Actions 1 through 9:

(1) As indicated, there is no evaluation procedure, assessment record, or report on which to base the School Board's denial of reimbursement for an Independent Educational Evaluation (IEE). Petitioner did not meet either legal prerequisite for obtaining an IEE (i.e., that the parent identified a School Board evaluation with which he or she disagreed, or that the

parent requested an IEE be provided at public expense) before requesting reimbursement as part of the Due Process Complaint. In addition, other factors relevant to the School Board's refused action are that the student did not need the purported outside evaluation and that the outside evaluation did not meet the proper criteria for an evaluation.

(2) The School Board used teacher data as the basis for the refused action. Another factor relevant to the denial of reimbursement for private ABA therapy is that the student is currently enrolled in a research-based preschool program.

(3) The School Board based the denial of compensatory education during the summer vacation in the form of intensive one-on-one behavior therapy on teacher data. Other factors that are relevant include that the student is eligible for Extended School Year services and Voluntary PreK programming.

(4) The allegation is premature and requires no further response.

(5) The allegation is premature and requires no further response. However, another factor to consider is that the School Board was willing to complete a transition (Kindergarten) IEP for [REDACTED] on May 31, 2007, but canceled the meeting at the demand of Petitioner's advocate.

(6) The allegation is premature and requires no further response.

(7) The School Board is not proposing or refusing any action. Therefore, no further response is necessary.

(8) The School Board is not proposing or refusing any action. Therefore, no further response is necessary.

(9) The School Board is not proposing or refusing any action. Therefore, no further response is necessary.

On May 30, 2007, the School Board filed Motion to Dismiss

Due Process Hearing Request for Failure to State a Claim,

arguing as follows:

1. Petitioner's Due Process Hearing Request fails to state a claim upon which relief can be granted.

2. As to the request for reimbursement for an Independent Educational Evaluation (IEE), page 4, paragraph 1, Petitioner fails to allege the prerequisites for reimbursement for an IEE. See 34 C.F.R. § 300.502(b); Fla. Admin. Code R. 6A-6.03311(7)(f), (g). Particularly, the Request fails to:

(a) identify an evaluation conducted by the School Board with which Petitioner disagrees; and

(b) demonstrate that the parent requested that the School Board grant an IEE prior to obtaining one and requesting reimbursement.

Neither prerequisite condition for an IEE has been alleged. Therefore, as a matter of law, the claim for reimbursement for an IEE must fail.

3. As to the request for reimbursement for ABA services provided by Behavior Analysis, Inc., page 5, paragraph 2, Petitioner fails to allege that they have any legal entitlement to such relief. In fact, aside from IEEs, the only other reimbursement provision contained in the IDEA regulations is for private school placement. Congress did not intend for school districts to reimburse parents for private therapy, but rather, only for comparable school programs under limited conditions. To be sure:

"If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in private preschool, elementary school, or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate."

34 C.F.R. § 300.148(c) (emphasis added); accord Fla. Admin. Code R. 6A-6.03311(9)(c). See also D. P. v. Broward Co. Sch. Bd., DOAH Case No. 04-2942E (Van Laningham)(finding that the school district was not required to reimburse Petitioner's parents for the cost of placing Petitioner under the care of private therapists). Therefore, the claim for reimbursement for private ABA therapy must fail as a matter of law.

4. As to the request for compensatory education, page 5, paragraph 3, the School Board asserts that there are no facts to support Petitioner's entitlement to relief. Therefore, the claim must fail as a matter of law.

5. As to the remainder of the claims, they are not ripe for review, as they concern events that have not yet happened (i.e., issues affecting the development of a new IEP for [REDACTED]). Therefore, they must fail as a matter of law.

On June 1, 2007, the Parents filed a response in opposition to the motion. On June 4, 2007, the undersigned issued an Order on School Board's Motion to Dismiss Due Process Hearing Request for Failure to State a Claim, in which he ruled as follows:

Upon consideration, the School Board's motion is hereby denied inasmuch as Petitioner's due process complaint is sufficient to demonstrate Petitioner's entitlement to a due process hearing, which, according Florida Administrative Code Rule 6A-6.03311(11), is "available to parents of students with disabilities and to school districts to resolve matters related to the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education." This denial is without prejudice to the School Board continuing to maintain in these proceedings that Petitioner is not entitled to the particular relief he has requested. Cf. Davis v. Passman, 442 U.S. 228, 239 (1979)("[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.").

On June 7, 2007, the parties filed the following Joint Stipulation of Facts:

1. ■■■ is ■■■ old. ■■■ date of birth is ■■■.
2. ■■■ is eligible for special education services in the areas of Autism and Language Impaired.
3. During the 2006-2007 school year, ■■■ attended a special education preschool program at ■■■ School, a school within the Miami-Dade County Public Schools (M-DCPS).
4. ■■■'s public school day program consists of 12.5 hours per week (2.5 hours per day from 8:15 A.M. to 10:45 A.M.).
5. In accordance with ■■■ February 27, 2007 Individual Educational Plan (IEP), ■■■'s educational placement is in general education.

6. In accordance with █ February 27, 2007 IEP, █'s disability affects █ participation in appropriate activities due to global delays in all areas. █ February 27, 2007 IEP states that █ requires hand over hand assistance for tasks and activities, has a short attention span, has difficulty focusing, has weak fine motor skills and needs help with █ self-help skills.

7. In accordance with █ February 27, 2007 IEP, █ requires daily specialized instruction in the areas of communication, attentive listening, fine motor skills, pre-academics, self-help skills, and receptive and expressive language (at the rate of 90 minutes per week).

8. In accordance with his February 27, 2007 IEP, █ receives 60 minutes per week of Occupational Therapy.

9. On March 21, 2007, at the request of █'s Mother and after she provided signed consent, the School Board re-evaluated █ for the Bilingual/ESOL program by administering a Language Proficiency/Dominance and Developmental Assessment.

10. On April 12, 2007, █ was reclassified as a Level 4 ESOL student, in need of ESOL strategies.

11. At the request of █'s mother and after she provided signed consent, the School Board evaluated █ for Assistive Technology. The results of █'s Assistive Technology Evaluation as well as the initial recommendations are contained in an Assistive Technology Assessment Summary report dated April 10, 2007.

The 30-day resolution period having expired without the dispute between the Parents and the School Board being resolved, the due process hearing commenced on June 11, 2007, as scheduled.<sup>3</sup> After three days of hearing, the hearing concluded on June 13, 2007. At the hearing, the Parents presented the testimony of two witnesses (David Garcia, the clinical director at Behavior Analysis, Inc.; and [REDACTED]) and offered a total of 29 exhibits (Petitioner's Exhibits A through J, L through Z, and AA through DD), all of which were received. The School Board presented the testimony of five witnesses (Dolores Mendoza, supervisor of the School Board's Prekindergarten Program for Children with Disabilities; Phyllis Sandrow, a speech/language pathologist with the School Board; Barbara Moss, a prekindergarten exceptional student education (ESE) teacher with the School Board; Kathy Velazquez, an autism support teacher with the School Board; and Angel Velez-Diaz, Ph.D., the School Board's "psychologist for autism spectrum disorders"). It also offered the following exhibits: Respondent's Exhibits 1 through 10, 11a. through b., 12a. through d., 13, 14, 16, 17, and 20. All of Respondent's proffered exhibits, except for Respondent's Exhibit 20, which the undersigned rejected at the behest of the Parents on the ground that it was not timely disclosed, were received.

At the conclusion of the evidentiary portion of the due process hearing on June 13, 2007, the undersigned, with input from the parties, established July 18, 2007, as the deadline for the filing of proposed final orders.<sup>4</sup> In so doing, with the parties' agreement, the undersigned also extended the deadline for the issuance of the final order until August 8, 2007, pursuant to Florida Administrative Code Rule 6A-6.03311(11)(i)(14) and 34 C.F.R. § 300.515(c).

The Transcript of the due process hearing (consisting of five volumes) was filed with DOAH on June 28, 2007.

The Parents and the School Board both timely submitted their Proposed Final Orders on July 18, 2007. Along with their Proposed Final Order, the Parents filed a request for permission to file a proposed final order in excess of the 40 pages allowed by Florida Administrative Code Rule 28-106.215.<sup>5</sup> Upon consideration, the request is hereby GRANTED.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, including the parties' Joint Stipulation of Facts, the following findings of fact are made:

##### Background Information

1. ■■■ was born on ■■■.
2. ■■■ parents, ■■■ and ■■■, are originally from Cuba, but they were living in Chile (along with ■■■'s older ■■■) at the time of ■■■'s birth.

3. ■■■ and ■■■ are both health care professionals. ■■■ is a pediatrician. ■■■ is a dentist. They were practicing their respective professions in Chile.

4. ■■■ was born with renal problems.

5. When ■■■ was approximately one year old, the family moved from Chile to the United States because the Parents "thought this would be the best place for [them to find] a solution [to these renal problems] some day." The family settled in Miami-Dade County.

6. ■■■ was diagnosed as autistic when ■■■ was approximately 21 months old.

7. As a two-year-old, ■■■ received early intervention services through a preschool program offered by the Association for Retarded Citizens (ARC). ■■■'s ARC preschool class had 13 students, some of whom were typically developing.

8. During the year that ■■■ was in the ARC preschool program, ■■■ attended various training sessions, workshops, and conferences designed to provide assistance to parents of children with autism, including six or seven training sessions offered by the University of Miami's Center for Autism and Related Disabilities (CARD).

9. At one of these CARD training sessions, ■■■ learned about Applied Behavior Analysis (ABA) therapy and how it could be used to help autistic children learn. ABA therapy is

premised on the basic behavioral principle (developed by B. F. Skinner) that how an individual behaves is dependent on what he or she has learned from the consequences of previous behavior.

█████'s First Year as a Miami-Dade Public School Student

10. █████ was first enrolled as a Miami-Dade County public school student when █████ turned three years of age. █████ has attended Miami-Dade County public schools since that time.

11. Monica Tonarely Cooper, Ed.S., a school psychologist with the School Board, conducted a "developmental evaluation" of █████ on May 26, 2005, in anticipation of █████ enrollment. Her written report of the evaluation contained the following

"Summary and Recommendations":

[█████] is a █████ old student referred for a developmental evaluation in order to assess current levels of functioning and ascertain an appropriate educational placement. At this time, [█████] presents with developmental delays in several areas including cognitive, language, social and self-help skills. [█████] demonstrated limited functional independence as measured by the Scales of Independent Behavior-Revised. Results of the Childhood Autism Rating Scale are indicative of the presence of autistic like characteristics to a significant degree.

