

**FSDB County School District
No. 07-0060E
Initiated by: Parent
Hearing Officer: Suzanne F. Hood
Date of Final Order: October 5, 2007**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)
)
Petitioner,)
)
vs.) Case No. 07-0060E
)
FLORIDA SCHOOL FOR THE DEAF)
AND THE BLIND,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on May 20, 2007 through June 1, 2007, and July 30, 2007, through August 3, 2007, in St. Augustine, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Doris Landis Raskin, Esquire
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For Respondent: Charles L. Weatherly, Esquire
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STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Petitioner [REDACTED] (Petitioner) is eligible for enrollment at the Respondent Florida School for the Deaf and Blind (FSDB); (b) whether FSDB provided Petitioner with a free appropriate public education (FAPE); and(c) whether FSDB complied with all procedural due process requirements.

PRELIMINARY STATEMENT

On January 4, 2007, Petitioner filed a due process hearing request pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, (2004), et seq., and Section 1002.36, Florida Statutes. The request challenged FSDB's December 20, 2006, determination that Petitioner was ineligible for enrollment at FSDB. On January 4, 2007, FSDB referred Petitioner's hearing request to the Division of Administrative Hearings.

On January 8, 2007, the undersigned issued a Notice of Telephonic Pre-hearing Conference. The notice scheduled the conference for January 19, 2007.

On January 16, 2007, FSDB filed a Motion to Challenge the Sufficiency of Petitioner's Due Process Hearing Complaint. After hearing oral argument on January 19, 2007, the undersigned issued an Order Documenting Pre-hearing Conference, and Granting

Motion Challenging Sufficiency of Due Process Complaint without Prejudice for Petitioner to File an Amended Complaint.

On January 29, 2007, Petitioner filed an Amended Due Process Complaint Notice. The amended complaint raised the three issues set forth above in the Statement of the Issues.

In a Joint Status Report dated February 2, 2007, the parties advised that they had scheduled a resolution session for February 9, 2007.

On February 5, 2007, the undersigned issued a Notice of Telephonic Pre-hearing Conference on February 15, 2007. The purpose of the conference included, but was not limited to, oral argument on FSDB's Motion to Challenge the Sufficiency of the Amended Due Process Hearing Complaint.

On February 16, 2007, the undersigned issued an Order Documenting Pre-hearing Conference, Reserving Ruling on Pending Discovery Motions, and Extending Time for Issuance of Final Order to May 2, 2007. That same day, the undersigned issued an Order Denying Motion to Challenge the Sufficiency of the Amended Due Process Hearing Complaint and a Notice of Hearing, scheduling the final hearing for March 20-23, 2007.

In a telephone conference on March 8, 2007, the undersigned heard oral argument on pending motions. On March 9, 2007, the undersigned issued an Order Documenting Telephone Conference and

Denying Respondent's Motion in Limine and Petitioner's Motion for Protective Order.

In a telephone call on March 14, 2007, Petitioner's counsel made an ore tenus request for a continuance due to an out-of-state family medical emergency. FSBD did not oppose the request. On March 15, 2007, the undersigned issued an Order Granting Continuance and Placing Case in Abeyance.

In a letter dated April 9, 2007, the parties provided the undersigned mutually agreeable dates for rescheduling the hearing. On April 16, 2007, the undersigned issued a Notice of Hearing, scheduling the hearing for May 29, 2007, through June 1, 2007.

At the conclusion of the hearing on June 1, 2007, the parties had not completed the presentation of all evidence. They agreed to reconvene the hearing on July 30, 2007, through August 3, 2007, and to extend the time for the issuance of this Final Order as required in order to complete the hearing and file proposed final orders after receipt of the hearing transcript.

During the hearing, the parties offered Joint Exhibit One that was accepted as evidence.

Petitioner presented the testimony of four witnesses. Petitioner offered Petitioner's Exhibit 1, containing 35 individual or composite exhibits, and Petitioner's Exhibit 2, an

individual exhibit. Petitioner's exhibits were accepted as evidence. Petitioner also filed four depositions that were accepted in lieu of live testimony.

FSDB presented the testimony of 11 witnesses. FSDB offered Respondent's Exhibits 1-5, containing 305 individual or composite exhibits. FSDB's exhibits were accepted as evidence.

The 18th and final volume of hearing transcript was filed on August 27, 2007. In a Post-hearing Order dated August 28, 2007, the undersigned advised the parties that they had an opportunity to file proposed orders on September 6, 2007, and that this Final Order would issued on or before September 26, 2007.

On September 5, 2007, FSDB filed its Proposed Findings of Fact and Conclusions of Law. On September 6, 2007, Petitioner filed [REDACTED] Proposed Final Order.

Due to a medical emergency in the undersigned's family, the parties agreed to extend the time for issuance of this Final Order to September 5, 2007. On or about September 13, 2007, the undersigned issued an Order Granting Extension of Time.

Petitioner's request for relief has changed over time. At the hearing Petitioner's counsel stated that Petitioner's family would not reenroll Petitioner at FSBD. Instead, Petitioner wants FSDB to remove the "trainable mentally handicapped (TMH) label." Petitioner also wants compensatory education for [REDACTED]

alleged denial of FAPE for the past two years in the form of expert assistance in program development at Petitioner's current public school placement.

FINDINGS OF FACT

1. FSDB's mission is to provide an academic program for eligible sensory impaired students. The school's focus is to prepare its students for college or additional post-graduate training, with the ultimate goal for the students to become literate, employable, life-long learners.

2. Only those individuals who satisfy the enrollment criteria can enroll in, and attend, FSDB. The enrollment criteria ensure that students are able to access an education in accordance with FSDB's mission and to prepare them for independent living after graduation.

3. Applicants for enrollment must first and foremost have a sensory impairment, either auditory, visual, or both, that meets FSDB's sensory impairment criteria. Applicants also must satisfy general enrollment requirements of age (between the ages of 3 and 21 for day students or between the ages of 5 and 21 for boarding students), in-state residence (out-of-state eligible applicants must pay tuition), and a basic level of independence in the activities of daily living.

