

Florida School for Deaf and Blind  
No. 05-0182E  
Initiated by: Parent  
Hearing Officer: P. Michael Ruff  
Date of Final Order: January 4, 2006

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████ )  
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Petitioner, )  
 )  
vs. ) Case No. 05-0182E  
 )  
SCHOOL FOR THE DEAF AND BLIND, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to Notice, this cause came on for hearing on August 1-2, 2005, before P. Michael Ruff, duly-designated Administrative Law Judge, in St. Augustine, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Doris L. Raskins, Esquire  
Post Office Box 600606  
Jacksonville, Florida 32260-0606

For Respondent: Charles L. Weatherly, Esquire  
The Weatherly Law Firm  
3414 Peachtree Road, Northeast Suite 1550  
Atlanta, Georgia 30326

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, in ██████ should be dis-enrolled as a student at the Florida School for The Deaf and Blind (FSDB), on the ground that ██████ is a danger to ██████ or to others because of ██████ unpredictable seizures; whether that seizure disorder places ██████ in a medical risk category that exceeds the responsibility, practice, and training of the health care center on campus; and whether ██████ seizure activity is disruptive to the educational process for the Petitioner as well as for other students in the classroom and otherwise at FSDB.

#### PRELIMINARY STATEMENT

This cause arose when on November 30, 2004, Dr. Karen Belsito, the Medical Director of FSDB, changed the health acuity level of ██████ from a level four to a level five, which under the rules cited below, concerning eligibility for enrollment, rendered ██████ ineligible to be present on the FSDB campus. The Petitioner, an eleven-year-old ██████, has been a student at FSDB since February 2000, when ██████ was enrolled as a day student in the blind school kindergarten. In addition to ██████ visual impairment, ██████ has epilepsy, including a severe seizure disorder, as well as developmental delays. The FSDB decided, on recommendation of the medical director, that ██████ was ineligible to be on the FSDB campus. The medical director did not feel that she could keep ██████ safe on the campus because of ██████ seizure disorder and its manifestations and surrounding circumstances.

A due process hearing was requested by the Petitioner on January 20, 2005. Mediation activities were initiated between the FSDB and the Petitioner and following attempted mediation the FSDB permitted [REDACTED] to return to campus for a "trial period" between February 28, 2005, and April 8, 2005. A staffing meeting was held some two days before conclusion of that trial period to discuss whether the Petitioner's seizures, as manifested during the trial period, made [REDACTED] a danger to [REDACTED]self or to others on the campus; whether those seizures were disruptive to the educational process for the Petitioner and for other students; and whether [REDACTED] seizure disorder and its manifestations were beyond the management capabilities of the school's health care center (HCC) and other staff. The Respondent's school staff at that meeting expressed concern that those elements were true and that, in accordance with Florida Administrative Code Rule 6D.3.002, the Petitioner was no longer eligible for continued placement at the school.

In accordance with the prior mediation agreement, the Respondent continued to provide services in the home, until resolution of this matter through the administrative hearing process is concluded. The parents, however, determined that they did not believe that these services were sufficient and voluntarily enrolled [REDACTED] in the St. Johns County School District at the commencement of the 2005-2006 school year.

The cause came on for hearing as noticed. The Petitioner presented the testimony of the Petitioner's [REDACTED]; the Petitioner's [REDACTED]; Kristina Fields, the Prevention Education and

Vocational Coordinator for the Epilepsy Foundation of Northeast Florida; Maryann Hutto, the Petitioner's classroom teacher; Karen Belsito, M.D., the medical director of FSDB; Mike LaMee, an FSDB physical education teacher; and Debra Giordino, a teacher at the [REDACTED]. Additionally, the Petitioner submitted into evidence the deposition testimony of Dr. Harry Abram, Jr., M.D., a pediatric neurologist, taken on August 12, 2005. The Petitioner also presented exhibits 1 through 40, which were admitted into evidence. The Respondent presented the testimony of Mary Ann Hutto, the Petitioner's teacher; Dr. Karen Belsito, M.D.; Jane Leazer, the Staffing Specialist at FSDB; Patricia Jackson, a Speech Therapist; Carl Jacobson, the Orientation and Mobility Instructor at FSDB; and Dr. David Rostetter, an educational consultant and expert witness regarding IDEA law and policy on a national level. Additionally, the deposition of Dr. Nicholas Krawiecki was adduced by FSDB on August 19, 2005, and placed into evidence. (Pediatric Neurologist)

Upon conclusion of the hearing the parties ordered a transcript thereof, which was filed with the undersigned along with the transcript of the above post-hearing deposition. The parties additionally agreed to an extension of time in which to submit proposed final orders which was approved and have waived the relevant 45 day period for conduct of the due process hearing and rendition of a decision herein.

#### FINDINGS OF FACT

1. The Petitioner is an 11-year-old [REDACTED] with multiple disabilities including a severe seizure disorder or epilepsy, developmental delays, and a severe visual impairment. [REDACTED] is an only child and resides with [REDACTED] parents in [REDACTED], Florida. Under Florida Law the FSDB is a component of the delivery of public education within the K-20 Florida educational system and is funded directly by the Florida Department of Education budget. The FSDB is thus required to provide educational programs and support services appropriate to meet the education and related evaluation, counseling, and educational needs of hearing-impaired and visually-impaired students who meet the enrollment criteria of the FSDB. Additionally, the FSDB has a special needs students department for students who have other impairments emotional, mental, or physical, in addition to visual and hearing impairment. The FSDB is not a local educational agency, rather, it is a state educational agency (SEA) and must comply with all laws and rules applicable to SEA's. As provided in Section 1002.36(2), Florida Statutes (2005), the mission of the FSDB is to provide FAPE to Florida's eligible sensory-impaired students.

2. The Petitioner, [REDACTED] has suffered from epilepsy since he was three days old. [REDACTED] seizure disorder has been diagnosed by a pediatric neurologist attending [REDACTED] as "intractable" and [REDACTED] has received medical care for the long-term at Nemours Children's Clinic in [REDACTED], essentially since birth. The Petitioner's current treating pediatric neurologist is Dr. Harry Abram, who sees [REDACTED] approximately

every three months or more often, as needed, to address medication adjustments and other aspects of care.

3. An intractable condition is one that is resistant to medication or medical therapy. That is, it is incurable and cannot be totally alleviated through therapy or through medication.

4. The Petitioner experiences two types of seizures: myoclonic and complex partial seizures. Myoclonic seizures occur predictably when the Petitioner first wakes up from sleeping and, according to [REDACTED], may last anywhere from one to five minutes, sometimes a little more. The Petitioner's [REDACTED] describes a myoclonic seizure as one in which the Petitioner's head drops multiple times as if [REDACTED] is nodding and sometimes [REDACTED] arms rise at the same time. According to the Petitioner's [REDACTED], the Petitioner is lucid during these myoclonic seizures. Myoclonic seizures also occur at other times but are not as predictable.

5. Complex partial seizures differ from myoclonic seizures in that they are completely unpredictable and may occur at any time. According to the Petitioner's [REDACTED], if the Petitioner is standing while having a complex partial seizure [REDACTED] arm will rise, [REDACTED] head will drop and [REDACTED] will start to turn to the left. Additionally, [REDACTED] describes [REDACTED] legs as becoming stiff and has observed the Petitioner to fall over sometimes during a seizure, although not always. The Nemours Clinic records indicate that the Petitioner's seizures have been characterized by sudden head turning to either side "with collapsing at [REDACTED]

knees." At home, however, the Petitioner's [REDACTED] is generally always present and is able to assist the Petitioner before he actually falls.

