Nassau County School District
No. 06-2321E
Initiated by: Parent
Hearing Officer: Suzanne F. Hood
Date of Final Order: September 26, 2006

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2321E
	)	
NASSAU COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A formal hearing was conducted in this case on August 17, and 18, 2006, in Fernandina Beach, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Hiliary Reeves
Certified Legal Intern
Rebekah A. Gleason, Esquire
Florida Coastal School of Law
644 Cesery Boulevard, Suite 250
Jacksonville, Florida 32211

For Respondent: Leonard T. Hackett, Esquire
Vernis & Bowling of
North Florida, P.A.
3740 St. Johns Bluff Road, Suite One
Jacksonville, Florida 32224

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent should provide Petitioner with a full-time, one-on-one paraprofessional/interpreter who is American Sign Language certified to work with Petitioner during the school day; and (b) whether Petitioner's least restrictive environment is placement in a general kindergarten class or a special "varying exceptionalities" class.

PRELIMINARY STATEMENT

By letter dated June 27, 2006, Petitioner [redacted] (Petitioner) requested a due process hearing. The request specifically alleged the following: (a) Respondent Nassau County School Board (Respondent) had not provided Petitioner's parents written notice regarding the refusal of services and change in placement; and (b) Respondent had not allowed Petitioner's parents to participate in the individualized education plan (IPE) meetings.

The request sought the following relief: (a) a full-time certified American Sign Language (ASL) interpreter to work one-on-one with Petitioner; (b) placement in a regular education kindergarten for the 2006/2007 school year; and (c) continued pediatric feeding therapy by a trained occupational therapist (OT).

On June 29, 2006, Respondent referred Petitioner's hearing request to the Division of Administrative Hearings (DOAH).

On June 30, 2006, a Notice of Telephonic Pre-hearing Conference scheduled a telephone conference for July 10, 2006. After the telephone conference, an Order documented the conference, documented the issues and relief for consideration at final hearing, and granted an extension of the date for ultimate disposition. As agreed by the parties, September 15, 2006, was the ultimate disposition date.

On July 7, 2006, the parties met for a resolution meeting. The parties did not reach a resolution.

A Notice of Hearing dated July 11, 2006, scheduled the hearing for August 17 and 18, 2006.

On August 4, 2006, Petitioner filed a Motion to Amend Letter Requesting Due Process.

When the hearing commenced, the undersigned granted the unopposed Motion to Amend Letter Requesting Due Process. The parties also agreed that they had resolved the issue regarding continued pediatric feeding therapy.

During the hearing, Petitioner presented the testimony of 12 witnesses. Petitioner offered 11 exhibits, P1-P4, P6, P9, P19, P21, P35, P37, and P41, which were accepted as evidence.

Respondent presented the testimony of two witnesses. Respondent offered four exhibits, R3, R7, R8, and R9, which were accepted as evidence.

Before the hearing adjourned, the parties agreed that Petitioner could submit a post-hearing deposition in lieu of live testimony no later than August 31, 2006. They also agreed to extend the time for ultimate disposition to September 28, 2006.

On August 24, 2006, the court reporter filed the Transcript.

On August 29, 2006, Petitioner submitted the post-hearing deposition of Dianne Febles in lieu of live testimony.

Petitioner submitted a Proposed Final Order on September 11, 2006. Respondent submitted a Proposed Final Order on September 12, 2006.

FINDINGS OF FACTS

1. Petitioner is a five and a half year old [redacted] student with Down Syndrome. [redacted] has a moderate-to-severe hearing loss and a language disorder.

2. Petitioner's parents communicate with [redacted] using verbal language and ASL. Petitioner's mother is not proficient in ASL but she is able to communicate with Petitioner.

3. Petitioner has hearing aids, which [redacted] has not worn for approximately one year. Petitioner resists wearing the

hearing aids because they are uncomfortable. Additionally, Petitioner frequently has ear infections, which make it difficult to wear the hearing aids. The hearing aids require continued adjustment and refitting to accommodate changes in Petitioner's impairment and/or growth.