4. Applicants may be deemed ineligible for enrollment if determined to be dangerous or "a disruption to the educational

process or to other students." Moreover, if there is evidence that a child meets the criteria for TMH, that child is not qualified for enrollment.

5. Applicants may be enrolled in one of three departments at FSDB: (a) the Deaf Department; (b) the Blind Department; and (c) the Special Needs Department.

6. To be eligible for enrollment in the Deaf Department, there must be evidence of the following: (a) the applicant has a hearing loss of 30 decibels or greater; (b) the hearing impairment has the potential to adversely affect the applicant's academic performance, social development, language development, communication skills, or intellectual functioning; and (c) the applicant is not functioning in either the TMH or profoundly mentally handicapped (PMH) range. If an applicant has a primary disability of sensory impairment, but also has an ancillary or co-morbid disability, including specific learning disability, speech/language disability, educable mental handicap (EMH), or emotional handicap, that applicant may be served in the Special Needs Department.

7. FSDB recognizes that language is the foundation for all learning. Deafness is a communication disorder that requires a strong emphasis on language to rehabilitate children academically and functionally. Thus, FSDB immerses its students in a language-rich environment via formal and informal

communication opportunities. FSDB structures its academic program for the hearing impaired/special needs students around language.

8. FSDB employs a "total communication" philosophy. Total communication involves using whatever helps to impart understanding. FSDB's faculty and staff use multiple modes of communication with all deaf/hearing impaired students to ensure that communication and education is provided at each student's individual level, regardless of their cognitive and academic abilities.

9. As stated above, the school's goal for its special needs/hearing impaired students is that they will achieve a level of communication commensurate with independent life after graduation. In line with this goal, the hearing impaired/special needs high school teachers expect their students, upon entering high school or shortly thereafter, to have enough language to request assistance, to answer questions, and to share information both socially and academically. High school students should be able to navigate the campus without assistance and should possess functional skills and communication. These students should be able to generalize the skills they acquire in different settings.

10. Petitioner applied for enrollment at FSDB in August 2000 when [REDACTED] was [REDACTED] old. At the time of [REDACTED] application,

Petitioner was enrolled in the Polk County School District. School records indicated that Petitioner was academically, socially, and linguistically delayed.

11. In Polk County, Petitioner was identified as functioning in the mild to moderate mentally handicapped range, i.e. EMH. [REDACTED] was enrolled in an exceptional student education (ESE) classroom.

12. As part of FSDB's application process, or "intake," the school conducted multiple evaluations of Petitioner with parental permission. The results indicated that Petitioner met eligibility criteria for enrollment at FSDB. On August 25, 2000, Petitioner's parents gave their permission for [REDACTED] enrollment at the school.

13. Petitioner suffered a very complex medical history from birth to approximately five years of age. During this time, Petitioner was admitted to multiple hospitals and other healthcare facilities for treatment by numerous physicians.

14. Petitioner was born premature with myelofibrosis and congenital neutropenia, meaning that his bone marrow did not produce sufficient white cells to ward off infection. Petitioner was hospitalized many times during his early life for various infections, including ear infections, sustained as a result of the neutropenia. Additionally, Petitioner suffered

from "volume loss of the brain which most likely consisted of both white and gray matter."

15. Petitioner's neutropenia, coupled with [REDACTED] ear infections, resulted in early onset hearing loss and developmental delay. Unrefuted evidence indicates that Petitioner's medical problems as a whole are the result of a genetic disease, i.e. mitochondrial disease.

16. Mitochondrial disease is a progressive condition that is due to the failure of cells to produce enough energy. With metabolic or neurometabolic conditions, or problems with the biochemistry of the body, an enzyme or chemical reaction is involved.

17. The first reported case of mitochondrial disease occurred in 1986, although the research started in the 1970s. Mitochondrial disease manifests in various ways. For example, vision loss, hearing loss, developmental delay (ranging from mild to very severe), and affectation of the bone marrow can be symptoms of the syndrome.

18. During Petitioner's early hospitalizations, the University of Michigan essentially diagnosed Petitioner as having mitochondrial disease despite the relative paucity of information about the condition, including its name. Petitioner's medical records document that [REDACTED] myelofibrosis and neurological findings were most consistent with a metabolic or

storage disease of the autosomal recessive type. The records further noted that Petitioner had as yet an undefined myeloproliferative disorder that was probably associated with a particular chromosomal abnormality.

19. Because mitochondrial disease is an underlying progressive condition, there will be a corresponding progressive loss of brain function. In the case of a child, there is a combination of the brain function that is slowly decreasing as the brain continues to grow. The result is that things are going to progress and children will make some progress. Unfortunately, over the passage of time, the child's functioning deviates further and further from the norm and the child manifests greater delay.

20. The effect of mitochondrial disease on Petitioner's brain cells affects proper functioning of [REDACTED] brain. The slow progression of the disease explains Petitioner's acquisition of skills early in [REDACTED] academic career, and the slower and slower acquisition of new skills as [REDACTED] ages. It also explains [REDACTED] surprising high school behavioral changes, difficulty with orientation around the campus, attention problems, and episodes of difficulty with impulse control.

21. In August 2000, Petitioner enrolled in FSDB's fourth grade in the Special Needs/Deaf Department. Petitioner's individual education plan (IEP) identified [REDACTED] as being hearing

impaired, speech/language impaired, and as needing occupational therapy services. Petitioner was not identified as having a mental handicapping condition.

22. FSDB's policy is to refrain from identifying a student at intake as having an educational disability. Once the student begins classes pursuant to an IEP, the teachers and staff engage in observations and other information-gathering processes to assess the student in the new school environment and new school program before discussing the possibility of adding an additional disability. In this case, the school identified Petitioner in 2003, without parental objection, as EMH pursuant to ■■■ educational, intellectual, and adaptive behavior assessment results.

23. When Petitioner began fourth grade at FSDB, ■■■ had extremely minimal academic skills, immature social skills, and very little language skills. However, despite ■■■ very low functioning, Petitioner made meaningful progress in all areas throughout ■■■ elementary and middle school years.

