Lee County School District
No. 04-4300E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: March 17, 2006

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4300E
	)	
LEE COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing of this case on December 12 through 14 and 19 and 20, 2005, in Fort Myers, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Paul E. Liles, Esquire
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For Respondent: Edward Samuel Polk, Esquire
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STATEMENT OF THE ISSUE

The issue presented is whether an Individualized Education Plan (IEP) that Respondent proposed during IEP meetings conducted

on May 25 and June 25, 2005, denies Petitioner a free and appropriate public education (FAPE), within the meaning of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401 et seq., 34 C.F.R. Section 300.001 et seq., Section 1003.57, Florida Statutes (2005), and Florida Administrative Code Chapter 6A-6.

PRELIMINARY STATEMENT

By letter dated November 24, 2004, Petitioner's mother requested a due process hearing. Respondent received the request on November 29, 2004, and referred the request to DOAH to conduct the due process hearing. The parties subsequently waived the requirement for a final order within 45 days of the date on which Respondent received the request for due process hearing.

The due process hearing was delayed by Respondent's motion to recuse the ALJ. On December 15, 2004, Respondent filed Respondent's Motion for Recusal of Administrative Law Judge (Motion). By Order issued on December 23, 2004, the ALJ denied the Motion. Respondent petitioned the First District Court of Appeal for a writ of prohibition. In a per curiam opinion, the court denied the petition "on the merits." School Board of Lee County, Florida v. B.S., 906 So. 2d 1064 (Fla. 1st DCA 2005), reh. denied July 20, 2005. The ALJ rescheduled the due process hearing in accordance with the agreement of the parties.

At the due process hearing, Petitioner presented the testimony of eight witnesses and submitted 253 exhibits for

admission into evidence. Respondent presented the testimony of eight witnesses and submitted 11 exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the six-volume Transcript of the hearing filed with DOAH on January 19, 2006. The ALJ granted the parties' request for an extension of time to file their proposed final orders (PFOs). Petitioner and Respondent timely filed their respective PFOs on February 13 and 14, 2006.

FINDINGS OF FACT

1. Respondent is the agency that operates, controls, and supervises all free public schools in the School District of Lee County, Florida (the District). Respondent receives state and federal funding, in relevant part, to provide special educational services to disabled students enrolled in the District.

2. Petitioner is a disabled [redacted] student, born on [redacted]. Petitioner has been continuously enrolled in the District from June 15, 1998.

3. Petitioner is autistic and language impaired. Petitioner suffers from dyspraxia, a disorder characterized by an impaired ability to plan and carry out sensory and motor tasks. Petitioner experiences delayed auditory and sensory integration. Petitioner is also diagnosed with encephalopathy, mild left scoliosis, and chronic allergic rhinitis.

4. The two primary educational concerns for Petitioner are maladaptive behavior and communication. Petitioner's unique educational needs are discussed later in another context.

5. Petitioner's maladaptive behavior includes self-injurious behavior (SIB). From at least the date of enrollment in the District, Petitioner has struck [redacted] own ear with either [redacted] open hand or fist and with such frequency and force that the SIB sometimes results in bleeding and has previously required hospitalization (ear-strikes or ear-striking). Other forms of maladaptive behaviors have emerged with age, but ear-striking has been with Petitioner from [redacted] earliest years.

6. Petitioner is the biological child of [redacted], [redacted] [redacted] and [redacted], respectively. Over approximately 16 years, [redacted] in particular, has gained extensive experience with [redacted] educational needs across all settings, the educational services that enable [redacted] to make educational progress, and those that do not result in educational progress. [redacted] also has considerable training and education in the subject of autism and is the area training coordinator for the Parent Training and Information Center within the District.

7. [redacted] first noticed developmental delays in [redacted] when [redacted] was about 6 months old. Shortly thereafter, Petitioner was diagnosed with autism.

8. [redacted] and [redacted] moved their [redacted] from Lee County to Chapel Hill, North Carolina, to participate in research with on-site

direct services at the University of North Carolina. Petitioner and [redacted] parents resided in North Carolina until March 1998, when they returned to Lee County.

9. From approximately December 1996 through December 10, 1997, Petitioner attended [redacted] School ([redacted]), a public school in Wake County, North Carolina (Wake County). [redacted] placed Petitioner in a class for the profoundly mentally handicapped with six other students. Educational progress was adversely affected, in relevant part, by Petitioner's state of health. In particular, Petitioner suffered educational regression after a severe sinus infection that required surgery.

10. On December 10, 1997, Petitioner transferred to [redacted] School, another Wake County public school ([redacted]). [redacted] placed Petitioner in a class with six other autistic students, one teacher, and two aides. The classroom was an open room with small work areas. Noise was kept to a minimum. The teacher utilized the TEACCH instructional methodology developed by the University of North Carolina.

