

Miami-Dade County School District  
No. 06-0799E  
Initiated by: Parent  
Hearing Officer: Stuart M. Lerner  
Date of Final Order: June 5, 2006

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0799E
	)	
MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Section 1003.57(5), Florida Statutes, on April 18, 2006, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████ Parent  
(address of record)

For Respondent: Laura E. Pincus, Esquire  
Miami-Dade County School Board  
1450 Northeast 2nd Avenue, Suite 400  
Miami, Florida 33132

### STATEMENT OF THE ISSUE

Whether the Miami-Dade County School Board (School Board) is obligated to provide [REDACTED] [REDACTED] with physical therapy and additional occupational therapy, as requested by [REDACTED]'s [REDACTED].

### PRELIMINARY STATEMENT

On March 3, 2006, [REDACTED]'s [REDACTED], [REDACTED] requested a due process hearing challenging the School Board's refusal to grant [REDACTED] request that it provide [REDACTED] with physical therapy and additional occupational therapy. On March 6, 2006, the School Board referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division administrative law judge to conduct the due process hearing [REDACTED]'s mother had requested.

After being assigned the case, the undersigned, on March 8, 2006, held a pre-hearing conference with the parties by telephone conference call to discuss, among other things, the scheduling of the due process hearing. The undersigned, taking into consideration the input provided by the parties during the pre-hearing conference, thereafter set the due process hearing for April 18, 2006.

On March 22, 2006, the School Board filed a Status Report, advising that, "[o]n March 17, [2006], a resolution meeting was held between the parties" and "no agreement was reached" and that therefore "the parties [would] need to hold the due process hearing as scheduled on April 18, 2006." [REDACTED] subsequently,

also reported to the undersigned in writing of parties' inability to amicably resolve their dispute.

As noted above, the due process hearing was held on April 18, 2006, as scheduled. A total of seven witnesses testified at the hearing: Jennifer Strauss; Ann Marie Sasserville, Ph.D.; Louise Schmitt; Beverly Schroeder; Patricia Perez-Eguizabal; [REDACTED] and Sonia Mitchell. In addition to the testimony of these witnesses, a total of 23 exhibits (Petitioner's Exhibits 1 through 9 and 11 through 13, and Respondent's Exhibits 4 through 11 and 13 through 15) were offered and received into evidence.

At the conclusion of the evidentiary portion of the April 18, 2006, due process hearing, the undersigned, with the input of the parties, established the following deadline for the filing of proposed final orders: ten days from the date of the filing of the hearing transcript with the Division. In so doing, he also extended the deadline for the issuance of the final order for a period of time equal to the number of days from the end of the hearing until the filing of the hearing transcript.<sup>1</sup> This extension was necessary so that the parties could prepare their proposed final orders having the benefit of the hearing transcript (as [REDACTED] had requested).

The Transcript of the April 18, 2006, due process hearing was filed with the Division on May 19, 2006.

On May 25, 2006, [REDACTED] filed a motion requesting an "extension of time of 10 business days" for filing [REDACTED] proposed



Education) classroom with eight other autistic children. This placement meets ■■■ educational needs. ■■■ is being exposed to a "whole body, whole world kind of a curriculum" designed to "make ■■■ become more aware of ■■■ surroundings, develop an understanding of .... body and who ■■■ is in space, and interact[] . . . with objects in the environment in [a] sensory motor type way."

9. ■■■'s classroom teacher is Jennifer Strauss. There are two paraprofessionals in the classroom to assist Ms. Strauss.

10. Ms. Strauss has been teaching children with autism for over six years. She has a reputation of being "one of the best [ESE teachers] in the county and her classroom is [considered] a model classroom in terms of [serving children with] autism."

11. Ms. Strauss' classroom is divided into "centers." Each center is devoted to a different skill or activity.

12. Following their own "individual picture schedules" that they receive at the beginning of the school day, Ms. Strauss' students move from one center to another throughout the course of the day under the supervision and guidance of either Ms. Strauss or one of the paraprofessionals in the classroom.

13. At 10:20 a.m. each morning, the students leave the classroom to go to the school cafeteria for lunch. After lunch, they go to the playground. When they return to the classroom from the playground, the students "have quiet time for a few minutes, where [they are taught] to relax," after which there is a reading lesson. They then "go back into centers." At the end

of the day, before leaving, the students participate in a "large group activity."

14. ■ is receiving instruction and services pursuant to an Individual Education Plan (IEP) initially developed on May 20, 2005, that covers the period from August 8, 2005, through May 19, 2006 (Current IEP).

15. The Current IEP indicates that ■ "has been determined eligible for the following ESE program(s): Developmentally Delayed (Age 0-5); Language Impaired."

16. The Current IEP describes ■'s "strengths and abilities" as follows:

Follows simple familiar direction[s] (sit down, come here, stand up, etc.) Can finger feed. Is able to hold spoon and with assistance take spoon to .... mouth. Is on a toileting schedule. As per home therapist<sup>3</sup> ■ is matching pictures with an array of 4 pictures, is matching identical pictures, objects and colors. ■ is also following simple familiar directions without cues. In school plays appropriately with some toys. Plays with the ball. Rings the bell. Holds a book and turns pages randomly. At times initiates acknowledgment of peers by tapping them on the back. Builds a tower with 2 blocks. Is imitating some large movement. Is following routine with physical assistance. Can access the classroom physically. Plays on playground equipment (climbing, running, walking).

17. The Current IEP contains the following "statement describing how ■'s] disability affects [■] participation in appropriate activities":

■■■■'s] participation in a general curriculum is affected by limited self-help skills. Is not toilet trained. Is not verbal. Difficulty expressing wants and needs. At times gets frustrated when ■■■■ does not get ■■■■ way and may tantrum (sit and cry). Is not doing inset puzz[le]s or matching pictures and objects at school. Overall developmental delays. Is having difficulty scooping food onto spoon to feed. Limited fine motor skills.