24. By the eighth grade, Petitioner had developed a vocabulary list and could communicate basic things that happened at home. ■■■ could refer back to field trips in a basic way. In math, Petitioner could add three digit numbers without borrowing.

25. At the end of the eighth grade in 2005, Petitioner had made progress as indicated in the present levels of performance of ■■■ IEP. At that time, Petitioner was adding three-digit numbers with regrouping at 70 percent accuracy and subtracting multi-digit numbers without borrowing at 100 percent accuracy. ■■■ was reading on a pre-primer level independently. Petitioner could answer reading comprehension questions 70 percent of the time.

26. Petitioner also made progress with ■■■ social skills over the five-year period. ■■■ progressed from wanting to be held in adults' laps in fourth grade, and communicating by yelling, to being able to socialize with peers and communicate with teachers on a minimal level. Petitioner eventually sought out the interaction of ■■■ peers, although ■■■ social skills were still very immature.

27. Petitioner's language skills also improved during ■■■ first five years at FSDB. At the beginning of fourth grade, Petitioner's language skills were limited to a few signs, gestures, and unintelligible vocalizations. Additionally, ■■■ voice was inappropriately loud. ■■■ needed to learn pre-communication behaviors such as respecting an individual's personal space and taking turns.

28. By the eighth grade, Petitioner had improved in each of these language skill areas. ■■■ was able to use hundreds of

signs, learned through constant repetition. ■ used basic sign language with ■ teachers and peers. However, Petitioner's language acquisition was slower than ■ special needs hearing impaired peers, who acquired thousands of signs.

29. FSDB advised Petitioner's parents of his academic skill levels and progress through the IEP process and by mailing report cards home. ■ attended all of the IEP meetings when present levels of performance and goals and objectives were discussed. As a special needs student, Petitioner's grades were assigned based on ■ individual progress as stated on the back of the report card.

30. Petitioner completed eighth grade at the conclusion of the 2004/2005 school year. In the spring of 2005, Petitioner's teachers and support staff discussed and considered Petitioner's low-skill level in light of the different, more advanced expectations of students at the high school level. The high school expects their students, upon entering high school or shortly thereafter, to navigate independently on campus, to socially interact with peers and teachers, to generalize their learned skills, and to possess functional communication skills. In deciding whether Petitioner should matriculate, the staff agreed that Petitioner was ready to enter ninth grade. The staff made this decision based on Petitioner's vocational skills, ■ competence at repetitive tasks, ■ ability to

navigate the campus independently, and his improved communication skills.

31. The focus of high school courses is more functional. Academics and language acquisition continue to be critical components, but for the hearing impaired/special needs students, the academic lessons are amended to promote the goal of preparing students for post-graduate life.

32. For hearing impaired/special needs students, language arts and math classes incorporate pragmatic community-oriented skills, including developing grocery lists, reading and cooking recipes, understanding the concept of money and paying bills, and learning about community agencies that are available to provide assistance after graduation.

33. In the fall of 2005, Petitioner entered high school as a ninth grader. ■■■ was placed in the lower functioning semi-self-contained classrooms for ■■■ academic subjects. ■■■ core teachers had adjoining rooms to minimize navigation around campus. ■■■ class size ranged from four to six students.

34. Petitioner's core teachers shared an instructional aide. The aide assists in preparing materials for class and providing individual assistance to students as needed.

35. As of October 2005, Petitioner's skills and abilities were integrated with the new functional emphasis at the high school. Petitioner had gained 25 new vocabulary words. ■■■

maintained ■■■ ability to add and subtract. ■■■ maintained ■■■ ability to tell time to the hour, watching the clock in anticipation of upcoming events.

36. During ■■■ freshman year, Petitioner continued to make slow educational progress. However, Petitioner began to require extensive modifications to the curriculum in ■■■ language arts class. ■■■ weekly list of ten vocabulary words was ultimately reduced to five words. Petitioner required a picture of the sign-language sign for each vocabulary word on the back of ■■■ vocabulary cards. Petitioner required one-to-one assistance to color-code the vowels in the vocabulary words, despite a chart displayed in the room as a model. ■■■ required lots of pictures during the reading of a story or when ■■■ was sharing weekend activities with the class. Petitioner required extensive repetition.

37. It was obvious that Petitioner was beginning to have more trouble with retention. Despite constant repetition and review, by ■■■ tenth grade year, the focus of Petitioner's instruction shifted from high frequency vocabulary words to functional signs and symbols. Petitioner also demonstrated difficulty being able to generalize ■■■ acquired skills in different environments, requiring additional instructional modifications.

38. Petitioner began to have difficulties in addition to [REDACTED] academic performance. For example, despite having attended FSDB for five years, and living in the dormitory for much of that time period, and despite having been able to navigate the campus in middle school, Petitioner had problems navigating the campus in high school.

39. In the spring of [REDACTED] freshman year, Petitioner started engaging in very uncharacteristic behavior, both at home and at school. Specifically, Petitioner urinated on the school's bathroom floor and littered the bathroom with soap, water and toilet paper. This behavior was in direct contrast to Petitioner's well-known concern for cleanliness and hygiene.

40. Moreover, Petitioner was found by dorm staff standing at the bedside of [REDACTED] roommate laughing and giggling. The roommate woke up screaming.

41. The high school teachers and staff ultimately shared their observation and concerns about Petitioner's behavior and academic performance with middle school personnel. As a result of this meeting, the high school teachers learned that Petitioner had been able to accomplish things in middle school that he was unable to do in high school. In high school, Petitioner was unable to complete the same tasks independently.

42. In the spring of Petitioner's freshman year, [REDACTED] had difficulty spelling [REDACTED] first and last names. By the fall of

2006, Petitioner's first semester as a sophomore, Petitioner was unable to identify the hour and minute hand on a clock, even with color coding as a modification. ■■■ retained the ability to add by regrouping. Petitioner could still identify a penny, but could not find a quarter among various numerous coins on a table.

43. With respect to peer interaction, Petitioner did not pick up a conversation and chat with high school peers. ■■■ had to be prodded along, using a model, to demonstrate ■■■ functional language skills.

