Flagler County School District
No. 07-1223E
Initiated by: Parent
Hearing Officer: Ella Jane P. Davis
Date of Final Order: August 24, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1223E
	)	
FLAGLER COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Upon due notice, a confidential hearing with Exceptional Student Education (ESE) student [redacted] present, was convened on June 27, 2007, in Bunnell, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: [redacted]
(Address of Record)

For Respondent: Sidney M. Nowell, Esquire
Nowell & Associates, P.A.
1100 East Moody Boulevard
Post Office Box 819
Bunnell, Florida 32110

STATEMENT OF THE ISSUES

(1) Whether the School District is properly implementing [redacted]'s August 24, 2006, Individualized Education Plan (IEP);

(2) Whether the School District has failed to provide a free and appropriate public education (FAPE) generally, and whether specifically, it has failed to provide FAPE by not providing one-on-one assistance to [redacted] regarding [redacted] wheelchair use, all life skills, and safety concerns;

(3) Whether the School District was required to provide, and has failed to provide, transition services mandated by the Individuals with Disabilities Education Act (IDEA), within the August 24, 2006, IEP, and more specifically, whether the School District has failed to provide community-based instruction two to three times per week, pursuant to the August 24, 2006, IEP.

(4) Whether the School District committed procedural errors and omissions with regard to a January 2007, request for a new IEP and an IEP meeting scheduled for, or conducted on, March 9, 2007.

PRELIMINARY STATEMENT

The Preliminary Statement in this cause is more detailed, and thus more lengthy, than those in most Final Orders. This is for the purpose of providing, in a single document, a procedural history of the minor litigation disputes between the parties that have delayed a speedy resolution of the substantive issues herein pursuant to the IDEA; to encourage the School District to

assure that, in the future, resolution meetings and the District's other obligations under the current federal regulations are accomplished in a timely manner; and to discourage either party from seeking fees and costs related hereto.

On or about March 15, 2007, the School District filed with the Division of Administrative Hearings its referral letter for the parents' request for due process hearing (due process complaint), which had been filed by the parents with the School District on March 14, 2007.

On March 16, 2007, a Notice of Telephonic Pre-hearing Conference set the mandatory pre-hearing conference for March 30, 2007, which date would have been 16 days from the filing of the due process complaint.

Paragraph 34 C.F.R. Section 300.510 requires that, unless both parties waive, in writing, a resolution meeting, the School District is required to give written notice and hold the resolution meeting within 15 days of the filing of the due process complaint. The School District did not comply.

The parents requested a continuance of the pre-hearing conference, and by Notice of March 29, 2007, the telephonic pre-hearing conference was continued to April 3, 2007. To accommodate the parents, the pre-hearing conference was actually held on April 4, 2007.

34 C.F.R. Section 300.508(e) requires that the School District file a response to the due process complaint within 10 days of the filing of the due process complaint. The School District filed no response.

At the telephonic pre-hearing conference conducted on April 4, 2007, it became apparent that the parents wanted a resolution meeting and mediation. The School District agreed to provide both. The Order entered on April 5, 2007, provided, in pertinent part:

> (1) The parties stipulated that the School Board will schedule a resolution meeting within seven days and give appropriate notice to the parties.
>
> (2) The parties stipulated that, in the event the resolution meeting does not resolve all issues, the parties will proceed to mediation. In an abundance of caution and to keep this case on as fast a track as possible, the parties agreed that mediation will be noticed immediately after the pre-hearing conference, but scheduled to actually occur after the resolution meeting date.
>
> (3) Any settlement of this cause shall be reported to the undersigned, immediately and in writing, filed with the Division.
>
> (4) Inability to settle this cause by mediation shall be reported to the undersigned, immediately and in writing.
>
> (5) Petitioner shall, before the resolution meeting actually occurs, send a letter to the School Board attorney signifying they are not represented by legal counsel.

(6) In the event Petitioner obtains legal counsel, that legal counsel shall immediately enter, serve, and file with the Division, a formal notice of appearance.
(7) The parties have mutually waived the statutory 30 days plus 45 days time frame for entry of a final order in this cause. However, after mediation, if notice is given that mediations has been unsuccessful, the parties agree to a second pre-hearing pursuant to the terms of the March 29, 2007, Amended Notice of Telephonic Pre-hearing Conference so as to further frame the issues and in order to schedule any necessary due process hearing at the earliest mutually available date(s).

(8) However, the issues for the due process hearing will, at a minimum, include determination of "Whether the School Board has provided the two benefits listed in the existing IEP as described in the request for due process hearing."

(9) The School Board acknowledges that the issue(s) may be expanded somewhat by the material filed by Petitioner overnight and that Petitioner's document may be treated as an amended request for due process hearing to the extent this forum has jurisdiction of the requests therein.

(10) However, until, and unless, an Order is entered setting forth with greater particularity additional issues in this proceeding, it is agreed that the School Board has the duty to go forward to prove up the contents of the current IEP and that the current IEP is being followed, but the burden of proof remains with the Petitioner to prove an absence of FAPE.

Also on April 5, 2007, the parents notified the secretary to the undersigned that they had not yet received written notice of the resolution meeting. The parents filed nothing in writing

concerning a resolution meeting or lack thereof. Because, by law, resolution meetings are not supposed to involve the undersigned, the undersigned assumed that the School District's written notice by mail of the resolution meeting simply had not had time to reach the parents.

On April 16, 2007, the School District filed a letter stating it now declined to participate in mediation.