18. The Current IEP lists the following as ■■■■'s "Priority Educational Needs (PEN[s])":

1. Receptive/Expressive Lang[uage] Skills
2. Fine Motor Skills
3. Self-Help Skills
4. Pre-academic Skills
5. English Language Acquisition Skills
6. Communication Skills

19. According to the Current IEP, the following related services are "required for ■■■■ to benefit from special education" and therefore will be provided:

Assistive Technology: visuals, low tech equipment, individual schedule [in] All Classes [from] 8/8/05 [to] 5/19/06 Daily

Occupational Therapy [in] Therapist's Office [from] 8/8/05 [to] 5/19/06 for 60 mpw

Physical therapy is not listed in the Current IEP as a required related service.

20. The Current IEP indicates that ■■■■ will receive "specialized instruction" in "Fine Motor Skills," "Self-Help Skills," "Pre-Academic Skills," "English Language Acquisition Skills," and "Communication Skills," in the classroom setting on

a daily basis, and that [REDACTED] will also receive "specialized instruction" in "Receptive/Expressive Lang[uage] Skills" in the "Therapist's Office" for 60 minutes per week.

21. The following "adaptations" are identified in the Current IEP as being "necessary to enable [REDACTED] to access the educational setting":

Frequent visual and verbal cueing to assist with on-task behavior

Alert student several minutes before a transition from one activity to another is planned

Break task into small, sequential steps, with frequent monitoring of progress

Give directions in small steps, and in as few words as possible

Preferential seating with proximity control to reduce distractions

Use a visual schedule/object schedule

Use of slant board

22. The Current IEP contains various "measurable annual goals and benchmarks."

23. Among these are the following "measurable annual goal" and related "benchmarks" (with evaluation procedures and requirements) addressing the PENS of "Fine Motor Skills" and "Self-Help Skills":

MEASURABLE GOAL: [REDACTED] will demonstrate some appropriate toileting skills by assisting with pants down and up with prompting.



Student's progress toward goal will be measured by:

Title: Teacher/Therapist

How often: weekly

MASTERY CRITERIA: 70% accuracy

EVALUATION PROCEDURES:

Teacher developed checklist/chart

Observations

Benchmarks:

-walk to the bathroom using physical and verbal cues/prompts

-pull pants from hips to waist with hand-over-hand

-pull pants from knees and to waist with hand-over-hand using gestural and verbal cues.

The most recent "Status Report on [this] Goal" reflects that, as of March 6, 2006, ■ had attained "Mastery of [this] goal."

24. The Current IEP contains the following additional "measurable annual goal" and related "benchmarks" (with evaluation procedures and requirements) also addressing the PENS of "Fine Motor Skills" and "Self-Help Skills":

MEASURABLE GOAL: ■ will feed self with spoon by scooping food and taking to mouth with minimal spilling and minimal prompting.

Student's progress toward goal will be measured by:

Title: Teacher/Therapist

How often: weekly

MASTERY CRITERIA: 70% accuracy

EVALUATION PROCEDURES:

Teacher developed checklist/chart

Observations

Benchmarks:

-take filled spoon to mouth with physical  
gesture and verbal prompting

-scoop food with physical assistance,  
gesture and verbal prompting

-scoop food with gesture and verbal  
prompting

-take spoon to mouth with physical, gesture,  
prompting

The most recent "Status Report on [this] Goal" reflects that, as of March 6, 2006, "[i]nsufficient progress [had been] made" and that [REDACTED] teacher did "not anticipate [REDACTED]'s] meeting [this] goal by IEP end."

25. The following "measurable annual goal" and related "benchmarks" (with evaluation procedures and requirements) address the PENs of "Pre-academic Skills" and "English Language Acquisition Skills":

MEASURABLE GOAL: [REDACTED] will match object to object with minimal prompting and in English.

Student's progress toward goal will be measured by:

Title: Teacher

How often: weekly

MASTERY CRITERIA: 70% accuracy

EVALUATION PROCEDURES:

Teacher developed checklist/chart

Brigance/ALP

Observations

Benchmarks:

-match with one item presented with physical prompting

-match with two choices using physical, gestural, & verbal prompting

-match with three to four choices using physical, gestural, and verbal prompting

The most recent "Status Report on [this] Goal" reflects that, as of March 6, 2006, ■ had attained "Mastery of [this] goal."

26. The Current IEP contains the following "measurable annual goal" and related "benchmarks" (with evaluation procedures and requirements) addressing the PEN of "Communication Skills":

MEASURABLE GOAL: ■ will request an activity/object purposefully using voice output 3 times in a row

Student's progress toward goal will be measured by:

Title: Teacher

How often: weekly

MASTERY CRITERIA: 70% accuracy

EVALUATION PROCEDURES:

Teacher developed checklist/chart

Observations

Benchmarks:

- smiles to repetitive activity with an adult (clapping, rocking, etc.)

- shows awareness that activity has stopped

- touches adult to continue the activity

- randomly activates voice output and stops when activity resumed

- shows awareness that activity has begun again after activating voice output

The most recent "Status Report on [this] Goal" reflects that, as of March 6, 2006, "[i]nsufficient progress [had been] made" and that [REDACTED] teacher did "not anticipate [REDACTED]'s] meeting [this] goal by IEP end."

27. The Current IEP contains the following "measurable annual goal" and related "benchmarks" (with evaluation procedures and requirements) addressing the PEN of "Receptive/Expressive Lang[uage] Skills":

MEASURABLE GOAL: [REDACTED] will make a choice between a minimum of 2 objects by pointing to/grabbing item with minimal prompting

Student's progress toward goal will be measured by:

Title: SLP

How often: weekly

MASTERY CRITERIA: 3 of 5 occurrences

EVALUATION PROCEDURES:

Therapy data

Benchmarks:

-will make a choice between 2 items (1 preferred, 1 non-preferred) with physical prompting

-[will] make a choice between 2 items with min. physical prompting

The most recent "Status Report on [this] Goal" reflects that, as of March 6, 2006, ■■■ had attained "Mastery of [this] goal."