44. Along with poor retention, Petitioner had difficulty generalizing ■■■ skills. ■■■ required much more assistance than ■■■ peers in the classroom. The level of assistance that Petitioner required interfered with the instruction provided to other students in the class. ■■■ need for and reliance on assistance from ■■■ teachers constituted a disruption to the educational environment.

45. The faculty and staff's concerns about Petitioner's behavior and academic performance in ninth grade, in conjunction with parents' reports of atypical behavior at home were discussed in several multidisciplinary team meetings early in the spring of 2006. The timeframe for conducting Petitioner's triennial evaluations coincided with these concerns. In preparation for the evaluations, the multidisciplinary team

discussed the need for information to assess and eventually address Petitioner's issues.

46. Petitioner's triennial evaluations were conducted between March and May 2006. At the conclusion of the evaluation, a brief meeting was convened with Petitioner's parents prior to the summer break. The purpose of the meeting was to provide the family with an overview of the evaluation results and to discuss the issue of Petitioner's continued eligibility. A more extensive meeting was held in September 2006.

47. Dr. JoAnn Gates, a psychologist in private practice, attended the September 2006 meeting at the request of Petitioner's parents. During the meeting, Petitioner's parents advised the school that Petitioner had been placed on medication for attention deficit disorder (ADD) since the spring assessments. Petitioner's family wanted the school to reevaluate Petitioner to account for potential improvements in ■■■ performance due to the medication. The school agreed to conduct subsequent evaluations in the fall of 2006. The additional reevaluations delayed any consideration of Petitioner eligibility at FSDB.

48. In 1999, the American Psychological Association (APA) published Standards for Educational and Psychological Testing. An evaluation that comports with the standards of practice will

involve the following: (a) multiple traits; (b) multiple methods; (c) multiple sources; (d) multiple environments; and (e) multiple time periods.

49. Intelligence can be defined as one's ability to learn, to retain, and/or to apply important information. In the process of acquiring information, intelligence determines how quickly, how completely, how adroitly, how fluidly one acquires and retains information.

50. In the field of psychology, the Cattell-Horn-Carroll (CHC) theory has emerged over time as the "gold standard" for the determination of intelligence. The CHC theory espouses ten components of intelligence that lays the empirical foundation for test development. The ten qualities are as follows: (a) fluid intelligence; (b) crystallized intelligence; (c) short-term memory; (d) visual processing; (e) auditory processing; (f) long-term memory; (g) processing speed; (h) decision speed; (i) reading; and (j) writing. The more robust testing instrument measures as many components of intelligence as possible, thereby providing a fuller, more complete picture of one's intellectual capabilities.

51. Each component of intelligence is measured via a corresponding subtest. However, the standards of professional practice require the use of the full scale score, i.e. the

compilation of data from the various components of intelligence being assessed.

52. When working with a person with mental retardation, the most important single piece of information involves adaptive behavior. Adaptive behavior is synonymous with daily living skills, such as dressing, bathing, brushing teeth, eating and preparing food, engaging in the community, applying functional academic skills, taking care of one's health and safety, and work. The scoring of standardized measures of adaptive behavior is the same as that for standardized measures of intelligence, with the subtests contributing to the full scale score.

53. In the spring and fall of 2006, FSDB's school psychologist administered the following tests to Petitioner: (a) the Leiter-R, a standardized nonverbal intelligence measure; and (b) the Vineland Adaptive Behavior Scale, a standardized adaptive assessment to measure basic skills of self-sufficiency.

54. The Leiter-R was an appropriate test because it is untimed and nonverbal, and thus best able to accommodate communication and language difficulties. Although the Leiter-R does not measure certain components of intelligence, it provides the most comprehensive assessment for hearing impaired students of the remaining components that comprise intelligence. The Leiter-R is a new test, developed in the 1990s. It is standardized using pantomime and gestures. The Leiter-R

contemplates that test subjects may be from different cultural backgrounds, as well as having low language skills.

55. The Leiter-R provides a full-scale score, in contrast with the Wechsler Adult Intelligence Scale-III (WAIS-III) and the Wechsler Intelligence Scale for Children-IV (WISC). The WAIS-III and the WISC, which were administered to Petitioner by private psychologists, resulted in a less robust representation of Petitioner's performance than the Leiter-R.

56. In the spring of 2006, Petitioner obtained a full-scale score of 50 on the Leiter-R that was administered by FSDB's psychologist. A full-scale score of 50 was below the first percentile and within the TMH range. Similarly, in the fall of 2006, Petitioner obtained a full-scale score of 41 on the Leiter-R that was administered by FSDB's psychologist. A full-scale score of 41 is also below the first percentile and within the TMH range. Both scores on the Leiter-R were within the three to five standard deviations below the mean. The Leiter-R revealed that Petitioner's crystallized intelligence is stronger, as evidence by [REDACTED] relative higher math skill, but [REDACTED] fluid intelligence, short-term memory, processing speed, and visual processing are all depressed.

57. FSDB's psychologist obtained a general adaptive composite score in both spring and fall 2006. The adaptive behavior scores were obtained by administering the Vineland

Adaptive Behavior Scale (Vineland) to Petitioner. The Vineland is a standardized measure of adaptive behavior based on an older model, as is the WISC. However, the Vineland is still a valid, reliable, and widely used measure.

58. The scores from each Vineland administration fell within the TMH range. The fall administration of the Vineland was based on scores from Petitioner's parents and school personnel in each of the domains assessed.

59. In addition to the standardized measures of intelligence and adaptive behavior, FSDB administered the third required assessment for determining a student's eligibility for educational programming for the mentally handicapped, i.e. a standardized measure of achievement. Specifically, FSDB's educational diagnostician administered the Woodcock Reading Mastery Test to Petitioner in the spring and fall of 2006. The Woodcock Reading Mastery Test (Woodcock) is designed to measure reading skills in a variety of areas, including letter and word identification.

60. FSDB's educational diagnostician also administered the Wechsler Individual Achievement Test (WIAT) to Petitioner. Petitioner scored consistently in the TMH range on both administrations of the Woodcock and the WIAT.