Please be advised that any assessment of children younger than six years old is subject to significant problems with reliability and validity. Consequently, these results should be interpreted more in terms of relative strengths and weaknesses, rather than absolute levels of functioning. More specifically, future assessment may yield different results. These results may

be higher or lower, due to the handicapping condition of the child, the changes over time, and/or other intervening factors.

Therefore, it is recommended that,

- This case should be reviewed by the M-Team in order to determine appropriate educational placement and programming.

- [REDACTED]'s curriculum should be individualized as much as possible, taking into consideration [REDACTED] current levels of developmental functioning, reported herein. The improvement of developmental skills should be emphasized in the areas of most deficits.

12. Based on the evaluation, [REDACTED] was determined by the School Board to be eligible for special education and related services as both a student with autism and a "language impaired" student.

13. [REDACTED] was placed in a "self-contained class for children with autism" at [REDACTED] School ([REDACTED]), where [REDACTED] remained for the entire 2005-2006 school year. [REDACTED] scheduled hours of instruction were from 8:30 a.m. to 2:00 p.m. (although [REDACTED] would regularly pull [REDACTED] out of class a half-hour early to take [REDACTED] to private speech/language therapy and occupational therapy sessions).

14. [REDACTED] received English for Speakers of Other Languages (ESOL) services while at Gloria Floyd.

May 23, 2006, IEP

15. A meeting to discuss ■■■'s individual educational plan (IEP) for the 2006-2007 school year was held on May 23, 2006, with ■■■, ■■■, and School Board personnel in attendance.

16. The IEP developed at the meeting (May 23, 2006, IEP) provided that ■■■ would continue at ■■■ in a "Separate Class (0%-40%)" of autistic children.

17. When ■■■ expressed ■■■ disagreement with this placement, School Board personnel at the meeting assured ■■■ "that the best thing for [■■■] would be this [self-contained] class."

#### ■■■'s Aborted Move to New York

18. ■■■ moved to New York following the 2005-2006 school year to complete a pediatric residency.

19. ■■■ had planned to go to New York with ■■■ and ■■■ other ■■■ to join ■■■, but ■■■ subsequently decided to stay in Miami-Dade County with the children (living temporarily apart from ■■■) so that ■■■ would be able to pursue a residency of ■■■ own in Jackson Memorial Hospital's Department of Oral Surgery.

20. For the 2006-2007 school year, while ■■■ was in New York completing ■■■ residency, ■■■ lived with ■■■, brother, and grandmother in Miami-Dade County. ■■■ spent most of ■■■ time at home with ■■■, who does not speak English. Spanish was the language spoken in the household.

21. After making [REDACTED] decision to stay in Miami-Dade County, [REDACTED] contacted the School Board to ask that [REDACTED]'s placement for the upcoming school year be changed "to a different class" with typically developing children.

July 14, 2006, IEP

22. An IEP meeting, attended by [REDACTED] and School Board personnel, was held on July 14, 2006, to discuss this request made [REDACTED]

23. At the meeting, School Board personnel acceded to [REDACTED]'s request, and the May 23, 2006, IEP was revised to reflect that [REDACTED]'s placement would be a "general education (LEAP)" classroom at [REDACTED] School ([REDACTED]).

24. LEAP (which is an acronym for "Learning Experiences: An Alternative Program for Preschoolers and Parents") is a researched-supported, federal-grant receiving, cost-effective instructional program developed specifically for young children with autism. It features peer-mediated learning activities in classroom settings having no more than four autistic children grouped with six to eight typically developing children who model skills and behavior for their autistic peers. The National Academy of Sciences-National Research Council Report on Educating Children with Autism, which was published in 2001, included LEAP in its review of "highly effective" preschool programs for children with autism. Over three-dozen peer-

reviewed empirical studies have shown LEAP's effectiveness in addressing autistic children's needs.

25. The "guiding principles" underpinning LEAP are:

- a) all children (i.e., both children with and without disabilities) can benefit from integrated childhood environments;
- b) young children with autism benefit most from early intervention when intervention efforts are conducted across school, home, and community environments;
- c) young children with autism make the greatest gains from early intervention when parents and professionals work together as partners and are equal members of the instructional team;
- d) young children with autism can learn many important skills (e.g., social skills, language skills, appropriate behavior) from typical same-age peers;
- e) young children with autism benefit most from early intervention when intervention efforts are planned, systematic, and individualized; and
- f) both children with and without disabilities benefit from curricular activities that reflect developmentally appropriate practices.

26. The "key . . . components" of the LEAP early intervention instructional model include: "a) teaching typical children to facilitate the social and communicative competence of their class peers with autism; b) teaching IEP objectives within routine class activities; and c) providing extensive

skill training for family members in order to address child behavior issues in home and community settings."

27. The classroom component of LEAP is referred to as the "integrated preschool."

28. The physical environment of the LEAP classroom "is arranged so that there are clearly defined interest areas . . . that support child-initiated, child-directed play." Furthermore, the classroom contains "[e]nvironmental adaptations" such as "more visual props/schedules, the use of concrete materials, and implementing augmentative systems for communication."

29. LEAP's classroom component "combine[s] developmental learning traditions and an applied behavior analytic approach to teaching. Instead of teaching the children skills that are non-meaningful or taught in isolation, the program teaches skills that embed engagement and support learning and generalization. . . . The basic focus centers upon following the child's lead, clear attention to antecedent statements by teaching staff, and the natural consequences and consequences delivered by the teaching staff."

30. LEAP classroom teachers employ "learning activities and instructional strategies specifically designed to facilitate the development of [their autistic students'] functional skills,

independent play and work skills, social interaction skills, language skills, and adaptive behavior."

31. "[The teachers'] [f]unctional skills instruction focuses on teaching children with autism skills such as transitioning from one activity to another, selecting play activities, following classroom routines, and participating in group activities."

32. "[The teachers'] [s]ocial interaction training focuses on teaching children with autism the necessary skills for developing friendships with same-age typical peers."

33. "[P]ositive reinforcement procedures [are used in LEAP classrooms] for increasing desired behaviors."

34. An important part of the LEAP classroom component is monitoring, "on an ongoing basis," the children's progress towards identified goals and objectives to determine the effectiveness of instructional strategies.

35. As part of the family component of LEAP, parents have the opportunity to "complete a parenting program designed to teach the basic principles of behavior management and effective strategies for teaching young children" the parents can use at home and elsewhere outside of school to supplement the classroom instruction received by their children.

36. The LEAP national demonstration/model site (Model Preschool) is located in Douglas County, Colorado. It

represents a "cooperative effort between the Colorado Department of Education, the University of Colorado at Denver['s] [LEAP Outreach Project, headed by Phillip Strain, Ph.D., the developer of the LEAP model], and the Douglas County [Colorado] School District."

37. The Model Preschool "operates three hours per day, four days a week for nine months of the year within a local [Douglas County, Colorado] elementary school."

38. Students whose parents actively participate in the family component of LEAP and implement the principles and strategies they are taught receive more than 12 hours of instruction per week inasmuch as these students also receive instruction outside the classroom. "[A]n active family component [can] easily expand[] the program to over 25 hours [of total instructional time per week]."

39. The School Board operates LEAP replication sites at ■■■ School (■■■), offering two and a half hours of classroom instruction a day, five days a week, to the students in the LEAP classrooms at these schools.

40. The School Board has a rule, Rule 6Gx13-6A-1.331, which briefly describes the LEAP model, as well as the High/Scope, Building Early Language and Literacy (BELL), and Conscious Discipline curricula that are used in the School

Board's LEAP classrooms. The rule provides, in pertinent part, as follows:

1. The primary curriculum implemented in M-DCPS by the general ed Pre-K classrooms and the Prekindergarten Program for Children with Disabilities is the High/Scope Curriculum. The ongoing assessment used is the documentation of daily Key notes/anecdotes from the Child Observation Record. Based on the Key notes/anecdotes teachers plan daily lessons and activities. Teachers and paraprofessionals new to the Prekindergarten Program for Children with Disabilities are provided five days of training in the High/Scope Curriculum, which includes training in the assessment procedures. All other Pre-K ESE teachers (not in their first year) are provided with ongoing staff development training on a variety of topics related to curriculum implementation and adaptations.

2. The language/literacy curriculum used in all Pre-K classrooms is Building Early Language and Literacy (BELL) Program. This program provides instruction in both phonological awareness and early literacy (shared reading). Progress in this curriculum is measured by the Phonological and Early Literacy Inventory (PELI), administered to children two times per year. Four days of training specifically on the BELL and PELI are provided to every Pre-K ESE teacher with follow-up trainings and on a yearly basis.

3. The social/emotional curriculum models implemented in the Pre-K ESE classroom are Conscious Discipline by Dr. Becky Bailey and the Devereux Early Childhood Assessment (DECA). Conscious Discipline focuses on cooperative connecting with each other through rituals, consistent routines, and strategies to disengage stress. Children become a part of the school family where

they feel safe and are encouraged to be respectful, compassionate, and helpful towards each other. The DECA builds resiliency by addressing issues of attachment, initiative and self-control and plans activities based on class and individual needs. Parents and teachers complete the DECA evaluation two times per year to assess the child's progress in these areas. A two-day introductory training is provided in the Conscious Discipline approach with advanced follow-up activities each year. A one-day training in DECA is provided to all teachers new to Pre-K ESE with a one-day advanced training after the first year.

4. The Learning Experiences- An Alternative Program for Preschoolers and Parents (LEAP) Curriculum by Dr. Philip Strain, University of Colorado, is a social skills curriculum for children with autism. Typically developing children and children with autism are taught necessary skills to promote positive social behaviors. All Pre-K ESE teachers receive one day of training on social skills development and teacher in LEAP classrooms receive ongoing training several times throughout the year, on site and through staff development sessions.

5. Limited English Proficient (LEP) Children are provided with English for Speakers of Other Languages (ESOL) strategies through the school day for English language development. Progress in English language development is assessed using one of the Continuum of ESOL Placement Tests for Exceptional Students.

6. Pre-K mentor teachers are provided to all teachers new to Pre-K ESE during their first year in the program. Mentors followup on training by directly assisting with implementation in each Pre-K ESE teacher's classroom.

41. ■■■ was closer to ■■■'s home than was ■■■, but there were no openings in the LEAP classroom at ■■■ for the 2006-2007 school year. ■■■ was therefore placed in the LEAP classroom at ■■■ (which was approximately a 15 to 20 minute car ride from his home).