11. Petitioner regressed educationally at [redacted]. Petitioner exhibited increased SIB, decreased communication skills, decreased affect, and decreased eye contact.

12. In 1996, [redacted] began exploring educational alternatives for her son. [redacted] undertook extensive nationwide research into programs for autistic children and found a multi-state program identified in the record as [redacted].

13. [redacted] read various books about the [redacted] program and visited an [redacted] school in New Jersey. In December 1997, [redacted] learned of [redacted], a private school in Lee County ([redacted]). [redacted] is a non-profit organization that provides services to people with autism based on applied behavior analysis.

14. After learning of [redacted], [redacted] began making arrangements to return to Lee County. In March 1998, [redacted] moved to Fort Myers and enrolled Petitioner in [redacted].

15. When Petitioner first enrolled in [redacted], [redacted] ear-strikes were so frequent that [redacted] staff had difficulty assessing [redacted] ability to use [redacted] hands. Petitioner made almost no eye contact and interacted minimally with [redacted] environment. [redacted] had intense vestibular regression and could not tolerate noise or music. [redacted] would not get on a swing by [redacted]self.

16. On May 28, 1998, the District sent a notice to parents disclosing the availability of Summer School at [redacted] for children with autism and provided a registration form to access services at [redacted]. [redacted] had been paying the fees at [redacted] [redacted]self, except for certain therapy services that were reimbursed by insurance.

17. On June 15, 1998, the District enrolled Petitioner in the autism and speech/language program at [redacted]. District personnel developed a temporary IEP that made Petitioner eligible for services as a student with autism, including services for speech, language, and occupational therapy.

18. Petitioner made educational progress at [redacted]. [redacted] experienced a marked decrease in the frequency and severity of ear-strikes.

19. On August 21, 1998, District personnel developed another IEP for Petitioner. The IEP proposed that Petitioner be placed at [redacted] School, a public school in Lee County ([redacted]).

20. District personnel did not perform an Independent Educational Evaluation (IEE) prior to developing the IEP. Rather, the IEP team relied on records from North Carolina, other histories, records provided by [redacted], and records of the occupational therapist.

21. [redacted] opposed the placement recommendation at [redacted] and requested a due process hearing. A due process hearing was scheduled, but continued and subsequently dismissed after Respondent agreed to continue Petitioner's placement at [redacted].

22. Respondent decided to allow Petitioner to "stay-put" at [redacted], in relevant part, in anticipation of obtaining "a reasonable rate" on the contract with [redacted]. Any disputes between Respondent and [redacted] were solely over money rather than the substantive quality or appropriateness of the [redacted] program.

23. After August 21, 1998, the frequency of recorded ear strikes increased to 1,262 hits during a five-hour period. Petitioner was unable to effectively work at discrete trials because [redacted] was constantly engaged in ear-hitting behavior.

Petitioner's ears were routinely red and sore due to hard, repeated, self-inflicted blows.

24. Between August 18 and August 31, 1999, at least five District staff members visited [redacted] to test or observe Petitioner. On September 15, 1999, District personnel completed an IEP for Petitioner for the 1999-2000 school year.

25. District personnel completed the IEP after [redacted] requested the IEP meeting to be continued and left the meeting to attend a previously scheduled appointment. District personnel completed the IEP in the absence of [redacted] and again proposed to place Petitioner at [redacted].

26. On September 20, 1999, [redacted] received a letter by regular mail, dated Friday, September 17, 1999. The letter stated that the IEP "team" had concluded that Petitioner would be placed in [redacted] and that, effective September 20, 1999, Respondent would no longer provide services at [redacted].

27. The parties agreed to a temporary stay-put that kept Petitioner at [redacted] but ultimately could not resolve their differences. By letter dated October 1, 1999, [redacted] requested a due process hearing to challenge the proposed IEP dated September 20, 1999. On November 17, 1999, Administrative Law Judge Lawrence P. Stevenson issued a Final Order finding the challenged IEP was inappropriate due to procedural and substantive deficiencies that "tainted the development of the IEP." The Order required Respondent to develop a new IEP that

provided FAPE. [redacted] v. School Board of Lee County, Case No. 99-4169E (DOAH November 17, 1999).

28. Neither Petitioner nor Respondent appealed the Final Order issued by Judge Stevenson. However, Respondent did not develop a new IEP as required in the Final Order.

29. Petitioner sought enforcement of the Final Order, initially in state court, and then in federal court. During the proceeding in federal court, Petitioner remained at [redacted] until [redacted] was placed in [redacted] current residential setting sometime after April 16, 2003.

