Nassau County School District
No. 04-2942E, 04-2943E, 04-2944E
Initiated by: Parent
Hearing Officer: John G. Van Laningham
Date of Final Order: April 25, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2942E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	
[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2943E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	
[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2944E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This case came before Administrative Law Judge John G.

Van Laningham for final hearing on January 24, 25, 27, and 28, 2005, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: [redacted]
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For Respondent: Edward J. Marko, Esquire
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STATEMENT OF THE ISSUE

The issue in these cases is whether Respondent, in consequence of its alleged failure to offer Petitioners——who are [redacted]age [redacted] with autism——a free appropriate public education, should be required to reimburse Petitioners' parents for the cost of placing the [redacted] under the care of private therapists, which latter treated the [redacted] using intensive, one-on-one behavioral therapy.

PRELIMINARY STATEMENT

On August 17, 2004, the parents of Petitioners [redacted] requested due process hearings to protest the decision of school authorities to place these [redacted], who were then [redacted] years old, at the [redacted] Preschool for pre-kindergarten children with autism. Petitioners' parents preferred that the

[redacted] continue to receive intensive, one-on-one behavioral therapy, at public expense, pursuant to Part B of the Individuals with Disabilities in Education Act ("IDEA"), in the manner that such therapeutic services had been provided previously through Florida's Early Intervention Program, which is administered under, and in compliance with, Part C of the IDEA. Petitioners alleged that Respondent Broward County School Board had violated, in numerous ways, their procedural and substantive rights under the IDEA.

On August 18, 2004, Respondent filed Petitioners' respective petitions with the Division of Administrative Hearings ("DOAH"), where an administrative law judge ("ALJ") was assigned to preside over the matters. The ALJ consolidated the petitions, and relatively extensive pre-hearing proceedings were conducted. Along the way, the parties waived the legal requirement that a final order be issued within 45 days after the filing of the petitions with Respondent.

The final hearing took place on January 24, 25, 27, and 28, 2005, as scheduled, with both sides present. Petitioners called 10 witnesses. These were: their father [redacted] psychologist David Lubin, Ph.D.; and school district employees Carol Bianco, Laksmy Ossaba, Mary Sue Gizzi, Grace McDonald, Patti Pritz, Janice Koblick, Mary Stone, and Nancy Lieberman. Petitioners also introduced exhibits numbered 1 through 28, inclusive, which

were admitted into evidence. Respondent elicited testimony for its case from the school district personnel that Petitioners presented and additionally called as witnesses David Garcia, Amy Vastine, and Susan Kabot. Respondents offered exhibits numbered 1 through 20 and 22 through 25, which were received in evidence.

The final hearing transcript was filed on February 18, 2005. Proposed Final Orders were due on March 10, 2005, which deadline was later enlarged to March 23, 2005, at the parties' request. Each party timely filed a Proposed Final Order, and the undersigned has considered the parties' respective submissions in the preparation of this Final Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

1. Petitioners [redacted] are [redacted] who were born on [redacted] They will be referred to collectively in this Final Order as the "[redacted]."

2. From infancy, the [redacted] exhibited signs of developmental delay. Consequently, before the age of two, they began receiving "early intervention services" (a term of art), including speech therapy, occupational therapy, and physical therapy, under Florida's Early Intervention Program ("EIP"), which is overseen by the Florida Department of Health, Division of Children's Medical Services. The [redacted]' early intervention

services were coordinated by the Children's Diagnostic & Treatment Center of South Florida, Inc. ("CDTC").

3. Florida's EIP is administered under state laws adopted to meet federal requirements for delivering early intervention services to infants and toddlers with disabilities. These federal requirements are located in a subchapter of the IDEA that is commonly referred to as "Part C."

4. Generally speaking, early intervention services must be made available to individuals with disabilities under the age of three. When an individual with a disability turns three, he or she "ages out" of Part C. If eligible, however, such an individual can receive "special education and related services" (a term of art[1]) pursuant to state laws adopted in furtherance of the IDEA's "Part B."

5. In Florida, the responsibility of delivering special education and related services to eligible individuals with disabilities belongs to the school districts. In these cases, the [redacted] have resided at all relevant times within the Broward County School District, which is governed by Respondent Broward County School Board (the "School Board").

6. Each of the [redacted] was diagnosed at age [redacted], in April 2003, with autism spectrum disorder ("ASD"). A second medical opinion obtained in July 2003 confirmed the diagnosis. It is undisputed that each of the [redacted] is autistic.

7. In May 2003, shortly after first learning of their children's diagnosis, the [redacted]' parents contacted David Garcia, a clinical supervisor for Behavioral Analysis, Inc. ("BAI"). Mr. Garcia holds a master's degree in behavioral analysis, which is a specialty in the field of psychology. Mr. Garcia examined the [redacted] and thereafter outlined a treatment plan for them based on a kind of therapy known as applied behavioral analysis ("ABA").

8. ABA therapy is a recognized therapeutic approach to treating persons with autism. One type of ABA therapy is known as discrete trial training ("DTT"). While it is undisputed that the [redacted] received ABA therapy, including DTT, there is little evidence in the record about these behavioral therapies, and thus detailed factual findings in this regard cannot be made. In broad terms, the evidence persuades the undersigned that ABA therapy entails behavior modification techniques, whereby desired behaviors are rewarded and reinforced, while undesired behaviors are penalized and discouraged. DTT uses repetition to reinforce specific skills or small components of behavior.[2]

9. The [redacted]' parents retained BAI to implement Mr. Garcia's treatment plan. The goal was for BAI to provide each of the [redacted] with 30 hours per week of one-on-one ABA therapy, although this intensity of treatment was not consistently met. Therapists under Mr. Garcia's supervision and direction provided the behavioral services, using a method called the Partington

Sunberg Model.[3] Initially, the therapy was given at BAI's clinic, but before long the therapists began treating the [redacted] in their (the [redacted]') home.

10. After retaining BAI, the [redacted]' parents urged CDTC to authorize payment for the ABA therapy as part of the [redacted]' early intervention services. CDTC did not immediately agree to this, and a dispute arose between the Part C coordinator and the [redacted]' parents. In due course, the parents consented to allowing CDTC to conduct examinations of the children, to determine whether ABA therapy could be provided at public expense.

11. In June 2003, as it was arranging to evaluate the [redacted] in response to the parents' request for publicly funded ABA therapy, CDTC asked the parents to consent to the School Board's concurrently evaluating the [redacted], ahead of their [redacted] birthdays, to ascertain their eligibility for special education and related services, as well to determine the nature and scope of any exceptional student education that the School Board might be required to provide. It is customary for the School Board to perform its evaluation of a toddler suspected of having a disability when the child is about age two-and-a-half, so that, if the child is eligible for exceptional student education, an individualized education plan ("IEP") can be developed and ready for implementation upon the child's turning three. In this instance, however, the parents refused to allow the School Board

to examine the [redacted], preferring to resolve the dispute with CDTC first.

