Brevard County School District
No. 04-2343E
Initiatfed by: Parent
Hearing Officer: Daniel M. Kilbride
Date of Final Order: August 24, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2343E
	)	
BREVARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A formal due process hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, on July 29, 2004, in Melbourne, Florida.

APPEARANCES

For Petitioner: [redacted] and [redacted] parents of [redacted]
(Address of record)

For Respondent: Melinda Baird, Qualified Representative
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STATEMENT OF THE ISSUES

Whether the Individual Education Plan (IEP) offered by Respondent, Brevard County School Board (Respondent), on June 2, 2004, was reasonably calculated to offer Petitioner, [redacted] (Petitioner or [redacted] meaningful educational progress;

Whether Respondent failed to provide Petitioner with [redacted] procedural safeguards and rights when it delayed convening the IEP meeting, and then delayed forwarding the parents' request for a due process hearing to the Division of Administrative Hearings (DOAH) until after mediation had taken place; and

Whether Respondent is required to reimburse Petitioner's parents for the costs associated with their retaining a private certified auditory-verbal (A-V) therapist for Petitioner.

PRELIMINARY STATEMENT

This matter commenced upon the filing of a Request for Due Process Hearing on June 9, 2004, by the parents of the student, [redacted] with Respondent. The parents consented to mediation, Respondent coordinated with the Department of Education, and mediation was held. When mediation proved unsuccessful, this matter was referred to DOAH by Respondent on July 7, 2004. The case was assigned to Daniel M. Kilbride, Administrative Law Judge (ALJ), and set for hearing to begin on July 29, 2004. Special counsel was retained by Respondent. The due process hearing was conducted as scheduled.

At the hearing, Petitioner's mother, [redacted] testified on behalf of her [redacted] Petitioner offered seven exhibits, which were admitted into evidence. Respondent called five witnesses to testify: Dr. Carol E. Rees, staffing specialist; Karen O.

Palladino, Ed.D., director of Administrative Support Services for Exceptional Student Education; Elizabeth M. Carmen and Tara R. Moxham, teachers, Specific Learning Disabilities (SLD) Program; and Mary E. Koch, M.A., expert in the area of auditory education therapy. Respondent offered 19 exhibits, which were admitted into evidence. At the conclusion of the hearing, Petitioner submitted three decisions upon which they relied, and Respondent submitted a Post-Hearing Brief. The parties stipulated that they would file their proposed final orders within seven days of the filing of the transcript.

The Transcript of the hearing was filed on August 11, 2004. Respondent filed its Proposed Findings of Fact and Conclusions of Law on August 13, 2004. No additional filings have been made by Petitioner. All of the parties' proposals have been accepted and given careful consideration in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is a [redacted] child, born [redacted], and who recently turned [redacted] years old. Petitioner was born profoundly deaf. [redacted] parents have been attending the Auditory-Verbal Communication Center in Gloucester, [redacted], since November 2000, when Petitioner was [redacted] months' old.

2. Auditory-verbal therapy (AVT) is the intervention process that enables a child who is deaf/hard of hearing to grow up in an environment where listening and spoken language are the expected modes of communication. AVT is an integral part of the A-V approach which is based on a set of principles. AVT

emphasizes listening as the main sense for learning language. When all the principles of the A-V approach are followed, listening becomes integrated into the child's personality. Children who engage in AVT require specific modifications in school in order to learn and live "in a hearing world"; however, they can attend regular school.

3. Petitioner's parents became knowledgeable about the options available for children who are hearing impaired, and they have become knowledgeable about AVT.

4. Petitioner has shown excellent development of [redacted] spoken language communication skills over the past [redacted] years. During the past [redacted] years, [redacted] has been learning to listen with [redacted] cochlear implant and learning through listening in order to develop [redacted] communication skills. Petitioner's parents have engaged in communication-promoting behaviors with Petitioner.