4. Petitioner is not proficient in sign language. [redacted] knows approximately 137 signs/words, but [redacted] does not sign independently on a consistent basis.

5. Petitioner's primary mode of communication is sign language with gestures, facial expressions, and some verbalization. [redacted] signs are not accurate like an interpreter's; they are modified because of [redacted] fine motor skill deficit. Because of this deficit, Petitioner needs hand-over-hand sign language instruction.

6. Although Petitioner attempts to express [redacted] verbally, [redacted] continues to have speech errors that make [redacted] speech unintelligible to unfamiliar listeners or communication partners. Persuasive evidence indicates that Petitioner's teachers and aides in [redacted] VE class are effective communication partners. At least one or more of them are available to communicate with [redacted] at school at all times.

7. Petitioner has recently been diagnosed with verbal apraxia, which is the inability to plan and execute the motor

movements for speech. It is unknown whether this condition is permanent.

8. Petitioner has not learned to form complete sentences verbally or in sign language. Only recently has [redacted] begun to communicate using two-word sentences.

9. In January 2005, Respondent administered the Kaufman speech practice test to Petitioner. [redacted] scored less than a two-year-old child.

10. In the last year, Respondent requested permission to perform an educational evaluation of Petitioner. [redacted] parents would not give their consent because the evaluation included an IQ test. The parents did not want Petitioner's IQ tested using a standard IQ test with scores based on a sample of non-disabled students.

11. During the 2005/2006 school year, Petitioner was in an exceptional student education (ESE) pre-kindergarten (Pre-K) class at [redacted] Elementary. The class had one teacher, one paraprofessional, and 13 students. [redacted] was Petitioner's Pre-K teacher.

12. In the Pre-K class, Petitioner used more verbalization than sign to communicate. [redacted] class schedule included academics with pull-outs for occupational therapy (OT), physical therapy (PT), and one-on-one speech classes. As the school year

progressed, Petitioner's verbal communication with teachers and students improved.

13. At times, Petitioner's behavior in the Pre-K class interfered with [redacted] academic work. [redacted] would throw [redacted] to the ground or stop and run the other way when called. [redacted] would also push and hit other children.

14. On May 12, 2006, the parties met to review and develop Petitioner's IEP for the upcoming school year. During the meeting, Respondent recommended that Petitioner be assigned to a VE class at [redacted] Elementary. Petitioner's parents requested that Petitioner repeat [redacted] ESE Pre-K class for the 2006/2007 school term. Petitioner's parents also requested that Respondent provide Petitioner with a full-time, one-on-one paraprofessional, who was certified in ASL. Respondent denied these requests.

15. The May 2006 IEP provides for Petitioner's placement in a VE class and to participate with general education students in physical education (PE), music, or library for one period, three days a week, and during lunch and recess on a daily basis. Regarding Petitioner's least restrictive environment (LRE), the May 2006 IEP provides for [redacted] to participate with non-disabled peers in the general education setting with the following exceptions: readiness skills development due to the need for small group instruction; speech and language services due to the

need for articulation and language therapy; and OT, PT, and hearing impaired services due to the need for fine and gross motor therapy and ASL instruction.

16. The IEP also has a section entitled "Placement Options." In this section, the option for "Separate Class (900 minutes or greater)" was selected over five other placement options, including the option for "General Education (0-315 minutes)."

17. For the 2006/2007 school year, Petitioner is assigned to a VE Classroom at [redacted] Elementary. The school term began on August 7, 2006, ten days before the due process hearing.

18. Petitioner's VE class has ten students, one teacher, and three paraprofessionals. One full-time paraprofessional is a registered interpreter who is very fluent in sign language. She signs with Petitioner through out the entire day.

19. The other students in Petitioner's VE class range in age from four to six and a half years old. One student is blind. Another student is partially blind. Some of the students have partial hearing. With two exceptions, the students are able to follow some directions and work on basic Pre-K skills. The two blind children are the only students that require one-on-one assistance during academic instruction.