12. The parents' dispute with the EIP continued for much of the rest of 2003, finally ending with a settlement in October or November of that year, pursuant to which the EIP reimbursed the parents for some portion of the fees they had paid BAI and also agreed to pay for 30 hours per week, per child, of ABA therapy until the [redacted] turned [redacted] on January 4, 2004. A new family support plan ("FSP") was prepared for each of the [redacted], authorizing the payment of BAI's fees for rendering ABA therapy.

13. When the new FSPs were written, CDTC asked the parents to sign consent forms authorizing the EIP to release records to the School Board, to facilitate the [redacted]' transition out of the Part C program, for which they were about to become ineligible, and into the school system, should the School Board find them, upon evaluation, eligible for exceptional student education. On November 6, 2003, the parents executed the necessary consents, and CDTC formally referred the [redacted] to the School Board for a comprehensive evaluation. The School Board received the referrals on November 11, 2003.

14. One week later, on November 18, 2003, a child study team met to review and discuss existing data about the [redacted] as derived from previous evaluations, and to identify which additional evaluations should be conducted to determine the [redacted]'

eligibility for special education and related services under Part B. Although the [redacted]' parents were not invited to attend this meeting, the undersigned is persuaded that on this occasion the child study team engaged in preparatory activities that would be discussed with the parents at a later meeting, and hence the failure to notify the parents was not, in this instance, a procedural violation.[4]

15. Following the child study team meeting, the School Board arranged to meet with the parents and the [redacted] for the purposes of discussing the transition from Part C to Part B and conducting evaluations of the [redacted]. This meeting took place on December 8, 2003. In discussing the transition, the [redacted]' parents made known their desire that the School Board provide (or pay BAI to continue providing) 30 hours per week, per child, of home-based, one-on-one ABA therapy. School personnel informed the parents that the [redacted]' exceptional student education would not necessarily mirror the early intervention services that the [redacted] were receiving under Part C, but that the School Board had pre-kindergarten programs for children with autism that would likely be appropriate for the [redacted].

16. Immediately after the discussion was had concerning the transition, the School Board's pre-kindergarten evaluation team conducted a comprehensive multidisciplinary evaluation of each of the [redacted]. This evaluation comprised a number of

different tests, which were administered concurrently. Petitioners complain that the evaluators did not spend enough time with the [redacted] to properly perform the various tests, but the undersigned is persuaded that the evaluation, viewed as a whole, was sufficient and appropriate for the purposes at hand, namely to determine eligibility for exceptional student education (which was never seriously in doubt) and to ascertain the [redacted]' respective levels of performance, for use in developing their IEPs. In considering the sufficiency of the evaluation, the undersigned has taken account of the fact that, as of December 8, 2004, the School Board already had a good deal of current information about the [redacted]' respective conditions and performance levels, from both CDTC (which had recently evaluated the [redacted]) and the parents. The comprehensive evaluation, therefore, while important, was not the only source of data available to the School Board.

17. Having evaluated the [redacted], the School Board scheduled an IEP meeting to be held on December 18, 2003. This date later proved inconvenient for the [redacted], however, and at [redacted] request the meeting was rescheduled for the next mutually agreeable date: Monday, [redacted], 2004——the day after the [redacted]' [redacted] birthday.[5] Then, in several letters, the earliest of which is dated December 18, 2003, the [redacted] made demand on the School Board to adopt the soon-to-expire FSPs (under which the [redacted] were receiving early

intervention services) as interim IEPs (for the provision of exceptional student education), to ensure "continuity of services." He also argued that the School Board would be required to continue funding (or provide) ABA therapy pursuant to the IDEA's "stay-put" provision.[6] School personnel informed [redacted], in advance of the January 5, 2004, IEP meeting, that the School Board did not intend simply to adopt the FSPs as the [redacted]' IEPs.

18. The IEP meeting went forward on January 5, 2004, as scheduled. It was not terribly productive, however, because [redacted], who attended the meeting with Mr. Garcia at [redacted] side, was adamantly opposed to any proposal that would not provide 30 hours per week, per child, of home-based, one-on-one, ABA therapy.[7] In the end, after doing some preliminary work on [redacted] IEP, the IEP team reached an impasse and adjourned.

19. Soon after the IEP meeting, [redacted] requested a due process hearing on their behalf and also requested an independent educational evaluation ("IEE") at public expense. Ultimately, on February 12, 2004, the School Board would grant his request for an IEE, albeit with some restrictions that [redacted] rejected. In the meantime, the School Board scheduled another IEP meeting, to occur on February 3, 2004.

20. The parents did not attend the second IEP meeting, though they were on notice thereof, ostensibly because their

pending request for an IEE at public expense had not been acted upon. School district personnel proceeded in the parents' absence to develop IEPs for each of the [redacted]. These IEPs provide for the delivery of specially designed instruction and related services to the [redacted]. They were denominated "temporary" IEPs because each by its terms would expire after six months, on August 3, 2004, rather than after one year, as is usually the case.[8] Although the IEPs do not specify the location at which services would be provided, the evidence establishes that the School Board's first choice was to place the [redacted] at the [redacted] Preschool, a private facility located on the campus of [redacted] University.[9] Alternatively, the IEPs could be implemented in the [redacted]' neighborhood public school, through the School Board's "Complex PLACE" program for autistic children.

21. On February 5, 2004, [redacted] notified the School Board in writing that he did not consent to the placement of the [redacted] at the [redacted] Preschool. As of the date of the final hearing, the [redacted]' parents had never consented to the provision of special education and related services by the School Board.

22. In March 2004, the [redacted] were brought by their parents to see Dr. David Lubin, a principal in, and the primary clinician for, a company called Children's Psychology Associates ("CPA"). A licensed psychologist, Dr. Lubin specializes in treating patients using ABA therapy. His company, CPA,

provides, in Dr. Lubin's words, "just about every [contemporary] form of psychological and developmental service."

23. Dr. Lubin performed a battery of tests on the [redacted] with a view toward developing a new behavior program for them. Following his examinations, Dr. Lubin formulated a treatment plan for the [redacted] that was quite different from that being implemented by BAI. For the time being, however, the [redacted] remained under BAI's care.