28. The Current IEP contains the following additional "measurable annual goal" and related "benchmarks" (with evaluation procedures and requirements) also addressing the PEN of "Receptive/Expressive Lang[uage] Skills":

MEASURABLE GOAL: ■■■ will identify 10 classroom objects when named with minimal prompting

Student's progress toward goal will be measured by:

Title: SLP

How often: weekly

MASTERY CRITERIA: during 3 sessions

EVALUATION PROCEDURES:

Therapy data

Benchmarks:

- match identical objects
- match objects to pictures with prompting
- identify objects when named with physical prompting
- identify objects with verbal/gestural cues

The most recent "Status Report on [this] Goal" reflects that, as of March 6, 2006, "[i]nsufficient progress [had been] made" and that [REDACTED] therapist did "not anticipate [REDACTED]'s] meeting [this] goal by IEP end."

29. [REDACTED] initialed the box indicating that [REDACTED] was in "agreement" with the Current IEP, but added the following written comments:

I understand the school's procedure regarding the physical therapy discontinuation, but I do not agree.

30. Since August of 2003, when [REDACTED] entered the Miami-Dade County Public School system as a pre-kindergarten student, the School Board had been providing [REDACTED] with 60 minutes per week of both physical and occupational therapy, notwithstanding therapist recommendations that had been made in May of 2004, and February of 2005, to either discontinue or reduce the therapy.

31. In May of 2005, Judith Ortner, a School Board physical therapist, recommended in writing that the School Board stop providing ■ with physical therapy. In her written recommendation, Ms. Ortner commented that ■'s "physical motor function [was] within functional limits allowing ■ to access the educational environment."

32. The IEP team, in fashioning the Current IEP, adopted Ms. Ortner's recommendation and eliminated physical therapy as a related service that the School Board was to provide to ■

33. There is "quite a bit of furniture" in Ms. Strauss' classroom "because, typically, children with autism learn better by having visual markers."

34. During the course of this (the 2005-2006) school year, ■ has "occasionally" (but not "any more frequently than [the] other children" in Ms. Strauss' class) "bump[ed] into furniture" and other students and also "trip[ped]" on items on the floor and fallen down, due, primarily, it appears, to a lack of attentiveness and awareness of ■ environment and "where ■ might be in space." Ms. Strauss has dealt with these incidents, which occurred "more so in the beginning of the year," by "monitor[ing] ■ more closely" and without "seeking outside assistance."

35. There have also been "periodic[]" occasions in Ms. Strauss' classroom when, in trying to sit down, ■ has

"miss[ed] the chair and end[ed] up on the floor." In response to these occurrences, Ms. Strauss, "based on input from the occupational therapist and physical therapist . . . placed a bright red seat on the chair to help [REDACTED] locate the chair" and sit down without falling to the floor. "[T]his . . . has helped. [REDACTED] hasn't missed the chair in . . . months."

36. [REDACTED] has also had mishaps outside of Ms. Strauss' classroom that have resulted in [REDACTED] sustaining physical injury.

37. On January 9, 2006, [REDACTED] "broke [REDACTED] lip" on the school playground. [REDACTED] "was sitting on a slide ready to go down, [when] another child [who] wanted to go on the slide at the same time . . . . toppled over [REDACTED] and [REDACTED]'s] lip went into the back of the child's head."

38. On February 16, 2006, while on a school field trip with [REDACTED] class at a bowling alley, [REDACTED] tripped stepping down from the lane area and "toppled over," hitting the "side of [REDACTED] head on [a] chair." As a result of the accident, [REDACTED] suffered a "small cut" where [REDACTED] hit [REDACTED] head. [REDACTED] who was on the field trip as a chaperone, took [REDACTED] home after paramedics arrived on the scene.

39. [REDACTED] has not tripped or fallen in Ms. Strauss' presence since this February 16, 2006, incident at the bowling alley.

40. [REDACTED] did fall on Saturday, March 4, 2006, and "bang[] the back of [REDACTED] head," but this incident occurred at home (when



■ was in the shower). Although ■ had "staples put in the back of ■ head" to treat the injury ■ sustained, ■ went to school the following Monday.

41. During the 2005-2006 school year, ■ has not "missed academic education time based on any of the [inadvertent] falls that ■ has had," and these falls have not "interfered with ■ academic progress" or "access[ing] the curriculum" in Ms. Strauss' classroom.

42. Nonetheless, ■ understandably, as a loving and caring ■, has remained "concerned about the issue of ■'s] falling."

43. In response to the concerns ■ expressed, the School Board had another evaluation of ■'s need for educationally relevant physical therapy conducted in February of 2006, this time, not by "the physical therapist that . . . cover[ed] ■'s] school," but by a School Board physical therapist "not familiar with ■'s] specific case."

44. That School Board physical therapist was Beverly Schroeder. Ms. Schroeder "spent a total of six hours over two days with ■ and [she] observed and tested ■ in every environment that ■ [was] in in the school during the school day."

45. Ms. Schroeder, in conducting her evaluation, "look[ed] for specific things that would be addressed by physical therapy

in terms of falling," including "balance, muscle strength, postural tone," and "range of motion." In "every one of those areas that [she] looked at, [REDACTED] had no deficits."

46. Ms. Schroeder, on February 23, 2006, issued a written Physical Therapy Evaluation Synopsis (Synopsis) concerning her evaluation of [REDACTED]

47. Under "Self Help" on the Synopsis, Ms. Schroeder wrote:

[REDACTED] is able to carry tray with hand-over-hand assistance to maintain attention in cafeteria. Assistance is provided by cutting up food & putting appropriate amount on spoon, so [REDACTED] doesn't put too much food in [REDACTED] mouth. [REDACTED] is able to put leftovers in trash, independently. [REDACTED] requires max. assistance for toileting. [REDACTED] wears a pull-up & can pull pants up over thighs.