Although mediation is still presumed to be an option for the parties until both parties have waived that right in writing, an Order Requiring Mutual Responses was entered on April 19, 2007. It provided in pertinent part as follows:

> 1. The parties shall confer and provide to the undersigned, in writing, filed with the Division, a list of at least five dates (with times) that they can participate in a telephonic pre-hearing conference. This submittal shall be filed not later than April 25, 2007, utilizing a fax machine if necessary.
>
> 2. With the same submittal, the parties shall state their respective estimates of the length of time necessary to try this cause and further list at least twelve individual dates or consecutive two-day periods when they can mutually be available for the final due process hearing.
>
> 3. Failure of the parties to timely submit mutually agreeable dates for the telephonic pre-hearing conference will result in that conference being scheduled at the earliest available date on the undersigned's docket.
>
> 4. Failure of the parties to timely submit mutually agreeable dates for the final due

> process hearing will result in the final due process hearing being scheduled in deference to the remainder of the undersigned's docket.

The School District provided a unilateral response, to the April 19, 2007, Order Requiring Mutual Responses, by letter on April 25, 2007. The parents provided no response.

On May 3, 2007, an Order Setting Pre-hearing Conference and Due Process Hearing was entered. It provided, in pertinent part:

> 1. A pre-hearing conference is hereby scheduled in this cause on May 10, 2007, at 11:00 a.m. (This is one of the dates the School District's attorney signified availability.) To initiate this conference, each party must call 1-888-808-6959, and when prompted enter the conference code number 4889675 followed by the # sign. The first party to call the number must not hang up even if no one else is yet on the line. As each party calls the number, he or she will be added to the line. Any party disconnected during the conference should call the number again to be added to the line.
>
> 2. The dates of June 4-5, 2007, are hereby reserved for the final due process hearing, subject to modification at the pre-hearing conference. (These are the earliest two consecutive days available on the undersigned's docket.)

On May 10, 2007, a telephonic pre-hearing conference was finally held. At that time, it became apparent that the School District had never scheduled a resolution meeting. There followed, on May 11, 2007, an Order refining the issues, for

pre-filing of materials by both parties and establishing due process hearing obligations upon the School District. On the same date, an Order requiring a resolution meeting with written notice by the School District was entered. On May 16, 2007, a Notice of Hearing for June 4-5, 2007, was entered.

The resolution meeting was not successful, as reported back by both parties. The parents were in attendance at the resolution meeting, but subsequently complained because the School District's notice for the resolution meeting had been made by telephone, instead of in writing. That complaint was moot when made and did not require an order.

On May 18, 2007, the School District moved to continue the commencement of the due process hearing for four hours from the time set for the hearing on June 4, 2007, because its counsel had prior hearings scheduled in circuit court on the morning of June 4, 2007. After oral argument by both parties in a telephonic conference on May 29, 2006, this motion was granted in a May 30, 2007, Order. During that telephonic conference, the parents had moved ore tenus to cease all evidence at 6:00 p.m. on June 4, 2007. Their oral motion also was granted in the May 30, 2007, Order.

By a letter filed May 30, 2007, the parents sought a 30-day continuance of the due process hearing due to the short time available to serve subpoenas.

Telephonic conferences were subsequently held on May 31, 2007, and June 4, 2007. On May 31, 2007, Petitioner was seeking a continuance in order to serve with subpoenas those witnesses the School District could not voluntarily produce for hearing on June 4-5, 2007, and two sets of dates were agreed-upon for the continued hearing date. Those dates were June 27-28, 2007, and July 16-17, 2007. Interim filings by the School District represented that the School District Attorney could not voluntarily produce, on either June 27-28, 2007, or on July 16-17, 2007, any of the witnesses listed by Petitioner or even the School Board's own witnesses. Petitioner was not willing to continue the due process hearing date beyond one of the dates previously agreed-upon, even though the School District volunteered to produce, on other specifically proposed dates, all the witnesses Petitioner had listed as Petitioner's witnesses. The parties finally agreed to hold the final due process hearing on June 27-28, 2007.

Thus, a form Order Granting Continuance and Rescheduling Hearing was entered on June 5, 2007, rescheduling the due process hearing for the agreed dates of June 27-28, 2007. Also on June 5, 2007, a case-specific Order Selecting Hearing Dates was entered, which Order memorialized the evolving positions assumed by the parties during the immediately preceding telephonic hearings and their final oral stipulation to dates

certain. The Order Selecting Hearing Dates further advised each party that they were individually liable for timely subpoenaing any witness that party sought to have testify on its behalf at the June 27-28, 2007, hearing; that the new situation might result in some persons being subpoenaed by both parties; that neither party could any longer rely on an opponent party to produce or subpoena anyone; that any failures of service or appearance would be addressed at the due process hearing as appropriate, pursuant to the applicable rules; and ordering the School District to provide Petitioner, within 24 hours, with the home addresses of potential witnesses Bill Delbrugge, Myra Middleton, Chris Pryor, Kim Halliday, and Sue Marier.