Petitioner does not require one-on-one direct instruction for academic activities in [redacted] VE class.

20. At the time of the hearing, Petitioner's VE class teacher was [redacted], a substitute teacher who recently retired from teaching after many years of experience in working with young children. Ms. [redacted] has a degree in elementary education and has taught first grade classes, Title I and Head Start classes, remedial reading classes, and students who are slow learners and/or disabled.

21. Ms. [redacted] does not sign. However, she was able to communicate with Petitioner by directing [redacted] attention to [redacted] face and speaking slowly to provide instruction or redirect non-compliant behavior. The paraprofessionals assisted with sign whenever required.

22. In the short time since school began, Ms. [redacted] had not read Petitioner's IEP. However she was familiar with some of [redacted] goals. There is no evidence that Ms. [redacted]'s instruction was inappropriate for Petitioner or that it did not assist [redacted] in achieving [redacted] long and short-term goals.

23. After the hearing, Respondent hired a full-time teacher for Petitioner's VE class. There is no persuasive evidence that the permanent teacher is not qualified to teach the VE class.

24. [redacted] is Petitioner's hearing-impaired teacher. She is in [redacted] VE class from 8:00 a.m. to 11:30 a.m. on a daily basis. Ms. [redacted] is fluent in sign language and provides assistance to Petitioner whenever necessary.

25. [redacted], Petitioner's speech therapist, is fluent in sign language. Ms. [redacted] is frequently present in Petitioner's VE class.

26. In accordance with Petitioner's IEP, Petitioner meets with [redacted] special teachers as scheduled. In addition to Ms. [redacted] and Ms. [redacted], Petitioner meets with [redacted] for OT and [redacted] [redacted] for PT. The record does not reflect whether Ms. [redacted] and Ms. [redacted] are fluent in sign language.

27. Petitioner's school day in the VE class begins at 8:30 a.m. and ends at 1:25 p.m. This time includes naptime as well as breakfast and lunch, which the VE class eats in the lunchroom. Contrary to Petitioner's IEP, the time [redacted] is in the cafeteria is not spent interacting with general education peers because the VE class sits together and apart from other classes.

28. Petitioner's IEP does not address having breakfast and naptime in the VE class. There is no persuasive evidence that Petitioner requires either. One or both of these times could be

spent participating with general education students with the support of a paraprofessional skilled in sign language.

29. Additional inclusion with general education students during circle time, song time, or story time would foster Petitioner's imitation of positive behavior such as learning to sit and wait [redacted] turn, to get in line, or standing up and sitting down at appropriate times.

30. In order to benefit substantially from full-time inclusion in a general education class, a student has to have a set of skills that allows him or her to learn by simply being around other students. These skills include not only imitation but also communication in the sense of making one's needs and wants known, as well as responding appropriately to other students.

31. With support of a qualified paraprofessional, Petitioner has the skills to benefit from limited inclusion, but not full-time placement, in a general education class. Without such an opportunity, Respondent is not providing Petitioner with an education in [redacted] LER.

32. Petitioner's VE class attends a music class once a week with non-disabled students. The music class provides [redacted] with the opportunity to learn to share with general education children.

33. There is evidence that Petitioner's VE class participates in PE once a week with general education students. However, Petitioner's VE class is located a significant distance from the general education classes. There is no persuasive evidence that Petitioner spends [redacted] time during daily recess with non-disabled peers.

34. Petitioner's VE class goes to the library once a week as a group. Contrary to [redacted] IEP, Petitioner's VE class does not interact with non-disabled peers during that time.

35. Petitioner is a middle-to-lower functioning child as compared to some of the students in [redacted] VE class. Several of [redacted] classmates function completely on their own as far as using the bathroom, being able to carry lunch trays, and going to the table.

36. Petitioner is not potty trained. When [redacted] arrives at school in the morning, [redacted] has to change from disposable pull-up pants into a regular pair of underwear.