48. Under "Mobility" on the Synopsis, Ms. Schroeder wrote:

[REDACTED] is able to ambulate independently on even & uneven terrain. [REDACTED] was able to run on uneven terrain with hand-held assistance to maintain running. [REDACTED] exhibits normal gait pattern when not distracted, then may trip. [REDACTED] is able to get in/out of classroom chair independently, pushing chair out & attempting to scoot in. [REDACTED] is able to get on/off cafeteria bench independently & sit independently during lunchtime. [REDACTED] was able to put one foot in front of other to simulate balance beam on curb, with one-hand held assistance.

49. Under "Gross Motor Skills" on the Synopsis, Ms. Schroeder wrote:

■■■■ exhibits normal tone throughout except for face where ■■■■ exhibits decreased tone/drooling. ■■■■ exhibits range of motion & muscle strength "within normal limits." ■■■■ is able to transition through developmental sequence independently. ■■■■ exhibits good sitting & standing balance. ■■■■ is able to negotiate playground equipment independently (up and down 2-4 steps, ramps, slides). ■■■■ is able to go up/down 2 flights of steps, alternating feet holding onto handrail. ■■■■ is able to negotiate obstacle course independently without loss of balance. ■■■■ jumped on trampoline & swung on the swing.

50. Under "Fine Motor/Visual Motor Skills" on the Synopsis, Ms. Schroeder wrote:

■■■■ has bilateral esotropia. ■■■■ was able to track vertically, horizontally, & circularly. ■■■■ appears to prefer looking to ■■■■ right side & using ■■■■ right hand. ■■■■ was able to turn a doorknob, but did not open the door (hard push). ■■■■ is able to pick up small coins using both hands. Printed work was attempted using a palmer grasp on a marker & hand-over-hand assistance. ■■■■ likes playdough & is able to use adaptive scissors with hand-over-hand assistance (per teacher).

51. Under "Sensory Processing" on the Synopsis, Ms. Schroeder wrote:

■■■■ was able to transition from classroom to cafeteria to playground to therapy room without too much difficulty. ■■■■ would get down on floor, if upset & would bang head, or ■■■■ would flap ■■■■ hands & scream. This happened (1) when teacher asked ■■■■ to get back in chair, (2) when going down 2 flights of steps & suddenly a lot of children started coming up. ■■■■ refused to go through

therapy tunnel, by getting down on ground,  
as well.

52. Under "Student's Strengths" on the Synopsis,

Ms. Schroeder wrote:

██████ is able to ambulate independently on  
even/uneven terrain.

██████ is able to independently negotiate  
playground.

██████ is able to sit in chair independently  
with good balance.

██████ is independent in transfers (sit &  
stand).

53. Under "Recommendations" on the Synopsis, Ms. Schroeder  
wrote:

Educationally relevant physical therapy is  
not recommended at this time.

54. Ms. Schroeder indicated, under "Information Source" on  
the Synopsis, that in making this recommendation, she was  
relying on information she had obtained from the "parent,"  
"school personnel," "school records review," "medical records,"  
and her "PT evaluation."

55. Ms. Schroeder was of the view that ██████ did not need  
educationally relevant physical therapy because ██████ was  
"functioning very, very well and doing everything in the school  
environment that ██████ need[ed] to do to access ██████ education."

56. Among the "medical records" that Ms. Schroeder  
considered in making her recommendation was a written "note"

concerning a January 24, 2006, visit that ■ had made to the office of Roberto Tuchman, M. D., a neurologist who is a "very well-known and respected expert in autism." The "note" (which, presumably, was made by or at the direction of Dr. Tuchman) read, in pertinent part, as follows:

Motor: Symmetrical postures and movements,  
postural tone is normal

DTRs [Deep Tendon Reflexes] are normal

Sensory: Normal response to touch

Cerebellum: Movements appear smooth, very  
clumsy, poor coordination

PLAN: I am strongly suggesting that  
physical therapy be part of ■ educational  
intervention. . . .

57. On or about February 24, 2006, Ms. Schroeder sent to Dr. Tuchman a copy of her Synopsis, along with the following cover letter:

I have just completed a Physical Therapy evaluation on ■ . . . . You saw ■ for a neurological follow-up on January 24, 2006. ■ had been receiving Physical Therapy at ■ school, but services were discontinued as ■ became a functional ambulator in school. ■ parents have recently expressed concern about ■ reported incidences of falling in school. I, however, have not seen ■ fall during the total of six hours on two different occasions that I have spent with ■.

■ does not exhibit balance or strength issues which would be addressed by Physical Therapy, but a body awareness and attention to task issues that are being addressed by

Occupational Therapy. It is also apparent that [REDACTED] has preferential activities and will physically avoid non-preferred ones by throwing [REDACTED] backwards or on the floor.[<sup>4</sup>]

[REDACTED] receives Occupational Therapy in [REDACTED] school two times a week and [REDACTED] treatment plan has been revised to address the above issues.

Please acknowledge receipt of this information by signing and faxing it to . . . Attn. Beverly Schroeder, OT/PT

58. Dr. Tuchman at no time expressed to Ms. Schroeder any disagreement with the recommendation made in Ms. Schroeder's Synopsis. Aside from signing Ms. Schroeder's letter and faxing it back to her, Dr. Tuchman made no effort to contact Ms. Schroeder.<sup>5</sup>

59. As Ms. Schroeder had advised Dr. Tuchman in her February 24, 2006, letter, [REDACTED]'s occupational therapy "treatment plan ha[d] been revised to address" [REDACTED]'s "falling in school" and emphasize "body awareness, spatial orientation, and position in space." The revision had been made on or about February 16, 2006. The revised plan, which is still in effect, reads as follows:

Activities for preparation of skill  
development areas/activities addressed for  
therapy:

Proprioceptive exercises

- Weight bearing activities
- Weight shifting activities
- Scooter board (prone wt. Bearing on VE's)