6. The Petitioner's complex partial seizures typically last 10 or 15 seconds and [REDACTED] [REDACTED] describes a "bad seizure" as one that may last 45 seconds. According to [REDACTED] [REDACTED] the Petitioner takes a minute or two to return to normal after a complex partial seizure, unless [REDACTED] is tired and wants to sleep. Sometimes continence is a problem when [REDACTED] has a seizure and [REDACTED] does not realize that [REDACTED] has wet [REDACTED].

7. A complex partial seizure ends with what is known as a "postical phasem," wherein the Petitioner becomes drowsy and somewhat unaware of [REDACTED] environment. There are potential risks as hours go by associated with these seizures because of the Petitioner's change in consciousness or loss of awareness during the seizure. This may put [REDACTED] at risk of falling or making a typical movement to different places because [REDACTED] is not aware of what is happening around [REDACTED] during or at the end of the seizure.

8. A number of medications have been tried in order to try to alleviate or eliminate the seizure problem. Presently the Petitioner is taking lamictal, depakote, topamax, and zoloft. None of these medications, thus far, have effectively controlled the seizures or made them cease recurring. The Petitioner's parents have also explored alternatives to medication, including the implantation of a Vagus Nerve Stimulation device (VNS) which was performed in 2002. They have considered other surgery possibilities. The VNS implant has not been effective and the

Petitioner's parents have found that there is nothing more that can be done surgically that will be effective in controlling the seizures.

#### Educational Programming at FSDB

9. In February 2000 the Petitioner's parents applied for admission to FSDB. In considering applications for admission FSDB is required to follow specific enrollment procedures which include, among other things, initial contact with parents through the parent information office; forwarding of a detailed information packet to parents; a request for extensive records by the registrar; a file review process, the performance of evaluations if necessary; and an intake meeting with parents wherein eligibility for enrollment is determined. If a student is determined for enrollment, an individual education plan (IEP) team meeting is convened to develop an IEP for the student.

10. As part of the intake process for the Petitioner, the health care center of FSDB completed a health acuity form dated May 2, 2000, assigning a health acuity level of four to the Petitioner. Health acuity levels for FSDB range from one to five and are used to decide individual health needs and to determine whether a student can be managed within the FSDB setting. In addition, the acuity levels dictate whether a strict health plan is necessary for a student and ensure that the staff is aware of those students who are more medically complex or at risk. Acuity levels are adjusted in accordance with a student's medical needs or conditions.



11. Assessment criteria such as the complexity of the health problem, the risk for complications, and the intensity of medical/nursing management required form the basis for determining a health acuity level for a student. The acuity levels reflect the following: Acuity level one-a healthy child; acuity level two-minor health conditions with minimal risk; acuity level three-moderate health conditions with moderate risks; acuity level four-complex health conditions with significant risk; and acuity level five-complex unstable health conditions with major risks. Under the FSDB rules, the medical director of the facility, in consultation with HCC's staff pediatrician, makes the acuity level determination for all students. Since April 2004, Dr. Balcito has served as the medical director and therefore makes the decisions.

12. The HCC at FSDB is not a hospital but is a unit located there that provides limited care for children with disease or medical processes that are stable. The HCC provides care in a non-acute fashion for a limited period of time. All students who attend the facility are required to have a primary care physician outside of the school.

13. Under the FSDB rules, a student is not eligible for admission or continued enrollment if the student is determined to be a danger to ██████ or others, is disruptive of the educational process, or has been determined to have medically related health and/or safety issues that are beyond the management scope of the HCC or educational program resources to appropriately manage. Because of the nature of the HCC, a health acuity level of five

is considered beyond the HCC's capability and responsibility and includes students with conditions that pose a danger to themselves or others. If a student is determined to have a health acuity level of five the child is asked to leave the campus and an immediate IEP staffing is convened to discuss the health condition and the student's future.

14. Once the intake process, significant information gathering, and evaluation were completed for the Petitioner, the FSDB staff determined that ■■■ was eligible for enrollment and accepted ■■■ to begin in August 2000 for the 2000-2001 school year. At the intake meeting of May 4, 2000, the acuity levels were explained to ■■■ parents as well as the fact that a student must continue to meet the enrollment criteria to remain a student at FSDB.

15. In a note dated August 18, 2000, the Petitioner's treating pediatric neurologist reported that "overall his myoclonic seizures seemed to be relatively well controlled . . .". Additionally, the family reported to FSDB at intake that the seizures were well controlled.

16. On August 21, 2000, an IEP was developed for the Petitioner and ■■■ began school in a class in the elementary blind department. In addition to special education services designed for visually impaired students, the Petitioner's program included occupational and physical therapy services. On October 7, 2000, an IEP meeting was convened wherein the Petitioner was found eligible for services as a speech-impaired student and speech services were added to ■■■ program.

17. From October 2000 until June 2001, the Petitioner experienced somewhat frequent and significant seizures. The FSDB physician progress notes show this and it is evident that the Petitioner's medication were being adjusted, discontinued, or changed during this period of time by [REDACTED] physician neurologist in order to attempt to better control the seizures.

18. On April 6, 2001, an IEP was developed for the Petitioner for the 2001-2002 school year and [REDACTED] continued to attend school in the blind elementary department for the 2001-2002 year. The Petitioner continued to make frequent visits to [REDACTED] treating pediatric neurologist during that year for medication adjustments and modifications. On December 4, 2001, Dr. Shanks, [REDACTED] pediatric neurologist at the time, notes that the parents had reported improvement in the Petitioner's attentiveness, but concurrent decline in behavior "with some emergence of oppositional behavior and obvious decline in school progress." On March 18, 2002, the annual IEP meeting was held and an IEP was developed for the 2002-2003 school year. The Petitioner continued to maintain an HCC acuity level of four at that time.

19. In the fall of 2002, Dr. Abram, the Petitioner's treating neurologist then noted that the Petitioner had experienced "increasingly stable course with regard to [REDACTED] seizures." In addition, Dr. Abram observed that the Petitioner's parents reported that [REDACTED] seizures were much briefer than in the past and less intense, though [REDACTED] continued to have almost daily

myoclonic seizures, particularly in the morning right after awakening.

20. Notwithstanding the reported improvement in seizure activity, Dr. Abram noted, from family reporting, that school was still a concern because the Petitioner continued to have problems with focusing and staying on task, was excessively fidgety and had become somewhat defiant and rebellious toward [REDACTED] teachers. Incident reports completed by the FSDB staff from October 2002 through May 2003, indicate significant behavior difficulties exhibited by the Petitioner, including hitting and kicking other students.

21. According to [REDACTED], the Petitioner's behavioral problems were related to medication. Whatever the cause, an IEP meeting was convened as early as November 8, 2002, for a review of [REDACTED] IEP. At the meeting it was recommended that an evaluation be conducted to include, among other things, the administration of adaptive behavior scales, (tests) a behavior observation check-list, and a social/emotional/behavioral evaluation.

22. During the winter and spring of 2003, the evaluations were conducted. In addition, the Petitioner was continuing frequent visits to Nemours Children's Clinic for medication and treatment adjustment and follow-up.