30. On February 8, 2000, the state court action to enforce the Final Order of Judge Stevenson was removed to the United States District Court for the Middle District of Florida. In November 2001 and January 2002, [redacted] and Respondent engaged in settlement conferences that resolved many of their differences. However, one issue the parties could not resolve was the educational placement of Petitioner.

31. On January 23, 2002, the District Court entered an order requiring the parties to cooperate in developing a new IEP for Petitioner. The members of the IEP team, including two experts for each party, agreed on many aspects of the IEP dated February 14, 2002.

32. Individual members of the IEP team could not agree on the proper educational placement for Petitioner. Members representing Respondent sought placement in public school at [redacted]

School ([redacted]). Members representing Petitioner sought placement in a residential setting.

33. United States Magistrate Judge Douglas N. Frazier conducted an evidentiary hearing on April 11 and 12, 2002. On May 30, 2002, the Magistrate issued a Report and Recommendation to the District Court (the Report). The Report based its findings and recommendations on the evidence of record and on the Final Order issued by Judge Stevenson.

34. The Report found that the IEP dated February 14, 2002, was reasonably calculated to provide Petitioner with FAPE, but found that the IEP could not be fully implemented at DES. The Report recommended that Petitioner be placed in a residential program for a period of at least one year to allow the IEP to be implemented and to allow Petitioner to receive educational benefit. The Report further recommended that a functional behavior assessment and behavior plan be performed as soon as practicable, that Respondent bear the costs of the residential program, and that the "stay put provision be the residential program."

35. The District Court confirmed the Report and recommendations in an order dated September 10, 2002. The order "enjoined Respondent to place [redacted] in a residential setting." [redacted] individually, and on behalf of [redacted] a minor v. School Board of Lee County Florida, Case No. 02-15648, 87 Fed. Appx. 711, 2003 U.S. App. Lexis 26913 at 2 (11th Cir. 2003).

36. In an unpublished opinion dated October 23, 2003, the United States Court of Appeals for the Eleventh Circuit affirmed the order of the District Court. [redacted] Case No. 02-15648, 87 Fed. Appx. 711, 2003 U.S. App. Lexis 26913 at 5. The appellate court reviewed the issue de novo and upheld the finding of the District Court that residential placement was necessary to provide Petitioner with FAPE. In particular, the appellate court found that residential placement did not maximize Petitioner's educational potential, but was required to provide Petitioner with a basic floor of opportunity for educational progress.

37. In relevant part, the appellate court found:

> [redacted] was no longer the proper place for [redacted] because it offered no further educational benefit. The choice was between a school classroom and a residential placement.
>
> Residential placement . . . would provide a consistent environment, . . . residential care givers could respond and react to [redacted]'s maladaptive behaviors, such as ear hitting, running from adults, and aggressiveness, . . . it would provide a locked environment to prevent [redacted] from running away and harming himself, . . . and the classrooms are smaller. . . . [R]esidential placement [was appropriate] because only there would a trained individual be available to work with [redacted] all day and all night when [redacted] behaviors erupt. . . . [redacted] needs structure 24 hours per day to reach [redacted] potential [and] needs major support with these skills 24 hours per day. . . . [redacted] would not get any educational benefit unless [redacted] received a residential placement.

E.S., at 2003 U.S. App. Lexis 26913

38. The Report and decisions of the district and appellate courts contemplated that Petitioner would be placed in a facility identified in the Report as [redacted]. However, Respondent did not place Petitioner in [redacted] or any other residential facility until the District Court threatened to hold the individual members of the School Board of Lee County in contempt of court.

39. At the time that Respondent sought to avoid the entry of a contempt order from the District Court, [redacted] had no availability for Petitioner. A residential facility in Wichita, Kansas, identified in the record as [redacted] did offer availability. By letter dated April 16, 2003, [redacted] notified [redacted] of Petitioner's enrollment in [redacted].

40. Unlike [redacted], [redacted] is not a locked facility and operates in classrooms the dimensions of which are slightly larger than those at [redacted]. The classrooms at [redacted] are small or individual rooms that remove "any outside stimulus," which can be very distracting to Petitioner. Otherwise, the programs at [redacted] and [redacted] are substantially similar, including 24-hour supervision, educational and residential components, and one-to-one supervision.

41. On July 8, 2003, an IEP team at [redacted] developed an IEP for Petitioner. Petitioner made educational progress under the [redacted] IEP.

42. Petitioner progressed in gross motor and leisure-time skills by walking on a treadmill for up to 14 minutes at a speed

of 3.4 mph. Petitioner learned to roller skate and began swimming at the local YMCA. Petitioner learned to enter and exit the pool, tread water, perform the initial stages of the front crawl stroke with moderate assistance, and blow bubbles as a precursor to going under water.