On June 7, 2007, the parents, who had adamantly opposed any change in hearing dates to accommodate schedules of School District employees or legal obligations of the School Board Attorney, filed a letter to the undersigned requesting a continuance, alleging that the School District had not timely complied with the Order requiring production of the names and addresses of Bill DelBrugge, Myra Middleton, Chris Pryor, Kim Halliday, and Sue Marier. This letter simultaneously gave notice that the parents would not be available for a telephone conference hearing on their letter/motion for a period of time. The School District could have just provided the ordered names and addresses at that point, but instead, on June 8, 2007, the

School District filed another letter to the undersigned opposing any continuance and claiming to have provided to the parents all witness names (but not all addresses) on June 7, 2007, and disavowing its prior oral agreement to voluntarily provide all witnesses it could, which agreement was, by then, moot. See supra. On June 11, 2007, the parents filed another letter to the School District's Attorney, raising mostly issues which were already moot. On June 13, 2007, the School District filed another letter to the parents stating that two witnesses the parents were concerned about would, in fact, be provided by the School District at the due process hearing. Although the letters to the undersigned were served on the opposing party each time and therefore did not constitute ex parte communications, it is hard to fathom why neither party ever filed a motion, and why neither party ever consulted the other party by telephone as contemplated by Florida Administrative Code Rule 28-106.204. It is even more puzzling that the parties felt the need to fill the Division's case file with their correspondence to each other. However, once again in an abundance of caution, the undersigned treated the parents' June 7, 2007, letter as a motion for continuance and motion to compel and accordingly entered a June 13, 2007, Order which denied the requested continuance and which yet again ordered the School District to provide the addresses of the same witnesses

it had now volunteered in writing to produce at hearing. This Order also reminded both parties that each of them was obligated to subpoena its own witnesses, since if the School District, for any reason, was unable to produce witnesses desired by the parents and the parents had not subpoenaed them, there would be no method of enforcing those witnesses' testimony at hearing.

The substantive due process hearing went forward on June 27, 2007, as scheduled. There were no further disputes about the appearance of any witnesses, and all evidence was completed in a single day.

The School District presented the oral testimony of Kim Halliday, Sue Marier, Donna Jaenicke, Chris Pryor, and Carla Cuthbertson, and had one composite exhibit (R-1) admitted in evidence.

Petitioner's parents, [redacted] and [redacted], presented the oral testimony of Bill Delbrugge, Shirley Stichter, and Anita Ocampo. Petitioner had one composite exhibit (P-1) and one other exhibit (P-2) admitted in evidence.

The parties stipulated to file proposed final orders within 15 days of the filing of the Transcript.

The Transcript was filed with the Division on July 10, 2007. Therefore, the last day agreed-upon for filing the parties' respective proposed orders was July 25, 2007, and any motion for an extension of time had to be filed before that date

and should have recited the position of the non-moving party. See Florida Administrative Code Rule 28-106.204.

On July 16, 2007, the School District Attorney filed a letter to the parents (not a motion, or even a letter, directed to the undersigned), proposing that the parties' respective proposed orders be filed on August 17, 2007, because he would be out of the country from August 1, 2007, to August 10, 2007, that entire period being after the agreed date for mutually filing the proposed orders. The letter contained no reason that the School District's proposal could not be timely filed on July 25, 2007.

Once again, in an abundance of caution, the undersigned caused her secretary to instruct the School District Attorney to arrange a telephonic conference so as to immediately determine the parents' position on the District's most recent letter/motion.

On July 23, 2007, the School District filed a Motion to Set Due Date, reciting this time that its attorney had another proposed order due on July 31, 2007, and that both attorneys in the office would be out of the country from July 25, 2007, to August 10, 2007.

Before a telephonic conference could be arranged, the parents filed a letter on July 23, 2007, to the School District

stating that they did not agree to extend the filing date for proposed orders and would file their proposal on July 27, 2007.

On July 24, 2007, the parents filed a “Motion to Keep the Respondents [sic] Original Requested and Agreed Due Date for Proposed Final Orders to be 15 Days After Receipt of Transcript.” The title of this document speaks for itself.

On July 25, 2007, the parents filed their Proposed Final Order. On July 26, 2007, the parents filed a letter stating that they would not be available for a telephone conference.

The School District's Motion to Set Due Date (motion for extension of time to file the School District's proposed final order) did not automatically extend the time for filing the School District's proposed final order. Even assuming, without any recitation to that effect in the School District’s pending Motion to Set Due Date, that the District had simultaneously made a motion for extension in its other case, the revised dates stated in the School District’s Motion in the instant case did not demonstrate good cause for an extension of time under the circumstances herein.

In light of the parents’ refusal to further extend the time frames herein, the undersigned cancelled the planned telephone conference call; considered all filings of both parties; and, on July 27, 2007, entered an Order Denying Extension, which denied

the School District's pending Motion to Set Due Date. The July 27, 2007, Order provided, in pertinent part:

> . . . To extend the School Board's time for filing its proposal would be contrary to the parties' agreement and the speedy resolution concepts of the laws and regulations this cause is proceeding under. It would also be prejudicial to the parents, in that it would have the effect of permitting the School Board to file a rebuttal to the parents' proposal.
>
> It is, therefore, ORDERED:
>
> (1) The School Board's Motion is Denied.
>
> (2) The aspirational date for entry of a Final Order herein is August 24, 2007.

On July 30, 2007, the School District Attorney filed yet another letter to the undersigned, wherein he instructed the parents to not send their Proposed Final Order to him and informed the undersigned that he would be filing a late proposed final order.

On August 20, 2007, the School District's Proposed Final Order was filed 25 days late, and contrary to the July 27, 2007, Order. Such a procedure is not contemplated by the rules. The School District's Proposed Final Order was unsolicited, unauthorized, and has not been considered.

FINDINGS OF FACT

1. [redacted] is a [redacted]-year old [redacted], born [redacted].

2. It is undisputed that [redacted] has microencephally, is a quadriplegic, suffers from spastic cerebral palsy, and is eligible for services, pursuant to IDEA.

3. Respondent is the school district wherein [redacted] and his parents reside and which is, therefore, charged with providing [redacted] with FAPE in the least restrictive environment (LRE).