5. Petitioner's therapists in [redacted] recommended that Petitioner's IEP provide for a regular mainstream preschool placement with appropriate support services including: AVT in-service for teachers, AVT inclusion lessons by an A-V therapist, regular team meetings, and daily speech-language therapy by a speech-language pathologist. It was also recommended that Petitioner receive AVT during the summer in order to prevent a serious regression of [redacted] learned speech-language listening skills.

6. On January 30, 2004, Petitioner's mother telephoned Respondent to inquire as to the educational services offered for deaf students in the district. At that time, Petitioner's mother

indicated that the family would be relocating from [redacted] to Florida in April. She advised Respondent that [redacted] was born profoundly deaf and had received a cochlear implant at 15 months of age and that Petitioner had been receiving AVT since [redacted] was six months of age. Petitioner's mother also advised that [redacted] had been found eligible for special educational services, the local school district in [redacted] had prepared an IEP for [redacted] and that she would fax it to Respondent's office promptly.

7. On February 3, 2004, Respondent was faxed a copy of Petitioner's most recent IEP developed by the [redacted] school district. Among other provisions, the IEP provided for [redacted] to be mainstreamed in [redacted] public preschool program and that [redacted] be provided with AVT services.

8. A representative from Respondent telephoned Petitioner's mother on February 12, 2004, and discussed with [redacted] the various types of educational placements and service options available for deaf students in the district. The representative recommended that Petitioner's mother visit Respondent's program for "severely language impaired" (SLI) students at a local elementary school. Petitioner's mother was also asked to contact Respondent's staff once the family had relocated to Brevard County, Florida, so that an IEP meeting could be scheduled promptly.

9. Petitioner's mother visited the SLI program on February 20, 2004, while she was in the area to close on the house the family had purchased. On April 19, 2004, Petitioner's mother advised Respondent that the family was in the process of moving. She also stated that she felt that the SLI program was

not appropriate for [redacted] and that [redacted] required a mainstream placement because [redacted] did not show any language impairment when tested in [redacted]. She also stated that the IEP team in [redacted] had met on April 15, 2004, to reassess [redacted]'s goals and objectives for the coming year and had continued the provisions of a mainstream preschool placement and of AVT. The new IEP was faxed to Respondent's office on April 20, 2004.

10. The family's move to Brevard County was completed by April 23, 2004, and Petitioner's mother tried to contact Respondent several times during the week of April 26, 2004, but several staff members were out of the office for in-service training. Notification of the move was not made to Respondent until May 3, 2004. Petitioner's mother also advised Respondent that she was in the process of contacting several A-V therapists in Florida and would be meeting with them in the following week. Respondent, subsequently, was advised that Petitioner's parents had engaged a private "certified" A-V therapist in Hobe Sound, Florida, because they were anxious that no break in AVT services occur. Petitioner's mother asked that the provision of education services for her [redacted] be arranged as soon as possible.

11. After several discussions with Dr. Carol E. Rees on scheduling a date for an IEP meeting, Petitioner's parents agreed to June 2, 2004, as the date for the meeting, and a Notice of Meeting was mailed to them and other interested parties on May 26, 2004. However, the parents indicated that they did not receive a copy of the Notice of Meeting or of the procedural safeguards until June 3, 2004, one day after the IEP meeting.

12. On June 2, 2004, an IEP meeting was convened with nine staff and Petitioner's mother present and participating. After about four hours, a temporary IEP was developed and agreed upon by all parties. Petitioner's mother indicated that she was in agreement with the goals and objectives. This IEP provided that Petitioner would receive two hours per week of speech-language and hearing therapy (using AVT techniques) for the period June 4, 2004, through June 24, 2004. In addition, the IEP also provided that Petitioner would be placed in a regular pre-kindergarten classroom in the family's neighborhood school for the 2004/2005 school year (the Step FOURward program at [redacted] Elementary), and [redacted] would receive two hours per-week of speech-language therapy (using AVT techniques) and audiology services with an auditory trainer. In-service would be provided to the school staff on cochlear implants and to the speech-language pathologist and hearing clinician on AVT techniques. However, Petitioner's mother disagreed with Respondent's decision to deny reimbursement for the private A-V therapist [redacted] had engaged and also disagreed with the IEP team for not providing a "certified" A-V therapist to provide services in the fall semester. She advised the IEP team that she would consider requesting a due process hearing and/or mediation and was provided the procedural safeguard forms needed. Petitioner's mother also signed a consent for evaluation for [redacted] and also consent for [redacted]'s placement in the Step FOURward Program.