23. On March 26, 2003, an IEP meeting was convened wherein the evaluation results were reviewed and it was recommended that the Petitioner be moved to an exceptional student education (ESE) combined elementary class for the 2003-2004 school year for one

quarter. After one quarter the Petitioner would be re-assessed for possible placement in a program within FSDB's special needs department.

24. Approximately, one month later, the Petitioner saw Dr. Abram, who noted that "█████ seizures remain a major concern" and planned for a change in treatment. By May 2003, the Petitioner's behavior had become a great concern to FSDB staff to the extent that there was some suggestion that if behavior did not change over the summer, "will need to determine if █████ is a danger to others and/or a disruption to the educational environment."

25. The Petitioner began school for the 2003-2004 school year and on September 10, 2003, the IEP team convened in order to review █████ placement and updated evaluation results. At the meeting it was determined, among other things, that the Petitioner qualified as a student with a language impairment and, therefore, should receive additional services in language therapy. Consideration of also identifying "Other Health Impairment" (OHI) as an additional disability was also discussed based upon the Petitioner's medical/seizure condition. Finally, it was recommended that the Petitioner be placed in FSDB special needs department, beginning on September 16, 2003. The determination of the additional disability identification of OHI was not made until December of 2003. Thus it was not shown that the Petitioner was merely labeled with the OHI disability designation in order to justify moving █████ to the special needs department. █████ was already moved to placement in the special

needs department some two months prior to the determination of the OHI disability designation.

26. The special needs department is one of three educational departments of FSDB. The other two are for the deaf and the visually impaired. Students eligible for special needs generally have disabilities, in addition to a primary disability of a sensory impairment, that affect their educational performance. The special needs program is more self-contained than the others, with a small teacher to pupil ratio, in order to provide more individualized attention than do the regular vision or hearing programs.

27. The Petitioner began in the special needs department with Rebecca Allen as ■ teacher, but moved to Mary Ann Hutto's class in December 2003. Ms. Hutto remained the Petitioner's teacher during the 2003-2004 and 2004-2005 school years. According to the Petitioner's father, once ■ was moved to the special needs department, the behavior problems began to disappear and the Petitioner was back to "■ old happy self again." Just after the move to Ms. Hutto's class an IEP meeting was held on December 8, 2003, where, among other things, it was agreed that the Petitioner met the eligibility criteria as an "other health-impaired" student and this would be recognized as an additional disabling condition for ■ based upon ■ seizure disorder. As explained by Jane Leazor this was for the purpose of making the FSDB staff more aware about ■ needs in terms of providing ■ additional time and attention.

28. Maryann Hutto is certified to teach students who are hearing-impaired, visually impaired, mentally handicapped, and students whose second language is English. She has worked in the special needs department at FSDB for approximately 20 years. There are a total of six children in the Petitioner's class, three of whom are totally blind. In terms of the extent of visual impairment, the Petitioner's vision is better than that of the other children in [REDACTED] class.

29. In her classroom, Ms. Hutto has the full-time assistance of an aide, Dorothy Davis, who has been with her for four years. Ms. Hutto describes her classroom as large with two doors to the hall on each end. Within each classroom each child has a desk. There is a book-shelf on one end of the room and a bathroom with two doors, along with Ms. Hutto's teacher desk and computer. There is an additional book shelf in the room, along with a circular table with chairs that is used for group activities. There is an area of the room that contains a TV, large tape players, a couch, and two additional chairs. There is also a play area in the room with a box of toys and other things in it. In total, there are five work station areas in the classroom. All of Ms. Hutto's students move from one workstation to another during the course of the typical school day.

30. In addition to required movement within the classroom environment, Ms. Hutto's students are required to move from building to building across the campus. When moving across campus, they are required to walk on sidewalks with curbs. For the first class period of the day, the class attends physical

education and is required to walk from the building where special needs is housed-which is at the back of the campus- to either the blind gym, the track, or the swimming pool. The blind gym is approximately 100 yards from the classroom building, and the swimming pool is 100 yards away in the other direction. Typically, only Ms. Davis accompanies the students to P.E., since that time period is Ms. Hutto's planning period.

31. After P.E., the students return to Ms. Hutto's classroom for a snack and then language instruction. During third period, the students receive math instruction and instruction in reading for fourth period. For fifth period, the students work on writing skills and then go to lunch in the cafeteria. The cafeteria is down the hall from Ms. Hutto's classroom and Ms. Davis accompanies the students there. Ms. Hutto helps the students get through the cafeteria line with their trays and to their tables.

32. After lunch, the class returns for homeroom time, where they do a bit of "regrouping," with some "down-time," where Ms. Hutto may read to them and ask questions about the story. The students then complete their writing period and move to sixth period, where the focus is on social/personal skills. The students are then dismissed from school and go to the dorm to wait for the school bus to take them home if they, like the Petitioner, are day students and do not reside in the FSDB dorm.

33. Within the above typical schedule there are additional activities in which the students and Ms. Hutto's class engage, including visits to the library building on Mondays, followed by



computer class. In order to get to the library, the class must use steps and/or a ramp and then must climb two flights of stairs to reach the computer class.

34. In addition to [REDACTED] general class activities, the Petitioner participated in related services, including speech services. Depending upon the speech teacher, the Petitioner received group speech in class or sometimes went to the speech room upstairs, being accompanied by the speech teacher.

Ms. Fields, from the Epilepsy Foundation testified and observed that children with complex partial seizures are more dangerous to themselves because they are unable to focus on things such as obstacles in their path or on stairs ahead of them. The Petitioner's speech and language therapist, Patricia Jackson, described two seizures that the Petitioner had during ten sessions. One of these seizures occurred while the Petitioner was on the stairs. For occupational therapy and physical therapy services, all students that receive such services, including the Petitioner, are met by an aide and taken via cart to the health care center because of the high numbers of students receiving such services and the need to get them there quickly. Finally, the Petitioner received mobility services on a group basis within the classroom, with an occasional outing with the instructor on a one-to-one basis.

35. According to Ms. Hutto, she and her aide faced particular challenges in the classroom because they have several blind children to look after. While trying to keep the Petitioner with them, they are also required to watch or hold

onto other children. Because they have observed the Petitioner having seizures coming and going from certain places on campus, they did not want to be very far from ■■■, as they could never predict when ■■■ seizures would occur. In Ms. Hutto's opinion, this was a problem for them and she and Ms. Davis found it a major concern to keep everyone of their students safe, including the Petitioner, because of the Petitioner's seizure problem. Although the Petitioner contends that the intensive attention necessary to protect ■■■ is nothing out of the ordinary for the educational environment and process at FSDB, by suggesting that the totally blind students also need intensive attention, Ms. Hutto explained that the difference is that the totally blind children can be taught mobility skills, whereas ■■■ who has mobility skills, exhibits unpredictable seizures that differentiate ■■■. Dr. Belsito corroborated this explanation by explaining the difference between children with acute medical conditions such as the Petitioner and the visually impaired children at FSDB, whose physical status is, in a sense, less acute and more predictable.

36. When the Petitioner first entered Ms. Hutto's class she observed seizure activity where the Petitioner's head would go down and ■■■ arms would curve before ■■■ would go into a seizure. In these cases, the Petitioner could be sitting or standing and would lose consciousness for a while. During such seizures, Ms. Hutto and Ms. Davis could not communicate with the Petitioner.

