Broward County School District
No. 05-2938E
Initiated by: Parent
Hearing Officer: Florence Snyder Rivas
Date of Final Order: June 29, 2006

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 05-2938E

BROWARD COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

Pursuant to notice, a final hearing in this matter was held on March 1, 2, 3, and 6, 2006, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Petitioner requires one-to-one applied behavioral analysis therapy (ABA therapy or ABA) in order to receive a free appropriate public education (FAPE), and if so, how much.

PRELIMINARY STATEMENT

Petitioner, ████ (████), is a four-year-old ████ with Autism Spectrum Disorder (ASD or autism). ████ lives in Broward County, Florida. By Due Process Hearing Request dated June 14, 2005 (Hearing Request), Petitioner's mother, ████, sought on ███ behalf a due process hearing to challenge the Individualized Education Program (IEP) developed for ████ by Respondent, Broward County School Board (Respondent or School Board). On August 15, 2005, the School Board referred the matter to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the due process hearing. In its transmittal letter to the Division, Respondent states that Petitioner's June 14, 2005, request for hearing was "resent on August 15, 2005 and received in [Respondent's] office August 15, 2005." Petitioner has not challenged the timeliness of the transmittal. Under the law then in effect, Petitioner was entitled to have ████ rights

adjudicated in this forum and a final order rendered within 45 days of the date of the filing of ___ Hearing Request with the School Board (the 45-day rule). Concerned that 62 days had elapsed between the filing of the Hearing Request and its transmittal to the Division, the undersigned set an immediate pre-hearing conference; the parties could not make themselves available for the conference until August 18, 2005, the 65th day following the filing of the Hearing Request, at which time the pre-hearing conference was conducted via telephone conference call. Both parents and School Board counsel participated. The conference call was focused upon more fully defining the issue(s) to be litigated in order to facilitate the parties' hearing preparation; to determine how much time should be allotted for the hearing; and to set a date(s) for the hearing. The utility of the conference call was greatly enhanced by the participation of ___, an experienced attorney. Petitioner advised that ___ challenged the IEP only to the extent that it failed to provide for ___ to receive ABA therapy delivered on a one-to-one basis by ___ current therapist or comparable ABA provider(s); ___ maintains that absent such ABA therapy, in an amount of 20 hours per week, ___ can not be provided with FAPE. The tribunal and the School Board were further informed that at relevant times ___ parents could afford to provide, had provided, and would continue to provide the ABA therapy they

deemed necessary to ████ at their personal expense. The tribunal specifically inquired of the parties as to whether Petitioner was prejudiced in any way by reason of the fact that it was now impossible to comply with the 45-day rule. The tribunal was assured that Petitioner had not suffered and (barring an unexpected adverse change in the parents' financial circumstances) would not suffer prejudice by reason of the delay; the parties agreed that this case is in substance a dispute between the parties over money, and did not concern the appropriateness of Petitioner's placement or ███ ability to access all services she alleged to be necessary for ███ to receive FAPE. Taking into account all of the input provided by the parties during this pre-hearing conference call, and being convinced that Petitioner had not been prejudiced by delay, the tribunal granted a specific extension of time, i.e. 65 days, between the initial filing, on June 14, 2005, of the Hearing Request and the date of the telephone conference call, retroactive to the date of the Hearing Request. An additional specific extension of time was granted to enable the parties to make preparations for hearing and the matter was set for 98th day following the filing of the Hearing Request, September 20, 2005. The parties requested and were granted three days of hearing time, through and including September 23, 2005. On September 13, 2005, the parties jointly requested a continuance

and the undersigned conducted a second conference call on that date to consider the request. At that time, the undersigned was advised that Petitioner desired a continuance for the purpose of seeking legal representation. Respondent did not oppose the request. Petitioner represented again that Petitioner would not suffer prejudice if the extension was granted and would instead benefit if counsel were to be engaged. Upon consideration, a specific extension of time was granted and the matter was re-set for the 147th day following the filing of the Hearing Request, to commence November 8, 2005, and continue for three days or until completed. On October 13, 2005, Petitioner's counsel filed a notice of appearance. On October 31, 2005, the parties filed a Joint Motion to Continue, which set forth in substantial detail the extensive disruption to their law practices and to the discovery schedule in this case by reason of Hurricane Wilma. The undersigned again conferred with the parties by telephone, and determined that they had cooperated in good faith to prepare for the November 8, 2005, hearing date, and but for the natural disaster which had befallen south Florida, a continuance would not have been sought. Crucial hearing participants, including attorneys, paralegals, expert and lay witnesses, were unable to contact one another and to proceed with scheduled discovery due to damaged offices, dangerous travel conditions, and in some cases the lack of electricity and