13. On June 9, 2004, Petitioner's mother submitted a "Request for Due Process Hearing Form" to Dr. Karen Palladino's

office. The form indicated that Petitioner requested a "due process hearing," but also indicated that Petitioner's parents were willing to participate in formal mediation prior to initiating the due process hearing.

14. A mediator, appointed by the Florida Department of Education, was promptly requested, and an all day mediation was held on July 6, 2004. However, the mediation was unsuccessful in resolving the parties' dispute.

15. The following day, July 7, 2004, Respondent filed the request with DOAH, and this due process hearing was scheduled and conducted. Dr. Palladino had not filed the Request for Due Process Hearing with DOAH prior to this date because she interpreted the consent signed by the parents' as their intent to conclude mediation prior to activating the due process hearing request. Dr Palladino incorrectly interpreted the parents' willingness to participate in mediation as a waiver of the "45-Day Rule" by the parents.

16. Services were promptly provided to [redacted] by Respondent during the month of June 2004, as provided in the temporary IEP. However, services were suspended for the remainder of the summer with the expectation that Petitioner would start the Step FOURward Program at the beginning of the fall semester, August 17, 2004. Petitioner's parents object to the suspension of services for July and part of August because of their concern that this would lead to regression of Petitioner's skills.

17. The parents insist that it is essential that [redacted] continue to receive AVT. They also strongly urge that AVT be

provided by a professional who is "certified" by Auditory-Verbal International, Inc., a non-profit organization based in Alexandria, Virginia, who has created international standards for persons who desire to provide AVT to the hearing impaired. The A-V therapist should be a qualified educator of the hearing impaired--an audiologist and/or speech-language pathologist who has received advanced special education instruction in learning centers and/or from certified AVT clinicians.

18. According to Warren Estabrooks, a certified A-V therapist and one of the most respected authorities in this field, an A-V therapist must be either: (1) a licensed speech-language pathologist; (2) a licensed audiologist; or (3) a certified teacher of the deaf who has received advanced special education instruction in learning centers and/or from certified AVT clinician(s). See page 7, Auditory-Verbal Therapy for Parents and Professionals, Warrant Estabrooks, Editor, published by A.G. Bell Association for the Deaf and Hard of Hearing, 1994. A-V therapists may, but are not required to, pursue "certification" by Auditory-Verbal International, Inc. Koch, recognized as an expert in AVT and who has worked in the field of deaf education for more than 25 years, testified that AVT is a methodology for children who have hearing impairments. Koch testified that there are 149 "certified" A-V therapists in the United States according to the website for Auditory-Verbal International, Inc. In comparison, there are "at least a half-a-million" school-aged children in the United States who are candidates for AVT. Clearly, it would be impossible for all

children who are candidates for AVT to receive it from a "certified" therapist.

19. During the June 2, 2004, IEP meeting, Respondent assigned Elizabeth M. Carmen, a speech-language pathologist with 31 years of experience, as the primary person who would provide [redacted] with speech-language therapy (using AVT techniques) under the temporary IEP beginning in the Fall of 2004.