24. In July 2004, the [redacted]' parents terminated BAI[10] and retained CPA to implement Dr. Lubin's treatment plan. Dr. Lubin's plan called for the [redacted] to receive ten hours per week, per child, of one-on-one ABA therapy using DTT, administered by "behavioral technicians" under Dr. Lubin's supervision. Dr. Lubin had recommended that the Comprehensive Behavior & Acquisition Model be used instead of the Partington Sunberg Model. In addition, the [redacted] were to receive speech therapy and occupational therapy. As of the final hearing, the [redacted] remained under Dr. Lubin's care, receiving the above-described therapies through CPA, whose bills the [redacted]' parents were paying on their own.[11]

25. Given the lapse of time since the School Board evaluated the [redacted] in December 2003, the IEPs prepared in February 2004——which have expired in any event——would not

necessarily be appropriate today, even if they were appropriate when written.

Ultimate Factual Determinations

26. The ABA therapy that the [redacted] have received, first through BAI and later through CPA, was not exceptional student education——indeed was not even "education" as that term is used and understood in the context of the IDEA and corresponding state law. To the point, Mr. Garcia, Dr. Lubin, and their respective associates who gave care to the [redacted], did not, in so doing, act as educators, teachers, or instructors in any meaningful sense of those words. That is, while the therapeutic interventions used with the [redacted] probably entailed the giving of "instructions" in a broad sense, the therapists who treated the [redacted] were not acting as "instructional personnel" in the relevant, narrower sense, i.e. as persons who impart knowledge to pupils pursuant to an academic curriculum; rather, they served as caregivers——providers of behavioral or psychological therapies meant to treat the [redacted], to make them better, perhaps even (hopefully) to cure them.

27. The undersigned is not persuaded that either BAI or CPA provided the [redacted] with any "instructional services" of the sort that common experience informs us are typically rendered in places ordinary people would recognize as schools. Instead, the evidence shows that BAI and CPA operate "clinics" where

treatment is administered to "clients" or "patients." To label either company a "school" would stretch that term so far beyond its common meaning as to make it meaningless——and then we might as well call doctors' offices and hospitals "schools," too.

28. Because neither BAI nor CPA attempted to provide the [redacted] with an education, it follows that the therapeutic interventions that the [redacted] have received from these providers could not, of themselves, constitute a FAPE. At best, such therapies, to the extent required to enable the [redacted] to benefit from special education, might be an integral part of a FAPE, as "related services." But the evidence presented fails to persuade the undersigned that the [redacted] must have at least ten hours per week, per child, of one-on-one ABA therapy in order to benefit from specially designed instruction (which they have yet to receive). Thus, the undersigned cannot find that the therapies administered to the [redacted] were appropriate from an educational standpoint even as "related services."

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Section 1003.57(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311, and the parties have standing.

30. As required by the IDEA, Florida law gives the parents of an exceptional student the general right to "a due process

hearing on the identification, evaluation, and placement, or lack thereof" of the student. See § 1003.57(5), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(11).

31. Parents are also entitled to a due process hearing specifically to resolve "[d]isagreements . . . regarding the availability of a program appropriate for the student, and the question of financial responsibility[,]" where the parents, in consequence of a dispute over the provision of a FAPE, have removed their child unilaterally from the public school system and placed him or her in a private school. See Fla. Admin. Code R. 6A-6.03311(9)(b). In such a case, the parents are authorized to seek recovery from the school district, via the due process procedure, of the cost of the private placement.

32. It is this special type of due process hearing that Petitioners requested in initiating the instant proceeding. Reimbursement of the cost of the parental placements is, indeed, the only relief Petitioners have sought. Thus, the ultimate question here is whether Petitioners are entitled to recover private school tuition from the School Board.

33. Florida law adopted in furtherance of the IDEA instructs that reimbursement of private school tuition is an authorized remedy when the following conditions are met:

> If the parents of a child with a disability, who previously received specially designed instruction and related services under the

> authority of a public agency, enroll the student in a private preschool, elementary, or secondary school without the consent of or referral by the school district, a court or an administrative law judge may require the school district to reimburse the parents for the cost of that enrollment; if the court or administrative law judge finds that the school district had not made a free appropriate public education available to the student in a timely manner prior to that enrollment, and that the private placement is appropriate. A parental placement may be found to be appropriate by an administrative law judge or a court even if it does not meet the state standards that apply to education by the Department of Education and the school district.

Fla. Admin. Code R. 6A-6.03311(9)(c). This Rule is nearly identical to, and clearly patterned after, Title 20, United States Code, Section 1412(a)(10)(C)(ii);[12] and Title 34, Code of Federal Regulations, Section 300.403(c).[13]

34. Through the foregoing provisions, the IDEA and parallel state law create what is, in effect, a unique cause of action for recovery of private school tuition. Like any cause of action, this one has particular elements, each of which must be established for relief to be awarded. To summarize these elements, a court or ALJ may require a school district to reimburse a student's parents for the cost of enrollment in a private school only if all of the following are proved:

> [1] Prior to the student's enrollment in a private school, the student received specially designed instruction and related services——in consequence of his or her disability——under the authority of a public agency;

[2] Prior to the student's enrollment in a private school, the school district failed to make a FAPE available in a timely manner to him or her;

[3] After the school district's failure to timely provide a FAPE, the student's parents unilaterally enrolled the student in a private preschool, elementary school, or secondary school;

[4] The private placement is appropriate; and

[5] The parents paid (or are legally obligated for paying) the cost of that enrollment, for which dollar amount they may be reimbursed.

35. Upon examination of the requisite elements it becomes clear that denial of a FAPE, while necessary, is not itself sufficient to make a school district liable for private school tuition. As the Rule unambiguously directs, this particular relief cannot be granted unless, in addition to denial of a FAPE, (1) the aggrieved student is a qualified student, that is, a student who not only (a) is eligible for specially designed instruction and related services, but also (b) previously (i.e. before the unilateral parental placement) received specially designed instruction and related services under the authority of a public agency, and (2) the parental placement is a reimbursable placement, namely one that: (a) was made unilaterally after the denial of a FAPE; (b) is located in a private preschool, elementary school, or secondary school; and (c) is appropriate.

36. With this in mind, the undersigned begins his analysis with the questions: Are the [redacted] "qualified students?" and, Are the parental placements at issue "reimbursable placements?" If these questions cannot be answered in the affirmative, then it will not be necessary to decide whether the School Board denied the [redacted] a FAPE, for relief could not be granted in that event, regardless of whether a FAPE was offered.

Are the [redacted] Qualified Students?

37. Because there is no dispute that the [redacted] are eligible for exceptional student education, the question whether they meet the criteria for recovery of private school tuition boils down to whether they had received specially designed instruction and related services under the authority of a public agency prior to their enrollment in a private school. Here, the only services that the [redacted] ever received "under the authority of a public agency" were early intervention services, including speech therapy, occupational therapy, and, finally, ABA therapy through BAI. Thus, unless these early intervention services constituted specially designed instruction and related services, the [redacted] are not qualified students for purposes of private school tuition reimbursement.