4. A prior case arose between these parties in 2003, when [redacted] was promoted to high school. That case was [redacted] v. Flagler County School Board, DOAH Case No. 03-2862E, (Final Order entered September 24, 2003). On August 19, 2003, the Administrative Law Judge (ALJ) therein entered an Order which denied [redacted]'s request that, pending the outcome of that case, the School District would be ordered to keep [redacted] at [redacted] ([redacted]) rather than promote/move [redacted] to [redacted] School ([redacted]). [redacted]'s request/motion was denied, based on the ALJ's finding that the change in schools from ITS to [redacted] did not constitute a change in placement, because, among other continuing services at [redacted], [redacted] would continue to have a one-on-one teaching assistant as he had at ITS.

5. The parents have erroneously assumed that the foregoing, essentially interlocutory, "Stay Put Order" of August 19, 2003, meant that forever after [redacted] would be provided with a one-on-one teaching assistant, exclusive to [redacted], wherever [redacted] was physically located by the School District.

6. After a full due process hearing, the September 24, 2003, Final Order in the prior case kept [redacted] at [redacted] under [redacted] then-existing IEP.

7. Indeed, sequential IEPs have been devised for [redacted] and he has remained at [redacted] for the School Years (SY) of 2003-2004, 2004-2005, 2005-2006, and the first semester of 2006-2007, when [redacted] was transferred to [redacted] School. (See Finding of Fact 44.)

8. [redacted]'s parents are devoted, attentive, and generally knowledgeable of the IEP process. They have visited and observed [redacted] in each of [redacted] successive classrooms throughout [redacted] education. Until March 9, 2007, (see Finding of Fact 55), they attended and fully participated in all sequential IEP meetings to create [redacted]'s IEPs, which IEPs seem to have been drafted annually, each second semester of each SY. They have also approved and signed each final draft IEP during that period.

9. Neither parent testified at the hearing herein, but the thrust of the parents' examination of witnesses involved the issue of one-on-one attendants for [redacted], and their Proposed Final Order states that they have continued to believe, through each IEP meeting since 2003, that each of the intervening IEPs has provided for a single classroom attendant, regardless of formal job title, to be exclusively devoted to [redacted] In fact, exclusive one-on-one classroom attendants have not been assigned to [redacted] since at least SY 2004-2005.

10. Although the parents' Proposed Final Order claims that the School District never informed them of a change in attendant focus, the thrust of their March 14, 2007, due process complaint herein has been directed to the implementation of the August 24, 2006, IEP and the manner in which the March 9, 2007, IEP was created. There is generally a two-year limitation for challenging past alleged IDEA abuses.

11. At least one educator testified that she had never known any of [redacted]'s IEPs to be created in a single meeting. The thrust of this educator's and all other School District witnesses' testimony is that the parents have had an opportunity at every IEP meeting to know how in-class paraprofessional care, would be, and has been, provided to [redacted]

12. The parents' confusion, if it is confusion, could have arisen due to changing job titles and duties of such attendants over the years.

13. The instant case arises, in part, because the School District transferred [redacted] from [redacted] to [redacted] School between the first and second semesters of SY 2006-2007, while [redacted] was under the August 24, 2006, IEP.

14. Kim Halliday has been [redacted]'s teacher for SY 2004-2005, 2005-2006, and 2006-2007. Her ESE class is called a "Life Skills Class." When she came to [redacted] at the beginning of SY 2004-2005, she implemented the Life Center Career Education

Curriculum. This curriculum includes Transition and Community-Based Instruction (CBI). The testing system to measure improvement in this curriculum has been approved by the State of Florida Department of Education (DOE).

15. Ms. Halliday currently chairs the Flagler County Community Transition Team, which is a group of professionals and parents who assist in meeting disabled students' needs. Ms. Halliday has earned a Batchelor's Degree in Adaptive Physical Education and a Master's Degree in Impairments and Multiple Disabilities. She is currently a Doctoral Degree candidate in Education with a primary focus on Transition.

16. "Transition" is a way of moving students from the school environment into the real world upon high school graduation and involves preparing them for adult living, working, and spending leisure time in their community, with as much self-determination and independence as their disabilities permit.

17. "Community-based instruction" (CBI) involves students learning skills in the environment in which they will eventually be using them. It is "hands-on" learning. CBI content areas are functional for students and have a direct, immediate impact on them and their families. Each school district determines its solutions locally. Programs are highly individualized for each

student, based on each individual student's preferences and skills.

18. Ms. Halliday participated in drafting [redacted]'s August 24, 2006, IEP. She and all the other educators uniformly testified that this IEP has been implemented, including the provision of an appropriate attendant, transition services, and CBI.

19. The August 24, 2006, IEP provides, under "Special Factors Additional Information," that "Aide or monitor is required due to exceptionality and specific need of student." Under "Extended School Year," it provides ". . . Without ESY services, specially designed PE during the year, the equipment and aids provided, a teacher assistant, and special transportation, the severity of the student's disability is likely to prevent the student from receiving an educational program to best meet [redacted] needs." (Emphasis supplied)

20. In the same vein, the 2006 IEP states,

> Measurable Annual Goal
>
> 1. [redacted] will be an active participant in his classroom setting by knowing [redacted] daily schedule, being able to answer questions regarding timeframe of schedule, initiating requests to leave the room (bathroom, nurse etc.), expressing [redacted] needs throughout the school day without prompts.
>
> Title/Position of Person(s) Responsible
> ESE teacher
> Speech/Language Therapist
>
> Para-professional

Student

* * *

Short-Term Objectives or Benchmarks
Objective/Benchmark:
1-1 [redacted] will be responsible for a daily classroom task that [redacted] will initiate at a specific time by a set schedule with the assistance of [redacted] paraprofessional without the use of prompts.