43. When Petitioner arrived at [redacted], [redacted] frequently refused to use [redacted] hands and often sat on [redacted] hands to avoid participation in tasks or leisure activities. By May 25, 2004, Petitioner demonstrated the upper extremity skills to touch and hold objects. [redacted] reaches and grasps objects and releases and picks up objects. These basic motor skills allow Petitioner to participate in educational activities involving work, play, leisure, and self-care.

44. Upon arrival at [redacted], Petitioner required hand-over-hand assistance to initiate almost any upper extremity skill and only manipulated objects briefly. By May 25, 2004, Petitioner engaged with objects for approximately two minutes, spontaneously reached out for a leisure activity placed in front of [redacted], and developed a preference for toys with auditory and visual feedback.

45. Petitioner's primary progress in sensorimotor movement has involved stepping onto balance boards. [redacted] occasionally steps onto the boards spontaneously.

46. Petitioner has learned to eat with utensils. [redacted] scoops food with a spoon and pierces bites of food with a fork.

47. Petitioner has learned to dress [redacted] self after a staff member places an article of clothing in its correct orientation. Petitioner dons pants without assistance, but requires assistance to straighten the waistband of pants and underwear. Petitioner can pull a shirt over [redacted] head and negotiate [redacted] arms through the sleeves without assistance. Petitioner has learned to place shoes over [redacted] toes without assistance.

48. Petitioner has learned to accept hand-over-hand assistance during bathing without resistance. [redacted] concentration improves when staff turns off the water for brief periods.

49. Petitioner frequently allows [redacted] teeth to be brushed with little or no resistance. Petitioner has learned to voluntarily open [redacted] mouth to accept a toothbrush and often places the brush into [redacted] mouth. Petitioner has learned to accept hand-over-hand assistance to brush [redacted] hair.

50. Petitioner either stands or sits to urinate and is capable of managing [redacted] clothing before and after toileting. However, Petitioner remains dependent for wiping after a bowel movement.

51. Petitioner has made some progress in receptive communication. However, the learning process is slow and the number of repetitions necessary for [redacted] to acquire a skill is very high.

52. Petitioner is capable of following a few simple, familiar one-step commands such as sit down, pickup, get, and put

in. However, [redacted] response to verbal direction is inconsistent, and [redacted] may rely more on visual cues than spoken words. When Petitioner does not follow direction, [redacted] responds either by doing nothing, attempting to leave the area, or engaging in tantrum behavior such as whining or stamping [redacted] feet.

53. Petitioner has made progress in expressive communication by using a picture communication system that involves symbols and objects. During April 2004, Petitioner selected a symbol of a snack item in a clear bag, handed it to staff, and accepted the corresponding object from staff with 89 percent accuracy. The accuracy rate improved in the following month.

54. Scanning improves if a staff member places a piece of the actual item in the clear bag. However, the learning progress requires constant exposure and repeated trials to move from a rote response to symbol recognition.

55. Other methods of communication have proven inappropriate for Petitioner. These methods include verbal speech, eye gaze, and sign language.

56. Petitioner has learned to significantly expand [redacted] diet and the diversity of food [redacted] will eat. [redacted] has enjoyed a consistent and healthy increase in weight.

57. Petitioner has demonstrated a noticeable increase in the level of appropriate behavior. Petitioner walks from location to location within the classroom. The frequency of SIB

has decreased from a daily average of 6,594, between April 11 and May 8, 2003, to 2,345, between April 15 and May 6, 2004.

58. Intervals free of masturbation behavior have increased. The percentage of observed intervals without masturbation behavior increased from 25 percent in the classroom and 31 percent in the home, between February 20 and March 18, 2004, to 51 percent in the classroom and 64 percent in the home, between April 9 and 29, 2004.

59. Petitioner has learned to place a card in the finished box for a structured activity on a schedule board. Petitioner then pulls a "break chip" off the schedule board and proceeds to the break area where he engages in leisure activity for up to five minutes.

60. Petitioner is easily confused and agitated by verbal directions and verbal prompts. Staff members limit verbalizations to emphasize certain receptive commands and to reduce confusion during the completion of tasks. Staff members limit physical prompts to obviate passive behavior in which Petitioner will allow staff to do [redacted] work for [redacted]. It is important to imbed visual prompts within Petitioner's work tasks.

61. At [redacted], Petitioner has learned to manipulate cause and effect toys and has increased [redacted] engagement time with those toys. Petitioner is using [redacted] hands to work on tasks and manipulate toys more than when [redacted] enrolled in [redacted]. Petitioner has also learned to carry [redacted] dish to the sink or dishwasher and

to carry [redacted] laundry to the laundry room. However, staff must watch [redacted] closely in order to prevent elopement.

62. Petitioner is staffed 1:1 due to [redacted] need for a highly structured routine and [redacted] frequency of elopement. Petitioner uses the same schedule in the group home as that utilized in the classroom.