38. In addressing this issue, the undersigned must acknowledge at the outset that in E.W. v. School Bd. of Miami-Dade County, Florida, 307 F. Supp. 2d 1363 (S.D.Fla. 2004), a

federal trial court sitting in Florida construed the law authorizing reimbursement of private school tuition in such a way as to eliminate the requirements that the student have received specially designed instruction and related services under the authority of a public agency prior to his or her enrollment in the private school, and that the enrollment in private school have occurred after the denial of a FAPE. If the undersigned were to follow E.W., as Petitioners urge, he could declare the [redacted] qualified students on that authority. The undersigned, however, declines to apply the E.W. decision here because, for the reasons that follow, he considers it unpersuasive with respect to the points mentioned.[14]

39. E.W. involved a young child with a disability (deafness) whose parents placed him, at age two-and-a-half, in a private nursery school. Prior to this enrollment, the child had received early intervention services at public expense, and he continued to receive such services until becoming three years old. When the child turned three, school district personnel contacted his parents, and an IEP was developed. The parents rejected the proposed placement, however, opting instead to keep the child enrolled in the private preschool. Several months later, they requested a due process hearing. Id. at 1366. The ALJ denied relief for several reasons, one of which was that, because the child had never been enrolled in public school, a

prerequisite for reimbursement of private school tuition was not satisfied. Id. at 1367. Following this setback, the parents sought further review in federal district court.

40. Once in court, the school district moved to dismiss the parents' complaint, arguing that because the child had never been enrolled in public school, a claim for tuition reimbursement could not be stated. Id. at 1367-68. The district court rejected the school's argument. In so doing, it relied upon Justin G. ex rel. Gene R. v. Bd. of Educ. of Montgomery County, 148 F. Supp. 2d 576 (D.Md. 2001), a case the court found "strikingly similar" to the one before it. 307 F. Supp. 2d at 1369.

41. Without going into unnecessary detail about the facts in Justin G., suffice it to say that the Maryland case was similar to E.W. in that it, too, involved a child with a disability whose parents had enrolled him in a private school before the local school district was required to develop an IEP, and thereafter had objected to every proposed IEP, refusing to consider any placement other than the private school they had selected. 148 F. Supp. 2d at 580. The parents eventually requested a due process hearing, seeking tuition reimbursement. This effort was unsuccessful at the administrative level, and a federal lawsuit ensued.

42. The school district moved for summary judgment, urging that the parents were not entitled to reimbursement because (among other reasons) the child had "never [been] enrolled in the public school system." Id. at 587. The court saw no merit whatsoever in this contention, writing:

> The Court finds that such a construction of the IDEA would produce the absurd result of barring children from receiving a FAPE because their disabilities were detected before they reached school age. [The school district's] disturbing interpretation would also place parents of such children in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to reimbursement. The Supreme Court has expressly rejected saddling parents of disabled children with such a pyrrhic victory. See [Town of] Burlington [v. Mass. Dep't of Educ.], 471 U.S. [359,] 369-70, 105 S.Ct. [1996,] 2003 [(1985).]. Therefore, the Court finds that the parents are not barred from seeking reimbursement because [the child] has not attended public school.

Id. at 587.

43. As mentioned, the court in E.W. found Justin G. to be good law and followed the ruling quoted above. Summing up its opinion on the subject, the E.W. court held:

> [S]hould this Court find that [the child] was denied a FAPE, Plaintiffs should not be barred from seeking tuition reimbursement under [20 U.S.C.] § 1412(a)(10)(C)(ii) for the same reasons as those set forth in Justin G. Here, Defendants did not become responsible for providing [the child] with a FAPE until he was already enrolled in a private nursery school. Should Plaintiffs

> meet their burden of proving that [the child] was denied a FAPE, they should not be prevented from seeking reimbursement under § 1412(a)(10)(C)(ii) merely because they refused to place their child, even for a day, in a public school program found to be inappropriate.

307 F. Supp. 2d at 1370.

44. When a statute or rule is clear and unambiguous, the function of a court is faithfully to apply, not interpret, the law. See, e.g., National American Ins. Co. v. Baxley, 578 So. 2d 441, 443 (Fla. 1st DCA 1991)("Terms in a statute which are unambiguous need no interpretation."); cf. Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199, 202 (Fla. 1st DCA 1975)("Where a contract is plain and unambiguous, there is no room for, and the court may not resort to, construction or interpretation, but must apply the contract as it is written."). It is noteworthy, therefore, that neither the court in Justin G. nor the court in E.W. declared Section 1412(a)(10)(C)(ii) to be ambiguous before deciding to disregard certain of its provisions. Having carefully reviewed the language in question, the undersigned is convinced that Rule 6A-6.03311(9)(c) and its federal analogues are unambiguous with regard to the conditions under consideration——i.e. that the student has received specially designed instruction and related services under the authority of a public agency prior to his or her enrollment in a private school, and that the enrollment in private school have

occurred after the denial of a FAPE; hence, it is concluded that they require no interpretation.

45. Beyond that, the courts' stated rationale for circumventing the law's plain language is less than airtight. The first reason given in Justin G. for changing the conditions under which tuition reimbursement might be available was that applying the law as written supposedly would bar some children from receiving a FAPE. While this would be an "absurd result," as the court said, such an undesirable outcome is neither necessary nor even likely. To the contrary, applying the law as written should not bar any child from receiving a FAPE. Rather, applying the law merely denies some parents, i.e. those who unilaterally forego the public school system and place their children in private schools, a particular remedy, namely private school tuition reimbursement. Every parent who eschews the public schools nevertheless has the right to compel his or her school district, via the due process procedure, to develop an appropriate IEP and provide his or her child a FAPE. In short, the premise that enforcing the strict letter of the law would bar children from receiving a FAPE is debatable.

46. Next, the court in Justin G. was disturbed that applying the law would put parents in the "untenable position" of placing their child in an inappropriate placement "to preserve their right to reimbursement."[15] It is true enough that

the law as written will undoubtedly force some parents (especially those whose children have never received exceptional student education) to make some potentially difficult decisions. See, e.g., endnote 15. However, for better or worse, Congress chose, as a matter of policy, to limit the conditions under which school districts could be ordered to pay for private schooling. Faced with an unambiguous law, the judge's task is to apply the policy, even if he disagrees with it, not to fashion one more to his liking.[16]

47. Finally, the Justin G. court cited the U.S. Supreme Court's Burlington decision as authority for proposition that parents should never have to experience the "Pyrrhic victory" of proving their child was denied a FAPE, only to be told that tuition reimbursement cannot be had. Burlington, in fact, provides the strongest support for the outcomes in Justin G. and E.W., and hence merits close examination.