* * *

Measurable Annual Goal
3- [redacted] will be given the opportunity to demonstrate [redacted] ability to communicate and function independently working towards transition from high school to adult living.
Title/Position of Person(s) Responsible
OT/PT/teacher/assistant Student

* * *

Objective Benchmark
3-1 When given a choice of 2 to 4 objects or pictures, [redacted] will be able to reach with [redacted] right arm to select, identify, or sequence a life skill task such as measuring cups, coins, cooking, tools, recipe, laundry with the goal of 85% or better response rate.

* * *

Evaluation: Therapist/teacher/assistant observation and support Student responses (Emphasis supplied.)

* * *

21. The parents sincerely believe that the foregoing August 24, 2006, IEP provisions require that a single attendant, by whatever job title, must be with, and totally devoted to, [redacted]

at all times. However, on their face, the foregoing provisions do not require that [redacted] be assigned a single “aide,” "monitor," “teacher aide,” “classroom aide",” "teacher assistant," "paraprofessional," “classroom assistant,” or "assistant" exclusive to [redacted]self during the regular school year.

22. Donna Jaenicke, currently IEP Staffing Specialist at [redacted] School, was [redacted]’s ESE teacher, or one of them, at [redacted] in SY 2003-2004. Shirley Stichter was one of the aides in her classroom. At that time, Ms. Stichter was assigned to help transition [redacted] from ITS to [redacted] in a one-on-one capacity. (See Findings of Fact 4 and 6.) Ms. Stichter testified that even then, she helped out among all the children in the classroom.

23. Ms. Jaenicke testified that the situation of a one-on-one aide exclusively for [redacted] was terminated sometime after the September 24, 2003, Final Order in the previous case.

24. Ms. Jaenicke guessed that the parents’ confusion could have arisen because the job title “classroom assistant” was used while [redacted] was at ITS in 2003; the title “individual aide” was employed in SY 2003-2004 at FPCHS; and “classroom aide” was employed in the August 31, 2005, IEP at [redacted]. Given this explanation; the August 31, 2005, IEP in evidence which actually uses the terms "teacher assistant," "assistant," and "paraprofessional;" and the terminology employed by the August 19, 2003, “Stay Put Order” (see Finding of Fact 4), the

evolving job titles could have been confusing, and it is not beyond belief that the parents simply misunderstood or assumed that [redacted] continued uninterruptedly to have assigned exclusively to [redacted] one aide up through [redacted] transfer to [redacted] in January 2007.

25. However, Sue Marier, the current IEP Staffing Specialist at [redacted], testified credibly, and without refutation, that the change whereby a classroom paraprofessional, regardless of which job title applied at the time, assisted each of the children in Ms. Halliday's classroom some of the time, was clearly explained to [redacted]'s parents when they signed-off on [redacted]'s 2005-2006 IEP.

26. There is no clear evidence that the parents were intentionally deceived at any time, that any IEP within the last two years has not been implemented or that a procedural due process error with prior IEPs occurred. Moreover, the parents' continuing sequential IEP involvement and frequent classroom visits provided every opportunity for them to understand the real situation, and to seek a timely IEP modification.

27. Ms. Halliday guessed that the parents may have extrapolated their erroneous concept from her willingness to accommodate their desire to have one aide they preferred regularly perform certain feeding or other functions for [redacted] when they had expressed a dislike for another aide, but all the paraprofessionals, by whatever job title they were known at a

given time, have interacted with all her students, including [redacted], on a variable basis for at least SY 2005-2006 and 2006-2007.

28. As early as SY 2004-2005, Ms. Halliday began to "adjust" how paraprofessionals were utilized in her classroom. As of SY 2004-2005, she had 15 students, four of whom had one-on-one paraprofessionals.

29. If one paraprofessional has only one student to watch out for, that paraprofessional tends to meet that single student's every need before the student can verbalize [redacted] need. This single paraprofessional's devotion robs the disabled student of independence and self-determination. If, as in [redacted]'s case, the disabled student cannot use [redacted] voice, which is the only physical tool [redacted] has left, [redacted] loses a lot of independence and self-determination. Throughout SY 2004-2005, 2005-2006, and 2006-2007, Ms. Halliday rotated students from learning station to learning station within her classroom and had them interact with all three paraprofessionals who were always present, as well as with speech therapists and other professionals who visited periodically. Her intent was to place a student where [redacted] would have a need that [redacted] would have to express orally/verbally or act on physically, and to teach [redacted] to interact with a variety of people, as [redacted], presumably, will

sometimes have to do when [redacted] leaves school and lives in the greater community.

30. [redacted] began using full sentences in SY 2004-2005, only after [redacted] exclusively devoted, one-on-one aide was absent one day.

31. Using the DOE-approved alternative assessment system that is geared to the Life Center Career Education Curriculum, Ms. Halliday assessed [redacted] as showing no personal growth in SY 2004-2005. She interpreted this lack of growth as being due, in part, to [redacted] having had [redacted] every need met by an aide exclusively devoted to [redacted]. Since the elimination of the exclusive aide concept, [redacted] has shown remarkable growth. (See Finding of Fact 52.)

32. Her first year, there were 15 students in Ms. Halliday's ESE classroom, including [redacted] Then, until recently, Ms. Halliday's classroom housed 11 ESE students, six in wheelchairs, including [redacted] Recently, two students graduated, so Ms. Halliday currently oversees nine students. Her classroom environment includes a total of three adults, plus herself, who are present at all times there are students present. This places the ratio of students to fully-functioning adults in the classroom at 11:4 or 9:4. That amounts to 2.75 students per adult or 2.25 students per adult at all times. At no time is any student, including [redacted], left entirely alone. Direct

instruction to students comes in only two ways: from the teacher to the individual student, or from the teacher to small groups of students. The paraprofessionals meet all [redacted]'s other needs, including re-enforcement of teaching techniques.