42. At the July 14, 2006, IEP meeting, ■■■ was advised by School Board personnel that ■■■ would be in the LEAP classroom at ■■■ for two and a half hours each school day (from 8:15 a.m. to 10:45 a.m.). ■■■ had concerns regarding the number of hours of daily classroom instruction ■■■ would be receiving, but ■■■ ultimately agreed to the placement because ■■■ "thought it would be better that ■■■ be in a program . . . with typical[ly] [developing] children," even if it was only for two and a half hours a day.<sup>6</sup>

43. School Board personnel at the July 14, 2006, IEP meeting also informed ■■■ of LEAP's family component and the availability of School Board-offered training in "positive parenting practices" that parents of LEAP students could use "to improve their quality of life with the child at home." At no time did ■■■ tell School Board personnel that there were "family circumstances [that] would prevent [the adult members of ■■■'s family] from attending these trainings," which were offered by the School Board in the morning and in the evening, in English and in Spanish, at various locations throughout the county.

44. [REDACTED] initialed the May 23, 2006, IEP, as revised at the July 14, 2006, IEP meeting (July 14, 2006, IEP), signifying her "agreement" therewith.

45. Section V. of the July 14, 2006, IEP indicated that an "annual language dominance/proficiency assessment" completed on May 22, 2006, had revealed that [REDACTED] "ESOL level" was a 5, and that, as a result, [REDACTED] was no longer receiving ESOL services.

46. Section VI. of the July 14, 2006, IEP, described [REDACTED]'s "strengths and abilities" as follows:

Builds a tower of 5 blocks. Uses a fork to eat with minimal assistance. Enjoys music. Follows simple directions and familiar commands.

It also contained the following "statement describing how [REDACTED]'s] disability affect[ed] [his] participation in appropriate activities":

[REDACTED]'s participation in a general education curriculum is affected by difficulty with receptive and expressive language. [REDACTED] is non verbal [and [REDACTED]] attention is limited. Is not toilet trained. Is not initiating play with peers, does not play appropriately with peers.

This section of IEP further provided the following list of [REDACTED]'s "Priority Educational Needs (PEN[s])":

1. Receptive/Expressive Lang. Skills
2. Communication Skills
3. Conforming Behavioral Skills

4. Attentive/Listening Skills

5. Self-Help Skills

6. Fine Motor Skills

47. Section X. of the July 14, 2006, IEP contained "measurable annual goals and benchmarks" for [REDACTED]. The "[g]oals include[d] [descriptions of desired] student performance, time line[s], mastery criteria and evaluation procedures."

48. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goals" and related "benchmarks" addressing [REDACTED]'s PEN of "Receptive/Expressive Lang. Skills":

MEASURABLE GOAL: [REDACTED] will imitate actions with objects during therapy session.

Student's progress toward goal will be measured by:

Title: SLP [Speech Language Professional].

How often: weekly.

MASTERY CRITERIA: 7 of 10 opportunities.

EVALUATION PROCEDURE(S): therapy data.

Benchmarks:

- end of 1st 9 wks of this IEP, imitate actions with objects with physical prompting.
- end of 2nd 9 wks of this IEP, imitate actions with objects with verbal prompting.
- end of 3rd 9 wks of this IEP, imitate actions with objects 4 of 10 opportunities.

MEASURABLE GOAL: [ ] will reciprocate non-verbal social greetings by waving hi/bye in response to someone waving with minimal prompting during therapy session.

Student's progress toward goal will be measured by:

Title: SLP.

How often: weekly.

MASTERY CRITERIA: 4 of 5 occurrences.

EVALUATION PROCEDURE(S): therapy data.

Benchmarks:

- end of 1st 9 wks of this IEP, wave hi/bye with physical prompting.
- end of 2nd 9 wks of this IEP, wave hi/bye with minimal physical prompting.
- end of 3rd 9 wks of this IEP, wave hi/bye in response to someone waving with verbal prompting 2 of 5 occurrences.

49. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goal" and related "benchmarks" addressing 's PEN of "Communication Skills":

MEASURABLE GOAL: [ ] will express simple wants and needs using low-tech voice output devices and picture boards.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: Weekly.

MASTERY CRITERIA: 4 of 5 occurrences.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart; observations/keynotes.

Benchmarks:

By the end of 1st semester- make a choice with two real objects; by end of 2nd semester- select objects with voice output device; by end of 3rd semester- make choices using pictures.

50. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Conforming Behavioral Skills":

MEASURABLE GOAL: [REDACTED] will follow one-step verbal command while following the Daily Routine.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: Weekly.

MASTERY CRITERIA: 80% accuracy.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart; observations/keynotes.

Benchmarks:

By the end of 1st semester- stops activity upon one-step command with visual cues and physical assistance; by end of 2nd semester- responds to name and verbal command by stopping the activity and going to the

speaker; by end of 3rd semester- follows a verbal direction with paired gesture.

51. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Attentive/Listening Skills":

MEASURABLE GOAL: [REDACTED] will follow the Individual Daily Object schedule independently.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: Weekly.

MASTERY CRITERIA: 80% accuracy.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart; observations/keynotes.

Benchmarks: By the end of 1st semester- removes object from schedule and goes to the activity with physical/verbal/gestural prompts; by end of 2nd semester- checks the schedule and removes the object with verbal prompts; by end of 3rd semester- removes object and goes to appropriate activity for 2-3 parts of daily routine.

52. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Self-Help Skills":

MEASURABLE GOAL: [REDACTED] will pull pants up completely from floor to waist independently.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: Weekly.

MASTERY CRITERIA: 80% accuracy.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart; observations/keynotes.

Benchmarks: By the end of 1st semester- pull pants up from hips to waist after pulled up by adult; by end of 2nd semester- pull pants up from knees to waist; by end of 3rd semester- pulls pants up from ankles to waist.

53. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Fine Motor Skills":

MEASURABLE GOAL: [REDACTED] will put 20 pegs on a peg board independently.

Student's progress toward goal will be measured by:

Title: Teacher/Therapist.

How often: Weekly.

MASTERY CRITERIA: 80% accuracy.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart; observations/keynotes.

Benchmarks: By the end of 1st semester- puts 10 pieces with hand-over-hand assistance; by end of 2nd semester- lets go of piece after assistance to pick up and

move hand; by end of 3rd semester- puts 10 pieces independently with verbal cues.

54. Section XII. of the July 14, 2006, IEP stated that no "supplementary aids and services" to further support [REDACTED] in the LEAP classroom were "needed at this time".

55. According to Section XIII. of the July 14, 2006, IEP, the following "related services" were "required for [REDACTED] to benefit from special education" and therefore would be provided:

Assistive Technology: visuals, [in] All Classes [from] 5/23/06 [to] 5/23/07 daily

Occupational Therapy within educational environment [from] 5/23/06 [to] 5/23/07 [for] 60 mpw

56. Section XIV. of the July 14, 2006, IEP contained the recommendation that the instructional staff provide the "[p]arent/[g]uardian" with "training/support" in "strategies for home" on an "as needed" basis to better enable the "[p]arent/[g]uardian" to "assist . . . in implementing [REDACTED]'s IEP goals and benchmarks."

57. Section XV. of the July 14, 2006, IEP indicated that [REDACTED] did not require a shortened version of the LEAP school day.

58. Section XVI. of the July 14, 2006, IEP noted that the following "factors [were] considered in selecting [REDACTED]'s placement [in a general education class] and ensuring that it [was] in the least restrictive environment":

- student frustration and stress

- distractibility
- need for lower pupil-to-teacher ratio
- time required to master educational objectives
- need for instructional technology
- social skills causing increased isolation
- difficulty completing tasks

59. Section XVII. of the July 14, 2006, IEP listed the following as "areas of instruction":

- Greeting
- Planning
- Work Time
- Recall
- Small/Large Group
- Outside
- Language Impaired
- Phonological Awareness
- Story Time

This section of the IEP further indicated that [REDACTED] would receive in the classroom setting on a daily basis "specialized instruction" in "Communication," "Conforming Behavioral Skills," "Attention," "Self-Help," and "Fine Motor Skills," and that [REDACTED] would also receive "specialized instruction" in

"Receptive/Expressive Language Skills" in the "Therapy room" or classroom for 60 minutes per week.

60. Section XVIII. of the July 14, 2006, listed the following "persons [as being] responsible for implementation of this IEP: ESE Teacher; Speech/Language Pathologist; [and] Occupational Therapist."

61. Section XX. of the July 14, 2006, IEP provided that "[s]ervices delineated on the IEP, unless otherwise indicated, will initiate 5/23/06 and have an anticipated duration through 5/22/07."

February 27, 2007, IEP

62. A meeting, attended by [REDACTED] and School Board personnel, was held on February 27, 2007, to determine whether any changes should be made to [REDACTED]'s IEP.

63. A new, but not drastically different, IEP was developed at the meeting (February 27, 2007, IEP). This new IEP maintained [REDACTED]'s placement in the LEAP classroom at [REDACTED].

64. Section V. of the February 27, 2007, IEP provided information regarding [REDACTED]'s exit, in May 2006, from the ESOL program.

65. Section VI. of the February 27, 2007, IEP described [REDACTED]'s "strengths and abilities" as follows:

[REDACTED] occasionally will look up momentarily when [REDACTED] name is called. [REDACTED] can partially pull [REDACTED] pants up/down. [REDACTED] has begun to

press a one button voice output device when [REDACTED] wants more snack. [REDACTED] understands the commands standup and sit down with gestures and verbal cues. [REDACTED] is a happy child.

It also contained the following "statement describing how [REDACTED]'s] disability affect[ed] [REDACTED] participation in appropriate activities":

[REDACTED]'s participation in appropriate activities is affected by [REDACTED] global delays in all areas. [REDACTED] needs hand over hand assistance for tasks and activities. [REDACTED] has a short attention span and has difficulty focusing. [REDACTED] has weak fine motor grasp and needs help with [REDACTED] self help skills.

This section of IEP further provided the following list of [REDACTED]'s "Priority Educational Needs (PEN[s])":

1. Communication
2. Attentive Listening
3. Fine Motor Skills
4. Pre-Academics
5. Self-Help
6. Receptive/Expressive

66. Section X. of the February 27, 2007, IEP contained new "measurable annual goals and benchmarks" for [REDACTED]

67. The "measurable annual goals and benchmarks" in Section X. of the IEP included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Communication":

MEASURABLE GOAL: [ ] will imitate simple actions and gestures.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: 2xs a month.

MASTERY CRITERIA: 4 of 5 occurrences.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart.

Benchmarks:

- 1) will focus attention on action being demonstrated (end of grading).
- 2) will do action w/hand over hand prompts (end of 1st).
- 3) will follow action w/verbal cues (end of 2).
- 4) will initiate and do action independently (end of 3).