20. In order to be prepared to provide AVT to [redacted] Respondent launched an aggressive program to train [redacted] in AVT techniques. [redacted] attended a seminar conducted by Mary Koch on September 30, 2003, entitled, Bringing Sounds to Life: Principles and Practices of Cochlear Implant Rehabilitation. On April 21, 2004, she visited the Auditory/Oral Program at [redacted] Elementary School in Orlando. From April 27 through 29, 2004, she attended a three-day training session on AVT conducted by Kathy Bricker, a certified A-V therapist. In June 2004, she attended an intensive two-week course of study in AVT conducted by the North Carolina Summer Institute in Auditory-Verbal Therapy. This was followed by a two-week course in training and education in AVT and auditory-based practices (July 12 through 23, 2004) sponsored by the Bolesta Center, Inc., in Tampa, Florida, and conducted by Marcus Rose, a certified A-V therapist. This training was specifically arranged for Respondent's staff, and [redacted] was one of two speech-language pathologists employed by Respondent to attend.

21. On July 13, 2004, Respondent entered into a contracted services agreement with the Bolesta Center, Inc., to provide on-

going consulting services in AVT with Respondent for the 2004/2005 school year.

22. In this case, it is clear that Petitioner will receive educational benefits from the proposed IEP.

23. The evidence does not support the contention that [redacted] must receive therapy from a "certified" A-V therapist or that the provision of a "certified" A-V therapist would result in a greater educational benefit to [redacted] than Respondent's provision of AVT by a speech-language pathologist who is trained in AVT, but who is not "certified" by Auditory-Verbal International, Inc.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties of this proceeding pursuant to Subsection 1003.57(5), Florida Statutes (2003), and Florida Administrative Code Rule 6A-6.03311(5)(e).

25. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities with a free appropriate public education (FAPE), which must be tailored to the unique needs of the handicapped child by means of an IEP program. Board of Education Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

26. The determination of whether a school district has provided or made available to an "exceptional" student a "FAPE," involves a "twofold" inquiry as the United States Supreme Court explained in Rowley:

> First, has the State [or district school board] complied with the procedures set forth

> in the Act [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-207.

27. If these two questions are answered in the affirmative, then "the State [school district] has complied with the obligations imposed by Congress and the courts can require no more." Id. at 207. Specifically, "[t]he statute may not require public schools to maximize the potential of disabled students." Disabled students should have opportunities "commensurate with the opportunities provided to other children." Renner v. Board of Education of Public Schools of the City of Ann Arbor, 185 F.3d 635, 644 (6th Cir. 1999).

28. As noted above, the first inquiry that must be made is whether the local educational agency has complied with the statutory procedures. If it is found that the educational agency has failed to follow the proper procedures and that this failure was significant, then the agency will have violated the legal requirement of a FAPE. Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1041 (5th Cir. 1989).

29. Petitioner's parents allege that Respondent violated their procedural rights by delaying [redacted] initial IEP meeting following the family's move to Brevard County, Florida. The evidence shows that Petitioner's mother initially contacted Dr. Rees in January 2004 to inquire about the special education services offered by Respondent. On February 3, 2004, she faxed a copy of [redacted]'s then-current IEP (developed in [redacted]) to

Respondent. Over the next several months and preceding the family's actual move to Florida, Dr. Rees had several telephone conversations with Petitioner's mother. Respondent's official notification that the family had completed their move to Florida was via a telephone conversation between Petitioner's mother and Dr. Rees on May 3, 2004. It is at this point that Respondent became legally responsible for providing special education and related services to [redacted] The IDEA permits Respondent 30 days to convene an IEP meeting after a child has been determined to be eligible for special education and related services. 34 C.F.R. § 300.343(b)(2). There is no question that Petitioner is entitled to services. In this case, the date of the official notification of the family's move to Florida would serve as a "trigger" for this time period. Although Petitioner's mother made reasonable efforts to have a meeting sooner, the IEP meeting was convened by mutual agreement of the parties on June 2, 2004, within 30 days of receipt of notification of the family's move to Florida.