- Push/pull activities (row your boat game, etc.)
- Carrying heavy items
- Isometric exercises
- "sandwich" using mat/bean bags
- Tunnels
- Obstacle course
- Joint compression
- Deep pressure massage
- Stacking/pushing boxes
- Ball kicking and throwing
- Wood tasks such as hammering
- Weighted vest/neoprene vest
- Simon says game

#### Vestibular tasks on unstable grounds

- Swing set
- Therapeutic ball

#### Environmental Adaptations

- Adequate chair/table height
- Legs 90° with foot rest
- Proper sitting position

#### Fine Motor Activities

- Filling containers with sand, uncooked macaroni
- Grasping small pegs and placing in foam board
- Playdo[ug]h/theraputty locate hidden objects within
- Coloring/painting using various utensils (brush, crayons, finger painting, dot to dot)
- Tearing crumbling paper using both hands
- Sensory activities using various texture as preparatory exercise

60. ■'s revised occupational therapy treatment plan is reasonably designed to help ■ "gain more awareness of ■ environment and, in turn, this will help ■ with ■ attending skills which [it appears] are the main issue with ■'s falling." "[B]y being better aware of where ■ body parts are

in space when [REDACTED] moves," [REDACTED] will be "better able to negotiate obstacles that are in [REDACTED] way."

61. At about the same time that the "treatment focus" of the occupational therapy treatment plan was revised, a change was also made in the delivery schedule of the services described in the plan.<sup>6</sup> Instead of [REDACTED]'s having two 30-minute sessions of occupational therapy per week, the occupational therapist began working with [REDACTED] (and has continued to work with [REDACTED]) three times a week, with each session being 20 minutes in length. This change was made to facilitate "more carry-over into the classroom" of activities that the occupational therapist works on with [REDACTED] so that [REDACTED] will be better able to "meet [REDACTED] academic goals."<sup>7</sup>

62. [REDACTED]'s occupational therapist has consulted with Ms. Strauss and suggested that Ms. Strauss "incorporate things in her curriculum that will benefit [REDACTED] during the classroom setting," suggestions that Ms. Strauss has followed. "[T]hroughout the [school] day . . . [Ms. Strauss is] working on things [with [REDACTED] to encourage proprioceptive input [and] vestibular [input]]."

63. [REDACTED]'s attention span has increased since the revisions were made to [REDACTED] occupational therapy treatment plan. [REDACTED] now can complete four or five activities in a 20-minute session with the occupational therapist.



64. Twenty-minute sessions of occupational therapy, three times a week, are sufficient to meet ■■■'s educational needs, particularly inasmuch as ■■■ has the opportunity to engage in many of the activities described in ■■■ occupational therapy treatment plan during the remainder of the school day in Ms. Strauss' classroom. ■■■'s schedule gives ■■■ the "time to learn those skills [■■■ needs] and [an opportunity to] generalize them."

65. "[W]hat can be done therapeutically in school for ■■■ is being done by the School Board: "provid[ing] ■■■ with consistent activities throughout ■■■ school day in ■■■ classroom as well as during therapy sessions that [are reasonably designed to] increase ■■■ body awareness, ■■■ awareness in space, [and] ■■■ proprioceptive perception."

66. It cannot be said at this time, with any degree of certainty, that providing ■■■ with more than the 60 minutes of occupational therapy ■■■ now receives per week would be of any educational benefit to ■■■. No occupational therapist has recommended such an increase in ■■■ occupational therapy time.

67. The occupational therapy that ■■■ receives adequately addresses ■■■ inadvertent falls at school.

68. Notwithstanding that ■■■ received a prescription from Dr. Tuchman (dated March 24, 2006) for ■■■ to receive "PT Evaluation and Treatment," the preponderance of the competent

substantial record evidence establishes that ■ does not "have deficits in any other areas of functioning [not addressed by the occupational therapy ■ is receiving] that would require the intervention of a physical therapist." ■ "appears to have the requisite [physical] skills that ■ needs to be able to access ■ environment and access ■ education."

69. In short, ■ does not need physical therapy or additional occupational therapy to meaningfully benefit from special education.

#### CONCLUSIONS OF LAW

70. District school boards are required by the Florida K-20 Education Code,<sup>8</sup> to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat.<sup>9</sup>

71. "Exceptional students," as that term is used in the Florida K-20 Education Code, are students who have been "been determined eligible for a special program in accordance with rules of the State Board of Education." The term includes "students who are gifted and students with disabilities who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospital and homebound, autistic, developmentally delayed

children, ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3), Fla. Stat.

72. The Florida K-20 Education Code's imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et. seq., as recently amended (IDEA),<sup>10</sup> which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1); cf. Agency for Health Care Administration v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998)("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Public Health Trust of Dade County, Florida v. Dade County School Board, 693 So. 2d 562, 564 (Fla. 3d DCA 1996)("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides

federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976)("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

73. Under the IDEA, a "free appropriate public education" (FAPE) consists of "special education" and, when necessary, "related services." See 20 U.S.C. § 1401(9)("The term 'free appropriate public education' means special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d)"). "Special education," as that term is used in the IDEA, is defined as

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1401(29). The term "related services," as used in the IDEA, is defined as:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

74. To meet its obligation under Sections 1001.42(4)(1) and 1003.57, Florida Statutes, to provide an "appropriate" public education to each of its "exceptional students," a district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry County School Board v.

Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982); see also § 1003.01(3)(b), Fla. Stat. ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board."). The instruction and services provided must be "'reasonably calculated to enable the child to receive educational benefits.'" School Board of Martin County v. A. S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. at 207. As the Fourth District Court of Appeal further stated in its opinion in School Board of Martin County, 727 So. 2d at 1074:

Federal cases have clarified what  
"reasonably calculated to enable the child  
to receive educational benefits" means.