33. Shirley Stichter's testimony supports that of both Ms. Jaenicke and Ms. Halliday. Ms. Stichter has continuously worked, under several job titles, as a paraprofessional in Ms. Halliday's class since Ms. Halliday arrived in 2004. She testified that she was assigned to [redacted] exclusively in SY 2004-2005, although she helped all the children then, too. In SY 2005-2006, and thereafter, she considered herself a classroom aide assigned to assist all the children in Ms. Halliday's class.

34. Ms. Stichter also was asked whether the staffing of one paraprofessional to two-and-a-fraction children did not mean that all the children, particularly those in wheelchairs like [redacted], could not be evacuated or moved to safety in case of a lunatic gunman or a fire, and she replied that one paraprofessional can handle two wheelchairs.

35. The August 24, 2006, IEP provides, in pertinent part, for "CBI training on Monday and Wednesday in classroom from 9:30 to 11:30 a.m. Special Olympics community involvement on Tuesday from 9:30 to 11:30." It further provides, "[redacted]. will access and use community resources and services in the classroom

and the community 15 hours per week, such as Special Olympics, participation in quilts for the needy project, phone skills, and getting information from the newspaper."

36. The parents maintain that 15 hours per week has not been utilized for [redacted] "in the community," during SY 2006-2007. The parents cited a number of places in the August 24, 2006, IEP where they erroneously interpret the term "school and community" to mean "solely in the community at large."

37. For SY 2006-2007, Ms. Halliday created a portfolio for each child in her class. The portfolio addresses the goals each child has personally communicated to her. [redacted]'s expressed goals were to graduate from high school; live in [redacted] own home in Flagler Beach; ride horses; go bowling; and "hang out" with [redacted] friends. [redacted] wanted to take a CBI trip to several banks in Palm Coast; to participate on the Special Olympics Bowling Team; and to become an active member of the Council on Inclusion for All.

38. In fact, in SY 2006-2007, Ms. Halliday took [redacted]'s class to several banks. [redacted] went to the Special Olympics regional level bowling competition and won first place. The Council on Inclusion for all involves students from all classrooms with students who have disabilities, and [redacted] tries to participate in its activities inside and outside of school. The Council on Inclusion for All previously met at [redacted] and now meets at [redacted] School.

39. Ms. Halliday and all the educators who testified uniformly consider the school environment to be part of CBI. The educators uniformly testified that CBI, which includes getting ready to work in the outside community, can be accomplished, at least in part, on the school campus. Superintendent of Schools Bill Delbrugge pointed out that the School District is the largest employer in Flagler County, with food service, custodian service, media, and a variety of other employment positions available, and that even many regular students train for these or similar positions in the safer school environment rather than in commercial workplaces.

40. In the first part of the first semester of SY 2006-2007, while [redacted] was still at [redacted], [redacted]'s class took between seven and ten field trips into the community. They visited a number of grocery stores, a number of banks, a bowling alley, and something called "Princess Place."

41. Ms. Halliday credibly demonstrated that with daily group discussions of community situations, including the weather, and debriefing classroom discussions concerning what had been seen and done after community field trips; adaptive physical therapy; Special Olympics; and an activity called "Make It-Take It", the time utilized would be at least 15 hours per week. An example of the return de-briefings is that after visiting Publix, Winn-Dixie, and Wal-Mart on different field

trips, the whole class or small groups would discuss which was the best place to purchase peas. Choosing one's own food preferences and purchasing wisely are life skills that lead to independence.

42. [redacted] has never been involved with quilts, but the "quilts for the needy" notation in [redacted] August 24, 2006, IEP was intended only as an example of what was available.

43. Ms. Halliday conceded that, in the last part of the first semester of SY 2006-2007, many of the skills to which [redacted] was exposed were demonstrated only in the school community, not the community at large, due to a funding crunch which affected transportation into the community at large. Therefore, skills taught were locating and accessing restrooms, mailroom, attendance office, and other sites within the school facility and locating the bookkeeping room, interacting with the bookkeeper, and seeing what the bookkeeper was doing.

44. As of December 1, 2006, the School District reassigned Ms. Halliday's Life Skills class from [redacted] to [redacted] School, effective January 3, 2007. The move was intended to occur over the semester break, so that no student would suffer any disruption in [redacted] education.

45. After the physical move from [redacted] to [redacted], all IEP services and programs remained the same. Transportation was arranged to provide the same level of service that the Life

Skills students had been receiving at [redacted]. There were no changes in [redacted]'s August 24, 2006, IEP, except reassignment to a new school location.

46. [redacted] is a new school with a variety of instructional and extracurricular options, an up-to-date physical plant, and a staff that utilizes inclusion strategies to promote generalization of skills to assist students who have individual physical and academic challenges with their goals for transition to the community.

47. For a month or two after the transfer to [redacted], there still were no CBI field trips into the community at large, because Ms. Halliday was acclimating her students to their new environment via exploring the ESE classroom and campus as before (see Finding of Fact 43), and because for safety reasons, she was getting them to know where the stop signs and exits in the new school were located. However, the number of field trips into the community increased after two months to about two trips per week, including those places visited before and to European Village.

48. As with any move to a new construction, there were unforeseen and unintended difficulties at Matanzas. On [redacted]'s first day at [redacted], the primary restroom facilities qualified under the Americans With Disabilities Act, but were not appropriate for [redacted] to utilize independently, due to [redacted] size.