48. In Burlington, the Court considered two issues arising under the Education of the Handicapped Act ("EHA")——the forerunner of the present-day IDEA. One of those issues was whether the potential relief available under Title 20, United States Code (1984), Section 1415(e)(2), included reimbursement to parents for private school tuition and related expenses. 471 U.S. at 367, 105 S. Ct. at 2001. The statutory provision in question authorized courts in civil actions brought pursuant to

the EHA to "grant such relief as" they determined "appropriate." This grant of judicial authority subsists in the IDEA, which provides that, in any civil action brought after the exhaustion of administrative remedies, the court "shall grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii).

49. The Court answered the question framed above in the affirmative, finding that the EHA's grant of judicial authority gave courts broad discretion to fashion remedies deemed appropriate in light of the purposes of the EHA. Id. at 369, 105 S. Ct. at 2002. In a passage that echoes in Justin G. and E.W., the Court announced:

> A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete.

> Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

Id. at 370, 105 S. Ct. at 2003.

50. The present-day reader of Burlington must be mindful that the EHA——later renamed the IDEA——was substantially revised from time to time during the decades following the rendition of the Court's opinion in 1985. One should be aware, in particular, that in enacting the Individuals With Disabilities Education Act Amendments of 1997, which became law on June 4, 1997, Congress added the tuition reimbursement provisions that are currently codified at Section 1412(a)(10)(C)(ii) of Title 20, United States Code. See P.L. 105-17. As the legislative history of these amendments explains, the provisions respecting tuition reimbursement were adopted to specify

> that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

1997 U.S.C.C.A.N. 78, 90. (emphasis added).

51. When the Court decided Burlington, it obviously could not have considered whether the special grant of authority to courts and hearing officers to order school districts to pay for private schooling under certain conditions cabins the general grant of judicial authority to fashion appropriate remedies, because the specific warrant did not then exist. Today, however, it seems fair to ask whether the general grant of power in Section 1415(i)(2)(B)(iii) authorizes a court to award tuition reimbursement when the express conditions for making such an award under the specific grant of power in Section 1412(a)(10)(C)(ii) are not met, as an affirmative answer would appear to render Section 1412(a)(10)(C)(ii) superfluous vis-à-vis the courts. Yet, neither the Justin G. nor the E.W. court mentioned the issue.

52. As interesting as the inquiry would be, the undersigned need not examine the interplay between Sections 1415(i)(2)(B)(iii) and 1412(a)(10)(C)(ii), because even if the former authorizes a court to award tuition reimbursement when the express conditions for making such an award under Section 1412(a)(10)(C)(ii) are not met, it plainly does not authorize an ALJ to do so. As statutory officers, DOAH ALJs, unlike constitutional judges, do not possess inherent or equitable powers; rather, they have only such authority as the Florida Legislature (or an agency exercising delegated legislative

authority) expressly confers upon them. See S.T. v. School Bd. of Seminole County, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001). The undersigned's power to order a school district to pay for private schooling therefore begins and ends in Rule 6A-6.03311(9)(c), which, as noted, is patterned after Section 1412(a)(10)(C)(ii), a statute whose time had yet to come when Burlington was decided. Consequently, unlike the district courts in Justin G. and E.W., the undersigned cannot even plausibly cite Burlington as authority for ignoring any of the unambiguous conditions that the policy makers have chosen to impose on the qualified right of parents to be reimbursed for private school tuition.

53. The undersigned respects the federal district courts and does not lightly reject their decisions. In this particular instance, however, the undersigned cannot adhere to E.W. It is hoped that the foregoing discussion explains why this is so.

54. Having dealt with E.W., the question that now must be answered is whether the early intervention services that the [redacted] received constituted "specially designed instruction and related services" for purposes of Florida Administrative Code Rule 6A-6.03311(9)(c).

55. It is significant, first off, that the Rule uses the particular phrase "specially designed instruction and related services." This phrase is used repeatedly in the Florida laws

governing the implementation of IDEA's Part B——but never to describe Part C services. This raises the question: Are the parents of a child with a disability who has never received Part B services precluded from seeking tuition reimbursement as a matter of law?

56. The phrase "specially designed instruction and related services" describes the essence of "special education," which is defined in Florida Administrative Code Rule 6A-6.03411(1)(c) as follows:

> Special education refers to the specially designed instruction and related services, as defined in paragraphs (1)(d) and (e) of this rule, provided, at no cost to the parents, to meet the unique needs of students with disabilities. Special education includes instruction in the classroom, the home, in hospitals and institutions, and in other settings.

57. Paragraphs (1)(d) and (e) of this "definitions" Rule provide:

> (d) Specially-Designed Instruction. Specially-designed instruction means adapting, as appropriate to the needs of an eligible student, the content, methodology, and/or delivery of instruction:
> 1. To address the unique needs of the student that result from the student's disability or giftedness; and
> 2. To ensure access to the general curriculum, so that the student can meet the district's expected proficiency levels, as appropriate.
> (e) Related Services. Related services means transportation and such developmental, corrective, and other supportive services as

> are required to assist a child with a disability to benefit from special education, and includes audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

58. "Special education" or "specially designed instruction and related services" (the two are interchangeable) are the heart of a FAPE, as this definition makes clear:

> (f) Free Appropriate Public Education (FAPE). FAPE refers to special education, specially designed instruction, and related services for students ages three (3) through twenty-one (21) and for students who are gifted in kindergarten through grade twelve that:
> 1. Are provided at public expense under the supervision and direction of the local school board without charge to the parent;
> 2. Meet the standards of the Department of Education;
> 3. Include preschool, elementary, or secondary programs in the state as applicable; and
> 4. Are provided in conformity with an individual educational plan (IEP) for students with disabilities that meet the requirements of Rule 6A-6.03028, F.A.C., or an educational plan (EP) for students who are gifted that meet the requirements of Rule 6A-6.030191, F.A.C., or a family support plan for students aged three (3) through five (5) in accordance with Rule 6A-6.03029, F.A.C.

Fla. Admin. Code R. 6A-6.03411(1)(f).

59. Contrast the above definitions relating to "specially designed instruction and related services" with the definition of "early intervention":

> Early intervention means developmental services that are designed to meet the developmental needs of an infant or toddler with a disability in any one (1) or more of the following areas:
> 1. Physical development;
> 2. Cognitive development;
> 3. Communication development;
> 4. Social or emotional development; or
> 5. Adaptive development.

Fla. Admin. Code R. 6A-6.03411(1)(b).

