

Sarasota County School District  
No. 04-1026E  
Initiated by: Parent  
Hearing Officer: Daniel Manry  
Date of Final Order: August 18, 2004

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner, )  
 )  
vs. ) Case No. 04-1026E  
 )  
SARASOTA COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on May 19, 20, 25, and 26, 2004, in Sarasota, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Sarah E. Warren, Esquire  
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For Respondent: E. Keith DuBose, Esquire  
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## STATEMENT OF THE ISSUES

The issues are whether DOAH has jurisdiction over the subject matter of this proceeding, and, if so, whether Respondent violated 20 United States Code (USC) Sections 1400 et seq., the Individuals With Disabilities Education Act (IDEA), and denied Petitioner a free appropriate public education (FAPE) by failing to conduct a Functional Behavioral Assessment (FBA) and implement an individualized Behavioral Intervention Plan (BIP) for Petitioner; by suspending and then removing Petitioner from school for behavior that was a manifestation of Petitioner's attention deficit hyperactivity disorder; by failing to hold manifestation hearings when required; by failing to properly inform Petitioner's mother of the single manifestation hearing that Respondent did conduct; by effectively denying Petitioner's mother the right to attend the manifestation hearing that Respondent conducted; by transferring Petitioner to another elementary school with only two months remaining in the school year; and by violating the requirement in the IDEA to stay put.

## PRELIMINARY STATEMENT

Petitioner's mother requested a due process hearing on March 10, 2004. Respondent referred the matter to DOAH to conduct the hearing. The parties waived the requirement that a

final order be entered within 45 days of the request for hearing.

At the hearing, Petitioner presented the testimony of six witnesses and submitted 25 exhibits for admission into evidence. Respondent presented the testimony of eight witnesses and submitted three exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the five-volume Transcript of the hearing filed with DOAH on June 22, 2004. The ALJ granted the parties' stipulated request to extend the time for filing proposed final orders (PFOs) until July 21, 2004. The parties timely filed their respective PFOs.

#### FINDINGS OF FACT

1. Petitioner is a disabled [REDACTED] student in the Sarasota County School District (the District). Petitioner was born on [REDACTED]

2. Petitioner has been continuously enrolled in District schools since the District evaluated Petitioner with attention deficit hyperactivity disorder (ADHD) on or before April 23, 1999, while Petitioner was in the District's Early Intervention Program (EIP). The District developed an individual education plan (IEP) and placed Petitioner in a special education pre-kindergarten class at [REDACTED] [REDACTED] [REDACTED] [REDACTED] ([REDACTED]). Petitioner has progressed each year to the next

grade level, but enrolled in [REDACTED] [REDACTED] [REDACTED] [REDACTED] ([REDACTED]) after March 11, 2004.

3. The District developed an IEP for Petitioner on December 5, 2002 (the previous IEP), while Petitioner was enrolled at [REDACTED]. The previous IEP included a behavior intervention plan (BIP) entitled "Individual Behavioral Management Plan." During the 2002-2003 school year, Petitioner exhibited few behavior problems.

4. The District developed the IEP at issue in this proceeding on March 10, 2003 (the challenged IEP), while Petitioner was enrolled in [REDACTED]. The challenged IEP listed Petitioner's "primary" and "secondary" exceptionalities as ADHD and "Occupational Therapy."

5. The challenged IEP noted Petitioner's difficulty in following rules and directions and [REDACTED] difficulty with transitions from one activity to another. Behavior objectives in the challenged IEP included teaching Petitioner to remain on task, completing class assignments, and transitioning from one activity to another with only one prompt from the teacher.

6. The challenged IEP no longer included a BIP and did not authorize any services in the category of "Behavior Management." The challenged IEP did not identify Petitioner as a child who needed "positive behavior intervention or strategies."

7. Prior to June 18, 2003, Petitioner had been treated with various ADHD and anti-psychotic medications for aggressive behavior. The medications included Tenex, Risperdal, Resperidone, and Adderall and were administered during the 2000-2001 and 2001-2002 school years, and part of the 2002-2003 school year. During those years, Petitioner's [REDACTED] and [REDACTED] divorced each other and established separate residences.

8. Petitioner moved in with [REDACTED] [REDACTED] on June 18, 2003. At first, Petitioner was erratic, compulsive, acted out in negative ways, and was difficult to control. Petitioner needed hourly structure to control [REDACTED] behavior. Sometime in September 2003, Petitioner's behavior had improved to the point that the treating physician took Petitioner off all medication.