Educational benefits provided under IDEA must be more than trivial or de minimis. J. S. K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. Of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. Of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

see also M. M. v. School Board of Miami-Dade County, 437 F.3d 1085, 1102 (11th Cir. 2006)("[U]nder the IDEA there is no entitlement to the 'best' program."). "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Independent School

District No. 283, St. Louis Park, Minn. V. S.D. By and Through J. D., 948 F. Supp. 860, 885 (D. Minn. 1995); see also Coale v. State Department of Education, 162 F. Supp. 2d 316, 331 n.17 (D. Del. 2001)("If the IDEA required the State to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student, then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive technology might be more problematic. But the court does not understand the IDEA to impose such requirements on the State.").

75. ■ is undisputedly an "exceptional student" entitled to receive a FAPE from the School Board. In dispute in the instant matter is whether, as part of its obligation to provide ■ with a FAPE, the School Board must provide ■ with the physical therapy and additional occupational therapy ■ mother has requested.

76. Physical therapy and occupational therapy are "related services," as that term is used in both the Florida K-20 Education Code and the IDEA. "Being eligible to receive special education is a necessary but not a sufficient condition of eligibility for related services." J. A. M. v. Broward County School Board, No. 03-1936E, 2003 Fla. Div. Adm. Hear. LEXIS 567 \*10 (Fla. DOAH July 3, 2003)(Final Order). An "exceptional student" is "eligible for related services only if such related services are necessary to help the exceptional student benefit



from the special education, and the [district] school [board] must provide such related services to an eligible student only to the extent such services are necessary to help the student benefit from the special education." Id. at \*11.

77. The State Board of Education, pursuant to the authority given it by the Florida Legislature, has adopted rules addressing "[s]pecial [p]rograms for [e]xceptional [s]tudents who [r]equire [p]hysical [t]herapy" (Florida Administrative Code Rule 6A-6.03024) and "[s]pecial [p]rograms for [e]xceptional [s]tudents who [r]equire [o]ccupational [t]herapy" (Florida Administrative Code Rule 6A-6.03025).

78. Florida Administrative Code Rule 6A-6.03024 provides as follows:

Special Programs for Exceptional Students  
who Require Physical Therapy.

(1) Definition. An exceptional student who requires a specially prescribed program directed toward the development, improvement, or restoration of neuromuscular or sensorimotor function, relief of pain or control of postural deviations to attain the exceptional student's functional performance in an educational setting is eligible to receive physical therapy.

(2) Criteria for eligibility. An exceptional student is eligible for a specially directed program for physical therapy if the exceptional student has:

(a) Identified physical impairments, motor deficits or developmental delays which significantly interfere with the achievement

of learning; or

(b) Muscular or neuromuscular conditions, skeletal deformities, trauma or physically debilitating conditions which limit the student's ability to attain functional performance within the educational setting.

(3) Procedures for student evaluation. The minimum evaluation for the student shall include an evaluation by a physical therapist licensed in this state.

(4) Medical prescription. Prior to the determination of eligibility and in the event of a change in medical condition of the student, the school district shall have a written medical prescription for physical therapy signed by a health care practitioner, pursuant to the provisions of Section 486.021, Florida Statutes.

(5) Individual Educational Plan (IEP). Annually a physical therapist shall evaluate the student's progress in meeting those short term objectives stated in the IEP related to physical therapy.

(6) Instructional program.

(a) The instructional program shall be based on the student's individual educational plan and the plan of treatment developed by a physical therapist.

(b) Physical therapy may be provided by either a licensed physical therapist or a licensed physical therapist assistant pursuant to the provisions of Section 486.021, Florida Statutes.

79. Although a "medical prescription" is required for an "exceptional student" to be eligible to receive physical therapy as a "related service" from a district school board under

Florida Administrative Code Rule 6A-6.03024, a district school board is not obligated to provide an "exceptional student" physical therapy services simply because a health care practitioner has prescribed such services as medically necessary or desirable for the student. The district school board's obligation to provide such services arises only if the physical therapy is not only medically advisable (as evidenced by a "medical prescription"), but also educationally necessary (that is, required for the student to benefit from "special education"). See J. A. M., 2003 Fla. Div. Adm. Hear. LEXIS 567 \*16 ("[S]chools are not required to provide all medically advisable physical therapy, but only that which is educationally necessary, i.e. that which falls within the definition of 'related services' as being 'required to assist a child with a disability to benefit from special education.'"); see also Howell v. Waterford Public Schools, No. 89-CV-72004-DT, 1991 U.S. Dist. LEXIS 1737 \*19-21 (D. Mich. 1991)("In this Court's opinion, it is important to distinguish, as Ms. Bartolino did, the difference between medically necessary occupational and/or physical therapy and the therapy necessary to further an individual's educational needs. The testimony of the witnesses who deal with Joseph in [REDACTED] educational program strongly support a conclusion that the 'monitoring' approach recommended by the IEP in 1987 and accepted by the local hearing officer and the

SLRO is an appropriate method for providing physical therapy and occupational therapy to Joseph in furtherance of [REDACTED] educational goals of being able to develop increased independence and vocational skills. . . . It is important for this Court to note that this Court does not dispute that Joseph can and has benefitted from the private physical and occupational therapy sessions [REDACTED] has been receiving. From a medical standpoint, those sessions have benefitted [REDACTED] and hopefully, to the extent that they continue to provide benefits to [REDACTED], will be continued. However, in determining whether or not the school district has met its obligation under the Act, the Court must determine whether or not the services provided by the school district are sufficient to 'assist a handicap child to benefit from special education.'").

80. Florida Administrative Code Rule 6A-6.03025 provides as follows:

Special Programs for Exceptional Students  
who Require Occupational Therapy.

(1) Definition. An exceptional student whose physical motor or neurological deficits result in significant dysfunction in daily living skills, academic learning skills or adaptive social or emotional behaviors is eligible to receive occupational therapy.

