

St. Johns County School District
No. 06-5136E
Initiated by: Parent
Hearing Officer: Suzanne F. Hood
Date of Final Order: August 28, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 06-5136E
)
ST. JOHNS COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on May 15-17, 2007, in St. Augustine, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Warren K. Anderson, Jr., Esquire
Anderson, Howell and Ravis, P.A.
2029 North Third Street
Jacksonville Beach, Florida 32250-7429

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

STATEMENT OF THE ISSUES

The issues are whether Respondent failed to offer Petitioner a free appropriate public education (FAPE), and if not, whether Petitioner is entitled to reimbursement for costs related to ■■■■ alleged intensive one-on-one home-based special education and other professional therapeutic and assessment services.

PRELIMINARY STATEMENT

On December 13, 2006, Petitioner ■■■■ (Petitioner) filed a request for a due process hearing with Respondent St. John's County School Board (Respondent). The request asserted that Respondent had failed to offer Petitioner FAPE in the following ways: (a) Respondent did not follow the correct procedure in scheduling a meeting to develop an individual education plan (IEP) for the 2005/2006 school year; (b) Respondent failed to conduct a functional behavior assessment (FBA) of Petitioner, an autistic child who displays significant behaviors that interfere with learning; (c) Respondent failed to provide Petitioner's parents with an meaningful opportunity to participate in the IEP development process; (d) Respondent failed to develop IEP goals that were sufficiently challenging and objectively measurable; (e) Respondent failed to specify the level of prompts, as to type and frequency, that are necessary for Petitioner to achieve the IEP's goals and objectives; (f) Respondent failed to accurately assess Petitioner's present levels of performance in

all domains; (g) Respondent failed to develop a transition plan for Petitioner's use in moving to the classroom without significant loss of skills; (h) Respondent failed to include adequate reading support in the IEP; (i) Respondent failed to consider placing Petitioner in the autistic program at [REDACTED] School, predetermining Petitioner's placement in a third-grade autistic class at [REDACTED]; (j) Respondent arbitrarily denied Petitioner's request for extended day services; and (k) Respondent failed to include research-based methods of teaching in Petitioner's IEP.

On December 18, 2006, Respondent referred Petitioner's due process hearing request to the Division of Administrative Hearings. Administrative Law Judge P. Michael Ruff was assigned to hear the case.

On December 19, 2006, Judge Ruff conducted a telephone conference with the parties. During the conference, the parties agreed to advise Judge Ruff in writing by December 27, 2006, whether they intended to proceed with a resolution meeting or mediation and to provide mutually convenient hearing dates.

In a letter dated December 28, 2006, Respondent requested an extension of time to file a response to the complaint. Judge Ruff issued an order requiring Respondent to file its response no later than January 12, 2007.

In a letter dated January 12, 2007, Respondent provided notice of the parties' mutually agreeable hearing dates. The letter also advised Judge Ruff that the parties agreed to extend the time for issuance of a final order.

On January 19, 2007, Judge Ruff issued a Notice of Hearing. Pursuant to the agreement of the parties, the notice scheduled the hearing for March 6, 2007.

On February 20, 2007, Petitioner filed an unopposed Motion for Continuance. On March 1, 2007, Judge Ruff granted the motion and rescheduled the hearing for May 15-18, 2007.

Shortly before the hearing, the undersigned was designated as the Administrative Law Judge to hear this case.

During the hearing, Petitioner presented the testimony of the following: (a) Petitioner's parents, [REDACTED]; (b) Valerie Galvin, Petitioner's lead behavior therapist; (c) Michael Sisbarro, Ph.D., licensed school psychologist; (d) Bob Ryan, certified behavior analyst; (e) Laura Sanders, certified behavior analyst and program director at Little Stars Center, Inc.; (f) Lisa Bell, Respondent's Director for Exceptional Student Education (ESE); (g) Wendy Resnich/Schoenfield, Respondent's ESE Program Coordinator; and (d) Tonya Wells, Respondent's ESE Staffing Specialist. Petitioner offered Petitioner's Exhibit Nos. P1 through P33, which were accepted as evidence.

Respondent presented the testimony of the following witnesses: (a) Kristine Musseau, Respondent's ESE teacher; (b) Patrick McGreevy, Ph.D., a certified behavior analyst; and (c) Christine Chancey, Respondent's Senior ESE Director. Respondent offered Respondent's Exhibit Nos. R1 and R2.

On June 13, 2007, the parties filed a Joint Motion for Extension of Time to File Proposed Orders. The motion requested that proposed orders be due on July 31, 2007. The undersigned granted the motion in a June 13, 2007, order, stating that this Final Order would issue on or before August 31, 2007.

The four-volume Transcript was filed on July 19, 2007.

The parties filed their Proposed Final Orders on July 31, 2007.

FINDINGS OF FACT

1. Petitioner was born on [REDACTED], and has lived with his parents, [REDACTED] at all times material to this case. At the time of the hearing, Petitioner was [REDACTED] old.

2. Petitioner is diagnosed with severe autism spectrum disorder. Petitioner also has mild cerebral palsy and a seizure disorder. [REDACTED] has special dietary restrictions. It is undisputed that Petitioner is eligible for ESE services.