9. Petitioner's mother enrolled Petitioner in [REDACTED] at the beginning of the 2003-2004 school year. The [REDACTED] listed Petitioner's address as the [REDACTED]'s address. The [REDACTED]'s address placed Petitioner within the geographic region for [REDACTED]. However, officials at [REDACTED] acquiesced in Petitioner's attendance in a school out of Petitioner's residential district.

10. Petitioner began the school year at [REDACTED] in a "stretch" program for academically advanced children. However, Petitioner's behavior caused school officials to transfer

Petitioner approximately three to four weeks into the school year to a classroom taught by Ms. Pamela Witte. School officials conducted an IEP revision meeting to reflect the change in classrooms.

11. Petitioner did not make progress toward the behavior objectives in the challenged IEP. In Ms. Witte's class, Petitioner displayed impulsive, disruptive behavior (negative behavior). Ms. Witte frequently telephoned Petitioner's [REDACTED], sent Petitioner to "time-out," or removed Petitioner from the classroom.

12. Much of Petitioner's negative behavior during the 2003-2004 school year was a manifestation of Petitioner's ADHD. Petitioner frequently exhibited negative behavior during transitions, including changes in class subjects or routines; changes from one activity or classroom to another; when school environments were loud or overly stimulating to Petitioner's senses; or during less-structured activities or classes such as music, art, and physical education (Specials).

13. The specific instances of negative behavior were consistent with antecedent events and "setting" events that involve transitions, excessively stimulating environments, or Specials. For example, a majority of Petitioner's negative behaviors occurred during "Technology" class, in badly smelling restrooms, during transitions from playground to classroom,

during a non-routine "tree planting ceremony," during other Specials, and during transition from Specials to Ms. Witte's classroom. Significant events occurred while lining up at a playground to go to the classroom and while in-line traveling between physical education to Ms. Witte's class.

14. Petitioner's negative behavior took a variety of forms. On September 4, 2003, Petitioner flicked and threw food. On October 1, 2003, Petitioner did not follow directions and made noises. On December 11, 2003, Petitioner made noises and fell out of [REDACTED] chair. The negative behavior subsequently escalated on December 11, 2003, when Petitioner crumpled papers and threw them to the ground and kicked the wall. On December 12, 2003, Petitioner made noises, fell out of [REDACTED] chair, and repeatedly tapped [REDACTED] pencil. On December 17, 2003, Petitioner made noises, turned around in [REDACTED] chair, and played with a sticker.

15. On January 15, 2004, Petitioner pulled and threw grass, turned in [REDACTED] seat, and made noises. On February 4, 2004, Petitioner made noises, touched work items, and touched the wall. On March 1, 2004, Petitioner impulsively ran over to another student and pushed the student's head down. On March 5, 2004, Petitioner poked another student with a pencil, scraped the pencil across the wall, poked another child with tape, touched another child's hair, tossed around [REDACTED] lunchbox, and

made noises. On March 12, 2004, Petitioner touched a key chain of another student, did not follow directions, peeled paint off the wall, and made noisy outbursts.

16. Identifiable antecedent and setting events, such as transitions, deviations from routine, and over-stimulating sensory environments, precipitated many ADHD or sensory-related responses to the antecedent events. Identifiable antecedent events included a noisy lunchroom on September 4, 2003; a non-structured music class on October 1, 2004; an odiferous bathroom on November 24, 2003; transition to the classroom on December 11, 2003; transition to a "rethink area" on December 17, 2003; a non-routine tree planting ceremony on January 15, 2004; transition back to class on February 4, 2004; a change in routine that included the absence of Petitioner's regular aide, lining up for recess, and loud noises from another student on March 1, 2004; while in line, going from activity to activity, and in a noisy lunchroom on March 5, 2004; and while in line during a transition on March 12, 2004.

17. The challenged IEP did not require or authorize a Functional Behavioral Assessment (FBA) in which data is collected to identify antecedent or setting events that precipitate specific negative behaviors. Nor did the challenged IEP require or authorize a BIP based on an FBA.



18. Ms. Witte did not devise or implement a de facto FBA or BIP. Ms. Witte utilized a "behavior contract" for Petitioner that was an adaptation of a plan Ms. Witte used for her entire class. The behavior plan was a classroom success plan that Ms. Witte made up on her own with no help from specialists in behavior or special education.