a reliable water supply. Again it was represented that the Petitioner would not suffer prejudice by reason of a grant of a specific extension of time to January 25, 2006, the 225th day following the filing of the Hearing Request. Again, the parties sought three days of hearing time. Exceptional good cause having been shown, the requested specific extension of time was granted and the hearing was re-set for January 25-27, 2006. On January 13, 2006, Petitioner filed an unopposed motion for a continuance. Petitioner's lead counsel had been recently diagnosed with pneumonia and ordered to bed rest. In addition, discovery had not been completed because both parties, despite diligent efforts, had been unable to secure the attendance of essential witnesses at depositions, in large part due to the disruptions occasioned by Hurricane Wilma which, unfortunately, continued to adversely affect the lives of hearing participants. The tribunal was again assured that the Petitioner would not be prejudiced by the specific extension sought. With the parties' input, taking into account the medical advice Petitioner's counsel received and reasonably followed, a specific extension of time was granted and the hearing was re-set for March 1, 2006, the 260th day following the Hearing Request, at which time the hearing went forward, and continued for four days.

At the conclusion of the hearing, the parties requested a specific extension of time to permit the preparation of a

transcript, and 20 days from the filing of the transcript to review the record and to submit proposed final orders. The tribunal was again assured that Petitioner would not suffer prejudice by reason of this delay, and instead would benefit from the preparation of a complete record in advance of the preparation of the parties' proposed orders and rendition of a final order. These specific extensions were granted. A four-volume transcript which sets forth the identity of witnesses, exhibits and attendant rulings was filed April 4, 2006, the 294th day following the filing of the Hearing Request; thus the parties would have a specific extension of time to file their proposed orders through and including April 24, 2006, the 314th day following the filing of the Hearing Request. On April 11, 2006, the School Board moved for a two-day specific extension of time to file its proposed final order, citing an intervening school holiday as well as a due process hearing which was expected to go forward the following week. The motion was unopposed. The undersigned again considered whether Petitioner would be prejudiced by the requested specific extension of time and concluded she would not be. The undersigned deemed it appropriate to grant a specific extension of time through and including May 1, 2006. Both parties filed their proposed orders on May 2, 2006, the 322nd day following the filing of the Hearing Request; the undersigned exercised discretion to deem

these filings timely.

Although this matter was not specifically addressed in the record, it was the undersigned's intention to render a final order no later than May 22, 2006. However, from the time of the filing of the Hearing Request, the undersigned's father was in failing health. His decline accelerated in 2006, and he died in April. There had been no indication from his doctor that he would not survive much past the date of the final hearing; as with the natural disaster which occurred in October and the illness of Petitioner's counsel earlier this year, his death was not forseen and was a significant distraction. If the undersigned had forseen in February what lay ahead, it would have been appropriate to request that the case be reassigned for hearing. As events unfolded, the undersigned needed additional time to provide the parties what they were entitled to--painstaking review of the proposed final orders as well as the entire record; and thoughtful consideration of relevant legal authority. For all of the foregoing reasons, the Final Order is dated and rendered on this, the 370th day following the filing of the Hearing Request.

FINDINGS OF FACT

1. [redacted] was born on [redacted]. At all relevant times, [redacted] lives with [redacted] parents and older sister in Broward County, Florida. It is undisputed that at all relevant times, [redacted] is

an exceptional student within the meaning of the Individuals with Disabilities Education Improvement Act, 20 U.S.C. Section 1400 et. seq. (2005) popularly known as IDEA. IDEA requires public school districts to provide exceptional students a FAPE. Respondent is the school district with the legal obligation to provide FAPE to ████ and to other exceptional students residing in Broward County, Florida. ████ is, at all relevant times, enrolled in the Respondent's Exceptional Student Education (ESE) program under the eligibility category of Autism.