60. These definitions teach that early intervention services are meant for infants or toddlers with disabilities, whereas specially designed instruction and related services are for students with disabilities. The latter group, according to the definition of "FAPE," comprises students between the ages of three and 21. The former group, by implication (and consistent with the ordinary meaning of the words "infant" and "toddler") comprises individuals under three years of age.[17]

61. From this the undersigned concludes that the phrase "specially designed instruction and related services" in Rule 6A-6.03311(9)(c) is a deliberate and unambiguous reference to the special education that must be provided to children with disabilities beginning at age three. The mention of the

specialized phrase "specially designed instruction and related services" coupled with the absence of any reference to "early intervention services" convinces the undersigned that the policy makers intended to exclude early intervention services from the mix of factors to consider in determining whether parents are eligible for tuition reimbursement.[18] Put another way, early intervention services cannot, as a matter of law, constitute "specially designed instruction and related services" for purposes of Rule 6A-6.03311(9)(c).

62. Thus, because it is undisputed that the [redacted] have previously received only early intervention services under the authority of a public agency, it is concluded that their parents are not eligible for reimbursement of private school tuition, as a matter of law.

63. Additionally, and in the alternative, even if Petitioners' claim for reimbursement were not legally barred for the reason just announced, it would fail as a matter of fact, for as the undersigned explained in his "ultimate factual determinations," the early intervention services that the [redacted] received through the EIP were not "special education" or "specially designed instruction," but rather constituted treatment for ASD. For this separate reason, it is concluded that the [redacted]' parents are not eligible, as a matter of fact, for tuition reimbursement.

Are the Placements At Issue Reimbursable Placements?

64. While the determination that the [redacted] are not qualified students for purposes of Rule 6A-6.03311(9)(c) is independently dispositive, the undersigned will consider alternatively whether BAI, CPA, or both constitute reimbursable placements——a question, incidentally, which did not arise in E.W. and hence would remain for decision even if the district court's opinion were applied in these cases.

65. To review, a parental placement is reimbursable if it: (a) was made unilaterally after the denial of a FAPE; (b) is located in a private preschool, elementary school, or secondary school; and (c) is appropriate. Each of these criteria will be examined in turn.

66. Petitioners allege that the School Board first denied the [redacted] a FAPE sometime between November 2003 and February 2004——in other words, during the 2003-04 school year. By this time, the [redacted] had already been "placed" with BAI, having started to receive therapy through that company in May 2003. And, as we know, the [redacted] would remain under the care of BAI continuously through July 2004.

67. There is no evidence that the [redacted] ever "re-enrolled" in BAI after the School Board allegedly denied the [redacted] a FAPE. Further, if it were assumed for argument's sake that BAI is a "private preschool," then one reasonably would infer (in the

absence of contrary evidence) that BAI's students would enroll for an entire school year——and would not ordinarily "re-enroll" in the middle of a school year.

68. In sum, therefore, the evidence shows that the [redacted] "enrolled" in BAI before the alleged denial of a FAPE, and fails to show——or even to provide a basis for reasonably inferring——that the [redacted] "re-enrolled" any time after the alleged denial of a FAPE. For this reason alone, BAI is not a reimbursable placement.

69. The placement at CPA, in contrast, which was made in July 2004, did occur after the alleged denial of a FAPE. Thus, CPA satisfies at least one of the criteria marking a reimbursable placement.

70. The next issue is whether BAI,[19] CPA, or both are "private schools." This is a more involved question than the simple matter of timing just addressed.

71. Florida law defines the term "private school" as follows:

> A "private school" is a nonpublic school defined as
>
> [A] an individual, association, copartnership, or corporation, or department, division, or section of such organizations, that designates itself
>
> [1] as an educational center that includes kindergarten or a higher grade or

> [2] as an elementary, secondary, business, technical, or trade school below college level or
>
> [B] any organization
>
> [1] that provides instructional services that meet the intent of s. 1003.01(13) or
>
> [2] that gives preemployment or supplementary training in technology or in fields of trade or industry or
>
> [3] that offers academic, literary, or career training below college level, or
>
> [C] any combination of the above, including an institution that performs the functions of the above schools through correspondence or extension, except those licensed under the provisions of chapter 1005.
>
> A private school may be a parochial, religious, denominational, for-profit, or nonprofit school. This definition does not include home education programs conducted in accordance with s. 1002.41.

§ 1002.01(2), Fla. Stat.[20]

72. Petitioners argue that BAI and CPA operate "programs" that require regular attendance and thus are "private schools" pursuant to "[B][1]" (as designated herein) of the foregoing definition. Specifically, according to Petitioners, "the interventions that the [redacted] received from [BAI] and [CPA] would constitute instruction in a private school because [the [redacted]] attended [these companies' programs], both at home and in a center, on a regular basis, five days each week." The undersigned disagrees with this contention.

73. Regular attendance is, to be sure, a relevant fact. For an "organization" to be a "private school" under [B][1], it must provide "instructional services" that "meet the intent" of Section 1003.01(13). And Section 1003.01(13), Florida Statutes, provides as follows:

> (13) "Regular school attendance" means the actual attendance of a student during the school day as defined by law and rules of the State Board of Education. Regular attendance within the intent of s. 1003.21 may be achieved by attendance in:
> (a) A public school supported by public funds;
> (b) A parochial, religious, or denominational school;
> (c) A private school supported in whole or in part by tuition charges or by endowments or gifts;
> (d) A home education program that meets the requirements of chapter 1002; or
> (e) A private tutoring program that meets the requirements of chapter 1002.

74. Because the intent of Section 1003.01(13) is to define the term "regular school attendance," [B][1]'s requirement that "instructional services" "meet the intent" of Section 1003.01(13) is a bit obscure, perhaps even ambiguous. The undersigned, however, understands "instructional services that meet the intent of s. 1003.01(13)" to mean instructional services that are delivered in a setting that can reasonably be called a "school," at which a student must actually be present each day except weekends, holidays, and regular vacation days.

75. Thus, while Petitioners are not wrong to stress the importance of regular attendance in determining whether an organization meets the definition of "private school," they overlook that what really counts is not just regular attendance, but regular school attendance, i.e. attendance at a place where students acquire knowledge from teachers in a process known as education.[21]

76. Besides that, Petitioners place too much importance on regularity of attendance, too little on whether BAI and/or CPA provided "instructional services." Performing or receiving something regularly, even five days per week, does not transform that "something" into "instructional services."

77. The term "instructional services" is not defined in Section 1002.01(2), Florida Statutes, and the parties have not referred the undersigned to an applicable definition elsewhere. However, common sense and our common understanding of the English language teach us that the term "instructional services," as used in a definition of "private school," cannot mean, simply, services that involve the giving of instructions. Rather, in this context, "instructional services" plainly refers to the kind of services rendered by teachers, namely services intended to give an education, in places ordinary people, based on common experience, recognize as schools.

78. The undersigned concludes that, to constitute a "private school" under [B][1], an organization must provide the sort of educational services commonly associated with the teaching profession, in a setting that can reasonably be called a "school," where students (or at least one student) must actually be present during regular school days.