30. Florida law permits Respondent to make a "temporary assignment" to a special program for exceptional students who are transferring from an out-of-state public school system. See Fla. Admin. Code R. 6A-6.0334. This temporary placement may extend for a period of six months. There is no requirement that a Florida school district must implement an out-of-state IEP. Rather, the law states, "[t]he receiving district may review and revise the current IEP, as necessary." Fla. Admin. Code. R. 6A-6.0334. In accordance with this regulation, Respondent scheduled an IEP meeting for June 2, 2004, and at that time

developed a "temporary IEP" for [redacted]. The development of this "temporary IEP" was with the full participation and agreement of [redacted]'s mother. The IEP provided that Petitioner would be placed in a regular pre-kindergarten classroom (Step FOURword Program) in [redacted] neighborhood school ([redacted] Elementary School), and would receive two hours per week of AVT as a part of [redacted] speech-language and hearing therapy services. In addition, [redacted] was to receive a frequency modulation auditory trainer and audiology services. In-service training would be provided to school staff regarding [redacted]'s cochlear implant. On June 4, 2004, just two days after the IEP meeting, [redacted] began to receive two hours per-week of AVT, speech-language therapy, and hearing therapy from Respondent's staff. These services were provided until June 29, 2004, as provided in the IEP.

31. Respondent asserts that it convened [redacted]'s IEP meeting and developed a "temporary IEP" in compliance with the requirements of the IDEA and Florida law. However, assuming arguendo, that there was, in fact, an inexcusable delay in scheduling the IEP meeting for June 2, 2004, there would be no available relief for this error. The U.S. Court of Appeals for the Eleventh Circuit has followed the majority rule holding that minor procedural violations do not warrant relief absent proof of actual harm. See Michael P. v. Indian River County School Board, 37 IDELR 186 (11th Cir. 2002); Doe v. Alabama State Department of Education, 915 F.2d 651, 661-62 (11th Cir. 1990) (no relief where procedural deficiencies have no impact on the parents' full and effective participation in the IEP development); Weiss v. School

Board of Hillsborough County, 141 F.3d 990 (11th Cir. 1998) (in evaluating FAPE deprivation, the court must consider the impact of the procedural defect, and not the defect per se); Jane Parent v. Osceola County School Board, 59 F.Supp.2d 1243 (M.D. Fla. 1999) (district's procedural errors did not deny the student a FAPE); Joshua S. v. School Board of Indian River County, 37 IDELR 218 (S.D. Fla. 2002) (court found no evidence that procedural violation had harmed the student).

32. In Doe, the court held that no violation of the IDEA's procedural requirements occurs that warrants relief so long as the parents have been afforded an opportunity to fully and effectively participate in the IEP process. In this case, Petitioner's mother attended the IEP meeting and participated fully in the development of the [redacted]'s IEP. In fact, Petitioner's mother signed the Informed Notice of Eligibility, Placement, and Consent for Placement form and checked a box entitled, "YES, I agree with the proposed educational placement." Clearly, Petitioner's mother was able to fully and effectively participate in the development of [redacted]'s IEP and agreed to the proposal for class placement and the number of hours of related services.

33. Petitioner's parents assert that they were not provided with a written copy of their procedural safeguards "prior to" the June 2, 2004, IEP meeting. Respondent denies this allegation and points to the IEP meeting notice sent by Dr. Rees to the family on May 26, 2004. The notice includes the statement, "Procedural Safeguards Enclosed." Assuming, arguendo, that the notice of

procedural safeguards was inadvertently left out of this mailing or delivery was delayed, there was no harm to the parents. Petitioner's mother attended the IEP meeting and fully participated in the development of her [redacted]'s educational program. She was obviously informed of her legal rights, as evidenced by her subsequent written request for mediation and a due process hearing. There is no evidence of actual harm to the parents or [redacted] from this alleged oversight.