3. Respondent's multidisciplinary team report dated April 5, 2000, indicates that Petitioner was non-verbal. The report states that Petitioner's IQ was less than 50 on the

Bayley Scales of Infant Development. Among other things, the report recommended a structured preschool program for autistic learners.

4. In a report dated April 2, 2001, Rebecca Davenport, an occupational therapist, provided Respondent with a review of Petitioner's functional status and [REDACTED] sensory and developmental needs.

5. In June 2001, First Coast Therapy Group, Inc., performed a psycho-educational evaluation of Petitioner. A report dated June 18, 2001, indicated that Petitioner required speech and language therapy, occupational therapy, physical therapy, and a behavioral therapist aide in the classroom. The report recommended that Petitioner have a therapist who was experienced in the language development of autistic children.

6. A report from Thera-peds of Jacksonville, Inc., dated June 21, 2001, indicated that Petitioner needed therapy in the areas of occupational and speech therapy.

7. During the 2001-2002 school year, Petitioner was enrolled in Respondent's early intervention program. Petitioner was four-years old at that time. [REDACTED] received ESE services pursuant to an IEP. The IEP stated that Petitioner had "autism and language impaired" exceptionalities.

8. When Petitioner entered school in 2001, he communicated by using pictures and sign language. Petitioner's ESE teacher

did not recognize sign language and did not use the picture icons. Instead, she taught Petitioner to touch [REDACTED]self on the head when [REDACTED] wanted something. Petitioner's parents were alarmed when Petitioner began hitting [REDACTED] on the head at home.

9. By March 2002, Petitioner's parents realized that [REDACTED] had significantly regressed in [REDACTED] behavior and [REDACTED] ability to learn at school and home. [REDACTED] completely lost [REDACTED] ability to sign and began fecal smearing. The latter problem created such a crisis in the home that Petitioner's parents called in a state crisis intervention team and considered whether Petitioner might have to be institutionalized.

10. The most persuasive evidence indicates that Respondent's failure to provide Petitioner with FAPE during the 2001/2002 school year, was at least in part responsible for Petitioner's severe regression. On March 21, 2002, Petitioner's parents unilaterally withdrew [REDACTED] from school, indicating that they were going to home school [REDACTED]. However, Petitioner's parents never enrolled [REDACTED] in Respondent's home school program. Instead, they focused on getting Petitioner's behavior under control.

11. Once the foregoing crisis was under control, Petitioner's parents arranged what they believed was a home-based special education program, tailored to Petitioner's needs. The parents hired various professionals and therapists to

provide Petitioner services. They paid for a FBA and the development of a behavior intervention plan (BIP).

12. In order to learn, Petitioner first has to have matters presented to ■■■ repetitiously, in the same order and the exact same way, with a reward system to affirm ■■■ behavior. Petitioner learns in chains and with hand-over-hand prompting.

13. Task analysis is necessary to break down the steps of a task into micro-steps. Once Petitioner appears to have "mastered" a skill, the skill must be maintained over time by presenting it in ever-increasing time spans and using a data-driven system to track continued "mastery."

14. Petitioner's parents employed a lead behavior therapist to work with ■■■ at home during regular school hours. They also employed one or two support therapists to work with ■■■ in the afternoons and on weekends. All of these therapists were generally monitored by a certified behavior analyst. They were not licensed or certified in any relevant field.

15. In 2003, Petitioner's daily schedule included toileting every 15 minutes with times to bathe, dress, eat, make ■■■ bed, work (using puzzles and toys), and play. Petitioner used a picture exchange system and carried a communication book with ■■■ all day.

16. Petitioner has substantial problems knowing how to generalize ■■■ skills. For example, ■■■ may learn to put a

puzzle together on a desk, but when the puzzle is moved the floor, ■■■ appears to lose the skill.

17. Petitioner also has great difficulty with transitions from one therapist to another. When a new therapist is hired to replace a familiar therapist, Petitioner's skills regress. The regression occurs even though the old and new therapists work together for weeks to ensure as smooth a transition as possible.

18. In the fall of 2004, Petitioner's lead behavior therapist changed two times, resulting in the employment of Dawn Mancuso. Ms. Mancuso had a Bachelor of Science degree in Psychology from the University of North Florida. Ms. Mancuso had experience in utilizing principles of Applied Behavior Analysis (ABA) and some experience in implementing a behavior plan.

19. Petitioner lost some skills during the transition from one lead therapist to another, but began to improve after receiving and learning to use a Chat PC. The Chat PC is a small portable touch-screen computer that can be individually programmed to sound out words for pictures.

20. From March 2002 to April 2005, Petitioner's parents and Respondent had no contact with each other. Respondent made no effort to perform a triennial evaluation in the 2004/2005 school year because Petitioner was not enrolled in public school.

21. Amber Wilson from ABC Learning Solutions, Inc. was Petitioner's private certified behavior analyst in 2005. Ms. Wilson developed a BIP dated April 27, 2005. She directed Petitioner's home therapists to use the Assessment of Basic Language and Learning Skills (ABLBS) tracking system to track data. She monitored their work to ensure correct implementation of the BIP and ABLBS program.

22. Ms. Wilson's BIP included interventions to correct Petitioner's stereotypic behaviors such as hand flapping, head swaying, and verbal stimulation. She also included interventions to address [REDACTED] aggressive behaviors such as pinching, squeezing, slapping, nail digging, and pushing.