37. The paraprofessionals in Petitioner's VE class take [redacted] to the restroom every 30 minutes to avoid an accident. [redacted] has had a number of accidents this year including a bowel movement in [redacted] pants.

38. The restroom that Petitioner uses when [redacted] is in [redacted] VE class is located in a hallway between [redacted] classroom and another ESE classroom. The hallway also serves as a storage

room and changing station. A shower curtain provides privacy in the hallway. The toilet is appropriate for students in wheelchairs, but inappropriate for Petitioner, who must resort to using a potty chair. This situation is certainly not ideal for helping Petitioner to learn self-sufficiency because it would not be safe for Petitioner to go into the hallway unattended.

39. So far this year, Petitioner continues to exhibit behavioral problems, including pinching and hitting both students and teachers. Except for brief periods of inclusion in a general education class during social times, Petitioner's behavioral problems are best addressed in [redacted] VE classroom with a low adult-to-student ratio. On a full-time basis, Petitioner's behavior would be disruptive to a general education class.

40. There is evidence that Petitioner's behavioral problems stem in part from [redacted] frustration in not being able to communicate. The problems exist despite [redacted] exposure at home to [redacted] non-disabled older brother and other non-disabled children in after school care.

41. Petitioner occasionally is non-compliant when given direction from either parent. Sometimes at home [redacted] runs away, falls to the floor, whines, and cries.

42. Petitioner's behavior at day care is inappropriate at times. [redacted] maladaptive behavior includes pushing, throwing objects, and pulling the tails of the owner's cats and dogs.

43. Competent evidence indicates that children with Down Syndrome are great imitators. As a general rule, they need inclusion with non-disabled peers so that they can observe and interact with regular kids who provide peer role models and a language rich environment. They need an opportunities for socialization, bonding, and greeting.

44. Down Syndrome students can learn good or non-compliant behavior from their peers. It may be that most Down Syndrome children learn best in a general education environment. Even so, such a placement is not always appropriate for Down Syndrome students. The degree of inclusion is a decision that must be made on an individual basis.

45. In this case, Petitioner's behavior at times interferes with [redacted] learning skills. There is no persuasive evidence that placement in the VE class is contributing to Petitioner's problems in this regard. There is evidence that Petitioner's behavior could benefit from additional brief periods of exposure to students in a general education class.

46. If Petitioner was placed in a general education class full-time, the goal still would be for [redacted] to meet [redacted] IEP goals, as contrasted with success in the kindergarten general

education curriculum. Even if [redacted] had a full-time, sign-proficient aide, [redacted] would have to be pulled out of a general education class a significant amount of time for [redacted] related services.

47. In a general education class, Petitioner's teacher in all likelihood would not be qualified to teach ESE students or be able to sign. A full-time paraprofessional with ASL certification could not provide instruction but would be limited to providing assistance with instruction provided by the teacher.

48. If Petitioner had a full-time, one-on-one ASL certified paraprofessional, in a general education class or [redacted] VE class, Petitioner might not have a chance to be independent. Petitioner would rely on that person to do everything for [redacted], including the things [redacted] needs to learn to do for [redacted].

49. Full-time inclusion in a general education class would mean that Petitioner would be totally dependent on [redacted] aide for communication. Because Petitioner would work on a lower level than the other students, it is hard to understand how [redacted] really could be a part of the class on a full-time basis. More likely than not, such a placement would cause Petitioner more frustration, inhibiting [redacted] development, than placement in a VE class. In other words, at this point in time, Petitioner's education cannot be achieved satisfactorily with total inclusion

even if [redacted] had the dedicated support of a full-time, one-on-one ASL paraprofessional.

50. Even though Petitioner's VE class has a full-time paraprofessional who is ASL certified, Petitioner does not require such expertise to assist [redacted] one-on-one in the classroom. The aide only needs to be available to converse with Petitioner at all times. The aide needs to know as many signs as Petitioner knows and some additional signs so that he or she can assist [redacted] as [redacted] builds [redacted] formal language.