34. Respondent did violate Petitioner's procedural safeguard rights by failing to forward Petitioner's parents' request for a due process hearing to DOAH immediately upon receiving it on June 9, 2004. Although the parents indicated that they were willing to participate and, in fact, did participate in formal mediation, nevertheless, they did not waive their right to a determination within 45 days of the Request for Due Process Hearing. However, since the school year is scheduled to start during the week of August 16, 2004, and the parents are not contesting [redacted]'s placement or the actual services she is to receive under the temporary IEP, the 30-day delay in completing this process has not caused actual harm to Petitioner. See Daniel R.R. v. State Board of Education, supra.

35. The second prong in the Rowley test to determine the appropriateness of an IEP is whether the "individualized educational program developed through the Act's [IDEA] procedures [is] reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207.

36. Pursuant to the IDEA, Respondent is required to provide Petitioner with a "FAPE." See 20 U.S.C. § 1401. In Rowley, the court stated that, "in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." Rowley, 458 U.S. at 200. More importantly, the Court further stated that "the intent of the [IDEA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Id. The Supreme Court has opined that the IDEA does not require a school district to provide an "equal" education to a handicapped child. Rowley, 458 U.S. at 198. Rather, the IDEA requires Respondent to ensure that Petitioner receives "some benefit" from [redacted] educational program. Rowley, 458 U.S. at 198.

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

Drew P. was receiving 'meaningful' education benefit, but was based on whether he was receiving any educational benefits." Id.

38. The U.S. Supreme Court has held that school districts satisfy the FAPE requirement "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. Moreover, the Court opined:

> [T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Rowley, 458 U.S. at 203-204.

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

> [A]n . . . IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit [redacted] "to benefit" from the instruction. In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit."

40. The IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it. See White v. Ascension Parish School

Board, 343 F.3d 373 (5th Cir. 2003); Teague Independent School District v. Todd L., 999 F.2d 127, 132 (5th Cir. 1993). In this case, the parents, as the party challenging the IEP, have the burden of proof to demonstrate that the June 2, 2004, temporary IEP did not offer a FAPE to [redacted] Devine v. Indian River County School Board, 249 F.3d at 1291-1292. In Devine, the Eleventh Circuit explicitly adopted the Fifth Circuit's position that the party challenging the IEP bears the burden of proof to show that it does not offer a FAPE. The Fifth Circuit said: "We have previously held--as have the majority of federal courts that have considered the issue--that [IDEA] 'creates a presumption in favor of the education placement established by [a child's] IEP, and a party attacking its term should bear the burden of showing why the educational setting established by the IEP is not appropriate.'" Devine at 1291, quoting from Christopher M. v. Corpus Christi Independent School District, 933 F.3d 1285, 1290-1291 (5th Cir. 1991). The Eleventh Circuit, thereby, rejected the minority view of the Third Circuit that the school district has the burden of proof in determining that an IEP is appropriate.

41. Respondent has proposed an IEP offering two hours per-week of AVT by a speech-language pathologist who is trained to provide AVT. The major dispute in this case is whether the provision of this therapy must be provided by a person who has been "certified" by Auditory-Verbal International, Inc., a private association which is independently promoting the use of "certified" therapists throughout the United States and other

countries. The IDEA requires the provision of educational services by "qualified personnel." 34 C.F.R. § 300.23. "Qualified personnel" means "personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services." Id. Each state is responsible for determining "the specific occupational categories required to provide special education and related services within the State." 34 C.F.R. § 300.136(b)(2). In Florida, students who are deaf or hard of hearing must have available to them "the services of professionals in the areas of audiology, school psychology, guidance, educational assessment, social services, and interpreting." Fla. Admin. Code R. 6A-6.03013(5). Speech-language pathologists in Florida must meet specific guidelines for certification. Fla. Admin. Code Chapter 64B20-2. Florida state law provides that speech-language pathologists hold: (1) a valid license in speech-language pathology; (2) a valid certificate of clinical competence; or (3) a master's or higher degree with a minimum of 60 semester college credits in speech-language pathology.