23. The ABLBS curriculum and tracking system covers the following areas: cooperation and reinforcement effectiveness; visual performance; receptive language; imitation; vocal imitation; requests; labeling; intra-verbals; spontaneous vocalizations; syntax and grammar; play and leisure; social interaction; group instruction; classroom routines; generalized responding; reading; math; writing; spelling; dressing; eating; grooming, toileting, gross motor; and fine motor.

24. Petitioner's parents sought to enroll Petitioner in Respondent's ESE program in April 2005. On April 14, 2005, Petitioner's parents, [REDACTED] attorney, and [REDACTED] lead therapist met

with Lisa Bell (Respondent's ESE Director) and Wendy Resnich/Schoenfield (Respondent's ESE Program Coordinator).

25. During the meeting, Petitioner's parents reviewed Petitioner's history. They explained [REDACTED] needs for known providers and a good transition plan. They explained that Petitioner has sensory integration problems and therefore needs one-on-one instruction to keep [REDACTED] attention.

26. Petitioner's parents volunteered to provide Respondent with copies of all current assessments. They inquired whether Respondent needed to perform additional evaluations and whether Petitioner could attend summer school.

27. Respondent's staff said that it was impossible for Petitioner to attend summer school, which lasted through the month of June, because Respondent's personnel was preparing for summer break and there was not enough time to develop an IEP. Respondent's staff requested copies of current assessments and stated Respondent would let Petitioner's parents know if further assessments were required.

28. Regarding Petitioner's placement, Respondent said that Petitioner's home school zone, [REDACTED], had a class for autistic students. They said a second teacher was being trained to work with autistic students at [REDACTED].

29. Petitioner's parents requested an IEP for the fall term. Respondent's staff scheduled that meeting for August 3,

2005, immediately prior to the first day of the 2005/2006 school term.

30. After the April 2005 meeting, [REDACTED] faxed Ms. Bell the BIP and assessments showing Petitioner's present level of performance. On June 17, 2005, [REDACTED] re-faxed the documents at the request of Ms. Bell.

31. Respondent never sent Petitioner's parents a written invitation to the August 3, 2005, IEP meeting. The day before the meeting, Respondent informed Petitioner's parents that the meeting was cancelled because some of Respondent's IEP team members had a "scheduling conflict". Respondent advised Petitioner's parents that the meeting had been rescheduled for August 16, 2005, approximately 11 days after school started.

32. From September 2004 through August 2005, Petitioner's private occupational therapist was Nancy Marin. On or about August 12, 2005, Ms. Marin prepared an occupational therapy update. The report reviews Petitioner progress and makes the following recommendation: (a) a school-based program that will accommodate Petitioner's needs; (b) a classroom routine with a one-on-one known provider who is familiar with Petitioner's sensory needs; (c) consistent sensory strategies at home and school in a small quiet environment with a familiar assistant; and (d) weekly occupational therapy to address [REDACTED] sound and vision sensory needs.

33. Respondent did not send Petitioner's parents a written invitation to the August 16, 2005, IEP meeting. They signed the written invitation after the meeting commenced. Prior to the meeting, Petitioner's parents did not know who would represent Respondent. Petitioner's parents were disappointed to learn that neither Ms. Bell nor Christy Chancy (Respondent's Senior Director of ESE Services) would participate in the meeting.

34. At the meeting, [REDACTED] read a document that summarized Petitioner's history. Ms. Resnich responded that regardless of the statement by [REDACTED], Respondent needed to get Petitioner in the classroom in order to assess [REDACTED]. Respondent's staff would not consider providing Petitioner one-on-one instruction until Petitioner was enrolled in school.

35. Respondent's staff was concerned that a dedicated aide would deprive Petitioner of an education in the least restrictive environment (LRE). The staff was also concerned that all parents wanted a one-on-one aide for their autistic children.

36. As to a transition plan, Petitioner's parents suggested one of three alternatives: (a) Ms. Mancuso could attend school with Petitioner and "pass the baton" to Respondent's employee, then fade out; (b) Respondent could hire Ms. Mancuso to stay with Petitioner; and (c) Respondent could

send its employee to Petitioner's home, where Ms. Mancuso would "pass the baton".

37. Respondent's staff did not accept any of the above referenced suggestions. They said Ms. Mancuso could not attend class with Petitioner unless she was an unpaid volunteer under Respondent's control or unless Respondent hired her as the most qualified applicant after a competitive hiring process. The later result could not be guaranteed.

38. Respondent's staff stated that [REDACTED] could attend class with Petitioner to facilitate the transition. [REDACTED] responded that [REDACTED] was not available because [REDACTED] home-schools three of [REDACTED] other four children. Respondent's staff did not agree to have the district's staff to spend time at Petitioner's home.

39. Once again Respondent's staff advised that all parents wanted their private providers to work directly or in tandem with school personnel. Respondent's staff seemed to be more concerned with Respondent's policy related to risk management than the necessary accommodations to provide Petitioner FAPE.

40. Before the end of the August 16, 2005, IEP meeting, the team discussed the following: (a) the need to purchase a communication device for Petitioner; (b) the parents' request to draft goals and objectives for inclusion in the IEP; (c) Petitioner's placement at [REDACTED] versus [REDACTED]; and (d) the workshop

training of Respondent's ESE teachers in the use of the ABLLS program.