2. ████'s older sister provided ███ with their first substantial opportunity to observe a young child's developmental stages. ████'s sister thus provided the frame of reference by which ███ evaluated ████'s developmental progress. ████'s sister reached typical developmental milestones. At the time of ████'s birth, there was no indication that ████ would not achieve similar milestones in a comparable time frame. However, ████ suffered almost from birth from a series of ear infections necessitating substantial medical intervention, including multiple surgeries. The infections were thought by ███ parents to have interfered with ████'s hearing, and thus ███ ability to learn. ████'s parents reasonably believed that the inherent misery of ear infections, along with multiple surgical interventions, produced pain and suffering which interfered with ████'s ability to self-regulate ███ behavior and to learn

appropriate ways of expressing and meeting needs. For these reasons, "cut some slack" as lagged far behind sister in terms of age-appropriate behavior and communication skills.

3. By the time was 18 months old, however, it had become clear to 's parents that the differences between development and that of older sister might be attributable to factors other than history of ear infections. 's speech development was lacking to the point where could not meaningfully communicate basic needs to family. had significant behavior problems which seriously impeded ability to learn, and significantly disrupted normal family life. Following a comprehensive evaluation when was approximately 20 months old, was provided with early intervention services including therapy for speech-language delay. also received physical therapy, occupational therapy and behavioral intervention. These services were furnished at public expense pursuant to a portion of IDEA popularly known as "Part C."

4. 's ability to profit from the early intervention services was impeded by limited attention span and by behavior, which included frequent tantrums. 's parents and health care providers became increasingly concerned that 's developmental delays were, in fact, unrelated to any hearing

impairment which might exist by reason of history of ear infections.

5. On April 5, 2004, [redacted] was seen at the Dan Marino Center by neurologist Carlos Gadia. Dr. Gadia and his colleagues at the Dan Marino Canter specialize in the diagnosis and treatment of children with ASD. Some weeks later, Dr. Gadia diagnosed [redacted] with ASD. At times relevant to this case, she functions in the middle-to-higher range relative to other children with ASD.

6. In the months following the ASD diagnosis, [redacted] was seen by other specialists in various medical and behavioral disciplines, most of whom work with ASD children. [redacted]'s parents researched ASD and attempted to collect as much information as possible in order to provide [redacted] the best help available. As they collected information, they learned that ABA therapy was recommended by many professionals as a means of addressing the challenges faced by ASD children.

7. An ABA therapist, Catherine Vega, was recommended to [redacted] by at least three medical professionals who saw [redacted] in the months following [redacted] diagnosis. Ms. Vega is in the business of providing ABA therapy to private clients. Ms. Vega has associates available to provide direct services to clients under Ms. Vega's supervision.

8. In December 2004, Erica Grub, who was providing speech therapy to , expressed concern to 's parents that needed "more support," specifically ABA therapy. The following month, 's parents hired Ms. Vega to provide ABA therapy in 's home. Since then, Ms. Vega and a number of her associates have worked directly with . Ms. Vega supervises ’s ABA therapy; she and her associates consult closely with 's parents and with one another.

9. At all relevant times, the amount of ABA therapy provided to varies. Scheduling of services provided by Ms. Vega and her associates may be affected by their other obligations, as well as by the obligations and schedules of the family. When Ms. Vega first began to work with , the child was approximately three months away from her third birthday, and lacked the attention span and other skills necessary to profit from ABA therapy. From January 2005 to August 2005, received between three and five hours a week of ABA, during which time attention span improved. entered pre-school in Respondent school district on or about August 8, 2005. From the time entered pre-school, was able to function with seven other autistic children in a structured classroom environment; the amount of ABA received from Ms. Vega and her associates was increased and generally fluctuated between ten and twelve hours.

10. Respondent maintains that ABA therapy is not necessary to provide FAPE to ████, but does not challenge ███ contention that ███ behavior, communication skills, and "learning readiness" were improved with the therapy provided by Ms. Vega and her associates. As an example, Respondent did not attempt to discredit the testimony of Marci Kahn, ████'s private speech therapist, who said she "[saw] dramatic differences in [████'s] overall behavior when she first started [ABA]. ███ has always made gradual progress."