51. Moreover, ASL does not have the same rules of grammar and syntax as the English language. Petitioner uses the vocabulary of ASL but in English order. Otherwise, [redacted] would have a difficult time acquiring academic skills corresponding with English. Therefore, someone who signs the grammar and syntax of ASL is not necessary or even desirable in this case.

52. A one-on-one paraprofessional is usually assigned to a person who could not otherwise benefit from instruction. This does not apply to Petitioner. The greater weight of the evidence indicates that the teachers and paraprofessionals assigned to Petitioner's VE class are competent signers and meet Petitioner's needs.

53. On June 27, 2006, Petitioner's parents requested a due process hearing. In that request, [redacted] parents asserted for the first time that Petitioner's LRE is in a general education

kindergarten class. Petitioner's parents contended that [redacted] could succeed in such a class with a full-time, one-on-one ASL certified interpreter.

54. After receiving Petitioner's request for a due process hearing, Respondent's staff scheduled a resolution session. Petitioner's parents and their attorneys wanted to waive the right to mediation and the resolution session. Nevertheless, Respondent scheduled the resolution session for July 7, 2006.

55. At this session, Respondent's staff intended to discuss Petitioner's placement, inclusion in general education kindergarten, and the reasoning behind the decision to place Petitioner in the VE class.

56. Petitioner's parents and their attorneys attended the resolution session. However, Respondent's staff was not given the opportunity to explain Petitioner's placement or to explore possible alternatives. Instead, Petitioner's parents and their attorneys stated that these issues would be addressed at the due process hearing.

CONCLUSIONS OF LAW

57. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 1003.75, Florida Statutes (2006).

58. Petitioner has the burden of proving that [redacted] LRE is placement in a general education kindergarten class with a full-

time, one-on-one certified ASL paraprofessional. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

59. This case arises out of the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400, et seq. The purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs . . . ." See 20 U.S.C. § 1400(d)(1)(A)-(B).

60. IDEA defines FAPE as special education and related services that are provided at public expense and in conformity with an IEP. See 20 U.S.C. § 1401(9). The term "related services" means interpreting services when required to "assist a child with a disability to benefit from special education." See 20 U.S.C. § 1401 (26).

61. An IEP is a written statement of the educational program that is designed to meet a child's unique needs. See 20 U.S.C. § 1401(14). An IEP must establish learning goals and state the services that the school system will provide in an effort to reach those goals. See 20 U.S.C. § 1414(d) and 34 C.F.R. § 300.346.

62. 20 U.S.C. § 1414(3)(B)(iv) states in pertinent part that the IEP team must consider the:

> communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

63. In Bd. of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982), the Supreme Court offered a two-prong test to determine whether the school district is offering an appropriate education. Rowley, 458 U.S. at 206-207 states as follows:

> A court must first determine whether the state has complied with the statutory procedures set forth in the Act, and second, whether the individualized education program developed is reasonably calculated to enable the child to receive educational benefits. If the requirements of either prong are not met, the state is in violation of the Act.

64. Respondent is required to provide Petitioner with FAPE in .... LRE. See Wiess v. School Board, 141 F.3d 990, 994 (11th Cir. 1998). Regarding LRE, 20 U.S.C. § 1412 (a)(5) states as follows in relevant part:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of the disability of a child is such

> that education in regular classes with the use of supplementary aids cannot be achieved satisfactorily.

65. In Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1045 (5th Cir. 1989), the Court stated that the presumption of favor of the LRE is overcome when education in a regular classroom cannot meet the disabled student's unique needs. See also Poolaw v. Bishop, 67 F.3d 830, 836 (9th Cir. 1995)(inappropriate to mainstream a child that cannot receive a benefit from such placement).

66. In Pachl v. Seagren, 453 F.3d 1064, 1068-1069 (8th Cir. 2006) the Court concurred that mainstreaming should be implemented "to the maximum extent appropriate" and does not apply if it cannot be achieved satisfactorily. The Court in Pachl, 453 F.3d at 1068-1069 went on to state as follows:

> Thus, removing a child from the mainstream setting is permissible when the handicapped child would not benefit from mainstreaming, when any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services, which could not feasibly be provided in the non-segregated setting, and when the handicapped child is a disruptive force in the non-segregated setting.