41. The August 16, 2005, meeting adjourned with no discussion about specific individual goals and objectives. The IEP team agreed to meet again on August 30, 2005.

42. On August 30, 2005, Petitioner's parents and Respondent's staff brought suggested goals and objectives in draft form. Respondent borrowed the parents' draft to type them into a unified document. ■■■ complained that some of the goals and objectives were not sufficiently challenging and that Respondent had simply taken them from 2001 IEP.

43. The August 30, 2005, IEP draft was not perfect. However, there is no persuasive evidence that any of the goals and objectives were inappropriate based on the information available at that time, including Petitioner's need for repetition, maintenance, and help with generalization of skills. The IEP teams gave due consideration to the parents' suggestions.

44. The August 30, 2005, meeting did not result in a completed IEP. Therefore, the parties agreed to meet again on September 8, 2005.

45. On September 8, 2005, the IEP team discussed ■■■ request for 50 per cent of Petitioner's academics to be presented on a computer using a mouse and/or a touch screen with

100 per cent accuracy. ■ wanted Petitioner to have a Chat PC with an expanded vocabulary of picture/words that he could use to make sentences.

46. The IEP team agreed that Petitioner needed the Chat PC and the computer. Respondent's staff properly determined that the IEP goals and objectives did not have to be as detailed as requested by ■. It was unnecessary to describe the percent of accuracy that Petitioner would achieve on each skill using the computer as opposed to some other method of instruction.

47. The parties could not agree that the IEP was complete at the end of the September 8, 2005, meeting. They agreed to meet again on September 19, 2005. ■ requested that Melissa Glendening, Respondent's head of assistive technology, be invited to attend the next meeting. However, the September 19, 2005, meeting was cancelled and rescheduled for October 6, 2005, due to an emergency in Petitioner's family.

48. After the September 8, 2005, IEP meeting, ■ visited the autistic classrooms at ■. ■ concluded that Petitioner would be better placed in a kindergarten class at ■ as opposed to a third grade class at ■.

49. ■ also visited with Respondent's staff person who would be responsible for programming Petitioner's touch screen computer. ■ was not convinced that the person would be competent to perform the task.

50. On or about September 11, 2006, Stacy Haine, a private certified behavior analyst, prepared an individualized program for Petitioner's behavioral challenges. The plan states that its purpose is twofold: (a) to increase Petitioner's independence and independent toileting; and (b) to decrease Petitioner's aggression and non-compliance.

51. Ms. Haine's plan states as follows: (a) Petitioner needs constant supervision because [REDACTED] is totally unaware of dangerous or unsafe items; (b) Petitioner loses [REDACTED] skills or steps within skills when prompts and cues are faded or have ceased.

52. In October 2005, Petitioner's lead therapist, Ms. Mancuso, and the support therapist, Nicole Stein, gave notice that they would be leaving the employment of Petitioner's parents.

53. Before the October 6, 2005, IEP meeting, Tanya Wells, Respondent's staffing specialist, contacted [REDACTED]. Ms. Wells said she would send [REDACTED] copies of the minutes for previous meetings and copies of the audiotapes as requested. About 30 minutes later, Ms. Wells called [REDACTED] again to report that the audiotapes were blank. The parties agreed to use [REDACTED] audiotapes to prepare transcripts of the previous meetings.

54. Petitioner's parents did not receive a written invitation prior to the October 6, 2005, IEP meeting. The

invitation they signed at the meeting listed Ms. Glendening as having been invited.

55. Ms. Glendening did not attend any of Petitioner's IEP meetings. Her attendance was not necessary given the level of assistive technology experience of other team members. In any event, Respondent's staff was not denying Petitioner the opportunity to use assistive technology to implement [REDACTED] IEP.

56. During the October 6, 2005, IEP meeting, [REDACTED] requested that Petitioner's education program begin preparing him now for a standard diploma. [REDACTED] wanted to ensure that Petitioner did not miss any skills that would give [REDACTED] that opportunity. Accordingly, [REDACTED] wanted Petitioner placed in a kindergarten class instead of a third grade class. [REDACTED] wanted Florida's Sunshine State Standards for kindergarten included in the IEP.

57. The IEP team explained that Petitioner was to be placed in the [REDACTED] third grade autism class. [REDACTED] included students close to Petitioner's age and performance level. [REDACTED] would receive instruction in that class as specified by his IEP. There is no persuasive evidence to show that Petitioner would not receive FAPE in the third-grade class at [REDACTED].

58. The Sunshine State Standards for kindergarten did not have to be specifically included in Petitioner's IEP. Petitioner cannot progress academically until [REDACTED] masters those standards. In the mean time, Petitioner's IEP has to be

developed using [REDACTED] present levels of performance. It was sufficient for the IEP to include the parents' concern for Petitioner to prepare for integration into the general education curriculum and to ultimately earn a standard diploma.

59. [REDACTED] requested that Respondent provide Petitioner with noise-reduction headsets. During the hearing, Respondent's ESE teacher agreed with this suggestion and admitted that it should have been written into the IEP.

60. After the October 6, 2005, IEP meeting, Ms. Chancey wrote Petitioner's parents a letter dated October 27, 2005. The letter advised Petitioner's parents as follows: (a) their request for a one-on-one classroom assistant is not possible until the IEP team determines that Petitioner requires such assistance; (b) a one-on-one assistant would have to be hired through an advertised position; (c) all school employees must undergo a complete background check; and (d) the IEP team will consider Petitioner's age and [REDACTED] parents' request when determining Petitioner's placement.