(2) Criteria for eligibility. An exceptional student is eligible for a special program of occupational therapy if the exceptional student has identified

significant developmental deficits, dysfunctions, or disabilities to a degree not otherwise provided for in the exceptional student education instructional environment.

(3) Procedures for student evaluation. The minimum evaluation for the student shall include an evaluation by an occupational therapist licensed in this state. Although a medical prescription is not required, appropriate medical records and social history may be reviewed as a part of the evaluation process.

(4) Individual Educational Plan (IEP). Annually an occupational therapist shall evaluate the student's progress in meeting those short term objectives in the IEP related to occupational therapy.

(5) Instructional Program.

(a) The instructional program shall be based on the student's individual educational plan and the plan of treatment developed by an occupational therapist.

(b) Occupational therapy may be provided by either a licensed occupational therapist or a licensed occupational therapy assistant pursuant to the provisions of Section 468.203, Florida Statutes.

81. If a student is found eligible for special education and related services, the district school board must develop, taking into consideration any input provided by the child's parents,<sup>11</sup> an IEP designed to meet the student's unique needs. Fla. Admin. Code R. 6A-6.03028; and 20 U.S.C. § 1414(d). The IEP is "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988).

82. Parents who have "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" under the IDEA must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f).

83. In Florida, by statute, a Division administrative law judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(5), Fla. Stat.

84. "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 126 S. Ct. 528, 537 (2005); see also West Platte R-II School District v. Wilson, 439 F.3d 782, 784 (8th Cir. 2006)("[T]he burden of proof in an IDEA case lies with the party initiating the challenge to the Individualized Education Plan (IEP)."); and Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001)("In the present case, because it is the parents who are seeking to attack a program they once deemed appropriate, the burden rests on the parents in this IEP challenge.").

85. In the instant case, ██████ requested, and was granted, an "impartial due process hearing" to air ██████ complaints about the School Board's refusal to grant ██████ request that it provide ██████ with physical therapy and additional occupational therapy.

86. At this "impartial due process hearing," ██████ failed to meet ██████ burden of showing ██████'s entitlement to the relief ██████ has requested on ██████ behalf. ██████ presented no expert testimony or other persuasive competent substantial evidence

effectively rebutting the conclusions reached by the School Board's educational and physical and occupational therapy specialists who testified, credibly, at the hearing. The undersigned, therefore, has deferred to the informed judgment of these specialists and determined that ■ does not need physical therapy or additional occupational therapy to meaningfully benefit from special education. See Arlington County School Board v. Smith, 230 F. Supp. 2d 704, 713 (D. Va. 2002) ("When this case record is viewed through the lens of these well-established legal principles, they compel the conclusion that the hearing officer's decision was erroneous. Specifically, the hearing officer's findings lack support in the record, and he failed to defer to the considered judgment of the educational experts, who uniformly and consistently testified that ■ would receive educational benefit from ■ placement in the Interlude program."); Johnson v. Metro Davidson School System, 108 F. Supp. 2d 906, 915 (M. D. Tenn. 2000) ("[I]f the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only be that the ALJ presiding over such a [due process] hearing must give due weight to such policy decisions. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the educational expertise of the local school authorities and then



require such deference by the district court would be inefficient and thus counter to sound jurisprudence."); Wiederhold v. Wiederhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997)("[T]he trial court as fact-finder cannot arbitrarily reject un rebutted expert testimony."); J. A. M., 2003 Fla. Div. Adm. Hear. LEXIS 567 \*18 ("The school authorities who made this decision, including Ms. Rubin, are specialists in the field of education who possess some degree of firsthand knowledge regarding [REDACTED]'s particular circumstances and educational needs. Having received no expert testimony or other persuasive evidence challenging the IEP team's conclusion, the undersigned has elected to defer to the judgment of the school officials."); and J. R. v. Palm Beach County School Board, No. 00-1281E, 2000 Fla. Div. Adm. Hear. LEXIS 5333 \*113 (Fla. DOAH December 8, 2000)(Final Order)("In ascertaining whether an IEP offered by a district school board was 'reasonably calculated to enable the child to receive educational benefits' . . . , a hearing officer/Administrative Law Judge should give deference to the reasonable opinions of those witnesses who have expertise in the field of education. . . . If an educational expert's opinion testimony is un rebutted, it may not be rejected by the hearing officer/Administrative Law Judge unless there is a reasonable explanation given for doing so.")(citation omitted).

87. Accordingly, the School Board is not obligated, and therefore cannot be ordered, to provide ■ with the physical therapy and additional occupational therapy ■ mother has requested on ■ behalf.<sup>12</sup>

DONE AND ORDERED this 5th day of June, 2006, in  
Tallahassee, Leon County, Florida.

S

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of June, 2006.

#### ENDNOTES

<sup>1</sup> This extension of the final order deadline turned out to be 31 days in length.

<sup>2</sup> In these Findings of Fact, "currently" and like terms refer to at the time of the due process hearing.

<sup>3</sup> ■'s "home therapist" is Sonia Mitchell, a certified associate behavior analyst, who for the last 17 months has worked "one-on-one" with ■ for six hours a week. At first it was "difficult [for Ms. Mitchell] to hold ■'s] attention for more than . . . 30 to 40 seconds," but now ■ "is able to sit at the table and work with [her] for [a period of] two hours."

<sup>4</sup> In addition to the accidental spills .... has had, ■ has also, in Ms. Strauss' classroom, "when given a request or transitioning," intentionally "drop[ped] ■ self to the floor," and on other occasions ■ has "thow[n] [■] head back" or "throw[n] materials [and] object[s]." A Functional Assessment of Behavior to study these behaviors so that they could be dealt with effectively at school was undertaken by the School Board on February 28, 2006.

<sup>5</sup> Ms. Schroeder testified at the due process hearing in this case. Dr. Tuchman did not. A hearsay letter from Dr. Tuchman, dated April 11, 2006, however, was received into evidence as Respondent's Exhibit 8. The letter read as follows:

I am the pediatric neurologist treating the above named patient. ■ is a 5 1/2-year - old ■ diagnosed with Encephalopathy manifested by social, language and behavioral deficits consistent with the diagnosis of Autism.