61. As part of her assessment of Petitioner's achievement, FSDB's educational diagnostician observed Petitioner in his

classroom. In the spring of 2006, the diagnostician observed that Petitioner needed peer assistance on a task involving rolling plastic silverware and napkins for the cafeteria. In the fall of 2006, the diagnostician observed that Petitioner needed teacher direction for each task, and for each step of each task, that [REDACTED] performed.

62. For many of the instructional days, Petitioner demanded 70-80 percent of the teacher's assistance to provide [REDACTED] with instruction from which [REDACTED] would benefit. On one occasion, the teacher had to prompt Petitioner six times before [REDACTED] was able to answer a question. Petitioner's need for assistance established a pattern of instruction that required a disproportionate amount of time than was provided to other students.

63. At the conclusion of the fall 2006 assessments, FSDB convened an IEP meeting on November 14, 2006. The purpose of the meeting was to review the results of the evaluation. Based on the evaluations, the IEP team determined that Petitioner met the criteria for TMH. An IEP was developed on that date to address Petitioner's needs as a TMH student.

64. In December 2006, Petitioner's parents requested Dr. Joann Gates to conduct an independent evaluation of their son. Dr. Gates subsequently conducted a psychological and neurocognitive evaluation of Petitioner. Specifically, Dr.

Gates administered the WAIS-III to Petitioner as a standardized measure of intellectual functioning. On that test, Petitioner obtained a score in the borderline range, meaning that [REDACTED] was cognitively functioning in the mild retardation to low average range. However, Dr. Gates' test results yielded data at or below the first percentile, consistent with the result evidencing TMH obtained by FSDB.

65. Dr. Gates' evaluation fails to comport with the standards of the APA. First, she completely omitted any information obtained from the school, thereby failing to examine behavior in multiple environments. Second, Dr. Gates failed to include information about Petitioner's medical history, thereby omitting the requirements to include information over multiple timeframes and multiple traits.

66. Third, Dr. Gates' selection of the WAIS-III as her standardized measure of intelligence was improper. Petitioner was [REDACTED] old when Dr. Gates administered the test. While the WAIS-III overlaps with the WISC at that age, and can be properly administered to a [REDACTED] old student, it should not be administered to children with diminished cognitive abilities, such as Petitioner.

67. Because the WAIS-III is designed for administration to an older population, it does not have a sufficient number of easy items measure the intelligence of a child with mental

disabilities. Therefore Petitioner's WAIS-III score was artificially high and suspect.

68. Unlike the Leiter-R, which measures six facets of intelligence, the WAIS-III is not "nonverbal." It measures only three aspects of intelligence for the hearing impaired population because its verbal domain cannot be administered.

69. Dr. Gates administered an outdated standardized measure of adaptive behavior, i.e. the American Association on Mental Retardation Adaptive Behavior Scale. The test does not provide a full-scale score, rendering it virtually useless for purposes of this hearing. Additionally, Dr. Gates administered the school version of this test to Petitioner's parents and not to school personnel, calling into question the reliability of the results.

70. Dr. Gates administered a standardized measure of achievement. However, her choice of the Wide Range Achievement Test (WRAT) is problematic. The WRAT is a screening measure used to make a quick assessment of achievement, not to provide a comprehensive assessment. Consequently, the WRAT should not be used as a basis for making curricular or instructional decisions of the type required here.

71. Nevertheless, the scores that Dr. Gates obtained from the WRAT are consistent with scores from the WIAT, in that all of Petitioner's scores fell in the first percentile and at the

first grade level. Petitioner's WRAT scores are corroborative of the reports from school personnel who knew Petitioner.

72. FSDB held a continuation of enrollment staffing on December 20, 2006. The committee reviewed the numerous evaluation reports by both FSDB and Dr. Gates. After reviewing all relevant information, the committee determined that Petitioner did not meet the criteria for continued enrollment because [REDACTED] is TMH and because the level and amount of supervision [REDACTED] requires results in a disruption to the educational process and to other students at FSDB.

73. In the middle of the spring 2007 semester, Petitioner left FSDB. The students in [REDACTED] core classes were then able to move through activities more quickly and did not require as much basic vocabulary development.

74. At the request of Petitioner's parents in 2007, Dr. Christy Monaghan administered an evaluation to assess Petitioner's cognitive functioning. Dr. Monaghan administered the WISC-IV, which is an appropriate instrument to use with cognitively deficient, hearing impaired, 16-year-old students. However, Dr. Monaghan made numerous testing errors, which rendered her evaluation meaningless.

75. There are four domains that can be administered for the WISC-IV. Dr. Monaghan appropriately did not administer the verbal comprehension domain. She inappropriately failed to

administer the working memory domain. She attempted to administer the processing speed domain, but used the wrong form on one of the subtests, thereby eliminating any valid data. With respect to the perceptual reasoning domain, Dr. Monaghan's protocols for her evaluation contain gross calculation and administration errors on four of the five subtests that she administered.

76. Dr. Monaghan did not administer a standardized measure of adaptive behavior.

77. In determining a student's eligibility for mentally handicapped programming, the student's development must reflect a reduced rate of learning. Petitioner exhibits this characteristic.

78. The phrase "rate of learning" refers to the amount of needed skills and abilities learned and retained relative to the amount of time it takes to acquire those skills and abilities. For example, an individual who can acquire a skill and ability in a very short amount of time and retains that skill and ability will have a higher rate of learning than the person who acquires that skill over a longer period of time.

79. A slower rate of learning is indicative of a mental handicap. Petitioner's rate of learning is exceedingly slow. It takes ■ longer, perhaps months or years to acquire, retain, and use information that others might acquire in a day.

80. During the hearing, Petitioner presented two DVDs containing scenes of ■■■ at a birthday party in a restaurant with ■■■ family, running during track practice, shopping in a grocery store, working on ■■■ vocabulary with ■■■ mother, and playing a game. Petitioner's video-recorded language skills were limited to one and two signs, supplemented with gestures. Petitioner's functional skills as recorded in the DVDs are very low, in corroboration of testimonies by witnesses who have worked with ■■■ at school. For the most part, all of the tasks that Petitioner performs on the DVDs is commensurate with the abilities of a much younger person.