37. In Ms. Hutto's classroom, the seizures did not present themselves the same way every time in terms of when, where, and how long they occurred or how tired the Petitioner would feel afterwards. Although the seizures were unpredictable, Ms. Hutto testified that "you would recognize it" and that "you knew it when you saw it."

38. Ms. Hutto received training in procedures for seizure response in her course work and in several workshops provided at FSDB. Dr. Belcito also came to her classroom in the Spring of 2004 to inform her concerning the nature of the Petitioner's seizures. In order to ensure the Petitioner's safety, Ms. Hutto and Ms. Davis devised a special system that they would follow when the Petitioner began to have a seizure. When a seizure was beginning, Ms. Hutto would yell Ms. Davis's name or Ms. Davis would yell hers and they would then leave what they were doing and both go to the Petitioner in order to make sure that ■ was safe and was not going to fall. At times the Petitioner was very unsteady, depending upon where ■ was. If the Petitioner was sitting at ■ desk at the time of a seizure, Ms. Hutto believed it to be her responsibility to go straight to ■ because she was not going to take the chance that he might hurt ■.

39. When the Petitioner had a seizure at school, "everything stopped" until the Petitioner was safe. This took away from instructional time provided to other students in the class who would wait for Ms. Hutto or Ms. Davis to return to an activity that they left in order to address the Petitioner's problem. Sometimes Ms. Hutto would tell other students that they

would have to wait until she was finished with the Petitioner. In addition, there were a couple of children who would act out in certain ways if they did not get enough individual attention from her or Ms. Davis at the time they were attending to the Petitioner.

40. When Ms. Hutto or Ms. Davis left other students to attend to the Petitioner's seizure activity, most of the students waited and did nothing, as there was only one who could work independently. In Ms. Hutto's opinion, the time she and Ms. Davis spent with the Petitioner was disruptive to the educational process of other students in the class.

41. The Petitioner's seizure activity was also disruptive to ■■■ own educational process. According to Ms. Hutto, the Petitioner missed a lot of educational time because of ■■■ seizure activity.

42. When the Petitioner began in her class, ■■■ seizures occurred mostly within the classroom environment. When Ms. Hutto began seeing seizures outside the classroom, and in other campus environments, however, it "changed a lot in her mind," in terms of paying more attention to ■■■ and the need to be closer to ■■■. In her opinion, this made things much more dangerous for the Petitioner and much more serious for her and Ms. Davis, to try to keep ■■■ as safe as could be.

43. When the Petitioner entered Ms. Hutto's classroom on December 3, 2003, Ms. Hutto began to keep a written log of the seizure activity, describing what she observed. According to Ms. Hutto, she began the log in an effort to find a pattern to ■■■

seizure activity. The log begins on December 3, 2003, and ends on May 26, 2004. It is documented that [REDACTED] had 36 seizures in 101 school days during that time period, when she was observing [REDACTED].

44. Ms. Hutto's logs reflect frequent seizure activity and a couple of situations where the Petitioner suffered potential injury as the result of a seizure. On December 4, 2003, the Petitioner had a short seizure in the swimming pool. In addition, on April 20, 2004, the Petitioner had a seizure while walking to the dorm. According to Ms. Hutto, the Petitioner was about four steps in front of her and "just like that [REDACTED] went down." It took her a couple of seconds to get to [REDACTED] and because [REDACTED] had fallen head first [REDACTED] had hit [REDACTED] front tooth on the ground. Ms. Hutto took [REDACTED] immediately to the HCC, but the dental assistant there could not work with [REDACTED] without permission from [REDACTED] parents, so Ms. Hutto called the Petitioner's [REDACTED] and accompanied the Petitioner back to the dorm to get on the bus. After the incident Ms. Hutto observed a small amount of blood above the Petitioner's left front tooth.

45. In April 2004, Dr. Karen Belcito became medical director at FSDB and was immediately made aware of the Petitioner's condition. In her view and based upon records maintained by Ms. Hutto and others at FSDB, the Petitioner's seizures were becoming more frequent and intense. In addition, upon Dr. Belsito's arrival at FSDB, Dr. Lesley Ravago, the staff pediatrician, immediately alerted Dr. Belsito to the complexity

of the Petitioner's condition and the worsening of it on FSDB's campus, in an environment that she felt was unsafe.

46. For the 2004-2005 school year, the Petitioner returned to Ms. Hutto's class. From August 9, 2004, through November 30, 2004, Ms. Hutto continued to record the Petitioner's frequent seizure activity. According to Ms. Hutto she observed the Petitioner have 43 seizures in 61 school days during that period of time. In her view, there was an increase in seizure activity and the seizures were more severe, especially the head jerking type that could result in ■■■ hitting the table. In fact, according to FSDB's neurological expert, Dr. Nicholas Krawieki, of Emory University, in comparing the seizure activity recorded by Ms. Hutto during the first observation period between December 2003 and May 2004-and the second, August 2004 through November 2004 - the Petitioner's average daily seizure frequency at school doubled from .35 seizures per day to .70 seizures per day.

47. In August of 2004, Ms. Hutto observed a different kind of seizure, she had never seen before. According to Ms. Hutto the Petitioner was sitting at ■■■ desk engaging in a group activity and began having seizures "one right after another." In one instance, they counted between 77 to 80 head jerks in a 20 minute period. There was also a subsequent repeat incident in October of 2004 when the Petitioner had 36 seizures in 7 minutes. Ms. Hutto was very concerned and phoned the Petitioner's ■■■ who told her that those were the kinds of seizures that the Petitioner had at home when ■■■ wakes up in the morning. Ms. Hutto was so concerned however that she informed

her supervisor and the principal of the special needs program, Mr. Sherwood Hampton.

48. Drs. Belcito, Abram, and Krawieki all described a condition known as "status epilepticus" as the existence of continuous seizures over a period of 15 to 30 minutes. Dr. Krawieki explained that such a condition can indicate a much more serious condition which puts a patient at higher risk of brain injury or death. This condition is indicative of the worsening of the Petitioner's seizure status during 2004.

49. Mr. Hampton wrote to the Petitioner's parents as early as September 1, 2004, advising them that several seizures had been documented by the staff raising a concern about the Petitioner's medical condition. Therefore, Mr. Hampton requested that the parents attend an IEP review meeting.

50. On September 23, 2004, the Petitioner experienced another seizure in the swimming pool at FSDB. Ms. Hutto was present when the seizure occurred. Ms. Davis yelled for the coach, Mr. Mike LaMee and Ms. Hutto saw the Petitioner's head go under water. Mr. LaMee left another child and went to the Petitioner, succeeding in getting [REDACTED] out of the pool. This incident was described by both Doctors Belcito and Krawieki as a "near drowning."

51. On October 7, 2004, FSDB sent a revised Acuity Four Heath Plan to the parents, which included the requirement that the academic staff keep a log documenting the Petitioner's seizure activity and forward it to the HCC for review. Although Ms. Hutto had not seen the health care plan and therefore was not

providing a log of seizure activity to the HCC, she was already documenting the seizure activity and had it available upon request for the HCC.