68. The IEP's "measurable annual goals and benchmarks" included the following "measurable annual goal" and related "benchmarks" addressing 's PEN of "Attentive Listening":

MEASURABLE GOAL: [ ] will respond to the command "come here" by physically walking over to speaker.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: 2xs a month.

MASTERY CRITERIA: 2 of 3 occurrences.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart; Observation.

Benchmarks:

- 1) looks up momentarily and stops what he's doing (end of grading).
- 2) stands up w/verbal and gestural cues (end of 1st).
- 3) moves toward speaker (end of 2nd).
- 4) goes directly to speaker when called (end of 3).

69. The IEP's "measurable annual goals and benchmarks" included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Fine Motor Skills":

MEASURABLE GOAL: [REDACTED] will string 4-6 large beads independently.

Student's progress toward goal will be measured by:

Title: Teacher/Therapist.

How often: 2xs a month.

MASTERY CRITERIA: 2 of 3 opportunities.

EVALUATION PROCEDURE(S): Teacher developed checklist/chart.

Benchmarks:

- 1) will pick bead w/intent on threading (end of grading).
- 2) will pull string up to bead with verbal cues (end of 1st).

3) will push bead through string (end of 2nd).

4) will push beads (at least 4) through string independently (end of 3).

70. The IEP's "measurable annual goals and benchmarks" included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Pre-Academics":

MEASURABLE GOAL: [REDACTED] will put together a simple inset puzzle (5 pieces).

Student's progress toward goal will be measured by:

Title: Teacher.

How often: 2xs a month.

MASTERY CRITERIA: 2 of 3 occurrences.

EVALUATION PROCEDURE(S): Observation.

Benchmarks:

1) [REDACTED] will put in 1-2 pieces by end of grading period.

2) [REDACTED] will put in 2-3 pieces by end of grading period.

3) [REDACTED] will put in 3-4 pieces by end of grading period.

4. [REDACTED] will put in 4-5 pieces by end of grading period

71. The IEP's "measurable annual goals and benchmarks" included the following "measurable annual goal" and related "benchmarks" addressing [REDACTED]'s PEN of "Self-Help":

MEASURABLE GOAL: [ ] will use appropriate sequence steps for hand washing.

Student's progress toward goal will be measured by:

Title: Teacher.

How often: 2xs a month.

MASTERY CRITERIA: 2 of 3 occurrences.

EVALUATION PROCEDURE(S): Observation.

Benchmarks:

- 1) [ ] will turn on water when directed by end of grading period.
- 2) [ ] will get soap & rub hands together by end of grading period.
- 3) [ ] will turn off water by end of grading period.
4. [ ] will get paper towel and dry hands by end of grading period

72. The IEP's "measurable annual goals and benchmarks" included the following "measurable annual goals" and related "benchmarks" addressing 's PEN of "Receptive/Expressive":

MEASURABLE GOAL: [ ] will follow one step direction with visual and auditory prompts.

Student's progress toward goal will be measured by:

Title: Speech Therapist.

How often: weekly.

MASTERY CRITERIA: 70% accuracy.

EVALUATION PROCEDURE(S): Charting.

Benchmarks:

- 1) will respond to - give me, show me, point with objects - using physical prompt - gestural prompt.
- 2) will follow 1 step direction for come here, sit down, turn off the light etc. with physical prompt - gestural prompt.

MEASURABLE GOAL: [ ] will make choices for preferences and wants/needs from 2 object[s]/pictures presented (voice output device).

Student's progress toward goal will be measured by:

Title: Speech Therapist.

How often: weekly.

MASTERY CRITERIA: 70% accuracy.

EVALUATION PROCEDURE(S): Charting.

Benchmarks:

- 1) touch, point to desired object with physical prompt
- 2) touch picture on voice output device for choice making.
- 3) make vocalization/approximations of name for choice.

73. Section XI. of the February 27, 2007, IEP listed the following "accommodations/modifications" as being "necessary to accurately measure [ ]'s] academic achievement, developmental and functional performance": "multi sensory approach, hands on

prompts, gestures, visuals, voice outputs, concrete objects, modeling."

74. Section XII. of the February 27, 2007, IEP stated that no "supplementary aids and services" to further support [REDACTED] in the LEAP classroom were "needed at this time."

75. According to Section XIII. of the February 27, 2007, IEP, the following "related services" were "required for [REDACTED] to benefit from special education" and therefore would be provided:

Assistive Technology: concrete objects, visuals, [in] All Classrooms [from] 2/ /07-2/ /08 daily

Occupational Therapy within educational environment [from] 2/ /07-2/ /08 [for] 60 mpw

76. Section XIV. of the February 27, 2007, IEP related the IEP team's determination that there was no need to provide additional "training/support to [any] individuals . . . to assist them in implementing [REDACTED]'s] IEP goals and benchmarks."

77. Section XV. of the February 27, 2007, IEP indicated that [REDACTED] did not require a shortened version of the LEAP school day.

78. Section XVI. of the he February 27, 2007, IEP noted that the following "factors [were] considered in selecting [REDACTED]'s placement [in a general education class] and ensuring that it [was] in the least restrictive environment":

- student frustration and stress
- student self-esteem and worth
- distractibility
- need for lower pupil-to-teacher ratio
- time required to master educational objectives
- social skills causing increased isolation
- difficulty completing tasks
- other: communication

79. The following "areas of instruction" were listed in Section XVII. of the February 27, 2007, IEP:

- Greeting
- Plan Do Review
- Shared Reading
- Phonological Awareness
- Small Group
- Large Group
- Closing Circle
- Language Therapy

This section of the IEP further indicated that [REDACTED] would receive "specialized instruction" in the classroom setting on a daily basis in "Communication," "Attentive Listening," "Fine Motor Skills," "Pre-Academics," and "Self-Help Skills", and that he will also receive "specialized instruction" in

"Receptive/Expressive" language skills in the "classroom/therapy rm." for 90 minutes per week (which was an increase in 30 minutes per week from what was provided for in the July 14, 2006, IEP).

80. Section XVIII. of the February 27, 2007, IEP listed the following "persons [as being] responsible for implementation of this IEP: ESE Teacher; Speech/Language Pathologist; [and] Occupational Therapist."

81. Section XX. of the February 27, 2007, IEP provided that "[s]ervices delineated on the IEP, unless otherwise indicated, will initiate 2/227/07 and have an anticipated duration through 2/26/08."

82. The February 27, 2007, IEP provided that [REDACTED] would be receiving Extended School Year (ESY) Services during the summer in the form of "Specialized Instruction" in "Pre-Academics" (for one hour, five days a week) "Self-Help Skills" (for one hour, five days a week), "Fine Motor Skills" (for 30 minutes per week) and Communication/Receptive Expressive lang." (for 60 minutes per week).

83. [REDACTED] initialed the February 27, 2007, IEP, signifying her "agreement" therewith. Underneath [REDACTED] initials [REDACTED] wrote the following "comments": "regular class w/paraprofessional," which was the placement [REDACTED] wanted for [REDACTED] in kindergarten.

84. Kathy Velazquez, an autism support teacher assigned to the School Board's Prekindergarten Program for Children with Disabilities, was the School Board's representative at the meeting. She wrote the following on the "Conference Notes" section of the February 27, 2007, IEP:

2/27/07 - ■■■ expressed interest in discussing options for placement in kindergarten. M-Team will review IEP and discuss option for kindergarten at the kindergarten staffing.

85. The February 27, 2007, IEP was developed with the understanding that, at this "kindergarten transition staffing," which was scheduled to take place in less than two weeks on March 12, 2007, an IEP for ■■■'s kindergarten year would be prepared.

Delivery of Special Education and Services Pursuant to IEPs

86. The July 14, 2006, IEP and the February 27, 2007, IEP (hereinafter referred to collectively as the "2006-2007 IEPs") addressed ■■■'s educational needs and were reasonably calculated at the time of their creation to provide, and their implementation in fact did provide, ■■■ with meaningful educational benefit. They contained goals that were appropriately tailored to ■■■'s needs and were objectively measurable.

87. As per the 2006-2007 IEPs, [REDACTED] received special education and related services in the LEAP classroom at [REDACTED] during the 2006-2007 school year.

88. Most days, [REDACTED] traveled to and from school by school bus, leaving home at 6:45 a.m. and returning at 11:00 a.m. When [REDACTED] did not take the school bus, [REDACTED] drove [REDACTED].

89. There were ten students in [REDACTED]'s class- six typically developing students and four autistic students, including [REDACTED]

90. Of the ten students in the class, [REDACTED] needed, and received, the most personalized attention from the teacher and the two paraprofessional aides in the classroom.

91. [REDACTED]'s classroom teacher was Barbara Moss, a well-qualified and experienced ESE teacher, who has been teaching children with autism for 17 years, the last three in a LEAP classroom.

92. Ms. Moss provided instruction to [REDACTED] and [REDACTED] classmates within the framework of the LEAP model (on which she has received extensive training). Her classroom was highly structured, with planned transitions and routines that provided predictability for the children. Ms. Moss made special adaptations in the classroom for [REDACTED] to enable [REDACTED] to better understand "what [the class was] doing" so that [REDACTED] would be able to participate in class activities to the extent that [REDACTED] was able.

93. Ms. Moss followed the High Scope, BELL, and Conscious Discipline curricula discussed in the School Board's Rule 6Gx13-6A-1.331 (set out above).

94. Among the various teaching strategies and techniques she used were those based on ABA principles.

95. In discharging her classroom teaching responsibilities, Ms. Moss received help on an ongoing basis from Ms. Velazquez, who provided training, advice, and assistance in "mak[ing] [instructional] materials." Once a month, Ms. Velazquez spent the entire day in Ms. Moss's classroom.

96. Ms. Moss, together with a School Board occupational therapist and School Board speech/language pathologist, implemented ■■■'s 2006-2007 IEPs substantially in accordance with the IEPs' requirements.

97. The occupational therapist and speech/language pathologist provided services to ■■■ in Ms. Moss's classroom while ■■■ was engaging in classroom activities.<sup>7</sup> Providing these services in such a "natural setting" promotes learning and generalization.

98. ■■■'s speech/language pathologist was Phyllis Sandrow, who has a masters degree in speech pathology and approximately 23 years of experience working with children with autism.

99. For the 2006-2007 school year, Ms. Sandrow was assigned to serve [REDACTED] students exclusively. She "started with 69 students in August [2006], and in May [2007] when the school year was over, [she] had 75 or 76 students." Many of these students, like [REDACTED], were autistic.