63. In the group home, Petitioner has [redacted] own bedroom and shares a bathroom with one other student. Petitioner is inclined to pour liquid from [redacted] glass or cup and must be closely supervised by staff to prevent the behavior.

64. On May 25 and June 25, 2004, Respondent conducted IEP meetings at [redacted] to develop a new IEP for Petitioner (the challenged IEP). The challenged IEP, in relevant part, proposed to place Petitioner in [redacted] School in Lee County ([redacted]) on October 15, 2004. Petitioner requested a due process hearing to prevent the proposed placement.

65. The ALJ conducted a five-day evidentiary hearing. The evidence included 16 witnesses and more than a thousand pages of exhibits.

66. The maladaptive behaviors that led Judge Stevenson, a United States Magistrate, a United States District Court, and the United States Court of Appeals for the Eleventh Circuit to place Petitioner in a residential setting are painfully evident in the instant proceeding. As in the previous case reviewed de novo by Judge Stevenson and the federal courts, Petitioner cannot enjoy

the educational benefit of a non-residential placement, including the inherent benefits of association with mainstream students, until his maladaptive behavior is eliminated.

67. Petitioner's maladaptive behaviors have not been eliminated. Although the frequency of SIB has decreased at [redacted], the frequency of other maladaptive behaviors has increased, and new maladaptive behaviors have emerged.

68. Increased or new maladaptive behaviors include elopement, dropping, aggression, property destruction, stripping, masturbation, and tantrums. Petitioner is preoccupied with water and will create water with [redacted] own urine when desired.

69. Only in a residential placement can Petitioner receive the 24-hour consistency that is necessary for a basic floor of opportunity to make educational process in [redacted] primary educational needs for behavior modification and communication. Residential placement enables caregivers to respond and react to Petitioner's maladaptive behaviors and to provide communication services across settings inside and outside of the classroom. In this case, as it was in the previously case:

> [redacted] needs consistency to get [redacted] mal-adaptive behaviors under control so that he can have educational benefit. The consistency that [redacted] needs must be at school and at home. If [redacted] does not have the consistency at home, then [redacted] regresses when [redacted] is at school and cannot receive educational benefit.

Report at 27.

70. The evidence from Respondent in the instant case presents the ALJ with no new justiciable issue of law or fact that was not previously decided by Judge Stevenson and the federal courts. In relevant part, Respondent has re-litigated the issue of placement that was previously decided by Judge Stevenson, a United States Magistrate, the District Court, and the United States Court of Appeals for the Eleventh Circuit.

71. There is a dearth of evidence of so-called "changed circumstances." Respondent does not rely on testimony from care givers at [redacted] who are personally involved with Petitioner on a daily basis. Rather, Respondent relies on testimony from employees of Respondent who either have no experience with Petitioner or who have briefly observed Petitioner at [redacted]; a new classroom at [redacted] that is arranged in an effort to duplicate the classroom at [redacted]; the inclusion of other disabled students in the proposed classroom; and the provision of classroom aides whose identity and training is uncertain.

72. The seven [redacted] staff members who attended the IEP meetings conducted on May 25 and June 25, 2004, did not recommend placement of Petitioner at [redacted] in Lee County. Only the six employees of Respondent who attended the IEP meetings in person and by telephone recommended the transfer of Petitioner from [redacted] to [redacted]. The employees of Respondent either have no experience with Petitioner or have only observed Petitioner at [redacted].

73. The behavior analyst and autism consultant for Respondent briefly observed Petitioner at [redacted]. The analyst collected data on Petitioner using a version of the Motivation Assessment Scale (MAS) that was not current. At that time, the analyst knew of published peer reviews that determined the MAS was not reliable.

74. The behavior analyst based his report on averages from his observations of Petitioner. The analyst's report is a summary of the data he collected, but the analyst did not keep the raw data gathered during his observations of Petitioner, and the underlying data was not available for Petitioner's counsel to use in cross-examination of either the summary report or its author.

75. The behavior analyst did not base his report on information gathered from Petitioner's parents. The behavior analyst never consulted Petitioner's parents.

76. Unlike the IEP at issue in the previous proceedings, the challenged IEP in this proceeding is not reasonably calculated to provide Petitioner with a basic floor of opportunity for educational progress. The challenged IEP does not adequately address Petitioner's unique educational needs.

77. The challenged IEP is not one developed by [redacted] personnel who have personal experience with Petitioner. Respondent did not rely on a proposed IEP developed by [redacted]

personnel in preparation for the IEP meeting that Respondent conducted on May 25 and June 25, 2004.

78. The [redacted] IEP is a 26-page, typed IEP that includes 30 goals and 30 objectives. The goals and objectives cover subject areas identified as gross motor and leisure-time skills; fine motor skills; communication; interpersonal skills; and functional academics, household management, living, and self-care skills.