52. On November 2, 2004, Dr. Ravago issued an order requiring one-to-one supervision of the Petitioner when he was on the play ground swing or on staircases. In addition, Dr. Ravago ordered that he was not to climb on playground equipment. On November 8, 2004, the activity restrictions were modified by Dr. Belcito to also include no swimming or pool activities that involved getting into the water, and supervision for climbing on any equipment higher than two feet above the ground. Additionally, the Petitioner was restricted from swinging on swings, although [REDACTED] could sit on a swing. Supervision was required on stairs but without any need to hold or restrain the Petitioner unless seizure activity began. The activity restrictions also included implementation of an alternative activity to swimming.

53. Petitioner's parents were informed of the restrictions and did not agree with them. According to the Petitioner's [REDACTED] they accepted them however, so that the Petitioner could stay at FSDB. In fact, the Petitioner's [REDACTED] was upset about the restrictions and went to FSDB sometime in November to negotiate about them. The parents believed that the restrictions were not needed "if [REDACTED] was being watched."

54. On November 10, 2004, the Petitioner's mother contacted the Nemour clinic and reported that the Petitioner's seizures had increased both at home and at school, noting that it had become a



"major problem" at school and that they had limited [REDACTED] activity at school.

55. On November 18, 2004, an IEP meeting was held wherein updated evaluation results were reviewed and explained, IEP goals were reviewed, and health care issues were discussed. However, a decision was not made about the Petitioner's eligibility for continued enrollment at FSDB, as that was not the IEP team's purpose for meeting and FSDB staff, including the HCC staff, were continuing to gather information.

56. On November 19, 2004, Dr. Belsito decided that the Petitioner was to be seen and evaluated at the HCC following every seizure episode. Ms. Hutto therefore began to take the Petitioner to the HCC after [REDACTED] experienced a seizure. The Petitioner's father told Ms. Hutto [REDACTED] did not think that was necessary every time a seizure occurred. However, since before 1992 it has been regular procedure to require any staff member witnessing a seizure to notify the HCC immediately. Additionally, they were to describe anything they saw in association with a seizure and refer the student to the HCC and the nursing staff. In Dr. Belsito's opinion it was essential to assess the vital signs and condition to determine whether the student had suffered an injury during an acute situation. This procedural policy applies to all students at FSDB with medical problems, not just children with seizure disorders.

57. On November 29, 2004, Dr. Abram noted that since the Petitioner's last visit on August 26, 2004, [REDACTED] "course remains increasingly complex with growing increase in the frequency of

■■■ seizures." According to Dr. Abram, the Petitioner's parents were reporting three to five seizures per day and that these events were having a growing impact "in particular, at school where ■■■ activities have been limited to a point where ■■■ is unable to swim or play on the playground."

58. Without knowledge of Dr. Abram's note, the next day on November 30, 2004, Dr. Belsito wrote to Sherwood Hampton advising that the Petitioner's health acuity level would be re-classified from four to five because of the unpredictable nature and high frequency of ■■■ seizures. Indeed, the Petitioner's ■■■ testified that at the time the acuity level was changed to five, the Petitioner was having seizures daily or close to daily.

59. Dr. Belsito thus noted that the Petitioner's medical condition was beyond the scope of the practice of the HCC and its resources to appropriately manage. Mr. Hampton immediately called the Petitioner's parents indicating that it was necessary that they meet as soon as possible in order to discuss the Petitioner's medical issues and concerns. It was agreed that a meeting would be held on December 1, 2004.

60. On December 1, 2004, a meeting was held to discuss the Petitioner's medical condition. Among other things, Dr. Belsito reviewed the seizure logs with the team and stated her concern about the frequency and nature of the seizures and the fact that they caused safety issues. She explained the acuity level five assignment and informed the Petitioner's ■■■ that acuity level would preclude the Petitioner from being schooled at FSDB.

61. It was also determined that homebound services would begin for the Petitioner and that [REDACTED] eligibility for continued enrollment at FSDB would be addressed at a future staffing meeting. A written notice of the proposed action was provided to the parents, along with a copy of their procedural safeguards. On the same date the Petitioner's parents wrote to Mr. Hampton indicating their disagreement with Dr. Belsito and that they would challenge their decision.

62. On December 3, 2004, an IEP review meeting was held in order to propose interim services that FSDB would provide to the Petitioner pending the upcoming continuation staffing. The staff proposed, that based on medical concerns, educational programming would be continued by FSDB at the Petitioner's home beginning December 6, 2004. Written notice of the proposed services was provided to the parents, indicating their agreement to services at home, along with the provision of procedural safeguards.

63. FSDB began the provision of homebound services to the Petitioner and a meeting was held on December 15, 2004, to address eligibility for continued enrollment at FSDB. The parents were accompanied by their counsel to the meeting as well as by an "advocate," Mr. Skeeter Key. The FSDB staff, including Dr. Belsito reviewed their medical concerns and Ms. Hutto reviewed her safety concerns at the meeting. The Petitioner's counsel suggested that a one-to-one para-professional be assigned to work with the Petitioner at FSDB and Ms. Leazer explained the school's policy with regard to the provision of one-on-one supervision. Written notice of the school's refusal to provide a

full-time para-professional person to work with the Petitioner was provided to the parents.

64. Dr. Belsito also agreed at the meeting that she would contact the Petitioner's neurologist for further information and that a continuation staffing meeting would be re-convened on January 10, 2005. The parents agreed to the provision of home services pending the January staffing meeting.

65. On December 15, 2004, Dr. Belsito contacted the Petitioner's neurologist, Dr. Harry Abram. She explained to Dr. Abram that she was gathering all pertinent medical information, including positive indicators for review for the next IEP meeting. Dr. Abram stated that the odds of controlling the Petitioner's seizures were less than 10 percent and he could not predict neurological improvements. Dr. Belsito explained to Dr. Abram that the school rule was that the Petitioner was to medically fragile to be enrolled at that time, but she hoped that there would be some improvement so that ██████ enrollment eligibility could be reconsidered. Dr. Belsito noted however, that the Petitioner would need one-to-one care in an educational setting. The discussion with Dr. Abram did not change Dr. Belsito's recommendation.

66. On January 6, 2005, Dr. Abram wrote that "[Petitioner's] reports that ██████ seizure control has significantly improved with only one-to-two brief complex partial seizures weekly." On that basis Dr. Abram opined that it would "be in ██████ best interest, as ██████ is now medically stable, for ██████ to return to ██████ normal school setting." According to Dr.

Belsito, however, Dr. Abram's letter indicated only that the Petitioner's parents were reporting improvements in the seizures. Dr. Belsito required that some consistent medical documentation be provided which would show that [REDACTED] seizures were under better control. Dr. Belsito was also concerned with the content of the letter because she had spoken to Dr. Abram only two weeks before and he had given her quite a different picture of the Petitioner's seizure situation.

67. On January 10, 2005, the continuation staffing meeting was re-convened for the purpose of again addressing the Petitioner's eligibility for continued enrollment. Dr. Belsito shared medical information she had gathered, as did Dr. Ravago. This indicated that the seizure activity had escalated in frequency, intensity, and duration since the Petitioner's initial enrollment. As explained by Ms. Leazer, it was determined that the Petitioner no longer met FSDB's enrollment criteria. The basis for this determination included the fact that the Petitioner was considered a danger to [REDACTED] and a disruption to the educational process and that [REDACTED] health and safety issues went beyond the scope of practice of the HCC and the educational program resources for management of [REDACTED] health and safety.