11. To ███, ████ is a "new child" by reason of Ms. Vega's work with ███. ████ received other services paid for by ███ parents, as well. For example, ████'s parents employed professional help in the home to work with them and with ████ on life skills such as feeding and establishing a bedtime routine for ████ and ███ sister. In addition, ████ benefits from "quantity time" with ███ mother, who established a home-based business in order to be available to attend to ███ young children, and particularly to take ████ to medical and private therapy appointments. ███ ability and willingness to be physically present for ████ provides ███ with consistency from which ███ benefits. ████ is fortunate in that ███ parents are willing to provide private services and to sacrifice leisure time in order to help ███ maximize ███ potential. Although they are not independently wealthy, at all relevant times ████'s

parents have the financial wherewithal to pay for services which are beyond the means of the parents of similarly situated children. In addition, they have had the wherewithal to provide, at relevant times, the ABA which they contend should be provided by Respondent. Petitioner contends that ABA therapy alone is to be credited for the progress has made both educationally and in other aspects of life, but the evidence established that benefits educationally and in many other respects by reason of all of the private services and loving attention receives.

12. All ESE students are provided services pursuant to an IEP. IEPs must be reviewed and updated annually, and more often if necessary, to meet the student's developing and changing needs. The IEP must be reasonably calculated to confer educational benefit on the student. The benefit conferred must be more than trivial or de minimus. The student must be educated in the least restrictive environment in which the IEP may be implemented. The IEP is developed by an IEP team, which includes the student's parents or guardians and professionals, generally employed by the School Board, who personally deliver services to the child and/or who have credentials and expertise relevant to the preparation and implementation of IEPs.

13. As 's third birthday approached, an IEP team was formed to prepare first IEP. An IEP was timely developed

for and was finalized on April 15, 2005. actively participated in the development of IEP. The professional members of ’s IEP team were at all relevant times appropriately credentialed. protested Respondent’s refusal to provide for ABA, but otherwise approved of the content of the IEP. The IEP was reasonably calculated to provide with educational benefit and could be implemented at the School (), a preschool which serves autistic children and which is located in Broward County, Florida. is 's least restrictive environment. Respondent is obliged to offer FAPE as of an ESE student's third birthday and was prepared to do so in this case. Specifically, Respondent was prepared to commence implementation of 's IEP at when turned three on April 23, 2005. However, because 's birthday was so close to the end of the school term, and because , like most autistic children, does not adapt readily to changes in environment, parents determined that should not transition to preschool until ’s fall term began in August 2005.

14. Since commenced preschool at , parents are satisfied with what is on the IEP and the manner in which it is implemented. staff implements 's IEP throughout the school day by working with to attain the specific goals set forth on IEP. The individuals tasked with implementing

's IEP, as well as the individuals tasked with the supervision of those who implement 's IEP, are well qualified for their jobs by virtue of education, training, and, where appropriate, state certification.

15. At all relevant times, ’s IEP goals are appropriate to needs, and has made adequate progress on her IEP goals. While conceding that is receiving educational benefit and making progress on appropriate IEP goals, Petitioner's parents maintain that would not have made this progress but for the provision of the services which Ms. Vega has rendered and continues to render to Therefore, ’s parents submit, such services are "necessary to confer FAPE." In support of this view, Petitioner presented the testimony of Jose Martinez-Diaz, a behavior analyst, who testified as an expert. Dr. Martinez-Diaz holds a doctorate in clinical psychology from the University of Virginia. At all times relevant to this case, Dr. Martinez-Diaz is a private provider of ABA services.

16. Dr. Martinez-Diaz has never met ; his opinions are based upon a review of some of school and home program records, her IEP, some of medical records, and information provided by various individuals who know or have observed He did not have access to all relevant records and information pertaining to 's educational needs. Based upon the

information provided to Dr. Martinez-Diaz, he acknowledged that ████ is making educational progress; nonetheless, he opined, in order to make (educational) progress, autistic children require "intensive behavior intervention" for a minimum of 20 hours a week. Without 20 hours per week of intensive behavior intervention, "it's as if nothing had been done. . . ." He opined that ████ does not and cannot receive FAPE unless provided with 20 hours per week of ABA delivered one-to-one by Ms. Vega or a comparable provider. In so stating, Dr. Martinez-Diaz relied upon anecdotes about and recollections of children other than ████ with whom he has worked over the years. He further claimed that "research" supports his view(s) regarding the need of all autistic children to be provided with ABA and/or "intensive behavior intervention" in order to receive FAPE. The record does not reflect the particulars of the research upon which this opinion is based.