19. The behavior contract did not define target behaviors or replacement behaviors. The contract did not include strategies for managing consequences and did not contain adequate positive supports for Petitioner. The contract contained neither modifications for Petitioner's physical environment nor any system of advance warnings. The contract did not assign tasks to specific persons, including aides. The behavior contract was not part of Petitioner's IEP and was not used by Petitioner's Specials teachers.

20. Petitioner's negative behavior increased over time. The District did not utilize a behavioral specialist to assist it in creating a BIP for Petitioner other than to send Petitioner to a segregated, special education class during January or February 2004, that a behavior specialist taught. The special education class reduced the time Petitioner spent in a regular education environment. The District did not note this change in classes on the challenged IEP. Late in the school

year, the District provided a functional behavior assessment summary, but did not implement a BIP.

21. The District responded to Petitioner's increasing negative behavior by subjecting Petitioner to a series of removals from class that constituted a pattern. The removals totaled more than 10 school days in the school year, increased in frequency and duration, and were proximate to each other.

22. The District utilized what the District characterized as progressive discipline in the form of in-school and out-of-school suspension. District personnel increased the number of days of suspension and the severity of the punishment as the year wore on and the number of events accumulated. District personnel determined that suspensions were part of a "behavioral program" that made Petitioner "stop and think about [REDACTED] behavior." District personnel concluded that suspensions helped Petitioner learn from consequences.

23. The challenged IEP did not list progressive discipline as a behavior intervention strategy. No one from the District told Petitioner or [REDACTED] [REDACTED] that Petitioner was subject to a behavioral program of progressive discipline.

24. The challenged IEP does not list in-school and out-of-school suspension as authorized interventions. Nor does Ms. Witte's behavior contract.

25. During the 2003-2004 school year, the District

repeatedly removed Petitioner from class and school as a result of impulsive and disruptive behavior. Excluding "time-outs" in the office or the days school staff sent Petitioner to other classrooms for negative behavior, staff removed Petitioner from [REDACTED] class on 21 days. The 21 days included 12 full days of out-of-school suspension (OSS), in which the school did not allow Petitioner on school property; three partial days on which school staff sent Petitioner home from school early; and six partial days spent in in-school suspension (ISS). School staff also referred to ISS as Administrative Intervention Class (AIC). This Final Order, for convenience, uses the initials ISS to include both ISS and AIC.

26. School staff removed Petitioner from [REDACTED] classroom, either by ISS and OSS one day in September, one day in October, two days in November, four days in December, four days in January, two days in February, and seven days in the first two weeks of March. The District suspended Petitioner for one day in the first quarter of the school year, six days in the second quarter, and 14 days in the third quarter.

27. The removals of Petitioner from [REDACTED] regular classes in the form of ISS and OSS constituted a change in placement. ISS was a separate classroom of 12 students utilized for any student that misbehaved. An aide, rather than a certified teacher, supervised the ISS room. The aide monitored the

behavior of the students while the students worked independently. A certified teacher did not provide services directly to students in the ISS room by instructing the students as a group, and the students did not participate in a shared curriculum.

28. If Petitioner were in [REDACTED] regular education classroom, rather than the ISS room, Petitioner would have had access to a certified teacher who would have instructed the group as a whole. Petitioner would have been required to cooperate in group activities, listen during group instruction, and follow the classroom's rules and procedures as [REDACTED] transitioned from subject to subject and activity to activity. IEP goals and objectives of staying on task, completing work, and effectively transitioning from activity to activity were not effectively addressed in the ISS room.

29. The ISS room was a more restrictive environment than Petitioner's regular classroom. The ISS room did not maintain Petitioner's inclusion in the population of regular students, but subjected Petitioner to a small number of students that were segregated from regular students because of behavior issues.

30. The District did not provide accommodations required in the challenged IEP while Petitioner was in the ISS room. The District did not: provide flexible preferential seating; emphasize Petitioner's individual learning style in instruction;

facilitate modeling; allow breaks; provide appropriate cues or prompts; teach self-management skills, including assignment completion strategy and organizational skills; or utilize cooperative learning groups or peer tutoring and provide positive reinforcement.