67. In Daniel R.R., 874 F.2d at 1048, the Fifth Circuit derived a two-part test for determining whether a school is in compliance with IDEA mainstreaming or LRE requirement. First, the court must determine "whether education in the regular

classroom, with the use of supplementary aids and services, can be achieved satisfactorily." Id. Second, if the court finds that placement outside a regular classroom is necessary for the child to benefit educationally, the court must decide "whether the school has mainstreamed the child to the maximum extent appropriate." Id.

68. The Eleventh Circuit, in Greer v. Rome City School District, 950 F.2d 688, 696, opinion withdrawn, 956 F.2d 1025, opinion reinstated in part, 967 F.2d 70 (11th Cir. 1991), adopted and elaborated on the Daniel R.R. test. Under Greer, no single factor is decisive under the test. Instead, the decision must be based on an individualized, fact-specific inquiry in which the court carefully examines the nature and severity of the child's disability, the child's needs and abilities, and the school's response to those needs. See Greer, 950 F.2d at 696.

69. There are several factors that a school district may consider in determining whether a child may satisfactorily achieve an education in a regular classroom. See Greer, 950 F.2d at 697. These factors include but are not limited to, the following: (a) a comparison of the benefits in a regular classroom, supplemented by appropriate aids and services, versus the benefits in a self-contained special education classroom; (b) the effect of the presence of the handicapped child in a regular classroom on the education of other children in that

classroom; and (c) the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the handicapped child in a regular classroom. See Greer, 950 F.2d at 697 and Wiess, 141 F.3d at 994. The school district cannot be required to provide a handicapped child with his or her own full-time teacher, even if this would permit the child to be satisfactorily educated in a regular classroom. See Greer, 950 F.2d at 697.

70. Regarding the first factor referenced above, if a school determines that the handicapped child will make significantly more progress in a self-contained special education classroom, and that education in a regular classroom may cause the child to fall behind his or her handicapped peers who are being educated in the self-contained environment, mainstreaming may not be appropriate. See Greer, 950 F.2d at 697. In such a case, mainstreaming may actually be detrimental to the child and therefore, would not provide the child with FAPE. Id.

71. However, a school system cannot justify a more restrictive placement on the sole basis that the student would make greater educational progress in that setting. See Oberti v. Board of Education, 995 F.2d 1204, 1222 (3rd Cir. 1993).

72. In this case, the most persuasive evidence establishes that Respondent considered whether Petitioner could be educated

in a general education classroom, with supplemental aids and services, prior to and during the development of the IEP. Such placement was not discussed during the May 2006 IEP meeting in major part because Petitioner's parents and their attorneys were insisting that Petitioner be retained in [redacted] Pre-K ESE class. However, the IEP document as drafted mandates that the IEP team address such topics as "Participation in General and Vocational Activities," "Least Restrictive Environment," and "Placement Options." The IEP team made selections for each topic within Petitioner's IEP.

73. Petitioner's parents did not request [redacted] placement in a regular classroom until after the IEP meeting. Nevertheless, the IEP team as a whole considered Petitioner's placement in general education kindergarten as reflected in the IEP, which was signed by all participating team members, including Petitioner's parents.

74. The record establishes that Petitioner's education in a regular education classroom on a full-time basis cannot be achieved satisfactorily at this time. The witnesses who were most familiar with Petitioner's needs, the services available in [redacted] VE class, and the school's regular kindergarten classes concluded that Petitioner could not master [redacted] IEP goals if [redacted] were placed full-time in a regular class with an ASL paraprofessional. The witnesses reached this conclusion based

on their knowledge of Petitioner's developmental needs, [redacted] low level of functioning, and [redacted] difficulties with communication.

75. These witnesses all agree that Petitioner will make more progress in the VE class than a general education class. Most important, competent evidence indicates that Petitioner's full-time placement in a regular class with a one-on-one ASL aide would be detrimental to Petitioner's educational progress, causing [redacted] to be totally dependent on [redacted] ASL aide and to fall further behind academically.