17. Dr. Martinez-Diaz' view(s) regarding the provision of FAPE to ████ are unpersuasive and are rejected by the fact-finder. Even if Dr. Martinez-Diaz had based his opinions upon all of the relevant records and information, it was not established that he is qualified to interpret such records and information with reference to Petitioner's unique educational needs. His professional responsibilities at relevant times do not include implementing the ESEs of exceptional students. He

is not by training and experience an educator. Dr. Martinez-Diaz was not asked, and did not explain, how ████ has been able to make educational progress, as everyone agrees ███ has, even though ███ has received substantially less ABA therapy than the minimum he deems necessary in order for any autistic student to be provided with FAPE.

18. Dr. Martinez-Diaz makes no distinction regarding the ABA therapy needs of autistic children based upon any factor unique to the child. His opinion in this case did not take into account, among other such relevant matters, Petitioner's placement on the autism spectrum; age; complete psycho-educational and medical history; individual need for and access or lack of access to other services and enrichment activities; early intervention services provided pursuant to Part C, and from private resources; and the credentials and training of the individuals responsible to implement ███ IEP. ███'s IEP team was qualified to address all relevant factors and did so.

19. Dr. Martinez-Diaz advocates a "cookie-cutter" or "one size fits all" approach. Such an approach is not appropriate under all the facts and circumstances of this case. Even if Dr. Martinez-Diaz had been provided all of the relevant records and information, and had thought it important to consider all of the relevant records and information, it was not established that he is qualified to interpret such records and information

with reference to Petitioner's educational needs. Further, it was not established that Dr. Martinez-Diaz has, at relevant times, a working knowledge of the legal context in which an IEP team is required to perform its duties. He is not by training and experience an educator. His professional responsibilities at relevant times do not include implementing the ESEs of exceptional students. Assuming arguendo that persuasive evidence supports a finding that ██ in fact requires 20 hours per week of ABA therapy, there is no persuasive evidence, from Dr. Martinez-Diaz or any other source, regarding when ██ needed to begin to receive 20 hours per week of ABA therapy in order to be provided FAPE. It bears repeating that Dr. Martinez-Diaz was not asked, and did not explain, how ██ has been able to make educational progress, as everyone agrees ██ has, even though ██ has received substantially less ABA therapy than the minimum he deems necessary in order for any autistic student to be provided with FAPE. Based upon the foregoing, and taking into account the demeanor of the witness under oath, the fact-finder does not credit Dr. Martinez-Diaz' view(s) regarding the provision of FAPE to ██.

20. If ABA therapy is ever determined to be necessary to provide ██ with FAPE, ██ staff would be well-qualified to implement such therapy, in whatever amount ██ might require, without the assistance of a private provider such as Ms. Vega.

fully embraces ABA, and utilizes it as a matter of course in the implementation of 's IEP, and the IEP of each autistic student who attends . Peer-reviewed research, much of it conducted at and/or by its staff, demonstrates the value of ABA for autistic students in terms of assisting them to make adequate yearly progress on IEP goals, as has done at all relevant times. Because ABA works, it is embedded within the curriculum and within the methodologies used to implement 's IEP, and the IEP of other ESE students who attend . Petitioner agrees that if it were determined that is entitled to receive some amount of one-to-one ABA therapy going forward, it would be, in the first instance, up to Respondent, acting through the IEP team, to determine whether such therapy would be provided by its own employees or a private provider, and if so, what compensation arrangements are appropriate. Additionally, the IEP team would, in the first instance, be responsible to determine when and where ABA therapy would be provided to . Nothing in this order limits the Petitioner's future rights, in accordance with IDEA, to require that IEP team consider new information relative to needs with respect to ABA therapy, or any other matter which affects educational needs.

21. Upon exhaustive consideration of the entire record, it is determined that Petitioner failed to prove by a preponderance

of evidence that ████ requires, at any relevant time, ABA therapy in the amount provided from week-to-week by Ms. Vega, or in the amount recommended by Dr Martinez-Diaz, or in any amount, in order to be provided with FAPE.