100. Although [REDACTED] was no longer in the ESOL program, Ms. Sandrow used ESOL strategies with [REDACTED], as did Ms. Moss.

101. In servicing [REDACTED], Ms. Sandrow and Ms. Moss also employed assistive technology, including visuals, a Picture Exchange Communication System (PECS), concrete objects, and a voice output device.

#### Progress Made

102. Ms. Sandrow and Ms. Moss worked with [REDACTED] in an effort to help [REDACTED] achieve the goals and benchmarks in the 2006-2007 IEPs.<sup>8</sup>

103. They regularly monitored and evaluated [REDACTED] progress, using the criteria set forth in the 2006-2007 IEPs, and recorded their findings.

104. As their observations revealed, [REDACTED] (who, in August 2006, was functioning at the infant/toddler level, needing hand-over-hand assistance with most tasks) made meaningful progress during the 2006-2007 school year, particularly after [REDACTED] return from the winter break, although [REDACTED] did not master any of [REDACTED] goals. [REDACTED] became more interested in, and started to watch and

interact with, the people and things around [REDACTED] in the classroom and elsewhere on school grounds. [REDACTED] required lower levels of prompting to perform targeted tasks and behaviors. [REDACTED] transitioned with greater ease. [REDACTED] remained engaged in activities for longer periods of time. [REDACTED] started to make choices. [REDACTED] began using gestures and responding to the gestures of others. [REDACTED] vocalizations became more frequent, and they "sometimes had intonations to them." [REDACTED] even "said a few words," albeit not often. [REDACTED] responded enthusiastically to music. It appeared that "[REDACTED] was starting to understand cause and effect" and "make some sense out of [REDACTED] environment."

#### Behavioral Issues

105. During the 2006-2007 school year, [REDACTED] did not engage in any distracting or disruptive behavior that impeded [REDACTED] learning or the learning of [REDACTED] classmates.

106. In Ms. Moss' classroom, there were "positive behavior[all] supports in place" (such as an "organiz[ed] [physical] environment," "consistent predictable routines," "visual supports," and "[other] adaptations") that were designed "to prevent [such] problem behavior[]" on the part of her students.

107. Like other children with autism, [REDACTED] did "have an inability to sit [and participate in an activity] for any length of time." When [REDACTED] disengaged, however, staff was "easily able

to redirect [REDACTED] and get [REDACTED] back to the task at hand and involve[d] . . . with the rest of the students in the class."

108. Ms. Moss did not receive any request from the Parents that a functional assessment of [REDACTED]'s behavior be conducted.

#### Parents' Participation in Training

109. The Parents did not attend any of the "positive parenting practices" training sessions offered by the School Board during the 2006-2007 school year, although they had each attended four or five sessions the previous school year (with [REDACTED] going to the Spanish-language sessions and [REDACTED] going to the English-language sessions).

#### Communication between Parents' Advocate and School Board

110. Prior to the scheduled March 12, 2007, "kindergarten transition staffing," the Parents, through their advocate, Lilliam Rangel-Diaz, communicated in writing with Kathy Maguire, the School Board's ESE Instructional Supervisor for Region Center V. In a letter to Ms. Maguire dated March 8, 2007, Ms. Rangel-Diaz asserted that the February 27, 2007, IEP "fails to provide [REDACTED] with the support and access to education that [REDACTED] needs in order to be successful in general education classes," and she requested the following "on behalf of [REDACTED] and [REDACTED] parents":

1. Bilingual ESOL assessment to determine an accurate ESOL Level.

2. Complete Assistive Technology Evaluation to address [REDACTED]'s communication needs as well as other assistive technology needs.

3. Postponement of the IEP meeting scheduled March 12, 2007 at 1:30 P.M. to be rescheduled as soon as the requested evaluations (see numbers 1 and 2 above) are completed and the reports are provided to [REDACTED] parents and the undersigned. The IEP team meeting must be scheduled at a mutually convenient date to begin at 9:30 A.M. with the full participation of [REDACTED]'s IEP team, including but not limited to [REDACTED] Speech and Language Pathologist and Occupational Therapist (who did not participate in [REDACTED] 2/27/07 annual IEP team meeting). We are requesting that [REDACTED]'s IEP team meeting be held at [REDACTED] neighborhood school, [REDACTED].

4. Development of an appropriate IEP for [REDACTED] to address [REDACTED] priority educational needs with measurable and individualized annual goals, supplementary aids (including but not limited to full-time paraprofessional support) and related services.

5. Full inclusion in general education classes with meaningful access to the general education curriculum alongside [REDACTED] non-disabled peers.

6. On-going training for teachers, paraprofessional[s], administrators, therapists and parents on IEP implementation, inclusion strategies, behavioral interventions as well as [REDACTED]'s learning style to be provided by school district experts.

A written reply to this letter is requested within five days. Needless to say that [REDACTED]'s parents are determined to provide [REDACTED] with the educational services that [REDACTED] is entitled to receive. Time is of the essence and failure to reply to this letter

within the indicated time frame will result in the immediate filing of the appropriate formal complaints on behalf of [REDACTED] and [REDACTED] parents.

Your prompt attention is always appreciated.

111. A written response was sent to Ms. Rangel-Diaz in the form of a letter, dated March 13, 2007, and signed by Delores Mendoza, the Supervisor of the School Board's Prekindergarten Program for Children with Disabilities, and Ana Gispert, a Staffing Specialist in the School Board's Regional Center V.

The letter read as follows:

In response to your letter of March 8, 2007 regarding the Educational Plan for [REDACTED] this is the proposed follow-up:

1. The March 12, 2007 Transition IEP Meeting was postponed per your request.
2. [REDACTED] will receive a bilingual ESOL Assessment completed by Ms. Zilkia M. Rodriguez, Pre-K Bilingual Education Specialist and a staff member from the K-12 Bilingual Education Program.
3. As requested in your letter, an Assistive Technology Evaluation will be completed by the Pre-K Assistive Technology Team. There is an Assistive Technology Implementation Plan for [REDACTED] that the teacher, Ms. Barbara Moss, has been implementing in the classroom for the past school year.
4. The IEP Pre-K to kindergarten transition meeting will be held at [REDACTED] current school, [REDACTED]. [REDACTED] staff will be invited again, as they were for the March 12, 2007 meeting. The occupational therapist may attend the Pre-K to Kindergarten transition meeting,

nevertheless the parent did sign on page 2 of the Parent Notification of Meeting dated 1/25/07 excusing Ms. Deguerre, occupational therapist to attend the meeting. Ms. Deguerre provided Ms. Moss with up-to-date therapy progress notes to review with [the] parent at the meeting.

5. As you are aware, educational placement of a student is an IEP team decision.

6. As usual, an appropriate kindergarten IEP will be developed at the Pre-K to Kindergarten transition meeting. A tentative staffing date for [ ] has been scheduled for Monday May 7, 2007, at [ ] at 9:30 A.M. per your request.

A consent form for re-evaluation will be sent to the parent via U.S. Mail to sign consent for the Bilingual ESOL Assessment and the Assistive Technology Assessment.

112. In a reply letter, dated March 13, 2007, Ms. Rangel-Diaz requested that the "Pre-K to Kindergarten transition IEP meeting" be held on April 12 or 13, 2007, instead of May 7, 2007, and indicated that the parents were agreeable to having the meeting held at [ ] School. In addition, Ms. Rangel-Diaz stated the following:

We agree with you that "educational placement" is an IEP team decision. In [ ]'s individual case, [ ] IEP already made the decision that [ ] educational placement was in "general education class (80%-100%)" beginning on 2/27/07 through 2/26/08. We agree with that educational placement decision made by [ ]'s 2/27/07 annual IEP team. However, [ ]'s IEP fails to provide [ ] with the necessary and required supports in the form of supplementary aids and services and is also

deficient in many other areas. As indicated in our previous letter, [REDACTED] 2/27/07 IEP provides [REDACTED] with no supplementary aids and services (no paraprofessional support, no consultation, no collaboration) and with absolutely no training for the general education teachers, support staff and parents, etc. to implement [REDACTED] IEP in the general education classroom.

A written reply to this letter is requested within five days. Needless to say that [REDACTED]'s parents are determined to provide [REDACTED] with the educational services that [REDACTED] is entitled to receive. Time is of the essence and failure to reply to this letter within the indicated time frame will result in the immediate filing of the appropriate formal complaints on behalf of [REDACTED] and [REDACTED] parents. In the meantime, we look forward to working with you and school district staff in the best interest of [REDACTED] and [REDACTED] parents.

113. Ms. Mendoza responded to Ms. Rangel-Diaz. In a letter dated March 20, 2007, she offered to hold the "kindergarten transition staffing" on April 12, 2007, and went on to state as follows:

The IEP that was written for [REDACTED] on 2/27/07 was to provide continued services until the end of the Prekindergarten year (May 30, 2007). The LEAP program model is an inclusive program with four students with autism and six-eight typically developing peers. The teacher is a certified special education teacher who can in Prekindergarten teach both typical [children] and children with disabilities in inclusive settings as stated in the State of Florida Course Code Directory. There are no supports required at this time because the special education teacher is the general education teacher.

In addition, presently there are two paraprofessionals in the classroom to support the goals and benchmarks for [REDACTED].

At the Transition to Kindergarten Staffing Conference, either a new IEP will be written for kindergarten, or the current IEP will be reviewed with proposed changes made as an Interim. At this time, with the kindergarten teacher present, the goals and benchmarks will be updated to reflect progress towards the Sunshine State Standards and Grade Level Expectations. Since [REDACTED] is being evaluated for ESOL and Assistive Technology, a new IEP will be developed.

I hope this is helpful and assists in answering some of your questions.

#### ESOL Assessment

114. The "bilingual ESOL Assessment" referred to in Ms. Mendoza's and Ms. Gispert's March 13, 2007, letter, to Ms. Rangel-Diaz was conducted by Zilkia Rodriguez on March 21, 2007. Ms. Rodriguez prepared a written report following the assessment, which contained a "summary," in which she stated the following, among other things:

Based on this assessment, [REDACTED] obtained an ESOL Level 5. Furthermore, the assessment confirms that [REDACTED] has developed parallel socio-communicative skills both in Spanish and English (commands/requests) with English being the language used more often for academic purposes since [REDACTED] has been receiving services since an early age. [REDACTED] has developed some receptive language skills in English and Spanish. Academic language skills such as colors have been taught in an English environment. [REDACTED]

stated . . . that at home [REDACTED] has worked on identification of colors in English too. . . . [I]t was determined that both English and Spanish are used with [REDACTED] at home. . . .