It is medically necessary that ■ receive Occupational and Physical Therapy. This is the correct medical treatment for the remediation of ■ condition. These types of interventions will not only maximize the child's potential, but may possibly decrease the need for future medical intervention.

<sup>6</sup> No occupational therapy evaluation was completed prior to making these changes.

<sup>7</sup> The total amount of time ■ spent with the occupational therapist each week was not increased because it was felt that "enough changes" had already been made to .... occupational therapy program and it would be prudent to "let some time pass to determine actually what was effective and what wasn't."

<sup>8</sup> Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1001.01(1), Fla. Stat.

<sup>9</sup> All references to Florida Statutes in this Final Order are to Florida Statutes (2005).

<sup>10</sup> "The IDEA was recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-

446, 118 Stat. 2647 (2004)." M. T. V. v. Dekalb County School District, No. 04-16133, 2006 U.S. App. LEXIS 9621 n.2 \*8 (11th Cir. April 18, 2006).

<sup>11</sup> "The [parents'] right to provide meaningful input [in the development of the IEP] is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish School Board, 343 F.3d 373, 380 (5th Cir. 2003); see also Bradley v. Arkansas Department of Education, 443 F.3d 965 (8th Cir. 2006)("[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit."); and AW ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 683 n.10 (4th Cir. 2004) ("Although AW's parents indicated their dissatisfaction with AW's April IEP by declining to sign it, the right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions.").

<sup>12</sup> In her Proposed Final Order, in addition to requesting that the School Board be directed to provide [REDACTED] with physical therapy and additional occupational therapy, [REDACTED] also requests an award of non-reimbursement type monetary damages (compensatory and punitive). Such a damage award is relief that, under no circumstances (regardless of what proof [REDACTED] might have submitted at the due process hearing), would the undersigned have the authority to grant. See Emery v. Roanoke City School Board, 432 F.3d 294, 299 (4th Cir. 2005)("A plaintiff cannot recover compensatory or punitive damages for a violation of the IDEA."); Ortega v. Bibb County School District, 397 F.3d 1321, 1326 (11th Cir. 2005)("[W]e hold that the IDEA does not provide a cause of action for tort-like relief."); Polera v. Board of Education of Newburgh Enlarged City School District, 288 F.3d 478, 486 (2d Cir. 2002)("We agree with the prevailing opinion of the other Circuits and the district courts in our Circuit. The purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy--as contrasted with reimbursement of expenses--is fundamentally inconsistent with this goal. The availability of damages also would undercut the IDEA's carefully structured procedure for administrative remedies, a mechanism that encourages parents to seek relief at the time that a deficiency occurs and that allows the educational system to bring its expertise to bear in correcting its own mistakes. We therefore hold that monetary damages are not available under the IDEA."); Witte v. Clark County School District, 197 F.3d 1271, 1275 (9th Cir.

1999)("Although the IDEA allows courts to grant 'such relief as the court determines is appropriate,' 20 U.S.C. 1415(i)(2)(B)(iii), ordinarily monetary damages are not available under that statute."); Sellers by Sellers v. School Board of City of Manassas, Va., 141 F.3d 524, 527 (4th Cir. 1998)("Tort-like damages are simply inconsistent with IDEA's statutory scheme. The touchstone of a traditional tort-like remedy is redress for a broad range of harms 'associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages.' . . . By contrast, the touchstone of IDEA is the actual provision of a free appropriate public education. . . . [T]he [United States Supreme] Court has never approved an award of compensatory or punitive damages under IDEA for a violation of its requirements. In fact, it 'took pains to emphasize that . . . reimbursement [for appropriate specialized education] should not be characterized as 'damages.' . . . Compensatory or punitive damages would transform IDEA into a remedy for pain and suffering, emotional distress, and other consequential damages caused by the lack of a free appropriate public education. Such a result would be inconsistent with the structure of the statute, which so strongly favors the provision of and, where appropriate, the restoration of educational rights."); and Whitehead By and Through Whitehead v. School Board for Hillsborough County, Fla., 918 F. Supp. 1515, 1519-20 (M.D. Fla. 1996)("[T]he only appropriate damages for violations of IDEA are reimbursement type damages that compensate the parents of a handicapped child for the failure of the school to provide a 'free appropriate education' as mandated by IDEA. . . . Since the explicit purpose of IDEA is to assure the establishment of appropriate public educational opportunities for handicapped children, and not to serve as a source from which individuals may collect tort-type damages, the proper remedy for a violation of IDEA is to implement an appropriate education plan for the child and compensate parents for providing services that the school should have provided."); see also Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc., 511 So. 2d 962, 965-66 (Fla. 1987)("Notwithstanding our finding that Dade County has the authority to enact ordinances prohibiting age discrimination in housing, we nevertheless find the \$ 7,000 award of unliquidated damages for Reid's humiliation, embarrassment, and mental distress to be unconstitutional based on our recent decision in Broward County v. La Rosa [505 So. 2d 422, 423 (Fla. 1987)]. In La Rosa this Court considered the constitutionality of an ordinance creating an administrative agency known as the Broward

County Human Rights Board (board). The ordinance empowered the board to investigate alleged discriminatory practices and award common law money damages for such noneconomic injuries as humiliation and embarrassment. We held that the section of the ordinance authorizing the board to award common law money damages for such nonquantifiable injuries violated both article II, section 3 (separation of powers) and article I, section 22 (right to a jury trial) of the Florida Constitution. LaRosa, at 423-24. Therefore, we hold that section 11A-7(5)(f)(ii) of the instant ordinance is unconstitutional to the extent that it authorizes administrative awards of common law damages for such nonquantifiable injuries as humiliation, embarrassment, and mental distress.").

COPIES FURNISHED:



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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 IDEA; 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.