81. The undisputed evidence is that Petitioner has received FAPE throughout ■■■ enrollment at FSDB. ■■■ IEPs were developed in accordance with the "snapshot" of ■■■ at the time they were created. Each IEP was reasonably calculated to provide Petitioner with an educational benefit.

82. If Petitioner had stayed at FSDB, in accordance with ■■■ IEP goals and objectives, ■■■ teachers would have continued to teach ■■■ new vocabulary words and other functional academic skills. However, the timing of FSDB's disenrollment of Petitioner coincides with the shift in focus to post-graduation, i.e. ■■■ transition services. Petitioner now needs a vocationally-based program, with extensive one-to-one attention that FSDB is not equipped to provide.

83. There is no persuasive evidence that FSDB committed a procedural violation by identifying Petitioner as a hearing impaired student instead of identifying █████ as a deaf child. The school provided appropriate instruction regardless of the label attached to Petitioner's hearing loss.

84. FSDB does not distinguish between the definitions of deaf and hearing impaired. The audiological enrollment criteria for FSDB's Deaf Department requires only evidence of a hearing impairment of 30 decibels of greater, unaided in the better ear.

85. Students in FSDB's Deaf Department have widely ranging levels of hearing impairment. They are educated in the same classes regardless of their levels of impairment. The school's "total communication philosophy and environment" ensures that each student accesses education by way of that student's preferred, and perhaps only, mode of communication. Consequently, even if Petitioner was improperly tested by FSDB as having a milder hearing loss than is actually the case, █████ was still able to access █████ education.

86. FSDB did not commit a procedural violation by failing to provide Petitioner's parents periodic progress reports on █████. The school did not mislead the parents with respect to Petitioner's level of actual functioning in school.

87. The record contains significant documentation of parental notification of Petitioner's progress. █████ IEPs

contain the requisite provision indicating how progress will be reported to parents, i.e. via report cards. The report cards indicate that grades for special needs students are assigned based on work completed at that student's level. More importantly, ■■■ attended all of Petitioner's IEP meetings, during which the present levels of performance were discussed and the goals and objectives were developed.

88. The present levels of performance on the IEPs are not misleading. They cannot be misinterpreted to indicate that Petitioner was a typically developing child.

89. There is no evidence that Petitioner's parents ever lodged a protest or complaint of the family not receiving a progress report or report card. Petitioner's parents were never precluded from participating at IEP meetings.

90. Petitioner's IEP team, including his parents, developed ■■■ IEPs based on current school work and evaluations. There is no persuasive evidence that FSDB improperly administered any evaluation.

91. In part, FSDB used the Bader Reading Inventory (Bader) to develop the IEPs. The most recent Bader indicated that Petitioner reads in the pre-primer to primer range. This result is supported by the record as a whole. There is no persuasive evidence that Petitioner reads at a higher level than as reported by the Bader and teacher observations. Petitioner's

IEPs were developed to address [REDACTED] strengths, weaknesses, and unique needs.

92. Although the IEP team developed the April 22, 2004, IEP outside the applicable statute of limitations period, FSDB implemented the IEP during the limitations period. Therefore, a brief discussion of the educational benefit afforded Petitioner during this time is warranted.

93. The present level of performance in the April 2004 IEP documents Petitioner's skill acquisition by the end of [REDACTED] seventh grade year. At that time, Petitioner was reading below a pre-primer level. In other words, [REDACTED] demonstrated readiness skills taught in preschool. [REDACTED] could read 56 of the first 200 words on the Brigance, another reading test. [REDACTED] could write [REDACTED] name, age, grade, school name, teacher's name, and sisters' names. In math, Petitioner functioned at the first grade level, adding and subtracting multi-digit numbers without regrouping at 80 percent accuracy.

94. By April 2005, Petitioner had made progress and received educational benefit. [REDACTED] had a successful eighth grade year during the 2004/2005 school term. [REDACTED] reading improved to reading at the pre-primer level independently. [REDACTED] learned 21 more vocabulary words. [REDACTED] retained knowledge about [REDACTED] personal information and learned the names of his city, state, and country.

95. In Math, Petitioner improved ■■■ addition and subtraction skills without regrouping to 100 percent mastery. ■■■ acquired regrouping skills to 70 percent mastery. ■■■ also learned how to tell time to the hour and the half hour and was working on the minute.

96. At the end of Petitioner's eighth grade year, the IEP team drafted the April 2005 IEP. This IEP was another appropriate "snapshot" of Petitioner's strengths, limitations, and educational needs. The IEP comports with the procedural and substantive requirements of IDEA and is reasonably calculated to provide Petitioner with FAPE. The record shows that FSDB properly implemented the goals for the April 2005 IEP. Petitioner made progress as ■■■ began to identify coins and to learn functional vocabulary words.

97. The April 2005 IEP was short-lived because the IEP team reconvened in October 2005, Petitioner's ninth-grade year, to develop a transition IEP for Petitioner. The October 2005 IEP contains appropriate present levels of performance, goals, and objectives. There is no evidence to the contrary.

98. As the 2005-2006 school year evolved, Petitioner's behavior at home and school began to change in uncharacteristic ways as discussed above. ■■■ also began to have academic problems. The concerns of Petitioner's family and FSDB's faculty and staff in spring 2006, resulted in the spring 2006

evaluations. The evaluations resulted in the May 2006 notice to Petitioner's parents regarding [REDACTED] possible disenrollment.

99. When school personnel became aware that Petitioner was having greater difficulty accessing [REDACTED] education, as set forth in the October 2005 IEP, action was taken to address the problem. [REDACTED] teachers made numerous modifications to ensure that Petitioner continued to receive an educational benefit in [REDACTED] classes.

100. The record is replete with documentation of FSDB's diligent and tireless efforts to work with Petitioner. The school's faculty and staff provided extra academic and behavioral attention to meet his needs. Petitioner's family was fully informed about [REDACTED] problems. Petitioner's teacher sent work home so that [REDACTED] parents could provide extra assistance. All of these interventions commenced immediately when the problems first occurred.