31. The District provided no educational services to Petitioner during periods of OSS. During OSS, the District did not provide any educational services that assisted Petitioner in making progress toward the educational goals and objectives in the challenged IEP or that assisted Petitioner in advancing in the general curriculum.

32. By January 15, 2004, the District had taken disciplinary action against Petitioner for more than ten days without conducting a manifestation hearing. Disciplinary action without a manifestation hearing continued until the District conducted a manifestation hearing on March 4, 2004.

33. The behavior intervention strategy of progressive discipline did not enable Petitioner to make progress toward the behavior goals in the challenged IEP. Rather, Petitioner's negative behavior increased. The incidents of Petitioner's negative behavior increased in number almost every month as the 2003-2004 school year progressed. Petitioner's negative behavior increased proportionately with the District's increase in progressive discipline.

34. The quarterly progress reports for the first two quarters in the 2003-2004 school year reflect a correlation between the use of progressive discipline and an increase in Petitioner's negative behavior. In the progress report for the first quarter, Petitioner received only one needs improvement (N) in physical education and none in any other classes. In the second quarter report, Petitioner received an N in each class of physical education, agriculture, and art. Petitioner also received an unsatisfactory (U) in music and in academic achievement and effort.

35. At the end of the first quarter of the school year, only two of Petitioner's teachers in Specials observed negative behavior in their classes. At the end of the second quarter on December 19, 2003, all five of Petitioner's teachers for Specials determined that Petitioner exhibited negative behavior in their respective classes. Petitioner did not follow school or classroom rules or directions, did not work and play well with others, and did not work independently.

36. Petitioner's "work habits" in Ms. Witte's class also declined after the first grading period. By the end of the second quarter, Petitioner's work habits were no longer satisfactory.

37. On February 22, 2004, staff at [REDACTED] received a letter from Mr. Stanley Krawetz, the attorney representing the

Petitioner's [REDACTED] in the divorce. The letter advised staff that Petitioner's residence was that of [REDACTED] [REDACTED] and that Petitioner's [REDACTED] had exclusive responsibility for Petitioner.

38. Prior to receiving the letter from Mr. Krawetz, the principal mistakenly believed that Petitioner was living in the [REDACTED] attendance zone where Petitioner's mother and sister lived. After receiving the letter, the principal sought to reassign Petitioner to [REDACTED].

39. Respondent requires parents to sign a reassignment form for a student to move to another school. The reassignment form is not optional. Respondent required the principal at [REDACTED] to obtain a signature on the reassignment form from Petitioner's [REDACTED] before the principal could transfer Petitioner to [REDACTED]. The principal also ensured through the District's ESE Director that the challenged IEP could be implemented at [REDACTED].

40. The reassignment forms serve several functions. They provide Respondent and individual schools within the District with accurate information about each student's residence for purposes of each schools' emergency records. The reassignment forms also provide census information by tracking how many students attend schools outside of their attendance zones.

41. On March 1, 2004, the assistant principal at [REDACTED] telephoned Petitioner's [REDACTED] to arrange a meeting

to discuss reassignment. The meeting was set for Friday, March 5, 2004.

42. Later in the day, on March 1, 2004, Petitioner engaged in aggressive, hands-on behavior, toward another student. Petitioner placed both of [REDACTED] hands on the head of a student who was making loud noises in line with Petitioner during a transition between classes on a day when Petitioner's regular aide was absent.

43. The assistant principal suspended Petitioner for one day pending the reassignment conference previously scheduled with Petitioner's [REDACTED] for March 5, 2004. The written notice to Petitioner's [REDACTED] described the suspension as being "one day OSS, pending conference re redistricting."

44. Sometime between March 1 and 3, 2004, the assistant principal advised the principal that they needed to conduct a manifestation hearing because the number of days that they had suspended Petitioner from school was "close to 10." The two scheduled a manifestation hearing for March 4, 2004, to determine if the negative behavior for which they suspended Petitioner on March 1, 2004, was a manifestation of Petitioner's disability.

45. The District effectively denied Petitioner's [REDACTED] the right to attend the manifestation hearing. Although the



District provided the [REDACTED] with advance notice of the hearing, the notice was inadequate to enable the [REDACTED] to attend.