This was significant because independent toileting is one of [redacted]'s important personal goals and a goal of [redacted] IEP.

49. Ms. Halliday had the restroom assessed by an occupational therapist, a physical therapist, and [redacted]. Ms. Halliday and the occupational therapist came up with the idea of a reducer ring for the toilet seat. [redacted] came up with the idea for a special footstool to go under the user's feet, but there was a delay in implementation, so that the problem was not solved until the beginning of April 2007.

50. The parents have frequently volunteered ideas and services to Ms. Halliday and to [redacted] as a whole. However, on this occasion, a footstool and reducer ring were ordered with School District funds, which occasioned the delay, and Ms. Halliday did not accept [redacted] offer to immediately build a footstool.

51. On February 21, 2007, Ms. Halliday was called away from [redacted] campus to pick up one of her children who had become ill. While she was out of the classroom, only three paraprofessionals, and possibly ESE Speech Therapist Ms. Gross were present in the classroom. While Ms. Halliday was out, [redacted] soiled [redacted]. [redacted] School Nurse, Anita Ocampo, was summoned. Ms. Ocampo arrived in the classroom to find [redacted], on the adult-size changing table, attended by a paraprofessional. It is unclear whether [redacted] was entirely or partially undressed. Nurse Ocampo

took [redacted]'s temperature and found it to be very slightly elevated. She had no assistant to cover for her in the School Nurse's Office, and she had no changing table there. Also, [redacted] had no clean clothes available in [redacted] classroom. Nurse Ocampo did not take [redacted] to her office, but returned there alone to telephone [redacted]'s parents to come pick [redacted] up. This is common school procedure when a child has an elevated temperature and is presumed ill. While she returned to her office, Nurse Ocampo left [redacted] in the care of the three-to-four adults in his classroom. By the time [redacted] arrived at the Nurse's Office, [redacted] had been brought there. Considering that Nurse Ocampo did not have anyone to attend [redacted] in her office if she had been called out again to another classroom for another child, the decision she made to leave [redacted] under adult supervision in [redacted] classroom was the best practice under difficult circumstances and does not equate with the parents' perception that the school refused to treat [redacted]'s elevated temperature/illness in the Nurse's Office/clinic. It was not established that the nurse's choice unnecessarily exposed [redacted] to infection from other children, great danger without appropriate oversight by an aide or teacher, or unnecessary embarrassment in [redacted] classroom. This episode represented an unfortunate and embarrassing chain of events, but those events did not constitute an improper implementation of [redacted]'s August 24, 2006, IEP.

52. Ms. Halliday measured [redacted]'s growth in SY 2005-2006, using the DOE-approved Life Center Career Education Curriculum measurement system, as 62 percent. She tested [redacted] in May 2007, after the instant due process complaint was filed, and measured [redacted] growth as 72 percent from the beginning of SY 2006-2007, to the testing date.

53. Ms. Jaenicke testified that she sees growth in [redacted] since she had [redacted] as her ESE student. She believes that [redacted] could make [redacted] noticed then but it is good that [redacted] now can communicate with a wider variety of people. She believes that it should be a an independent living goal for [redacted] to get along with diminishing assistance from [redacted] aides and to have greater communication with more people.

54. The toileting problems prompted parental requests for IEP modification, and the parents attended, and fully participated in, one IEP meeting in January 2007, and one IEP meeting in February 2007, each with the usual staffing to create [redacted]'s SY 2007-2008 IEP. During each of these meetings, the parents were adamant that [redacted] needed an attendant/aide exclusive to [redacted]. They also had other requests. District personnel from multiple disciplines told them that [redacted] was making better progress without an exclusive attendant/aide.

55. After twice failing to develop an IEP, a third meeting was convened, and advance notice of the date, time, and place

was given to all concerned. In order to address all their concerns in a single session, the parents had requested that Dr. Myra Middleton, the School District's Director of Exceptional Education, be present for the third meeting. They also had requested that a school administrator attend. The School District designated Dr. Chris Pryor, [redacted] Principal, to attend. Except for Dr. Pryor, who received notice by radio immediately before the appointed time, all the School District participants blocked off two hours on their calendars for the meeting. The meeting was due to begin at 1:00 p.m. on March 9, 2007. The parents arrived 15 minutes early, at 12:45 p. m. While the parents and regular IEP personnel were waiting, Dr. Pryor radioed that he was delayed, and would be late, but he sent Mr. Seabolt, an assistant principal, ahead to the meeting. Mr. Seabolt arrived shortly thereafter at the meeting location. At 1:05 p.m., the parents left the meeting location, citing work conflicts and the absence of Middleton and Pryor as their reasons for leaving. Mr. Seabolt then left the meeting. Shortly afterwards, Dr. Middleton arrived. At 1:13 p.m. Dr. Pryor arrived. Due to the limits of the SY and IDEA, the remaining participants proceeded to complete the IEP with an implementation date of August 20, 2007.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has

jurisdiction over the parties and subject matter of this proceeding, pursuant to Section 1003.57(5) Florida Statutes, Florida Administrative Code Rule 6A-6.03311, and 20 U.S.C. Section 1401, et seq. The undersigned has final order authority in this proceeding.

57. In plain terms, the due process complaint asserts that (1) the School District never gave the parents written notice, or even oral notice, that [redacted] was no longer receiving one-on-one care exclusively from a single classroom paraprofessional, regardless of job title, and that such lack of exclusive one-on-one care denied FAPE; (2) that the School District has failed to provide the exclusive paraprofessional, and has thereby denied FAPE; (3) that the School District has failed to provide CBI in the community and has thereby denied FAPE; and (4) that the parents did not get to fully participate in the IEP that was drafted on March 9, 2007, for SY 2007-2008.