61. The final IEP meeting was on November 16, 2005. When the meeting commenced, Ms. Bell announced that if the IEP was not completed that day, Respondent would request "mediation".

62. [REDACTED] presented the team with a letter dated September 8, 2005, from Petitioner's pediatrician, Julie A. Buckley, M.D. The letter states that Petitioner requires a one-on-one aide in

a classroom setting; otherwise, Petitioner would engage in activities such as drinking water from a toilet or consuming non-food items.

63. [REDACTED] also provided the team with some updated present levels of performance for some of the IEP's goals. [REDACTED] asserted that Petitioner had already mastered many of the IEP goals and objectives. She complained that the goals and objectives were not sufficiently challenging.

64. [REDACTED] gave Respondent's staff a written request for Petitioner to attend school at Webster Elementary.

65. [REDACTED] gave Respondent's staff a copy of a proposed IEP based on the ABLLS program. The team proceeded to complete the IEP, especially in the curriculum domain. Ms. Bell and another team member unintentionally turned their back to [REDACTED] and the rest of the IEP team as they typed the final IEP. Despite this one incident, [REDACTED] had adequate opportunity and took advantage of that opportunity to participate in the IEP development process from the beginning to the end.

66. Before the meeting concluded, Ms. Bell advised [REDACTED] that Petitioner could not attend Webster Elementary because [REDACTED], Petitioner's home school, was an appropriate placement for Petitioner. There is no persuasive evidence to the contrary. [REDACTED] signed the IEP, stating that she did not accept it.

67. In November 2005, after Ms. Mancuso left her job as Petitioner's lead behavior therapist, Petitioner's parents hired Valarie Galvin to work under Petitioner's certified behavior analyst, Ms. Wilson. Ms. Gavin identifies herself as a behavior therapist. In addition to working with Petitioner at home on the ABLLS program, Ms. Gavin takes Petitioner to all of [REDACTED] outside therapies and appointments and trains the support therapists. Mrs. Gavin does not have a post-secondary degree or any licenses or certifications.

68. One of Ms. Gavin's responsibilities is to escort Petitioner to the [REDACTED]. The school is operated by Laura Sanders, a board-certified behavior analyst. Ms. Sanders with the assistance of Ms. Gavin has worked to prepare Petitioner for transition to a school environment. They have not completed a transition even though they have used a pairing method for weeks.

69. Ms. Bell sent Petitioner's parents a letter dated December 7, 2005. The letter stated that Respondent would not place Petitioner at [REDACTED] because the autistic program at [REDACTED] was appropriate for Petitioner. The letter advised [REDACTED] that Respondent had purchased a Chat PC for Petitioner. The letter explained that Respondent had advertised to hire a second paraprofessional for Petitioner's proposed classroom by January

3, 2006. Respondent could not promise the person hired would be a familiar provider for Petitioner.

70. Regarding Petitioner's transition from home to school, the December 7, 2005, letter set forth the following options: (a) Petitioner could attend a shortened school day or week; (b) Petitioner's proposed ESE teacher and occupational therapist would visit Petitioner's home one time prior to ■■■ starting school; and (c) Petitioner's parents could choose a combination of these alternatives. The letter shows that Respondent continued to believe Petitioner would enroll in school.

71. In a letter dated December 15, 2005, from ■■■ to Respondent, ■■■ agreed to arrange a time for Respondent's staff to visit Petitioner's home. ■■■ acknowledged that the visit could take place after the holidays, in January 2006, if necessary.

72. In a letter dated January 6, 2006, ■■■ informed Respondent that ■■■ is looking forward to a visit by Respondent's staff. ■■■ suggests some dates for the visit. However, ■■■ notes that a ten-minute visit with three strange women would be difficult for Petitioner. ■■■ stated that a one-hour home visit would be even more traumatic for ■■■.

73. The planned visit by Respondent's staff was not a reasonable "transition plan" and would not have been a positive experience for Petitioner. Additionally, attending school for

shortened days or on a part-time basis, without a one-on-one known provider, more likely than not, would result in severe regression that would further delay [REDACTED] education.

74. A letter dated January 20, 2006 from Ms. Bell to Petitioner's parents refused [REDACTED] request for multiple visits to Petitioner's home. Ms. Bell stated that Respondent stood by its previous offer to ease Petitioner's transition.

75. [REDACTED] sent Respondent a letter dated May 2, 2006. The letter states that they had not enrolled Petitioner in school because they did not believe [REDACTED] would receive an appropriate or adequate education. They complained about the placement at [REDACTED] and the lack of adequate transition support. They alleged for the first time that Respondent owes them reimbursement for the private programs and services provided to Petitioner at the family's expense.

76. Ms. Bell sent [REDACTED] a letter dated May 5, 2006. The letter purports to address [REDACTED] concerns. It states that Respondent has purchased a Chat PC, added a teacher and paraprofessional to decrease class size in the autistic program, advertised to hire another paraprofessional to provide extra support in Petitioner's classroom, and provided an adequate IEP and transition plan. Ms. Bell's asserts in the letter that Respondent refused to reimburse Petitioner's parents for any

expenses because an appropriate program is available to [REDACTED] at [REDACTED].