22. Having determined that Petitioner is not entitled to receive any amount of ABA therapy from Ms. Vega or a comparable provider, at any relevant time, it is unnecessary to address the question of reimbursement. In any event, at hearing the Respondent claimed surprise and prejudice when Petitioner sought to introduce billing records in support of ███ claim for reimbursement. Respondent asserted that the records had not been produced in a timely manner. Respondent strenuously objected to the introduction of these records. Upon consideration, the undersigned sustained the objection and advised the parties that an evidentiary hearing on the matter of reimbursement would be held, if necessary, at a later date. The parties were encouraged to stipulate, if they could, to an amount for which Respondent was financially responsible for past ABA therapy, in the event Petitioner was determined to be entitled to reimbursement. To date, the record does not reflect that there is such stipulation. Accordingly, should a reviewing tribunal conclude that Petitioner is entitled to financial relief, the Division will, upon motion and/or the instructions of a reviewing tribunal, conduct an appropriate hearing.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.57(1) and 1003.57(5), Florida Statutes (2006). To prevail, Petitioner must prove by a preponderance of the evidence that the Respondent's refusal to include ABA therapy on her IEP constitutes a denial of FAPE. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). ████ is undisputedly entitled to be provided by Respondent with FAPE.

24. The determination of whether a school district has provided FAPE involves a "twofold" inquiry stated as follows by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207 (1982):

> First, has the State [or district school board] complied with the procedures set forth in the Act [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

25. If these two questions are answered in the affirmative, then "the State [school district] has complied with the obligations imposed by Congress and the courts can require no more." Id. at 207. Specifically, "[t]he statute may not

require public schools to maximize the potential of disabled students."

26. Petitioner does not challenge Respondent's compliance with the first prong of the Rowley test; the issue here is the second prong, more particularly whether ████'s IEP is appropriate to ███ unique needs and reasonably calculated to enable ███ to receive educational benefits.

27. "[T]he intent of the [IDEA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Rowley, 458 U.S. at 207. IDEA requires Respondent to ensure that Petitioner receives "some benefit" from his educational program. Id. at 199.

28. The U.S. Court of Appeals for the Eleventh Circuit has carefully followed the U.S. Supreme Court's analysis of the FAPE standard in requiring local school systems to provide "some" educational benefit to ESE students. See Devine v. Indian River County School Board, 249 F.3d 1289 (11th Cir. 2001); J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991); Drew P. v. Clarke County School District, 877 F.2d 927 (11th Cir. 1989). In Drew P., the Court stated, "[t]he state must provide the child only with 'a basic floor of opportunity.'" Id. at 930.

29. In School Board of Martin County v. A. S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999), the court addressed the educational benefits which school districts must provide to exceptional students and stated:

> Federal cases have clarified what 'reasonably calculated to enable the child to receive educational benefits' means. Educational benefits 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. 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). . . .

30. The U.S. Court of Appeals for the Fifth Circuit has articulated a standard for determining whether a student has received a FAPE in compliance with the IDEA. In Cypress-Fairbanks Independent School District v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997), the Court said,

> [A]n . . . IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. In other

> words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit."

31. The evidence established that at all times material to this case, Respondent has fulfilled its obligations to deliver FAPE to ███. ███ is provided by Respondent with personalized instruction with sufficient support services to permit ███ to benefit educationally from that instruction. Respondent may be compelled only to prepare and to implement an IEP which provides a "basic floor of opportunity." Petitioner has failed to prove that Respondent has failed to provide this "floor." Instead, the preponderance of persuasive evidence establishes that ████'s IEP, as written and as implemented, is appropriate for ███ in light of ███ individual educational needs, and is reasonably calculated to enable ███ to receive educational benefit. The evidence further establishes that Petitioner has actually made educational progress. The progress ███ has made is neither de minimis nor trivial in nature. Rowley and its progeny cannot be fairly read to require more. In sum, there is no legal basis upon which Petitioner may be afforded the relief ████ seeks in this forum inasmuch as ███ has failed to prove by a preponderance of evidence that ███ requires any amount of ABA,

delivered privately, on a one-to one basis, from Ms. Vega or a comparable provider, in order to receive FAPE.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's claim for ABA therapy be denied.

DONE AND ORDERED this 29th day of June, 2006, in Tallahassee, Leon County, Florida.

S

FLORENCE SNYDER RIVAS
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.