42. Respondent developed a temporary IEP which identified the program that would be used to educate [redacted] and then set out an aggressive program to train the designated teacher in the methodologies needed to provide the services identified in the IEP to [redacted] by the fall semester. Carmen has received over 150 hours of training in the provision of AVT. Although she lacks hours in practical application of these techniques, this is

sufficient to provide the required services. The Supreme Court has held that the "'basic floor of opportunity' provided by [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. Respondent has designed an individualized program which, on its face, gives some indication of how the child's unique needs are going to be met. Respondent has complied with Rowley in this regard.

43. At the June 2, 2004, IEP meeting, the parents asked about the qualifications of the teacher that would be used to teach their child. They were most concerned about his/her specific training and knowledge in the areas that their child needed in order to progress. Respondent advised the parents that Elizabeth Carmen had been selected to provide [redacted]'s speech-language therapy beginning in the fall semester. It is standard procedure that Respondent does not put the name of the teacher in the IEP. However, the law is clear that Respondent does have an obligation of providing a teacher who is qualified and possesses the skills necessary to provide the services required by the child's disabilities. The parents were rightfully concerned at the June 2, 2004, IEP meeting when Respondent presented a teacher who had a great deal of experience in methodologies other than AVT. They expressed their desire that only AVT methodologies be provided to [redacted] because AVT had proven to be highly successful with [redacted] up to that point.

44. Carmen is a speech-language pathologist, who is employed by Respondent and meets these licensure and/or certification requirements. Carmen is a licensed speech-language pathologist, who has over 30 years of experience working with children. Carmen has received more than 150 hours of training in AVT from a "certified AVT therapist, particularly Marcus Rose, a "certified" AVT therapist in Tampa, Florida. Rose provided a two-week intensive training course in AVT to Carmen in July of 2004, and is under contract with Respondent to provide consultation to staff on the implementation of AVT. Respondent has spent a considerable amount of money to train its staff in the provision of AVT. It is clear that Respondent has "qualified personnel" who can provide AVT to [redacted] Koch observed Carmen working with a child and interviewed Carmen as to [redacted] knowledge of the principles of AVT. Koch testified that Carmen is capable of providing AVT. The evidence is uncontroverted that Respondent can provide "qualified personnel" who are trained and competent to deliver AVT to [redacted] as provided in [redacted] IEP.

45. Petitioner's parents are insisting on the provision of an A-V therapist who has been "certified" by Auditory-Verbal International, Inc., the only association in the world providing this certification.

46. There is only one reported decision on point. In Carbon-Lehigh Intermediate Unit, 4 ECLPR 116 (SEA PA 1999), a state due process hearing review officer ruled that a public school system was not required to provide an A-V therapist who was "certified" by Auditory-Verbal International, Inc., so long

as the school system's therapist(s) had recent training or experience in AVT. The Carbon-Lehigh case is almost "on all fours" with the instant case. Respondent has gone to exceptional lengths to obtain high-quality training for its staff in AVT. These staff members, who have received this training, are qualified to provide AVT to [redacted] Respondent's staff members, who will be providing AVT to [redacted] hold the proper licensure and/or Florida endorsements to provide AVT to [redacted] There is no federal or state law requiring a provider of AVT to be "certified" by Auditory-Verbal International, Inc. Therefore, Respondent is not required to offer the provision of this therapy by a private "certified" A-V therapist.

47. Further, it is well-settled that the choice of educational methodology is a matter of discretion within the authority of school personnel. Although parents are active participants in an IEP process, they do not single-handedly control the outcome of this process. As the U.S. Supreme Court has stated, "the primary responsibility for formulating the education to be accorded a handicapped child and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 U.S. at 207. The leading case on methodology is Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988), cert. denied, 488 U.S. 925 (1988). The court recognized, "[o]nce it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities."