77. Michael A. Sisbarro, Ph.D., is a licensed school psychologist with a private practice after years of working with various school districts. Petitioner's parents requested Dr. Sisbarro to conduct a psycho-educational evaluation of Petitioner. Dr. Sisbarro began the evaluation in October 2005 and completed it in December 2005.

78. Dr. Sisbarro's written report is dated August 14, 2006. Among other things, the report states that Petitioner is mildly mentally handicapped. The report states that ABLLS is an appropriate curriculum for Petitioner if supervised by a master's level ESE teacher.

79. The record contains a letter dated May 7, 2007, from Dr. Buckley. The letter states that Petitioner has made a great deal of progress since Dr. Buckley's 2005 letter. The letter states that Petitioner needs continuity of teachers and classrooms and a familiar one-on-one paraprofessional, skilled in behavioral techniques.

80. Rosalind Brown is a licensed speech/language pathologist. She prepared a report dated May 7, 2007, reviewing her experience in working with Petitioner since December 2005. The report recommends that Petitioner continue to have speech/language therapy and to use [REDACTED] alternative and

augmentative communication devices to demonstrate receptive and expressive communication skills.

81. At the time of the hearing, Petitioner's schedule showed that ■■■ attended ■■■ for two days a week for a total of five hours per week, ■■■ had one hour per week of occupational therapy, one hour per week of speech therapy, 30 minutes per week of eye therapy, and one hour per week of computer lab.

82. In May 2007, Ms. Marin re-evaluated Petitioner and prepared a report dated May 2, 2007. The report set out occupational therapy treatment goals for the following year.

83. From May 2004 to the date of the hearing, Petitioner's parents paid for services, including but not limited to the following: (a) computer lab with ESE teacher; (b) behavior assessments; (c) behavior services; (d) background checks for employees; (e) advertising expenses for employees; (f) transportation; (g) miscellaneous office supplies; (h) autistic gym class; (i) occupational therapy; (j) laptop and surge protector; (k) Chat PC and carrying case; and (l) salaries for lead and support behavior therapists. Petitioner's parents incurred these expenses on Petitioner's behalf in the amount of \$86,013.41. The undisputed expenses are itemized in the record.

CONCLUSIONS OF LAW

84. The Division of Administrative has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 1003.57(5), Florida Statutes (2005), and Florida Administrative Code Rule 6A-6.03313. The parties have standing to participate in the Proceedings.

85. As required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400 et. Seq., Florida law gives the parents of an exceptional student the general right to a "due process" hearing on the identification, evaluation, and placement, or lack thereof, of the student. See § 1003.57(5), Fla. Stat. (2005); Fla. Admin. Code R. 6A-6.03311(11).

86. Petitioner has the burden of proving by a preponderance of the evidence that Respondent did not offer him FAPE and that his parents are entitled to reimbursement of the cost of the home program and related services from April 2005 through July 2007. See Schaffer v. Weast, 126 S. Ct. 528, 537 (2005); M.M. V. School District of Greenville County, 303 F.3d 523, 537-538 (4th Cir. 2002).

87. FAPE is defined as follows in Title 20, United States Code Service, Section 1401(9):

(9) Free appropriate public education. 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) [20 U.S.C.S. §1414(d)].

88. In order to satisfy its duty to provide FAPE, a state or local educational agency must provide an educational plan "reasonably calculated to enable the child to receive educational benefits". See Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. V. Rowley, 458 U.S. 176, 206-207 (1982). The "basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, at 210.

89. Title 20, United States Code Service, Section 1401, provides the following relevant definitions:

(6) Elementary school. The term "elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

* * *

(14) Individualized education program; IEP. The term "individualized education program" or "IEP" means a written statement

for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d)[20 U.S.C.S. §1414(d)].

* * *

(26) Related services. The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy . . . as described in the individualized education program of the child

* * *

(29) Special education. The term "special education" means 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.

90. Title 34, Code of Federal Regulation, Section 300.323, provides as follows in relevant part:

300.323 When IEPs must be in effect.

(a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in 300.320.

* * *

(c) Initial IEPs; provision of services. Each public agency must ensure that--

- (1) A meeting to develop an IEP for a child is conducted within 30 days or a

determination that the child needs special education and related services. . .

91. Title 34, Code of Federal Regulation, Section 300.106, provides in relevant part:

300.106 Extended school year services.

(a) General.

(1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

92. Under Rowley, the first question is whether Respondent complied with IDEA's procedures. See Rowely, at 206. The next question is whether Respondent's IEP will provide FAPE to Petitioner. See Rowley, at 207. The first test focuses on whether the correct procedures were followed and the second test goes to the substance of the IEP.

93. Title 34, Code of Federal Regulation, Section 300.513, speaks to hearing decisions as follows in pertinent part:

300.513 Hearing decisions.

(a) Decisions of hearing officer on the provision of FAPE.

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

(2) In matters alleging a procedural violation, a hearing officer may find that a

child did not receive FAPE only if the procedural inadequacies--

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

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

(iii) Caused a deprivation of educational benefit.

PROCEDURAL COMPLIANCE

94. Applying the standard referenced above, Respondent committed a procedural error by waiting until August 2005 to conduct an IEP meeting for Petitioner. In April 2005, Respondent's staff may have been preparing for summer break, but they had from April 14, 2005, until school ended in May 2005 to conduct the meeting.