\* \* \*

The report also contained the following "conclusion":

Based on the results at the time of this evaluation, it appears that [REDACTED]'s difficulties progressing in school may be due to other factors which may not be related to the process of second language acquisition.

Notwithstanding the results of the assessment, on April 12, 2007, [REDACTED] "was reclassified as a Level 4 ESOL student, in need of ESOL strategies."

#### Assistive Technology Assessment

115. The "Assistive Technology Evaluation" referred to in Ms. Mendoza's and Ms. Gispert's March 13, 2007, letter, to Ms. Rangel-Diaz was done on April 10, 2007. As reflected by the written report it prepared, the evaluation team concluded that [REDACTED] needed "a comprehensive communication system that can be developed over time."

#### "Kindergarten Transition Staffing"

116. The "kindergarten transition staffing" originally scheduled for March 12, 2007, was held instead on April 12, 2007, with the Parents and School Board personnel in attendance.

117. A new IEP was not completed at the staffing.

█'s Private ABA Therapy

118. █ and █ are loving and caring parents who want the best for █. Although grateful for "everything that [the School Board] had offered" █, they were dissatisfied with the pace of █'s progress in school.

119. In late March 2007, after receiving a \$3,000.00 income tax refund, the Parents went to Behavior Analysis, Inc. (BAI) "seeking [an] intensive language based program that would help █ start to improve █ communication receptively and expressively." They expressed to BAI's clinical director their concerns regarding "[d]elays in [█'s] language communication skills." They mentioned that they were also concerned about █'s "not following instructions" (or noncompliance) at home, but indicated that this was not a priority concern.

120. On March 29, 2007, BAI conducted an assessment of █ to determine "what to include in [█'s] program." A "variety of questions on [the] assessment" did relate to █'s behavior, but the "primary focus" of the assessment was on matters relating to █'s "speech, language, and communication." No written report documenting the results of the assessment was prepared. A "complete, thorough behavioral assessment" was not done.

121. The week following the assessment, █ started receiving ABA therapy at BAI's Kendall Center for two hours a

day, five days per week, for a total of ten hours a week, with the "primary emphasis on [REDACTED]'s] receptive and expressive language." Ten hours a week of ABA therapy is "not ideal," but it is sufficient to enable a child to make progress, according to BAI's analysis of its "own program data." This was all the Parents were able to afford. After paying \$500.00 for the assessment, they have paid BAI \$500.00 a week for the ten hours of weekly ABA therapy [REDACTED] has received since [REDACTED] first session in early April 2007. The therapy sessions take place "in [BAI's] office building in Kendall in a therapy room, with one tech and [REDACTED] and no other children around." The "primary focus of this program is language based."

122. The "tech" providing this "one-on-one" therapy "does not have to be board-certified." He or she must simply "pass [BAI's] training program which is competency based. A teaching license is not required.

123. BAI's records reveal that, since starting ABA therapy, [REDACTED] has "mastered," as BAI interprets that term, "[a]pproximately 30 plus skills." BAI considers a skill mastered if there are "three independent correct responses [that is, correct responses given without any prompting or physical assistance] on three consecutive sessions."

124. BAI "caution[s] parents that unless special methods are used, treatment gains obtained in the therapist's office are

not likely to generalize to other settings such as home or school."

#### CONCLUSIONS OF LAW

125. District school boards are required by the Florida K-20 Education Code<sup>9</sup> to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat. Pursuant to Section 1003.57(1)(f). Florida Statutes, "[i]n providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

126. "Exceptional students," as that term is used in the Florida K-20 Education Code, are students who have been "been determined eligible for a special program in accordance with rules of the State Board of Education." The term includes, among others, "students who are . . . speech and language impaired . . . [and those who are] autistic . . . ."

§ 1003.01(3), Fla. Stat. According to the "rules of the State Board of Education," the former are students with "disorders of language, articulation, fluency, or voice which interfere with communication, preacademic or academic learning, vocational training, or social adjustment." Fla. Admin Code R. 6A-6.03012(1). The latter are described in the "rules of the State Board of Education" as follows:

Autistic - one who has a disability reflected in severe disorders of communication, behavior socialization and academic skills, and whose disability was evident in the early developmental stages of childhood. The autistic child appears to suffer primarily from a pervasive impairment of cognitive and perceptual functioning, the consequences of which are manifested by limited ability to understand, communicate, learn, and participate in social relationships.

Fla. Admin Code R. 6A-6.03023(1); see also 34 C.F.R. § 300.8(c)(1)(i) ("Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."). It is undisputed that [REDACTED] is an "exceptional student" eligible to receive special

education and related services from the School Board as a student who is "speech and language impaired" and "autistic" under the "rules of the State Board of Education."

127. The Florida K-20 Education Code's imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et. seq., as most recently amended (IDEA),<sup>10</sup> which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." See 20 U.S.C. § 1412(a)(1); and Shore Regional High School Board of Education v. P. S., 381 F.3d 194, 198 (3d Cir. 2004)("All states receiving federal education funding under the IDEA must comply with federal requirements designed to provide a 'free appropriate public education' ('FAPE') for all disabled children."); cf. Agency for Health Care Administration v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998)("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Public Health Trust of Dade County, Florida v.

Dade County School Board, 693 So. 2d 562, 564 (Fla. 3d DCA 1996)("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976)("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

128. Under the IDEA, a "free appropriate public education" consists of "special education" and, when necessary, "related services." See 20 U.S.C. § 1401(9)("The term 'free appropriate public education' means special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required

under section 614(d)"). "Special education," as that term is used in the IDEA, is defined as:

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1401(29). The term "related services," as used in the IDEA, is defined as:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

129. To meet its obligation under Sections 1001.42(4)(1) and 1003.57, Florida Statutes, to provide an "appropriate" public education to each of its "exceptional students," a

district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982); see also § 1003.01(3)(b), Fla. Stat. ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.").

130. The instruction and services provided must be "'reasonably calculated to enable the child to receive educational benefits.'" School Board of Martin County v. A. S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999), quoting from, Rowley, 458 U.S. at 207. As the Fourth District Court of Appeal further

stated in its opinion in School Board of Martin County, 727 So. 2d at 1074:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J. S. K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. Of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

See also M. H. v. Nassau County School Board, 918 So. 2d 316, 318 (Fla. 1st DCA 2005)("A free appropriate public education 'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child,' but must be

designed to afford the child a meaningful opportunity to learn." )(citation omitted); C. P. v. Leon County School Board, 483 F.3d 1151, 1153 (11th Cir. 2007) ("This standard, that the local school system must provide the child 'some educational benefit,' Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, has become known as the Rowley 'basic floor of opportunity' standard."<sup>11</sup>); M. M. v. School Board of Miami-Dade County, 437 F.3d 1085, 1102 (11th Cir. 2006) ("[U]nder the IDEA there is no entitlement to the 'best' program."); Doe v. Board of Education, 9 F.3d 455, 459-460 (6th Cir. 1993) ("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA."); and School Board of Lee Co. v. M. M., No. 2:05-cv-5-FtM-29SPC, 2007 U.S. Dist. LEXIS 21582 \*9-10 (M.D. Fla. March 27, 2007) ("Under the United States Supreme Court's Rowley standard, a child must be provided 'a basic floor of opportunity' that affords 'some'

educational benefit, but the outcome need not maximize the child's education.").

131. "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Independent School District No. 283, St. Louis Park, Minn. V. S. D. By and Through J. D., 948 F. Supp. 860, 885 (D. Minn. 1995).; see also Coale v. State Department of Education, 162 F. Supp. 2d 316, 331 n.17 (D. Del. 2001)("If the IDEA required the State to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student, then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive technology might be more problematic. But the court does not understand the IDEA to impose such requirements on the State.").

132. District school boards may take cost into consideration in determining what instruction and services to provide an exceptional student, but only "when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." Clevenger v. Oak Ridge School Board, 744 F.2d 514, 517 (6th Cir. 1984); see also Barnett by Barnett v. Fairfax County School Board, 927 F.2d 146, 153-54 (4th Cir. 1991)("Plaintiffs also

argue that the district court erroneously allowed the Board, in making placement decision, to consider the lack of financial resources and the impact on the other students of providing one student an interpreter. The district court found that in light of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school. Although we agree with plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school could provide if given access to unlimited funds. . . . [I]n reviewing the defendant's placement decision, the district court correctly considered these factors and properly found that the program offered at Annandale was appropriate."); J. P. ex rel. Popson v. West Clark Community Schools, 230 F. Supp. 2d 910, 945 (S.D. Ind. 2002)("[T]aking financial or staffing concerns into account when formulating an IEP or when providing services is not a violation of the IDEA. A school district is not obligated by law to provide every possible benefit that money can buy. A school district need only provide an 'appropriate' education at public expense. Therefore, it may deny requested services or programs that are too costly, so long as the requested services or programs are merely supplemental."); and Matta By and Through

Matta v. Board of Education-Indian Hill Exempted Village Schools, 731 F. Supp. 253, 255 (S.D. Ohio 1990)("When devising an appropriate program for individual students, cost concerns are legitimate. . . . However, costs may be taken into consideration only when choosing among several appropriate education options. . . . When only one alternative for an appropriate education is available, the state must follow that alternative irrespective of the cost.").

133. For each student found eligible for special education and related services, the district school board must develop, taking into consideration any input provided by the child's parents,<sup>12</sup> an IEP. An IEP is described in the IDEA (specifically, 20 U.S.C. § 1414(d)(1)(A)) as a "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the IDEA] and that includes[:] (I) a statement of the child's present levels of academic and functional performance . . . ; (II) a statement of measurable annual goals, including academic and functional goals . . . ; (III) a description of how the child's progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress the child is making . . . will be provided; (IV) a statement of the special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child, and a

statement of the program or supports for school personnel that will be provided for the child . . . ; (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in . . . activities; (VI) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district, assessments . . . [or a statement of why the child should take an alternative assessment, if the IEP Team so determines]; (VII) [pertaining to IEPs in effect when the child is 16 and thereafter]." North Reading School Committee v. Bureau of Special Education Appeals of the Massachusetts Department of Education, 480 F. Supp. 2d 479, 482 (D. Mass. 2007). The IEP has been called "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988).