79. The challenged IEP is a 16-page document that was hand-written by Respondent's employees. The challenged IEP contains 12 goals and approximately 35 numbered objectives. The stated goals cover subject areas identified as tooth-brushing; leisure activities; compliance with instructions; gross motor activities; laundry; structured activity communication; wiping surfaces with active hand-over-hand assistance; use of signing to ask for what Petitioner wants; washing [redacted] body with active hand-over-hand assistance; reducing prompts while doing tasks; matching objects; and putting on [redacted] coat in Florida.

80. The annual goal in the challenged IEP that requires Petitioner to use sign language does not adequately address Petitioner's unique educational needs. The annual goal is not reasonably calculated to provide Petitioner with a basic floor of opportunity for educational progress in expressive communication.

81. Sign language is too abstract for Petitioner to acquire or use beyond rote, contextual compliance. Petitioner may learn to perform a sign as part of a routine but is unable to learn a

clear communicative intent. Attempting to teach Petitioner sign language has not been successful in the past and, more likely than not, will confuse Petitioner in the use of the hand-to-mouth sign [redacted] has developed to mean, "I want." Moreover, sign language would be problematic, at best, given the rate of ear-strikes that Petitioner inflicts on [redacted]self.

82. The annual goal that requires Petitioner to decrease prompts "across all settings" can be neither implemented nor measured in the classroom at [redacted]. The challenged IEP does not provide 24-hour care in the areas of behavior modification and communication that comprise Petitioner's primary educational needs. Rather, Respondent contemplates that [redacted] will "take care of [redacted] child at night the way other parents do" and will be responsible for arranging for wrap-around services, including respite care. The challenged IEP does not make provision for the safety, feeding, or living skills of Petitioner outside of the classroom.

83. The annual goal that requires Petitioner to "put on [redacted] coat" with no more than two prompts on 80 percent of opportunities does not adequately address Petitioner's unique educational needs. As previously discussed, Petitioner's current level of performance includes putting [redacted] arms through sleeves when clothing is oriented for Petitioner. The goal does not define the phrase "put on [redacted] coat" according to the separate steps required to complete the task and is untenably vague.

The stated short-term objectives for putting on a coat are mere tautologies of the annual goal.

84. The requirement to put on a coat in Fort Myers, Florida, would cause discomfort for Petitioner approximately eight months during the year unless [redacted] were permitted to immediately remove the coat after completing the task. [redacted] staff members worked diligently to end Petitioner's previous practice of removing clothing immediately after completing the task. Moreover, Petitioner's maladaptive behaviors include stripping, and removing an article of clothing immediately after donning it risks reinforcement of stripping behavior.

85. The annual goal in the challenged IEP that requires Petitioner to select and engage in "up to five" gross motor skills with minimal assistance is vague and incapable of objective measurement. The goal does not define the gross motor skills to be achieved and does not identify a minimum number of skills to be achieved. The goal is written in a manner that would enable compliance with mastery of one unidentified gross motor skill.

86. Petitioner's present level of performance already achieves a goal stated as "up to five gross motor skills." Petitioner walks on a treadmill, roller skates, and swims. Petitioner can enter and exit a swimming pool, tread water, and perform the initial stages of the front crawl stroke with moderate assistance.

87. The annual goals in the challenged IEP that require Petitioner to participate in leisure activities for up to five minutes and to participate in tooth-brushing do not adequately address Petitioner's unique educational needs. Petitioner's present level of performance includes leisure activities of up to five minutes and participation in tooth-brushing.

88. The challenged IEP does not adequately prescribe the method of data collection for measuring compliance. Nor does the challenged IEP adequately address the method of prompting Petitioner.

89. The challenged IEP proposes to employ a 1:1 aide for Petitioner at [redacted]. However, Respondent cannot ensure that the identity or qualifications of the aide or that the identity and qualifications of the aide will remain the same throughout the school year. Petitioner experiences an increase in maladaptive behaviors during and after transitions.

90. The proposed teacher at [redacted] lacks sufficient training, experience, and personal knowledge of Petitioner to provide Petitioner with a basic floor of opportunity to make educational progress. The teacher has a college degree in Business Administration and worked for Lee County Utilities before her current employment. The teacher has a temporary certification in ESE.

91. The proposed teacher has autism training consisting of an unspecified literary course in the "late '80s or early 90s"

and one-day of training from the behavior analyst previously discussed herein. The teacher also has training in sign language and four hours each year in "IEP training."

92. The proposed teacher is unfamiliar with Petitioner's present levels of performance. The teacher is unfamiliar with the data regarding the frequency of Petitioner's maladaptive behaviors. The teacher waits until a student arrives in her classroom to learn about the student and his or her behaviors.