58. To prevail on their first three allegations, Petitioner must prove by a preponderance of the evidence that the School District's refusal to include in [redacted] August 24, 2006, IEP and in its implementation of that IEP, a one-on-one aide exclusive to [redacted] constitutes a denial of FAPE and that the implementation of CBI under the August 24, 2006, IEP constitutes a denial of FAPE. See Schaeffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 537 (2005).

59. The legal standard to be applied in determining whether a student has received FAPE is a two-pronged test, described by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982):

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

60. "[T]he intent of the [IDEA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." IDEA requires Respondent to ensure that Petitioner receives "some benefit" from [redacted] educational program. See Rowley, supra.

61. The U. S. Court of Appeals for the Eleventh Circuit has carefully followed the U.S. Supreme Court's analysis of the FAPE standard in requiring local school systems to provide "some" educational benefit to ESE students. See Devine v. Indian River County School Board, 249 F.3d 1289 (11th Cir. 2001); J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991); Drew P. v. Clarke County School District, 877 F.2d 927 (11th Cir. 1989) In Drew P., the court stated, "[t]he state

must provide the child only with 'a basic floor of opportunity.'" Id. at 930.

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

> Federal cases have clarified what 'reasonably calculated to enable the child to receive educational benefits' means. Educational benefits under IDEA must be more than trivial or de minimis. *J.S.K. v. Hendry County 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. 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). . . .

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

> [A]n . . . IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only

> be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit."

64. There is unrefuted credible evidence that the parents did receive clear information in the 2005 IEP process that a one-on-one aide, by whatever name, was not being provided thereafter. The evidence as a whole constitutes a preponderance of the evidence that the parents were informed of this as early as the middle of SY 2004-2005, when Ms. Halliday began to phase out all exclusivity of aides in favor of exposing each student to all the aides. Any aide/assistant/attendant changes before that date cannot be considered under the March 14, 2007, due process complaint herein.

65. The absence of an aide, by any job title, who is wholly devoted to [redacted] was established. However, the overwhelming evidence is that Petitioner received adequate support services via the omnipresent one teacher and three aides who rotated among students in the classroom. Petitioner presented no evidence to show that [redacted] was in any danger, did not receive meaningful educational benefit, or regressed as a result of the absence of a personal one-on-one attendant. The

School District presented standardized testing results and two educators' observations that [redacted] is progressing well without an exclusively dedicated personal aide. Standardized tests showed that Petitioner did 62 percent better in the first year he was without an exclusive personal aide and another 10 percent better in the second year [redacted] was without a personal aide, than [redacted] had the first year [redacted] was without one. Educators opined that [redacted] should be expanding [redacted] interaction with a number of people; that [redacted] is affirmatively expanding [redacted] interaction with more people as a result of not having an exclusive personal aide; and that an exclusive aide might stunt [redacted] progress in this regard. It is conceivable that one exclusive aide would not represent LRE.

66. All educators also were uniform in their opinion that CBI can be taught on campus, as well as in the community at large. There have been both on- and off-campus activities this year. The parents are quite right that some time has been lost from physically doing some activities in the community at large, but with the interactive de-briefings, it is de minimus, and the on-campus orientation for careers and safety was a reasonable substitute. Moreover, the school "community" provided career orientation that equated with CBI standards most of the time. [redacted] has been enthusiastic, involved, and successful in [redacted] CBI endeavors. [redacted] is showing improvement in all of [redacted] testing and

observation. The CBI problems experienced in SY 2006-2007 do not amount to a denial of FAPE.

67. The fourth issue raised in the due process complaint is that the parents were prevented from having any meaningful involvement in the March 9, 2007, IEP. If so, it was their own doing, because they would not wait 15-20 minutes until all the staff members they had asked to attend could arrive.

68. Parents, however well-motivated, do not have a right to dictate educational methodology or to compel a School District to adopt their recommendations or employ their methodologies. See Lachman v. Illinois Bd. Of Education, 852 F.2d 290 (7th Cir. 1988) and Deal v. Hamilton County Department of Education, 2003 WL 1957409*4. Herein, the parents' refusal to remain longer than 15-20 minutes for a third IEP meeting was unreasonable, and cannot be grounds, without more, to invalidate the resultant IEP.

69. Technical deviations without substantive impact on FAPE does not invalidate an IEP. See Dong ex rel Dong v. Board of Educ., 197 F.3d 793 (6th Cir. 1999). A procedurally defective IEP does not automatically entitle a party to relief. School Board v. K. C. 285 F.3d 977 (11th Cir. 2002). Moreover, Petitioner has not demonstrated that the IEP created on March 9, 2007, was invalid in any sense. "The [parents'] right to provide meaningful imput [in the development of the IEP] is

simply not the right to dictate an outcome and obviously cannot be measured by such." White v. Ascension Parish Church School Bd., 343 F.3d 373 (U.S. App. 2003).

70. Petitioner remains free at any time to formally seek a modification of the March 9, 2007, IEP.

ORDERED

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

ORDERED that the relief sought by Petitioner is denied.

DONE AND ORDERED this 24th day of August, 2007, in Tallahassee, Leon County, Florida.

S

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of August, 2007.

COPIES FURNISHED:

[redacted]
(Address of Record)

Sidney M. Nowell, Esquire

Nowell & Associates, P.A.
1100 East Moody Boulevard
Post Office Box 819
Bunnell, Florida 32110

Dr. Myra B. Middleton
Director of Exceptional Student Education
Flagler County School District
Post Office Box 755
Bunnell, Florida 32110

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.