134. "[A]n IEP must respond to all significant facets of the student's disability, both academic and behavioral. That is why a school district's IEP team is required [pursuant to 20 U.S.C. § 1414(d)(3)(B)(i)] to assess whether the student's disability-related 'behavior impedes his or her learning or that of others' in the classroom. . . . An IEP that fails to address disability related actions of violence and disruption in the classroom is not 'reasonably calculated to enable the child to

receive educational benefits.' Nor does it address an important aspect of the student's disability. It also does not reflect the IEP's team's consideration of whether the student's 'behavior impedes his or her learning or that of others" in the classroom.'" Alex R. v. Forrestville Valley Community Unit School District # 221, 375 F.3d 603, 613 (7th Cir. 2004); see also Fla. Admin. Code R. 6A-6.03028(6)(d)("The IEP team shall consider the following in IEP development, review, and revision: In the case of a student whose behavior impedes learning or the learning of others, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.").

135. "[T]here are only two circumstances under which a behavioral intervention plan might be warranted [for an exceptional student]. The first . . . is when the school district imposes certain types of discipline on the student. See 20 U.S.C. § 1415(k)(1). The second is when the student exhibits behavioral problems that impede the student's learning or that of other students. . . . And, even when the IDEA requires the IEP team to consider behavioral intervention, it does not establish any express statutory or regulatory standards governing the content of such a program." Lessard v. Wilton-Lyndeborough Cooperative School District, No. 05-CV-192-SM, 2007

U.S. Dist. LEXIS 30293 \*25-26 (D. N. H. April 23, 2007)(citation omitted).

136. A "[p]arent['s] right to [an] evaluation at public expense" under the IDEA is discussed in 34 C.F.R. 300.502(b),<sup>13</sup> which provides as follows:

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may

not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

The "plain meaning" of the regulation requires that, "in order to obtain reimbursement, the parents must disagree with an evaluation that the public agency has already 'obtained.' . . . . [T]he assessment obtained by the parent must come after the assessment obtained by the school district." Hiram C. v. Manteca Unified School District, No. CIV. S-03-2568 WBS KJM, 2004 U.S. Dist. LEXIS 29175 \*9-10 (E.D. Cal. August 27, 2004). Simply stated, if there is no district school board-obtained assessment with which the parents can disagree, there can be no reimbursement.

137. Under the IDEA, parents who have "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f).

138. In Florida, by statute, a DOAH administrative law judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(5), Fla. Stat.

139. Absent the district school board's consent, the administrative law judge may only consider those issues raised in the parent's due process complaint.<sup>14</sup> See 20 U.S.C. § 1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise."); see also Department of Education, State of Hawaii v. D. K., No. 05-00560 ACK/LEK, 2006 U.S. Dist. LEXIS 37438 \*13 (D. Haw. June 6, 2006) ("[T]he Court concludes that the parties are precluded from raising new issues at an administrative hearing that were not previously raised. All parties should have fair notice of the contested issues and the right to defend themselves at the hearing. In addition, a hearings officer should limit the issues he considers in reaching his determination to those that were raised prior to the hearing.").

140. "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 62 (2005); see also Brown v. Bartholomew Consolidated School Corp., 442 F.3d 588, 594 (7th Cir. 2006) ("The Supreme Court recently has clarified

that, under the IDEA, the student and the student's parents bear the burden of proof in an administrative hearing challenging a school district's IEP."); West Platte R-II School District v. Wilson, 439 F.3d 782, 784 (8th Cir. 2006)("[T]he burden of proof in an IDEA case lies with the party initiating the challenge to the Individualized Education Plan (IEP)."); and Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001)("In the present case, because it is the parents who are seeking to attack a program they once deemed appropriate, the burden rests on the parents in this IEP challenge.").

141. The appropriateness of an IEP must be judged prospectively, taking into consideration the circumstances that existed at the time of the IEP's development. See Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999)("We do not judge an [IEP] in hindsight; rather, we look to the [IEP]'s goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer Lucas with a meaningful benefit."); Walczak v. Florida Union Free School District, 142 F.3d 119, 133 (2d Cir. 1998)("IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results."); Carlisle Area School v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995)("[A]ppropriateness [of an IEP] is judged prospectively. . . ."); Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1040 (3d Cir. 1993)("[T]he measure and adequacy of an IEP can

only be determined as of the time it is offered to the student, and not at some later date."); Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1st Cir. 1990)("[A]ctions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); A. M. v. Fairbanks North Star Borough School District, No. 3:05-cv-179 TMB, 2006 U.S. Dist. LEXIS 71724 \*19 (D. Alaska September 29, 2006)("Turning to the question of whether the IEP was reasonably calculated to enable A.M. to receive educational benefits, the Court agrees with FSD that the pertinent inquiry is whether the program is appropriate when developed, not in hindsight."); J. R. ex rel. S. R. v. Board of Education of the City of Rye School District, 345 F. Supp. 2d 386, 395 (D. N. Y. 2004)("[W]e turn our attention to the SRO's decision upholding the IHO's determination that the IEP at issue is 'reasonably calculated to enable [S. R.] to receive educational benefits.' This determination is necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of S. R.'s subsequent progress at Eagle Hill, but rather consider the propriety of the IEP with respect to the

likelihood that it would benefit S. R. at the time it was devised."); Board of Education of the County of Kanawha v. Michael M., 95 F. Supp. 2d 600, 609 (S.D. W. Va. 2000) ("The appropriate inquiry is whether the Board's IEPs, at the time of creation, were reasonably calculated to provide some educational benefit to Michael. Courts should not judge an IEP in hindsight; instead, courts should look to the IEP's goals and methodology at the time of its creation and ask whether it was reasonably calculated to provide educational benefit."); and D. B. v. Ocean Township Board of Education, 985 F. Supp. 457, 525 (D. N. J. 1997) ("However, the fact of failing to make adequate educational progress in the past, even if that occurred, generally has not been held sufficient to warrant residential placement. This is because, as our courts have held, the appropriateness of a proposed IEP program must be viewed prospectively.") "Although a [district school board] can meet its statutory obligation even though its IEP proves ultimately unsuccessful, the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed." Board of Education of the County of Kanawha v. Michael M., 95 F. Supp. 2d 600, 609 n.8 (D. W. Va. 2000).

142. In making a determination as to the appropriateness of an IEP, the administrative law judge should give deference to the

reasonable opinions of those witnesses who have expertise in education and related fields. See MM ex rel. DM v. School District of Greenville County, 303 F.3d 523, 532-33 (4th Cir. 2002) ("We have always been, and we should continue to be, reluctant to second-guess professional educators. . . . In refusing to credit such evidence, and in conducting its own assessment of MM's IEP, the court elevated its judgment over that of the educators designated by the IDEA to implement its mandate. The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators. As we have repeatedly recognized, 'the task of education belongs to the educators who have been charged by society with that critical task . . . .'"); School District of Wisconsin Dells v. Z. S. ex rel. Littlegeorge, 295 F.3d 671, 676-77 (7th Cir. 2002) ("Administrative law judges . . . are not required to accept supinely whatever school officials testify to. But they have to give that testimony due weight. . . . The administrative law judge substituted his own opinion for that of the school administrators. He thought them mistaken, and they may have been; but they were not unreasonable."); Devine, 249 F.3d at 1292 ("[G]reat deference must be paid to the educators who develop the IEP."); Wagner v. Board of Education of Montgomery County, 340 F. Supp. 2d 603, 611 (D. Md. 2004) ("[T]his court owes generous deference (as did the ALJ) to the educators on Daniel's IEP Team."); Gill v. Columbia 93 School District, 217 F.3d 1027, 1038 (8th Cir. 2000) ("Federal courts must defer to the

judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his nondisabled classmates to the maximum extent possible."); and Johnson v. Metro Davidson School System, 108 F. Supp. 2d 906, 915 (M. D. Tenn. 2000) ("[I]f the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only be that the ALJ presiding over such a [due process] hearing must give due weight to such policy decisions. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the educational expertise of the local school authorities and then require such deference by the district court would be inefficient and thus counter to sound jurisprudence."). If the expert's opinion testimony is un rebutted, it may not be rejected by the administrative law judge unless there is an reasonable explanation given for doing so. See Heritage Health Care Center (Beverly Enterprises-Florida, Inc., d/b/a Beverly Gulf Coast-Florida, Inc.) v. Agency for Health Care Administration, 746 So. 2d 573, 573-74 (Fla. 1st DCA 1999); Weiderhold v. Weiderhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997); Fuentes v. Caribbean Electric, 596 So. 2d 1228, 1229 (Fla. 1st DCA 1992); and Brooks v. St. Tammany School Board, 510 So. 2d 51, 55 (La. App. 1987).

143. It is not the function of the administrative law judge, in passing upon the appropriateness of an IEP, to determine the "best methodology for educating [the] child. That is precisely the kind of issue which is properly resolved by

local educators and experts" and is not subject to review in a due process hearing. O'Toole By and Through O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 709 (10th Cir. 1998); see also M. M., 437 F.3d at 1102, quoting Lachman v. Illinois Board of Education, 852 F.2d 290, 297 (7th Cir. 1988) ("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."); and Tucker By and Through Tucker v. Calloway County Board of Education, 136 F.3d 495, 506 (6th Cir. 1998) ("Case law is clear that the Tuckers are not entitled to dictate educational methodology or to compel a school district to supply a specific program for their disabled child.").

144. An administrative law judge is empowered, in a due process hearing, to require a district school board to reimburse parents who enrolled their child in a private school, without the consent of the district school board, for the cost of such enrollment, if the parents have requested such relief in their due process complaint and the administrative law judge finds that: (1) the district school board had not timely made a "free appropriate public education" available to the child prior to the parents' provision of private instruction; (2) the child's private instruction was appropriate; and (3) facts of the case do not establish that there should be any "limitation on

reimbursement." Circumstances warranting a "limitation on reimbursement" include the parents' failure to have given timely notice of their rejection of the placement offered by the district school board and of their intention to enroll their child in public school at public expense. See 20 U.S.C. § 1412(a)(10)(C)<sup>15</sup>; 34 C.F.R. § 300.148; and Fla. Admin. Code R. 6A-6.03311(9).

145. In the instant case, in their due process complaint, the Parents allege that the School Board has failed to meet its obligation to provide [REDACTED] with a "free appropriate public education," and they request relief to remedy this breach, including reimbursement of costs and compensatory educational services. The focus of their complaint is the February 27, 2007, IEP, which they claim "was not calculated to provide [REDACTED] with the requisite benefit" inasmuch as it did not provide [REDACTED] "with the rigorous, intensive education program of between 20 and 40 hours of instruction per week [REDACTED] needs in order to be successful and make more than just de minimis progress." The Parents further assert in their complaint that the IEP was deficient for the additional reasons that it did not contain appropriate, measurable goals; failed to provide for sufficient accommodations and "supplementary aids and services"; did not adequately address [REDACTED]'s "behavioral needs"; and had no behavioral intervention plan attached to it. According to the

Parents, the School Board should have "provide[d] [ ] with a functional behavioral assessment" and "develop[ed] a positive behavioral intervention plan for him."