93. Unfamiliarity with Petitioner would exacerbate regression following changes or other inconsistencies in Petitioner's educational plan. Maladaptive behaviors increase following changes in Petitioner's routine.

94. The proposed classroom teacher does not maintain frequency data for maladaptive behavior. She is not aware of how the data is reported, the purposes for which it is used, or its use at [redacted]. Rather, the teacher maintains a behavior chart on which she would place two different colors of happy faces for separate types of compliant behavior from Petitioner.

95. The proposed teacher did not demonstrate adequate knowledge of specific techniques that would be effective in reducing Petitioner's rate of noncompliance. Rather, the teacher would:

> . . . make [redacted] part of the class. [redacted] just seemed so isolated and caged [at [redacted]], that we would make it exciting. [redacted] life should be happy, so we would -- we're a very happy classroom. We would make [redacted] belong, and he would feel like a part of the class. And the

more they see other kids doing something, they're more likely to comply.

Q. How do you go about getting [students] to do nonpreferred activities?

A. Get them excited. Show them they can succeed.

Q. How do you do that? What do you do to invite their excitement in a nonpreferred activity?

A. We get excited, encourage.

Transcript (TR) at 104 and 202.

96. Staff interpretation of when Petitioner is happy or excited would be difficult. Petitioner is nonverbal. [redacted] vocalizes using vowels, consonant-vowel combinations, whining, and crying. [redacted] sometimes uses eye-gaze to identify wanted items. However, eye contact is unreliable as a means of interpreting Petitioner's pleasure, displeasure, or motivation.

97. Staff interpretation of when Petitioner is happy or excited may exacerbate the development of a formal communication system. It is important to minimize staff interpretation in the development of a formal communication system for Petitioner. When staff observes Petitioner staring at an object, staff should offer a system of object symbols, including a symbol of the object at which Petitioner is staring, and allow Petitioner to communicate [redacted] choice. This increases Petitioner's control/independence with communication, decreases the amount of staff interpretation, and enhances progress toward a formal communication system.

98. As Respondent's behavior analyst pointed out, problem behavior will not decrease dramatically in the absence of a formal communication system. Problem behavior is a means of communication for Petitioner.

99. The proposed procedure for transition from [redacted] to [redacted] in the challenged IEP is inadequate. The challenged IEP proposes to complete the transfer in less than four months.

100. A transition period of six months to two years is an appropriate period of transition. An appropriate procedure would include [redacted] staff visiting the proposed classroom, being present during the transition, and then fading from the classroom.

101. Problem behaviors experienced by Petitioner increase following transitions. The federal court contemplated that the transition to a residential facility would be a one-time transition. As the court explained:

> Although [redacted] would have a difficult transition to a residential program, this transition would be a one time transition.

Report at 27.

102. The challenged IEP does not include an adequate behavior intervention plan (BIP). There is no adequate identification of antecedent events that precede problem behaviors.

103. Respondent developed the challenged IEP in violation of relevant procedural due process rights. Respondent failed to provide appropriate responses to requests by [redacted] for prior

written notice for the IEP meeting and the proposed change in placement.

104. Respondent failed to provide [redacted] with copies of the report prepared by the behavior analyst. Timely disclosure of the report before the first IEP meeting on May 25, 2004, would have disclosed to [redacted] that Respondent proposed to change the placement of Petitioner. Similarly, reports made by Respondent's employees of their observations of Petitioner at [redacted] were requested in November 2004, but not provided by Respondent for almost a year after the date of the observations.

105. Counsel for Petitioner requested an IEE on October 8, 2004. Respondent neither initiated an IEE nor requested a due process hearing to prove the appropriateness of any evaluations conducted by Respondent. Similarly, Respondent did not disclose its criteria for an IEE, did not inform [redacted] of the names and addresses of evaluators who satisfy the minimum qualifications, and did not otherwise inform [redacted] of how to obtain an IEE.

106. The notice of the IEP meeting that Respondent provided to [redacted] denied the parents a practicable opportunity to fly from Florida to [redacted] and attend the IEP meeting in person on May 25, 2004. The parents attended the meeting by telephone and were unable to review documents relied on by Respondent at that time.

107. Respondent predetermined the proposed transfer from [redacted] to [redacted] before Respondent convened the IEP meeting on May 25,

2004. The paucity of evidence of changed circumstances to support the proposed change in placement is egregious.

108. Respondent has not provided an adequate explanation of why Respondent is proposing to change the educational placement of Petitioner. Respondent does not rely on an independent IEE as a basis for the proposed change in placement. Respondent has not provided the parents with a written description of any other options that Respondent considered and the reasons for rejecting those options.

109. Respondent did show that the District has never had an opportunity to educate Petitioner in a public school setting in Lee County. Respondent clearly wants that opportunity.