79. Neither BAI nor CPA meets this definition of a "private school." Rather, BAI and CPA are healthcare providers. They gave the [redacted] therapy, not an education. To conclude otherwise, on the evidence presented in this case, would distort the meaning of "private school" beyond recognition.

80. Thus, it is concluded that BAI and CPA do not, either of them, meet the "private school" criterion for reimbursable placements.

81. Finally, for the sake of completeness the undersigned will consider whether BAI and CPA were "appropriate" placements. The question, restated, is whether the private placements were suitable substitutes for the FAPE that allegedly was denied the [redacted]. Because no private placement would be, in this context, either "free" or "public," its appropriateness must necessarily be evaluated from an educational standpoint. A placement is only "appropriate" in the relevant sense, therefore, if it afforded an appropriate education.

82. The preceding point underscores the irrelevance of the fact that BAI and CPA might have provided appropriate services to the [redacted]. The undersigned is persuaded, in fact, that from a clinical standpoint, BAI and CPA did provide the [redacted] with appropriate therapeutic services.

83. Whether their services were appropriate from an educational standpoint is a different story. In this regard, as the undersigned has found, the evidence shows that BAI and CPA were not trying to give the [redacted] an education; they were treating the [redacted]' ASD, attempting to restore them, as much as possible, to healthy functioning. Since the healthcare providers were not giving the [redacted] an education, it follows that the "placements" with BAI and CPA were not "appropriate" for purposes of Rule 6A-6.03311(9)(c).

84. It is possible that the School Board might be obligated in the future, pursuant to IEPs yet to be developed, to provide the [redacted] with some ABA therapy as a "related service." "Related services" are, after all, an integral component of a FAPE. See Fla. Admin. Code R. 6A-6.03411(1)(f). As we have seen, the term "related services" means

> transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes audiology services, psychological services, physical and occupational therapy, recreation, including

> therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

Fla. Admin. Code R. 6A-6.03411(1)(e)(emphasis added).

85. It should be borne in mind, however, that related services are secondary to specially designed instruction; they are not the primary focus of a FAPE. Being eligible to receive special education is a necessary but not a sufficient condition of eligibility for related services.

86. The U.S. Supreme Court made this latter point clear in Irving Independent School Dist. v. Tatro, 468 U.S. 883, 894, 104 S. Ct. 3371, 3378 (1984). There, the Court wrote:

> In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the [IDEA].
>
> * * *
>
> [Moreover,] only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless [of] how easily a school [employee] could furnish them.

Id. (emphasis added; citations omitted); accord Donald B. By and Through Christine B. v. Board of School Com'rs of Mobile County, Ala., 117 F.3d 1371, 1374-75 (11th Cir. 1997). Thus, a student

who receives special education is further eligible for related services only if such related services are necessary to help the exceptional student benefit from the special education, and the school 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.

87. The evidence in these cases does not establish that the [redacted] needed any ABA therapy in order to benefit from special education, much less the amounts provided by BAI and CPA. Thus, on the instant record, the undersigned could not deem "appropriate" the therapeutic services the [redacted] received, even as "related services."

88. The bottom line, then, is that neither BAI nor CPA was a reimbursable placement. Therefore, Petitioners are not entitled to reimbursement of private school tuition pursuant to Rule 6A-6.03311(9)(c).

Did the School Board Deny the [redacted] a FAPE?

89. The ultimate question whether a FAPE was offered, which is usually the crux of a due process hearing, turns out, ironically, not to be relevant in these cases. This is because Petitioners sought only to recover the costs incurred as a result of "enrolling" the [redacted] in BAI and CPA, and they failed to establish an entitlement to such reimbursement. The upshot is

that the undersigned could not require the School Board to pay for the private ABA therapy the [redacted] have received even if the [redacted] were denied a FAPE.[22] Because no purpose would be served by deciding whether the School Board offered the [redacted] a FAPE, the undersigned declines to reach the issue.[23]

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that the School Board should not be required to reimburse Petitioners for expenses incurred in placing the [redacted] under the care of BAI and CPA.

DONE AND ORDERED this 25th day of April, 2005, in Tallahassee, Leon County, Florida.

S

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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2005.

ENDNOTES

[1]/ "Special education and related services" is IDEA terminology. See, e.g., 20 U.S.C. § 1401(8)(defining "free appropriate public

education" as "special education and related services" provided on prescribed terms). Florida law uses the synonymous phrase "specially designed instruction and related services." See, e.g., Fla. Admin. Code R. 6A-6.03411(1)(c)(defining "special education" as "specially designed instruction and related services" provided on prescribed terms) and Fla. Admin. Code R. 6A-6.03411(1)(f)(defining "free appropriate public education" as "special education, specially designed instruction, and related services").

[2]/ The undersigned is aware that the above description of ABA and DTT is very general and probably oversimplifies the therapies under discussion. The findings, however, reflect the limitations of the evidentiary record in these cases.

[3]/ The Partington Sunberg Model, also known as the verbal behavior model, is a form of ABA therapy. The record evidence is insufficient to make more detailed findings about this model.

[4]/ See Fla. Admin. Code R. 6A-6.03311(4)(e)("A meeting [for which advance notice to the parents must be given] does not include preparatory activities that the school district personnel engage in to develop a proposal or response to a parent proposal that will be presented at a later meeting.")

[5]/ January 5, 2004, was the first school day following Christmas vacation. While not directly relevant to the disposition of these cases, the undersigned finds that, contrary to Petitioners' charge, the School Board acted diligently and with reasonable promptness in evaluating, and preparing IEPs for, the [redacted]. Indeed, despite the relatively late referral of the [redacted] for evaluation (less than two months before they turned [redacted]); despite the father's request that the December 18, 2003, IEP meeting be rescheduled; and despite the year-end winter break, the School Board still could have begun providing exceptional student education to the [redacted] as early as the second school day (Tuesday, January 6, 2004) after the triplets' [redacted] birthday (which fell on a [redacted]), had the parents consented to the proposed placement. It was their right, of course, to withhold such consent, as they did, and request a due process hearing. But under the totality of the circumstances, the undersigned is not persuaded and cannot find that the School Board is solely (or even largely) responsible for the failure of the parties to reach agreement on IEPs prior to the [redacted] [redacted] birthday.

[6]/ This particular legal argument was later rejected by an administrative law judge and a federal district court. See D.P. ex rel. E.P. v. School Bd. of Broward County, Florida, ___ F. Supp. 2d ___, 2005 WL 608405 (S.D.Fla. Mar. 8, 2005).