All members of the team were in agreement except for the parents and their counsel.

68. On January 15, 2005, it was Dr. Belsito's opinion that the seizure disorder and its level of intensity put the Petitioner at risk for injury if [REDACTED] continued to be enrolled at FSDB. She believed [REDACTED] a danger to [REDACTED] and that the complexity

of [REDACTED] condition was beyond the scope of FSDB's ability to manage. Dr. Belsito believed that with the history of seizure episodes and activity that the Petitioner's condition was putting [REDACTED] at risk within the school environment at FSDB. Dr. Belsito stated that she would have to see a definite reduction in the daily seizure activity over a period of two to three months to confirm that [REDACTED] seizure activity had actually decreased.

69. Dr. Nicholas Krawieki, a child neurologist from Emory University and a senior examiner for the American Board of Psychiatry and Neurology concurred with Dr. Belsito. He felt that the unpredictable seizures put the Petitioner at risk of injury and posed a danger to [REDACTED] while enrolled at FSDB. Dr. Krawieki has been on the faculty at Emory University School of Medicine for 21 years and practices as a child neurologist. He provides direct clinical care for patients with seizure disorders on a daily basis. Dr. Krawieki reviewed records from FSDB and from Nemours clinic, interviewed staff who had worked with the Petitioner and observed the campus on two occasions. He acknowledged that all children at FSDB are at some risk, but observed that the Petitioner was at greater risk because of the unpredictability of [REDACTED] seizures. He also concluded that this higher risk of injury to the Petitioner could place other students at higher risk and cause a disruption in the educational process.

70. On January 20, 2005, the Petitioner filed a due-process hearing request challenging the disenrollment determination. Once that process was initiated FSDB was required to continue the

provision of home-bound services to ■ and could not disenroll ■ from that service.

71. From January 24, 2005, until February 3, 2005, the Petitioner attended a public school program in St. Johns County in conjunction with the home-bound services from FSDB. ■ teacher in that program, Debra Giordano, observed only one seizure during that time period. The public school program involved developing an emergency plan for the Petitioner, which included no swimming, climbing, and included height restrictions.

72. On February 8, 2005, Dr. Abram issued a letter indicating that the Petitioner's seizures were "under reasonable control" and that ■ should be allowed to return to ■ normal school setting. His opinion was based on the fact that the Petitioner's teacher in St. Johns County had seen only one seizure during the week the Petitioner was in her class. In an effort to resolve the request of due process from the parents, mediation was then engaged in. At the mediation FSDB agreed that the Petitioner could return to campus for a trial period of five weeks in order to collect various specific data to determine exactly what was happening in terms of the Petitioner's seizure disorder and whether ■ would be able to meet the eligibility criteria for continued enrollment at FSDB.

73. On February 22, 2005, Mr. Hampton notified the relevant FSDB staff that the Petitioner would be returning on a trial basis from February 28th until April 8, 2005, excluding Spring Break. Mr. Hampton reminded the staff of the restrictions to be imposed during that time, including no activity on play ground

equipment or in the swimming pool, and no activity that would elevate the Petitioner above ground level during physical education. It was also agreed that Dr. Belsito would train the staff in the data collection process regarding seizures during that trial period.

74. On April 6, 2005, a meeting was convened to discuss the result of the Petitioner's trial period at FSDB. The staff explained that they still had concerns that the seizure activity presented a danger to the Petitioner, to others and was disruptive to the educational process. As agreed at mediation, home services began again on Monday, April 11, 2005.

75. The Petitioner's seizure report created by Dr. Belsito and provided to the Petitioner's parents on April 7, 2005, reflects that there were a total of 20 seizures reported during the 25 day trial period. The Petitioner was free from seizures on 7 of those 25 days. The duration of the seizures was noted to be from 1 minute to 3.5 hours and several cases required intervention from the staff to prevent injury or falling. In terms of frequency and severity, Dr. Belsito considered this activity to be the same or higher than what she had observed in the fall of 2004. Indeed, Dr. Krawieki calculated that during the trial period, the Petitioner's daily seizure activity increased to .80 seizures per day from the level of .70 seizures per day prevailing in the fall of 2004. Additionally, he noticed that 10 of the 20 documented seizures reflected the occurrence of the postictal stage, which implies that the seizure preceding the postictal period was more involved, severe, and intense. This



data was supportive of FSDB's decision that the Petitioner remained ineligible for continued enrollment.

76. In making its determination to disenroll the Petitioner, FSDB relied, among other things, upon data collected by its staff about the seizures. More importantly, the seizure history relied upon by FSDB in terms of increase in frequency, intensity, and severity of the seizure activity is corroborated by what the parents routinely reported to Dr. Abram at Nemours. For example, in January of 2004, the Petitioner's ██████ reported to Dr. Abram that in ██████ opinion the seizures were better controlled than they had been in several years. During a follow-up visit to Dr. Abram on April 28, 2004, the Petitioner's ██████ indicated that the seizures were essentially without change. Dr. Abram indicated that upon another visit, in August of 2004, the Petitioner had experienced a "relative good summer." However, on November 29, 2004, Dr. Abram was told by the Petitioner's parents that since the last visit in August there was a growing increase in the frequency of seizures. Similarly, the seizure data collected by FSDB during the trial period in 2005 was corroborated by the parents' statements to Dr. Abrams at the April 11, 2005, neurology exam wherein Dr. Abram's noted, "unfortunately, ██████ parents report today that ██████ seizures have increased and ██████ is now having at least one complex partial seizure a day . . . on ██████ current medications, he continues to have daily complex partial seizures that are fairly disruptive as ██████ has been released from school due to them."

CONCLUSIONS OF LAW

77. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding.

78. The Florida School for the Deaf and Blind was founded in 1885 and is a special school, as provided in the Florida Constitution, to serve deaf and blind students in the state. It is one of a number of educational placements available for sensory impaired students. Florida law provides that FSDB is a component of the delivery of public education within the K through 20 educational system and it is funded by the Florida Department of Education. See § 1002.36(1), Fla. Stat. (2005). The FSDB is thus required to provide educational programs and support services appropriate to meet the education and related evaluation and counseling needs of hearing and visually impaired students "who meet the enrollment criteria." Id.

79. By law FSDB is not a local educational agency (LEA) but rather is a state educational agency (SEA). It must comply with all laws and rules applicable to SEA's. Id. Although FSDB does not serve in the role of an LEA it is responsible for the provision of FAPE to students who are enrolled there. As provided in Section 1002.36(2), Florida Statutes (2005), the mission of FSDB is to use available talent, energy, and resources to provide FAPE to eligible sensory impaired students.

#### Enrollment Criteria

80. FSDB is overseen by a board of trustees appointed by the governor in accordance with Section 1002.36(4)(a), Florida Statutes (2005). The board of trustees is thus granted the

authority to adopt rules and to implement provisions of law relating to FSDB's operation. It is required that these rules be submitted to the State Board of Education for approval or disapproval. See § 1002.36(4)(c), Fla. Stat. (2005).

81. Once the State Board of Education has reviewed and approved FSDB's rules, they become part of the Florida Administrative Code which renders them a mandate for management of the school and the students. In 1974, the original enrollment criteria were developed and in their present form are set forth in Chapter 6D-3, Florida Administrative Code. The enrollment criteria define the resources FSDB has to provide to enrolled students, as well as which students it serves.