46. On March 3, 2004, the assistant principal telephoned the business office of Petitioner's [REDACTED] to advise the [REDACTED] that the assistant principal needed to move the meeting originally scheduled for Friday to Thursday, March 4, 2004. Petitioner's [REDACTED] was in a meeting, and the assistant principal spoke with the secretary of Petitioner's [REDACTED]. When Petitioner's [REDACTED] finished [REDACTED] meeting and received the message, Petitioner's [REDACTED] instructed [REDACTED] secretary to telephone the assistant principal and advise [REDACTED] to direct any further contact to the attorney representing Petitioner and [REDACTED] [REDACTED].

47. On March 3, 2004, Petitioner's [REDACTED] participated in a telephone conference with the principal and assistant principal. The three discussed the length of suspension, the reassignment form, and the manifestation hearing scheduled for the next day. Petitioner's [REDACTED] refused to sign the reassignment form before the end of the school year, but agreed to reassignment of Petitioner to Phillippi Shores after the school year ended. The principal insisted on immediate reassignment. The principal left open the duration of the suspension ordered on March 1, 2004.

48. During the telephone conference on March 3, 2004, Petitioner's [REDACTED] requested the principal to reschedule the

manifestation hearing. Petitioner's [REDACTED] contacted [REDACTED] attorney.

49. The attorney for Petitioner attempted to reschedule the manifestation hearing by contacting Respondent's attorney, the Special Education Director for the District, and the principal. The attorney for the District and the Special Education Director agreed to the requested postponement. The principal did not.

50. At approximately 3:45 p.m., on March 3, 2004, the assistant principal notified Petitioner's [REDACTED] by facsimile that the manifestation hearing was scheduled for March 4, 2004, at 2:45 p.m. No representative for Respondent notified Petitioner's [REDACTED] of the procedural safeguards accorded by federal law.

51. On March 4, 2004, the District staff conducted the manifestation hearing. The manifestation team determined that Petitioner's negative behavior on March 1, 2004, was not a manifestation of Petitioner's disability. The team considered behavior incorrectly described in a written report as scratching and kicking another student. Ms. Witte was the only team member to witness the negative behavior on March 1, 2004, was present at the meeting, and did not correct the behavior report by advising the team of the behavior that Petitioner actually engaged in on March 1, 2004.

52. The manifestation team approved the principal's recommendation to increase the suspension from one day to three days based on the severity of Petitioner's behavior. The District suspended Petitioner through March 4, 2004.

53. When Petitioner returned to school on March 5, 2004, the District suspended Petitioner for two more days. Petitioner kicked a basketball during physical education class and did not dribble the ball. During transition back to class, Petitioner poked another student with a pencil and scraped the wall with the pencil. Petitioner also poked another student with a piece of tape, touched another student's hair while standing in line, and tossed [REDACTED] lunchbox around and fell down in line. At lunch, Petitioner made loud noises with [REDACTED] hand while [REDACTED] was seated alone to "rethink" [REDACTED] behavior.

54. The District did not enforce the stay put requirement of the IDEA. On March 10, 2004, Petitioner's [REDACTED] requested a due process hearing. The principal refused to permit Petitioner to return to [REDACTED] [REDACTED] unless Petitioner's [REDACTED] signed the reassignment form. Petitioner's [REDACTED] signed the form on March 11, 2004, to get [REDACTED] [REDACTED] back in school.

55. On March 12, 2004, the principal removed Petitioner from school for making noises, slapping [REDACTED] desk, touching another student's key chain and shoe, peeling paint from the

wall while in line, and kicking the wall. Petitioner's [REDACTED] enrolled Petitioner in [REDACTED] on March 17, 2004.

56. The District developed a new IEP for Petitioner at [REDACTED] that includes a BIP. Petitioner resumed medication and was, at the time of the due process hearing, making progress toward the goals and objectives in the new IEP. Petitioner's [REDACTED] was satisfied with the new IEP, the BIP, and Petitioner's educational progress at [REDACTED].

57. Petitioner's attorneys now stipulate that this proceeding is about attorney's fees. They seek findings of fact and conclusions of law that the actions of Respondent violated the IDEA so that Petitioner will be able to obtain attorney's fees and costs in another forum. They do not seek a final order that changes Petitioner's current placement at [REDACTED]. No final order would affect the challenged IEP, its implementation at [REDACTED], or Petitioner's placement at [REDACTED].