Lachman, 852 F.2d at 292. Lachman holds that a state-proposed IEP that meets the substantive requirements of the IDEA cannot be defeated merely because the parents believe a better educational program exists for their child. Other federal courts, including the U.S. Court of Appeals for the Eleventh Circuit, have followed Lachman. See Greer v. Rome City Schools, 950 F.2d 688 (11th Cir. 1991). See also Barnett by Barnett v. Fairfax County School Board, 927 F.2d 146, 152 (4th Cir. 1991), cert. denied, 502 U.S. 859 (1991) (the IDEA (then EHA) mandates an education that is responsive to the handicapped child's needs, "but leaves the substance and the details of that education to state and local school officials"); Roland M. v. Concord School Committee, 910 F.2d 983, 993 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991) (issue is not whether the program preferred by the parents is better, but whether the program proposed by the school district "struck an 'adequate and appropriate' balance on the maximum benefit/least restrictive fulcrum").

48. The law does not require Respondent to adopt any particular "brand" name educational program or therapy to achieve [redacted]'s educational objectives and goals. Nor does the law require Respondent to accede to a parent's educational preferences. Rather, the law merely requires Respondent to provide "appropriate" educational services to enable [redacted] to receive "some educational benefit." It is irrelevant whether the provision of AVT by a "certified" therapist would be "better" than the therapy proposed by Respondent (provided by a licensed speech-language pathologist who is trained in the provision of

AVT techniques). The only relevant issue is whether Respondent has offered a FAPE in accordance with the requirements of the IDEA and Florida state law. The clear weight of the evidence shows that the proposed IEP meets or exceeds the FAPE standard.

49. [redacted]s parents are asking this tribunal to order Respondent to pay for a private therapist of their own choosing. The courts have uniformly rejected parental demands for schools to hire or assign particular individuals to assist their children with disabilities. A federal court in California recently held that parents do not have the right to demand that a particular individual be hired as an aide for an 11-year-old child with autism. In Gellerman v. Clalaveras Unified School District, 34 IDELR 33 (E.D. Cal. 2000), the court rejected the parents' claims that the aide must know the child well and must have previously worked with [redacted]. This demand, according to the court, would "impose too high a standard" for school districts and was not required by the IDEA. Rather, the court characterized the parents' demands as statements of desirable features in an aide, having slight legal effect, if any. See also Michael P. v. School Board of Indian River County, 34 IDELR 30 (S.D. Fla. 2001) (parents could not demand placement in a classroom where the teacher was a personal friend of the mother). In this case, [redacted]'s parents have no legal right to demand the provision of AVT by a particular therapist, so long as Respondent's staff members, who are delivering the therapy, are trained to do so.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

FOUND AND DETERMINED that

1. Respondent drafted an IEP which was reasonably calculated to confer educational benefits for [redacted] in that: (a) the IEP provides measurable goals and objectives; (b) the IEP defines the educational program proposed for [redacted] in clear, objective terms in order to assure a truly individualized, specially designed program to meet [redacted]'s educational needs; and (c) the IEP is reasonably calculated to confer meaningful educational benefits.

2. Respondent has not violated Petitioner's procedural due process rights by conducting the IEP meeting on June 2, 2004. However, Respondent's rights were violated when [redacted] parent's request for a due process hearing was not forwarded to DOAH for nearly 30 days, until after mediation had proved unsuccessful, but such delay has not denied Petitioner a FAPE.

3. By unilaterally retaining a private A-V therapist for [redacted] Petitioner has acted in the best interest of their child; however, Respondent should not be required to pay for said services. It is, therefore,

ORDERED that

1. Respondent has drafted, with the cooperation of Petitioner's parents, an appropriate IEP which is reasonably calculated to confer meaningful educational benefits for [redacted] based on [redacted] special needs for the current school year.

2. The delay in forwarding the due process request form to the Division of Administrative Hearings was a violation of procedural safeguards; however, Petitioner has not suffered harm thereby.

3. Petitioner's request that Respondent reimburse Petitioner for the cost of private AVT is denied.

DONE AND ORDERED this 24th day of August, 2004, in Tallahassee, Leon County, Florida.

S

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th 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.