[7]/ Ironically, Petitioners accuse the School Board of having been close-minded about placement options because school district personnel were not receptive to the parents' repeated demands that the [redacted] ABA therapy be continued under the School Board's authority. The undersigned finds that the School Board did not "predetermine" placement for the [redacted], as Petitioners allege, but rather properly developed a program of specially designed education and related services for each of the [redacted]. It is not evidence of "predetermination" here that the School Board quickly rejected the parents' demand for continuation of the [redacted] early intervention services. For one thing——and this point will be developed in more detail later——the ABA therapy that the [redacted] had been receiving pursuant to Mr. Garcia's treatment plan was therapy, not education. The School Board's mission, however, is to provide a free appropriate public education ("FAPE"), not free psychological or behavioral treatment, except to the extent such treatment might be necessary as a "related service" to allow an exceptional student to obtain an educational benefit. Having no educational component, the [redacted]' early intervention services could not provide a FAPE. Moreover, the [redacted]' ABA therapy was being provided in the home (after initially having been administered in a clinic). The IDEA requires that a FAPE be provided in the least restrictive setting——and a home or clinic is an extremely restrictive environment, far removed from a mainstream or regular classroom. School district personnel could readily ascertain that a home or clinic would not be the least restrictive setting for the [redacted]' special education. For at least these reasons, if not others, school district personnel justifiably declined to engage in protracted deliberations about whether to adopt Mr. Garcia's treatment plan as an IEP for each of the [redacted].

[8]/ Notwithstanding the general requirement that IEPs be reviewed at least annually, any IEP can be revisited whenever circumstances warrant a change in placement.

[9]/ The [redacted] Preschool caters exclusively to children with autism; it educates autistic public school students pursuant to a contract with the School Board.

[10]/ The [redacted]' parents had become dissatisfied with BAI's performance. Also, a dispute over the bills had arisen between BAI and the parents, which dispute had not been resolved as of the final hearing.

[11]/ A few weeks before the final hearing, the [redacted] began attending a day care or preschool for half a day, where they were "shadowed" by CPA personnel. A lack of evidence precludes further findings about this preschool program.

[12]/ The federal statute provides as follows:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

[13]/ The federal regulation provides as follows:

> Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

[14]/ "It is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a state." Bradshaw v. State, 286 So. 2d 4, 6

(Fla. 1973), cert. denied, 417 U.S. 919 (1974). Thus, the undersigned is not duty bound, under the principle of stare decisis, to follow E.W.

[15]/ This statement of the parents' dilemma is confusing. If the parents were to "acquiesce" to a placement in public school they considered inappropriate, then they would not be required to pay private school tuition, and hence would not incur a cost that might later be reimbursed; their acquiescence, in other words, would not preserve a right to reimbursement, but rather would obviate the need to assert such a right. (In the event of such acquiescence, the disappointed parents could, of course, request a due process hearing and seek relief besides tuition reimbursement, e.g., a revised IEP and compensatory education.) The court's real concern, it appears, was that some parents (i.e. those whose children have never received exceptional student education) might face a Hobson's choice (as the court probably would view it) between (a) rejecting a free public school placement they consider inappropriate in favor of a preferred private school placement for which they would be financially responsible or (b) acquiescing to the "inappropriate" public school placement to avoid incurring unreimbursable private school tuition.

[16]/ The undersigned does not believe, incidentally, that the courts made a persuasive case that the law creates an "untenable" situation for some parents. Moreover, the undersigned is concerned that disregarding the law's unambiguous conditions might put some school districts in the "untenable position" of acquiescing to the unreasonable demands of parents whose children have never stepped foot in a public school classroom in order to avoid the risk of liability for expensive private school tuition.

[17]/ This is consistent as well with the federal definition of "infant or toddler with a disability," which provides:

> The term "infant or toddler with a disability"--
> (A) means an individual under 3 years of age who needs early intervention services because the individual--
> (i) is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the areas of cognitive development, physical development, communication development,

social or emotional development, and adaptive development; or
(ii) has a diagnosed physical or mental condition which has a high probability of resulting in developmental delay; and
(B) may also include, at a State's discretion, at-risk infants and toddlers.

20 U.S.C. § 1432(5).

[18]/ This is a straightforward application of the maxim expressio unius est exclusio alterius, which holds that if "one subject is specifically named [in a contract], or if several subjects of a large class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded." Espinosa v. State, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997)(internal quotation marks omitted); see also, e.g., Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997)("[W]hen a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.")

[19]/ While BAI is not a reimbursable placement because the [redacted] were "enrolled" there before the School Board allegedly denied them a FAPE, the undersigned will nevertheless consider whether BAI meets the other criteria.

[20]/ The undersigned added the letters and numbers in brackets and organized the various clauses into an outline to make this grammatically challenged definition somewhat easier to read and understand.

[21]/ The undersigned is aware that any definition of "private school" which depends in part on an understanding of the word "school" is circular to some degree. But the tautology, while less than ideal, is excusable in this instance because, school attendance being compulsory in this country, ordinary people share a common understanding of what a "school" is. Thus, even accounting for the probability of reasonable disagreement at the margins, the undersigned believes that most ordinary people should agree most of the time on whether a particular setting constitutes a "school" or not.

[22]/ There is no other relief the undersigned could award either, on the evidence presented. The thrust of Petitioners' attack on the substance of the proposed IEPs was that the School Board refused to provide intensive, one-on-one ABA therapy like that the [redacted] received from BAI and CPA. The evidence establishes, however, that if the School Board had done exactly as Petitioners wanted, then the [redacted] would not have received a FAPE, for neither BAI nor CPA provided them with an education. Therefore, even if the School Board had denied the [redacted] a FAPE, the undersigned would not order the School Board to write new IEPs offering the [redacted] what CPA has been providing them, for that, too, would deny them a FAPE. Further, as the undersigned has explained, the evidence fails to show that any one-on-one ABA therapy is necessary for the [redacted] to benefit from special education, so the undersigned could not, in any event, order the School Board to add such therapy to the [redacted]' IEPs as a related service. Finally, the evidence establishes that the [redacted] are not in the same condition today as they were in December 2003 when the School Board last evaluated them. Obviously, owing to the passage of time, if the [redacted]' parents decide to enroll them in public school, the School Board will need to re-evaluate the [redacted] and prepare new IEPs for them. Because there is no evidence in the record to support findings as to what the [redacted] might need today for a FAPE, and certainly none showing what specially designed instruction and related services the [redacted] might need down the road, the undersigned could not, at this time, require the School Board to do anything except that which it will need to do anyway, if and when the [redacted] return to public school.

[23]/ It should not be inferred that the undersigned would rule against the School Board on this issue were he to reach it, and neither should the contrary inference be drawn.

COPIES FURNISHED:

[redacted]

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NOTICE OF RIGHT TO SEEK JUDICIAL RELIEF

1. This decision and its findings are 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.