#### CONCLUSIONS OF LAW

58. DOAH has jurisdiction over the parties to this proceeding pursuant to Subsection 1003.57(5), Florida Statutes (2003); Florida Administrative Code Rule 6A-6.03311; and the Individuals with Educational Disabilities Act, 20 United States Code, Section 1400 (the "IDEA"). DOAH provided the parties with adequate notice of the due process hearing.

59. DOAH does not have jurisdiction to make conclusions of law concerning the subject matter of this proceeding. The legal issues of whether the actions of the District at [REDACTED] violated the IDEA or whether the implementation of the challenged IEP at [REDACTED] prevented Petitioner from receiving a FAPE are moot. See Board of Education of Downers Grove Grade School District No. 58 v. Steven, 89 F.3d 464, 467 (7th Cir. 1996)(denying jurisdiction over challenge to fifth grade IEP when student was in different school in eighth grade with new IEP at time of decision).

60. The facts in this proceeding are substantially similar to those in Steven. Although [REDACTED] and [REDACTED] [REDACTED] are in the same school district, Petitioner is in another grade, in a school other than [REDACTED], with different educational needs. Petitioner is receiving educational services pursuant to a new IEP that Petitioner's [REDACTED] has accepted. Petitioner's [REDACTED] agreed at the due process hearing that Petitioner is making progress toward the goals and objectives in the new IEP. Petitioner and [REDACTED] [REDACTED] lack an actual injury that can be redressed by a favorable decision concerning the challenged IEP. The legal conclusions that Petitioner seeks in this proceeding would result in no enforceable obligations against those responsible for implementing the challenged IEP at [REDACTED]; even if

the ALJ reached the legal conclusion that staff at [REDACTED] implemented the challenged IEP in a manner that violated procedural safeguards and denied Petitioner a FAPE.

61. The evidence is insufficient to support a finding that this case is an exception to the judicial doctrine of mootness. The evidence does not show that the matters at issue are "capable of repetition yet evading review." Steven, 89 F.3d at 467-468. There is no reasonable expectation, much less demonstrated probability, that the same controversy will recur between Petitioner and those at [REDACTED] who implemented the challenged IEP. Petitioner will never again attend [REDACTED] previous grade at [REDACTED] and does not seek to do so.

62. Petitioner and [REDACTED] [REDACTED] have received the relief they originally sought. They received a new IEP, with a BIP, that is being implemented differently than the challenged IEP was implemented at [REDACTED].

63. As was the situation in Steven, "[a]ttorneys fees are the true objective" of this proceeding. Steven, 89 F.3d at 468. The requirement for an actual case or controversy extends throughout the pendency of this proceeding and is not limited to the facts that existed at the time Petitioner's [REDACTED] requested the due process hearing. DOAH has no jurisdiction to order attorneys fees and costs and is limited to issuing a final

order that can be executed against those responsible for implementing the challenged IEP at [REDACTED]. DOAH has no jurisdiction to provide opinions upon "moot questions or abstract propositions." Compare Steven, 89 F.3d at 467.

64. The ALJ has made findings the ALJ considers relevant and material to DOAH's jurisdiction; and findings that a reviewing court may need to reach conclusions of law concerning alleged violations of applicable law in the event the reviewing court were to disagree with the conclusion that DOAH lacks subject matter jurisdiction. As to the findings made in this proceeding, Petitioner is the party objecting to the challenged IEP and, therefore, bears the burden of proof. Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001); Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285, 1290-1291 (5th Cir. 1991). The rule recognizes the underlying principle that great deference must be given to educators when a child was learning in a program that was jointly developed by the District and Petitioner's [REDACTED] and initially accepted by the [REDACTED] as appropriate for the student. Devine, 249 F.3d at 1292; JSK v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991).

65. There is insufficient evidence to establish the cause of Petitioner's failure to make progress toward the behavioral goals in the challenged IEP. Either a BIP or proper medication,

or both, may have enabled Petitioner to make progress toward the behavioral goals in the challenged IEP. Petitioner received medication during the previous IEP at [REDACTED] and has both a BIP and proper medication with [REDACTED] new IEP at [REDACTED]. Petitioner made progress toward the goals and objectives in [REDACTED] previous IEP at [REDACTED] and, as of the date of the due process hearing, was making progress toward the goals and objectives in the new IEP at [REDACTED].

ORDER

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

ORDERED that this proceeding is dismissed as moot.

DONE AND ORDERED this 18th day of August, 2004, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of August, 2004.

COPIES FURNISHED:



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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the

appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.