82. Along with the rules contained in the Florida Administrative Code the school maintains internal operating rules and procedures that are monitored on a yearly basis by the Florida Department of Education (FDOE). The internal operating rules and procedures specifically relating to enrollment and eligibility criteria have never been found to be out of compliance with state or federal legal requirements by the FDOE.

83. FSDB is entitled, as a matter of law, to maintain its rules and operating procedures regarding eligibility and enrollment criteria. In a previous challenge to a disenrollment determination made by FSDB under its enrollment criteria, an Administrative Law Judge held that FSDB eligibility criteria are valid, and that its unwillingness to fully accommodate a student's extensive developmental disabilities, as ██████ parents wished "did not deny ██████ a free appropriate public education

because children not eligible for admission to FSDB must be educated by the school district in which their parents reside." Florida School for the Deaf and Blind, 26 IDELR 1220 (Florida DOAH 1997) at page 9. That judge noted that FSDB's decision to disenroll the student was consistent with its admissions policy and was correct based upon the admissions criteria of FSDB. Id., page 10, see also Eva N. v. Brock, 741 F. Supp. 626 (E.D. Kentucky 1990), aff'd 1991 WL 164324 (6th Cir. 1991) (admissions criteria of the Kentucky School for the Blind did not violate IDEA or Section 504). See also Harrison v. Crist, Case No. 01-0293RU (DOAH 2001).

84. The enrollment criteria authorized by law are facially valid. Thus, the only question remaining is whether the criteria were applied correctly by FSDB in making the determination that the Petitioner was no longer eligible for continued enrollment.

85. The Florida Administrative Code sets out the enrollment criteria for FSDB. The first element of eligibility under those criteria includes the requirement that a student applying for admission be either hearing impaired, visually impaired, or "deaf-blind", as defined by the rules. See Fla. Admin. Code Rule 6D-3.002(1)(a-c). Within each program category, there are additional eligibility criteria.

86. A student found eligible for the schools program for the visually impaired must, among other things, possess evidence of minimum daily living skills, such as feeding oneself, chewing and swallowing, the ability to indicate awareness of being soiled or wet, the ability to dress oneself and the ability cooperate in

bathing. Florida Administrative Code Rule 6D-3.002(2)(i)(3). In addition, there must be evidence that the visually impaired applicant does not meet eligibility criteria for programs for severely emotionally disturbed, autistic, homebound-hospitalized, or trainably or profoundly mentally retarded under state board of education rules. Id., at Section (4). The rules also provide that any applicant to FSDB may not be qualified for admission or continued enrollment if [REDACTED] is determined, among other things, to be a danger to self or others; is determined to be disruptive to other students; or the educational process; or is determined to have medically related health and safety issues which are beyond the scope of the health care center, the educational and residential programs and their resources to appropriately manage. Fla. Admin. Code. R. 6D-3.002(2)(k). The rules contemplate that once enrolled a student who, upon reevaluation, no longer meets the admission criteria, may be allowed to remain if it is determined that the student's identified needs are being met and the student is progressing. However, a student shall not be allowed to remain if the student is considered to be a danger to [REDACTED]self or others. Fla. Admin. Code. R. 6D-3.002(5)(b).

87. The rules further contemplates that where a student is deemed medically at risk by the medical director or is determined to have a health condition beyond the responsibility of the health care center, the student shall immediately be sent home, and the medical director may request appropriate medical examinations from the student's attending physicians or specialists. Fla. Admin. Code R. 6D-3.002(5)(h). The rules

require a staffing committee to meet to make a recommendation as to whether the student continues to meet the admissions criteria. Fla. Admin. Code. R. 6D-3.002(5)(i). Disenrollment or dismissal of a student who has been determined to have medically-related health and safety issues beyond the scope of the HCC, educational and residential programs and their resources, shall not take affect until 10 days after the school president's written notification of the dismissal to the local school district and to the student's parents or guardian. Fla. Admin. Code R. 6D-3.002(5)(j)33.

88. The determination was made by FSDB that the Petitioner was no longer eligible for continuing enrollment. This determination on January 10, 2005, as re-affirmed on April 6, 2005, after the mediated trial period, was based upon the determination that the seizure disorder makes the Petitioner a danger to himself or to others; 2) that the seizure disorder makes ██████ presence disruptive to the educational process for him or for other students; and 3) that the Petitioner has medically-related health and safety issues beyond the scope of the health care center, the educational and residential programs and their resources to appropriately manage.

89. The Respondent concedes that the Petitioner does not exhibit conduct that is outwardly dangerous to ██████ or to others. ██████ is not self-abusive, nor is ██████ intentionally aggressive toward other students. However, ██████ seizure disorder clearly manifests itself in ways that are considered by educators and medical experts to be dangerous to the Petitioner

and potentially to the educational process for the Petitioner and other students at FSDB.

90. FSDB's operational policy number OP 2.07 dated November 29, 2004, clarifies what a staffing committee must determine in terms of "danger to self" and "danger to others." Specifically, the policy notes that "danger to self" involves a determination that a student demonstrates behavior which places the student at risk and in danger physically or emotionally, including behavior such as lack of awareness and/or understanding of the environment. In addition, pertinent behavior would include those that would require one-to-one supervision by FSDB staff "to the extent that the needs of one student interferes with the provision of a safe learning environment for others and creates an interruption in the ability of others to benefit from the academic and/or residential programs." The policy contains the same provision relative to "danger to others," requiring a determination that the student demonstrates behaviors that place other students and/or staff at risk, including the need for one-to-on supervision. See Respondent's volume exhibits page 337, in evidence.

91. The Petitioner's seizure disorder manifested itself in behaviors that placed ██████, and to a lesser extent other students, at risk and in danger physically. While the parents may not view the seizure activity to be dangerous at home where ██████ receives constant supervision, the staff, with daily experience with the Petitioner on campus, clearly viewed ██████ to be at risk and physically in danger while at FSDB.

92. Not only did the Petitioner exhibit seizures that actually placed him in danger, such as near drowning in the swimming pool, falling and injuring a tooth, banging █████ chin hard on a desk, and walking into a door, █████ seizure behaviors made it such that █████ teacher believed that █████ was always at risk for physical harm. The Petitioner's parents contend that the seizure activity did not create a danger because the Petitioner was rarely injured when █████ had a seizure at FSDB. According to Dr. Belsito testimony, however, one incident in 10 years constitutes an injury and even if there are only two documented injuries in two years, her point was that to focus only on documented injuries is to ignore the clear risk of injury that was considered serious to the FSDB staff and is pertinent to the eligibility criteria.

93. The Petitioner questions the application of the enrollment criteria in the manner FSDB poses because of the fact that there are other children on the FSDB campus with seizure disorders, including intractable seizure disorders. The Petitioner's seizures, however, are different in that they are more frequent and more intense, as established by Dr. Belsito's testimony. When Ms. Hutto began observing seizure activity outside of the classroom on campus this made the situation much more dangerous for the Petitioner and more serious for the staff in trying to keep █████ as safe as possible. Ms. Hutto was adamant in █████ opinion that the Petitioner should not remain at FSDB "because we could not keep █████ safe with the types of seizures that █████ had and where he had them." Ms. Hutto held



to this opinion, which is credible, even though she and her aide had created a relatively successful coordinated procedure for immediately attending to the Petitioner upon any observed indication of seizure activity. Though Ms. Hutto and Ms. Davis arrived at a fairly successful system for keeping the Petitioner safe, that system of caring for the Petitioner potentially left other students in the class in danger in such times or at least inadequately supervised. As ██████ stated "it was a major concern to keep every one of those children safe . . ."