110. The federal court previously addressed Respondent's desire for an opportunity to educate Petitioner in DES. The court concluded that the IDEA does not entitle Respondent to place Petitioner in an inappropriate educational environment while Respondent tries every option short of residential placement. Report at 25.

CONCLUSIONS OF LAW

111. DOAH has jurisdiction over the subject matter and parties to this proceeding. 20 U.S.C. § 1400, § 1003.57(5), Fla. Stat. (2003); Fla. Admin. Code R.6A-6.03311. DOAH provided the parties with adequate notice of the due process hearing.

112. The burden of proof is on Petitioner. Petitioner is the party seeking relief from the challenged IEP. The burden of

proof is properly placed upon the party seeking relief under the IDEA. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The ruling in Schaffer involves a procedural issue, and the ruling applies retroactively to this proceeding.

113. Neither party cited any legal authority that requires a school board to request a due process hearing in order to change an existing IEP. In the absence of such a legal requirement, a school board is free to change an existing IEP without seeking relief under the IDEA. Even though a school board is the party seeking to change an existing IEP, the ruling in Schaffer effectively places the burden of proof on parents who must seek relief under the IDEA in order to invoke the stay-put provisions of the IDEA and thereby prevent a school board from changing the IEP.

114. On March 6, 2006, Respondent filed Respondent's Notice of Supplemental Authority in which Respondent notified the ALJ of a federal district court decision in West Platte R-II School District v. Wilson, 2004 U.S. Dist. Lexis 16889 (W.D. Mo., 2004). In relevant part, the district court placed the burden of proof on the school district even though the parents proposed a change to the IEP and requested a due process hearing to implement the requested change.

115. Although Respondent's Notice of Supplemental Authority contained no subsequent history in the case, research shows the appellate court reversed the district court's allocation of the

burden of proof based on the ruling in Schaffer. West Platte R-II School District v. Wilson, 2006 U.S. App. Lexis 5253 at 4 (8th Cir. March 2, 2006). Significantly, the appellate court did not reverse the district court on the ground that the parents proposed a change to the IEP. Rather, the appellate court reversed the district court because the parents "initiated the challenge to the IEP." West Platte, 2006 U.S. App. Lexis 5253 at 4.

116. Unlike the facts in West Platte, the parents of Petitioner do not propose to change the existing [redacted] IEP. Rather, Respondent proposes a change in the [redacted] IEP. Nevertheless, it is the parents who must initiate a challenge to Respondent's IEP because no legal authority requires Respondent to initiate a challenge to the [redacted] IEP before Respondent implements its own IEP. Accord Schaffer, 126 S. Ct. at 537; West Platte, 2006 U.S. App. Lexis 5253 at 4.

117. Petitioner satisfied [redacted] burden of proof. For reasons stated in the Findings of Fact and not repeated here, Petitioner showed by a preponderance of the evidence that the challenged IEP is not reasonably calculated to provide FAPE to Petitioner and does not provide a basic floor of opportunity for Petitioner to make educational progress toward goals and objectives that are appropriate for [redacted] unique educational needs.

118. Even if the evidence in this proceeding were in equipoise, Respondent correctly points out in its PFO that great

deference must be given to educators when a child is learning in a program agreed to by educators and [redacted] parents. Petitioner is learning in a program agreed to by [redacted] educators and [redacted] parents.

119. Although Respondent opposed the placement of Petitioner in [redacted] and placed Petitioner in [redacted] to avoid a contempt order, Respondent is deemed to have agreed to the placement in [redacted]. An administrative decision or judicial decision in favor of the parents is equivalent to an agreement between the educational agency and the parents. See West Platte, 2004 U.S. Dist. LEXIS at 3 (citing, inter alia, 34 CFR § 300.514(c) and School Commission of Town of Burlington v. Massachusetts Department of Education, 471 U.S. 359, 373, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)).

120. Petitioner is learning in the [redacted] program. Respondent agreed with Petitioner's parents to the placement of Petitioner in the [redacted] program. The [redacted] program and its IEP is entitled to great deference.

121. Substantive changes in the IDEA enacted after the date of the challenged IEP do not operate retroactively and are inapposite to this proceeding. The apposite legal authority has been made clear to the parties in prior decisions from Judge Stevenson, the federal magistrate, the district court, and the appellate court. Those decisions are part of the record, and a recitation of previously cited legal authority would serve little, if any, purpose.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED that:

The challenged IEP is not reasonably calculated to provide Petitioner with FAPE and does not adequately address Petitioner's unique educational needs. Placement of Petitioner in [redacted] pursuant to the challenged IEP is inappropriate, and continued placement in [redacted] is appropriate.

DONE AND ORDERED this 17th day of March, 2006, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
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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(5), Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.