95. Because Respondent failed to act promptly, Petitioner's IEP team never considered whether ESY in the summer of 2005 was appropriate for Petitioner. Respondent's delay also left the IEP team unprepared to place Petitioner in school in August 2005. Respondent's failure to act in a timely manner impeded Petitioner's right to FAPE and caused a deprivation of educational benefit.

96. Respondent never deprived [REDACTED] of an opportunity to participate in the IEP meetings. The failure to follow the written notice procedure did not impact the parents' opportunity to meet and interact with a properly constituted IEP team. As

long as the required staff members attended the meetings, Petitioner did not have a right to demand the attendance of other staff members. Moreover, it was unnecessary for a behavior analyst or an assistive technology staff member to attend the meetings in light of the broad professional backgrounds and experiences of Petitioner's IEP team members in those areas.

97. Additionally, there is no persuasive evidence that Respondent's staff predetermined any decision made in Petitioner's IEP. The IEP team may not have known how to reach a compromise on many issues, but the team certainly considered all requests.

SUBSTANCE OF THE IEP

98. In developing an IEP, the team must consider the following provisions of Title 34, Code of Federal Regulations, Section 300.324, which states as follows in relevant part:

300.324 Development, review, and revision of IEP.

(a) Development of IEP.

(1) General. In developing each child's IEP, the IEP Team must consider--

(i) The strengths of the child;

(ii) The concerns of the parents for enhancing the education of their child;

(iii) The results of the initial or most recent evaluation of the child; and

(iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must--

(i) in the case of a child whose behavior impeded the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

99. Petitioner's IEP references a general need for positive behavior interventions or strategies. It states that ■■■ will receive intensive behavior management on campus.

100. The IEP also notes that Petitioner has difficulty maintaining social interactions if ■■■ is over stimulated. The IEP does not refer to Petitioner's tendency to self-stimulate and many other behavior problems. There is nothing in the IEP to set specific goals, objectives, and interventions for Petitioner's behavior, which is a major roadblock to further academic progress. Neither the most current FBA or BIP was attached and incorporated into the IEP.

101. Respondent elected to rely on the assessments of Petitioner's most current private professionals, including ■■■ FBA as reported by ■■■ certified behavior analyst. Respondent then refused to incorporate the numerous recommendations for Petitioner to have a one-on-one known provider, supervised by a behavior analyst, when ■■■ enters school. At a minimum, Petitioner needs this recommendation written into ■■■ IEP and implemented during the transition phase in order to receive FAPE.

102. Failure to provide Petitioner with a one-on-one known provider during the transition phase will more likely than not result in severe regression in skills and behavior. Without the necessary BIP and behavior support, Petitioner will in all likelihood have to be withdrawn from school once again.

103. At this time, the IEP is incomplete and will not provide FAPE because it does not include specifics relating to the obvious need for a FBA, BIP, and a one-on-one known provider, supervised by a behavior analyst, during the transition phase. Notwithstanding Respondent's concern relative to liability, no other suggestion by either party will be sufficient to provide Petitioner some educational benefit in a public school placement.

104. The November 2005, IEP is appropriate in all other respects. The greater weight of the evidence indicates that the present levels of performance, as well as the goals and objectives, will provide Petitioner with FAPE if properly implemented in conjunction with an appropriate BIP.

105. Some of the goals and objectives duplicate skills set forth in the 2001 IEP. Some of them may have been mastered at home. Many of the skills did not contain the specificity requested by [REDACTED]. However, given Petitioner's tendency to regress with every change in provider, [REDACTED] difficulty making generalizations and transitions in learning environments, and

█ need to maintain skills, the 2005 IEP goals and objectives are appropriate.

106. The November 2005 IEP goals and objectives also are measurable. An ESE teacher would quickly recognize and correct a typographical error in one communication skill that results in a conflict between the percentage of accuracy in an annual goal and the evaluation criteria for the short-term objectives.

REIMBURSEMENT

107. Reimbursement is the only relief Petitioner seeks. Thus, the final question here is whether Petitioner's parents are entitled to recover certain expenses from the school board because it failed to offer Petitioner FAPE.

108. There is no federal statute, rule, or regulation that determines whether a home education program is a reimbursable private school placement. Rather, each state has authority to make that determination. See Hooks v. Clark County School District, 228 F.3d 1036,1039 (9th Cir. 2000).

109. Florida Administrative Code Rule 6A-6.03311(9)(c), adopted in furtherance of the IDEA, is patterned after Title 20, United States Code, Section 1412(a)(10)(C)(ii), and Title 34, Code of Federal Regulations, Section 300.148. The latter provision states as follows in relevant part:

300.148 Placement of children by
parents when FAPE is at issue.

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144.

(b) Disagreements about FAPE. Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in 300.504 through 300.520.

(c) Reimbursement for private school placement. 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 a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a 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 had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of the section may be reduced or denied-

-

(1) if--

(i) At the most recent IEP Team meeting that the parents attended prior to

removal of the child for the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.

See 34 C.F.R. § 300.148.