101. The fact that Petitioner made very little progress in ninth grade is not evidence that the October 2005 IEP was inappropriate. FSDB made a heroic effort to properly implement the IEP despite Petitioner's behavior and academic problems.

102. After Petitioner began taking medication for ADD, the school agreed to reevaluate Petitioner in the fall of 2006, Petitioner's tenth grade year. The school acquiesced to the request of Petitioner's parents to retest Petitioner believing

that they were acting in Petitioner's best interest. The parents and the school wanted Petitioner to stay at FSDB, where ■■■ could receive an education in a language-rich environment.

103. The school's faculty and staff knew and liked Petitioner. They considered him a happy, loving child. As in all such cases, the school staff experienced emotional difficulty in making the decision whether to disenroll Petitioner.

104. While the second round of evaluations was administered to Petitioner in the fall of 2006, the school's staff continued working on ■■■ goals and objectives that addressed ■■■ individual needs. The staff did so within the context of the high school's mission of fostering independence. In the face of Petitioner's neurological impairment and the developmental problems that Petitioner experienced at the age of 17, there is no persuasive evidence to show that ■■■ low functioning is a result of FSDB's poor instruction and poor academic planning.

105. FSDB is a choice school that presents a limited option for certain students due to its enrollment criteria. FSDB is a state-supported school that is just one component of the delivery of public education within Florida's K-20 education system, including the following: controlled open enrollment; lab schools; charter schools; technical career centers, magnet

schools, alternative schools, special programs, advanced placements, and dual enrollment.

106. FSDB is funded by the Florida Department of Education. It is not a local education agency (LEA) like a county school district. Any LEA determination in this case falls with Flagler County School District, Petitioner's LEA.

107. FSDB has an obligation to provide FAPE for its enrolled students. However, FSDB provides only one placement along a continuum of alternative placements, such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.

108. FSDB does not have the burden of proving the proper placement for Petitioner. FSDB can only determine whether an individual meets or does not meet eligibility criteria for enrollment.

109. Placement of a student is defined by, not incorporated into, a student's IEP. In a LEA's public school the IEP team determines the child's individual needs and how those needs will be addressed to provide the student with an educational benefit. The LEA's IEP team then has the obligation to look at the appropriate placement to implement the IEP. The LEA's IEP team must consider multiple options with the ever-present requirement of educating a student in the least

restrictive environment (LRE), i.e. to the maximum extent appropriate with non-disabled peers.

110. By definition, FSDB, as a special school placement of choice, is not the LRE for Petitioner. At FSDB, no students associate with non-disabled peers. However, all high school students, including special needs students, are free to associate with each other as much as possible before and after school, in between classes, and in the cafeteria.

111. Petitioner could remain at FSDB and benefit from the classroom instruction. However, the record here indicates that Petitioner can no longer achieve post-graduate success at FSDB. FSDB cannot provide community-based instruction in the community where ■■■ will be living. Because Petitioner no longer meets FSDB's eligibility criteria, the responsibility for developing an IEP and offering appropriate placement for Petitioner falls on ■■■ home school district.

112. There is no evidence to support an award of compensatory education to Petitioner. There is no persuasive evidence that FSDB failed to provide FAPE by failing to develop and implement appropriate IEPs. FSDB did not commit any procedural or substantive violations of IDEA.

CONCLUSIONS OF LAW

113. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding pursuant to Sections 120.569, 120.57(1), 1002.36, Florida Statutes (2007), Florida Administrative Code Rule 6D-3.003, and 20 U.S.C. Section 1415(c)(2).

114. Petitioner's allegations are limited by the applicable two-year statute of limitation set forth in the IDEA, 20 U.S.C. Section 1415 (f)(3)(C). Petitioner filed [REDACTED] complaint in January 2007; therefore, the applicable timeframe for relief extends back to January 2005.

115. Petitioner has the burden of proving [REDACTED] FAPE and compensatory education claims. Respondent has the burden of proving Petitioner's ineligibility for enrollment at FSDB. See Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 537 (2005).
Eligibility for Enrollment

116. FSDB has authority to maintain and implement its eligibility criteria pursuant to Section 1002.36, Florida Statutes (2006). FSDB is neither a district school board, nor a LEA. Id. Instead, FSDB is a state educational agency (SEA). Id. It is overseen by a Governor-appointed Board of Trustees (Board). See § 1002.36(4)(a), Fla. Stat. (2006).

117. The Board has authority to adopt rules and to implement provisions of the law relating to FSDB's operation. See § 1002.36(4)(c), Fla. Stat. (2006). The Board's rules, in their present form, appear in Chapter 6D-3 of the Florida Administrative Code.

118. There are two eligibility criteria for enrollment at FSDB that are especially relevant here. First, if there is evidence that a child meets the criteria for severe emotional disturbance, autism, homebound services, or "trainable or profoundly mentally handicapped," that child is not qualified for admission or for continued enrollment. See Fla. Admin. Code R. 6D-3.002(h). Second, enrollment is conditioned on a determination that the applicant or student is not disruptive to other students or the educational process. See Fla. Admin. Code R. 6D-3.002(2)(k).

119. In Florida, the assessment of a student to determine eligibility for educational programming for the mentally handicapped must comport with requirements in the Florida Administrative Code, the Florida Statutes, and the State Board of Education Rules, Revised 2006. The latter is hereinafter referred to as "the Red Book."

120. Florida Administrative Code Rule 6A-6.03011(4) requires, at a minimum, that an evaluation to determine eligibility for mentally handicapped programming consist of the following components: (a) a standardized test of intellectual functioning; (b) a standardized assessment of adaptive behavior; (c) a standardized test of academic achievement; and (d) a social-developmental history provided by the primary caregiver of the student.

121. In addition to the requirements for conducting the evaluations, the Red Book has criteria for determining whether a student meets eligibility for mental handicap programming. First, for every classification of mental handicap, there should be evidence of (a) impaired intellectual behavior; (b) impaired adaptive behavior; and (c) a reduced rate of learning. See Fla. Admin. Code R. 6A-6.03011(1).