94. Over a period of six months or more in April of 2004 until November of 2004, Dr. Belsito collected and studied seizure data reports and relevant medical reports to reach her ultimate conclusion that the Petitioner should be assigned an HCC acuity level of five. In fact, it was in August 2004 when she really started noticing that things were worsening with regard to the seizures in terms of incontinence, decreased awareness, and alertness associated with ██████ seizures. In addition, ██████ found the fact that ██████ teacher had counted 70 seizures in 15 minutes in August 2004 to be medically significant to her of a worsening of ██████ condition.

95. Both Drs. Nicholas Krawiecki and David Rostetter, the independent expert witness called to testify by FSDB, opined that the seizures presented a risk of and physical danger to the Petitioner. Based upon Dr. Krawiecki's review of the Petitioner's educational records from FSDB and documents from the Nemours Clinic, as well as his two visits to the campus where he interviewed all of the Petitioner's service providers, it was

██████ medical opinion that the seizures caused some actual danger to the Petitioner and that ██████ teacher and her aide were actually frightened by the repetitive nature of the seizure episodes.

96. It was Dr. Krawiecki's opinion, within a reasonable degree of medical certainty, that the Petitioner presented a danger to ██████self at FSDB and would continue to do so if ██████ remained there. The fact that he saw no indication that the Petitioner had ever seriously injured ██████self at FSDB did not affect that opinion regarding the seizure disorder and his opinion was based largely on the fact that he observed a lot of potential "danger points" as students move around the campus. Although acknowledging that all students at FSDB are potentially in danger, Dr. Krawiecki noted that the Petitioner's situation presented an additional danger to ██████ because of the unpredictability of the seizures that could potentially throw ██████ rather forcefully to the ground. Moreover, the doctor felt that even if ██████ was wearing a swimming vest for use in the pool that the Petitioner would still be in relative danger because of the potential for losing consciousness with a lot of the seizures and the fact that the seizures can be pretty forceful.

97. Dr. David Rostetter agrees that within the environment at FSDB, the Petitioner's condition presented a risk of physical injury to the Petitioner. Dr. Rostetter reviewed all the FSDB's policies and procedures and all of the Petitioner's educational and medical records, visited and interviewed all relevant staff in preparation for ██████ testimony. Based upon the work

performed, it was his opinion that the school and the staff are not designed or trained to withstand the kind of risk presented by the Petitioner in [REDACTED] condition and that the Petitioner was "essentially unprotected here a substantial part of the time." It was [REDACTED] opinion that the Petitioner's needs require an extraordinarily intensive program of one-on-one or two-on-one adults who teach and manage behavior in a clinical sense.

98. In addition to the seizure disorder placing the Petitioner at risk of physical danger within the FSDB environment, [REDACTED] seizure disorder for the same reason has created a disruption to the educational environment at FSDB. This is the case because of the risk of injury to the Petitioner during a seizure and because of the frequent repetitive nature of those seizures. Here also the operational policy of the school states that when a staffing committee is determining whether a student is disruptive to the educational process, behaviors that are focused upon would include those that would require one-to-one supervision from FSDB staff and create an interruption in the ability of others to benefit from the academic program, as well as the one student receiving the one-to-one supervision. Ms. Hutto described in detail the care system that [REDACTED] and her aide devised in order to prevent injury to the Petitioner during a seizure. Although necessary and laudable, the system that was implemented by Ms. Hutto and Ms. Davis resulted in a disruption to the educational process for both the Petitioner and for other students.

99. The Petitioner's frequent seizure activity and the time away from instruction that was necessary to address it was disruptive to the Petitioner's own educational process because the Petitioner missed a lot of educational time because of the seizures, even though Ms. Hutto tried her best to bring [REDACTED] immediately into the group after a seizure.

100. The seizure activity was also disruptive to the educational process of the other students because whenever a seizure occurred "everything stopped" with all the students until Ms. Hutto and Ms. Davis were sure the Petitioner was safe. Although the other students in the classroom were very accepting of this situation they sometimes asked for or needed help during an incident and Ms. Hutto would have to ask them to wait until she was finished with the Petitioner's needs.

101. While the other students were waiting for Ms. Hutto or Ms. Davis to attend to the Petitioner the other students were mostly doing nothing. Ms. Hutto established that one or two of the other students would also act out during such times because they did not get enough individual attention from her or her aide during the time they were attending to the Petitioner, during a seizure episode or its aftermath.

102. Based upon his discussions with Ms. Hutto and Ms. Davis and with a full understanding of their efforts to address the seizure activity, Dr. Rostetter opined that the Petitioner needs one-to-one supervision and also agreed that the Petitioner was disruptive of the educational process at FSDB. He noted that to the extent that the Petitioner had a seizure, even

of short duration, the educational process stopped for everyone including the Petitioner for a period of time. Observing that this population of sensory impaired students could not simply go right back on task after the Petitioner had a seizure, it was his opinion that the seizures constituted events that clearly disrupted the educational process at FSDB. That testimony is deemed credible and is accepted.

103. The final basis for determining that the Petitioner was not eligible for continued enrollment as of January 10, 2005, was the fact that [REDACTED] medical needs had reached the point of being beyond the scope of resources of FSDB's HCC and its educational program to appropriately manage. Ms. Hutto pointed out at the time of the continuation staffing determination, that she could no longer keep the Petitioner safe within the educational setting, based upon the types of seizures and their frequency and because of where the seizures occurred. In addition, and beginning in April 2004, Dr. Belsito spent months accumulating data, reviewing records, talking to the staff and analyzing the Petitioner's increased seizure activity to reach the conclusion on November 30, 2004, that [REDACTED] should be assigned a health acuity level of five.

104. From the 2003-2004 school year to the 2004-2005 school year, the Petitioner's seizure activity essentially doubled in frequency. During the five week period in the Spring of 2005, when the Petitioner was allowed to return for a trial period at FSDB, there was a further increase in seizure activity from what had been observed in the fall of 2004. Clearly this confirmed

the correctness of the assignment of the acuity level of five and the ultimate determination that the Petitioner was no longer eligible for continued enrollment at FSDB. The preponderant weight of persuasive evidence supports Dr. Belsito's decision that the Petitioner should be assigned an acuity level of five. [REDACTED] medical condition had reached the level that was beyond the scope of the HCC or educational staff to appropriately manage and nothing Dr. Belsito learned from Dr. Abram changed her opinion in any way. Dr. Belsito's testimony is deemed credible and is accepted. It has thus been established that the determination that the Petitioner was no longer eligible for continued enrollment at FSDB, based upon the criteria contained in its approved rules and policies, unfortunately is an appropriate determination.

ORDER

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is

DETERMINED that the Petitioner no longer meets the approved criteria for continued enrollment at FSDB.

DONE AND ORDERED this 4th day of January, 2006, in Tallahassee, Leon County, Florida.

**S**

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P. MICHAEL RUFF  
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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 230.23(4)(m)5, Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.