110. Upon examination of the requisite elements for reimbursement in this case, it is clear that Petitioner meets some but not all of the requirements in order for the parents to receive the relief they seek. First, Petitioner meets the requirement of receiving specially designed instruction and related services prior to [REDACTED] withdrawal from public school in 2002. Second, Respondent denied Petitioner FAPE in 2002. Third, the home program and related therapies provided by Petitioner's parents focused on and were appropriate to treat, correct, and control Petitioner's primary problem during that time, his behavior.

111. The right to reimbursement fails because Petitioner's home program was not a reimbursable placement under Florida law. Section 1002.01, Florida Statutes (2005), defines the terms "home education program" and "private school" as follows:

(1) A "home education program" means the sequentially progressive instruction of a student directed by his or her parent in order to satisfy the attendance requirements of ss. 1002.41, 1003.01(4), and 1003.21(1).

(2) A "private school" is a nonpublic school defined as an individual, association, copartnership, or corporation, or department, division, or section of such organizations, that designates itself as an educational center that includes kindergarten or a higher grade or as an elementary, secondary, business, technical, or trade school below college level or any organization that provides instructional services that meet the intent of s. 1003.01(13) . . . or that offers academic, literary, or career training below college level, or any combination of the above, including an institution that performs the functions of the above schools through correspondence or extension, except those licensed under the provision of chapter 1005. A private school may be a parochial, religious, denominational, for-profit, or nonprofit school. This definition does not include home education programs conducted in accordance with s. 1002.41.

112. Petitioner was not enrolled in a "home education program" as defined above. [REDACTED] was not enrolled in "private school" as defined by law or common understanding of that term. The instructional services as used in the definition of "private school" cannot mean, simply, services that involve the giving of instructions in a curriculum like ABLLS. Rather, in this context, "instructional services" plainly refers to the kind of services rendered by teachers, not therapists. "'Instructional services' are services intended to give an education, in places

ordinary people, based on common experience, recognize as schools." See D.P. v. Broward County School Board, Final Order, Case No. DOAH 04-2942E (April 25, 2005).

113. The record shows that Petitioner's parents were not focused on providing ■■■ a comprehensive education. Instead, they were treating ■■■ behavior problems, attempting to restore ■■■, as much as possible, to healthy functioning. Petitioner's home program did not constitute a "private school."

114. Because Petitioner's home placement is not reimbursable, it follows that the related services are not reimbursable. Related services are secondary to specially designed instruction; they are not the primary focus of FAPE. Id.

115. In M.M. V. School Bd. Of Miami-Dade Co, Florida, 437 F.3d 1085 (11th Cir. 2006), the parents of a disabled child, who had always been enrolled in a "synagogue school," did not have to enroll the child in public school pursuant to an inadequate IEP, in order to preserve their right to reimbursement of private school tuition and related services. See also E.W. v. School Bd. Of Miami-Dade County, Florida, 307 F. Supp. 1363 (S.D. Fla. 2004)(Parents of a disabled child who was enrolled in a private nursery school and never enrolled in a public school was entitled to reimbursement of private school tuition and related services) and Justin G. v. Bd. Of Educ. Of Montgomery

County, 148 F. Supp. 2d 576, 587 (D. Md. 2001)(Parents of a disabled child who was enrolled in a private school and had never been enrolled in a public school was entitled to reimbursement).

116. Petitioner relies on the above-referenced cases to argue that if disabled children who have never been enrolled in public schools can receive reimbursement for private school tuition and related services, ■■■ parents should be allowed to receive reimbursement without ever enrolling ■■■ in a private school. Petitioner's argument is without merit based on the plain language of the following: Title 20, United States Code, Section 1412(a)(10)(C)(ii); Title 34, Code of Federal Regulations, Section 300.148; and Florida Administrative Code Rule 6A-6.03311(9)(c), all of which require placement in a private school, when FAPE is denied, before reimbursement is possible.

117. As a general rule, when statutes are clear and unambiguous, the function of a court is to apply, not interpret, the law. See National American Ins. Co. v. Baxley, 578 So. 2d 441, 443 (Fla. 1st DCA 1991). However, a "court" may have authority in a civil action, brought after the exhaustion of administrative remedies, to "grant such relief as [it] determines is appropriate." See 20 U.S.C. § 1415(i)(2)(B)(iii). Unlike constitutional judges, Administrative Law Judges, as

statutory officers, do not possess inherent or equitable powers. They only have the authority as set forth in the Florida statutes and/or administrative rules. See S.T. v. School Bd. Of Seminole Co., 783 So. 2d 1231, 1233, (Fla. 5th DCA 2001).

118. In this case there is no federal or state law, rule, or regulation, that authorizes the undersigned to grant the relief sought here. Consequently, the undersigned is without subject matter jurisdiction to require Respondent to reimburse Petitioner's parents.

ORDER

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

ORDERED:

That Respondent failed to offer Petitioner FAPE but Respondent is not required to reimburse Petitioner for costs associated with ■■■ home school program and related services from April 2005 through July 2007.

DONE AND ORDERED this 28th day of August, 2007, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
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 28th day of August, 2007.

COPIES FURNISHED:

Joseph G. Joyner, Superintendent
St. Johns County School District
40 Orange Street
St. Augustine, Florida 32084

Eileen L. Amy, Administrator
Exceptional Student Education Program
Administration and Quality Assurance
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

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

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

Warren K. Anderson, Jr., Esquire
Anderson and Howell, P.A.
2029 North Third Street
Jacksonville Beach, Florida 32250

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

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