122. According to the Red Book, an EMH student will have a mild impairment in intellectual and adaptive behavior, and that student's development will reflect a reduced rate of learning. See Fla. Admin. Code R. 6A-6.03011(1)(a). Moreover, the EMH student's scores from the standardized measure of intelligence will fall between two and three deviation below the mean and will be "below that of other students of the same age and socio-cultural group." See Fla. Admin. Code R. 6A-6.03011(1)(a). In other words, an EMH student will have deficits in academics, but will have well developed social skills and be able to function in the community.

123. A TMH student will be "moderately or severely impaired" in intellectual and adaptive behavior, demonstrate a reduced rate of learning, and have a score from a standardized measure of intelligence falling between three and five standard deviations below the mean. See Fla. Admin. Code R. 6A-6.03011(1)(b).

124. Record evidence indicates that a TMH student will not be able to demonstrate independence in academic skills, or in social and emotional behaviors; a TMH student will need considerable assistance, support, attention, and help throughout his or her life. Additionally, a TMH student does not transfer what is learning in one environment to another environment; therefore, it is important to prepare them to live in particular environments with assistance.

125. In accordance with its authority, FSDB has properly determined that Petitioner no longer meets the eligibility criteria and should be disenrolled. Overwhelming evidence clearly demonstrates that Petitioner's adaptive functioning, ■■■ academic achievement, and ■■■ development reflect a reduced rate of learning consistent with his functioning in the TMH range.

126. Petitioner is also ineligible for continued enrollment at FSDB because ■■■ constitutes a disruption to the educational process. The disruption is not that of a "behavior problem" that invokes images of outburst and other overt behavioral interruptions to the instructional day. Instead, Petitioner's diminished skill and ability levels require a disproportionate amount of individual teacher assistance, which detracts from the teacher's attention given to the rest of the class.

FAPE

127. It is well-settled that the purpose of IDEA, 20 U.S.C. Section 1400 et seq., is to ensure "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." See 20 U.S.C. § 1400(d)(1)(A) (2006). In order to provide FAPE, a SEA or LEA must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. V. Rowley, 458 U.S. 176, 203 (1982).

128. The Rowley Court established a two-part test to address the provision of FAPE. First, the educational agency must comply with the procedures set forth in the IDEA. Rowley, 458 U.S. at 206-207. Second, an IEP developed through IDEA's procedures must be reasonably calculated to enable the child to receive educational benefits. Id.

129. In accordance with Rowley's two-fold inquiry, the first question is whether FSDB followed the IDEA's procedural requirements. If not, the next question is whether Petitioner suffered harm as a result of the alleged procedural violations." See Weiss v. Sch. Bd. Of Hillsborough Co., 141 F.3d 990,996 (11th Cir. 1998).

130. FSDB did not commit a procedural error by finding that Petitioner was hearing impaired as opposed to being deaf. The IDEA regulations distinguish between the definitions of "deaf" or "hearing impaired" in terms of the severity of the audiological impairment. See 34 C.F.R. §§ 300.8(b)(3) and 300.8(b)(5). In contrast, FSDB does not make such a distinction. All eligible students at FSDB, with a hearing loss of 30 decibels or greater in the better ear, are educated in the same classes. Regardless of the label attached to Petitioner's hearing loss, FSDB used total communication in a language rich environment to ensure [REDACTED] access to education.

131. Pursuant to 34 C.F.R. Section 300.320, parents of students are entitled to periodic reports about their child's progress in special education classes. FSDB did not commit a procedural violation by failing to provide Petitioner's parents periodic progress reports.

132. Petitioner's parents received periodic report cards. The report cards clearly state that special needs students receive grades based on the work completed at each student's level. Petitioner's parents also attended every IEP meeting. Testimony that Petitioner's parents were misled regarding Petitioner's school performance is not credible.

133. Under the second prong of Rowley, an education program for an ESE student must provide "a basic floor of

opportunity" for the child to access "personalized instruction" and to provide "benefit educationally from that instruction." See Rowley, 458 U.S. at 203. However, "the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." Rowley, 458 U.S. at 208. IDEA does not impose an "additional requirement that the services be sufficient to maximize each child's potential." See Rowley, 458 U.S. at 198. Moreover, the Court in JSK v. Hendry Co. Sch. Bd., 942 F.2d 1563, 1573 (11th Cir. 1991) defined an "appropriate education" as "making measurable and adequate gains in the classroom."

134. In this case, the most persuasive evidence shows that FSDB made appropriate assessments of Petitioner's educational needs. The school developed IEPs that were reasonably calculated to confer educational benefit on Petitioner. Using measurable goals and objectives, FSDB appropriately implemented the IEPs.

135. Petitioner made adequate gains until [REDACTED] transferred to high school and began to experience behavior problems. Even then, FSDB's teachers continued to provide Petitioner with instructional modifications to ensure [REDACTED] had access to education. Given Petitioner's progressive neurological impairment, [REDACTED] need for individual attention, and [REDACTED] trouble generalizing skills learned in middle school to the high school

environment, it cannot be said that Petitioner's slower rate of learning was the result of poor instruction and poor academic programming on the part of FSDB.

Compensory Education

136. When a claim is brought pursuant to IDEA, and relief is deemed warranted to remedy a denial of FAPE, students are entitled to appropriate relief. See 20 U.S.C. § 415(i)(2)(C)(iii). Compensatory education has been upheld as an appropriate remedy for an "educational deficit created by an educational agency's failure over a given period of time to provide FAPE to a student." See Reid v. District of Columbia, 401 F.3d 516, 523 (C.A.D.C. 2005), quoting G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), citing Burlington v. Dep't of Educ., 471 U.S. 359 (1985).

137. The greater weight of the evidence indicates that FSDB properly disenrolled Petitioner. ■ was TMH and caused disruption to the education of other students. FSDB provided Petitioner with FAPE at all times. FSDB complied with all procedural and substantive requirements of IDEA. There is no basis to award compensatory education in this case.

ORDER

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

ORDERED:

That the Amended Complaint is hereby dismissed.

DONE AND ORDERED this 5th day of October, 2007, in
Tallahassee, Leon County, Florida.

S

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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

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