146. In an attempt to meet their burden of proof, the Parents offered various exhibits and presented the testimony of two witnesses, [ ] and David Garcia, the clinical director at BAI, who gave expert testimony.

147. Mr. Garcia is a board-certified behavioral analyst. He is not a teacher. He was offered by the Parents as an expert in ABA and the "treatment of autism." During his testimony, he conceded that he did not have a detailed understanding of the LEAP model, that he was "not familiar at all with the curricula . . . used in [ ]'s LEAP] classroom" at [ ], and that he could not "comment on what [was] going on in [that classroom] setting." What he did "comment on" in his testimony were the goals and objectives in the 2006-2007 IEPs. He expressed the view that, although [ ] "need[ed] to learn the skills listed," these goals and objectives were poorly written and not ambitious enough, and the "measurement system" set forth in the IEPs to assess [ ]'s progress "need[ed] to be clarified" and to provide for shorter assessment periods. Mr. Garcia also opined on the efficacy of ABA therapy. When asked on direct examination whether it was his "opinion that in order for [ ] to make progress and to learn the required skills, [ ] requires a

rigorous, intensive ABA program of between 20 and 40 hours of instruction per week," Mr. Garcia answered:

Yes. Yes. Based on the research, currently 10 hours. Although we are doing 10 hours, 10 hours to my knowledge, based on the literature in ABA, is not the ideal, the ideal for a child receiving ABA services.

On cross-examination, he clarified that he was testifying "about what [was] best in terms of programming for [REDACTED]" and that he was not saying that that [REDACTED] could not make progress in school without the benefit of such a "rigorous, intensive ABA program."

148. The School Board countered the Parents' evidentiary presentation with documentary evidence of its own, as well as the testimony of five School Board employees -- the supervisor of the School Board's Prekindergarten Program for Children with Disabilities; [REDACTED]'s classroom teacher and speech/language pathologist at [REDACTED]; the autism support teacher assisting his classroom teacher; and the School Board's "psychologist for autism spectrum disorders" -- who, collectively, were far more familiar than Mr. Garcia with the "programming" the School Board offered [REDACTED] and were able to shed light on what [REDACTED]'s LEAP classroom placement entailed, the nature and extent of services [REDACTED] received, and how those services met [REDACTED] unique needs.

149. Through the credible and persuasive testimony of these witnesses, together with its accepted exhibits, the School Board affirmatively established (although it was not its burden

to do so) that the 2006-2007 IEPs were not substantially deficient in any of the ways alleged by the Parents, but rather were reasonably calculated to, and upon their implementation did in fact, address █████'s educational and behavioral needs and provide █████ with meaningful educational benefit and therefore a "free appropriate public education." While a "rigorous, intensive ABA program" of 20 and 40 hours per week (of the type the Parents now prefer) may have also benefited █████ to the same, or to an even greater, extent, the School Board was nonetheless under no obligation to offer █████ such a program inasmuch as it was not the only beneficial program available. Rejecting this program in favor of one based on the accepted and well-recognized LEAP model was a matter within the School Board's sound discretion. See M. M., 437 F.3d at 1103 ("While C. M.'s parents may not want such a [proven and accepted] program, the IDEA does not grant them a right to select among various programs. Rather, the School Board offered C. M. what was required under the IDEA - a free appropriate public education.").

150. Having provided █████ with a "free appropriate public education," the School Board cannot be required to "[p]rovide reimbursement to [█████'s] parents for costs and expenses related to the ABA services provided to [█████] by [BAI]"; to [p]rovide compensatory educational services for [█████]"; or to take any of

the other Requested Actions sought by the Parents' to remedy the School Board's alleged (but not proven) dereliction of its duty in this regard.

151. Neither can the School Board be required to reimburse the Parents for the cost of, what the Parents have described as, "the IEE functional assessment of behavior" conducted by BAI, inasmuch as there existed no School Board-conducted functional assessment of behavior with which the Parents could disagree at the time ■■■ was evaluated by BAI (■■■'s behavior not having warranted such an assessment by the School Board).

152. To the extent that the Parents are requesting that the undersigned dictate what should be included in ■■■'s kindergarten IEP, such request is denied as being beyond the undersigned's authority to grant.<sup>16</sup>

ORDER

In view of the foregoing, the Parents' due process challenge fails, and the relief they have requested in their due process complaint is denied.

DONE AND ORDERED this 3rd day of August, 2007, in Tallahassee, Leon County, Florida.

S

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of August, 2007.

ENDNOTES

<sup>1</sup> Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2007).

<sup>2</sup> On May 21, 2007, the undersigned issued an order permitting Ms. Rangel-Diaz to serve as Petitioner's qualified representative in this matter.

<sup>3</sup> 34 C.F.R. § 300.510 provides, in pertinent part, that, "[i]f the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur," and "the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period."

<sup>4</sup> Both parties expressed a desire to be able to prepare their proposed final orders having the benefit of the hearing transcript.

<sup>5</sup> Florida Administrative Code Rule 28-106.215 is applicable to this proceeding pursuant to Florida Administrative Code Rule 6A-6.03311(11)(c), which provides, in pertinent part, as follows:

An administrative law judge (ALJ) shall use subsection (11) of this rule for any such [due process] hearings and shall conduct such hearings in accordance with the Uniform Rules for Administrative Proceedings, Chapter 28-106, F.A.C.

<sup>6</sup> M. V. was already familiar with LEAP, having discussed the program with a School Board staffing specialist and observed a LEAP classroom in early March 2005.

<sup>7</sup> On "[s]ome days," the occupational therapist took R. out of the classroom and brought him to the "therapy room" to receive occupational therapy.

<sup>8</sup> Ms. Sandrow and Ms. Moss drafted the goals and benchmarks found in the February 27, 2007, IEP, but they were not involved in the development of the July 14, 2006, IEP. The goals and benchmarks Ms. Moss drafted were designed to address skills she believed should be "target[ed] . . . before [R.] went to kindergarten." Ms. Sandrow, unlike Ms. Moss, was not physically present at the February 27, 2007, IEP meeting. The goals and benchmarks she drafted were given to Ms. Moss for presentation at the meeting "as possible goals that [could be] use[d]" until the "kindergarten transition staffing" was held. In drafting these new goals and benchmarks, Ms. Sandrow "wanted to cue in on some functional activities that [she] felt were important for [R.] to obtain."

<sup>9</sup> Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

<sup>10</sup> "The IDEA was [most] recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004)," effective July 1, 2005. M. T. V. v. Dekalb County School District, 446 F.3d 1153, 1157 n.2 (11th Cir. 2006).

<sup>11</sup> The undersigned rejects the suggestion made in the Parents' Proposed Final Order that the "standards in Rowley are no longer appropriate." See L.T. v. Warwick School Committee, 361 F.3d 80, 83 (1st Cir. 2004) ("The B.'s argue that the 1997 amendments to IDEA, Pub. L. No. 105-17, 111 Stat. 37 (1997), changed this standard to require school districts to provide the 'maximum benefit' to special needs children. They point out that the IDEA now contains legislative findings emphasizing the importance of training teachers to help special needs children 'meet . . . , to the maximum extent possible, those challenging expectations that have been established for all children' and prepare them to 'lead productive, independent, adult lives, to the maximum extent possible.' 20 U.S.C. § 1400(c)(5)(E). We do not interpret this statutory language, which simply articulates the importance of teacher training, as overruling Rowley. This

court has continued to apply the Rowley standard in cases following the 1997 amendments, see, e.g., Rome Sch. Comm. v. Mrs. B., 247 F.3d 29, 33 (1st Cir. 2001), as have several of our sister circuits, see Mo. Dep't of Elem. & Secondary Educ. v. Springfield R-12, 358 F.3d 992, at n.7 (8th Cir. 2004); Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M., 356 F.3d 798, 802, 804 (7th Cir. 2004); A. B. ex rel. D .B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004). And that is for good reason. The Rowley standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods.); see also Winkelman v. Parma City School District, 127 S. Ct. 1994, 2001 (2007)(citing Rowley).

<sup>12</sup> "The [parents'] right to provide meaningful input [in the development of the IEP] is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish School Board, 343 F.3d 373, 380 (5th Cir. 2003); see also Bradley v. Arkansas Department of Education, 443 F.3d 965 (8th Cir. 2006)("[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit."); and AW ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 683 n.10 (4th Cir. 2004) ("Although AW's parents indicated their dissatisfaction with AW's April IEP by declining to sign it, the right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions.").

<sup>13</sup> Florida Administrative Code Rule 6A-6.03311(7)(f)-(g) addresses a "parent['s] . . . right to an independent educational evaluation at public expense" under state law and provides as follows:

(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.

(g) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay either:

1. Ensure that an independent educational evaluation is provided at public expense; or

2. Initiate a hearing under subsection (11) of this rule to show that its evaluation is appropriate or that the evaluation obtained by the parent did not meet the school district's criteria. If the school district initiates a hearing and the final decision from the hearing is that the district's evaluation is appropriate then the independent educational evaluation obtained by the parent will be at the parent's expense.

(h) If a parent requests an independent educational evaluation, the school district may ask the parent to give a reason why he or she objects to the school district's evaluation. However, the explanation by the parent may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the school district's evaluation as described in subsection (11) of this rule.

<sup>14</sup> Accordingly, the undersigned has not addressed in this Final Order issues raised for the first time in the Parents' Proposed Final Order.

<sup>15</sup> While Congress has specified, in 20 U.S.C. § 1412(a)(10)(C), that either "a court or a hearing officer may require the agency to reimburse the parents" under the circumstances described therein, it has not vested hearing officers/administrative law judges with the same broad authority it has given to courts in civil actions brought pursuant to 20 U.S.C. Section 1415(i)(2) (of the IDEA) to "grant such relief as [they] determine[] is appropriate." See Beach v. Great Western Bank, 692 So. 2d 146, 152 (Fla. 1997), quoting from, Russello v. U.S., 104 S. Ct. 296, 300 (1983)("As a general rule, '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976)("It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion

of another."); and Sierra Club v. St. Johns River Water Management District, 816 So. 2d 687, 693 (Fla. 5th DCA 2002)("When the legislature uses a term in one section of the statute but omits it in another section of the same statute, courts should not imply it where it has been excluded.").

<sup>16</sup> It is unnecessary to, and therefore the undersigned will not, decide the merits of the other grounds for denial of the Requested Actions urged by the School Board.

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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); 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.