76. Persuasive evidence indicates that Petitioner's presence in a general education class on a full-time basis would have a negative impact on the non-disabled students. Petitioner's non-compliant behavior would have a disruptive effect in a class with regular students who work on a much higher academic level than Petitioner.

77. Petitioner's signing/communication needs are being met in [redacted] VE class. Several adults in the class are fluent in sign. Petitioner's level of signing is not so advanced as to require an ASL certified interpreter. Additionally, the low student-to-adult ratio in Petitioner's VE class renders a one-on-one, full-time paraprofessional unnecessary.

78. Petitioner's IEP is designed and being implemented to provide [redacted] with FAPE in all respects except one. The greater

weight of the evidence indicates that Respondent is not providing Petitioner an education in the LRE.

79. The IEP states that Petitioner will spend time with non-disabled peers one period a week for music, library, and PE. In reality, Petitioner is not spending time with general education students during [redacted] library time.

80. The IEP also states that Petitioner will spend time with general education students during lunch and recess everyday. Petitioner's time in the lunchroom is always spent sitting with [redacted] class in an area apart from non-ESE students so that [redacted] has no opportunity to interact with them. The same is true of recess because the ESE students have their own playground equipment that other regular students are not allowed to use.

81. Additionally, Respondent is not providing Petitioner with an education with [redacted] non-disabled peers to the "maximum extent appropriate" because, prior to and during the development of the IEP, Respondent did not consider whether there are additional opportunities for Petitioner to participate with general education students that are not included in [redacted] IEP. For example, persuasive testimony indicates that Petitioner, with the assistance of a signing paraprofessional, could spend short periods of time in a regular class during less-structured activities, such as circle time and story time.

82. The major part of Petitioner's school day is and should be spent in [redacted] VE class learning readiness skills and receiving [redacted] related services such as OT, PT, speech and language therapy, and hearing impaired services. Even so, short visits to a regular class with a qualified aide could take place during the time that Petitioner usually spends in the lunchroom when [redacted] VE class eats breakfast, during naptime, or other times permitted by [redacted] daily schedule as deemed appropriate by [redacted] IEP team.

83. In sum, the IEP team has the responsibility to develop and ensure implementation of the requirements for a LRE. In this case, Petitioner is not being provided time with non-disabled peers as required by [redacted] IEP. The IEP team must consider opportunities for additional brief periods of inclusion during Petitioner's school day/week that are not included in the IEP. There is no evidence that brief periods of additional inclusion would compromise the achievement of Petitioner's long and short-term goals or be disruptive to the general education class. Respondent's failure to provide Petitioner with an education with regular students to the "maximum extent appropriate" means that Respondent is not providing [redacted] with FAPE.

ORDER

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

ORDERED: That Respondent provide Petitioner with FAPE by providing [redacted] an education in [redacted] LRE as required by [redacted] IEP and to consider opportunities for additional inclusion to the "maximum extent appropriate."

DONE AND ORDERED this 26th day of September, 2006, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of September, 2006.

COPIES FURNISHED:

Dr. John L. Ruis
Superintendent of Schools
Nassau County School District
1201 Atlantic Avenue
Fernandina Beach, Florida 32034

Eileen L. Amy, Administrator
Exceptional Student Education Program
Administration and Quality Assurance
Department of Education

325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Daniel J. Woodring, General Counsel
Department of Education
325 West Gaines Street, Suite 1244
Tallahassee, Florida 32399-0400

Hiliary Reeves
Certified Legal Intern
Rebekah A. Gleason, Esquire
Florida Coastal School of Law
8787 Baypine Road, Suite 255
Jacksonville, Florida 32256

Leonard T. Hackett, Esquire
Vernis & Bowling of North Florida, P.A.
3740 St. Johns Bluff Road, Suite One
Jacksonville, Florida 32224

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 230.23(4)(m)5, Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.